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Date: December 12, 2000

Case No: 1999-TSC-0005

In the Matter of:

PATRICK HIGGINS,
Complainant,

v.

ALYESKA PIPELINE SERVICES CORPORATION,
Respondent.

Before: FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

INTRODUCTION

On May 26, 1999, Patrick Higgins ("Complainant") filed a complaint against Alyeska Pipeline Services Corporation ("Respondent") under the employee protection provisions of the Toxic Substances Control Act of 1976, 15 U.S.C. § 2622; the Water Pollution Control Act, 33 U.S.C. § 1367; the Clean Air Act, 42 U.S.C. § 7622; the Solid Waste Disposal Act, 42 U.S.C. § 6971, and the Energy Reorganization Act, 42 U.S.C. § 5851. In his prayer for relief, Complainant seeks an injunctive order placing him in the same position or a position substantially similar to that for which he applied. He also

seeks back pay and benefits, less any interim earnings, from the time other individuals were hired as ECP investigators until such time as he is instated into such position.

On August 23, 1999, after completion of an Occupational Safety and Health Administration (OSHA) investigation into Higgins' complaint, OSHA issued a report finding in favor of Respondent. On August 30, 1999, Complainant objected to OSHA's findings and requested a hearing before an administrative law judge. The formal hearing took place on April 24-26, 2000 before me in Anchorage, Alaska. Complainant offered Exhibits CX-1 through CX-3.[1] Respondent offered Exhibits RX-1 through RX-67. The parties jointly offered Exhibits JX-1 through JX-24. All were admitted into evidence.[2] Both parties filed post-hearing briefs. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, and pertinent precedent.

ISSUES PRESENTED

i. Whether Complainant engaged in protected activity within the meaning of the employee protection statutes.

ii. Whether Complainant was subject to adverse action.

iii. Whether Respondent produced evidence of a legitimate nondiscriminatory reason for the actions.

iv. Whether Complainant has shown by the preponderance of evidence that Respondent's reasons for the adverse action were pretextual and that the real reason was retaliation for protected activity.

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[1] The following abbreviations will be used as citations to the record:
CX-Complainant's Exhibits
RX - Respondent's Exhibits
JX - Joint Exhibits
Tr.- Transcript

[2] Although I permitted post-hearing motions to strike any documents, no such motions were filed regarding any of the exhibits. Complainant filed a motion to strike a number of charts and graphs included with Respondent's brief. Although these are somewhat misleadingly labeled as exhibits A-K, they are not independent items of evidence but illustrations of data contained in RX 16 and RX 29. Therefore Complainant's motion to strike these documents is inappropriate. In the alternative, Complainant moved to require amendment to Respondent's brief. The motion is denied. The graphs and charts accurately depict data already in evidence, and they are proper for illustrative purposes.

STATEMENT OF FACTS

What follows is a summary of the testimony and documentary evidence presented at the hearing.

A. Testimony of Patrick Higgins

Higgins testified that the Employee Concerns Program (ECP) at Alyeska originated in 1994, with an official start date of October 1995 (Tr. 33). Alyeska started the ECP because a 1993 Bureau of Land Management audit showed harassing, intimidating, and retaliatory behavior by Alyeska Management against employees (Tr. 33-4). Higgins joined ECP when it was established in 1995. For a time, he was the only investigator (Tr. 35).

Higgins testified that he had filed a previous DOL complaint against Alyeska in 1997 (Tr. 36, RX 1). The complaint grew out of a 1996 investigation of allegations that Alyeska was retaliating against employees who raised environmental and safety concerns (Tr. 36-7). The legal department determined that these allegations were unfounded. Higgins believed that the investigation was inadequate, and he refused to agree with the report (Tr. 38-9). Higgins alleged in his 1997 complaint that Alyeska retaliated against him for his role in the investigation by taking away his clerical help, isolating and criticizing him, giving him a performance evaluation substantially lower than previous ones, and, finally, by failing to select him for an ECP position when the department was reorganized (Tr. 39-40). Higgins and Alyeska resolved his complaint with a settlement agreement, which was signed by all parties in April 1998 (JX 6). Its terms stated that Higgins could be rehired by Alyeska and that the company would provide favorable letters of recommendation to potential employers (JX 6, Tr. 41).

Higgins testified that, while working at Alyeska, he filed an ECP concern regarding Cindy Wick, stating that she had inappropriately signed a report written by her supervisor, Harry Kieling. The report involved serious environmental safety issues (Tr. 42). If Kieling had signed the report himself, it would have been subject to further review. However, if Wick signed the report as her own work, Kieling could claim to "review" his own work, and no further review would be done (Tr. 42-3). According to Higgins, an investigation showed that Wick's behavior in this matter was inappropriate (Tr. 43). Higgins stated he had no hard feelings toward Wick. However, due to their past conflict, he testified that it would have been inappropriate for him to sit on a selection panel if the situations were reversed and she were an applicant (Tr. 46).

Beginning in June 1998, Higgins worked as the Senior human resources (HR) consultant for

National Inspection and Consulting at Millstone Nuclear Plant in Waterford, Connecticut (Tr. 46-7). At Millstone, Higgins mediated a dispute involving Sham Mehta, an investigator, and Ed Morgan, then the ECP Director at Millstone (Tr. 47). Mehta alleged that Morgan was harassing him because Mehta disagreed with the results of an investigation (Tr. 48).

Higgins overheard an argument between Morgan and Mehta. Higgins believed that Morgan was threatening to retaliate against Mehta if Mehta did not agree with Morgan's conclusion (Tr. 50). Higgins discussed the incident with Morgan (Tr. 52). Higgins also reported Morgan's conduct to Chuck Tabo, a Millstone attorney, and other members of Millstone senior management, including Judy Gorski, John Carlin, John Beck, and Billie Garde (Tr. 50-1, 92-3). Mehta had told Higgins that he had been in touch with the Nuclear Regulatory Commission (NRC), and the NRC later questioned Higgins about Morgan's behavior (Tr. 52). Higgins did not make any written notation in the case file indicating that he reported Morgan's behavior (Tr. 91). At the end of the mediation, Morgan told Higgins that he believed that Higgins had done a good job (Tr. 94).

Higgins wanted to return to Alyeska. In January or February 1999, he learned from an Alyeska employee that an HR generalist position had been filled without opening the position for outside applications (Tr. 54).[3] David Otto, then corporate HR manager, told Higgins that the position was "developmental" and that Higgins would not be interested. Higgins understood "developmental" to mean that the job was designated for an Alaska native. Higgins later discovered that the person hired was not an Alaska native (Tr. 56). In early 1999, Higgins contacted Renee Imhof, an HR recruiter at Alyeska, several times to inquire about available positions. After two or three calls, she informed Higgins that she was not allowed to discuss Alyeska with Higgins (Tr. 58). Higgins sent an e-mail to Alyeska president Bob Malone to notify him of "improper activities" in the hiring process (Tr. 73).

In February 1999, Alyeska posted three ECP investigator positions externally, and Higgins applied. Kathy LaForest, a generalist in the Alyeska HR department, informed Higgins that he would be interviewed by a three-person panel: LaForest, Cindy Wick and Ed Morgan. Higgins believed that Wick and Morgan were biased against him[4] (Tr. 76-7). Prior to the interview, Higgins did not inform any member of Alyeska management of his opinion that Wick and Morgan should not be on the panel (Tr. 80). He discussed his concerns with Clyde Stewart, an independent contractor working at Alyeska, but he did not expect Stewart to "do anything about" the composition of the panel (Tr. 85).

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[3] Higgins originally claimed that he was wrongfully rejected for an "asset manager" position for which he applied in 1998. He submitted an application for that position, was never interviewed, and received a rejection letter (Tr. 53). However, later in the hearing, Higgins admitted that he had not been aware of the nature of the position, which involved working at a pipeline pump station, when he applied for it (Tr. 698). He admitted that he did not think he should have gotten the asset manager job (Tr. 701).

[4] At various times during the hearing and in Complainant's briefs, Higgins has asserted that Kathy LaForest was also biased against him. However, on the stand, Higgins acknowledged that he was not seriously contending that LaForest was biased against him in any way during or after the interview (Tr. 704).

Ed Morgan, Cindy Wick, and Kathy LaForest interviewed Higgins by telephone (Tr. 59). The first question was "Why do you want to be an ECP representative?" Higgins talked about the importance of ECP, his qualifications, and his positive feelings about ECP (Tr. 60).

The second question asked Higgins to describe his most challenging investigation (Tr. 60). Higgins talked about an investigation with serious environmental, safety, and regulatory compliance issues.[5] Higgins told the interviewers that he became physically threatened during the investigation, that he found the ECP manager unresponsive, and that he took his concerns to the president of the company and then "outside." Higgins considered the investigation to be challenging because it is difficult to conduct investigations without senior level support (Tr. 61).

The third question was a role-playing problem in which Morgan played an employee with some concerns about the pipeline's "quality program." Higgins answered by explaining ECP policies and processes, including "confidentiality limitations" (Tr. 63). Higgins asked a number of questions for the hypothetical investigation, and Morgan gave answers that Higgins considered "non-responsive." Higgins first testified that he never guaranteed the concerned individual (CI)[6] absolute confidentiality (Tr. 64). Later, he admitted that he did not remember precisely what he said regarding confidentiality (Tr. 707). On cross-examination, Higgins acknowledged that he never asked the CI his name, the location of the valve, or if there were any HIRD (harassment, intimidation, retaliation, or discrimination) concerns (Tr. 85-9).

The fourth "question" was actually an opportunity for Higgins to ask any questions and to "enhance" his answers to the earlier questions (Tr. 65).

Several weeks after the interview, LaForest called to inform Higgins that he had not been selected (Tr. 66).

When he left Alyeska, Higgins was a salary grade 16, making approximately $100,000 per year. Higgins now works for Southeast Alaska Regional Health Consortium (SEARHC) in Sitka, Alaska, where his salary is approximately $76,000 per year (Tr. 67). Higgins' family lives in Anchorage. He must maintain two households, and the benefits at SEARHC are inferior to those that he had at Alyeska (Tr. 68).

Higgins believed that Morgan formed a good opinion of "some of the work" Higgins did at Millstone. Higgins stated that he believed that Morgan's opinion of him changed when Jim Sweeney and others made negative comments which suggested that Higgins would be a bad choice (Tr. 704-5). Higgins believed that his "disparaging" comments during the interview, as Morgan described them,

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[5] The testimony of the panelists made it clear that the investigation occurred when Higgins was working for Alyeska and that Wick and Morgan, at least, understood that Higgins was talking about his prior experience at Alyeska (Tr. 226, 432).

[6] "Concerned individual" or "CI" is a term of art within the Alyeska ECP. The CI is the individual who raises a complaint or "concern," which the ECP then investigates. Tr. 32.

may have contributed to "turning [Morgan] around." However, Higgins believed that Morgan had probably already changed his opinion before the interview due to "being advised by so many people that I shouldn't be there" (Tr. 705).

B. Testimony of Sham Mehta[7]

Mehta is an ECP representative at Millstone Nuclear Power plant. Formerly, Ed Morgan was Mehta's second line supervisor (that is, the supervisor of Mehta's supervisor, Peter Novak) (Tr. 121). Novak and Morgan disagreed with some of Mehta's findings regarding nuclear safety. Mehta described the dispute as a "difference of professional opinion." Mehta believed that the difference of opinion caused Novak to give him a low score on his performance review. Higgins mediated the dispute among Mehta, Novak, and Morgan (Tr. 121-3). During the mediation, Morgan yelled at Mehta and threatened that he would not be able to work in ECP if he continued to raise so many concerns (Tr. 125-6). After Higgins mediated the dispute, Mehta's relationships with Morgan and with Novak improved. Mehta told Higgins that he considered the mediation a success (Tr. 130). Mehta thought that the "root cause" of the dispute was Morgan's belief that Mehta's differing opinions were undermining the ECP program (Tr. 132). Mehta also shared his concerns with the NRC (Tr. 133).

C. Testimony of Ed Morgan

Morgan holds a contract with Little Harbor Consulting and works full time at Alyeska in his status as a contractor (Tr. 113-4). Previously, he was the director of the ECP at Millstone (Tr. 114). Morgan and Higgins never worked closely together at Millstone until Higgins mediated a dispute among Morgan, Mehta, and Novak (Tr. 176). Mehta had investigated an employee concern which stated that quality was being sacrificed for schedule at the plant (Tr. 183). Mehta signed a report stating that the concern was unsubstantiated, but he later said that he had signed "under duress" (Tr. 184). Higgins mediated the dispute, and it was resolved. Mehta told Morgan that he thought the mediation was successful. Morgan agreed, and he told Higgins' boss that Higgins had done a very good job (Tr. 192). Morgan never told Mehta that his job was in jeopardy if he did not sign off on investigations, nor does he recall raising his voice at Mehta (Tr. 118-9). Higgins never told Morgan that he was concerned about Morgan threatening or retaliating against Mehta (Tr. 119). Morgan did not know that Higgins had these concerns until he read Higgins's complaint in the present case (Tr. 193-4).

In January 1999, Morgan left Millstone and became ECP manager at Alyeska. Alyeska decided to hire three ECP investigators (Tr. 137). In accordance with company practice, the positions were first posted internally for approximately a week. There were few applicants and, in accordance with

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[7] I excluded Mehta's testimony due to his refusal to submit to a pre-hearing deposition. Nevertheless, I received the testimony by offer of proof. Upon Complainant's motion for reconsideration, I have determined that Mehta's testimony should be admitted on the grounds of limited and negligible prejudice. This issue will be addressed more fully later in the discussion section of the opinion.

practice, the positions were then posted externally. Alyeska received more than one hundred applications, and the HR department narrowed the number of candidates down to twelve based on qualifications and willingness to move to Fairbanks or Valdez (Tr. 138). Eleven[8] applicants took part in a telephone interview, during which they were evaluated without reference to prior work experience (Tr. 139). Four applicants were selected for a second, in-person, interview based solely on the scores they received during the telephone interview (Tr. 140).

Morgan came to Alyeska in January 1999. The ECP positions were posted in late February, and the telephone interviews occurred in April (Tr. 140). Between January and April, several members of Alyeska's ECP and HR staff made "generally negative comments" to Morgan about Higgins' investigative skills and his lack of organization (Tr. 140-1). Morgan does not remember who made which specific comments, but Cindy Wick did speak negatively about Higgins' performance (Tr. 141). A number of people including Wick stated that Higgins was "disruptive" (Tr. 142). These negative comments surprised Morgan because his experience with Higgins at Millstone had been positive (Tr. 143).

Prior to the interviews, Wick disclosed that she was concerned about evaluating Higgins because they had filed concerns against each other in the past. Morgan discussed with Rob Shoaf, Alyeska's Senior Executive for Open Work Environment[9], and with a Mr. Griffin[10] the issue of whether Wick should serve on the panel. They concluded that Wick would be able to set her differences with Higgins aside and be unbiased. Because they intended to give Wick a more responsible position in the ECP, they thought it would be important for her to help determine who would work in the department (Tr. 144).

At Alyeska, Rob Shoaf made final hiring and firing decisions. Morgan did not have any hiring or firing authority (Tr. 204). Morgan worked with Kathy LaForest to develop a hiring process for the ECP positions (Tr. 206), and he participated in drafting the interview questions (Tr. 210). Morgan took notes during the telephone interviews, and he reviewed his notes in order to assign a numerical score of up to three points. The other interviewers did the same, but they did not discuss individual scores or answers until the end of all the interviews (Tr. 221-2). During the post-interview discussion, Morgan stated that he had expected Higgins to perform well on the questions and was surprised that Higgins had done so poorly (Tr. 223).

Morgan made notes during the telephone interview with Higgins (JX 13). The first question was,

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[8] Immediately prior to the scheduled interview, one of the twelve individuals selected for phase I indicated an unwillingness to relocate.

[9] Rob Shoaf testified that "open work environment" refers to an initiative that Alyeska began in September 1998 to improve the work environment by addressing employee concerns about harassment, intimidation, retaliation, and discrimination. Tr. 524.

[10] Morgan's statement to a DOL investigator identifies this individual as John Griffin of Little Harbor management (RX 44, p. 4).

"Why do you want to be an ECP representative?" Morgan gave Higgins one and one-half (1.5) points out of three (3). He thought that Higgins gave a "middle of the road" answer (Tr. 224).

The second question was, "Tell us about your most challenging investigation." Morgan gave Higgins a score of point five (.5) out of three (3) (Tr. 145). Higgins' presentation was "disjointed" and hard to follow. Morgan could not tell from the answer what type of investigation Higgins was describing. The focus of the answer was an attempt to disparage the president of Alyeska and the previous ECP manager (Tr. 146). Morgan testified that he found it "unusual and surprising" for an interview subject to disparage the president of the company and blame other people for problems with the company (Tr. 226). Morgan did not think that Higgins' discussion of past retaliation constituted protected activity. He thought that Higgins' answer did not address the question that had been asked (Tr. 228). Morgan acknowledged that it would be challenging for an investigator to be physically threatened, but he said that Higgins did not discuss physical threats in the interview. Morgan does not consider a lack of support from upper management sufficient to create a "challenging investigation" (Tr. 147).

The purpose of question two was to elicit information about an investigation in order to evaluate the applicant's investigative experience. Higgins did not talk about the investigation itself but about his past problems with the president of the company (Tr. 148). The questions were intentionally open ended. No other consideration of an applicant's experience was made at this phase of the interview process. This was "a conscious decision so that everybody would have an equal ability to compete" (Tr. 149). In his notes on question three, Morgan commented that Higgins' response was "disturbing for a candidate of his experience and background." Morgan stated that they assumed that everyone whom they interviewed had a good investigative background (Tr. 150). He said that he did not have personal knowledge of Higgins' investigative work at Alyeska or of the work experience of any other applicants (Tr. 151). Every applicant met the minimum requirements of experience, and the purpose of the interview was to see whether each candidate's investigative experience was as extensive as the candidate claimed (Tr. 151).

In the question three role-play, Morgan had a mental checklist of things that a candidate should do during an investigation. These included discovering the location of the faulty valve, learning the name of the concerned individual, and recognizing a "duty to act" situation (Tr. 152-3). Morgan stated that Higgins failed to do these "basic things" (Tr. 228). Higgins was not able to give the identity of the concerned individual or the location of the faulty valve; therefore, it would have been difficult for the manager in the role-playing situation to deal with a potentially serious problem (Tr. 235-7). Morgan's notes on Higgins' interview do not indicate that Higgins guaranteed confidentiality (Tr. 154-5), and Morgan does not remember what Higgins said with regard to confidentiality (Tr. 232). His notes regarding Charles Cameron, one of the finalists, indicate that Cameron "missed confidentiality issues" (Tr. 155-6).[11]

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[11] Testimony about Ed Morgan's behavior in other investigations is largely irrelevant. Respondent previously moved to have this evidence excluded as inadmissible character evidence. At the time, I admitted the evidence provisionally with leave to Respondent to renew its objection upon brief. Upon hearing the evidence, I concur with Respondent that the evidence was offered to establish Morgan's past bad character and show that his behavior toward Higgins was consistent with his past behavior. As such, the evidence has very low probative value that is outweighed by potential prejudice. Therefore, it is of little relevance to the current case and will not be

D. Testimony of Dave Otto

Dave Otto has been Vice President of Human Resources at Alyeska since November 1999 (Tr. 265). Previously, he was a corporate HR manager in charge of strategy policy development (Tr. 265-6). Around January 1999, Otto's boss, Patty Ptacek, informed him that any communications regarding Higgins should be referred to Jim Sweeney, who was the ECP manager at that time (Tr. 267-9). Otto understood this to mean that HR employees should not speak with Higgins but should refer his calls to Sweeney (Tr. 269). Otto was not sure of the reasons for this policy, but he believed that it was part of an agreement between Alyeska and Higgins. He believed that the purpose of the policy was to ensure "consistency of language or of communication" by Alyeska in regard to Higgins (Tr. 271). At Sweeney's request, Otto placed letters of recommendation in Higgins' personnel file (Tr. 274).

In December 1998, Alyeska filled an entry-level HR job by direct hire. Under direct hire, a vice president may waive the posting requirements that generally apply when Alyeska fills positions (Tr. 279-81). The purpose of the policy is to hire an individual who is already a "known entity." The person hired in December was Statia Motes, who had worked for Alyeska as a contractor and had done "exceptional" work in the past. Patty Ptacek, who was then Otto's boss, made the decision to hire Motes directly. Direct hires must meet all qualifications for the position (Tr. 279-81).

On February 8, 1999, Higgins made a phone call to Otto, who told Higgins about the job filled by Motes as well as a job in crisis management. Otto also told Higgins about the ECP positions. Later, Otto thought that he should have referred Higgins' call to Jim Sweeney (Tr. 282).

E. Testimony of Clyde Stewart

Stewart owns a consulting business that has a contract to do ECP work at Alyeska. Stewart personally worked in ECP at Alyeska from January to May 1999 (Tr. 303). He attended staff meetings where Morgan and others spoke about hiring employees for ECP (Tr. 304). At one of these meetings, Morgan said that Alyeska president Bob Malone had instructed that any section 29 (Native Alaskan) candidate who met the minimum qualifications for any position should be hired (Tr. 305-6).[12]

Stewart examined the role-playing situation in question three of the interview (RX-16). The written scenario includes the information that "the pipeline integrity could be impacted" (Tr. 308). Asked whether the scenario presented a "duty to act" situation, Stewart stated that the definition of "duty to act" is subjective and not based on any written threshold criterion. He said that the role play

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considered.

[12] The relevance of this testimony is unclear because Higgins nowhere alleges that he was subjected to discrimination because he was not an Alaska native.

situation could present a duty to act and that a pipeline integrity fault would be a very serious situation (Tr. 310-12).

F. Testimony of Kathy LaForest

LaForest has been an HR generalist with Alyeska since 1997 (Tr. 320). She worked with Morgan and Shoaf to set the job postings for the ECP investigator positions. Under Alyeska policy, the hiring manager determines whether positions will be posted internally or externally. LaForest recommended to Morgan, the hiring manager, that Alyeska post the ECP positions internally. If this posting did not generate sufficient applicants, she recommended that Alyeska should then post them externally. Morgan followed these suggestions (Tr. 324).

Alyeska did not fill the investigator positions "developmentally" because the company did not want to hire investigators who would require significant training (Tr. 325). Malone and Shoaf had ultimate hiring authority. Morgan, who was in a contract position, could only make recommendations (Tr. 325). LaForest, Morgan, and Wick decided on the questions for the first stage of the interview (Tr. 327). The legal department, in accordance with standard practice, reviewed the questions (Tr. 328-9).

The panel did not set a predetermined number who would move on to phase II face-to-face interviews but looked for a natural break in the scores (Tr. 329). Prior to the interview, the panelists did not discuss among themselves what would be a good answer to each question except in very general terms about the purpose of each question (Tr. 332-3). One purpose of the process was to focus on what each individual interviewer could bring to the process (Tr. 344). LaForest considered it her role in the interview process to be an employee advocate (Tr. 343). She considered communication skills, commitment to the open work environment, and a focus on employees to be the most important factors (Tr. 334-5).

After all the interviews, the panelists discussed the scores. When the scores of all three panelists were combined, there was a natural break between the top four candidates and the rest of the field. These four individuals advanced to the second round of interviews (Tr. 338-41). The panelists did not have an opportunity to reconsider their scoring after the scores were initially assigned (Tr. 344).

LaForest considered the process to be objective (Tr. 346). She knew before the interview that Wick had expressed concern about being on the panel because she was a former co-worker of Higgins (Tr. 349). LaForest did not know that Higgins and Wick had raised employee concerns about each other in the past (Tr. 350). LaForest does not recall speaking about Higgins with any individual at Alyeska except Morgan, whose comments were very positive (Tr. 403).

On question one, LaForest gave Higgins a one (1). She thought that his answer was too concerned with Higgins himself and not concerned enough with the needs of concerned individuals. (Tr. 356).

On question three, LaForest gave Higgins a three (3), the highest possible score (Tr. 352). She

thought that he was thorough and approached the problem as an employee advocate (Tr. 352). Higgins was the second candidate to be interviewed (Tr. 397). Based on later answers, LaForest realized that she should be looking for more specific information, such as the location of the valve (Tr. 353). LaForest's evaluation of Higgins' answer to question three probably would have been different if he had interviewed later (Tr. 398). The panelists did not discuss what specific information should be included in the answers, but LaForest inferred the importance of learning the valve's location from the responses of other candidates (Tr. 354, 398). LaForest did not go back and change any scores based on subsequent information, nor was there an opportunity during the interviewing process for any panelist to influence the scoring of another (Tr. 399).

G. Testimony of Cindy Wick

Wick is a senior ECP Specialist at Alyeska (Tr. 421). She has worked at Alyeska for eight years, having worked in ECP since 1996 (Tr. 422). She worked with Higgins when she was an ECP analyst and he was an ECP investigator (Tr. 446-7). Her working relationship with Higgins and the other investigators deteriorated when ECP manager Harry Kieling asked her to conduct a peer review of investigative files (Tr. 445-7). Higgins accused Wick of lying during an investigation, but Wick did not learn the details of the allegations (Tr. 449-50). In 1997, Higgins filed an ECP concern against Wick, alleging improper conduct (Tr. 422). Wick raised issues regarding Higgins to her manager but never filed a formal concern (Tr. 422). She told Jim Sweeney that Higgins was engaging in intimidating behavior towards her in a manner that created an inappropriate work environment (Tr. 450-1). She thought that Sweeney did not act on her concerns, and she then went to Rob Shoaf about Sweeney's lack of action (Tr. 451).

After Morgan became manager of ECP, Wick told him that Higgins had harassed her and accused her of lying (Tr. 423-4). She also told Morgan that other employees had said Higgins' return to ECP would be disruptive (Tr. 423-4). Wick was concerned that her participation on the interview panel would create an appearance of bias and might lead Higgins to file a lawsuit (Tr. 425-6). She believed that Higgins's "successful return to the ECP would be conditional upon having a professional, productive relationship" (Tr. 426). She never said that she should not be on the panel but only expressed concern about how the situation might appear like to someone "outside looking in" (Tr. 427). In discussions with other Alyeska personnel, Wick stated that she could be professional and unbiased in evaluating Higgins' candidacy (Tr. 428).[13]

On question one, Wick gave Higgins one and one-half (1.5) points (JX 9). She was concerned that Higgins was too focused on the concerned individual (Tr. 435). On question two, Wick gave

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[13] Wick's testimony at the hearing did not reveal which individuals favored or opposed Wick's inclusion on the panel. However, in a statement to a Department of Labor investigator that was admitted into evidence, Wick stated that Shoaf and Morgan wanted to include her on the panel, while Jim Sweeney recommended that she not participate (RX 43, p. 5).

Higgins a one (1). She believed that he identified why the investigation was challenging but not how he had overcome the challenges (Tr. 431). Candidates who were more successful on the question not only identified a challenging investigation but told how challenges had been overcome (Tr. 461). Wick did not find anything "off-putting" about the particular investigation that Higgins mentioned (Tr. 462).

On question three, Wick gave Higgins a score of point five (.5). She would have awarded him a one, but she deducted one-half point (.5) because she believed that he improperly guaranteed the confidentiality of the concerned individual (Tr. 483). In her Department of Labor statement (RX 43), Wick stated that she made the deduction because the guarantee was improper and "because Pat's knowledge of our program is extensive" (Tr. 483). In her testimony at the hearing, Wick emphasized that such a guarantee could not possibly be made in any ECP program (Tr. 435). Wick stated that Cameron, another candidate, handled the confidentiality issue in a manner that was "generally not a first choice" by identifying the concerned individual to a superior (Tr. 436). She did not deduct points from Cameron's score for his handling of the issue (Tr. 437).

H. Testimony of Jim Sweeney

Sweeney is currently Corporate Environmental Manager at Alyeska (Tr. 487). From January to October 1999, he was Business Practice Officer, and prior to that, he was ECP manager and supervised Higgins (Tr. 488). As part of the settlement of Higgins' 1997 claim against Alyeska, Sweeney wrote a letter of recommendation for Higgins. Sweeney was also assigned as the contact person for potential employers who wanted to discuss Higgins. Due to "confusion," Renee Imhof and other employees at one time believed that all calls from Higgins himself should be referred to Sweeney (Tr. 489-91). However, it was "straightened out" that, when Higgins called, he should be treated like any other applicant and given the same information as any other applicant (Tr. 490).

After the ECP selection process began, Sweeney told Morgan that he had some concerns about how effective Higgins could be in the ECP (Tr. 494-5). In the course of a "very short" conversation, Sweeney questioned Higgins' objectivity and said that the quality and timeliness of his work had not always met Sweeney's expectations (Tr. 495). Sweeney was concerned about Wick serving on the panel because of her past conflicts with Higgins (Tr. 499-500). Sweeney spoke with Morgan, Wick, and Shoaf about the potential conflict.[14] Shoaf told Sweeney that Shoaf, Morgan, and "others" had considered the issue and were comfortable with Wick's service on the panel (Tr. 501-2).[15]

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[14] See note 13, *supra*. Although it is not clear from the testimony presented at the hearing, Cindy Wick's statement to DOL investigators states that Sweeney opposed Wick's presence on the panel.

[15] Sweeney's testimony regarding Morgan's role in another investigation is of negligible relevance for reasons discussed in note 11, *supra*.

I. Testimony of Rob Shoaf

Shoaf is currently Vice President of Alyeska (Tr. 523). From January to June 1999, he was Senior Executive for Open Work Environment (Tr. 524). Shoaf knew Higgins but never worked closely with him (Tr. 529). He was aware of Higgins' original claim against Alyeska but was not involved in the settlement (Tr. 530). Upon reviewing the settlement agreement, Shoaf determined that Higgins should be treated like any other applicant (Tr. 531). Shoaf was aware of the past conflict between Higgins and Wick, although he "never took the time to develop a detailed understanding of what the issues were" between them (Tr. 535-6). Shoaf believed that Wick should participate in the interview panel because she was moving into a position of greater responsibility in the ECP (Tr. 532). He observed that "it is important for people who are accountable for work functions to, whenever possible, be part of the selection of the people who will help them meet that accountability" (Tr. 533). Based on his past experience with Wick, he believed that she could be objective in evaluating the candidates (Tr. 537-8).

After the telephone interviews, Shoaf met with Morgan to discuss the numerical scores (Tr. 540). Morgan expressed surprise that Higgins had not performed better in the interview (Tr. 542). Shoaf analyzed Wick's scores relative to the other panelists due to his concern about her possible bias (Tr. 543). Shoaf looked at the results with Wick's scores removed and determined that Higgins would not have been in the top four even without Wick's scores (Tr. 544). It was not until after the selection process that Shoaf learned that Higgins believed Morgan to be biased against him (Tr. 547). Shoaf received comments about the interviews from Morgan but did not look at any of the panelists' interview notes himself (Tr. 555).

J. Testimony of Robert Malone

Malone is President, Chief Executive Officer, and Chief Operating Officer of Alyeska. Higgins has twice taken concerns to Malone. The first was a concern regarding an Alyeska employee, and Malone hired a law firm to conduct an investigation (Tr. 592). The former security chief of Alyeska threatened Higgins and, for that and other reasons, is no longer employed by Alyeska (Tr. 591-2).

It is Alyeska policy to post positions internally before posting them externally, although there is no legal requirement to post positions externally at all. Malone never stated that any minimally qualified Native Alaskan should be given preferential hiring treatment (Tr. 599).

Malone was not part of the selection process for ECP investigators. When he became aware

of Wick's role on the panel, he was comfortable with it because he believed Wick to be "an absolute professional" (Tr. 601). Higgins did not raise any concerns with Malone about the composition of the panel, and Higgins had never been reluctant to bring issues to Malone's attention in the past (Tr. 605). Malone acknowledged the possibility that Higgins might have been reluctant to raise concerns because, if the composition of the panel remained the same, he might fear that they would penalize him (Tr. 606-7).

K. Testimony of Patty Ptacek

Ptacek was previously Vice President of Human Resources for Alyeska (Tr. 617). She was not aware of the terms of Higgins' settlement with Alyeska (Tr. 617). In June 1998, she received a memo that required all communication about Higgins' employment to be forwarded to Jim Sweeney (Tr. 618-9). Ptacek was unaware of any distinction between communication with Higgins himself and communication with others about Higgins (Tr. 621). She instructed her employees that, if Higgins called, he should be referred to Sweeney (Tr. 621).

The first time that Ptacek met Morgan, he told her that his experience with Higgins at Millstone had been very positive (Tr. 621). Ptacek replied that her own experience was different, but that was the extent of the conversation (Tr. 621). When Higgins worked at Alyeska, Cindy Wick came to Ptacek and requested a transfer to a different department because of the difficulty of working with Higgins (Tr. 622). Ptacek had negative experiences when Higgins did not follow through on projects (Tr. 622-3).

L. Testimony of Renee Imhof

Imhof was a recruiter for Alyeska in 1999 when Higgins contacted her about available jobs (Tr. 628). On February 18, 1999, she told him that ECP jobs had been posted internally and that she did not know whether or when they would be posted externally (Tr. 628). Higgins told Imhof that he would be "having some fun" in the near future. Imhof gave Higgins general information about the positions. She did not answer his questions about affirmative action goals because she would not normally give out that information to anyone, including Alyeska employees (Tr. 632).

Higgins applied for a position as an asset manager, but this is a very technical position, and Higgins was not qualified due to lack of industrial operations experience (Tr. 634). No HR generalist positions were filled by direct hire between January 1998 and February 1999 (Tr. 634-5). Three entry-level positions were filled by direct hire, but they were not generalists (Tr. 635-6).

M. Testimony of Judy Gorski

Gorski was director of HR at Millstone, where she worked with Higgins and Morgan (Tr. 642). She recommended Higgins to mediate a dispute among Morgan, Novak, and Mehta (Tr. 643). Gorski left Millstone before the end of the mediation, but she was not aware of any harassment or intimidation issues involving Morgan. Higgins did not report any such issues to HR (Tr. 644).

N. Stipulated Testimony of John Carlin

Carlin was Vice President of Human Services at Millstone Nuclear Station. He had no recollection that anyone accused Morgan of harassment or intimidation. Morgan informed Carlin that he was happy with the outcome of the mediation conducted by Higgins (Tr. 677).

O. Testimony of R.L. Trotter

Trotter has been Vice President and General Counsel for Alyeska for more than three years (Tr. 684). Trotter stated that the settlement agreement between Higgins and Alyeska (JX 6) did not require all communications regarding Higgins to go through one person. The instruction that only Sweeney should give information regarding Higgins was the manner in which Alyeska chose to carry out the agreement (Tr.689).

P. Stipulated Testimony of Alene Anderson and JoAnn Royce

The parties stipulated (JX 24) that, if called as witnesses, Alene Anderson and JoAnn Royce would testify that they have no recollection of discussing with Charles Flynn, Thomas Owens, Jim Sweeney, or any other representative of Alyeska the issue of what information could be considered by Alyeska in the event that Higgins ever applied for a job following settlement of case no. 97-CAA-13.

Selected Exhibits

RX 19: The interview packet containing the questions asked during the telephone interview:

"Question 1: Why do you want to be an ECP Representative?"

"Question 2: Tell us about your most challenging investigation."

"Question 3: [labeled "situational"] You're at a pump station working on an investigation. Over lunch, a pipeline maintenance contractor asks if he can talk with you. You meet with him right after lunch and he tells you he and the rest of the crew are concerned that work isn't being done to the Quality Program standards. As a result, the pipeline integrity could be impacted because their group is responsible for maintaining the valves. If something doesn't happen quickly to fix all these safety and integrity issues, the pipe could blow and there would be oil all over the ground. What do you do now?"

"Question 4: You now have 15 minutes (or longer if they do not use all of the first 30 minutes allotted for the position-based questions) to ask us any questions you feel will be beneficial to clarify the position description, accountabilities, performance expectations, information about the ECP Team, Alyeska, etc."

The interview packet indicates that the scores are assigned on a scale of one to three, with "1=minimum requirement met and 3 = exceeds expectations." In practice, a number of candidates received scores of one-half point (.5) on individual answers, presumably indicating that the candidate's performance fell below minimum requirements (JX 16).

JX-9: Wick notes from Pat Higgins interview.

Wick's scoresheet from the Higgins interview indicates:

Question 1: score of 1.5. General comments about Higgins' reasons for wanting to be in ECP.

Question 2: score of 1.0. Notes that Higgins described an investigation that was "not successful but was challenging." States "issue not addressed" and notes "w/out Sr. Mngmt ECP can't be successful." Scoring indicates that "1=invt."[16]

Question 3: score of .5. Indicates that she gave "1=invt"(one point for describing an investigation) but deducted one half (.5) because Higgins promised total confidentiality to the concerned individual.

Question 4: score of 1.5. Wick notes that she gave him one (1) point because he had questions and one half point (.5) because he referred to questions that he was going to ask. Wick lists about ten questions that Higgins asked at this point in the interview. They include questions about the selection process, the relationship of Little Harbor Consulting with ECP, and the makeup of the ECP team.

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[16] This notation indicates, as Wick explained in testimony, that she gave him one point because he did describe an investigation.

JX 11: LaForest notes from Pat Higgins interview.

Question 1:score of 1.0. Notes that the answer was "I focused" rather than focused on the CI or the investigative process, until the end of his comments. Higgins asked to return to this question later in the interview and made negative comments about past HR practices at Alyeska. He indicated that ECP could help move the company away from these problems.

Question 2: score of 2.5. Notes that the investigation he described "dealt with contractor issues." Higgins reported that he experienced a lack of senior-level support for the investigation and that the head of security made threats. LaForest's notes state that the investigation was not successful but was challenging. Higgins stated that he took his concerns to the company president and then to the government when the president did not act.

Question 3: score of 3.0. Notes that Higgins is "clearly comfortable with the investigative process." He asked "detail-oriented questions of CI." He assured the CI of confidentiality and mentioned "chilling effect concerns." He did not mention the open work environment or ECP's commitment to guard against HIRD (harassment, intimidation, retaliation, and discrimination).[17]

Question 4: score of 2.0. Lists eight questions that Higgins asked.

JX 13: Morgan notes from Pat Higgins interview.

Question 1: score of 1.5. Notes that Higgins "talked a lot about what ECP should do rather than why he wanted to be a rep."

Question 2: score of .5. "Didn't talk about a challenging investigation as much as about a 'failed' investigation in which he became the concern." Higgins' "presentation was very disjointed and hard to follow." Morgan thought that Higgins' answer was "mostly directed at how others had mishandled the situation." He stated that Higgins "made directed and indirect disparaging comments about the old ECP manager and President respectively."

Question 3: score of 1.0. Notes that Higgins' response was "acceptable" but that he left out some "fundamental considerations which is disturbing for a candidate of his experience and background." Morgan gave the following examples: Higgins didn't determine the safety significance immediately; he failed to consider "duty to act"; didn't determine why CI was fearful he would lose his job; didn't consider "chilling effect."
Question 4: score of 2.0. Considered Higgins' questions "well thought out and prepared."

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[17] "Open work environment" and "HIRD" are apparently terms widely used within the Alyeska ECP.

DISCUSSION

I. LEGAL STANDARD

The Secretary set forth the burdens of proof and production that apply to "whistleblower" proceedings in Dartey v. Zack Company of Chicago, 82-ERA-2 (Secretary, April 25, 1983), which adopted the test of Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) (setting out burdens of proof or persuasion in discrimination cases under Title VII of the Civil Rights Act). The Secretary gave a restatement of these burdens in Zinn v. University of Missouri, 93-ERA-34 and 36 (Sec'y Jan. 18, 1996), adding that they apply when a claimant seeks to rely on circumstantial evidence of intentional discriminatory conduct. Under the Dartey/ Burdine framework, the complainant must present a prima facie case by showing that: (1) the complainant engaged in protected conduct; (2) the employer was aware of that conduct; and (3) the employer took some adverse action against the complainant. Dartey, supra at 5. The complainant must also present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. Id.

The respondent may rebut the complainant's prima facie showing by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason for the action. Id. The complainant may counter the respondent's evidence by proving that the legitimate reason proffered by the respondent is a pretext. Id. at 6. The complainant may prove pretext directly by showing that the unlawful reason more likely motivated Respondent or indirectly by showing that Respondent's proffered explanation is unworthy of credence. Id. In any event, the complainant bears the ultimate burden of proving by a preponderance of the evidence that the employer retaliated against him or her in violation of the law. Zinn, supra, at 4 (citing St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993)).

After weighing the evidence presented by all parties, the trier of fact may conclude that the employer was motivated by both prohibited and legitimate reasons. Dartey, supra, at 6. If this is the case, then the respondent must meet the dual motive test. Id.; Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287 (1987). In order to avoid liability in dual motive cases, the respondent has the burden of persuasion to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. Dartey, supra, at 6; Mt. Healthy, supra, at 287. The employer bears the risk that the influence of legal and illegal motives cannot be separated. Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 11159, 1164 (9th Cir. 1984); Mandreger v. Detroit Edison, 88-ERA-17 (Sec'y Mar. 30, 1994), at 11.

II. Complainant's prima facie case

A. Protected activity

1. Prior DOL complaint

Higgins' 1997 Department of Labor complaint, which he brought under the Clean Air Act, CERCLA, TSCA, and the Clean Water Act, invoke the employee protection provisions of the respective statutes. 42 U.S.C. § 7622, 15 U.S.C. § 2622; 33 U.S.C. § 1367. Complainant also alleges three other instances of protected activity that merit brief discussion.

2. Prior activities at Alyeska

Complainant testified, and Respondent has not specifically contradicted, that, during his employment with Alyeska, he investigated complaints of retaliation that occurred when employees reported environmental violations (Tr. 32, 36-7). The Secretary has held that a report of retaliation for protected activity may itself be protected activity. Dodd v. Polysar Latex, 88-SWD-4 (Sec'y Sept. 22, 1994) at 6-7 (finding that an informal complaint of retaliation following a plant meeting on "open" management style was protected activity). While employed at Alyeska, Complainant filed a concern stating that, in order to avoid further review of a report written by ECP manager Harry Kieling, Wick had signed the report in place of Kieling (Tr. 42, RX 63). The report involved serious environmental safety issues (Tr. 42). Complainant emphasizes this incident as evidence that Wick was biased against him for reasons directly related to protected activity. Respondent seeks to minimize Wick's role in the incident, arguing that Wick and Higgins had professional differences unrelated to environmental concerns.

I find that Complainant's activities while employed at Alyeska, including the concern that implicated Wick, did involve protected activity. The provisions of the employee protection statutes are construed broadly. Jenkins v. U.S. Environmental Protection Agency, 92-CAA-6 (Sec'y May 18, 1994). If investigations of retaliation and safety issues are mishandled, there could be a chilling effect on employee concerns, which could lead to underenforcement of environmental statutes. See Tyndall v. U.S. Environmental Protection Agency, 93-CAA-6 and 95-CAA-5 (ARB June 14, 1996) (finding that an investigator's report on improprieties in administering a computer modeling contract to study acid rain constituted protected activity because the reported conduct could conceivably cause EPA to rely on faulty studies).

3. Complainant's activities at Millstone

Complainant testified that, while he worked at Millstone, he witnessed inappropriate conduct

by Ed Morgan. According to Complainant's account, Morgan threatened to retaliate against Sham Mehta if Mehta adhered to his differing professional opinions about quality control issues (Tr. 50). Complainant confronted Morgan about the incident and reported Morgan's behavior to several individuals at Millstone: Chuck Tabo, Judy Gorski, John Carlin, John Griffin, and John Beck (Tr. 50-52, 92-93). Complainant also testified that he answered questions from the NRC about Morgan's conduct (Tr. 52). These allegations reflect protected activity under the ERA. As discussed above, an individual engages in protected activity when he reports that an employer has retaliated or threatened retaliation against another employee. Dodd, supra. at 6-7.

In support of his account of events at Millstone, Complainant offers his own testimony and the testimony of Sham Mehta (Tr. 120-136). Prior to the hearing, Mehta refused to provide a deposition. On Respondent's motion, I excluded Mehta's testimony from the hearing because of his refusal to be deposed. I left the issue open for reconsideration and received Mehta's testimony by offer of proof. In his post-hearing brief, Complainant moved for reconsideration of the ruling. I now reverse my original ruling on the grounds of limited and negligible prejudice. A witness's refusal to submit to a deposition may create serious prejudice to parties who require information in order to prepare their case. However, in this case Respondent's counsel was able to conduct a thorough and meaningful cross-examination of the witness (Tr. 127-134). Therefore, I now admit Mehta's testimony.

Mehta's testimony tends to increase Complainant's credibility regarding the events at Millstone (Tr. 121-33). Mehta corroborates Complainant's account of the conflict between Mehta and Morgan (Tr. 125-6). Mehta does not address whether Complainant reported the incident to anyone in authority. However, a whistleblower's testimony does not require corroboration in order to establish protected activity in the prima facie case. Samodurov v. General Physics Corp., 89-ERA-20, n. 2 (Sec'y Nov. 16, 1993), at 5, n.2 (finding employee's own testimony about complaints to a supervisor to be sufficient evidence for a prima facie showing of protected activity). I find Complainant's testimony regarding his protected activity at Millstone to be credible, and I find that he has made a prima facie showing of protected activity.

Respondent does not present sufficient evidence to rebut Complainant's testimony about his protected activity at Millstone. In response to Complainant's allegations, Respondent called Morgan (Tr. 115-18) and Judy Gorski (Tr. 640-49) and offered the stipulated testimony of John Carlin (Tr. 676-7). Morgan testified that he did not threaten Mehta and that he was unaware that Higgins had raised any concerns (Tr. 118-19). Gorski testified that she was not aware of any allegations that Higgins made about Morgan, but she also stated that she left Millstone before the end of the mediation (Tr. 644). John Carlin's stipulated testimony was that he did not recall any accusations against Morgan (Tr. 677). However, Complainant's credible testimony regarding the other people to whom he had spoken was not specifically contradicted.

4. Complainant's comments during the job interview

Both parties agree that, in response to question two of the interview, Complainant made

comments that were critical of Alyeska management (Tr. 60, 226, 432). Complainant testified that he told the panel about an Alyeska investigation which involved serious environmental, regulatory, and compliance issues (Tr. 60). He told the panelists that management did not support him during the investigation and that an Alyeska employee threatened him physically (Tr. 61). Morgan described Higgins' response to question two as "disparaging" of Alyeska, the previous ECP manager, and Alyeska's president (Tr. 227, JX 13).

Complainant argues that his criticisms of Alyeska during the interview constitute protected activity "under Department of Labor precedents." Complainant fails to cite any such precedent, however, and in fact the law does not support this view. Complainant correctly argues that "internal complaints" are protected, and that a complaint or charge of retaliation may itself be protected activity. See Lambert v. Ackerley, 180 F. 3d 997, 1007 (9th Cir. 1999) (observing that the protections afforded by an analogous provision of the Fair Labor Standards Act would be "largely hollow" if restricted to formal complaints filed with government agencies); Mackowiak v. University Nuclear Sys., Inc., 735 F.2d 1159, 1163 (9th Cir.1984) (stating that internal quality control reports are protected under the ERA); Poulos v. Ambassador Fuel Oil Co., Inc., 86-CAA-1 (Sec'y Apr. 27, 1987) (stating the Secretary's position that the Clean Air Act protects internal complaints); Dodd, supra (finding protected activity when an employee reports prior acts of retaliation).

However, I cannot find that Complainant's criticisms amounted to a "filing a complaint" within the meaning of the relevant acts. Regarding the analogous provisions of the Fair Labor Standards Act, the Ninth Circuit has concurred with the First Circuit's statement that "not all abstract grumblings will suffice to constitute the filing of a complaint with one's employer . . . " Lambert v. Ackerley, 180 F.3d 997, 1007 (9th Cir. 1999), quoting Clean Harbors Environmental Service, Inc. v. Herman, 146 F.3d 12, 22 (1st Cir. 1998). The employee protection provisions of the relevant acts do not apply to any and all critical statements that an employee may in any circumstances choose to make about his employer but only to those that "carry out the purposes" of the relevant acts.

The Secretary has long held that an employee may fulfill the purposes of the various employee protection acts through complaints to an employer as well as to a government agency. See Poulos, supra., at 4-5. The Ninth Circuit, in accordance with a majority of federal courts, has supported this interpretation. See Lambert, Mackowiak, supra. In Passaic Valley Sewerage Commr's v. United States Dept. of Labor, 992 F.2d 474 (3d Cir. 1993), the Third Circuit provided an in-depth discussion of the reasons why such internal reports are protected:

> Employees should not be discouraged from the normal route of pursuing internal remedies before going public with their good faith allegations. Indeed, it is most appropriate, both in terms of efficiency and economics, as well as congenial with inherent corporate structure, that employees notify management of their observations as to the corporation's failures before formal investigations and litigation are initiated, so as to facilitate prompt voluntary remediation and compliance. Id. at 478-479

There is no evidence that Complainant intended for his comments during the interview to inform

Alyeska of a situation in need of remediation. By Complainant's own account, he was simply recounting a past situation in order to provide an example of his investigative experience (Tr. 60-61). Complainant's comments do not constitute protected activity under the relevant acts.

B. Employer's knowledge of protected activity

Respondent does not seriously dispute that decision makers at Alyeska were aware that Complainant had engaged in protected activity. Rob Shoaf, who reviewed the interview scores and made the final hiring decisions, knew of Complainant's protected activity at Alyeska (Tr. 555-6). Cindy Wick knew of, and was in part the subject of, Complainant's prior protected activity (Tr. 422). Wick herself raised the issue of a potential conflict due to the concerns that Complainant had raised about her past conduct (Tr. 424-5). Shoaf discussed the conflict with Morgan and John Griffin, which indicates that they learned the details of Complainant's activity at that time, if not before[18] (Tr. 143).

C. Adverse action

Complainant alleges that Alyeska took four adverse actions as a result of his protected activity. First, Respondent rejected Complainant's candidacy for the job of ECP investigator. In order to establish that an adverse action occurred in a case of failure to hire or failure to rehire, the complainant must show that he was qualified for the position, that he applied for it or that the employer was otherwise obligated to consider him, and that the employer hired another individual not protected by the acts or that the position remained vacant after the application was rejected. Holtzclaw v. Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet, 95-CAA-7 (ARB Feb. 13, 1997), citing to Loyd v. Phillips Bros., 25 F.3d 518, 523 (7th Cir. 1994) (setting out requirements for establishing a failure-to-hire claim). Respondent does not dispute that these requirements were met with regard to the ECP investigator position. Respondent also concedes that Complainant raised this claim in a timely complaint.

Respondent contests the merits and the timeliness with which Complainant raised the three

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[18] Complainant does not contend that any member of Alyeska management other than Ed Morgan had knowledge of Complainant's protected activity at Millstone. Complainant testified that, while at Millstone, he raised his concerns about possible retaliation to Morgan directly (Tr. 52), while Morgan testified that he did not know that Complainant had raised any concerns until after the ECP selection process was over (Tr. 193-94). Thus, the evidence is conflicting on this issue and, because it does not affect the outcome or the analysis of this case, I decline to make a credibility determination.

remaining claims. These claims are as follows: Complainant contends that Respondent breached its settlement agreement when Sweeney provided Morgan with negative information about Complainant's prior employment with Alyeska. Complainant also asserts that Respondent denied him the opportunity to compete for an HR generalist position. Finally, Complainant maintains that by instructing HR staff not to talk to him, Respondent treated him differently from others seeking employment.

1. The settlement agreement

Complainant bases his allegation that Respondent violated the settlement agreement (JX 6) on statements that Jim Sweeney made during his deposition on March 2, 2000. After the deposition, Complainant filed a motion to amend on March 6, 2000, well within the thirty-day period permitted by statute. *See, e.g.,* 42 U.S.C. §§ 7622 (3) (b), 15 U.S.C. §§ 2622 (b) (1) (setting thirty day statute of limitations for reporting adverse action under environmental statutes). Respondent argued that the information in Sweeney's testimony was contained in Respondent's answers to interrogatories, which Complainant received in January. I allowed the amended complaint to go forward, and I now affirm that decision. Therefore, I will reach the merits of complainant's claim.

In an April 1998 agreement (JX 6), Higgins and Alyeska reached a settlement of Higgins' 1997 DOL complaint (Patrick A. Higgins v. Alyeska Pipeline Service Company, No. 97-CAA-13). The agreement provided, inter alia, that Robert Malone and Jim Sweeney would write letters of recommendation for Complainant (JX 7, JX 8). The parties further agreed that Alyeska would not "make representations to prospective employers or others, which are inconsistent with such letters [but would]. . only provide information regarding Mr. Higgins' employment that is consistent with the letters of recommendation by Mr. Malone and Mr. Sweeney" (JX 6 at 4).

Complainant argues that Alyeska violated the agreement when Sweeney expressed to Morgan a negative opinion of Complainant's work at Alyeska (Tr. 494, 497). The agreement forbids inconsistent communications to "prospective employers" and makes Complainant eligible for rehire with Alyeska (JX 6). Therefore, Complainant argues, Alyeska employees should not have communicated information inconsistent with the letters to any Alyeska employee involved in the hiring process.

Complainant maintains that Sweeney's comments to Morgan violated the agreement and that this violation constituted an adverse action under the relevant statutes. It is unnecessary to consider whether Respondent's breach of the settlement agreement would constitute adverse action because I find that Alyeska did not violate the settlement agreement. It is not reasonable to interpret the terms of the settlement to forbid Alyeska employees from discussing Higgins among themselves. A corporation does not "provide information" or "make representations" to itself when employees have conversations among themselves. Taking Complainant's argument to its logical conclusion, no Alyeska employee who had prior experience with Complainant would safely be able to talk about him

with anyone involved in the hiring process except to repeat the contents of the letter. This result is not reasonable, and it is not required by the agreement.

The plain language of the agreement does not limit the information or opinions that Alyeska employees can share among themselves. I consider the language of the agreement to be clear, but, if there were ambiguity, it would be resolved by the parties' agreement that the issue was not discussed in negotiations. Complainant's own attorneys stipulated that the settlement negotiations contained no discussion of what information Alyeska employees could exchange among themselves (JX 24). Without explicit evidence that the parties so intended, it is not reasonable to construe the agreement in a manner that would make discussion of Higgins within the company difficult or impossible.

2. The "silent treatment" and the HR generalist position

The next two allegations were not timely and are barred by the statute of limitations. Complainant contends that he learned that he had been denied the opportunity to apply for the HR generalist job during a February 7, 1999 telephone conversation with Dave Otto (JX 16). Regarding the "silent treatment," Sweeney's notes from a February 25, 1999 conversation with Complainant indicate, and Complainant does not dispute, that any instructions that the HR staff received not to speak with Higgins had been lifted by that date (RX 13). By February 7 and February 25, respectively, the alleged violations had been accomplished and Complainant had knowledge of them.

Complainant admits that he failed to raise a formal complaint within the required 30 days. See, e.g., 42 U.S.C. §§ 7622 (3) (b), 15 U.S.C. §§ 2622 (b) (1) (setting 30 day statute of limitations for reporting adverse action under environmental statutes). Complainant's brief invokes the "continuing violation" doctrine to argue that the filing was nonetheless timely but provides little support or explanation for this theory. Reliance on Simmons v. Arizona Public Service Co., 93-ERA-5 (Sec'y May 9, 1995) is misplaced. Simmons applies the continuing violation theory to cases in which "employment practices cannot logically be viewed as discrete 'incidents' occurring at a particular point in time." Id. at 4.

Complainant's allegations amount not to a single "continuing violation" but to a series of discrete incidents which affected his rights in different ways. After his respective conversations with Dave Otto and Jim Sweeney, Complainant had sufficient notice of Respondent's completed actions. The only unifying factor is Higgins' allegation that the actions arose out of a common scheme to deny him employment at Alyeska, but Complainant presents no evidence of such a scheme aside from his own assertion.

Even if the claims were not time barred, they would fail on the merits. Complainant argues that adverse employment action occurred when Alyeska instructed HR personnel not to speak with him. In Complainant's theory, this instruction was part of a retaliatory effort to deny him employment opportunities at Alyeska. Assuming arguendo that this "silent treatment" constitutes an adverse action, I find that Respondent has shown a legitimate nondiscriminatory reason for the instruction. Testimony and exhibits, discussed below, establish that Alyeska management issued the instruction in order to

ensure compliance with the settlement agreement.

The agreement provided that Alyeska should only issue information about Complainant to potential employers if it was consistent with Sweeney's and Malone's letters of recommendation (JX 6). In order to be sure that no employee would inadvertently violate the agreement, L.R. Trotter, Vice President and General Counsel for Alyeska, issued a memo instructing that "all requests for information regarding Mr. Higgins" should be referred to Sweeney, who was then ECP manager (RX 4). During the time when Complainant was inquiring about employment with Alyeska, some HR employees, including Patty Ptacek and Dave Otto, misconstrued this memo to mean that any calls from Higgins himself should be referred to Sweeney exclusively (Tr. 269, Tr. 621). Sweeney later corrected the misunderstanding (Tr. 490, RX 13).

This incident may, unfortunately, have caused Complainant to perceive that he was being treated unfairly. However, I am convinced that any mishandling of Complainant's calls was inadvertent and not retaliatory in nature. Furthermore, Complainant received all information that would have been given to any individual who requested employment information. The only question that Renee Imhof declined to answer involved Alyeska's affirmative action goals, information about which was not available to the general public (Tr. 630-1).

Furthermore, there is no evidence that any miscommunication prejudiced Complainant's attempts to obtain employment with Alyeska. Complainant asserts that an HR generalist position was filled internally without opening the process to outside applicants. He contends that such a job would ordinarily be opened to external applicants. Respondent deviated from its normal policy, Complainant argues, in order to prevent him from applying for the job.

The evidence does not support these allegations. Imhof testified that, between January 1998 and February 1999, Alyeska filled three entry-level positions but no HR generalist positions (Tr. 634-5). Complainant has produced no evidence beyond his own assertion that the HR generalist position actually existed. Furthermore, Alyeska representatives repeatedly testified that it was within normal company policy to attempt to fill positions internally before making an external posting (Tr. 138, 279-81, 324, 599, JX 21). Complainant has produced no evidence that this was an incorrect statement of company policy. Clearly, a preponderance of the evidence does not support Complainant's contention that Alyeska took adverse action by denying him the opportunity to apply for an HR generalist position.

The only adverse action that remains to be considered is Respondent's failure to select Complainant as an ECP investigator. The remainder of this opinion will focus on the reasons that Respondent did not select Complainant for phase II of the interview process and, ultimately, did not offer him a job.

D. Inference of causation

Complainant presents sufficient evidence to raise the inference that the protected activity was the likely reason for the adverse action. Temporal proximity between protected activities and the adverse action against a complainant has been held sufficient to establish the inference that the protected activity motivated the adverse action. Couty v. Dole, 886 F.2d 147, 148 (8th Cir. 1989); Kahn v. Commonwealth Edison Co., 92-ERA-58, (Sec'y, Oct. 3, 1994), aff'd sub nom. Kahn v. U.S. Department of Labor, 1995 U.S.App. Lexis 24111 (7th Cir. 1995); Rainey v. Wayne State Univ., 89-ERA-48, (Sec'y, Apr. 21, 1994); McCuistion v. Tennessee Valley Authority, 89-ERA-6, (Sec'y., Nov. 13, 1991).

In the instant case, the adverse action was relatively close in time to the protected activity. Complainant interviewed for the ECP investigator position in April 1999, less than a year after his original complaint against Alyeska was settled (JX 6). The protected activity at Millstone was even closer in time, occurring in late 1998 (Tr. 8-10). Furthermore, Wick and Morgan, who were both directly implicated in Complainant's protected activity, served on the interview panel. Both gave him realtively low scores that hurt his chances to advance in the interview process (RX 29). Taken together, this evidence is sufficient to raise an inference that the protected activity caused the adverse action.

III. Respondent's rebuttal

Respondent may rebut Complainant's prima facie showing by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason. Dartey v. Zack Company of Chicago, 82-ERA-2 (Secretary, April 25, 1983). Respondent answers Complainant's allegations by arguing that Complainant failed to advance in the interview process due to his poor performance on the interview questions. Testimony at the hearing and Respondent's brief contain an exhaustive discussion of the scoring method, the answers that Higgins gave to each question, and the reasons that each panelist gave for a particular score on each question.

I find that Complainant's responses to the interview questions, as developed in Respondent's exhibits, briefs, and appendices, constitute a legitimate nondiscriminatory explanation for Respondents' failure to hire him. Complainant ranked eighth out of eleven in overall scoring, and his highest score, which he received from LaForest, placed him only sixth (RX 16, RX 29). Furthermore, examination of the qualifications of the individuals who were selected, and their own responses to the interview, support the explanation that Higgins simply was not one of the three most qualified candidates (JX 1- JX 4, RX 16).

The panelists drafted the interview questions in accordance with a method called "behavioral interviewing" (Tr. 331). This approach, which Alyeska regularly uses to evaluate candidates, uses "open-ended" questions to encourage interviewees to elaborate on their answers (Tr. 331). The behavioral interviewing method encouraged each panelist to bring his or her own set of criteria to the interview (Tr. 344, 346). In this case, the panelists did not discuss the "right" answers among themselves in advance (Tr. 333-4). Nor did they discuss each individual candidate between interviews (Tr. 344). Each panelist assigned scores separately, and the panelists made no attempt to equalize scoring (Tr. 344). No one had the opportunity to influence another panelist's scoring, and they were

not even aware of each other's scores until all the interviews were complete (Tr. 340).

The interview questions (JX 9-JX 14, RX 16) clearly constitute a legitimate basis on which to evaluate candidates for the job. The first question, "Why do you want to be an ECP representative?" is relevant to the candidate's motivation and understanding of the role of the ECP. The second question, "Describe your most challenging investigation," allows the interview panel to evaluate the candidate's communication skills, which are obviously important for a job that requires an individual to conduct interviews and make reports. Furthermore, the question gives the candidate a chance to discuss past investigative experience and to demonstrate ability to learn from challenges. The third or "role playing" question tests the candidate's technique and skills as an investigator. Finally, the questions that a candidate chooses to ask can legitimately be evaluated as an indication of the level of understanding and interest in the job.

The manner in which each panelist evaluated Complainant's responses will be discussed in more detail in Part IV. It is noteworthy, however, that Kathy LaForest who, Complainant has acknowledged, was not biased against him, ranked Complainant sixth among the eleven candidates interviewed (Tr. 704, RX 29). Even judging by LaForest's scores alone, Higgins would not be in the top tier of candidates with the four finalists: Don Allbright, Charles Cameron, Paul Tony, and Gilbert Gutierrez.[19]

An examination of the qualifications of the candidates indicates that those selected were highly qualified for the position.[20] Don Allbright had a B.S. degree with a concentration in criminal justice and psychology, and he had served for twenty-five years as an investigator in the U.S. Army (JX 2). Charles Cameron had a masters degree in public health administration and planning as well as extensive experience as an equal employment opportunity investigator, social worker, and pipeline counselor (JX 3). Paul Tony had a law degree and experience in legal practice, and he had served as an equal employment opportunity officer and as a regulatory training specialist with Alyeska (JX 4). Gilbert Gutierrez had a master of science degree with an interdisciplinary focus on business administration and counseling psychology.[21] He worked for over twenty years for such organizations as the Alaska Governor's Office of Equal Employment Rights and the Anchorage Equal Rights Commission, and as a professional consultant to business and village government entities (JX 5).

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[19] Of these four finalists, Gutierrez, Allbright, and Tony received job offers (Tr. 378).

[20] Although the panelists indicated that past experience was not considered during the interview, it is relevant for several reasons. First, the fact that candidates with strong credentials advanced to the next stage of interviews indicates that the screening process was an effective means of selecting qualified candidates for the job. Second, after passing the telephone interview, candidates were subject to a further level of scrutiny, including an examination of their work records. If Complainant had passed phase I of the interview process, his credentials would still have been compared to those of the competing candidates. Finally, Complainant has asserted that Respondent passed him over in favor of "less qualified" candidates, a contention that puts the qualifications of Messrs. Allbright, Cameron, Gutierrez, and Tony at issue.

[21] Based on the nature of the job, I cannot find that the graduate degrees that these candidates had should not have accorded them an advantage in the job application process or that the company's reliance on them was pretextual.

Complainant also had over twenty years' experience in human resources and personnel related work (JX 1). All of the successful candidates, however, possessed comparable or superior experience. Furthermore, Complainant has no post-graduate degree. The job posting for the ECP investigator position indicated that a master's degree in a business or technical discipline was "preferred" (JX 22). Three of the successful candidates had either a master's degree in a relevant field (Cameron and Gutierrez), or a law degree (Tony) (JX 3- JX 5). Allbright, the only successful phase I candidate without a graduate degree, had by far the most extensive experience as an investigator (JX 2). Together with Respondent's explanations of the interview questions and answers, the qualifications of the chosen candidates provide a legitimate nondiscriminatory reason for Complainant's failure to advance to the second round of the interview.

IV. Was Respondent's explanation pretextual?

After the employer has provided evidence of a legitimate nondiscriminatory reason for its hiring decision, the complainant may still prevail by establishing that the reasons proffered by the employer are merely pretextual and that the adverse action was actually based on a discriminatory motive. Dartey v. Zack Company of Chicago, 82-ERA-2 (Sec'y, April 25, 1983). The complainant may demonstrate that the reasons given were a pretext for discriminatory treatment by showing that discrimination was more likely the motivating factor or by showing that the proffered explanation is not worthy of credence. Id.

Complainant uses both approaches to argue that Respondent's reasoning was pretextual. He argues that his history of protected activity regarding Wick and Morgan made their service on the panel inappropriate, and that bias on the part of the panelists was the most likely reason for his poor scores and nonselection. Furthermore, he argues that the reasons which the panelists proffered in evaluating his responses were not credible. Regarding the substance of the interview, Complainant contends that he was evaluated differently from other candidates, that he was held to a different standard than other applicants, and that the selection process was arbitrary and subjective.

I agree in part and disagree in part with Complainant's arguments. I find that Respondent acted inappropriately when it placed Cindy Wick on the interview panel and that Wick's explanations of the scores that she gave to Complainant were at least partly pretextual. However, Ed Morgan's service on the panel was appropriate. Complainant has not shown that the reason Morgan gave for his scores were pretextual, and I find his explanations to be credible and convincing. Furthermore, Complainant has dropped any contention that Kathy LaForest was biased against him, and even LaForest did not rank him among the top four candidates.[22] Complainant has not shown that Respondent's explanation

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[22] The number of candidates who would advance to phase II was not established in advance but was determined based on a "natural break" in the scores (Tr. 329). . Although it is conceivable that the number of candidates who advanced to Phase II may have been different in the absence of Wick's scores, Complainant, who bears the overall burden of persuasion, has not shown this to be true by a preponderance of the evidence. Complainant's most favorable scores came from LaForest, who ranked him sixth overall (RX 29). Only three positions were available, four candidates advanced, and the top three scorers in phase I received job offers (Tr. 378,

that it failed to hire Complainant due to his poor performance on the interview was pretextual, nor has he proven his overall case by a preponderance of evidence.

A. Composition of the interview panel

1. Cindy Wick

I find that the decision to include Cindy Wick on the interview panel was violative. Ed Morgan, Rob Shoaf, and John Griffin[23] were chiefly responsible for this decision. I do not believe that they made this decision with discriminatory intent. That is, Respondent did not deliberately include Wick in the panel in order to prevent Complainant from being selected. However, Morgan, Shoaf, and Griffin decided to include her with little apparent consideration of the highly discordant relationship between her and Complainant. Indeed, they did so with full knowledge that there might be an "appearance" of conflict (Tr. 144, 425-6, 499-500).

In fact, much more than appearance was at stake in their choice. When Wick and Higgins were coworkers, the conflicts between them were so serious that Wick informed management that Complainant was harassing her (Tr. 450-1). Wick's concerns about Complainant did not dissipate over time. When Morgan came to Alyeska, Wick told him that Higgins had harassed and intimidated her and had accused her of lying (Tr. 423-4). She also said that some employees feared Complainant's return to the company would be "disruptive" (Tr. 423-4). Even at the hearing, Wick testified that she was concerned about her ability to form a professional relationship with Complainant (Tr. 426-7).

The conflicts between Wick and Higgins stemmed, at least in part, from Wick's role in reviewing Higgins' ECP reports (Tr. 445-51). These reports involved investigations of alleged harassment, intimidation, and other retaliation against Alyeska employees (Tr. 32, 36-7). The employee protection provisions are interpreted broadly, and allegations of retaliation for protected activity may themselves be protected activity. Jenkins v. U.S. Environmental Protection Agency, 92-CAA-6 (Sec'y May 19, 1994); Dodd v. Polysar Latex, 88-SWD-4 (Sec'y Sept. 22, 1994) at 6-7.

Complainant's adversarial interactions with Wick were related to Complainant's protected

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RX 29). In light of these facts, a preponderance of the evidence does not support a finding that Complainant would more likely than not have advanced if Wick's and Morgan's scores were not considered.

[23] Griffin is identified in Morgan's testimony and in Morgan's statement to a DOL investigator as a member of the Little Harbor consulting group, but Griffin did not testify at the hearing (Tr. 144, RX 44, p. 4).

activity. The history between Wick and Complainant meant that conscious bias on Wick's part was a distinct possibility, and unconscious bias was perhaps unavoidable. Yet, as I will discuss below, the decision makers dismissed the possibility of bias on Wick's part with vague and often conclusory generalizations. It is clear that Alyeska managers appointed Wick to the panel for what they considered valid business reasons, in the full knowledge that they were risking appearance of a conflict of interest. Because I find that Wick was indeed hostile due to Complainant's prior protected activity, I find that the appointment of Wick was a violative act.

Morgan stated that he, Shoaf, and Griffin "discussed [Wick's participation] for some period of time" and decided to place her on the panel because "we felt that she would be able to put [her previous conflict with Complainant] aside and be unbiased. . ." (Tr. 144). Morgan made this statement even though Wick had told him that Complainant had harassed her and that Complainant's return to ECP might be "disruptive" (Tr. 142, 423-4). Furthermore, Morgan had not been at Alyeska while Wick and Higgins were co-workers, and he had worked with Wick for too short a time to evaluate her professionalism adequately.

Shoaf testified that he concluded that Wick could be objective based on his past association with her at Alyeska, but he gave no further basis for that conclusion (Tr. 533, 538). He did not explain in any detail what it was about his past experience with Wick that led to this conclusion (Tr. 532-8). In fact, Shoaf stated that he had "never really [taken] the time to develop a detailed understanding of what the issues were" in the conflict between Wick and Complainant and that he did not remember the details (Tr. 535). In contrast, Jim Sweeney, according to Wick's own statement, did not think that Wick should be on the panel (RX 43, p. 5). Sweeney had worked closely with both Wick and Complainant: he was Complainant's manager in ECP and was involved in investigating Wick's allegations that Complainant harassed her (Tr. 488, 450-51).

In justifying their decision to place Wick on the panel, Morgan and Shoaf both emphasized the needs of the company. Shoaf thought that Wick should be on the panel because the new ECP investigators would be working with and for her (Tr. 532-3). He considered it important for her to be involved in the selection because she would ultimately be accountable for the work functions of the ECP (Tr. 533). Morgan concurred with this assessment, stating that he, Shoaf, and Griffin wanted Wick to help select the employees in preparation for her "more responsible position" (Tr. 144).

These may have been legitimate reasons to place Wick on the selection panel, but the environmental whistleblower statutes do not permit a company's own interests to override the employee protection requirements. The evidence indicates that Morgan and Shoaf valued the benefits that Alyeska could gain from placing Wick on the panel over Complainant's right to an unbiased selection process. An employer makes such a judgment at its own risk, and in this case I find that the placement of Wick on the panel was violative.

2. Ed Morgan

There is little circumstantial evidence that Ed Morgan, in contrast to Cindy Wick, was biased

against Complainant because of protected activity. Regardless of whether Morgan knew of Complainant's protected activities at Millstone,[24] the evidence indicates that Morgan formed a positive opinion of Complainant at Millstone. Morgan testified that he thought Complainant did a good job in the mediation at Millstone and that he expressed this opinion to others (Tr. 143, 192). Patty Ptacek, Judy Gorski, and John Carlin agree that Morgan expressed a positive opinion of Complainant (Tr. 621 646-7 , 677). None of these individuals is currently affiliated with Respondent, which enhances their credibility. Near the end of the hearing, Complainant stated that, based on the testimony he had heard, he thought that Morgan "had positive opinions about

some of the work I did at Millstone" (Tr. 704). Complainant then suggested that Morgan's opinion was "turned around" by negative comments from Alyeska employees, which occurred after Morgan left Millstone (Tr. 704).

Thus, Complainant himself was not convinced that his protected activity at Millstone adversely affected the scores he received from Morgan. I find that he has not carried his burden on this point. Furthermore, I do not find that Morgan's service on the panel was tainted simply because he had heard other employees express negative opinions of Complainant (Tr. 704-5). No principle of employee protection law would require Respondent to sequester interviewers from any discussion of an applicant's past experience with the company.

Complainant specifically notes Sweeney's negative comments to Morgan about Complainant (Tr. 705), but there is no evidence that these negative comments were related in any way to Complainant's previous protected activity at Alyeska or elsewhere. Sweeney acknowledged criticizing to Morgan the quality and timeliness of Higgins' work (Tr. 495), but there is no evidence that these were code words for criticism of Higgins' loyalty to management or "the company team," such as to imply a negative comment based on Higgins' prior protected activity.

B. Evaluation of Complainant's interview responses

First, it is important to identify the correct standard by which to evaluate the fairness of the selection process. The Secretary has noted that "employee protection and anti-discrimination statutes [do] not displace an employer's judgment of what qualities it seeks in its employees and its good faith evaluation of those qualities." Blake v. Hatfield Electric Co., 87-ERA-4, at 8(Sec'y Jan. 22, 1992). An employer's misjudgment of an applicant's qualifications is relevant insofar as it is "probative of whether the employer's reasons are pretexts for discrimination." Id. (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981)). The key inquiry is not whether Respondent designed the hiring process perfectly in order to select the "right" applicant but whether the process provided a pretext for discriminatory intent.

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[24] See note 18, *supra*.

Complainant argues that the selection process was unfair in that there were no predetermined criteria for a good answer. The panelists testified that they did not discuss what the best possible answers would be in advance (Tr. 332-3, 458), but it does not follow that the process was therefore arbitrary. LaForest credibly testified that it was part of the behavioral interviewing process for each panelist to bring an individualized set of criteria to the interview (Tr. 344). Morgan, for instance, stated that he formed a mental "checklist" prior to the interview and measured candidates against the answers that he expected to hear (Tr. 152-3). Furthermore, the fact that the panelists did not discuss the scoring until after all the interviews undermines any suspicion of a conspiracy within Alyeska management (Tr. 221-2, 354).

1. Question One

Complainant argues that candidates should not have been scored on question one, which he describes as "an icebreaker" and "apparently meaningless." As discussed above, an employer has any number of legitimate reasons to ask why an applicant is seeking a particular job. Furthermore, it is not for me to evaluate whether this is as important or deserves equal weight with the other questions. The issue is whether the panelists evaluated Complainant's answers by the same standards that they applied to other candidates. Each candidate was required to answer question one, and each received a score for the answer.

Complainant contends that Kathy LaForest's poor opinion of his answer to question one (he received one out of three possible points) was unwarranted. However, because Complainant has conceded that LaForest was not biased against him (Tr. 704), this claim is irrelevant. The issue is not whether the panelists evaluated Higgins' answers perfectly or even well, but whether any poor scores he received were the results of bias relating to protected activity.

Complainant is further concerned that LaForest and Wick evaluated his responses to this question differently: LaForest thought his response was too "I-focused," while Wick thought that Complainant was "too focused on the CI" (JX 11, Tr. 435). Indeed, it is difficult to understand how a candidate for ECP investigator position could be "too focused" on the concerned individual. Wick's testimony does not elaborate on that opinion, and she has offered no other explanation of how she evaluated Complainant's response to question one. Due to the vagueness of this explanation and strong circumstantial evidence that Wick was consciously or unconsciously biased against Complainant, I find that Wick's reasoning on this question was pretextual.

2. Question Two

Question two asked each candidate to "[t]ell us about your most challenging investigation" (JX 9-JX 14). Morgan, who gave Complainant a score of point five (.5) thought that Complainant's presentation was "disjointed," and he did not think that Higgins described a challenging investigation (Tr. 146-7). He thought that the investigation that Higgins described was not in itself complex but that

Higgins focused on the way that it affected him personally and how others had mishandled the situation (Tr. 147-8). In Morgan's view, the purpose of question two was for the candidate to illustrate his investigative skills, and Complainant failed to do so (Tr. 148).

Complainant argues that it was unfair for Morgan to seek such an answer because the text of the question does not indicate its purpose. In this type of open-ended interview, however, it is legitimate for an interviewer to seek a response that is not spelled out in the question. In fact, Morgan's interview notes, as developed in Respondent's brief, indicate that the candidates he rated favorably were those who described complex investigations in a manner that allowed him to evaluate their investigative skills. For example, Morgan noted of candidate Peggy O'Keefe who, like Complainant, received a score of .5, that she "did not give an investigation summary" (RX 16; Respondent's Brief, Appendix, p. 6). On the other hand, Morgan noted that Don Allbright, to whom he gave a 2.25, "did an excellent job of explaining a complex investigation and why it was challenging" and that Paul Tony, who received a two from Morgan, described a "logistically challenging investigation" (RX 28, RX 26).

Wick, on the other hand, considered the investigation that Higgins described to be challenging. In fact, she stated that a threat of retaliation is the most difficult challenge an investigator can face (Tr. 461). Wick gave Complainant one (1) point for describing an investigation. She did not give him any additional points because he did not describe how he had overcome the challenges (Tr. 461).

Wick acknowledged that, in the case of a failed investigation, the candidate would not be able to describe how he had overcome the challenges (Tr. 475-6). By Wick's criteria, if a candidate's most challenging investigation was one that had failed, a candidate could fully and honestly answer the question but would not receive a satisfactory score because he would not be able to describe something that did not happen. Combined with the circumstantial evidence of bias against Complainant, Wick's explanation is not convincing, and I find it to be pretextual.

Complainant points to another problem with question two. He states that Wick and Morgan downgraded his score because he made disparaging comments regarding Alyeska management. I find no direct evidence that Complainant's comments affected Wick's scoring beyond the level of bias already discussed. Morgan, however, acknowledged that he perceived Higgins' answer to be an attempt to disparage the company and its president and that these comments adversely affected his assessment of Higgins' performance (Tr. 146, 226).

In the context of Morgan's testimony, I find that Morgan's motive in considering Complainant's statements about Alyeska was not retaliatory. Rather, Morgan considered the statements as part of a larger problem with Complainant's response. Morgan believed that Complainant did not provide an adequate response to the question (Tr. 228). Morgan expected a successful candidate to focus on his own abilities as an investigator and to reveal something positive about what he could contribute to the company (Tr. 148). Complainant focused on the company's reaction rather than his own action, and, consequently, the answer did not reveal enough about what Complainant would bring to the job (Tr. 146-8). This reasoning is completely consistent with the criteria Morgan applied throughout the interview (RX 16, RX 26-RX 28). I find Morgan's explanation to be credible and not a pretext for discrimination.

3. Question Three

Complainant argues that the panelists evaluated his response to the "role play" question unfairly. He asserts that the role-playing scenario did not present a "duty to act" situation and did not implicate pipeline integrity. However, the text of the question three scenario states that "pipeline integrity could be impacted . . . If something doesn't happen quickly to fix all these safety and integrity issues, the pipe could blow and there would be oil all over the ground" (RX 16, JX 9-JX 14) It is hard to imagine how these facts could be stated more clearly.

The testimony of Complainant and all three panelists is in accord that Complainant did not obtain the location of the valve or the name of the concerned individual and that he did not treat the situation as a "duty to act" (Tr. 85, 152-3, 353, 706-7). Complainant argues that Morgan did not give him enough information to begin an investigation (Tr. 706-7). The role play scenario, which consisted of a mock investigation, required the candidate to ask the right questions in order to receive the necessary information (Tr. 220). All the panelists including LaForest agreed that Complainant failed to ask the questions needed to obtain the information (Tr. 152-3, 236, 353).

The evidence also supports the conclusion that Complainant guaranteed confidentiality to the concerned individual (Tr. 376, 400, 435-7, 464-5). Complainant's recollection of how he handled this issue wavered. At one point, he stated that it was not his "style" to grant confidentiality (Tr. 710), but elsewhere he admitted that he could not remember what he said about confidentiality and that he might have made a guarantee to the concerned individual (Tr. 707). Complainant did not take notes during the interview, while Wick and LaForest's contemporaneous notes indicate that he did make such a guarantee (JX 9, JX 11). Morgan did not recall Complainant's statements on confidentiality, which indicates that he did not base his scoring on this issue (Tr. 232).

LaForest , whose role was in human resources, thought that Complainant's approach to the question, including his commitment to confidentiality, demonstrated a strong advocacy for employees (Tr. 352). For that reason, she gave him a three (3), the highest possible score (Tr. 352, JX 11). LaForest testified that, when she interviewed Complainant, who was the second candidate in the sequence, she was unaware of the importance of obtaining the location of the valves (Tr. 353). She stated that, if Complainant had interviewed later in the process, she probably would have lowered his score due to his failure to elicit information as to the location of the valves (Tr. 398).

Wick gave Complainant one (1) point for describing an investigation, but she reduced his score by one-half point (.5), a significant deduction on a three-point scale, because he guaranteed confidentiality to the concerned individual in the role-playing scenario (Tr. 483). She stated that this guarantee was contrary to Alyeska policy and, in fact, could not possibly be made in any ECP program (Tr. 435, 483). Complainant argues that Wick's evaluation was inconsistent with statements by Wick and Morgan that prior experience was not a factor in evaluating the candidates during the telephonic interviews (Tr. 149, 429). Complainant also contends that Wick applied her criteria inconsistently among the candidates. Applicant Charles Cameron mishandled the confidentiality issue, but Wick did not deduct points from his score (Tr. 437, JX 10). I agree that these inconsistencies indicate that, as

with the other questions, Wick's reasoning was pretextual.

Morgan did not remember whether Complainant had guaranteed confidentiality to the concerned individual (Tr. 232), which suggests that this issue was not a major factor in his evaluation of Complainant's response. Morgan was more concerned that Complainant failed to obtain information that Morgan believed was "basic" to the investigation (Tr. 228). Morgan considered Complainant's answer to be deficient because he did not obtain the location of the faulty valve, learn the name of the concerned individual, or recognize a "duty to act" situation (Tr. 152-3). Because Complainant was not able to give the identity of the concerned individual or the location of the faulty valve, it would have been difficult for the manager in the role-playing situation to deal with a potentially serious problem (Tr. 235-7).

4. Question Four

Complainant argues that it was unfair to be scored on the fourth "question," which was actually an opportunity to ask questions. Complainant states that he was unaware that he was being judged and scored based on the questions that he chose to ask. However, the panel posed this "question" to each candidate, and each received a score. In fact, several scores were significantly lower than Complainant's (RX 29). There is no evidence that Complainant's response to the question received a different treatment from that of any other applicant.

C. Effect of Wick's scores on overall scoring

Based on the circumstantial evidence of Wick's past relationship with Complainant and her pretextual explanations for her scores, I find that Complainant's protected activity was a motivating factor in Wick's scores. However, Respondent has articulated legitimate nondiscriminatory reasons for the scores that Morgan and LaForest gave, and Complainant has not shown that their reasons were pretextual. Therefore, a preponderance of the evidence shows that both prohibited and legitimate reasons motivated Respondent's decision, and the dual motive test applies. Dartey v. Zack Company of Chicago, 82-ERA-2, at 6 (Sec'y, Apr. 25, 1983); Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287 (1987).

Under the dual motive test, the respondent must prove by a preponderance of the evidence that it would have reached the same conclusion in the absence of protected conduct. Dartey, supra, at 6; Mt. Healthy, supra, at 287. In this case, Wick's scores were only part of Respondent's decision-making process. Upon examination of the scores given by the other panelists, I find it clear that Wick's scores did not determine the outcome of Complainant's interview (RX 29). Even if Wick's scores are excluded, Complainant ranked only seventh out of eleven candidates (RX 29). In fact, the scores of LaForest alone who, Complainant acknowledges, was not biased against him, place Complainant

only sixth out of eleven (Tr. 704, RX 29).[25] Only three investigator positions were available, and no panelist placed Complainant among the top three candidates. Therefore, I find that any bias by Cindy Wick did not have a significant effect on the overall rankings of the interview candidates. Thus, Respondent's explanation that Complainant did not advance because of his interview scores is legitimate and is not a pretext for discrimination.

V. Conclusions

Complainant has shown by a preponderance of evidence that, while he was an employee of Respondent, he engaged in protected activity. He has established that he was subject to adverse action when Alyeska failed to hire him as an ECP representative. The individuals involved in the selection process were aware of Complainant's activity. The protected activity and the adverse action were relatively close in time. Wick and Morgan were closely involved in both the protected activity and the selection process. These facts are sufficient to raise the inference that the protected activity led to the adverse action.

In its defense, Alyeska has articulated legitimate, nondiscriminatory reasons for the hiring decision. Alyeska has presented evidence in support of the theory that Higgins was not hired due to poor performance on the interview, relative to other candidates. In response, Higgins has failed to demonstrate that Alyeska's rationale is pretextual. The ultimate burden of persuasion falls on Complainant to demonstrate, by a preponderance of the evidence, that he or she was retaliated against in violation of the law. I find that Complainant has not met this burden, and I will recommend that his claim under the employee protection provisions of the relevant acts be denied.

RECOMMENDED ORDER

It is hereby ordered that the Complainant's claim is DENIED.

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[25] Complainant emphasizes that LaForest ranked Higgins second overall on questions two and three combined (JX 16). Complainant argues that these questions were the most important, apparently on the basis of Wick's testimony that she and Morgan considered the answers to these questions separately because they focused on the investigative process (Tr. 467). However, LaForest stated that she herself weighed the questions equally, and she also testified that she missed some substantive issues in evaluating Complainant's answer (Tr. 309, 337). Furthermore, because the top four scorers on questions two and three were also the top scorers overall, it is not clear that these questions actually received any additional weight (Tr. 309, RX 29). Indeed, it is difficult to see the purpose of grading responses on a uniform scale and averaging all of the scores together unless all the questions were intended to carry essentially the same weight. Furthermore, when LaForest and Morgan's scores for questions two and three are combined, Complainant still ranks only fifth (JX 16).

FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

FEC/cp
Newport News, Virginia

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §§ 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§§§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).