



In the Matter of:

GREGORY CALDWELL,

ARB CASE NO. 05-101

COMPLAINANT,

ALJ CASE NO. 2003-SDW-001

v.

DATE: October 31, 2008

EG&G DEFENSE MATERIALS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Mick G. Harrison, Esq., Berea, Kentucky

For the Respondent:

**Lois A. Baar, Esq., Janove Baar Associates, LC, Salt Lake City, Utah,
H. Douglas Owens, Esq., Holland & Hart, Salt Lake City, Utah**

FINAL DECISION AND ORDER

The Complainant, Gregory Caldwell, filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his employer, the Respondent, EG&G Defense Materials, Inc. (EG&G), retaliated against him in violation of the employee protection provisions of the Solid Waste Disposal Act,¹ the Toxic Substances Control Act,² the Clean Air Act,³ the

¹ 42 U.S.C.A. § 6971 (West 2003) (SWDA).

² 15 U.S.C.A. § 2622 (West 1998) (TSCA).

Comprehensive Environmental Response, Compensation and Liability Act,⁴ the Federal Water Pollution Control Act,⁵ and the Safe Drinking Water Act⁶ (known collectively as the environmental acts) and their implementing regulations. Specifically, Caldwell charged that EG&G violated the whistleblower provisions of the environmental acts when it suspended him and then terminated his employment. After an evidentiary hearing, a United States Department of Labor Administrative Law Judge (ALJ) concluded that EG&G did not violate the environmental acts and recommended that we dismiss the complaint. We accept the ALJ's recommendation and dismiss Caldwell's complaint.

BACKGROUND

For convenience, we briefly restate certain background facts. Additional details are provided in the ALJ's Recommended Decision and Order (R. D. & O.).

At all times relevant to these proceedings, EG&G operated the Tooele Chemical Agent Disposal Facility (TOCDF) at the Deseret Chemical Depot 22 miles south of Tooele, Utah, under a contract with the United States Army. R. D. & O. at 2. In 1994 Caldwell began working for EG&G as a maintenance engineer, and at the time of his termination in 2003 he worked as an engineering technologist. *Id.*

Caldwell stated on his March 1994 application for employment with EG&G that he had completed four years of college and graduated from "Texas Tech" in Houston. He also stated on the application that he had attended classes at the University of Idaho and "Utah Tech" and that he had received an associate's degree from Texas Tech, which he described as a technical school and not a university. R. D. & O. at 3; RX-14 at R182. Caldwell produced no documentary evidence that he had graduated from or attended Texas Tech or any other institution of higher education. Tr. at 1382, 1392, 1494-1495. EG&G, however, offered into evidence a letter from Texas Tech University of Lubbock, Texas, stating that Caldwell's name and social security number did not appear in its records. Caldwell testified that he was unable to find his diploma or the location of the school. He also admitted that in a prior case he had testified that he had taken engineering courses from several colleges but did not graduate from any of them. R. D. & O. at 3.

Caldwell's supervisor, Curtis Goodell, gave Caldwell four job performance evaluations between 1999 and 2002. CX-4. In 1999 Caldwell needed improvement in

³ 42 U.S.C.A. § 7622 (West 2003) (CAA).

⁴ 42 U.S.C.A. § 9610 (West 2005) (CERCLA).

⁵ 33 U.S.C.A. § 1367 (West 2001) (FWPCA).

⁶ 42 U.S.C.A. § 300j-9(i) (West 2003) (SDWA).

five categories. In 2000 Goodell rated Caldwell at a level 2 (“standard”) performance level in all categories, but in 2001, 2002, and 2003 Goodell gave him a below-standard rating in the teamwork category. *Id.* Goodell testified that Caldwell received a below-standard rating in teamwork in 2001 and 2002 because he had problems with work orders completed by other departments. In April 2003 Goodell began drafting a Performance Improvement Plan (PIP) for Caldwell because of “performance issues that had been building.” Tr. 2187; RX-9. Goodell never put Caldwell’s name on the PIP and never obtained formal approval of the draft from the plant’s Human Resources Department. R. D. & O. at 3-4, 6; Tr. at 2188-2189.

In 2002 and 2003, there were three serious incidents at the plant that resulted in the release of toxic chemical agents into the plant. R. D. & O. at 4-12. On July 15, 2002, there was a release of a chemical agent in one of the plant’s liquid incinerator rooms, which resulted in the serious exposure of a worker to the agent. R. D. & O. at 4; Tr. at 1588. On April 22, 2003, an alarm in the Automatic Continuous Air Monitoring System was set off, signifying an agent migration, when TOCDF employees entered an x-ray florescence room. R. D. & O. at 7. RX-10 at 154. Finally, on May 3, 2003, another chemical migration set off a series of alarms along the ventilation system flow path in the Munitions Demilitarization Building, and the building was evacuated. R. D. & O. at 11. EG&G conducted investigations of all three incidents.

Investigation of the July 15 Incident

EG&G conducted an investigation of the July 15 migration incident and suspended operations for almost nine months. As a result of this investigation as well as investigations by the Army Board of Investigation and the Office of the Inspector General of the Department of Defense, EG&G implemented corrective actions, including creation of a comprehensive management planning and control document called PRP-MG-015 and adoption of higher performance standards for engineers. R. D. & O. at 4; Tr. at 1589-1590; CX-26 at 682.

By the time the plant resumed operations in March 2003, Caldwell had completed a modification of the Spent Decon System (SDS), the system for transporting spent decontaminant, the fluid that results from mixing fresh decontamination liquid with a toxic agent. R. D. & O. at 5; Tr. at 472, 1032-1033, 1406-1407. Caldwell’s modification, which was called the “multi-basket strainer system,” was not immediately put into operation because of delays in obtaining regulatory approvals. R. D. & O. at 5-6; Tr. at 443-444, 459; RX-22a at R232. Therefore, Terry Thomas, TOCDF’s engineering manager and Goodell’s supervisor, assigned Caldwell the task of designing a temporary system to bypass the multi-basket strainer system until EG&G received regulatory approval of the system. R. D. & O. at 6; Tr. at 1363-1365. Caldwell and Mike Burch, a systems engineer for the SDS, decided that spring-loaded check valves should be installed in the temporary bypass system to reduce the chances that toxins could back up and escape. Tr. at 2378-2382, 2443. Caldwell testified that he ordered spring-loaded valves from a supplier and that he completed a purchase requisition dated December 26, 2002, which specified “carbon steel-flanged valves,” but he did not list a part number or

specify “spring-loaded valves” on the requisition. Tr. at 1534, 1544, 1725-1727, 2067, 2079.

Investigation of the April 22 Incident

The investigative team assigned to determine the causes of the April 22 migration incident interviewed Caldwell four times during the 10 days after the incident because the team initially identified Caldwell’s temporary bypass as a pathway of possible agent seepage. The members of the team were Dick Snell, chair of the team and environmental manager of the plant; Bob Banks, an operations specialist; Steve Bunn, an agent munitions safety specialist; Brent Culley, a computer programmer; and Jim Wilcox, an environmental auditor. Their assignment was “to identify and investigate ‘potential pathways for [the] agent vapors’ that caused the alarms to activate on April 22.” R. D. & O. at 7; Tr. at 782, 1770, 1803, 1865, RX-10 at 155. Caldwell did not inform Goodell of his first two meetings with the investigative team until April 30, 2003, when he, Goodell, and Burch attended Caldwell’s third meeting with the team. Tr. at 1415, 2206-2207.

What Caldwell said to the members of the investigative team during his three meetings with them is disputed. Caldwell maintains that he informed the team at their first meeting, on or about April 25, that there was no way that the Clean Decon System (CDS) could be the source of the agent migration. Tr. at 1408. Banks, however, testified that there was just general discussion about the SDS, not the CDS. Tr. at 1918. Bunn testified that Caldwell “firmly denied that the SDS bypass could be the source of the leak.” R. D. & O. at 8; Tr. at 1873-1874.

Two days after their first meeting Caldwell again met with the investigative team and answered inquiries about the temporary bypass system. R. D. & O. at 8; Tr. at 1409-1411. Caldwell claims that on the morning after their second meeting, he told Culley that if the check valves in the SDS were failing, that would be the problem. Tr. at 1414. According to Culley, however, Caldwell said that the SDS bypass could not have been the source of the leak because check valves had been used in the system. R. D. & O. at 8; Tr. at 1807. Culley’s testimony is consistent with that of Snell, Banks, and Bunn. Snell said that during the second meeting Caldwell never told them that a check valve problem caused the agent migration, and Banks testified that Caldwell told them that the check valves were spring-loaded, and that there was no problem with their orientation. Tr. at 1028, 1878, 1906. Finally, Bunn stated that Caldwell was adamant that there was no risk of agent migration through the SDS bypass. R. D. & O. at 8-9; Tr. at 1874-1875.

According to Caldwell, at the team’s third meeting on April 30, 2003, which Goodell and Burch also attended, he told the team that the SDS bypass was definitely the source of the problem. Tr. at 1419. He stated that he warned the team that the leak could be related to the SDS bypass if two check valves failed, and also told them that the check valves in the SDS bypass should be spring-loaded. R. D. & O. at 9; Tr. at 1417-1419. Snell and Wilcox agreed that Caldwell told them that the check valves were spring-loaded. Tr. at 1036, 1772. Banks further testified that the team would have moved more quickly to identify the source of the leak if Caldwell had told them that the check valves

were not spring-loaded. R. D. & O. at 10-11; Tr. 1912.

Caldwell's fourth and final meeting with the investigative team was by a teleconference, in which Goodell also participated. According to Caldwell, during the conference Goodell tried to conceal information that Caldwell was sharing with the team, but both Snell and Culley stated that Goodell made no effort to conceal anything and was very cooperative in the investigation. R. D. & O. at 11; Tr. 1436, 1811, 1815.

Investigation of the May 3 Incident

After the May 3 migration incident, Goodell made two phone calls to Caldwell to get Caldwell's help in locating the purchasing documents for the SDS bypass check valves. Caldwell testified that during these phone calls he expressed surprise that the SDS bypass was still being used and asked Goodell if the check valves had been tested. Goodell, however, disputes Caldwell's claim that he expressed surprise. R. D. & O. at 12; Tr. at 1442-1443, 2274. Goodell stated that the purchase documents revealed that the SDS bypass was the likely source of the leak because swing valves had been installed in the bypass. Tr. at 2209; RX-11, RX-12. According to Goodell, Caldwell's work on the temporary bypass led to the agent migration:

These [purchase] documents confirmed that, in fact, swing valves, not spring valves, had been received from the parts supplier and installed into the SDS bypass. Tr. at 2199-2200, RX 10 at 162. Goodell also testified that he then began to believe that the valves were not working correctly because they had been installed with the wrong orientation. Tr. at 2211, RX 10 at 162. Specifically, he testified, the check valve on the line leading to the C sump was mounted in the horizontal position and, once opened, would not close. Tr. at 2212. Furthermore, Goodell asserted, the work order prepared by Caldwell for installing the check valves was inadequate insofar as it failed to properly describe the direction of flow and the vertical or horizontal orientation of the valves to be installed. Tr. at 2201. Inspection of the check valves after the temporary SDS bypass had been removed confirmed they were not spring-loaded and also "identified a lot of sludge material in the valves." RX 10 at 162. Based on this evidence, the members of the team concluded in their final report that the "direct cause" of the two agent migration incidents was that "the temporary configuration of the SDS system provided a pathway for agent contamination in category 'C' areas." RX 10 at 162. Four "contributing causes" were also noted: inadequate review of the temporary bypass design, inadequate review of extension requests for the temporary bypass, failure to properly identify the valves ordered for

the temporary bypass, and inadequacies in the work planning package associated with the temporary bypass. RX 10 at 162-63. Finally, the “root cause” was stated as “inadequate design and installation of the SDS temporary change.” RX-10 at 163.

R. D. & O. at 12. Caldwell was thus responsible for all of the “contributing causes” that led to the agent migration.

On May 5, 2003, Goodell met with Joe McKea, a Human Resources Representative at EG&G. Tr. at 292-294. According to McKea’s notes from this meeting, Goodell told him that he was concerned about the May 3 chemical migration and Caldwell’s role in it. Goodell said, “I need to get [Caldwell] out of here,” to which McKea replied that he would investigate to find out what happened and what to do about it. Tr. 295. McKea also noted that at his initial meeting with Goodell, Goodell said that he was worried “that this might turn into a whistleblower case.” R. D. & O. at 13; Tr. at 295; RX-3 at 26.

Also on May 5, after Goodell informed Thomas that check valves, and not spring valves, had been installed in the bypass, both Goodell and Thomas met with McKea, and the three decided that suspension of Caldwell was warranted. R. D. & O. at 13; Tr. at 571. The suspension letter, which was given to Caldwell on May 5, reads in part:

Your response [to the investigating team’s inquiries] that the orientation did not impact the valve operation biased the team’s decision, which in turn delayed critical actions by the team, which would have prevented the chemical event on 3 May 2003 In addition, you were contacted by the team members concerning the situation on 23 April 2003. No attempts to inform your management were made on your part. . . . This in turn again delayed any response to correct the situation.

R. D. & O. at 13; CX-1.

On May 12, 2003, Caldwell filed a whistleblower complaint with OSHA, alleging that EG&G violated the whistleblower provisions of the environmental acts when it suspended him for five days. R. D. & O. at 14; CX-3a. A copy of the complaint faxed to EG&G by Caldwell’s attorney is stamped “Received, Human Resources, May 13, 2003.” CX-3b at C7.

McKea continued to investigate Caldwell’s performance. He reviewed Goodell’s notes about Caldwell’s performance problems and interviewed members of the Snell team. McKea decided to bypass EG&G’s progressive discipline and immediately terminate Caldwell. Tr. at 412. According to McKea’s testimony, the primary reasons for termination were that “the responsibilities that Mr. Caldwell had in the whole process

of ordering the part, making sure it was installed correctly, testing it” were not properly carried out and the evidence that Caldwell “was not communicating with his management on his work and what he was doing” R. D. & O. at 15; Tr. at 413. McKea also decided to bypass progressive discipline because of Caldwell’s failure to provide adequate detail in the work order for the bypass check valves and his failure to specify a test plan for the valves. Tr. at 414. With Goodell’s assistance, McKea drafted a termination letter, and on May 15, 2003, when Caldwell returned to work after his suspension, Thomas told Caldwell that he was being terminated. Tr. at 370, 378, 387. The letter stated that Caldwell was terminated for failure to follow established procedures, resulting in agent release, and unacceptable past work performance:

This [termination] action is a result of your failure to follow PRP-MG-015, resulting in an agent release into a category “C” area and for issues related to continued unacceptable past work performance.

In relation to the chemical incident on May 03, 2003, the investigation team concluded that a temporary change (SDS-063), which you had initiated and for which you were responsible, was a main contributor to the agent release. Under the requirements of PRP-MG-015, it is the engineer’s responsibility, among other things, to “review impacts to permits, regulations and standards; develop detailed work instructions; identify special conditions; and approve conditional and/or full release for equipment operation.” As the principal engineer responsible for the temporary change, you failed to fully comply with the procedure.

Past performance evaluations have documented areas for improvement. The October 2002 Continuous Improvement Summary noted “continues to have difficulties with departments and/or individuals outside of Engineering” and the Performance Appraisal dated September 19, 2001 states “needs to develop a better working relationship with the Maintenance Supervision.” Your current supervisor, Curtis Goodell, has observed no improvement in these performance areas. He has received comments from personnel in other departments regarding your inability to communicate professionally. Strained relations have caused significant delays with projects critical to plant operations. Strong interdepartmental communication is critical to the success of Project Engineering and the Site overall.

CX-2.

As required by regulation, OSHA investigated Caldwell's complaint and determined that it lacked merit.⁷ Caldwell timely requested a hearing before a Department of Labor Administrative Law Judge.⁸ The ALJ conducted a hearing on March 15-19 and 22-26, 2004, and issued an R. D. & O. on May 10, 2005. The ALJ concluded that Caldwell failed to demonstrate by a preponderance of the evidence that EG&G "had any illegal, retaliatory motives for the adverse actions taken against him," and therefore recommended that Caldwell's complaint be dismissed. R. D. & O. at 20. Caldwell thereafter filed a timely appeal with the Administrative Review Board (ARB or the Board).

JURISDICTION AND STANDARD OF REVIEW

The employee protection provisions of the environmental acts authorize the Secretary of Labor to hear complaints of alleged discrimination because of protected activity and, upon finding a violation, to order abatement and other remedies.⁹ The Secretary has delegated authority to the ARB to review an ALJ's initial decision.¹⁰

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. At the time the parties appealed and filed their briefs with the Board, we reviewed questions of fact under the environmental acts de novo.¹¹ A new regulation calls for substantial evidence review.¹² Substantial evidence is that which is "more than a mere scintilla." It means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."¹³

⁷ OSHA's ruling letter treats Caldwell's suspension and termination complaints as a single complaint.

⁸ See 29 C.F.R. § 24.4(d)(3).

⁹ *Jenkins v. U.S. Env'tl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 9 (ARB Feb. 28, 2003).

¹⁰ 29 C.F.R. § 24.8. See also Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

¹¹ See *Sayre v. VECO Alaska, Inc.*, ARB No. 03-069, ALJ No. 2000-CAA-007, slip op. at 2 (ARB May 31, 2005).

¹² 72 Fed. Reg. 44,956 (Aug. 10, 2007), codified at 29 C.F.R. § 24.110(b).

¹³ *Clean Harbors Env'tl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998).

Neither party addressed the standard of review in its brief to the Board. Nor has either party requested leave to supplement or amend its brief in light of the change in the standard of review for questions of fact. We therefore assume that neither party considers the change in standard of review material to this case.¹⁴ In any event, applying either standard of review, we conclude that EG&G did not violate the environmental acts and that Caldwell's complaint must be dismissed.¹⁵

DISCUSSION

A. The Legal Standards

To prevail on his complaint of unlawful discrimination under the whistleblower protection provisions of the environmental statutes, Caldwell must establish by a preponderance of the evidence that he engaged in protected activity, that EG&G was aware of the protected activity, that he suffered adverse employment action, and that EG&G took the adverse action because of his protected activity.¹⁶

If Caldwell proves by a preponderance of the evidence that a retaliatory motive played at least some part in the Respondent's decision to take an adverse action, only then does the burden of proof shift to the respondent employer to prove by a preponderance of the evidence that the complainant employee would have been fired even if the employee had not engaged in protected activity.¹⁷

B. Protected Activity

The environmental whistleblower protection provisions prohibit employers from

¹⁴ Cf. Fed. R. App. P. 28(j) (the parties have the burden of calling the court's attention to any pertinent and significant authorities that came to the parties' attention after their briefs have been filed).

¹⁵ 5 U.S.C.A. § 557(b) (West 2000); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Berkman v. U.S. Coast Guard Acad.*, ARB No. 98-056, ALJ Nos. 1997-CAA-002, 1997-CAA-009, slip op. at 15 (ARB Feb. 29, 2000).

¹⁶ *Morriss v. LG&E Power Servs., LLC.*, ARB No. 05-047, ALJ No. 2004-CAA-014, slip op. at 31-32 (ARB Feb. 28, 2007); *Seetharaman v. General Elec. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-021, slip op. at 5 (ARB May 28, 2004); *Lopez v. Serbaco, Inc.*, ARB No. 04-158, ALJ No. 2004-CAA-005, slip op. at 4 (ARB Nov. 29, 2006); *Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 2001-CER-001, slip op. at 5 (ARB Apr. 30, 2004).

¹⁷ *Morriss*, ARB No. 05-047; *Schlagel*, slip op. at 6 n.1.

discharging or otherwise discriminating against any employee “with respect to the employee’s compensation, terms, conditions, or privileges of employment” because the employee (1) has commenced, or caused to be commenced, any proceeding under the acts, (2) has testified in any such proceeding, (3) assisted or participated in any manner in such a proceeding, (4) assisted or participated in any other action to carry out the purpose of the environmental acts, or (5) is about to engage in any of the listed actions.¹⁸

Caldwell alleged before the ALJ that he engaged in four protected activities: (1) reporting to Thomas in December of 2002 or January of 2003 that, contrary to EG&G’s representations to the Army, there were still some check valves in EG&G’s utility lines;¹⁹ (2) telling members of the Snell team in April and May of 2003 that there was likely to be a relationship between the agent migration incident of April 22, 2003, and the SDS bypass; (3) telling Goodell in May 2003 that he was surprised that Snell’s team had not taken steps to act on his advice concerning his alleged warnings to the team that there was likely a relationship between the April 22 agent migration incident and the SDS bypass, and (4) filing a whistleblower complaint alleging that his suspension was a violation of the environmental acts. R. D. & O. at 18.

The ALJ found that Caldwell engaged in protected activity of which EG&G was aware when he warned Thomas that check valves were still being improperly used, but he found that Caldwell’s participation in the Snell investigation, his comment to Goodell about the Snell team’s failure to act on his advice, and his filing of a whistleblower complaint after his suspension were not protected activities. R. D. & O. at 20.

The “participation” provisions of the employee protection (whistleblower) provisions of the environmental acts define protected activity as assisting or participating in any manner in a proceeding, or assisting or participating in any other action to carry out the purpose of the environmental acts.²⁰ We have construed the term “proceeding” broadly to encompass all phases of a proceeding that relate to public health or the environment, whether or not the phase generates a formal or informal “proceeding.”²¹

¹⁸ See 29 C.F.R. § 24.2(a) (emphasis added). See also 42 U.S.C.A. § 6971(a); 15 U.S.C.A. § 2622(a); 42 U.S.C.A. § 7622(a); 42 U.S.C.A. § 9610(a); 33 U.S.C.A. § 1367(a); 42 U.S.C.A. § 300j-9(i)(1)(A). *Accord Morriss*, slip op. at 31-32.

¹⁹ According to Caldwell, in late 2002 or early 2003, he attended a meeting at which Thomas stated that “no check valves were to be placed in agent lines.” Tr. at 1477-78, 1517. Caldwell testified that after the meeting he told Thomas that there were still check valves in part of the agent sampling system for the utility line. Tr. at 1478.

²⁰ See 29 C.F.R. § 24.2(a) (emphasis added). See also 42 U.S.C.A. § 6971(a); 15 U.S.C.A. § 2622(a); 42 U.S.C.A. § 7622(a); 42 U.S.C.A. § 9610(a); 33 U.S.C.A. § 1367(a); 42 U.S.C.A. § 300j-9(i)(1)(A).

²¹ *Passaic Valley Sewerage Comm’rs v. U.S. Dep’t of Labor*, 992 F.2d 474, 479 (3d Cir. 1993); *Schlagel*, slip op. at 9.

Caldwell contends that the ALJ erred in concluding that he did not engage in protected activity when he participated in the Snell team's investigation. We affirm the ALJ's conclusion. As stated above, protected activity furthers the purpose of the environmental whistleblower statutes to protect the public health and the environment.²² The Snell team investigation was an internal investigation of a hazardous waste incident and, as such, was an action to further the purpose of the environmental acts. Caldwell's actions constituted protected activity to the extent that they advanced the purpose of the acts. His initial participation in the investigation was therefore protected.²³ His participation, however, lost its protected status when Caldwell made "unwarranted assurances" to the team that spring-loaded valves had been installed in the SDS bypass system and failed to fully disclose information critical to the investigation, thereby delaying the team's discovery of the source of the agent leaks and contributing to another agent migration on May 3, 2003. R. D. & O. at 10, 20.²⁴

Caldwell's participation in the Snell team investigation, therefore, did not further the purpose of the acts. Employee cooperation is essential to making internal investigations effective, but Caldwell was defensive when talking to the team about the bypass system and never told the team that a check valve problem could account for the leak. R. D. & O. at 8-9; Tr. at 1028. Furthermore, when the team asked him detailed questions about the configuration of the system, the nature of the check valves, and whether the orientation of the valves could impair their function, Caldwell replied that the check valves were compatible, that they were spring-loaded and that there was no problem with the orientation. R. D. & O. at 9; Tr. at 1906. Caldwell had no basis for these claims. His unwarranted assurances and failure to fully disclose critical information delayed the team's discovery of the source of the agent leaks and contributed to another agent migration on May 3, 2003. R. D. & O. at 20, 22. Instead of furthering the purpose of the environmental acts, his participation in the investigation actually endangered the public health and the environment. If we were to adopt Caldwell's argument that such conduct is protected activity, employees would be entitled, under the guise of protected activity, to interfere with internal investigations while also avoiding disciplinary action and successfully maintaining a claim against their employers if the employers take adverse action for their misconduct.

The ALJ also correctly rejected Caldwell's contention that he engaged in

²² *Jenkins*, slip op. at 15 (ARB Feb. 29, 2003).

²³ *See* 29 C.F.R. § 24.2(a).

²⁴ *Cf. Williams v. U.S. Dep't of Labor*, 157 Fed. Appx. 564 (4th Cir. 2005) (letter from teacher to parents erroneously stating that drinking water contained lead is not protected activity); *Patey v. Sinclair Oil Corp.*, ARB No. 96-174, ALJ No. 1996-STA-020 (ARB Nov. 12, 1996) (finding that when employer responded to his safety concerns, employee's continued complaints about them were not protected).

protected activity when he complained to Goodell about the Snell team's failure to act on his advice. The only evidentiary support for this contention was Caldwell's testimony, which the ALJ discredited. R. D. & O. at 20. The ARB generally defers to an ALJ's credibility determinations unless they are "inherently incredible or patently unreasonable."²⁵ In weighing the testimony of witnesses, the fact finder considers the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of their testimony, and the extent to which their testimony is supported or contradicted by other credible evidence.²⁶ We therefore defer to the ALJ's credibility finding, which was based in part on his determination that Caldwell was unable to substantiate his claim that he received an engineering degree from Texas Tech of Houston. R. D. & O. at 20.

We disagree with the ALJ's determination that Caldwell's filing of a whistleblower complaint after his suspension was not protected activity because it "was filed for the sole purpose of deterring EG&G from imposing further discipline upon him . . ." and was based "almost entirely on his false assertions that he had warned the Snell team that the SDS bypass was the likely source of the April 22 agent migration incident." R. D. & O. at 20, 22. A complainant's motivation in making a safety complaint has no bearing on whether the complaint is protected.²⁷ All that is required under the environmental acts is that a complainant reasonably believe that a violation of the acts occurred.²⁸ We agree with the ALJ that Caldwell's false assertions undermine Caldwell's assertion that he reasonably believed that EG&G suspended him for participating in the Snell team investigation.²⁹ But the ALJ made no finding on Caldwell's contention that EG&G suspended and terminated him because they believed he might file a whistleblower complaint. Complainant's Rebuttal Brief at 8. Since the ALJ did not consider this issue, we will assume without deciding that Caldwell engaged in protected activity when he filed his complaint.

Because it is undisputed that Caldwell's suspension and termination were adverse actions, we next consider whether EG&G took these adverse actions because of Caldwell's protected activities.

²⁵ *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 5 (ARB Dec. 30, 2004).

²⁶ *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan 31, 2006).

²⁷ *Gain v. Las Vegas Metropolitan Police Dept.*, ARB No. 03-108, ALJ No. 2002-SWD-004 (ARB June 30, 2004); *Nichols v. Gordon Trucking, Inc.*, ARB No. 97-088, ALJ No. 1997-STA-002 (ARB July 17, 1997).

²⁸ *Guay v. Burford's Tree Surgeons, Inc.*, ARB No. 06-131, ALJ No. 2005-STA-045 (ARB June 30, 2008).

²⁹ See discussion, *supra*, at pp. 10-11.

C. Causal Connection

Caldwell has the burden of establishing by a preponderance of the evidence that EG&G took the adverse employment actions against him because he engaged in protected activity. He need not provide direct proof of discriminatory intent but may instead satisfy his burden of proof through circumstantial evidence of discriminatory intent. To meet his burden of proof Caldwell may prove that the legitimate reasons proffered by the employer were not the true reasons for its action, but rather were a pretext for discrimination, or, in other words, he may prove that EG&G's proffered explanations are unworthy of credence.³⁰

Although Caldwell engaged in protected activity when he informed Thomas that check valves were being used in places unacceptable to the Army, we agree with the ALJ that this protected activity did not contribute at all to the adverse actions EG&G took against Caldwell. Caldwell himself admitted that he did not believe there was anything in his statements to Thomas that would have motivated Thomas to retaliate against him. R. D. & O at 5; Tr. at 1520-1521.

We next consider whether Caldwell's filing of his first whistleblower complaint caused EG&G to retaliate against him. On May 12, 2003, Caldwell filed his complaint with OSHA, alleging that his suspension was a violation of the environmental whistleblower statutes. EG&G received notice of this complaint on May 13 and terminated Caldwell's employment on May 15. Temporal proximity between protected activity and adverse personnel action "normally" will satisfy the burden of making a prima facie showing of knowledge and causation.³¹ While a temporal connection between protected activity and an adverse action may support an inference of retaliation, the inference is not necessarily dispositive.³² For example, if an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee's burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action.³³ On the other hand, "once the

³⁰ See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-508 (1993); *Jenkins*, slip op. at 14.

³¹ 29 C.F.R. § 24.104(d)(3).

³² *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005).

³³ *Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-019, slip op. at 6-7 (ARB Apr. 28, 2006).

employer's justification has been eliminated, discrimination may well be the most likely alternative explanation" for an adverse action.³⁴ The ultimate burden of persuasion that an employer intentionally discriminated because of a complainant's protected activity remains at all times with the complainant,³⁵ but proof that an employer's "explanation is unworthy of credence" . . . "can be quite persuasive."³⁶ In this case, the ALJ concluded that Caldwell failed to prove by a preponderance of the evidence that EG&G "had any illegal, retaliatory motives for the adverse actions taken against him." R. D. & O. at 20. The overwhelming weight of the evidence supports the ALJ's conclusion. Therefore, Caldwell's case fails and we must dismiss his complaint.

McKea testified that he became aware that Caldwell had filed a complaint with OSHA after the suspension letter was delivered but before the termination letter was given to Caldwell. Tr. at 369. According to McKea, Goodell was determined to terminate Caldwell's employment when he first met with McKea concerning the suspension on May 5, 2003. Goodell told McKea, "I need to get him out of here." During the days following Caldwell's suspension, McKea gathered evidence, which is reflected in his contemporaneous notes that the ALJ discussed in detail. R. D. & O. at 14. McKea discussed Caldwell's termination in meetings with Sweeting and Hyder on May 14 and Sweeting, McKea, Goodell, and Thomas on May 15. On the day Caldwell returned from his suspension, Thomas, with McKea present, informed Caldwell that he was terminated. R. D. & O. at 15.

Caldwell contends that the reasons that EG&G proffered for terminating his employment were merely a pretext for discrimination. We disagree. EG&G suspended and terminated Caldwell because he misled the Snell investigation team, delaying critical actions by the team, which might have prevented the chemical migration on May 3. This action alone would have been a legitimate business reason to suspend and terminate him, particularly in light of EG&G's recent history of chemical releases, one of which led to a nine-month suspension of operations at the plant, and its adoption of higher performance standards for engineers. R. D. & O. at 4.

Like the ALJ, we find that Caldwell's "unwarranted assurances to the Snell team that spring-loaded valves had been installed in the SDS bypass unnecessarily delayed the team's discovery of the source of the agent leaks and thereby contributed to the second agent migration incident on May 3, 2003." R. D. & O. at 20. Furthermore, he was not forthcoming with information about his role in this incident. Instead of assisting the Snell team in carrying out the purposes of the statutes, Caldwell hindered their work. He was also negligent in not confirming that spring-loaded valves had been used in the SDS bypass. Caldwell testified that he warned the team about potential problems with the check valves in the SDS bypass, but none of the Snell team members corroborated his

³⁴ *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-48 (2000).

³⁵ *Martin v. United Parcel Ser.*, ARB No. 05-040, ALJ No. 2003-STA-009, slip op. at 9 (ARB May 31, 2007).

testimony. The ALJ explicitly credited the testimony of the Snell team members and discredited Caldwell's testimony. We defer to the ALJ's credibility findings and affirm his determination that Caldwell did not warn the Snell team that the spring-loaded valves had been installed in the bypass. EG&G did not fire Caldwell because he engaged in protected activity; EG&G fired him because it could have avoided the May 3 migration if Caldwell had provided accurate information in the first place when the Snell team interviewed him.

In addition, Caldwell's faulty work on the temporary bypass caused the May 3 chemical migration. Caldwell was responsible for reviewing permits, regulations and standards; developing detailed work instructions; identifying special conditions; and approving conditional and/or full release for equipment operation. He failed in these responsibilities when he did not properly request spring-loaded valves for the bypass and improperly completed a work order for installation of the valve. The investigation team determined that the temporary bypass, which was Caldwell's responsibility, was the main cause of the agent release on May 3, 2003.

EG&G had other reasons for its adverse action. Caldwell did not inform management of his contacts with the Snell team, which delayed management response to correct the situation. In this regard, we reject Caldwell's contention that the ALJ's decision relies on an erroneous legal theory that an employee must report to his supervisors that he engaged in protected activity. The ALJ's decision was based on the premise that it is entirely reasonable for an employer to be informed of ongoing investigations in its plant:

[T]he evidence indicates that the sole concern of the EG&G supervisor in this regard was the Complainant's failure to have informed his supervisors that the meetings were occurring. The Complainant's supervisors had both a responsibility and legitimate interest in knowing of all important events involving the Engineering Department.

R. D. & O. at 22.

The record also establishes that Caldwell had a history of performance problems. Caldwell's performance appraisal as early as 1999 specified that he needed to improve in five categories. His evaluations in 2001, 2002, and 2003 rated him below standard in the teamwork category. EG&G stated in its suspension letter that Goodell had received comments from personnel in other departments regarding his inability to communicate professionally. As the letter stated, "Strained relations . . . caused significant delays with projects critical to plant operations." Caldwell's performance problems had become so critical that Goodell began drafting a PIP for Caldwell in April 2003 because of "performance issues that had been building." R. D. & O. at 3-4; Tr. at 2187.

Caldwell contends that Goodell's comment to McKea that Caldwell's suspension and termination "might turn into a whistleblower case" indicates Goodell's

discriminatory intent. The ALJ concluded that this statement did not indicate a retaliatory intent because Goodell was merely expressing his fear “that [Caldwell] would use the whistleblower complaint procedures as a tactic for preventing or reversing any disciplinary action against him.” R. D. & O. at 21. His conclusion is supported by the testimony of Debbie Sweeting, Human Resources manager, who said that Goodell probably made this comment because he had heard that Caldwell was going to contact an attorney who had represented complainants in whistleblower cases. Sweeting acknowledged that both management and Human Resources staff were considering the possibility of a whistleblower complaint at the time of Caldwell’s suspension. Tr. at 267-269.

Finally, Caldwell contends that “the ALJ erred in concluding that a dual motive analysis was not required and that EG&G’s adverse actions against Mr. Caldwell were not even partly motivated by retaliatory animus.”³⁷ The respondent’s burden under the dual motive analysis is in the nature of an affirmative defense and arises only if the complainant has proven that the respondent took adverse action in part because of the complainant’s protected activity.³⁸ The ALJ found, and we agree, that Caldwell “has not met his burden of proving by a preponderance of the evidence that the Respondent had any illegal, retaliatory motives for the adverse actions taken against him.”³⁹ Because Caldwell failed to establish by a preponderance of the evidence that his protected activity either motivated or contributed to the adverse action, neither the ALJ nor we have reason to engage in a dual motive analysis.⁴⁰

We conclude, as the ALJ determined, that the record establishes legitimate reasons for EG&G’s actions in suspending and ultimately terminating Caldwell’s employment and that Caldwell has not proven by a preponderance of the evidence that EG&G proffered the reasons for its actions as a pretext for discriminating or retaliating against him because of his protected activity. R. D. & O. at 20-24.⁴¹

³² Complainant’s Initial Brief (I.B.) at 25.

³³ *Id.* at 8.

³⁴ R. D. & O. at 20.

³⁵ *See Kester*, slip op. at 8.

³⁶ *See Jenkins*, slip op. at 16-17.

CONCLUSION

Accordingly, because Caldwell has not demonstrated by a preponderance of the evidence that EG&G discriminated against him in violation of the environmental acts, we **DISMISS** his complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge