No. 14-15435

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DEKALB COUNTY, GEORGIA

Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR;
THOMAS PEREZ, SECRETARY OF LABOR

Respondent,

DAISY ABDUR-RAHMAN and RYAN PETTY

Intervenors.

On Petition for Review of the Final Decision and
Order of the United States Department of Labor's Administrative Review Board

BRIEF FOR RESPONDENT THE SECRETARY OF LABOR

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

WILLIAM LESSER
Deputy Associate Solicitor

MEGAN E. GUENTHER
Counsel for Whistleblower Protection Programs

ERIN M. MOHAN
Attorney
U.S. Department of Labor
200 Constitution Ave. NW, N-2716
Washington, DC 20210
Telephone: (202) 693-5783
Fax: (202) 693-5774
E-mail: mohan.erin.m@dol.gov

DEKALB COUNTY, GEORGIA v. U.S. DEP'T OF LABOR
CASE NO. 14-15435

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rules 26.1 and 27-1(a)(9), counsel for Respondent U.S. Department of Labor certifies that the following persons and entities have or may have an interest in the outcome of this appeal:

Abdur-Rahman, Daisy (Complainant/Intervenor)

Brand, Jennifer (Associate Solicitor, U.S. Department of Labor ("DOL"))

Corchado, Luis (Admin. Appeals Judge, U.S. DOL)

Brantley, O.V. (County Attorney, DeKalb County)

Brown, E. Cooper (Deputy Chief Admin. Appeals Judge, U.S. DOL)

DeKalb County, Georgia (Respondent/ Appellant)

Dover, Marleigh (United States Department of Justice)

Gepp, Randy C. (Counsel for Respondent/Appellant)

Guenther, Megan (Counsel for Whistleblower Programs, U.S. DOL)

Igasaki, Paul M. (Chief Administrative Appeals Judge, U.S. DOL)

Johnson, Laura K. (Deputy County Attorney, DeKalb County)

Keen, Stanley (Regional Solicitor, U.S. DOL)

Lesser, William (Deputy Associate Solicitor, U.S. DOL)

DEKALB COUNTY, GEORGIA v. U.S. DEP'T OF LABOR
CASE NO. 14-15435

Marcus, Stephanie (United States Department of Justice)

Martin, Dana (United States Department of Justice)

Marx, Jean (Counsel for Abdur-Rahman and Petty)

Marx, Robert (Counsel for Abdur-Rahman and Petty)

Mohan, Erin (Attorney, U.S. DOL)

Morgan, Richard (Administrative Law Judge U.S. DOL)

Occupational Safety and Health Administration (U.S. DOL)

Directorate of Whistleblower Protection Programs (OSHA, U.S. DOL)

Perez, Thomas (Secretary of Labor, U.S. DOL)

Petermeyer, Kurt (OSHA Regional Administrator, Region 4)

Petty, Ryan (Complainant/Intervenor)

Smith, M. Patricia (Solicitor of Labor, U.S. DOL)

Taylor English Duma LLP (Counsel for Respondent/Appellant)

Date: May 26, 2015

Respectfully submitted,

s/ Erin Mohan
ERIN MOHAN
Attorney

STATEMENT REGARDING ORAL ARGUMENT

Although Respondent Secretary of Labor will gladly participate in any oral argument scheduled by this Court, he does not believe that oral argument is necessary in this case because the issues may be resolved based on the briefs submitted by the parties.

TABLE OF CONTENTS

Page

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT i

STATEMENT REGARDING ORAL ARGUMENT iii

TABLE OF CONTENTS iv

TABLE OF CITATIONS vii

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION 1

STATEMENT OF THE ISSUES 3

STATEMENT OF THE CASE 3

A. Nature of the Case and Course of Proceedings 3

B. Statement of Facts 5

1. Sanitary Sewer Overflows in DeKalb County 6

2. Abdur-Rahman and Petty Inquire About Sanitary Sewer Overflow Reports 8

3. Abdur-Rahman and Petty Raise Concerns While Investigating Sanitary Sewer Overflows 11

4. The County Terminates Abdur-Rahman and Petty 13

C. The ALJ's Decision and Order 16

D. The Board's Decision 22

E. The Board's Order Denying Reconsideration 25

F. Subsequent Proceedings 27

Page

SUMMARY OF ARGUMENT 27

ARGUMENT 29

I. STANDARD OF REVIEW 29

II. THE FWPCA AND ITS APPLICABLE BURDENS 31

III. THE BOARD PROPERLY REJECTED THE ALJ'S CAUSATION ANALYSIS AS A MATTER OF LAW, AND THIS COURT CAN AFFIRM REGARDLESS OF THE STANDARD UNDER WHICH THE BOARD REVIEWED THE ALJ'S FACTUAL FINDINGS 33

A. Because the Board Rejected the ALJ's Causation Analysis as a Matter of Law, Applying Substantial Evidence Review Would Not Alter the Result on Remand, and This Court Can Affirm without Further Proceedings 33

B. The Board Correctly Rejected as a Matter of Law the ALJ's Conclusion that Abdur-Rahman and Petty Failed to Meet Their Burden on Causation, and the ALJ's Findings Support the Board's Determination that Protected Activity Was a Motivating Factor 36

C. Given the ALJ's Findings, the Board Correctly Held that the ALJ Erred as a Matter of Law When He Determined that the County Would Have Terminated Abdur-Rahman and Petty Absent Their Protected Activity 42

IV. THE ALJ AND THE BOARD CORRECTLY DETERMINED THAT ABDUR-RAHMAN AND PETTY ENGAGED IN FWPCA PROTECTED ACTIVITY 46

V. THE BOARD CORRECTLY UPHELD THE ALJ'S DISCRETIONARY DECISION TO LIMIT REOPENING OF THE RECORD ON REMAND 58

CONCLUSION 60

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A) 61

CERTIFICATE OF SERVICE 62

ADDENDUM A: Secretary of Labor Decision in Dartey v. Zack Co. of Chicago, No. 82-ERA-2 (Sec'y Apr. 25, 1983)

ADDENDUM B: Administrative Review Board Decision in Dale v. Step 1 Stairworks, Inc., ARB No. 04-003 (ARB Mar. 31, 2005)

TABLE OF CITATIONS

Page

Cases:

Abdur-Rahman v. Walker,
567 F.3d 1278 (11th Cir. 2009)..53

Anderson v. Bessemer City,
470 U.S. 564 (1985)..35

* Bechtel Constr. Co. v. Sec'y of Labor,
50 F.3d 926 (11th Cir. 1995).. 30 & passim

Bobreski v. J. Givoo Consultants, Inc.,
ARB No. 13-001, 2014 WL 4389968
(ARB Aug. 29, 2014).. 35-36

Brush v. Sears Holdings Corp.,
466 F. App'x 781 (11th Cir. 2012)..48

Calle v. U.S. Atty. Gen.,
504 F.3d 1324 (11th Cir. 2007)..35

Chevron, USA, Inc. v. Natural Res. Def. Council, Inc.,
467 U.S. 837 (1984)..31

Combs v. Lambda Link,
ARB No. 96-066, 1997 WL 665483 (ARB Oct. 17, 1997)................32

Dale v. Step 1 Stairworks, Inc.,
ARB No. 04-003 (ARB Mar. 31, 2005)..58

Dalton v. Copart,
ARB Nos. 04-027, 04-138, 2005 WL 1542549
(ARB June 30, 2005)..59

Dartey v. Zack Co. of Chicago,
No. 82-ERA-2 (Sec'y Apr. 25, 1983)..32

Page

Cases--continued:

Entrekin v. Panama City,
376 F. App'x 987 (11th Cir. 2010) 48

Erickson v. U.S. Dep't of Labor,
285 F. App'x 611 (11th Cir. 2008) (unpublished) 29

Fields v. U.S. Dep't of Labor,
173 F.3d 811 (11th Cir. 1999)... 30, 31, 53

Garcetti v. Ceballos,
547 U.S. 410 (2006) 53, 54

Green v. Sch. Bd. of Hillsborough Cnty.,
25 F.3d 974 (11th Cir. 1994)..35

Gross v. FBL Fin. Servs., Inc.,
557 U.S. 167 (2009) 32, 33

Halliburton, Inc. v. Admin. Review Bd.,
771 F.3d 254 (5th Cir. 2014)..38

Hibiscus Assocs. v. Bd. of Trs. of Policemen & Firemen
Ret. Sys. of Detroit,
50 F.3d 908 (11th Cir. 1995)...58-59

Higgins v. Alyeska Pipeline Serv.,
ARB No. 01-22, 2003 WL 21488356
(ARB June 27, 2003)...32

Hussain v. Gonzales,
477 F.3d 153 (4th Cir. 2007)..35

Johnson v. Dep't of Health & Human Servs.,
87 M.S.P.R. 204 (MSPB Aug. 21, 2000)...56

Page

Cases--continued:

Joyner v. Georgia-Pacific Gypsum,
ARB No. 12-028, 2014 WL 1758318
(ARB Apr. 25, 2014) 51, 53

Kwan v. Andalex Grp., LLC,
737 F.3d 834 (2d Cir. 2013) 39

Lin v. U.S. Dep't of Justice,
453 F.3d 99 (2d Cir. 2006) 35

Little v. T-Mobile USA, Inc.,
691 F.3d 1302 (11th Cir. 2012) 33

* Mackowiak v. Univ. Nuclear Sys., Inc.,
735 F.2d 1159 (9th Cir. 1984) 32, 42, 51, 52

Masek v. Cadle Co.,
ARB No. 97-069, 2000 WL 562699
(ARB Apr. 28, 2000) 32

McKenzie v. Renberg's, Inc.,
94 F.3d 1478 (10th Cir. 1996) 55

Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,
429 U.S. 274 (1977) 32

NLRB v. Episcopal Cmty. of St. Petersburg,
726 F.2d 1537 (11th Cir. 1984) 35

NLRB v. Transp. Mgmt. Corp.,
462 U.S. 393 (1983) 42

NLRB v. Wyman-Gordon Co.,
394 U.S. 759 (1969) 35

Page

Cases--continued:

Onysko v. Utah Dept. of Envtl. Quality,
ARB No. 11-023, 2013 WL 499361 (ARB Jan. 23, 2013), aff'd sub nom. Onysko v. Admin. Review Bd., 549 F. App'x 749 (10th Cir. 2013) 32

* Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor,
992 F.2d 474 (3d Cir. 1993) .... 3 & passim

Pollock v. Cont'l Express,
ARB Nos. 07-073, 08-051, 2010 WL 1776974 (ARB Apr. 7, 2010) 58

Redweik v. Shell Exploration & Prod.,
ARB No. 05-052, 2007 WL 4623495 (ARB Dec. 21, 2007) .... 3 & passim

Sasse v. U.S. Dep't of Labor,
409 F.3d 773 (6th Cir. 2005) 54, 55, 56

SEC v. Chenery Corp.,
318 U.S. 80 (1943) 35

Stone & Webster Constr., Inc. v. U.S. Dep't of Labor,
684 F.3d 1127 (11th Cir. 2012) 30, 45

Stone & Webster Eng'g Corp. v. Herman,
115 F.3d 1568 (11th Cir. 1997) 56

Univ. of Tex. Sw. Med. Ctr. v. Nassar,
133 S. Ct. 2517 (2013) 33

Valenti v. Shintech,
ARB No. 11-038, 2012 WL 4714687 (ARB Sept. 19, 2012) 37

Vinnett v. Mitsubishi Power Sys.,
ARB No. 08-104, 2010 WL 3031377 (ARB July 27, 2010) 51

Page

Cases--continued:

Warren v. Custom Organics,
ARB No. 10-092, 2012 WL 694499 (ARB Feb. 29, 2012) 51

Willis v. Dep't of Agric.,
141 F.3d 1339 (Fed. Cir. 1998) 54, 55, 56

Statutes:

Administrative Procedure Act,
29 U.S.C. 551 et seq.

Section 706 29
Sections 706(2)(A), (D), (E) 30

Energy Reorganization Act of 1974, as amended,
Section 211, 42 U.S.C. 5851 30

Federal Water Pollution Control Act,
33 U.S.C. 1251 et seq.:

Section 1251(a)..3
Section 1362(6) 3
* Section 1367 .... 1, 3, 31
Section 1367(a)..4, 51
Section 1367(b) 2, 4
Section 1367(d) 53
Section 1369 2

Code of Federal Regulations:

29 C.F.R. pt. 24..1, 31

Section 24.100(a)..33
Section 24.106(a)..4
Section 24.109 32
* Section 24.109(b)(2)..32
Section 24.110(b) 30

Page

Miscellaneous:

Federal Rules of Appellate Procedure:

Rule 32(a)(5) 61
Rule 32(a)(6) 61
Rule 32(a)(7)(B) 61
Rule 32(a)(7)(B)(iii) 61

S. Rep. No. 92-414 (1972), reprinted in 1972 U.S.C.C.A.N.
3668, 3748, 1971 WL 11307...52

S. Rep. No. 112-155 (2012), reprinted in 2012 U.S.C.C.A.N.
589, 593, 2012 WL 1377618...54, 55

U.S. Dep't of Labor, Occupational Safety & Health Admin.,
Procedures for the Handling of Retaliation Complaints Under
the Employee Protection Provisions of Six Environmental
Statutes and Section 211 of the Energy Reorganization Act
of 1974, as Amended:

72 Fed. Reg. 44,956 (Aug. 10, 2007) (Interim Final Rule)......30
76 Fed. Reg. 2808 (Jan. 18, 2011) (Final Rule) 31, 33

U.S. Dep't of Labor, Office of the Secretary:

Secretary's Order 05-2007 (May 30, 2007),
72 Fed. Reg. 31,160 (June 5, 2007) 4

Secretary's Order 01-2010 (Jan. 15, 2010),
75 Fed. Reg. 3924 (Jan. 25, 2010) 2

Whistleblower Protection Enhancement Act of 2012,
Pub. L. No. 112-119, § 101(f)(2), 126 Stat. 1465, 1466 (2012).........54

No. 14-15435

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DEKALB COUNTY, GEORGIA

Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR;
THOMAS PEREZ, SECRETARY OF LABOR

Respondent,

DAISY ABDUR-RAHMAN and RYAN PETTY

Intervenors.

On Petition for Review of the Final Decision and
Order of the United States Department of Labor's Administrative Review Board

BRIEF FOR RESPONDENT THE SECRETARY OF LABOR

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case arises under the employee protection ("whistleblower") provisions of the Federal Water Pollution Control Act ("FWPCA" or "the Act"), 33 U.S.C. 1367, authorizing the Secretary of Labor ("Secretary") to investigate complaints, conduct hearings, and order abatement of violations under the Act, and the regulations implementing the Act, found at 29 C.F.R. Part 24. The Secretary had subject matter jurisdiction over this case based on complaints filed on April 11, 2005 with the Occupational Safety and Health Administration ("OSHA") by Daisy

Abdur-Rahman and Ryan Petty against their former employer, DeKalb County, Georgia ("DeKalb County" or "the County").[1] CL 131.[2]

On October 16, 2014, the Department of Labor's Administrative Review Board ("ARB" or "Board") issued a Final Decision and Order ("FDO II"), which incorporated its earlier decision concluding that DeKalb County violated the FWPCA and disposed of all outstanding claims on liability and damages.[3] CL 182 (Pet. App. 102). DeKalb County timely filed a petition for review with this Court on December 5, 2014. As the violation found by the Board occurred in Georgia, this Court has jurisdiction to review the Secretary's final decision under 33 U.S.C. 1369 through reference to 33 U.S.C. 1367(b).

---

[1] The pleadings and administrative decisions in the matter capitalize the letters in "DeKalb" inconsistently. In this brief, the Secretary uses the spelling employed by Petitioner.

[2] References to the documents in the amended certified list filed with this Court by the Board are indicated by the abbreviation "CL" followed by the document number. "Tr." refers to the transcript of the proceedings before the ALJ, CL 39-41, 51-56, 58-60, 93-95, and any pages from the hearing transcript cited not included in the Petitioner's Appendix are included in the Secretary's Supplemental Appendix. The Board's February 16, 2011 Order Denying Reconsideration, "ODR," is also included in the Supplemental Appendix. References to the petitioner's brief are noted as "Pet. Br.".

[3] The Secretary has delegated authority to the Board to issue final agency decisions in cases arising under the employee protection provisions of the FWPCA. See U.S. Dep't of Labor, Office of the Secretary, Secretary's Order 1-2010 (Jan. 15, 2010), 75 Fed. Reg. 3924-01 (Jan. 25, 2010).

STATEMENT OF THE ISSUES

1. Whether the Board properly rejected the ALJ's determination on causation as a matter of law, and therefore, this court may affirm the Board's decision regardless of the standard under which it reviewed the ALJ's findings of fact.

2. Whether the Board correctly affirmed the ALJ's determination that Abdur-Rahman and Petty engaged in activity protected under the FWPCA.

3. Whether the Board correctly upheld the ALJ's discretionary decision to limit reopening of the record on remand.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

The objective of the FWPCA is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. 1251(a).[4] The Act aims to eliminate the discharge of pollution, including sewage, into the navigable waters of the United States. See id.; 33 U.S.C. 1362(6). The whistleblower provisions of the FWPCA, 33 U.S.C. 1367, protect employees who report environmental violations involving water pollution. See Redweik v. Shell Exploration & Prod., ARB No. 05-052, 2007 WL 4623495, at *5 (ARB Dec. 21,

[4] The FWPCA is sometimes referred to as the "Clean Water Act." See Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor, 992 F.2d 474, 475 (3d Cir. 1993).

2007). The whistleblower provisions prohibit an employer from retaliating against an employee for engaging in activity protected under the Act, and charge the Secretary with investigating and determining the validity of any complaints of retaliation. See 33 U.S.C. 1367(a) and (b).

On April 11, 2005, Daisy Abdur-Rahman and Ryan Petty filed complaints with OSHA, alleging that DeKalb County terminated their employment as compliance inspectors after they made environmental complaints.[5] CL 131. OSHA issued findings that DeKalb County did not violate the whistleblower provisions of the FWPCA. D&O 4; CL 130. Abdur-Rahman and Petty timely objected to OSHA's findings and requested a hearing before an administrative law judge ("ALJ") pursuant to 29 C.F.R. 24.106(a). CL 129. Following a hearing, the ALJ issued a Decision and Order ("D&O") on September 10, 2007, recommending that Abdur-Rahman and Petty's claims be dismissed. CL 28 (Pet. App. 2). Abdur-Rahman and Petty timely petitioned for review by the Board, which granted their petition in a Final Decision and Order dated May 18, 2010.[6] Finding "error in the ALJ's legal conclusions," the Board reversed the ALJ and remanded for entry of

[5] The Secretary has delegated authority and assigned responsibility to the Assistant Secretary for OSHA for investigating whistleblower complaints under the FWPCA. See Secretary's Order 5-2007 (May 30, 2007), 72 Fed. Reg. 31,160-01 (June 5, 2007).
[6] The Board reissued the Final Decision and Order ("FDO") on June 8, 2010. CL 146 (Pet. App. 39).

appropriate relief because Abdur-Rahman and Petty had demonstrated that their protected activity was a motivating factor in their discharge and the County failed to demonstrate that it would have discharged them if they had not engaged in protected activity. FDO 6 n.33; FDO 13. The County filed a motion for reconsideration, arguing that the Board erred by reviewing the ALJ's factual findings de novo rather than under the substantial evidence standard. See CL 136. The Board issued an Order Denying Reconsideration ("ODR") on February 16, 2011, concluding that applying substantial evidence review would not change the outcome of its decision, because it reversed the ALJ as a matter of law. Id.; see ODR 5; see also id. 6 n.23.

On remand, the ALJ issued a decision on remedies, CL 6 (Pet. App. 67), which both parties appealed to the ARB. See CL 182 (Pet. App. 102). The ARB subsequently affirmed the ALJ's Amended Decision and Order. Id. The County then filed a timely Petition for Review of the Board's decision with this Court.

B. Statement of Facts

DeKalb County's Division of Water and Sewer hired Daisy Abdur-Rahman and Ryan Petty as compliance inspectors in late summer and fall of 2004,

respectively. FDO 2; D&O 5.[7] Abdur-Rahman and Petty, along with four additional new compliance inspectors, started as probationary employees for a period of six months. FDO 2; D&O 5-6. Chester Gudewicz was Abdur-Rahman and Petty's immediate supervisor. FDO 2; D&O 6. John Walker was the Manager of the Compliance and Technical Services section, and Gudewicz's supervisor. FDO 2; D&O 6-7.

1. Sanitary Sewer Overflows in DeKalb County

Pursuant to the FWPCA, the State of Georgia has the authority to regulate and enforce water quality standards in the state. CL 45 (CX 51 at 1). A "sanitary sewer overflow" occurs when sewage escapes the sewer system, including into a waterway. FDO 2 n.5; D&O 7. When a sanitary sewer overflow in DeKalb County reaches state waters, the County has a duty to report the problem to the Georgia Environmental Protection Division. FDO 2 n.5; D&O 7-8. The Georgia Rules and Regulations for Water Quality Control set forth the requirements for reporting these incidents to the State. D&O 9 n.17. Abdur-Rahman and Petty believed that the County was required to report all sanitary sewer overflows. See D&O 7-8, 8-9, 23; FDO 2 n.5; Tr. 968:15-20 (Petty); Tr. 360:14-361:3 (Abdur-

[7] Throughout the Statement of Facts, because the facts in this case are largely not in dispute, the Secretary primarily relies upon the facts as stated in the ALJ's September 10, 2007 Order, "D&O", the Board's June 8, 2010 Final Decision and Order, "FDO," and the Board's February 16, 2011 Order Denying Reconsideration, "ODR."

Rahman). Walker testified that within the department, employees used the phrase "sanitary sewer overflow" synonymously with the term "spill," which describes an overflow that reaches state waters. See Tr. 2407:17-2408:2 (Walker).

The County assigned Abdur-Rahman and Petty to the Fats, Oils, and Grease Program, where the aim was to address sanitary sewer overflows caused by grease. See FDO 2; D&O 5, 7; see also Tr. 315:18-23 (Abdur-Rahman); Tr. 945:10-17 (Petty) ("My understanding of my job duties was to reduce sanitary sewer overflows associated with food service establishments and bring all the food service establishments in DeKalb County within compliance . . . ."). As compliance inspectors, Abdur-Rahman and Petty's job functions included conducting inspections of food service establishments and "assisting in tracing" sources of problematic waste discharges into DeKalb County's sewer system. D&O 6.

The County also assigned Abdur-Rahman and Petty to a committee tasked with expanding provisions of the County's sewer ordinance. FDO 2; D&O 7. The third member of the committee was another probationary employee, Manyon Anderson. See Tr. 955:3-16 (Petty); see also D&O 5-6 (probationary employee). The updated ordinance would improve the County's ability to identify the parties responsible for releasing fats, oils, and grease into the sewer system, develop a permitting system, and reduce the number of sewage spills. FDO 2.

2. Abdur-Rahman and Petty Inquire About Sanitary Sewer Overflow Reports

As part of their committee work, Abdur-Rahman and Petty attempted to identify clusters of past sanitary sewer overflow episodes or "hot spots." FDO 3; D&O 8. Early on, they asked Gudewicz and Walker for historical reports of sanitary sewer overflows in the County. FDO 3; D&O 8; see Tr. 360:12-13 (Abdur-Rahman). At the time, Abdur-Rahman and Petty believed that the County was required to report every sanitary sewer overflow. D&O 7-8, 8-9, 23; FDO 2 n.5; see Tr. 360:14-361:3 (Abdur-Rahman); Tr. 958:2-14 (Petty). Abdur-Rahman testified that she asked Gudewicz for the reports "almost weekly." Tr. 363:9-13. Petty asked Gudewicz about the information "at least two to three times a week." Tr. 958:24-959:6 (Petty). Anderson also raised concerns about the reports. See Tr. 531:10-532:4 (Abdur-Rahman). Despite Abdur-Rahman and Petty's repeated requests, their supervisors did not provide them the information. FDO 3. In late October or early November, Walker told them that they were being "too thorough" and "scientific." Id.; D&O 9; Tr. 361:14-362:13 (Abdur-Rahman) (testifying as to dates). According to Walker, Abdur-Rahman and Petty did not need data on sanitary sewer overflows to perform their committee work. D&O 9; Tr. 2637:13-23 (Walker).[8] In response to their requests for reports, Gudewicz told Abdur-

[8] Eventually, Abdur-Rahman and Petty successfully completed their work revising the ordinance without the historical data. D&O 9; Tr. 2640:4-11 (Walker).

Rahman and Petty not to "rock the boat," that they were "ruffling too many feathers," and should "Do it DeKalb's way." FDO 3; D&O 9; Tr. 361:18-20 (Abdur-Rahman); see Tr. 364:15-365:10 (Abdur-Rahman); see also Tr. 959:9-15 (Petty).

Eventually, Abdur-Rahman questioned Gudewicz about whether the reports existed. FDO 3; Tr. 364:9-13 (Abdur-Rahman). Although she did not know how the County was reporting sanitary sewer overflows, she started "to question whether the County was doing the right thing." Tr. 531:10-20 (Abdur-Rahman). Likewise, Petty did not know whether the County had, in fact, shirked reporting requirements, but came to suspect that the County was failing to report sanitary sewer overflows or might be hiding information. D&O 9; see Tr. 962:22-963:4 (Petty).[9]

As the probationary period continued, Gudewicz became increasingly intolerant of Abdur-Rahman and Petty's inquiries, viewing these queries as insubordination. D&O 9. Abdur-Rahman and Petty's persistent requests agitated him, and he walked away from them on several occasions when they asked him for the historical data. FDO 3; D&O 10; see Tr. 365:14-22 (Abdur-Rahman)

[9] Ultimately, the evidence did not establish that the County was attempting to hide the data for some "nefarious" purpose. D&O 23. The County was under scrutiny by the Georgia Environmental Protection Division, but consistently reported spills when state law required it to do so. Id.

(explaining that Gudewicz became "more hostile every time" she asked about the reports; by February, his "reaction was always generally non-verbal but it was always negative and upset").

Gudewicz also became annoyed that Abdur-Rahman asked for standard operating protocols. D&O 10. Gudewicz testified that Abdur-Rahman requested a standard operating procedure "just about for everything" from "punching in late to ordering uniforms to travel" to accidents to preventative maintenance on trucks. Tr. 2070:4-2071:19. However, Abdur-Rahman testified that she did not request standard operating procedures on these matters.[10] Tr. 2881:18-2882:17. In addition, Gudewicz testified that Petty and Anderson challenged him by commenting that forms he had developed were not sufficiently scientific. See D&O 11; Tr. 2051:11-2052:12 (Gudewicz) (explaining that Anderson and Petty eventually used the forms as instructed). Petty testified that he did not criticize the forms. Tr. 2920:15-23.

On January 26, 2005, Gudewicz encountered Abdur-Rahman talking about hot spots of sanitary sewer overflows. Tr. 2080:2-2081:4 (Gudewicz); Tr. 1494:13-25 (Gudewicz); Tr. 580:5-582:15 (Abdur-Rahman); see also D&O 11. Abdur-Rahman again asked Gudewicz for reports on past sanitary sewer

[10] Abdur-Rahman testified that she requested a standard operating procedure for sanitary sewer overflows, Tr. 2898:1-15, and the ALJ noted that the record includes her request for written protocols on job expectations. D&O 10.

overflows. Tr. 581:3-7 (Abdur-Rahman); Tr. 2080:25-2081:2 (Gudewicz). Gudewicz later wrote an undated memo to Walker about this interaction. CL 45 (Pet. App. 261). In it, Gudewicz stated that Abdur-Rahman told him that hot spots of sanitary sewer overflows continued to exist in DeKalb County because of Gudewicz's lack of attention and corrective action and "that this warranted [Gudewicz] being incompetent." Id.; see FDO 3.

3. Abdur-Rahman and Petty Raise Concerns While Investigating Sanitary Sewer Overflows

Beginning in January 2005, the County began dispatching Abdur-Rahman, Petty, and other compliance inspectors to investigate sanitary sewer overflows. Tr. 2409:21-25 (Walker). Abdur-Rahman and Petty were not the "first responders" to sanitary sewer overflow sites. D&O 22. Before their inspection, construction and maintenance crew visited the site and cleaned up the area. Tr. 2644:12-2645:18 (Walker). The construction and maintenance crew also "posted" the site, and, if the problem reached state waters, passed along information necessary for the County to provide notice to the state Environmental Protection Department. See Tr. 2644:20-2645:18 (Walker); see also D&O 9.

The Fats, Oils, and Grease program was not responsible for preparing or sending mandatory reports to the state Environmental Protection Department. D&O 9; Tr. 536:4-19 (Abdur-Rahman). When Abdur-Rahman and Petty later visited a site, their role was to determine whether grease was a cause of the

incident. Tr. 966:12-16 (Petty); Tr. 534:23-535:9 (Abdur-Rahman); Tr. 1161:22-25 (Bethea); Tr. 2413:12-24 (Walker). If grease was a factor, they would ensure that any food service establishments in the area were in compliance, and in residential areas, educate the public about how to correct the problem. Tr. 535:6-9 (Abdur-Rahman).

On January 27, 2005, Abdur-Rahman and Petty investigated a sanitary sewer overflow on Panthersville Road. FDO 4; D&O 13. Abdur-Rahman and Petty expressed concern to Gudewicz that the County had not done any bioremediation of the raw sewage spill. FDO 4; D&O 13 (referring to Abdur-Rahman). They also expressed concern that the County had not cordoned off the affected area. FDO 4; see e.g., Tr. 428:12-429:2 (Abdur-Rahman); Tr. 970:23-972:17, 974:11-975:6 (Petty). In addition, Abdur-Rahman and Petty questioned the County's use of a stock form pre-printed with the phrase "no fish kill"; it appeared to them that the form language could lead to inaccurate reporting of sanitary sewer overflows. FDO 4; D&O 8; id. at 13 (referring to Abdur-Rahman); see Tr. 428:22-24, Tr. 436:7-25 (Abdur-Rahman). Anderson expressed similar concerns. See Tr. 428:22-429:5, Tr. 435:14-24, Tr. 442:8-19 (Abdur-Rahman). Despite their concerns, Abdur-Rahman and Petty did not know whether the County had, in fact, violated environmental laws. D&O 9. Abdur-Rahman testified that the issues she and Petty raised were "Georgia EPD [Environmental Protection Division] issue[s]."

Tr. 537:6-24 (Abdur-Rahman). Throughout February, Abdur-Rahman and Petty participated in additional sanitary sewer overflow investigations and continued to raise similar concerns. D&O 13.

4. The County Terminates Abdur-Rahman and Petty

At some point during the probationary period, Gudewicz came to believe that Abdur-Rahman and Petty were "disruptive." D&O 12. Abdur-Rahman and Petty's former co-workers gave conflicting testimony on this issue. Id. Three former co-workers who continued working for the County testified that Abdur-Rahman was, or both Abdur Rahman and Petty were, opinionated and uncompromising, and frequently argued with Gudewicz. Id. Another former co-worker, whom the County did not retain, testified that Abdur-Rahman and Petty were "polite, attentive, respectful," and "not aggressive." Id. Walker testified that he observed poor morale within the section, which he attributed to Abdur-Rahman and Petty. D&O 16.

Sometime between late January and February 8, Gudewicz wrote the undated memo to Walker, stating that Abdur-Rahman had become "argumentative," with him during their January 26 interaction. FDO 3; D&O 12 (dating the memo on January 28, 2005). Sometime after receiving the memo, but before February 8, Gudewicz met with Walker about Abdur-Rahman. FDO 4; D&O 14; see also Tr. 2665:9-18 (Walker). Gudewicz told Walker that he wanted

to terminate Abdur-Rahman because she was rude, insubordinate, and disrupted meetings, and because it "was one battle after another." FDO 4. At his deposition, Gudewicz testified that he did not discuss Abdur-Rahman's termination with Walker until after February 14, 2005. Tr. 1483:7-1484:14. At trial, Gudewicz testified that he recommended Abdur-Rahman's termination to Walker "in or about the first week of February." Tr. 1481:13-18. On February 8, Walker initialed a routing sheet attached to Abdur-Rahman's then-blank performance appraisal to recommend that the County discharge her. FDO 4; D&O 14; CL 45 (CX 16); Tr. 2669:20-2670:4 (Walker).

The record also contains a memo from Gudewicz to Walker and others recommending Petty's termination. FDO 3; D&O 12; CL 44 (Pet. App. 280). The memo is dated January 13, 2005. Id. In it, Gudewicz cites Petty for being insubordinate, confrontational, belligerent, disruptive, and inattentive. Id. Without specifying any details, Gudewicz refers to "incidences" involving "Divisional Supervisors, employees, and myself." Id. At trial, the parties presented conflicting evidence about a November 23 conflict between Petty and a supervisor from another division, and a mid-December incident in which another employee accused Petty of staring at him during a meeting. D&O 10. At his deposition, Gudewicz testified that he decided to terminate Petty when he wrote Petty's performance evaluation. D&O 12-13, 14; see also Tr. 1587:1-20. At trial, however, Gudewicz

testified that he decided to do so on January 13, 2005, before completing the evaluation. D&O 14. On February 8, Walker initialed a routing sheet attached to Petty's then-blank performance appraisal to recommend that the County discharge him. FDO 4; D&O 14; CL 45 (CX 40); Tr. 2671:10-17 (Walker).

On February 15, 2005, Gudewicz provided Walker with completed performance appraisal forms for Abdur-Rahman and Petty. Tr. 2671:1-24. Abdur-Rahman's appraisal pointed to various performance problems. D&O 25. Gudewicz testified that he recommended Abdur-Rahman's termination because of her unsatisfactory performance, and additionally because she was argumentative, disruptive, and disrespectful, and the time required to supervise her was "above" his "means." D&O 14. Petty's appraisal pointed to his disrupting of a class, his disagreement with program policies, absences, conflicts with coworkers, and insubordination. D&O 25. Roy Barnes, Walker's supervisor, approved the terminations on the same day. D&O 15. The County officially discharged Abdur-Rahman and Petty on March 11, 2005. FDO 5; D&O 15.

The County also terminated Anderson, and another probationary employee, Deidre Stokes, at the same time. D&O 15. Stokes had misled Gudewicz, had two traffic accidents, and dressed poorly. D&O 12. Anderson's employee action memo states that he was "insubordinate," "confrontational," "belligerent," and "disruptive." Id.

C. The ALJ's Decision and Order

The ALJ held a hearing and found that Abdur-Rahman and Petty engaged in protected activity, suffered an adverse personnel action when the County terminated them, and made an "inferential showing" that a "nexus existed" between the protected activity and adverse action. D&O 22. However, the ALJ held that Abdur-Rahman and Petty failed to meet their burden on causation, D&O 30, and that DeKalb County was not liable under the FWPCA's whistleblower provisions because the County would have terminated Abdur-Rahman and Petty even if they had not engaged in protected activity. D&O 31.

The ALJ concluded that Abdur-Rahman and Petty engaged in FWPCA protected activity when they requested information and "expressed concerns" about past sanitary sewer overflows, which they believed the County was required by law to report to environmental officials. D&O 23. The ALJ also concluded that Abdur-Rahman and Petty engaged in FWPCA protected activity by (1) pointing out that spill sites they visited were not properly "posted," as required by state law, (2) questioning whether the County had properly calculated the volume of the spills they observed, and (3) raising concerns about the bioremediation of fecal waste. D&O 22-23. Abdur-Rahman and Petty also engaged in FWPCA protected activity, the ALJ found, when they questioned whether the County could accurately report sanitary sewage overflows using "canned" forms. Id.

In concluding that the FWPCA's whistleblower protection provision encompassed this activity, the ALJ found that Abdur-Rahman and Petty "went beyond" their "explicit basic job requirements" to raise concerns about the sanitary sewer overflow investigations. D&O 22. Abdur-Rahman and Petty were not the "first responders" when a sanitary sewer overflow occurred. Id.; D&O 23 n.29. As a result, neither was responsible for assessing the volume of the sanitary sewer overflows, or whether fish were killed as a result of the overflows, for example. D&O 22. The ALJ also found that Walker had determined that the historical reports Abdur-Rahman and Petty sought were not necessary to complete their work on the ordinance. D&O 23. The ALJ opined, however, that this information would have "greatly facilitated" Abdur-Rahman and Petty achieving the goals the County set for them. Id.

After concluding that the County's decisions to terminate Abdur-Rahman and Petty constituted adverse employment actions, D&O 23-24, the ALJ turned to the "central" issue in the case: whether the County terminated Abdur-Rahman and Petty "for their protected activities." D&O 24. The ALJ indicated that Abdur-Rahman and Petty must show that protected activity was a "contributing" (rather than "motivating") factor driving their discharge. D&O 19, 19 n.23. The ALJ also indicated, however, that if the County proffered legitimate non-discriminatory reasons for the terminations, Abdur-Rahman and Petty must prove by a

preponderance of the evidence that the reasons were a pretext for discrimination based on protected activity. D&O 20.

There was "little question," the ALJ found, that Abdur-Rahman and Petty's persistent "pestering," questioning, and criticisms annoyed Gudewicz. D&O 24. The ALJ found this "pestering" to consist of Abdur-Rahman and Petty's: (1) "persistent requests" for historical sanitary sewer overflow data, (2) their concerns about reporting forms Gudewicz had developed, (3) their skepticism about whether the County was properly reporting spill volume and fish kills on canned forms, and (4) Abdur-Rahman's requests for standard operating procedures. Id.[11] The ALJ therefore found that some of Gudewicz's annoyance with Abdur-Rahman and Petty's questioning reflected "antagonism" toward their protected activity. Id. The "cumulative effect," of Abdur-Rahman and Petty's "pestering," moreover, was that Gudewicz "came to view them" through "a negative prism." Id. The ALJ further found that it was "likely that a part of what was viewed by supervisors as pestering and 'insubordination' was not much more than the manifestation" of Abdur-Rahman and Petty's protected activity. D&O 25.

Given these findings, the ALJ determined that Abdur-Rahman and Petty had "established an inferential showing of a nexus" between their protected activity

[11] The ALJ also hypothesized that the number of emails Abdur-Rahman sent Gudewicz contributed to his irritation. D&O 24.

and the County's decision to terminate them. D&O 25. The ALJ then stated that the inspectors' protected activity was "a factor, in connection with other factors, which tended to affect the decision to terminate them," and that "it need not have been a . . . motivating [or] substantial . . . factor." Id.; see also Tr. 268:19-24; D&O 19 (reciting the test for whether a factor is a "contributing" factor).

The ALJ next considered evidence offered by DeKalb County to demonstrate that it terminated Abdur-Rahman and Petty for legitimate nondiscriminatory reasons. D&O 25. In particular, the County offered the performance reports Gudewicz prepared for Abdur-Rahman and Petty and argued that the reports justified its decision to terminate them. Id. The ALJ then found that the County "successfully rebutted the initial inference" of causation that Abdur-Rahman and Petty had raised. D&O 26.

Next, however, the ALJ found that the County's asserted justifications were "false." D&O 30. Gudewicz had "largely concocted" the negative performance appraisals, the ALJ found. D&O 25. As to Gudewicz's testimony about why he recommended Abdur-Rahman and Petty's termination, the ALJ declined to give it "much credit," as Gudewicz's story changed between his deposition and trial, and was inconsistent with his contemporaneous writings. D&O 28.

Accordingly, the ALJ found that the County did not terminate Abdur-Rahman or Petty for performance problems. D&O 30. The ALJ further found that

"'anger management,' 'disrespectfulness,' or 'challenges' to his supervisor" were not "true bases for Mr. Petty's termination." D&O 27. Likewise, the ALJ found that Abdur-Rahman was not "'challenging,' argumentative or insubordinate, as those terms are generally understood." Id. Rather, the ALJ found, Gudewicz "was not equipped" to manage employees who "asked 'why'" and "challenged the way things had always been done." D&O 28. Instead, Gudewicz and other supervisors "took their behavior as 'challenges' to their authority and as 'insubordination.'" Id.

Having rejected each of the County's proffered justifications, the ALJ determined that Abdur-Rahman and Petty established by a preponderance of the evidence that the reasons offered by the County for their terminations, "were not its true reasons." D&O 30. The ALJ went on to conclude, however, that the County's "false rationale" concealed "poor management" rather than discrimination based on protected activity. Id. Specifically, the ALJ found that Gudewicz's "supervisory incompetence" was "the primary reason" for their termination. Id.

The ALJ also stated that the concerns Abdur-Rahman and Petty raised during the sanitary sewer overflow investigations could not have played "any" role in their termination. D&O 30. The ALJ based this conclusion on his finding that Gudewicz decided to terminate Petty on January 13, 2005, and his determination

that Gudewicz's "perceptions" of the interaction with Abdur-Rahman on January 26, 2005 "sealed his decision" to terminate her. Id.

Despite having previously concluded that protected activity was a factor in the County's decision to fire them, D&O 25, the ALJ then stated that Abdur-Rahman and Petty had failed to satisfy their showing on causation, because they "did not prove that the Respondent's false rationale concealed discrimination (based on protected activity)." D&O 30.

The ALJ next indicated, however, that the case presented a "dual motive" fact-pattern, and the County had the burden to prove that it would have terminated Abdur-Rahman and Petty even if they had not engaged in protected activity. D&O 31. The ALJ concluded that Gudewicz's "inability to manage" Abdur-Rahman and Petty was "the true motivation," for their termination. Id. The ALJ then held that the County established Abdur-Rahman and Petty "would have been terminated even had they not engaged in protected activity because managing them was above their supervisor's means and they did not fit in the peculiar culture of the Water and Sewer Department." Id. As a result, the ALJ dismissed Abdur-Rahman and Petty's complaints. D&O 32.

D. The Board's Decision

On May 18, 2010, the Board issued a Final Decision and Order of Remand in which it reversed the ALJ's Recommended Decision and Order.[12] The Board noted that new regulations provided for substantial evidence review of the ALJ's factual findings. FDO 6 n.33. The Board stated that it applied the law in effect at the time the complaints were filed, that it was "exercising de novo review," and that it found "error in the ALJ's legal conclusions." Id. The Board largely accepted the underlying facts as determined by the ALJ, including that supervisory incompetence motivated the County to terminate Abdur-Rahman and Petty. FDO 2. But the Board concluded that Abdur-Rahman and Petty met their burden to show causation and that the County had not shown it would have terminated them in the absence of their protected activity. FDO 2, 10, 12.

The Board first turned to DeKalb County's cross-appeal contesting the ALJ's finding that Abdur Rahman and Petty engaged in protected activity. FDO 7. The Board affirmed that Abdur-Rahman and Petty engaged in protected activity "when they made internal complaints related to violations of environmental laws." FDO 8. The Board noted that Abdur-Rahman and Petty repeatedly sought information about previous sanitary sewer overflows, and "hot spots" of environmental problems. Id. In particular, the Board highlighted Gudewicz's own

[12] The Board reissued this order on June 8, 2010. CL 146 (Pet. App. 39).

statement that Abdur-Rahman claimed that these hot spots continued to exist because of his "inattention and lack of corrective action." Id. Further, the Board held, Abdur-Rahman and Petty engaged in protected activity when, after inspecting the Panthersville spill site, they reported concerns about the lack of bioremediation, the County's failure to cordon off the area, and its use of stock reporting forms. FDO 8-9.

The Board rejected the County's argument that Abdur-Rahman and Petty were merely seeking information and did not "allege any violation of an environmental law." FDO 9. To the contrary, the Board found, the record demonstrated that "Abdur-Rahman and Petty complained that DeKalb County was improperly treating and reporting sanitary sewer overflows, and through its inaction was allowing clusters" of the sanitary sewer overflows "to continue unmitigated." Id. Explaining that the "FWPCA protects such internal complaints about violations of environmental laws," the Board denied the County's cross-appeal. Id.

The Board next turned to causation, concluding that the ALJ analyzed this issue incorrectly as a matter of law. FDO 10. To establish a violation, the FWPCA required the ALJ to determine whether Abdur-Rahman and Petty proved that their protected activity was a "motivating factor," in DeKalb County's decision to discharge them. FDO 9-10. The Board concluded that the ALJ failed

to make this determination. FDO 10. Instead, the ALJ first erred by applying a "contributing factor" standard, and then required that Abdur-Rahman and Petty show that their protected activity was "the motivating factor," rather than "a motivating factor." Id. & n.48 (emphases in original). The Board also noted that the ALJ may have incorrectly addressed "the existence of a prima facie showing," which was inappropriate in a case tried fully on its merits. FDO 10 n.47. The ALJ also erred, the Board determined, when—having already found that the County discharged Abdur-Rahman and Petty in part for protected activity—it required them to prove that the County's proffered justifications were pretext for discrimination. FDO 11. Applying the proper test, the Board found that Abdur-Rahman and Petty demonstrated by a preponderance of evidence that their protected activity was a motivating factor in DeKalb County's decision to fire them. FDO 10.

Given that Abdur-Rahman and Petty had proven that the County "discharged them in part because of their protected activity," the Board then turned to DeKalb County's affirmative defense. FDO 11. The Board accepted the ALJ's findings that Gudewicz was unable to manage Abdur-Rahman and Petty, and that his supervisory incompetence led to the County's decision to discharge them. FDO 12. Based on the same factual findings, however, the Board arrived "at a different legal conclusion than the ALJ." Id. Under a mixed motive analysis, the Board

explained, the County bore the risk that this "apparent lawful reason" for its actions could not be separated from the unlawful, discriminatory reason. FDO 11-12. Because "Gudewicz's very inability to manage Abdur-Rahman and Petty was inextricably tied to their FWPCA-protected activity," the Board held that the County failed to meet this burden. FDO 12. Accordingly, the Board reversed the ALJ's conclusion that the County demonstrated that it would have discharged Abdur-Rahman and Petty even if they had not engaged in protected activity.[13] Id.

E. The Board's Order Denying Reconsideration

The County filed a motion for reconsideration, arguing that the Board should have applied the substantial evidence standard to review the ALJ's factual findings. ODR 4. On February 16, 2011, the Board issued an order denying reconsideration. ODR 1. The Board explained that it had "rejected the ALJ's finding on a legal analysis," and that applying substantial evidence review would not change the decision. ODR 5, 6 n.23. As a result, the Board found it unnecessary to resolve whether it should have applied the new standard. Id.

[13] Administrative Appeals Judge Beyer concurred. FDO 14. He disagreed with the ALJ's finding that the County's proffered non-discriminatory reasons for its actions were pretextual. FDO 15. Judge Beyer agreed with the majority, however, that the ALJ "did not apply an authentic mixed motive analysis," and that the County failed to satisfy its burden to show that it would have terminated Abdur-Rahman and Petty in the absence of protected activity. FDO 15-16.

Instead, the Board clarified that the ALJ's factual findings "formed the basis" of its Final Decision and Order. ODR 2. In the Order, the Board explained, it "agreed with the ALJ's finding of protected activity." ODR 3. The Board also noted that its determination that protected activity was a motivating factor in the County's discharge action was "[c]onsistent" with the ALJ's fact findings. Id. Although the ALJ's analysis of this issue was "confusing," the Board noted, the ALJ "concretely found that protected activity was 'a factor, in connection with other factors' which affected the decision to terminate" Abdur-Rahman and Petty. ODR 2 n.2. Moreover, the Board agreed with the ALJ's findings that Gudewicz was unable to manage Abdur-Rahman and Petty, and that his incompetence led to the discharge decision. ODR 3.

The Board reversed the ALJ, the Board explained, because it "arrived at a different conclusion based on the ALJ's factual findings." ODR 3. The ALJ's factual findings showed that when the County terminated Abdur-Rahman and Petty because of their supervisor's inability to manage them, this flowed from their protected activity. ODR 5. But it was "not a valid legal defense," for the County to fire Abdur-Rahman and Petty because Gudewicz was "incompetent to deal with whistleblowing activities." ODR 6.

Administrative Appeals Judge E. Cooper Brown wrote separately to explain his opinion that the substantial evidence standard was "the appropriate standard for

review of the ALJ's findings of fact." ODR 6 (Brown, J. concurring). Judge Brown concurred in the majority's judgment because applying substantial evidence review to the ALJ's findings—particularly to the issue of the County's motive in terminating Abdur-Rahman and Petty—did "not alter the results" reached in the Board's original decision. ODR 6-7 (Brown, J. concurring). Under the dual motive test, the County bore the risk that its legal and illegal motives could not be separated, and because Gudewicz's "mismanagement" was "inseparable" from Abdur-Rahman and Petty's protected activity, the County failed to satisfy this burden. ODR 8 (Brown, J. concurring).

Accordingly, the Board denied the County's motion for reconsideration.

F. Subsequent Proceedings

On remand, the ALJ limited the submission of backpay evidence to Abdur-Rahman and Petty's actual and projected earnings from 2007 to 2011. FDO II 6. The ALJ issued a decision on damages ("D&O II") on January 17, 2012. CL 6 (Pet. App. 67). Both parties petitioned the Board for review, and the Board issued a Final Decision and Order ("FDO II") on October 16, 2014. CL 182 (Pet. App. 102). This appeal followed.

SUMMARY OF ARGUMENT

This Court should affirm the Board's decision in this FWPCA whistleblower case. Regardless of the standard of review the Board applied to the ALJ's factual

findings, the Board properly reversed the ALJ's causation determination based on legal error. In particular, the ALJ failed to determine whether protected activity was a motivating factor in the County's decision to terminate Abdur-Rahman and Petty. Applying the correct test, and based largely on the ALJ's underlying findings, the Board rightly found that protected activity was a motivating factor. The Board accepted the ALJ's finding that Gudewicz's supervisory incompetence also played a role, but correctly determined that the ALJ again erred as a matter of law by failing to hold the County to its mixed-motive burden of disentangling the this apparently lawful motive from the unlawful motive. Accordingly, as the Board concluded in its Order Denying Reconsideration, it would have reached the same outcome even if it had reviewed the ALJ's factual findings for substantial evidence rather than de novo.

The Board also correctly affirmed the ALJ's determination that Abdur-Rahman and Petty engaged in protected activity when they raised concerns about reports regarding and investigations of sanitary sewer overflows. It is well-established that internal complaints—including complaints about internal procedures—can constitute protected activity under the FWPCA and other environmental whistleblower statutes. Although the County contends that Abdur-Rahman and Petty's complaints concerned their job duties, the Board has consistently held that an employee's job responsibilities do not alter or diminish

environmental whistleblower protections. This interpretation is the best means to effectuate the purposes of the FWPCA and other environmental whistleblower statutes, and warrants this court's deference. In any event, when Abdur-Rahman and Petty raised environmental concerns, they went beyond their basic job duties (to prevent private parties from dumping grease in County sewers) and implicated behavior by the County itself. If these concerns are unprotected merely because they relate to Abdur-Rahman and Petty's job duties, it is difficult to imagine what employee whistleblowing activity would be protected.

Finally, the Board correctly upheld the ALJ's discretionary decision to limit reopening of the record on remand and properly affirmed the ALJ's conclusion that the County did not meet its burden to show that Abdur-Rahman or Petty failed to mitigate damages.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the Secretary's final decision in accordance with the standard of review established by the Administrative Procedure Act ("APA"), 5 U.S.C. 706; see Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor, 992 F.2d 474, 478 (3d Cir. 1993); see also Erickson v. U.S. Dep't of Labor, 285 F. App'x 611, 614 (11th Cir. 2008) (unpublished). Under APA review, a court sustains the Board's decision unless it is "unsupported by substantial evidence" or

is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or if the findings were made "without observance of procedure required by law." 5 U.S.C. 706(2)(A), (D), (E); see Stone & Webster Constr., Inc. v. U.S. Dep't of Labor, 684 F.3d 1127, 1132 (11th Cir. 2012); Fields v. U.S. Dep't of Labor, 173 F.3d 811, 813 (11th Cir. 1999).

On August 10, 2007 the Department of Labor amended its regulations pertaining to the Board's review of ALJ decisions in cases arising under the FWPCA and other environmental whistleblower statutes. See U.S. Dep't of Labor, Occupational Safety & Health Admin., Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provisions of Six Federal Environmental Statutes and Section 211 of the Energy Reorganization Act of 1974, as Amended, 72 Fed. Reg. 44,956 (Aug. 10, 2007) (Interim Final Rule). The revised regulation states that "[t]he ARB will review the factual findings of the ALJ under the substantial evidence standard." 29 C.F.R. 24.110(b). In reviewing the ARB's decision to reverse any factual findings of the ALJ, therefore, this Court must determine whether substantial evidence supported the ALJ's original factual findings. See Stone & Webster Constr., 684 F.3d at 1132.

Finally, this Court grants appropriate deference to the Board's construction of the environmental whistleblower statutes, accepting the Secretary's reasonable interpretation where the statute is silent or ambiguous. See Bechtel Constr. Co. v.

Sec'y of Labor, 50 F.3d 926, 932-33 (11th Cir. 1995) (citing Chevron, USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)); Fields, 173 F.3d at 813-14; see also Passaic Valley, 992 F.2d at 478, 480. Such deference reflects the "Secretary's expertise in employee protection." Bechtel Constr., 50 F.3d at 933.

II. THE FWPCA AND ITS APPLICABLE BURDENS

The FWPCA makes it unlawful to "fire, or in any other way discriminate against," "any employee" "by reason of the fact that" she has "filed, instituted, or caused to be filed or instituted any proceeding" under the FWPCA. 33 U.S.C. 1367. The term "'proceeding'" encompasses "all phases of a proceeding" including "the initial internal . . . statement or complaint of an employee that points out a violation, whether or not it generates a formal or informal 'proceeding.'" Redweik, 2007 WL 4623495, at *5; see also Passaic Valley, 992 F.2d at 480.

Actions under the whistleblower protection provisions of the FWPCA are governed by the legal burdens set forth in the applicable regulations at 29 C.F.R. Part 24. These regulations codify the Secretary's longstanding administrative case law interpreting the FWPCA and other environmental whistleblower statutes. See 76 Fed. Reg. 2808, 2811 (Jan. 18, 2011) (Final Rule).

To prevail on an FWPCA claim, a complainant must prove by a preponderance of the evidence that protected activity caused or was "a motivating

factor" in the adverse action (i.e. a mixed-motive analysis). 29 C.F.R. 24.109(b)(2). A motivating factor is a substantial factor in causing an adverse action. See Onysko v. Utah Dept. of Envtl. Quality, ARB No. 11-023, 2013 WL 499361, at *10 (ARB Jan. 23, 2013), aff'd sub nom. Onysko v.Admin. Review Bd., 549 F. App'x 749, 754, 756 (10th Cir. 2013) (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)). Once a complainant demonstrates that a retaliatory motive was a motivating factor in the employer's decision to take an adverse action, the burden of proof shifts to the employer to prove "by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity." 29 C.F.R. 24.109; see Higgins v. Alyeska Pipeline Serv., ARB No. 01-22, 2003 WL 21488356, at *4 (ARB June 27, 2003); Masek v. Cadle Co., ARB No. 97-069, 2000 WL 562699, at *10 (ARB Apr. 28, 2000); Combs v. Lambda Link, ARB No. 96-066, 1997 WL 665483, at *2 (ARB Oct. 17, 1997); see also Dartey v. Zack Co. of Chicago, No. 82-ERA-2 (Sec'y Apr. 25, 1983) (Addendum A); Mackowiak v. Univ. Nuclear Sys., 735 F.2d 1159, 1164 (9th Cir. 1984) (deferring to the Secretary's interpretation).[14]

[14] In the Preamble to its 2011 regulations, the Department reaffirmed this burden-shifting framework upon consideration of the Supreme Court's decision in Gross v. FBL Financial Services, which rejected the use of mixed-motive analysis in an action under the Age Discrimination in Employment Act. 557 U.S. 167, 176

III. THE BOARD PROPERLY REJECTED THE ALJ'S CAUSATION ANALYSIS AS A MATTER OF LAW, AND THIS COURT CAN AFFIRM REGARDLESS OF THE STANDARD UNDER WHICH THE BOARD REVIEWED THE ALJ'S FACTUAL FINDINGS.

A. Because the Board Rejected the ALJ's Causation Analysis as a Matter of Law, Applying Substantial Evidence Review Would Not Alter the Result on Remand, and This Court Can Affirm without Further Proceedings.

Although the Board reviewed the ALJ's fact findings de novo, applying the substantial evidence standard to the ALJ's findings would not alter its decision, because the Board reversed the ALJ's causation analysis based on legal error. Upon reviewing the record in this case, the Board accepted most of the ALJ's findings. See FDO 8 (agreeing with the ALJ's finding that Abdur-Rahman and Petty engaged in protected activity); ODR 3 (same); ODR 2 n.2 (explaining that it adopted the ALJ's "concrete" finding that protected activity influenced the

---

(2009). The Department concluded that the "application of a mixed-motive analysis to the environmental whistleblower statutes continues to be appropriate based on the ARB's longstanding decisions interpreting these statutes, is consistent with Congress' intent and is reasonable in the context of the remedial purposes of these laws to safeguard workers from retaliation for protected activity involving the public health and the environment." 76 Fed. Reg. at 2811-12.

The County has not challenged the Secretary's interpretation—which applies to the FWPCA and five other environmental whistleblower statutes administered by the Department (29 C.F.R. 24.100(a))—in light of Gross or the Supreme Court's subsequent decision in University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517 (2013), which held that the but-for causation standard applies to Title VII retaliation claims. Accordingly, the County has waived its right to do so, and this Court need not address the issue. See Little v. T-Mobile USA, Inc., 691 F.3d 1302, 1306-1307 (11th Cir. 2012).

County's decision to terminate Abdur-Rahman and Petty); FDO 12 (agreeing with the ALJ's finding that Gudewicz was unable to manage Abdur-Rahman and Petty and his supervisory incompetence motivated their discharge).

The Board found "error," however, "in the ALJ's legal conclusions." FDO 6 n.33; see ODR 6 n.23 (explaining that the Board rejected the ALJ's findings on a "legal analysis"). In particular, the ALJ failed to apply the proper test when assessing whether Abdur-Rahman and Petty met their burden on causation, and failed to properly conduct a dual motive analysis. FDO 10-12. As a result, as the Board made clear when it denied the County's motion for reconsideration, applying the substantial evidence standard to the ALJ's factual findings would not alter its decision. See ODR 5 (explaining that applying the substantial evidence standard "would not compel us to . . . change our decision"); see also ODR 6-7 (Brown, J. concurring) ("[A]pplication of the 'substantial evidence' review standard to the ALJ's findings, particularly to the question of Respondent's motive in terminating Complainants' employment, does not alter the results reached in our original decision.")

Because the Board reversed the ALJ as a matter of law, and indicated that applying the substantial evidence standard would not alter its decision, the Court may affirm without further remand. As a general matter, an appellate court remands an administrative order "'unless the grounds upon which the agency acted

in exercising its powers were those upon which its action can be sustained.'" NLRB v. Episcopal Cmty. of St. Petersburg, 726 F.2d 1537, 1540 (11th Cir. 1984) (quoting SEC v. Chenery Corp., 318 U.S. 80, 95 (1943)). However, the Chenery rule need not require remand where "[t]here is not the slightest uncertainty as to the outcome of a proceeding before" the administrative agency. See NLRB v. Wyman-Gordon Co., 394 U.S. 759, 766 n.6 (1969). Given the Board's Order Denying Reconsideration, this case presents such an exception to the usual rule. See Hussain v. Gonzales, 477 F.3d 153, 158 (4th Cir. 2007) (declining to remand despite agency error where the result was "a foregone conclusion such that remand would amount to nothing more than a mere formality"); Lin v. U.S. Dep't of Justice, 453 F.3d 99, 107 (2d Cir. 2006) (stating that remand to an administrative agency is futile "whenever the reviewing panel is confident that the agency would reach the same result upon a reconsideration cleansed of errors") (emphasis in original); cf. Calle v. U.S. Atty. Gen., 504 F.3d 1324, 1330 (11th Cir. 2007) (affirming despite agency error when the undecided issue was legal and procedural).[15]

---

[15] Petitioner makes much of Supreme Court and Eleventh Circuit precedent explaining that whether discriminatory intent exists is a question of fact. Pet. Br. 19-20. Even so, a factual finding regarding the existence of discriminatory intent may be reversed when it is clearly erroneous or when it is not based on substantial evidence. Anderson v. Bessemer City, 470 U.S. 564, 573 (1985); Green v. Sch. Bd. of Hillsborough Cnty., 25 F.3d 974, 977 (11th Cir. 1994); Bobreski v. J. Givoo

B. The Board Correctly Rejected as a Matter of Law the ALJ's Conclusion that Abdur-Rahman and Petty Failed to Meet Their Burden on Causation, and the ALJ's Findings Support the Board's Determination that Protected Activity Was a Motivating Factor.

1. The Board properly rejected as a matter of law the ALJ's conclusion that Abdur-Rahman and Petty failed to satisfy their burden on causation. The ALJ made several legal errors in reaching this conclusion. As the Board explained, the ALJ's initial finding of a nexus between Abdur-Rahman and Petty's protected activity and the County's termination decision is "confusing," as the ALJ may have inappropriately relied on a prima facie analysis in a case fully tried on the merits. ODR 2 n.2; see FDO 10 n.47. Furthermore, the ALJ appears to articulate two different tests for Abdur-Rahman and Petty's showing on causation, neither of which is correct. Initially, the ALJ erred by applying the "contributing factor" standard—a lower standard than the motivating factor standard required under the

---

Consultants, Inc., ARB No. 13-001, 2014 WL 4389968, at *8 (ARB Aug. 29, 2014) (explaining the nature of substantial evidence review). As Administrative Appeals Judge Brown explained in his concurrence on reconsideration, given the ALJ's observations and failure to separate the effects of Gudewicz's impermissible retaliatory motive from his supervisory incompetence, "the substantial evidence of the record simply does not support the ALJ's finding that" Gudewicz's "inability to manage" Abdur-Rahman and Petty "would have resulted in their employment termination even if they had not engaged in protected activity." ODR 8 (Brown, J. concurring). As a result, the ARB would have properly reversed the ALJ's finding as unsupported by substantial evidence, had it not already decided to reverse based on the ALJ's legal errors.

FWPCA. See FDO 10; D&O 19; D&O 25 (concluding that Abdur-Rahman and Petty's protected activity was a contributing factor in their termination); Valenti v. Shintech, ARB No. 11-038, 2012 WL 4714687, at *1 n.3 (ARB Sept. 19, 2012) (explaining that the "'contributing factor' standard is a less demanding causation standard of proof than 'motivating factor'"). Later in his decision, the ALJ appears to conclude that Abdur-Rahman and Petty failed to meet their burden on causation by showing that protected activity was the sole or primary motivating factor for their termination—a higher standard than required. See FDO 10 n.48; D&O 30-31. Relatedly, the ALJ erroneously required Abdur-Rahman and Petty to show that the County's proffered justification for the terminations was a pretext for discrimination, when they needed only to show that—notwithstanding any rationale offered by the County—their protected activity was a motivating factor in its decision. See FDO 11; FDO 15 (Beyer, J. concurring).

In the end, the ALJ erred as a matter of law, because he "did not determine, as he must," whether Abdur-Rahman and Petty "demonstrated by a preponderance of the evidence that their protected activity was a motivating factor in the decision to discharge them." FDO 10.

2. Applying the proper legal standard, and "[c]onsistent with the ALJ's fact findings," the Board determined that protected activity was a motivating factor in the County's decision. ODR 3. The Board's determination is based on the facts

found by the ALJ and supported by substantial evidence in the record. See Halliburton v. Admin. Review Bd., 771 F.3d 254, 261 (5th Cir. 2014) (affirming ARB's decision as based on substantial evidence where the ARB accepted the ALJ's factual findings but drew a different legal conclusion from them). Although applying the incorrect standard, the ALJ concretely found that Abdur-Rahman's and Petty's "protected activity was a factor, in connection with other factors," which affected the County's decision to terminate them. D&O 25; see ODR 2 n.2. In support of this finding, the ALJ specifically found it "likely that a part of what was viewed by supervisors as pestering and 'insubordination' was not much more than the manifestation of the Complainants' protected activity." D&O 25. Similarly, the ALJ found that some of Gudewicz's annoyance with Abdur-Rahman and Petty's "persistent pestering, questioning, and criticisms" might "be similar to . . . antagonism toward activity that is protected . . . ." D&O 24. Given the ALJ's findings, the Board did not err, therefore, when it determined that Abdur-Rahman and Petty's protected activity was a factor motivating the County's discharge decision.

3. The County emphasizes that the ALJ later found that Gudewicz's managerial incompetence was the "true motivation" for terminating Abdur-Rahman and Petty. Pet. Br. 24; see also D&O 30 (stating that supervisory incompetence was the "primary reason" for the termination). But this finding is

grounded in the ALJ's apparent, erroneous view that the FWPCA required Abdur-Rahman and Petty to prove that their protected activity was the sole or primary factor motivating their termination. See D&O 30-31.[16] Such a finding is not akin to a determination by the ALJ that protected activity was not a motivating factor. If it were, moreover, the ALJ's conclusion would be inconsistent with his earlier findings that the County acted in part out of hostility toward Abdur-Rahman's and Petty's protected activity.

4. The County also points to various "incidents of antagonism" which it argues constitute substantial evidence supporting the ALJ's determination that Abdur-Rahman and Petty fell short of their burden on causation. Pet. Br. 21-23. These arguments do little more than rehash the County's proffered justifications rejected by the ALJ as pretextual. See D&O 27-30. Those justifications cannot now constitute substantial evidence supporting the ALJ's conclusion.

For example, the County argues that "Petty had heated exchanges with other supervisors and employees and was deemed disruptive, disrespectful and insubordinate." Pet. Br. 22. The County also contends that Gudewicz

---

[16] Even when an employee is required to prove "but for" causation rather than meeting a "motivating factor" standard of causation, the employee is not required to show that the protected conduct was the sole factor in the employer's decision. See Kwan v. Andalex Grp., LLC, 737 F.3d 834, 846 & n.5 (2d Cir. 2013) ("Requiring proof that a prohibited consideration was a 'but-for' cause of an adverse action does not equate to a burden to show that such consideration was the 'sole' cause.") (internal citations omitted).

recommended Petty's termination "based on him being insubordinate, confrontational, and disruptive." Id. But the ALJ expressly stated that he did not find "'anger management,' 'disrespectfulness,' or 'challenges' to his supervisor to be true bases for Mr. Petty's termination." D&O 27.

Likewise, the County points to testimony suggesting that Abdur-Rahman was argumentative or disagreed too often with Gudewicz. Pet. Br. 21-22. But the ALJ specifically rejected this proffered basis for Abdur-Rahman's discharge, finding that she was not "'challenging,' argumentative or insubordinate, as those terms are generally understood."[17] D&O 27. Because the ALJ found the record did not support the County's proffered justifications, they cannot constitute substantial evidence supporting the ALJ's conclusion that Abdur-Rahman and Petty failed to satisfy their burden on causation.

5. The County also points to the ALJ's conclusion that Petty's and Abdur-Rahman's January 27 complaints about the Panthersville spill site did not play a role in their termination. Pet. Br. 21, 24. The ALJ drew this conclusion from his finding that Gudewicz recommended Petty's termination on January 13, 2005, and

[17] The County also points to a former colleague's testimony that he "heard Abdur-Rahman yell at Gudewicz and call him a liar." Pet. Br. 21. But the ALJ specifically found that that Abdur-Rahman did not call Gudewicz a "liar," a "flip-flopper," or "incompetent," even if Gudewicz believed she did. D&O 28.

that it was “more likely than not that Mr. Gudewicz’s perceptions of the January 26, 2005 incident sealed his decision” to terminate Abdur-Rahman. D&O 30.

There is not substantial evidence in the record to support the ALJ’s finding that Gudewicz decided to terminate Abdur-Rahman on the day before the Panthersville inspection. Gudewicz testified that he recommended Abdur-Rahman’s termination “in or about the first week of February.” Tr. 1481:13-17. Walker testified that “some days after” he received the memo about the January 26 incident, Gudewicz informed Walker that he wanted to “go ahead with terminating.” Tr. 2664:13-2665:18. Although the ALJ pointed to evidence that Gudewicz told Abdur-Rahman her Panthersville report was “fine,” and believed that Abdur-Rahman called him incompetent on January 26, D&O 30, these facts hardly make it more likely than not that Gudewicz decided to terminate Abdur-Rahman before the time period about which he and Walker testified.

In addition, the ALJ found that Gudewicz gave conflicting testimony about when he decided to terminate Petty. D&O 14. At his deposition, Gudewicz testified that he decided to terminate Petty when Gudewicz wrote Petty’s evaluation. Id. At trial, however, Gudewicz testified that he decided to do so on January 13, 2005, before completing the evaluation. Id. The Board focused on the fact that Walker did not approve Petty’s termination until February 8, 2005, after the Panthersville investigation. See FDO 9 & n.45.

Even if substantial evidence supported a finding that the County decided to terminate Petty on January 13, 2005 and Abdur-Rahman on January 26, 2005, each had already engaged in protected activity—when they repeatedly requested historical reports on sanitary sewer overflows—prior to those dates. Accordingly, the Board correctly rejected as a matter of law the ALJ's conclusion that Abdur-Rahman and Petty failed to meet their burden on causation.

C. Given the ALJ's Findings, the Board Correctly Held that the ALJ Erred as a Matter of Law When He Determined that the County Would Have Terminated Abdur-Rahman and Petty Absent Their Protected Activity.

The Board adopted the ALJ's finding that Gudewicz's inability to manage Abdur-Rahman and Petty played a role in the termination, but arrived at a "different legal conclusion," based on the facts. FDO 12. To the extent that the record supported a finding that an illegitimate and an "apparent" legitimate reason propelled the County's decision to terminate the compliance inspectors, the County had the burden to disentangle its motives. FDO 11; see Mackowiak, 735 F.2d at 1164 (citing NLRB v. Transp. Mgmt., 462 U.S. 393 (1983)). Although the ALJ correctly stated the County's burden, D&O 31, he failed to hold the County to it.

1. The ALJ's factual findings compel the conclusion that "Gudewicz's very inability to manage Abdur-Rahman and Petty was inextricably tied to their FWPCA-protected activity." FDO 12. As Judge Brown noted, the ALJ found it

likely that a “part of what was viewed” by Gudewicz “as pestering[18] and ‘insubordination’ was not much more than the manifestation” of Abdur-Rahman and Petty’s “protected activity.” ODR 7-8 (Brown, J., concurring) (internal quotation marks omitted); see D&O 25. Likewise, the ALJ found that some of Gudewicz’s annoyance with Abdur-Rahman and Petty could be viewed as antagonism toward their protected activity. D&O 24. The ALJ further found that rather “than accept challenges to the status quo,” Gudewicz and other supervisors, characterized them as “‘insubordination,’ ‘disruption,’ disrespect and as challenges to their authority.” D&O 29. Gudewicz in particular, the ALJ found, was “not equipped” to manage “employees who asked ‘why’ and challenged the way things had always been done.” D&O 28. The ALJ’s Decision and Order also shows that protected activity infected the whole of Gudewicz’s relationship with Abdur-

[18] To be sure, the ALJ listed some activities unrelated to environmental complaints as part of the pestering that fueled Gudewicz’s antagonism, namely: Abdur-Rahman’s requests for standard operating procedures; (presumably Petty’s) “displeasure” with forms Gudewicz developed; and the fact that Abdur-Rahman, in the ALJ’s estimation, sent many emails. D&O 24. But the ALJ went no further to distinguish between this “pestering” and “pestering” that was, in fact, the protected raising of environmental complaints. Nor did the ALJ reconcile contradictory testimony concerning the extent and frequency of these non-protected activities. Compare Tr. 2070:4-2071:19 (Gudewicz) to Tr. 2881:18-2882:17 (Abdur-Rahman), Tr. 2898:1-15 (Abdur-Rahman), and compare Tr. 2051:11-2052:12 (Gudewicz) to Tr. 2920:15-23 (Petty). Moreover, the ALJ failed to support his observation that Abdur-Rahman’s propensity for emailing probably irritated Gudewicz with anything other than speculation.

Rahman and Petty. Specifically, the ALJ found that the "cumulative effect," of Abdur-Rahman and Petty's "pestering," which included protected activity, was that Gudewicz "came to view" them and their activities "through a negative prism." D&O 24.

Despite these findings—and without pointing to any evidence sufficient to separate Gudewicz's "inability to manage" Abdur-Rahman and Petty from their protected activity—the ALJ nevertheless concluded that the County satisfied its burden under a mixed-motive analysis. The Board properly reversed this error. As the Board explained, "it is not a valid legal defense to fire employees because a supervisor is incompetent to deal with whistleblowing activities." ODR 6.

2. The County is correct that in determining whether the County proved its affirmative defense, the ALJ emphasized that the County also fired two other new compliance inspectors, Anderson and Stokes. Pet. Br. 25; D&O 31. But these facts are not substantial evidence supporting a finding that the County would have terminated Abdur-Rahman and Petty absent their protected activity. The County apparently fired Stokes for misleading Gudewicz, being involved in two traffic accidents, and dressing poorly. D&O 12. The ALJ did not offer any reasons explaining how her discharge shows that the County would have fired Abdur-Rahman and Petty even if they had not raised environmental concerns.

As for Anderson, the ALJ appears to have concluded that he, along with Abdur-Rahman and Petty, was terminated due to the County supervisors' inability to manage "common challenges posed by enthusiastic and more highly-educated inspectors" because Anderson "was not shown to have engaged in protected activity." D&O 31. This finding, however, is wholly contradicted by evidence in the record which the ALJ failed to address: Anderson—like Abdur-Rahman and Petty—requested historical reports on sanitary sewer overflows. See Tr. 531:10-532:4 (Abdur-Rahman). He also raised concerns about bioremediation and preprinted reporting forms at the Panthersville inspection. See Tr. 428:22-429:5, Tr. 435:14-24, Tr. 442:8-19 (Abdur-Rahman). Given the ALJ's findings that both activities constituted protected activity, D&O 22-23, Anderson's termination cannot constitute substantial evidence supporting the ALJ's finding that the County would have terminated Abdur-Rahman and Petty absent their protected activity.

Accordingly, the ALJ's conclusion that the County proved its affirmative defense fails as a matter of law. This court should affirm the Board's decision to reverse it. If, however, the Court disagrees that the Board reversed based on legal error and has doubts about whether the Board would have reversed had it reviewed the ALJ's findings of fact for substantial evidence, the proper remedy is to remand with instructions to the Board to apply the correct standard of review to the facts. See Stone & Webster Constr., 684 F.3d at 1137.

IV. THE ALJ AND THE BOARD CORRECTLY DETERMINED THAT ABDUR-RAHMAN AND PETTY ENGAGED IN FWPCA PROTECTED ACTIVITY.

The ALJ and Board correctly determined that Abdur-Rahman and Petty engaged in protected activity when they inquired about environmental reports and raised concerns about the Panthersville spill site. The County contends that the FWPCA whistleblower provision does not protect these activities as a matter of law, because Abdur-Rahman and Petty did not elevate their concerns to the Georgia Environmental Protection Division or Gudewicz's supervisors, Pet. Br. 28; they did not accuse the County of being in violation of environmental laws but rather complained about "internal procedures," id. at 27, 31; and they "made inquiries concerning their job duties." Id. at 27, 31-32. These arguments misapprehend the scope of whistleblower protection under the FWPCA, and the Board properly affirmed the ALJ's determination that Abdur-Rahman and Petty engaged in activity protected by the Act.

1. The FWPCA does not require Abdur-Rahman and Petty to have lodged their concerns with the Georgia Environmental Protection Division or any other government agency for their complaints to be protected. To the contrary, "all good faith intracorporate allegations are fully protected from retaliation" under the Act. Passaic Valley, 992 F.2d at 480; see also Bechtel Constr., 50 F.3d at 931-33 (holding that protected activity under an environmental whistleblower protection

provision "similar" to the FWPCA includes internal complaints "made to supervisors and others"); see also Pet. Br. 26 (acknowledging that it is "well-established that an employee's internal complaints may constitute protected activity"). This court has explained that protecting such internal complaints "promotes the remedial purposes" of an environmental whistleblower statute and "avoids the unwitting consequence of preemptive retaliation, which would allow the whistleblowers to be fired or otherwise discriminated against with impunity for internal complaints before they have a chance to bring them before an appropriate agency." Bechtel Constr., 50 F.3d at 932-33.

Furthermore, the County is incorrect when it asserts that Abdur-Rahman and Petty did not "take any concerns to Walker or Barnes." Pet. Br. 28. To the contrary, the Board found, and the record shows, that Abdur-Rahman and Petty requested historical reports on sanitary sewer overflows from Walker, and Abdur-Rahman took her concerns about the reports to Barnes. See FDO 3; see, e.g., Tr. 360:7-13 (Abdur-Rahman); Tr. 531:10-22 (Abdur-Rahman); see also D&O 9. Even so, neither this court's environmental whistleblower decisions nor the text of the FWPCA require that a whistleblower elevate complaints beyond his immediate supervisor.

2. Nor is there any support for the County's contention that Abdur-Rahman and Petty's actions were not protected as a matter of law because they raised

concerns about the County's internal procedures.[19] Quite the opposite. In a case involving a "similar whistleblower provision" to the FWPCA, this court held that questioning a supervisor about internal procedures can constitute protected activity. See Bechtel Constr., 50 F.3d at 931-32. In Bechtel, the worker disagreed with his supervisor about the "proper procedure" for handling radiation contaminated tools. Id. at 929. In an analysis echoed by the County's argument here, the ALJ in Bechtel (erroneously) concluded that the employee did not engage in protected activity because he had "merely questioned a supervisor about the correct method of handling tools." Id. at 930. The Department's final decision reversed the error, and this court affirmed, deferring to the Secretary's interpretation that "questioning" of "one's supervisor's instructions on safety procedures" is "tantamount to a complaint." Id. at 931.

Likewise, in this case, Abdur-Rahman and Petty engaged in protected activity when they raised specific concerns about the County's handling of the

[19] The County cites to two unpublished, non-precedential cases, Entrekin v. Panama City and Brush v. Sears Holdings Corp. for the proposition that questioning about internal procedures does not constitute protected activity. Pet. Br. 31. Neither case, however, involved complaints related to potential employer violations of environmental rules. The panels in those cases found that concerns about internal sexual harassment procedures were not protected under Title VII's anti-retaliation provision. Title VII, the panels explained, does not require employers to adopt any internal procedures. See Brush v. Sears Holdings Corp., 466 F. App'x 781, 786 (11th Cir. 2012); Entrekin v. Panama City, 376 F. App'x 987, 994 (11th Cir. 2010).

Panthersville sanitary sewer overflow. In particular, Abdur-Rahman and Petty raised concerns with Gudewicz that the County "had not done any bioremediation of the raw sewage spill nor cordoned off the affected area, presenting a public health hazard." FDO 8. They also raised concerns about the County's use of pre-printed forms that could lead to inaccurate reporting. See D&O 8; FDO 8-9. These were not "general inquiries" but "tantamount to a complaint that correct safety procedures were not being observed." Bechtel Constr., 50 F.3d at 931 (internal quotation marks omitted).

The County avers that Abdur-Rahman "testified that she was asking only for information to understand County procedures." Pet. Br. 29 (citing Tr. 761-62). But that was not her full testimony. Abdur-Rahman later clarified that she thought "there were things done improperly" at the Panthersville site, and raised these issues with Gudewicz. Tr. 763:16-22 (Abdur-Rahman); see also Tr. 437:1-15 (Abdur-Rahman) (explaining that she was concerned about water quality). While Petty's testimony indicated that he asked questions about procedures rather than accuse the County of violating environmental regulations, see Pet. Br. 30, it also showed that he shared Abdur-Rahman's concerns that the County was acting improperly. Petty testified that he had been trained in his previous job to know whether a sanitary sewer overflow had been "handled in the correct manner," and this was why the County's treatment of the Panthersville Road overflow triggered

the concerns he raised with Gudewicz. Tr. 973:15-974:19. The ALJ correctly found that the fact that Abdur-Rahman and Petty "were not totally familiar with the overall picture of how the County responded" to the overflows did not "make their expressed concerns any less protected," D&O 22, and the ALJ's finding that they engaged in protected activity with respect to the Panthersville site is supported by substantial evidence in the record.

Abdur-Rahman and Petty also engaged in protected activity when they "repeatedly sought from their supervisors the County's historic [sanitary sewer overflow] reports." FDO 8. Abdur-Rahman and Petty believed the County had a duty to provide these reports to the Georgia Environmental Protection Division or to a federal agency. See D&O 8-9; Tr. 360:14-361:3 (Abdur-Rahman); Tr. 958:2-14 (Petty). When the County failed to provide them access to the reports, despite their requests, they became concerned about the propriety of the County's actions. D&O 9; see Tr. 962:22-963:4 (Petty); Tr. 531:10-20 (Abdur-Rahman). Furthermore, as the Board noted, according to Gudewicz himself, during a conversation about the reports, "Abdur-Rahman specifically claimed" that problem areas of sanitary sewer overflows "continued to exist due to Gudewicz's inattention and lack of corrective action." FDO 8; see CL 45 (Pet. App. 261); see also Tr. 2080:2-2081:4 (Gudewicz) (describing conversation). Accordingly, the

Board correctly agreed with the ALJ's determination that Abdur-Rahman and Petty engaged in protected activity as a matter of law. FDO 9.

3. The County argues that Abdur-Rahman and Petty "only made inquiries concerning their job duties." Pet. Br. 27. But nothing in the text or legislative history of the FWPCA whistleblower provision limits protection based on an employee's duties. To the contrary, the Act prohibits retaliation against "any employee" instituting "any proceeding." 33 U.S.C. 1367(a).

The Board, moreover, has consistently held that the environmental whistleblower statutes protect complaints regardless of the whistleblower's job responsibilities. See, e.g., Joyner v. Georgia-Pacific Gypsum, ARB No. 12-028, 2014 WL 1758318, at *8 (ARB Apr. 25, 2014); Vinnett v. Mitsubishi Power Sys., ARB No. 08-104, 2010 WL 3031377, at *6 (ARB July 27, 2010); see also Warren v. Custom Organics, ARB No. 10-092, 2012 WL 694499, at *6 (ARB Feb. 29, 2012) (holding the same with respect to the Surface Transportation Assistance Act). The Board's interpretation is consistent with the purposes of the environmental whistleblower statutes and warrants deference. See Mackowiak, 735 F.2d at 1162-65 (sustaining the Secretary's conclusion that the whistleblower provision of the Energy Reorganization Act protected a quality control inspector from retaliation based on internal safety and quality control complaints that "flowed directly from his duties.").

The aim of the FWPCA's whistleblower provision is for employees to "help assure that employers do not contribute to the degradation of our environment." S. Rep. No. 92-414 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3748, 1971 WL 11307. Congress enacted the provision "for the broad remedial purpose of shielding employees from retaliatory actions taken against them by management to discourage or to punish employee efforts to bring the corporation into compliance with the . . . Act's safety and quality standards." Passaic Valley, 992 F.2d at 478. The FWPCA would be severely hampered in effectuating this goal if it did not protect employees who raise concerns that arise in the performance of their duties.

Indeed, the more closely an employee's job duties relate to reporting environmental problems under the FWPCA or another environmental whistleblower statute, the better he or she stands to promote the effectiveness of those laws. Accordingly, in Mackowiak, the Ninth Circuit held that an environmental whistleblower statute forbid retaliation based on "competent and aggressive inspection work." Mackowiak, 735 F.2d at 1163. "In other words," the court explained, an employer "may not discharge quality control inspectors because they do their jobs too well." Id. Likewise, the Board has found protected activity even where, for example, unlike in this case, an employee directly responsible for monitoring compliance with environmental regulations and a state

consent decree raised concerns about violations of those rules.[20] See Joyner, 2014 WL 1758318, at *2, *8. Because the Department's approach is not only permissible, but best effectuates the statutory purposes underlying environmental whistleblower protection, this Court should defer to its interpretation.

The County cites to the Eleventh Circuit's previous decision evaluating the facts of this case under Garcetti v. Ceballos, which holds that the First Amendment does not prohibit adverse action based on an employee's statements "made pursuant to official responsibilities." 547 U.S. 410, 424 (2006); see Pet. Br. 32 (citing Abdur-Rahman v. Walker, 567 F.3d 1278 (11th Cir. 2009)). That doctrine has no applicability here. Unlike the whistleblower provisions contained in the FWPCA and other environmental statutes, the First Amendment does not protect individuals in their capacity as employees, but rather affords them speech rights as citizens. See Garcetti, 547 U.S. at 418-19. The Garcetti doctrine is premised on the notion that when "a public employee speaks pursuant to employment responsibilities," there is "no relevant analogue to speech by citizens who are not government employees." Id. at 424. Indeed, the Garcetti Court recognized the importance of exposing governmental misconduct, and indicated that

[20] Of course, an employee who deliberately violates the FWPCA without direction from his employer would not be protected. See 33 U.S.C. 1367(d); cf. Fields, 173 F.3d at 813-14.

whistleblower statutes, rather than the First Amendment, will protect employees against retaliation when they do so. Id. at 425-26.

The County also cites Willis v. Department of Agriculture, a Federal Circuit decision interpreting the Whistleblower Protection Act. See Pet. Br. 27 (citing 141 F.3d 1339 (Fed. Cir. 1998)). In 2005, the Sixth Circuit extended Willis' holding to the FWPCA and other environmental whistleblower provisions. See Sasse v. U.S. Dep't of Labor, 409 F.3d 773, 779-80 (6th Cir. 2005). Both Willis and Sasse rely on an erroneous reading of the Whistleblower Protection Act abrogated by Congress in 2012. See Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-119, § 101(f)(2), 126 Stat. 1465, 1466 (2012) (amending the Act to provide that if "a disclosure is made during the normal course of duties of an employee," it will not be excluded from protection, if a personnel action is taken "in reprisal for the disclosure"); see also S. Rep. No. 112-155 (2012), reprinted in 2012 U.S.C.C.A.N. 589, 593, 2012 WL 1377618, at *5 (explaining that the amendment overturns Willis and clarifies that "an employee is not deprived of protection merely because the employee made the disclosure in the normal course of the employee's duties, provided that actual reprisal occurred"). The accompanying Senate Report makes clear that the Federal Circuit's rule was contrary to congressional intent and contravened the "very broad protection required by the plain language" of the Whistleblower Protection Act. 2012 WL

1377618, at *5. As the Board has, the Senate Committee emphasized the importance of preserving protection even for employees whose job it is to report violations, for example, "where an auditor can show that she was retaliated against for refusing to water down a report." Id. at *6.

In any event, neither Willis nor Sasse stands for the broad proposition the County advocates, nor do they foreclose protection here.[21] The government workers in those cases were employed for the specific purpose of investigating or prosecuting violations by outside parties, and alleged that they engaged in protected activity when they carried out these duties. See Willis, 141 F.3d at 1141, 1144 (holding that a farm compliance inspector did not engage in protected activity when he reported farms out of compliance); Sasse, 409 F.3d at 779-80 (holding that an Assistant United States Attorney's investigation and prosecution of environmental crimes was not protected activity). Indeed, the whistleblower in

[21] The County's citation to McKenzie v. Renberg's, Inc., 94 F.3d 1478 (10th Cir. 1996) is likewise inapposite. McKenzie involved an employee who, in her capacity as personnel manager, informed her employer that it was at risk of claims that might be instituted by others as a result of its alleged Fair Labor Standards Act violations. Id. at 1486. The Tenth Circuit held that this conduct was not protected not only because the employee was "performing her everyday duties as personnel director," but, more importantly, because she did not take a position "adverse" to the company. Id. at 1486-87. Even if McKenzie was correctly decided, Abdur-Rahman and Petty took a position adverse to the County when they repeatedly and persistently sought environmental reports, despite their supervisor's admonition that their inquiries were "ruffling too many feathers" and they should stop "rock[ing] the boat." FDO 3.

Willis had argued in effect that "nearly every report by a government employee concerning the possible breach of law or regulation by a private party" constitutes a protected activity. Willis, 141 F.3d at 1144. Neither Willis nor Sasse holds, therefore, that blowing the whistle on one's employer is unprotected whenever it relates to an employee's job duties. See Sasse, 409 F.3d at 779 n.2 ("[W]e do not hold that Sasse's activities were unprotected merely because they were related to his official duties."); see also Johnson v. Dep't of Health & Human Servs., 87 M.S.P.R. 204, 210 (MSPB Aug. 21, 2000) (explaining that Willis does not stand for the broad proposition that disclosures are not protected if they pertain to matters within the scope of an employee's duties). Indeed, if this were the rule, almost no employee whistleblowing activity would retain protection. See, e.g., Stone & Webster Eng'g Corp. v. Herman, 115 F.3d 1568, 1570 (11th Cir. 1997) (ironworker foreman engaged in protected activity when he relayed ironworkers' concerns that the firewatch procedure for which they were responsible did not comply with fire prevention rules); Bechtel Constr., 50 F.3d at 930-31.

When Abdur-Rahman and Petty raised environmental concerns, they went beyond their basic duty to prevent private parties from improperly dumping grease in County sewers, and implicated behavior by the County itself. Although Abdur-Rahman and Petty sought sanitary sewer overflow reports to assist with their work updating the sewer ordinance, and the ALJ found that obtaining them would have

served the County's goals, the County's position (via Walker) was that the assignment did not require them to access the data. D&O 23. Nevertheless, Abdur-Rahman and Petty persisted in inquiring after the reports, eventually questioning "whether the County was doing the right thing." Tr. 531:10-20 (Abdur-Rahman); see also D&O 9; Tr. 962:22-963:4 (Petty). Indeed, as the Board noted, Gudewicz himself stated that when Abdur-Rahman questioned him about the sanitary sewer overflow data, she claimed that hotspots of these sites continued to exist because of his "inattention and lack of corrective action." FDO 8; see CL 45 (Pet. App. 261); see also Tr. 2080:2-2081:4 (Gudewicz).

With respect to the Panthersville complaints, the ALJ found and the record is clear that Abdur-Rahman and Petty were not the "first responders" when a sanitary sewer overflow occurred and were not responsible for reporting sewer spills to the Georgia Environmental Protection Division. D&O 9, 22, 23 n.29; Tr. 2644:2-2645:18 (Walker). Rather, when Abdur-Rahman or Petty later visited a site, their role was to determine whether grease was a cause of the incident. Tr. 966:12-16 (Petty); Tr. 534:23-535:14 (Abdur-Rahman); Tr. 2413:12-20 (Walker). Accordingly, as the ALJ found, Abdur-Rahman and Petty "went beyond" their "explicit basic job requirements" when they raised concerns about the County's handling of the Panthersville overflow site. D&O 22. The ALJ correctly determined and the Board correctly affirmed that these internal complaints

constituted protected activity under the FWPCA, and this Court should affirm that determination as based on substantial evidence.

V. THE BOARD CORRECTLY UPHELD THE ALJ'S DISCRETIONARY DECISION TO LIMIT REOPENING OF THE RECORD ON REMAND.

The County argues that the ALJ erred by declining to reopen the record on remand to receive evidence on mitigation for the time period following March 2007. Pet. Br. 33. The County maintains that this decision "violated the ARB's guidance allowing reopening of the record." Id. (citing Pollock v. Cont'l Express, ARB Nos. 07-073, 08-051, 2010 WL 1776974 (ARB Apr. 7, 2010) and Dale v. Step 1 Stairworks, Inc., ARB No. 04-003 (ARB Mar. 31, 2005) (Addendum B). But these cases do not guide ALJs about when to reopen the record, absent some order from the Board. Pollock merely states that the "Board may order an ALJ to reopen the record to receive evidence . . . where the proffered evidence is relevant and material and was not available prior to the closing of the record." Pollock, 2010 WL 1776974, at *8 n.94 (emphasis added). Dale instructed an ALJ to allow a pro se litigant the opportunity to present evidence on mitigation where the litigant had not been advised of his burden to do so. Dale, ARB No. 04-003, slip op. at 8.

A trial judge "has broad discretion to reopen a case to accept additional evidence," and a reviewing court should not overturn this decision "absent an abuse of that discretion." Hibiscus Assocs. v. Bd. of Trs. of Policemen & Firemen

Ret. Sys. of Detroit, 50 F.3d 908, 917 (11th Cir. 1995); see Dalton v. Copart, ARB Nos. 04-027, 04-138, 2005 WL 1542549, at *5 (ARB June 30, 2005). And, in fact, the record contains a communication from the County urging the ALJ not to reopen the record on remand. See CL 23, June 9, 2011 letter from the County's counsel to ALJ Morgan, at 1 (stating that "[n]either party should be allowed to introduce new evidence, new damages issues, or take advantage of events that were unknown at the time the hearing closed"). The Board did not err, therefore, when it upheld the ALJ's decision to limit reopening of the record on remand and determination that the County did not meet its burden to show that Abdur-Rahman and Petty failed to mitigate damages.

CONCLUSION

For the reasons set forth above, the Secretary requests that this Court affirm the Board's Final Decision and Order.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

WILLIAM C. LESSER
Deputy Associate Solicitor

MEGAN E. GUENTHER
Counsel for Whistleblower Programs

/s/ Erin M. Mohan
ERIN M. MOHAN
Attorney
U.S. Department of Labor
200 Constitution Ave. NW, N-2716
Washington, DC 20210
Telephone: (202) 693-5783
Fax: (202) 693-5774
E-mail: mohan.erin.m@dol.gov

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

Pursuant to Fed. R. Pet. P. 32(a) the undersigned certifies that the foregoing brief of the Secretary of Labor:

(1) Complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,523 words, including footnotes but excluding the parts of the brief exempted by Fed. R. App. Proc. 32(a)(7)(B)(iii); and

(2) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Word 2007 utilizing plain roman style, with exceptions for case names and emphasis, and using Times New Roman 14-point font, which is a proportionately spaced font, including serifs.

Date: May 26, 2015

/s/ Erin M. Mohan
ERIN M. MOHAN
Attorney
U.S. Department of Labor

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on May 26, 2015. I certify that the following are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. In addition, a copy of the foregoing was served on the following counsel of record via U.S. mail with proper postage attached thereto:

Randy C. Gepp
Taylor English Duma, LLP
1600 Parkwood Circle, Suite 400
Atlanta, Georgia 30339
Email: rgepp@taylorenglish.com
Attorney for DeKalb County

Robert Marx
Marx & Marx, LLC
5555 Glenridge Connector, Ste. 200
Atlanta, GA 30342
Email: lawyers@marxlawoffice.com
Attorney for Daisy Abdur-Rahman and Ryan Petty

/s/ Erin M. Mohan
ERIN M. MOHAN
Attorney
U.S. Department of Labor