

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
BOSTON, MASSACHUSETTS

CASE NO.: 2010-CAA-00007

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*In the Matter of:*

**DONNA KUEHU,**  
*Complainant*

v.

**UNITED AIRLINES,**  
*Respondent*

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*Before:* Jonathan C. Calianos, Administrative Law Judge

*Appearances:*

Andre' S. Wooten, Esq.<sup>1</sup> (Andre' S. Wooten Attorney and Counselor at Law), Honolulu, Hawaii,  
for the Complainant

Christopher J. Cole, Esq. (Marr Jones & Wang, LLP), Honolulu, Hawaii, for the Employer

**DECISION AND ORDER DENYING CLAIMS**

**I. Statement of the Case**

This proceeding arises from a complaint of discrimination filed by Donna Kuehu against her employer, United Airlines, alleging violations of the employee protection provisions of the following statutes: section 507 of the Federal Water Pollution Control Act of 1972 (the "FWPCA"), 33 U.S.C. § 1367; section 7001 of the Solid Waste Disposal Act (the "SWDA"), 42

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<sup>1</sup> The Complainant was previously represented by Anthony P.X. Bothwell, Esq. On November 15, 2011, subsequent to the hearing, the Complainant filed a Motion for Substitution of Counsel, requesting the withdrawal of Anthony P. X. Bothwell, Esq. as counsel and the substitution of Andre' S. Wooten, Esq. as the new attorney of record. I granted the Motion on November 23, 2011.

U.S.C. § 6971; section 322 of the Clean Air Act (the “CAA”), 42 U.S.C. § 7622; and section 1450(i) of the Safe Drinking Water Act (the “SDWA”), 42 U.S.C. § 300j-9(i). The formal hearing was conducted on September 19, 20, & 21, 2011, in Honolulu, Hawaii. The parties appeared at the hearing represented by counsel, and I heard testimony from the Complainant, Katherine Wong, Bara Yoza, Susan Quimby, JoAnn Tawada, Carolyn Schoeneman, Denise Peterson, Tony Huntsiger, Bernadette Erwin, and Laura Butler. A continued hearing on the record was conducted telephonically on September 29, 2011, to discuss the admissibility of four exhibits proffered by the Complainant. The following exhibits are full exhibits and the record is now closed: Administrative Law Judge Exhibits (“ALJX”) 2-42; Joint Exhibits (“JX”) 1-60; Respondent’s Exhibits (“RX”) 1-72; and Complainant’s Exhibits (“CX”) 12, 28, 38, 43-44, 75-77, 79-81, 87, 89-92, 108, 136, 142, 143 (only UAL Bates Stamp page UAL1\_002843 and the last page with the aerial photo of the airport), 144 (only Bates Stamp pages K1805, K1806, and K1908 through K1921 inclusive), 145-146. The Respondent submitted its Post-Trial Brief (“Resp. Br.”) on February 2, 2012, and the Complainant submitted her Post-Trial Brief (“Cl. Br.”)<sup>2</sup> on March 2, 2012.

Prior to the hearing, Respondent filed a Motion for Summary Decision on August 16, 2011, and due to its close proximity to the hearing date, I held the motion under advisement until the full record was developed at trial. Aug. 18, 2011 Telephonic Hearing (“H. TR.”) 7-11. After the Complainant rested at trial, Respondent moved for a Judgment as a Matter of Law, which I also took under advisement until all the evidence was presented. Trial Transcript (“TR”) 297-301. This Decision and Order is written with these pending motions in the background. Upon

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<sup>2</sup> While I am sympathetic to Attorney Wooten’s late arrival in this case, I was surprised by the lack of substance contained in his brief, notwithstanding the three extensions of the briefing deadline granted at his request. Although it was voluminous, the brief contained minimal legal analysis, failing to discuss the requisite elements of a whistleblower claim or apply the specific environmental statutes allegedly violated. As such, the Complainant’s brief was of little value in rendering this decision.

consideration of the record as a whole, I find that Kuehu has failed to set forth a claim of discrimination under any of the four environmental statutes involved in this case. As such, Kuehu's claims are DENIED and judgment is entered in favor of the Respondent.

## **II. Factual Summary**

### **A. Kuehu's Employment at United Airlines**

Donna Kuehu ("Kuehu") was an employee of United Airlines from August 28, 1989 until January 8, 2010. ALJX-42 at 1. From September 2000 until January 25, 2006, she was employed as a Reservations Sales and Service Representative ("RSSR") in the reservations call center ("Call Center"), located in the subbasement of a building within the Honolulu International Airport. *Id.*; TR 65. Kuehu's last day of active employment was January 25, 2006, after which she was placed on extended illness status ("EIS") starting on January 26, 2006. ALJX-42 at 1. Kuehu was placed on EIS due to an alleged injury resulting from toxic chemical exposures at work. RX-2; RX-26. EIS is governed by a provision of a collective bargaining agreement ("CBA") entered into by United Airlines and the International Association of Machinists, Kuehu's union representative. ALJX-42 at 1-2; RX-71 at 54-55. The CBA states that employees "shall be placed on EIS up to a maximum of three (3) years . . . [and] separation by termination of the employee's extended illness status shall be automatic." RX-71 at 54-55.

Commencing in June or August of 2009, United Airlines sent Kuehu letters and emails informing her that the expiration of her EIS was approaching. ALJX-42 at 2. On September 21, 2009, Kuehu's supervisor, Denise Peterson ("Peterson"), sent a letter stating that Kuehu's EIS would expire on October 23, 2009, and that her separation from employment would be automatic. *Id.*; RX-28. On October 2, 2009, Kuehu's doctor released her to return to work with certain restrictions effective October 21, 2009. ALJX-42 at 2. Following her doctor's release,

Kuehu requested a meeting with United Airlines to discuss reasonable accommodation in returning to work. *Id.* Due to the ongoing reasonable accommodation process (“RAP”) and the need to obtain additional medical information, Peterson extended the EIS expiration date beyond October 23, 2009. TR 185-86; *see* CX-76; RX-30.

On November 16, 2009, Kuehu, along with Kuehu’s union representative, Bara Yoza, and a supervisor, Ann Forsyth, met with Peterson for a RAP meeting. ALJX-42 at 2; TR 156, 172. At this meeting, Peterson offered Kuehu her old position in the Call Center, and in order to accommodate her medical restrictions, they agreed to let her work with some sort of breathing mask for a regular six hour shift on a four or five day work week. TR 154, 188; JX-58. In response, Kuehu indicated that she was unable to return to the building where the Call Center was located in any capacity. JX-40 at K4553. Peterson then suggested the possibility of transferring to an RSSR position in an alternate location, to the extent that such a position was available, or transferring to a position outside of her current RSSR classification. JX-58.

Kuehu submitted system bids for RSSR positions in alternate call center locations, but there were no openings available at the time. TR 198-200; JX-38. Kuehu also applied through a competitive bid process<sup>3</sup> for a transfer to a position in Kona, Hawaii as a Customer Service Representative (“CSR”). TR 109. The competitive bid process is handled by an outside contractor, SourceRight Solutions. *Id.* at 431-32. On December 17, 2009, Kuehu took a written test and had two interviews, one with the assistant manager in the Kona office and one with Lauren Butler (“Butler”), a senior operations manager from SourceRight Solutions. *Id.* at 113, 206, 514. During Kuehu’s interview with Butler, Butler asked questions from a standard

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<sup>3</sup> A competitive bid process is a process whereby a United Airlines employee applies for a position outside his or her current classification. TR 432. The employee is considered along with other employees applying for the position outside their classification, as well as any non-employees who had applied for the position. *Id.* at 339. This is in contrast to the system bid process which is governed by the CBA and is seniority-based for current employees within the same classification. *Id.* at 338.

interview guide provided by United Airlines. *Id.* at 520; *see* RX-39. After the interview, Butler used the guide to grade Kuehu's answers to the interview questions, and based on the final score, Kuehu did not pass the interview. TR 520, 525-26; *see* RX-39. Peterson informed Kuehu by email on December 17, 2009, that her EIS would be extended pending the results of her interview for the Kona position and no further. JX-40.

On January 7, 2010, SourceRight Solutions informed Kuehu that she was not selected for the position in Kona. TR 112. Kuehu emailed Peterson on the same day to advise her that she was not selected for the position. JX-40 at K4558. On January 12, 2010, Peterson notified Kuehu that her employment had been terminated effective January 8, 2010, due to the expiration of her EIS following her rejection for the CSR position. JX-41; TR 64, 118.

B. Kuehu's Internal and External Complaints

Kuehu frequently complained internally about the conditions at the Call Center, including complaints about sewage overflows and strong, pungent odors inside and surrounding the building. TR 132-33, 226. During her active employment she made numerous verbal complaints to managers and supervisors at United Airlines. *Id.* at 133, 226. Additionally, on August 29, 2005, Kuehu filed a Safety, Health and Environment Concern form with United Airlines, in response to a recent evacuation at the Call Center due to strong odors emanating from a grease trap located on the property. *Id.* at 132; JX-57. In this form, Kuehu wrote "Employees are only interested in a safe and healthy work environment." JX-57; TR 132. After her active employment, Kuehu was unable to complain directly to managers and supervisors because she was involved in an ongoing workers' compensation claim and any concerns had to go through counsel. TR 133-35.

Kuehu also made numerous external complaints, both verbal and written, beginning in 2005, to a variety of state and federal agencies<sup>4</sup> regarding her concerns with the grease trap located on the property, sewer overflows, persistent odors, and other occupational hazards at the Call Center. *See, e.g.*, JX-1, 2, 5, 8, 17, 20, 22-24, 30. Kuehu also filed a claim for workers' compensation based on her alleged exposure to toxic fumes at the workplace, and a civil toxic tort claim against Gate Gourmet, Inc. (the operator of the grease trap) and several other defendants, not including United Airlines. *See* RX-2; JX-46. These proceedings only dealt with occupational safety and health concerns at the Call Center, not the outer environment.

In a letter dated November 3, 2009, Kuehu wrote to the United States Environmental Protection Agency ("EPA"), Criminal Investigations Division, at the top of which she wrote: "Re: Sanitary Sewer Overflows, Clean Water Act, NPDES Violations, 324 Rodgers Boulevard, Honolulu International Airport . . . ." JX-20. This letter was the first complaint that Kuehu made about the environment at large. Kuehu began the letter: "I would like to report of serious conditions and environmental violations at an industrial building in the Honolulu International Airport, which has endangered the health of the occupants, and health of the Manuwai Stream environment." *Id.* at K1878. In the body of the letter, Kuehu focused on past complaints to various agencies about occupational concerns, sickness of the employees, and concerns with the grease trap operated by Gate Gourmet.<sup>5</sup> *See id.* The letter also briefly referred to "storm water violations;" specifically, it mentioned a Consent Decree issued on October 6, 2005, finding the Hawaii Department of Transportation ("HDOT") liable for storm water violations under the

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<sup>4</sup> These agencies include the Hawaii Occupational Safety and Health Division, Honolulu Department of Planning and Permitting, the Mayor, various U.S. Senators, U.S. Department of Health and Human Services, the State of Hawaii Department of Health, the U.S. Department of Labor, the National Institute for Occupational Safety and Health, and the U.S. Environmental Protection Agency.

<sup>5</sup> Gate Gourmet contracts with United Airlines to provide catering to the airline's passengers and is also a sublessee of United Airlines.

Clean Water Act. *Id.* at K1879. The letter also stated that records from Gate Gourmet “indicat[ed] a NPDES Wastewater Violation<sup>6</sup> that was not reported.” *Id.* at K1880. Kuehu concluded at the end of the letter: “Please allow this letter to serve as a formal charge for environmental violations.” *Id.*

Similar to her letter to the EPA, Kuehu wrote letters to the United States Department of Health and Human Services (“DHHS”) on December 1, 2009, and to the United States Department of Labor (“DOL”) on December 3, 2009. *See* CX-43; JX-22. The caption of each letter matched that of the letter to the EPA, in which Kuehu referred to the Clean Water Act and an NPDES Violation. CX-43 at K1939; JX-22 at K1964. The letter to DHHS began: “I am writing you regarding concerns of health and safety shared amongst myself and fellow coworkers assigned to work at the [Call Center].” CX-43 at K1939. The letter to DOL began: “I am writing you regarding concerns of health and safety shared amongst myself and fellow coworkers assigned to work at the location described above.” JX-22. The letters referenced past complaints that she and others had made to various agencies, and mentioned the recent letter sent to the EPA. CX-43. Kuehu indicated in both letters that she enclosed an article entitled “Storm Water Violations Cost Hawaii Transportation Department \$52 Million.” CX-43 at K1939; JX-22 at K1966. In the letter to DHHS, Kuehu concluded by asking for help regarding “the health and safety concerns *at this facility*,” and in the letter to the DOL, she concluded by emphasizing her “health and safety concerns *at this work location*.” CX-43 at K1941; JX-22 at K1966.

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<sup>6</sup> An NPDES violation presumably refers to a violation pertaining to “National Pollutant Discharge Elimination System” as used in the Clean Air Act.

### III. Discussion

#### A. Timeliness of Claims

Under the FWCPA, SWDA, SDWA, and CAA, the complainant is required to file a complaint with the Secretary of Labor within thirty days after an alleged violation occurs. 33 U.S.C. § 1367(b); 42 U.S.C. §§ 6971(b), 300j-9(i)(2)(A), 7622(b)(1). Claims based on an adverse employer action that occurred more than 30 days prior to the filing of a complaint are time-barred unless equitable tolling applies or the respondent's actions were a "continuing pattern of retaliatory conduct that is apparent only with the passage of time." *Ilgenfritz v. U.S. Coast Guard Acad.*, ARB No. 99-066, ALJ No. 1999-WPC-3, PDF at 6 (ARB Aug. 28, 2001). There are three principal scenarios where equitable tolling is applicable; namely, "(1) when the defendant has actively misled the plaintiff respecting the cause of action; or (2) the plaintiff has in some extraordinary way been prevented from asserting his rights; or (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum." *Id.* at 6-7. "The restrictions on equitable tolling, however, must be scrupulously observed." *Sch. Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3d Cir. 1981).

Kuehu filed her complaint on February 11, 2010, and as such, any alleged adverse actions must have occurred on or after January 12, 2010. Kuehu alleged three adverse actions in her complaint: (1) denial of transfer to the CSR position in Kona, Hawaii; (2) refusal to provide a safe workplace; and (3) termination of employment.<sup>7</sup> Kuehu was informed that she was denied the transfer to the CSR position in Kona on January 7, 2010, and was notified that she was terminated on January 12, 2010. TR 112; JX-41. Kuehu testified that the last day she "set foot in the Call Center"—and therefore the last day she was subjected to an unsafe workplace—was

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<sup>7</sup> Complainant's post-trial brief lists fourteen instances of alleged retaliatory conduct. Cl. Br. 6-7. These additional alleged retaliatory claims were not part of Kuehu's complaint and will not be considered.



January 25, 2006, her last day of active employment. TR 127. Therefore only Kuehu's notice of termination falls within the statute of limitations. The alleged adverse actions of "denial of transfer" and "refusal to provide a safe workplace" occurred prior to January 12, 2010, and are untimely, unless equitable tolling, equitable estoppel, or some "continuing violation" is established.

Kuehu argues that equitable tolling should be applied because the Hawaii Occupational Safety and Health Division ("HIOSH") fraudulently concealed her right to file a claim under OSHA and mishandled her complaints.<sup>8</sup> Opp. Mot. Sum. Dec. 2. However, Kuehu has provided no evidence beyond mere accusations of any affirmative misconduct on behalf of HIOSH. *See Mitchell v. EG&G (Idaho)*, 87-ERA-22, HTML at 10 (Sec'y July 22, 1993) ("[A] tolling of the complaint filing period is inappropriate even assuming, *arguendo*, that the [agency's] conduct . . . was negligent or substandard as a matter of proper agency behavior, because estoppel generally cannot be applied against the Government except in cases of affirmative misconduct . . ."). Furthermore, Kuehu provided no evidence that HIOSH was aware of her environmental concerns beyond the immediate workplace that would have prompted the agency to inform her of her right to file a claim under the environmental whistleblower provisions.

Kuehu also argues that equitable tolling should apply because she was not represented by counsel at the time that United Airlines allegedly retaliated against her. Opp. Mot. Sum. Dec. 2. However, Kuehu admitted at trial that she was represented by counsel at the time she was denied a transfer to the Kona office. TR 128-129. Although Kuehu testified that that the representation was limited to her workers' compensation claim, it is well settled that "counsel are

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<sup>8</sup> The issue of timeliness was not presented during the hearing, nor was it argued in the Complainant's post-trial brief. As such, I must rely on the arguments made in the Complainant's Opposition to the Motion for Summary Decision.

presumptively aware of whatever legal recourse may be available to their client, and this constructive knowledge of the law's requirements is imputed to [the client]." *Mitchell*, 87-ERA-22, HTML at 7-8 (citations omitted); TR 128, 217. Furthermore, although Kuehu was not represented by counsel during her active employment, Kuehu has not offered any evidence to suggest that she was unable to seek legal counsel at that time, and therefore equitable tolling cannot save her claims based on allegations that United Airlines failed "to provide a safe workplace." *Rose v. Dole*, 945 F.2d 1331, 1336 (6th Cir. 1991) (per curiam) ("It is well-settled that ignorance of the law alone is not sufficient to warrant equitable tolling . . . Absent a showing that [the complainant] was somehow deterred from seeking legal advice by his employer, this is simply not enough to warrant equitable tolling.").

Kuehu has failed to demonstrate that equitable tolling is appropriate in this case. Accordingly, Kuehu's claims based on "denial of transfer" and "failure to provide a safe workplace" are time-barred, and the only claim that can be considered timely is the one alleging termination as the requisite retaliatory conduct.

#### B. Kuehu's Environmental Whistleblower Claims

Under the SWDA and FWPCA whistleblower provisions, no person shall discriminate against any employee because such employee has "filed, instituted, or caused to be filed or instituted" any proceeding under the respective statutes, or has "testified or is about to testify" in any proceeding under the statutes. 42 U.S.C. § 6971; 33 U.S.C. § 1367. Under the SDWA and CAA whistleblower provisions, no employer may discriminate against an employee "with respect to his compensation, terms, conditions, or privileges of employment" because he or she has "commenced," "testified," or "assisted or participated" in any proceeding under the

respective statutes “or in any other action to carry out the purposes of [the statutes].” 42 U.S.C. §§ 300j-9(i), 7622.

In order to establish a whistleblower claim under all four environmental statutes, a complainant must establish by a preponderance of the evidence that the employer took an adverse action against the complainant because he or she engaged in protected activity. *Jenkins v. U.S. EPA*, ARB No. 98-146, ALJ No. 1988-SWD-2, HTML at 15 (ARB Feb. 28, 2003). In reaching a decision, administrative law judges may apply the framework of burdens developed for discrimination cases under Title VII of the Civil Rights Act of 1964 and other employment discrimination laws. *Id.*

A complainant must first establish a *prima facie* case, raising an inference of unlawful discrimination, by demonstrating that: (1) she engaged in protected activity; (2) the respondent was aware of the protected activity; (3) she suffered unfavorable personnel action; and (4) the protected activity was the reason for the unfavorable personnel action. *Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984); *Evans v. EPA*, ARB No. 08-059, ALJ No. 2008-CAA-003, PDF at 5 (ARB Apr. 30, 2010); *Jenkins*, ARB No. 98-146, HTML at 15. Once the complainant has established these elements, the burden then shifts to the respondent “to simply produce evidence or articulate that it took adverse action for a legitimate, nondiscriminatory reason (a burden of production, as opposed to a burden of proof).” *Morriss v. LG&E Power Servs., LLC*, ARB No. 05-047, ALJ No. 2004-CAA-14, PDF at 32 (ARB Feb. 28, 2007). If the employer meets its burden of production, “the inference of discrimination disappears” and the complainant must prove by a preponderance of the evidence the employer intentionally discriminated against the complainant. *Jenkins*, ARB No. 98-146, HTML at 15 (citations omitted). To meet this burden, “a complainant 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.” *Id.*

If the complainant establishes that a retaliatory motive was a factor in the employer’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.” *Morriss*, ARB No. 05-047, PDF at 33. However, “[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.” *Williams v. U.S. DOL*, No. 03-1749, PDF at 13 (4th Cir. 2005) (per curiam) (unpublished) (citing *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

The Board has established that once a whistleblower case has been litigated fully on the merits, an administrative law judge no longer determines whether a *prima facie* case has been met, but instead determines only whether the complainant has proven by a preponderance of the evidence that the respondent intentionally discriminated against the complainant because of his or her protected activity. *Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 2001-CER-1, HTML at 7 n.1 (ARB Apr. 30, 2004) (citing *Williams v. Baltimore City Pub. Schs. Sys.*, ARB No. 01-021, ALJ No. 00-CAA-15, HTML at 2 n.7 (ARB May 30, 2003)); *see also Morriss*, ARB No. 05-047 at 32-33. However, in this case, the Respondent filed a Motion for Summary Decision on August 16, 2011 and moved for a Judgment as a Matter of Law at the end of the Complainant’s case-in-chief, and both motions are still pending before me. H. TR 7-11; TR 297-301. Given the current posture of the case, although the claims were fully litigated, I will evaluate each step in the burden shifting analysis, including the *prima facie* case, rather than proceeding directly to the final weighing of the evidence.

C. Complainant's prima facie case

1. *Protected Activity*

The environmental whistleblower provisions protect employees “in activities that further the purposes of those acts or relate to their administration or enforcement.” *Evans*, ARB No. 08-059, PDF at 5. The Secretary of Labor and the Administrative Review Board “have consistently held that the raising of internal concerns to an employer as well as the filing of formal complaints with external entities are protected under the employee protection provisions.” *Melendez v. Exxon Chems. Ams.*, ARB No. 96-051, ALJ No. 1993-ERA-6, PDF at 16 (ARB July 14, 2000).

Protected activity cannot be based on “assumptions and speculation.” *McKoy v. N. Fork Servs. Joint Venture*, ARB No. 04-176, ALJ No. 2004-CAA-002, slip op. at 6 (ARB Apr. 30, 2007). An employee’s protected activity must be “grounded in conditions constituting reasonably perceived violations of the environmental acts.” *Evans*, ARB No. 08-059, PDF at 6. In other words, the complainant must demonstrate that her complaints were based on a reasonable belief that the respondent violated the applicable environmental laws. *See Evans v. Baby-Tenda*, ARB No. 03-001, ALJ No. 2001-CAA-4, PDF at 4 (ARB July 30, 2004). Reasonable belief must be scrutinized under both a subjective and objective standard; namely “[the complainant] must have actually believed that the employer was in violation of an environmental statute and that belief must be reasonable for an individual in [the complainant’s] circumstances having his training and experience.” *Melendez*, ARB No. 96-051, PDF at 28. Employees need not prove that the hazards they perceived actually violated the environmental acts. *McKoy*, ARB No. 04-176, slip op. at 6.

An employee's safety and health complaints, including filing complaints under OSHA, are considered protected activity "when such complaints touch on the concerns for the environment and public health and safety that are addressed by those statutes." *Melendez*, ARB No. 96-051, PDF at 17; *see also Devers v. Kaiser-Hill Co.*, ARB No. 03-113, ALJ No. 2001-SWD-3, PDF at 13 (ARB Mar. 31, 2005). Complaints about "purely occupational hazards" are not protected under the statutes. *Evans*, ARB No. 08-059, PDF at 6; *see also Carpenter v. Bishop Well Servs. Corp.*, ARB No. 07-060, ALJ No. 2006-ERA-35, PDF at 8 (ARB Sept. 16, 2009) ("Such complaints, which describe hazards limited to a workplace but not endangering the public, are not protected under the environmental statutes."); *Kemp v. Volunteers of Am. of Pa., Inc.*, ARB No. 00-069, ALJ No. 2000-CAA-6, PDF at 4-6 (ARB Dec. 18, 2000) ("[A] key threshold question . . . is whether he reasonably believed that the alleged asbestos hazard violated EPA regulations or posed a risk to the general public outside the building . . . . Concerns only about an occupational hazard [are] beyond this Board's jurisdiction.").

*i. Protected Activity under FWPCA*

The purposes of the FWPCA are to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and eliminate "the discharge of pollutants into the navigable waters." 33 U.S.C. § 1251(a). The only potential protected activity in this case that related in any way to navigable waters was Kuehu's letter to the EPA on November 3, 2009. *See* JX-20. However, despite references to "environmental violations" and "Clear Water Act" in the November 3, 2009 letter, Kuehu has failed to establish that she reasonably believed United Airlines violated the FWPCA.

First, Kuehu's generalized statements in the EPA letter referring to "environmental violations" and the "health of the Manuwai Stream environment," without any supportive

evidence showing how the Manuwai Stream was affected, are too speculative and vague to constitute protected activity.<sup>9</sup> See *Saporito v. Cent. Locating Servs., LTD et al.*, ARB No. 05-004, ALJ No. 2001-CAA-00013, PDF at 8 (ARB Feb. 28, 2006) (“[M]ere belief without some supporting evidence, that the air and water could become polluted because of the gas or pollutants in or near the manholes involved is not a reasonable perception that [the respondent] violated the environmental statutes. [Complainant’s] belief is only speculation.”). Kuehu testified that “the fat oil and grease from the grease trap entered the waste water system, which then would lead to the stream.” TR 87. However, when asked to explain how the grease from the grease trap would get from the waste water system to the Manuwai Stream, Kuehu vaguely responded “somehow, that fat oil and grease was ending up in the storm water system, which could then lead to the Manuwai Stream.” *Id.* at 223-24. Kuehu was unable to explain how the waste water system was connected with the storm water system, and her complaints remain purely speculative.

Second, Kuehu has not established that her belief was reasonable. She testified that she became aware of the affect of the grease trap on the outer environment when she began representing herself in her toxic tort case and gained direct access to discovery produced by Gate Gourmet. *Id.* at 136. She testified that that documents produced by Gate Gourmet established that grease was in the waste water system, which had a potential effect on the Manuwai Stream. *Id.* She referred to a series of emails from December 2002, in which the State of Hawaii informed United Airlines that Gate Gourmet was dumping grease and oil in the storm drain system, which could potentially affect the Manuwai Stream. *Id.* at 223. These emails do not provide a reasonable basis for Kuehu’s belief that United Airlines was violating the FWCP.

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<sup>9</sup> As an aside, there is nothing in the record before me to even establish that the Manuwai Stream is a navigable water. In this decision, I have tried to give Kuehu the benefit of many doubts and this is just one more hurdle that she is unable to overcome.

First, the emails were from 2002, seven years prior to Kuehu's letter to the EPA, and there is no evidence to suggest that this was a continuing violation as opposed to an isolated incident. In fact, the emails demonstrate that Gate Gourmet was in the process of fixing the problem. CX-75 at K4242. Second, the emails do not mention the grease trap, which Kuehu believed was the cause of harm to the stream. Instead, the emails establish that the grease was getting into the storm drain system because there was a leak in a compactor. *Id.*

Kuehu also alleges that a Consent Decree from October 6, 2005, in which the Hawaii Department of Transportation was assessed fines under the Clean Water Act led to her reasonable belief that United Airlines was violating the FWCP. CX-144 at K1908-K1921. However, the decree does not mention United Airlines or Gate Gourmet, and only makes a general reference to future inspections and enforcement requirements for noncompliant airport tenants. *See id.* This is not sufficient to provide Kuehu with a reasonable belief that grease from Gate Gourmet's grease trap was entering the storm water system, and ultimately the Manuwai Stream.

There is also an issue of control in this case. It is undisputed that Gate Gourmet was the company that operated the grease trap. TR 67, 266. No evidence was presented showing that United Airlines had control over the operation of the grease trap or that United Airlines should be legally accountable for the actions of Gate Gourmet. *See id.* at 300. Although Gate Gourmet was a contractor and a sub-lessee of United Airlines, nothing in this arrangement established that United Airlines was liable for Gate Gourmet's actions. *Id.* at 70-71, 266. The emails from 2002, clearly establish that Gate Gourmet was at fault for the grease in the storm water system, not United Airlines, and United Airlines forwarded the email to Gate Gourmet to handle the problem. CX-75. The 2002 emails made no mention of actual or potential wrongdoing by



United Airlines. Therefore, it was not reasonable for Kuehu to conclude that United Airlines was involved in any potential violations under any of the environmental acts, including the FWPCA.

The reasonableness of Kuehu's belief is further diminished by the fact that she had knowledge at the time she wrote the letter to the EPA that Gate Gourmet had moved out of the building to another location, and consequently stopped operating the grease trap. TR 156-57; JX-20 at K1880. Therefore, her concern for the "health of the Manuwai stream environment" cannot be considered reasonable when she was aware that the alleged threat to the stream no longer existed. Lastly, the fact that Kuehu attended classes at the Honolulu Community College studying environmental and occupational safety, and received a degree in Science, Occupational, and Environmental Safety Management in 2007, also diminishes the reasonableness of her belief. TR 145-46; JX-38; *Melendez*, ARB No. 96-051, PDF at 28 ("[Complainant's] belief must be reasonable for an individual in [the complainant's] circumstances having his training and experience.").

Kuehu's primary and true concern remained that of occupational safety and health of her and her fellow workers at the Call Center. All of Kuehu's complaints leading up to the November 3, 2009 EPA letter, and all of the complaints subsequent to the letter, focused solely on employee health and safety at the Call Center. Kuehu only briefly mentioned the outer environment in the EPA letter with a passing reference to the Manuwai Stream, with the bulk of the letter discussing occupational hazards at the Call Center. When asked during her deposition why she contacted the EPA, she responded: "I wanted someone with authority to . . . help relieve and alleviate the problems that employees . . . are suffering from under these conditions . . . at the building, in the workplace in the basement at the airport." RX-67 at 202-03. Certainly,

based on the record before me I can find that there were problems at the Call Center especially with noxious odors, but there is no evidence to support a finding that these hazards extended to the environment in general, threatening potential harm to the public. There is also no evidence to establish that at the time she was making these complaints, Kuehu reasonably believed the harms she was complaining about extended beyond her work environment. For the reasons set forth above, Kuehu has not established protected activity under the FWPCA.

*ii. Protected Activity under CAA*

The main purpose of the CAA is to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population. 42 U.S.C. § 7410(b). To be considered protected activity, an employee must be concerned about potential pollution of the outer, ambient air; complaints about purely occupational hazards are not protected under the CAA. *Stephenson v. NASA*, ARB No. 98-025, ALJ No. 94-TSC-5, PDF at 15 (ARB July 18, 2000); *see McKoy*, ARB No. 04-176, slip op. at 7 (“[I]f the complainant is concerned only with airborne asbestos as an occupational hazard within the workplace, and not in the outer, ambient air, the employee protection provisions of the CAA would not be triggered.”).

Kuehu frequently complained of strong odors coming from the grease trap located outside the Call Center. TR 297. However, Kuehu did not present evidence that she complained of gases and chemicals affecting the outside ambient air, as required under CAA. Instead, she consistently complained only of “indoor air quality.” *See, e.g.*, JX-28 at K2517; JX-24 at K2040; JX-20 at K1878. Even when Kuehu became aware of potential harm to the outer environment in 2009, she continued to complain of indoor air quality only. In her letter to the EPA, Kuehu complained about “poor indoor air quality” and wrote “how is it that the DOH

Clean Air Branch can issue violations to entities exceeding the hydrogen sulfide emissions of 0.25 parts per million in the outdoor air, but HIOSH claims no violation to occur *in a basement without windows* unless the Permitted Exposure Level (“PEL”) exceeds 20.0 parts per million?” JX-20 at K1878-79. Kuehu’s complaints about indoor air quality did not address concerns for the general population, or relate to the purposes of the CAA, and therefore she did not engage in protected activity under the CAA.<sup>10</sup>

*iii. Protected activity under SWDA*

The purpose of the SWDA is to “promote the reduction of hazardous waste and the treatment, storage, or disposal of such waste so as to minimize threats to human health and the environment.” *Culligan v. Am. Heavy Lifting Shipping Co. et al.*, ARB No. 02-046, ALJ No. 00-CAA-20, 01-CAA-09, 01-CAA-11, PDF at 10 (ARB June 30, 2004); *see* 42 U.S.C. § 6902(b). Concerns for purely occupational hazards do not fall under the provisions of the SWDA. *See Devers*, ARB No. 03-113, PDF at 14 (“While the contaminated soil at Rocky Flats could be considered solid waste, the Complainants’ concerns reflected only their personal safety and health within the confines of [their workplace].”).

Kuehu has presented no evidence that she complained about the treatment, storage, or disposal of waste, or its affect on the environment. Kuehu was only concerned about sewage overflows occurring at the Call Center. *See, e.g.*, JX-20 at K1878 (“sewer overflows within the building”); JX-5 at DK0013 (“the Facility has experienced sewer backups”); JX-22 at K1965 (“sewage overflow from the restroom areas”). Kuehu stated in her deposition that she was not aware of the SWDA until after her termination. RX-67 at 227. Even if sewage qualified as solid

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<sup>10</sup> Even if Kuehu had complained about the ambient air, her belief that United Airlines violated the CAA would be unreasonable because investigations and testing by various government agencies consistently found that there were no violations of air quality standards. *See* RX-46.

waste, Kuehu's complaints were purely occupational in nature, and therefore she did not engage in protected activity under the SDWA.

*iv. Protected Activity under SDWA*

The purpose of the SDWA is to “assure a supply of drinking water which dependably complies with such maximum contaminant levels; including accepted methods for quality control and testing procedures to insure compliance with such levels and to insure proper operation and maintenance of the system, and requirements as to the minimum quality of water which may be taken into the system.” 42 U.S.C. § 300(f). No evidence was presented nor was testimony elicited at trial regarding any protected activity under the SDWA. Although Kuehu testified during her deposition that she complained to management about gas leaking from the bathroom faucets, she admitted that when she made the complaint, she “didn’t make [the] connection” that the drinking water could be contaminated as a result. RX-67 at 190. Additionally, this passing comment about the faucet was purely an occupational concern. *See id.* at 191. As such, Kuehu did not engage in protected activity under the SDWA.

*2. Respondent’s Awareness of Protected Activity*

Knowledge of the complainant’s protected activity by “the alleged discriminatory official” is an “essential element” of a whistleblower case. *Mosley v. Carolina Power & Light Co.*, 94-ERA-23, HTML at 4 (ARB Aug. 23, 1996) (citations omitted). Knowledge can be proven by circumstantial evidence, but the evidence “must show that an employee of the respondent with authority to take the complained of action, or an employee with substantial input in that decision, had knowledge.” *Id.* Additionally, the complainant must show actual evidence of knowledge, and not mere speculation. *Muino v. Fla. Power & Light Co.*, ARB Nos. 06-092/06-143, ALJ Nos. 2006-ERA-2/8, HTML at 8 (ARB Apr. 2, 2008) (“[The complainant]

submitted no evidence, only conjecture and speculation, that the hiring officials were aware of his whistleblowing activities.”).

Assuming, *arguendo*, that Kuehu engaged in protected activity, there is no evidence in the record demonstrating that United Airlines was aware of any complaints made by Kuehu about the outer environment beyond workplace safety and health concerns. To the contrary, Kuehu testified that she never informed Peterson or any other management at United Airlines about her letter to the EPA or her newly-formed belief in 2009 that the grease trap was affecting navigable waters. TR 141-42; RX-67 at 178-79, 205-06. Furthermore, Peterson testified that although she was aware of past complaints made by Kuehu about workplace health and safety, she was unaware of Kuehu’s complaints about the outer environment.<sup>11</sup> TR 388, 479-80. The fact that management at United Airlines knew that Kuehu had complained in the past about workplace health and safety is not sufficient to establish awareness under this element;<sup>12</sup> Kuehu is required to prove that United Airline management knew about specific protected activity concerning the outer environment. United Airlines did not have knowledge of such protected activity, and as a result, it could not have retaliated against Kuehu because of her environmental complaints.

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<sup>11</sup> When Peterson was asked by Complainant’s counsel whether she was aware of Kuehu’s complaints about environmental violations outside the workplace, she responded “yes.” TR 448. However, Peterson also testified that she became aware of these complaints in 2008, which is prior to Kuehu’s letter to the EPA in 2009, and on cross-examination, Peterson testified that she was not aware that Kuehu complained about the contamination of the nearby stream, or pollution of the air outside the workplace. *Id.* at 448, 480. Given the conflict, I find that Peterson’s initial affirmative response was most likely due to a misunderstanding of the question posed.

<sup>12</sup> Furthermore, the fact that Kuehu’s experts inspected the Call Center and its surrounding area for purposes of her toxic tort case (involving occupational concerns only), is insufficient to establish United Airlines’ knowledge of her complaints to the EPA, or concerns about the Manuwai Stream and the ambient air. *See* TR 141.

### 3. Unfavorable Personnel Action

It is clear that Kuehu suffered from an adverse employment action when United Airlines terminated her employment, and United Airlines does not contest that termination is an adverse employment action. Therefore, this element of the *prima facie* case is met.

### 4. Protected Activity as Reason for Unfavorable Personnel Action

As for causation, the complainant must demonstrate “that adverse action was taken ‘because of’ protected activity [and] his protected activity was a ‘motivating’ factor in [the respondent’s] decision to dismiss him.” *Lopez v. Serbaco, Inc.*, ARB No. 04-158, ALJ No. 2004-CAA-5, HTML at 4 (ARB Nov. 29, 2006). Temporal proximity, or the lack of temporal proximity, is not dispositive by itself in determining whether the adverse action was retaliatory. *Erickson v. U.S. EPA*, ARB No. 99-095, ALJ No. 1999-CAA-2, HTML at 5 (ARB July 31, 2001); *Caldwell v. EG&G Def. Materials, Inc.*, ARB No. 05-101, ALJ No. 2003-SDW-1, PDF at 13 (ARB Oct. 31, 2008). In addition, “when the protected activity and the adverse action are separated by an intervening event that independently could have caused the adverse action, the inference of causation becomes less likely because the intervening event also could have caused the adverse action.” *Lopez*, ARB No. 04-158, HTML at 8; *see also Evans v. Wash. Pub. Power Supply Sys.*, 95-ERA-52, HTML at 2 (ARB July 30, 1996) (*citing Williams v. S. Coaches, Inc.*, 94-STA-44 (Sec’y Sept. 11, 1995)) (“[A] legitimate reason for termination that occurs after protected activity may negate any temporal inference of causation.”).

There is temporal proximity between Kuehu’s letter to the EPA on November 3, 2009 and her notice of termination on January 12, 2010—approximately a two month interval. However, given the facts of this case, temporal proximity alone is not sufficient to provide an inference of causation. There were several independent, intervening causes that negate any

causation that could have been inferred by the temporal proximity. Following Kuehu's November 3<sup>rd</sup> letter to the EPA, the following occurred: (1) Kuehu rejected United Airlines' offer to return to work at the Call Center with a mask, at the regular six hour shift on a four or five day work week; (2) Kuehu applied through a competitive bid process to a CSR position in Kona; (3) Kuehu was interviewed for the CSR position by a third-party contractor, SourceRight Solutions, and was rated poorly on the interview; (4) Peterson informed Kuehu that her EIS would be extended pending the results of the interview and that it would be extended no further; (5) Kuehu was not selected for the position in Kona; and (6) Kuehu was terminated because of the expiration of her EIS. *See* RX-30, 39, 42. The expiration of Kuehu's EIS upon non-selection for the CSR position was entirely independent from her alleged protected activity, and negates any temporal inference of causation.

It is also significant that the EIS termination process was already in motion prior to Kuehu's letter to the EPA. Kuehu's EIS was initially due to expire, leading to an automatic termination, on October 23, 2009, and her EIS was only extended beyond this date because of a letter from Kuehu's doctor on October 2, 2009 releasing her to return work. *See* RX-28; RX-29. Absent the release to return to work, Kuehu would have been automatically terminated on October 23, 2009, *prior to* her complaints to the EPA. Therefore, Kuehu has failed to establish an inference of causation.<sup>13</sup>

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<sup>13</sup> As previously discussed, Kuehu's "denial of transfer" and "refusal to provide safe workplace" claims are time-barred. Even assuming such claims were timely, Kuehu cannot show a causal nexus between these actions and her alleged protected activity.

Regarding Kuehu's denial of transfer claim, a third-party contractor handled the competitive bid process and United Airlines did not take part in the selection process. TR 439-40. Furthermore, Laura Butler, who interviewed Kuehu for the CSR position, had no knowledge of any of Kuehu's past complaints, and therefore she would have had no reason to retaliate against Kuehu. *Id.* at 209, 523, 527-28.

As for the "refusal to provide a safe workplace" claim, Kuehu cannot establish an inference of causation because United Airlines' alleged failure to remedy unsafe work conditions was ongoing for several years before Kuehu complained about the outer environment in 2009. The alleged adverse action predated the alleged protected activity by many years.

Based on the foregoing, Kuehu has clearly failed to meet her *prima facie* burden under all four environmental statutes, as she has not shown protected activity, the employer's awareness of protected activity, or protected activity as the reason for the adverse action. Although my finding that Kuehu has not met her *prima facie* burden is dispositive, for completeness of the record and possible appellate purposes, I will proceed to the next steps in the analysis.

D. Legitimate, Non-Discriminatory Reason for Adverse Action

Assuming that is determined on appeal that Kuehu established her *prima facie* case, I find that United Airlines has met its burden of production by demonstrating a legitimate, nondiscriminatory reason for Kuehu's termination. *See Morriss*, ARB No. 05-047, PDF at 32. Specifically, United Airlines followed the EIS provision of the CBA when it terminated Kuehu's employment. Article XV of the CBA states:

- A. An employee who exhausts their sick leave or who is off work because of illness or injury longer than sixteen (16) days without sick leave pay shall be placed on [EIS] up to a maximum of three (3) years from the first day placed on [EIS].

....

- D. At least sixty (60) days prior to the end of the employee's [EIS], the employee's condition shall be reviewed by the Company and further extensions in the period of [EIS] may be granted if circumstances warrant. Thirty (30) days before the end of the employee's [EIS] the company shall notify the employee, the System General Chairperson, and the Local Committee of its decision to extend the employee's [EIS] or separate the employee. Separation by termination of the employee's [EIS] shall be automatic and the Company shall not be required to follow the procedures specified in the Disciplinary Action Article of the Agreement.

RX-71 at 54-55. United Airlines complied with the requirements of the CBA. Sixty days before the expiration of her EIS, United Airlines notified Kuehu that they were reviewing her condition. RX-27. Thirty days before her EIS was to expire, United Airlines notified Kuehu that



her separation would be automatic upon termination of her EIS on October 23, 2009. RX-28. Due to Kuehu's release to return to work on October 21, 2009, Peterson decided, in her discretion, to extend Kuehu's EIS, and informed Kuehu of the extension. *See* RX-30. Peterson notified Kuehu that she further extended EIS pending the results of Kuehu's interview for the CSR position in Kona. *Id.* at K4557. When Kuehu was not selected for the position, United Airlines notified her that the EIS had expired and her separation by termination of EIS was automatic. RX-42. Kuehu's own union found that United Airlines did not violate Article XV of the collective bargaining agreement. RX-43.

The EIS provision under Article XV of the CBA provides a legitimate, nondiscriminatory basis for United Airlines' adverse action. Because United Airlines met its burden of production, an inference of discrimination no longer exists, and Kuehu must prove by a preponderance of the evidence that United Airlines intentionally discriminated against her.

E. Complainant's Burden of Proving Intentional Discrimination Based on Protected Activity by a Preponderance of the Evidence

The complainant bears the ultimate burden of demonstrating that the legitimate reason offered by the employer was a pretext, either by showing "that the unlawful reason more likely motivated it or by showing that the proffered explanation is unworthy of credence." *Samodurov v. Niagara Mohawk Power Corp.*, 89-ERA-20, HTML at 10 (Sec'y Nov. 16, 1993). Kuehu has not established by a preponderance of the evidence that United Airlines intentionally discriminated against her. First, Kuehu has not established that she engaged in protected activity under any of the four environmental statutes, as discussed *supra*. Additionally, even if Kuehu had engaged in protected activity, Kuehu has not shown that the legitimate reason proffered by United Airlines for her termination was a pretext for discrimination. *See Jenkins*, ARB No. 98-146, HTML at 15.

The only evidence of discriminatory animus provided by Kuehu is testimony from three United Airlines employees, Katherine Wong, Susan Quimby, and JoAnn Tawada. These witnesses testified that they feared being retaliated against for their complaints of workplace hazards. TR 35-37, 253, 285-87. However, the witnesses did not provide any specific instances in which employees were retaliated against in the past for making complaints. *See id.* at 49-51. The witnesses also testified that Kuehu was retaliated against for her complaints, but they acknowledged that this was not based on any personal knowledge, but simply based on speculation, office gossip, and conversations with Kuehu herself. *See, e.g., id.* at 37, 49-51, 54-55, 253, 285-87. Complainant's witnesses also testified that Bernadette Erwin and Lauren Wright, managers at United Airlines, knew of Kuehu's past complaints. *See id.* at 29-32, 54. However, no testimony was provided that Erwin or Wright knew of any complaints made by Kuehu about the outer environment as opposed to purely occupational complaints concerning the Call Center. Additionally, neither Bernadette Erwin nor Lauren Wright were involved in Kuehu's termination, and as a result, they could not have retaliated against her based on any biases they may have had.<sup>14</sup> *Id.* at 405-06, 499-500.

Kuehu's termination was standard procedure under Article XV of the CBA. The EIS provisions are frequently invoked by United Airlines and Kuehu has provided no evidence that she was treated any differently than other employees on EIS. In fact, Kuehu was allowed two extensions to her EIS period, which other employees have rarely received in the past. *See* JX-49.

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<sup>14</sup> Kuehu also attempts to establish discriminatory intent based on the following actions by United Airlines: (1) Peterson delayed the RAP meeting; (2) her vocational rehabilitation consultant, Tony Huntsiger, was not invited to attend the RAP meeting; and (3) she had to pay for her flight to Kona for her interview. TR 105-08, 150-52, 221, 272. However, these actions do not support a finding of discrimination. Peterson articulated that United Airlines needed time to review medical documentation before scheduling a RAP meeting. *Id.* at 412-13. Further, the delay presented no harm to Kuehu because her EIS was extended during the RAP process. As for Tony Huntsiger, Kuehu provided no evidence that it was company procedure to allow rehabilitation consultants to partake in RAP meetings. Lastly, Kuehu did not identify any company policy or procedure whereby United Airlines pays for employee's airfare when interviewing for another position in the company.

The Complainant spent a significant amount of time at the hearing arguing that she should not have been placed on EIS to begin with, because she had sick leave remaining in her bank, or in the alternative, because she was receiving workers' compensation. TR 45, 268-71, 374-75. This argument does not bolster her case for several reasons. First, the decision to place Kuehu on EIS back in 2006 occurred long before her letter to the EPA in 2009, and therefore, could not have been retaliatory.<sup>15</sup> Second, United Airlines presented a substantial amount of evidence that it followed protocol regarding the depletion of sick banks, and that an employee can be on EIS while receiving workers' compensation. *See id.* at 330, 368-69, 392-98, 406, 487; RX-71 at 54; RX-25.

Kuehu's termination was contingent on the outcome of Kuehu's application for the Kona position. The application process was handled by a third party contractor, SourceRight Solutions. Laura Butler relied on an interview guide, and went through a number of set questions from the guide.<sup>16</sup> TR 520; *see* RX-39. Butler testified that she had never met Kuehu prior to the interview, had no information about her beforehand, and never discussed Kuehu's interview with United Airlines managers. TR 523, 527-28; *see also* TR 476. After the interview, Butler graded Kuehu based on her answers to the interview questions, as is routine procedure, and followed a guide on how to grade the answers. TR 520, 525. Kuehu received a score of 11, which was not a passing interview score. *Id.* at 526; RX-39. The only influence United Airline had on the selection process was Peterson's responses to SourceRight's screening questions before the interview. TR 438-39. None of Peterson's responses to the screening questions were negative towards Kuehu, and in fact they qualified Kuehu for further

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<sup>15</sup> Adjustments to Kuehu's EIS in order to switch her status from non-occupational to occupational also occurred prior to Kuehu's letter to the EPA, and therefore could not have been retaliatory. *See* RX-25; TR 392-98.

<sup>16</sup> Kuehu acknowledged that the interview questions were reasonable. TR 209.

consideration.<sup>17</sup> *Id.* at 439; *see* RX-36A. Therefore, if United Airlines was motivated by a desire to retaliate, it would not have made Kuehu's termination contingent on a decision it had no control over. Accordingly, weighing all the evidence, I find that Kuehu cannot prove intentional retaliation based on protected activity under the relevant environmental statutes.<sup>18</sup>

While almost complete, I feel compelled to make one additional observation. This case has little to do with the credibility of Ms. Kuehu. Based on the evidence presented, I am confident that she encountered disturbing odors at the Call Center that made her sick. Perhaps she is more sensitive than others to such odors, but they certainly affected her ability to work in that environment. With that said, the harmful conditions complained of had nothing to do with the environment in general and everything to do with working conditions at the Call Center. While I am certainly sympathetic to what Ms. Kuehu endured, there is no remedy available under the statutes in play in this litigation.

#### **IV. Conclusion**

Based on the foregoing, Kuehu has not met her burden of establishing by a preponderance of the evidence that United Airlines took an adverse action against her because she engaged in protected activity under the relevant environmental statutes. Two of Kuehu's alleged adverse actions—"denial of transfer" to the Kona position and "refusal to provide a safe workplace"—are time-barred. As for the third alleged adverse action—the termination of her

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<sup>17</sup> In the Complainant's brief, counsel suggests that Peterson's response "yes, but has been out on EIS for over three years" to a screening question asking whether the employee had been in her position for at least a year were "trigger words for Respondents practice of automatically terminating employees no matter what the circumstances even if it violates existing laws, and a signal to HR to complete discriminatory and retaliatory practice by denying her a job transfer." Cl. Br. 84. This allegation is purely speculative and there is no basis in the record to support this conclusion.

<sup>18</sup> The Complainant's counsel spends a significant amount of time in his brief arguing that United Airlines' invocation of the EIS provision and its alleged failure to accommodate Kuehu in her return to work were in violation of the Americans with Disabilities Act, as well as Hawaii state law. Cl. Br. 93-94, 96-105, 113. Such claims are not before me, nor do I have jurisdiction to hear such claims. Although the Complainant may have potential claims under other laws, such claims are entirely irrelevant to the case at Bench.

employment with United Airlines—Kuehu failed to meet her *prima facie* burden. She did not provide evidence to support a finding of protected activity, employer awareness of protected activity, or that adverse action was taken because of protected activity. Therefore, judgment as a matter of law for the Employer is appropriate in this case.

Even if Ms. Kuehu could somehow overcome these initial shortcomings and I consider all of the evidence presented, the result would remain unchanged. Upon review of the entire record and weighing all the evidence presented, I find that Kuehu has failed to establish that she was intentionally discriminated against because of protected activity under any of the four environmental statutes. Kuehu did not establish that she engaged in activity that is protected under the FWPCA, SWDA, CAA or SDWA, nor did she provide sufficient evidence to establish that United Airlines' legitimate, nondiscriminatory reason for its adverse action was a pretext for actual retaliation. As such, Kuehu's claims must be denied.

## **V. Order**

It is hereby **ORDERED** that the Complainant's claims under the employee protection provisions of section 507 of the FWPCA, 33 U.S.C. § 1367; section 7001 of the SWDA, 42 U.S.C. § 6971; section 322 of the CAA, 42 U.S.C. § 7622; and section 1450(i) of the SDWA, 42 U.S.C. § 300j-9(i), are **DENIED** and judgment is entered in favor of the Respondent.

**SO ORDERED.**

**A**

**JONATHAN C. CALIANOS**  
Administrative Law Judge

Boston, Massachusetts

**NOTICE OF APPEAL RIGHTS:** This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW., Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: [ARB-Correspondence@dol.gov](mailto:ARB-Correspondence@dol.gov).

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110.