In the Matter of:

MARK DUNCAN, **ARB CASE NO. 99-011**

COMPLAINANT, **ALJ CASE NO. 97-CAA-12**

v. **DATE: September 19, 2001**

SACRAMENTO METROPOLITAN AIR QUALITY MANAGEMENT DISTRICT,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

Appearances:

For the Complainant:
John L. Simonson, Esq., *La Tuna Canyon, California*; Mark Duncan, *pro se, Folsom, California*[2/]

For the Respondent:
Kenneth L. Swenson, Esq., *Duncan, Ball, Evans, & Ubaldi, Sacramento, California*

For the Assistant Secretary, Occupational Safety and Health as Amicus Curiae:
William J. Stone, Esq., Steven J. Mandel, Esq., *U.S. Department of Labor, Washington, D.C.*

FINAL DECISION AND ORDER

Complainant Mark Duncan filed this case under the Clean Air Act, 42 U.S.C.A. §7622 (West 1995) ("CAA") alleging that his former employer the Sacramento Metropolitan Air Quality Management District ("SMAQMD") violated the CAA's employee protection provisions by taking various adverse actions against him and ultimately terminating his employment. The Occupational Safety and Health Administration ("OSHA") investigated Duncan's complaint and found it without merit. Duncan objected to OSHA's findings and the matter was referred to a Department of Labor Administrative Law Judge ("ALJ") for a hearing.

[1/] This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

[2/] The complainant was represented by counsel during the initial phases of his appeal before this Board, but ultimately filed briefs on his own behalf.

On October 16, 1998, the ALJ issued a Recommended Decision and Order ("RDO") finding that SMAQMD did not take any actions against Duncan in retaliation for engaging in protected activity. Therefore, the ALJ recommended that Duncan's complaint be dismissed. This appeal followed.[3/]

We have jurisdiction under the Clean Air Act, *supra*, and 29 C.F.R. §24.8 (2000). Under the Administrative Procedure Act, we have plenary power to review an ALJ's factual and legal conclusions *de novo*. *See* 5 U.S.C.A. §557(b)(West 1996); *Masek v. Cadle Co*., ARB No. 97-069, ALJ No. 95-WPC-1, slip op. at 7 (ARB Apr. 28, 2000).

Essentially, Duncan argues that the facts in this case support an inference that SMAQMD retaliated against him. The ALJ himself recognized the possibility that some of SMAQMD's actions could have been motivated by retaliatory animus. However, he ultimately found that the weight of the evidence and testimony in this case militated against drawing such an inference. In our view, the ALJ's decision is thorough, well-reasoned, and fully supported by the record. Accordingly, we adopt the attached ALJ's RDO. Therefore, Duncan's complaint is **DISMISSED**.[4/]

SO ORDERED.

PAUL GREENBERG
Chair

RICHARD A. BEVERLY
Alternate Member

[3/] Duncan's petition for review of the ALJ's RDO initially was filed with the Labor Department's Chief Administrative Law Judge, rather than with the Board. The filing with the ALJ occurred within the 10-business day time limitation required by the Labor Department's regulations at 29 C.F.R. §24.8(a); however, by the time the petition was re-submitted to the Board, the 10-day time period had lapsed, and the petition could have been viewed as untimely. We ordered briefing on whether the appeal should be accepted as timely. The Assistant Secretary appeared as an *amicus* in this case solely on the issue of timeliness, submitting a letter brief arguing that the appeal should be accepted. The Board issued an order accepting the petition for review on September 1, 1999, and ordered briefing on the merits of the case.

[4/] Before the Board, SMAQMD contends that it also is entitled to prevail under a collateral estoppel theory pursuant to *Sawyers v. Baldwin Union Free School District*, No. 85-TSC-1 (Sec'y Oct. 24, 1994), arguing the Board should give preclusive effect to an arbitration decision that was adverse to Duncan. Because we adopt the ALJ's merits finding that SMAQMD's discharge of Duncan was not unlawful under the CAA, it is unnecessary for us to address this argument.

DATE: October 16, 1998

CASE NUMBER 97-CAA-12

In the Matter of

MARK DUNCAN,

COMPLAINANT,

v.

SACRAMENTO METROPOLITAN AIR QUALITY MANAGEMENT DISTRICT,

RESPONDENT.

Appearances

John Simonson, Esquire
10627 Penrose Street
La Tuna Canyon, California 91352
For the Complainant

Mathew D. Evans, Esquire
Kenneth L. Swenson, Esquire
Duncan, Ball, Evans & Ubaldi
641 Fulton Avenue, Second Floor
Sacramento, California 95825
For the Respondent

RECOMMENDED DECISION AND ORDER

This proceeding involves a complaint against the Sacramento Metropolitan Air Quality Management District under the employee protection provisions of the Clean Air Act, 42 U.S.C. §7622 (hereinafter also referred to as "the Act"). In general, these provisions prohibit employers from firing or otherwise retaliating against employees who have engaged in certain actions in furtherance of the Act's enforcement. The complainant, Mark Duncan, is a former employee of the District who alleges that during 1996 and 1997 the District took various adverse actions against him

in retaliation for having engaged in activities that are within the scope of the Act's protection. A trial on the merits of the complaint was held in Sacramento, California, on November 3-7, 1997; February 17-20, 1998; and March 25-26, 1998. The following exhibits have been admitted into evidence: Complainant Exhibits (CX) 1-34; Respondent Exhibits (RX) 1-29; Administrative Law Judge Exhibits (ALJX) 1-9. When this matter was initially referred to the Office of Administrative Law Judges, the issues also included allegations of discrimination against two other complainants: Eric Munz and Linda Clark. However, Complainant Clark's complaint was dismissed in a May 29, 1998 Recommended Decision and Order that became final on June 12, 1998 and Complainant Munz's complaint was dismissed in an August 3, 1998 Recommended Decision and Order that became final on August 17, 1998.

SUMMARY OF EVIDENCE

A. The Parties

The Sacramento Metropolitan Air Quality Management District(hereinafter referred to as "the District" or "SMAQMD") is a state-created agency "with the primary responsibility for the development, implementation, monitoring, and enforcement of air pollution control strategies" in the County of Sacramento.[5/] See Cal. Health & Safety Code §40950 et seq. A restructuring of the District, during which it "separated from the County," began in 1995 and was completed June 1, 1996. Tr. at 1654. As of October 1996, the District was governed by a Board of Directors made up of Sacramento County Supervisors, Sacramento City Council Members, and the Mayor of the City of Folsom. CX 33 at 63128. The District is funded in part by grants made by the United States Environmental Protection Agency (hereinafter "EPA") pursuant to 42 U.S.C. § 7405 (hereinafter "Section 105"). The District consists of two major divisions, the Mobile Source Division, and the Stationary Source Division. The District's highest ranking executive officer is Norm Covell (hereinafter "Covell"), who holds the title of Air Pollution Control Officer and has worked at the District since 1984. Tr. at 1653. Below Covell in the District's organizational structure are David Grose (hereinafter "Grose"), who began working for the District as Stationary Source Division Manager on January 6, 1997, and Timothy Taylor (hereinafter "Taylor"), the Mobile Source Division Manager. Tr. at 1359, 1982. The immediate subordinates of Grose included, inter alia, Eric Munz (hereinafter "Munz"), who in turn was the immediate supervisor of Complainant Duncan (hereinafter "Duncan"). Other management personnel relevant to this matter include Catherine Spinelli (hereinafter "Spinelli"), the District's in-house counsel; LaShelle Dozier (hereinafter "Dozier"), the District's Administrative Services Manager; Carolyn Johnson (hereinafter "Johnson"), the District's Personnel Officer; Karen Wilson (hereinafter "Wilson"), a division manager in charge of strategic planning; and Aleta Kennard (hereinafter "Kennard"), the District's Technical Services Supervisor. Tr. at 584, 656, 1202, 1178. Among Kennard's subordinates were Linda Clark (hereinafter "Clark"), who was fired by the District on June 13, 1997. CX 17.

Complainant Duncan holds a Bachelor of Science degree in Environmental Management. Tr. at 30. He began working for the District in 1987 and was a Senior Air Pollution Control Specialist during the entire period between 1990 and his termination by the District on September 25, 1997. Tr. at 30-31, 1359, CX 5. As a Senior Air Pollution Control Specialist, he supervised inspectors in the District's Stationary Source Division. Tr. at 31. According to Duncan's testimony,

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[5/]Until July of 1989, the District was known as the Sacramento County Air Pollution Control District. See Cal. Health & Safety Code §40962.

he was commended by Covell in 1995 and received awards from the Sacramento County Board of Supervisors in 1994 and 1995 for his work on a "Red Tape Task Force." Tr. at 32. Prior to 1997, Duncan had never been subjected to any type of disciplinary action. Tr. at 91.

B. Chronological Summary of Relevant Events

According to EPA records and the testimony of Duncan and Munz, on August 30, 1994 Duncan and Munz were sent to San Francisco by Covell to be interviewed by a group of EPA employees as part of an EPA effort to address "unresolved issues" between the District and the EPA concerning the District's enforcement of the Clean Air Act. CX 33 at 63177-81, Tr. at 34-38 (Duncan testimony), Tr. at 331-38 (Munz testimony). Duncan described the subject matter of this meeting as including such topics as how the District identified new sources of air pollution, what procedures were followed in making those identifications, and the role of the Engineering and Rules Sections in that process. Tr. at 35. As well, he testified the EPA employees "wanted in detail knowledge of our inspection activities and how we did them . . . [and] where we put our priorities in manpower." Tr. at 36. In Duncan's opinion, his responses to these questions could be characterized as "critical" of the District, but were nonetheless "a fair appraisal" of the problems at the District. Tr. at 38. According to Munz, the EPA staff "were asking some real probing questions about what they perceived as problems [at the District]." Tr. at 334. One of the most serious issues was apparently a "permit backlog." Tr. at 333, 336. Munz testified that because of this permit backlog, 1000 or more potential air pollution sources within the District's jurisdiction had not been issued permits and therefore were not receiving inspections by the District. Tr. at 336. The EPA's "minutes" of the meeting do not indicate that either Munz or Duncan accused the District of being involved in any illegal activities, but do reflect various comments which could be construed as critical of the District's operations, including statements by Munz or Duncan alleging that the Engineering and Enforcement sections were understaffed, that the Enforcement section was not allowed to participate in writing the rules included in permits issued by the District, and that internal District communication could be improved. CX 33 at 63177-81.

According to a declaration submitted by Ed Snyder, a former chief of the Compliance and Oversight Section of the Air Division of Region IX of the EPA, at some unspecified date in August of 1994 Duncan contacted Chuck Seeley, one of the EPA employees who was at the August 30 meeting, and offered to provide the EPA "confidential information" about the District's operation. CX 32 (February 12, 1998 Declaration of Ed Snyder). Thereafter, Synder indicates, Duncan twice provided information to Seeley. The declaration further represents that upon Seeley's retirement in October 1994, Seeley told Snyder of Duncan's role as a confidential source within the District.

According to Covell, on various occasions in 1994 he met with David Howecamp, the EPA Region IX Director of Air and Radiation Programs, regarding the reorganization of the District. Tr. at 1677. At the time, Covell testified, EPA was concerned about the District's permitting and enforcement backlog and was unusually active in conducting its own inspections and bringing it own enforcement actions against alleged violators, rather than relying solely on the District's efforts Tr. at 1678-80. However, Covell asserted, during the meetings he was "assured that this was no vendetta or specific attention directed by EPA Region IX at our district, it was just our turn for review." Tr. at 1678. Covell also acknowledged that at one of these 1994 meetings, Howecamp told him that "there may have been mole comments coming to [EPA]" from someone within the District. Tr. at 1677-78. However, Covell testified, Howecamp phrased the statement in such a way as to suggest that he did not know if in fact there were any "moles." Tr. at 1679. Nor, according to

Covell, did Howecamp indicate who in particular was receiving the comments, who made the comments or even what the comments were. Tr. at 1679.

During the following two years, the District was engaged in the process of transforming itself from a Sacramento County government entity into an independent agency. This transformation apparently affected the civil service status of the District's employees and required the renegotiation of pre-existing collective bargaining agreements between the District and its employees. Tr. at 148-85. When Duncan learned of these changes and conducted some legal research, he felt the District and the Sacramento Board of Supervisors were "violating state law [by removing] the District from the county organization." Tr. at 165, 183. As a result, some time in 1995 he met with his union's attorneys who, according to Duncan, agreed with his concerns. Tr. at 183. Ultimately, Duncan testified, an attorney representing his union unsuccessfully sought an injunction to stop the District from imposing an "interim contract" on its employees. Tr. at 167-69. According to Duncan, while acting in his role as a member of his union's board of directors, he voted to seek the injunction and also collected employee declarations, including one of his own, to support the request for the injunction. Tr. at 170-71.

In July of 1996, according to Snyder's declaration, his supervisor asked him to contact the confidential source within the District (i.e., Duncan) and ask if he would be willing to talk to an agent from the EPA's Criminal Investigations Division. Snyder's declaration further represents that when the request was made to Duncan, he agreed to allow his name and telephone number to be given to the agent.

According to Duncan's testimony, when Snyder called, he told him "that they had received information from a source, and he didn't tell me what source, that led the Criminal Division's people [at] EPA to suspect there might be criminal negligence occurring within the District." Tr. at 38. Duncan further testified that Snyder gave him the phone number of EPA "Special Agent" Mark Measer and asked him to call if he wanted. Tr. at 39. According to Duncan, Snyder told him he "thought the District would be a better place if you know, if I made the call." Tr. at 38. Duncan also testified that he called Measer the next day and that they set up a meeting after work at Sacramento's K Street Mall.[6/] Tr. at 39. According to Duncan, a second agent, Kent Montgomery, was with Measer at the meeting. Tr. at 40. Duncan testified that the agents were curious about "budget anomalies" and personnel changes "where people were placed in positions where it didn't seem that the right individual was put there." Tr. at 41. As well, he testified, the agents asked about "the permit backlog," the recent reorganization of the District, emission credits, and "any sources that where an investigation was either blocked or changed or any sources that should have had permits that didn't have them." Tr. at 41. Thereafter, Duncan testified, he informed Munz and Clark of the agents' request and the three of them began providing written materials to the agents. In total, he asserted, he sent five packets of documents to the investigators and Clark sent one packet. Tr. at 53. According to Duncan, some of the materials sent to the investigators showed that Campbell Soup Company had been granted emission credits for a reduction in pollution that never occurred. Tr. at 293. Copies of the materials Duncan and Clark sent to the EPA are contained in Complainants' Exhibit 33. Notes prepared by an EPA employee indicate that the packages were received by the EPA on July 3, September 1, October 10, and November 12, 1996. CX 33 at 62581.

[6/] While it is not explicit in Duncan's testimony, this meeting presumably took place the same day Duncan called Measer.

According to Munz's testimony, in July of 1996 he and several other District employees including Duncan and Karen Wilson met with Valerie Cooper, an EPA grant coordinator. Tr. at 388. During the meeting, Munz asserted, he, Duncan, and another Enforcement Section employee (Kevin Leonard), "really kind of laid it out on the line to [Cooper] about the problems we were having in the section." Tr. at 390. Issues raised included lack of staffing, a tri-annual inspection cycle, and consolidation of inspections by different agencies, resulting in "a mediocre job [of inspecting]." Tr. at 390-91. According to Munz, these comments were all made in the presence of Wilson, a person Munz characterized as Covell's "second in command." Tr. at 388, 392.

On August 27, 1996, Covell sent a memo to Munz regarding Duncan and Clark. CX 30 at 14. The memo read as follows:

> On June 17, 1996, during a program review meeting, I discussed with you the issue of you and/or Mark Duncan spending work time in meetings with Linda Clark. I indicated that this concern had been brought to my attention by Linda's supervisors who are attempting to deal with her regarding some performance issues. I told you that this was improper in that neither you or Mark supervise Linda, and further, that it interferes with both your work efforts in dealing with your program responsibilities. Linda has recourse through her representation organization and I expected the work time meetings to cease. You responded by telling me that you were not involved in any such meetings and would check with Mark. Since that time, I have continued to receive information that Mark continues to meet with Linda either in his or her office, or outside the building. As Mark's supervisor, I am again informing you that this is improper behavior and is not to continue. Please inform Mark of this directive, and I fully expect both of you to cooperate regarding this matter.

On September 9, 1996, Munz responded to Covell's August 27 memo. CX 30 at 13. In the response, Munz asserted that he and Duncan had reason to interact with Clark "pertaining to a number of issues concerning District business as it relates to her rule making history and our need to understand that history." As well, he wrote that he, Duncan, and Clark were all "members of the negotiating team," and occasionally had discussions in that regard. He then stated, however, that he would "take steps to address" any "inappropriate discussions or time wasting" he observed among the employees under his supervision.

During approximately the same period that Duncan, Munz and Clark began secretly providing materials to the EPA Special Agents, Duncan became engaged in a dispute with Covell over Covell's alleged failure to resolve conflicts that Duncan claimed to be having with one of his subordinates, who will be hereinafter referred to as "Jane Doe." The nature of the dispute was described by Duncan in a September 12, 1996 memorandum to Covell entitled "Sexual Harassment, [Jane Doe], County Policy, Your Obligations and Putting Me in Harm's Way." RX 29. The memo noted that in August of 1996 Duncan and Covell had met twice concerning Duncan's alleged problems with Jane Doe and indicated that Duncan believed that she was disrupting the work of the compliance team "due to her argumentative nature, resistance to taking direction, the willful undermining of work assignments, failure to honor agreed-upon time tables, and intentionally maligning the good reputations of a staff member and me." The memo further asserted that Jane Doe wanted to be supervised by someone else and that she claimed to have "engaged an attorney to file a sexual harassment lawsuit" against Duncan. According to Duncan's memo, Jane Doe had also been

"defaming" him by telling other staff that he had a history of harassment and that he had been investigated previously for using a racial epithet in reference to another employee. He also wrote, "nothing can describe the humiliation, anger, and hurt I feel from a vindictive employee propagating things so vulgar and malevolent." Duncan's memo also described a meeting with Johnson concerning various alleged problems with Jane Doe and a confrontation with Jane Doe over her request to be supervised by someone else. Duncan then complained that Johnson was denying that she had any responsibility to be present at further meetings with Jane Doe and further asserted that:

> None of you should be directing me to continue supervising [Jane Doe] while the investigation is taking place. You especially should not be directing me to document [Jane Doe's] poor performance during this investigation. Both of these directives compromise my rights and [Jane Doe's] rights. To ask me to supervise and document her oppositional behavior while being investigated for sexual harassment or gender bias puts me in great jeopardy of being determined biased or being viewed as retaliating against her.[7/]

Duncan then complained about the decision to have Dozier and Johnson investigate Jane Doe's complaints because, he asserted, through his "union responsibilities" as a shop steward and member of the Board of the Sacramento Air District Employee's Association (SADEA) he had opposed their views "numerous times" during negotiations over a new collective bargaining agreement. He further asserted that "I believe they do not like me." Duncan also wrote that he also believed Covell was "shrugging off the seriousness of [Jane Doe's] actions and accusations; thereby leaving me to take the blame for her misconduct." In concluding, Duncan "formally" requested that he be removed as Jane Doe's supervisor and added that he would "take whatever measures are necessary to defend myself should your investigative team proceed with any findings other than, that I am innocent."

It appears that sometime during the following week, Covell replied to Duncan's memo. Although neither party offered the reply into evidence, it is clear that Covell declined to grant Duncan's requests. As a result, on September 20, 1996, Duncan wrote another memo to Covell. RX 27. In the memo, Duncan thanked Covell for his quick response, but added that he was disappointed that his concerns "were not given the thoughtful consideration I had hoped." He further wrote "[t]he supervisory staff cannot carry on in a 'business as usual' mode in this situation and this is where management's responsibility lies, especially when it comes to sexual harassment, slander, insubordination and threats of a lawsuit against the supervisor." Duncan then asserted that Jane Doe was blocking his access to her calendar, spreading "malicious stories about our section," sending mail without review, creating a "hostile work environment," and "scheming to entrap me in some sexual harassment event." Duncan concluded: "[g]iven that you have denied my formal request to be relieved as her supervisor, and for the reasons cited above, I am forced to act on my own behalf and hereby resign from any further involvement with her. Effective immediately I am formally noticing you that I can no longer operate over Ms. [Jane Doe] in the capacity of her supervisor."

Four days later, Covell sent Duncan a reply memo in which Covell wrote that he did not believe that Duncan's memo "serve[d] a constructive purpose," and indicated that he intended "to

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[7/] He also wrote that County (and therefore District) policy "counsels against allowing the alleged harasser to continue to supervise or document the victim because it could be construed as a reprisal. It states that a 'reassignment or transfer may be necessary' to protect against reprisal."

wait until the ongoing investigation is fully completed before taking any action." RX 28. Covell added that Duncan's accusations that Covell had not been thoughtful or responsible in his approach to the matter were "untrue, unwarranted and unprofessional." Covell noted that delay in the matter resulted, in part, from Duncan's own actions, and in part from Covell's busy schedule. He noted, as well, that he had consulted "several persons who are knowledgeable about personnel issues, including the District Counsel" and that they had concurred in his handling of Duncan's complaint. Covell then noted that none of the many allegations concerning Jane Doe set forth in Duncan's September 20 letter were supported by "objective facts or documentation," and specifically requested that such materials be provided to him. Covell further noted that, to his knowledge, neither Duncan nor Munz had followed his direction to document Jane Doe's misconduct or develop a Performance Improvement Plan to improve her performance and correct her allegedly improper behavior. Covell then pointed out that the District's counsel had indicated that such documentation would be necessary to support the course of action Duncan was proposing. Covell then responded to Duncan's asserted fear of personal liability by commenting that "[s]o long as you take a professional approach to your supervision" of Jane Doe and "carefully document your directions to her and exchanges with her, the District Counsel does not believe you are placed in any 'significant personal jeopardy.'" As well, he wrote, Jane Doe had told him that she had no plans to make any sexual harassment claim against Duncan. Finally, Covell rejected Duncan's putative resignation from supervision of Jane Doe in the following words: "I categorically deny that you have any authority to unilaterally resign from such supervision unless you are resigning your position with the District." Covell added that failure to resume such supervision could result in disciplinary action. According to Covell's trial testimony, until the occurrence of this dispute he had "no reason to believe" that Duncan was not doing a great job. Tr. at 1661-62.

At some unspecified date in October of 1996, a group of District employees met with an audit team from EPA to hear the team's preliminary findings. Tr. at 374-77. According to Munz, immediately after that meeting there was a second meeting involving only District employees, during which Covell "angrily pointed his finger at all of us and told us that David Howecamp of EPA had told him that he had moles in his organization that were giving information to EPA."[8/] Tr. at 376-378. According to Covell, Howecamp had in fact twice mentioned the possibility of "moles" and that on both occasions other District employees had been present. Tr. at 2187. He further testified that he "may have mentioned it when I got back to a management meeting or something like that. But beyond that I don't recall having said it." Tr. at 2187. According to Munz, about a month after Covell's "moles" comment, Covell and the District's in-house counsel instructed Munz, Duncan and two other District employees not to mention problems with the District's permitting of "major permitting sources" or violations resulting from these problems during an upcoming meeting that Munz had arranged with the some EPA attorneys and staff members. Tr. at 365-69. However, Munz testified, he disregarded these instructions. Tr. at 369.

[8/] It is noted that Duncan's opening post-trial brief asserts that during this meeting "Covell angrily accused staff members including Duncan and Munz, of being the moles." However, although Munz's testimony does allege that Covell pointed his finger at "all of us" at the meeting, Munz's list of the meeting's attendees does not include Duncan. Tr. at 376. Moreover, although Munz's testimony does assert that Covell was angry, it does not explicitly contend that Covell directly accused anyone at the meeting of being a "mole." It is further noted that in a letter that Munz, Duncan and Clark sent to the EPA in March of 1997, Covell's comment about the "moles" was described as being boastful instead of angry. CX 33 at 62136.

On November 1, 1996, Duncan sent an inter-office memorandum to Covell and various other District executives in which he asserted that he had a mental disability and was entitled to accommodation under the Americans with Disabilities Act. RX 11 at 9. The text of the memo is as follows (capitalization in original):

> DECLARATION OF MENTAL DISABILITY AS COVERED BY THE AMERICAN DISABILITIES ACT (ADA):
> I have been diagnosed with a mental disability. I have been taking various medications over the last few years as a result of my disability. I have been working out of class with no additional compensation for over five years. Consistently, over the last year, the new Management Team has chronically neglected to provide the support required to sustain me in my role as Supervisor of Compliance. Additionally, the malicious and unwarranted harassment of my person relative to my interactions with Linda Clark have undermined the treatment of my disability and my health.
>
> FORMAL REQUEST FOR ACCOMMODATION AS PROVIDED UNDER ADA:
> Based on the above issues, I am formally requesting ACCOMMODATION. The form of accommodation I'm requesting is in accordance with my current Civil Service Classification, that is to supervise one employee or provide lead to 2 or more employees.
>
> DECLINATION TO TENDER MY RESIGNATION
> I decline to resign my position of Senior Air Pollution Control Specialist
>
> DISCRIMINATION OF MY PERSON IN RESPECT TO COMPENSATION AND GENDER
> The fact that Aleta Kennard is compensated for "out of class work" and I am not amounts to a discriminatory practice. Her Civil Service job description, as it relates to the supervision of employees, is identical to mine. The other 2 male Senior APC Specialists also do not receive special salary adjustments. I believe the extra compensation for Aleta Kennard is gender motivated and also a discriminatory [sic].

According to Duncan's trial testimony, he filed this request because Covell's memo telling him he could not "resign" as Jane Doe's supervisor caused him to fear that he would be fired unless he disclosed his mental disability and requested an accommodation. Tr. at 2612-15.

On November 12, 1996, Johnson sent to Dozier an e-mail memo concerning three subjects: Duncan's accommodation request, a decision to place Jane Doe on leave with pay pending an evaluation of her mental state, and a discrimination complaint filed by Clark with California's Department of Fair Employment and Housing ("DFEH"). CX 2. Johnson's memo listed the subject of the memo as "Three Confidential Matters" and, as a result, this memo has become known as the "THREECON" memo. The full text of the memo is as follows:

> 1. Based on two dr's notes received on [Jane Doe], it was decided in a meeting with [Covell and others] and me to place [Jane Doe] on Administrative Leave with pay pending further evaluation of her mental state. I'm trying to reach [Jane Doe] tonight by phone to instruct her not to come to work until further notice.

2. Also in the meeting: it was decided that a packet will go to [Jane Doe] and Mark Duncan both which contains a Request for Reasonable Accommodation, Workers' Comp Claim Form Packet and an SDI packet. Apparently Mark has given Eric a letter advising of various disabilities (I have not seen a copy) and is requesting accommodation.

3. Linda Clark has filed a complaint with DFEH charging that she has been denied reasonable accommodation. The notice from DFEH arrived today addressed to you. Lynda [sic] opened it and gave it to me. We have 21 days to respond.

According to Dozier, after she read this memo she saved it for "a few days" in an electronic file that she had entitled "5150." Tr. at 744-46, 753. Dozier also testified that the 5150 file was the only electronic file she had and, as a result, any e-mail she decided to save went into it, regardless of the e-mail's subject matter. Tr. at 746, 752, 754, 756. Dozier also testified that, at the time she saved the THREECON memo, she believed that the contents of the 5150 file could not be accessed by other District employees and further represented that she did not learn until later that she had mistakenly selected computer settings that allowed other District employees to access the file through the District's local area network (LAN) system. Tr. at 747, 787. Nonetheless, she testified, other District employees "couldn't just run across it by mistake," and explained that before someone could read the contents of the file they would have had to make a deliberate effort to gain access to it. Tr. at 747-48. According to Dozier, the term "5150" refers to things that are "unbalanced or didn't make sense" and that when she worked for the City of Oakland's Office of Public Works the term was also sometimes used to refer to "crazy people." Tr. at 744-45, 758. Dozier also testified that she used the term 5150 in naming her e-mail save file because at the time she set up the file, the District was separating from Sacramento County and things were "very, very chaotic." Tr. at 755.

As indicated in the THREECON memo, on November 13, 1996, Johnson provided Duncan with a number of forms, including a form titled "Request for Reasonable Accommodation." RX 11 at 25. On November 26, 1996, Dozier wrote to Duncan, informing him that the District had yet to receive a completed request form, and asking him to return a completed form to her by December 3. RX 11 at 39. The note also indicated that if Duncan had questions or needed additional time, he should contact Dozier or Johnson. On December 3, Duncan sent an e-mail to Dozier asking for additional time. RX 11 at 40. Dozier responded by e-mail a few minutes later and indicated that "the additional time to complete the form is fine." In reply, Duncan sent an e-mail indicating that he would "hopefully" complete his request by December 13.

Duncan completed the form on December 11, 1996. RX 11 at 21-25. In it, he listed his disability as "adult attention deficit disorder/depression," and listed his physician as Dr. Clopton. In an attachment, Duncan listed the accommodations he requested. These included: (1) flexible work hours, including an arrival time between 8:30 and 9:30 a.m., a lunch period of one-half to one hour, and a departure time of between 5:00 and 6:00 p.m., (2) "[f]lexible leave usage (including leave without pay)," (3) telecommuting privileges "1-2 days per week," (4) a "[q]uiet and undisruptive work environment," (5) "[f]lexible break times," (6) "[r]ecognition and tolerance of union board position and advocacy of disabled," and (7) "[m]anagement support." Duncan then described how the accommodations would help him. He wrote, first, that flexible hours would help "in my medical appointments as well as the medical issues required by my sons' disability." He then wrote that "a telecommute day once a week would enhance my efficiency by reducing distractions,"

"[r]especting my 'other hat' associated with my union board position would relieve stress from my job," and "[a]ssistance and support from management would greatly reduce the stress level on myself and the whole office."

According to Dozier's testimony, in early January of 1997 a supervisor reported to her that an unnamed employee had found a copy of the THREECON memo on someone's chair. Tr. at 781-83. Dozier further testified that she could not understand how the memo "popped up" and therefore had Kevin Williams, the District's LAN administrator, determine how the memo had been disclosed. Tr. at 782. She added that after searching the LAN systems computer records, Williams printed out a document indicating that someone using Duncan's computer password had in effect gone into her computer files and "moved" the THREECON memo into a file used by the Enforcement Section. Tr. at 782-83, RX 2 at 352 (computer record purporting to show that on November 14, 1996 someone using a computer password assigned to "MARKD" had transferred a document entitled "THREECON" into the files of the Enforcement Section).

According to Grose, he first became aware of the disclosure of the THREECON Memo on January 7, the day after he started working at the District. Tr. at 1461-62. Grose further asserted that when he spoke to Jane Doe about the memo's disclosure, she was "quite shocked and upset by it." Tr. at 1936. On January 9, 1997, Grose testified, he learned from Kevin Williams that computer records showed that Duncan had "messed with" the THREECON Memo. Tr. at 1820-21. On the following day, Grose recounted, he asked Duncan if anyone else knew or had used his computer password and was told that to the best of Duncan's knowledge, no one else was aware of it. Tr. at 1820-21, RX 2 at 337-38. According to Grose, on January 21 he again met with Duncan and told him that the evidence indicated that he was the person who transferred the THREECON memo to the Enforcement Section's files. Tr. at 1823, 2199, RX 2 at 349-51. At that time, Grose testified, Duncan denied being the person and attempted to demonstrate how someone else could have moved the memo, but "whatever he was trying to show me on my computer in my office it failed because nothing really came of that," perhaps because Dozier had "closed" her e-mail. Tr. at 1823-24. Grose added that it was his impression that in addition to denying that he had been the one who transferred the THREECON memo, Duncan also denied "anything else associated with that at all." Tr. at 2197. Grose further testified that he then told Duncan that the evidence was "compelling" that he had been the perpetrator and that disciplinary action would be pursued. Tr. at 1824, 2199. Thereafter, Grose testified, he began preparing a written Notice of Disciplinary Suspension. Tr. at 1824, 1828, RX 2 at 349-51.

On January 28, 1997, four copies of a 20-page draft letter from Duncan, Clark and Munz to Sacramento attorney Gary Messing was found by District clerical personnel on a computer printer nearest to the offices of the District's senior managers. CX 1, Tr. at 64-66 (Duncan testimony). The letter's caption lists its subject matter as follows (capitalization in original):

> THE VIOLATION OF STATE LAW BY THE SACRAMENTO METROPOLITAN AIR QUALITY MANAGEMENT DISTRICT BOARD OF DIRECTORS AND THE SACRAMENTO COUNTY BOARD OF SUPERVISORS FOR CONSPIRING TO DEPRIVE AND WILLFULLY STRIPPING DISTRICT STAFF OF STATUTORY ENTITILEMENTS [sic] BY STATE LAW AND NONSTATORY [sic] COMPENSATION ESTABLISHED BY CONTRACT IN THE CREATION OF THE SMAQMD AS A SPECIAL DISTRICT.

> HARASSMENT FOR SUPPLI NG [sic] INFORMATION TO THE OVERSIGHT (WHISTLE BLOWING) AUTHORITIES REGARDING "BADGES OF FRAUD" AND WILLFUL NEGLECT OF DUTY.
>
> DISCRIMINATION, RETALIATION AND DEFAMATION OF OUR PERSONS BY THE DISTRICT MANAGEMENT STAFF AND NORM COVELL FOR THE FOLLOWING: AGE, GENDER, MENTAL DISABILITY, HOSTILE WORK ENVIRONMENT AND SEXUAL HARASSMENT WITH REGARDS TO THE AMERICANS WITH DISABILITIES ACT.

The great majority of the letter's text (i.e., almost all of the letter's first 17 pages) consists of an attempt to explain the contention that the District evaded Sacramento County civil service rules by illegally restructuring itself when making legislatively-mandated changes in its governing board in 1994. However, in a second section of the letter entitled "Cooperation with the Department of Justice" the letter indicates that in 1993 and 1994 Duncan and Munz had spoken candidly with EPA employees who were auditing the District's performance and that since Duncan's July 1996 meeting with the EPA special agents, Duncan, Clark and Munz had sent the EPA investigators five "Informational Packages" including "internal documents and information that point to willful misconduct" on the part of the District and its management. CX 1 at 18-19. The letter further represents that "the Department of Justice is currently utilizing the information and investigating various District practices and staff for criminal neglect of duty and fraud." The letter also indicates that the authors felt that Covell believed that they were the "moles" who he had been told were supplying information to the Department of Justice. The letter concludes:

> We wish to receive counsel as to our options and strategies in pursuing damages for the above issues against the District Board, Civil Service System, Norm Covell and his management team and a few employees who are openly discriminating, harassing, and defaming us. . . . It is obvious to us a plot to deprive or remove us from our rightful positions through intimidation, favoritism, false accusations, abuse of process, the creation of a hostile work environment and discriminatory work practices. Below are the entities and people who have damaged us.

Included in the letter's list of proposed defendants were the District's Board, Covell, Dozier, Taylor, Grose, Wilson, the Board of the union representing the District's employees (SADEA), and six co-workers who allegedly committed acts of defamation, discrimination, retaliation, libel, slander, and sexual harassment.

According to Grose, he was in Dozier's office when someone (presumably a clerical employee) brought what he believes to be the January 28 letter (hereinafter "the Messing letter") to Dozier. Tr. at 1360-61. However, he testified, Dozier told him that it was not anything he needed to know about. Tr. at 1360. He also testified that he has never read the letter and is unaware of its contents. Tr. at 1361. According to Dozier, after reviewing the letter, she spoke to Covell about who had written the letter and to whom. Tr. at 801. She also testified that Spinelli was present the first time she mentioned the letter to Covell, though she conceded she could not remember exactly the order in which she spoke to the two of them. Tr. at 801-02. Dozier also testified that her primary focus at the time was how to deal "with an employee who may have been using our time and our materials to generate this particular [20 page] document." Tr. at 803. According to Spinelli, she took the letter from Dozier and went to her own office to read it. Tr. at 595. Upon reading the letter, she

was concerned by the allegation that a criminal investigation into the District was pending. Tr. at 602. She also testified that she later informed Covell in his office that Duncan, Linda Clark, and Eric Munz had alleged in the Messing letter that they were supplying information to the EPA in connection with a criminal investigation. Tr. at 612. According to Spinelli, Covell was "puzzled" by the report. Tr. at 613. According to Covell, Spinelli also told him something to the effect of "this must have been what Dave Howecamp was referring to in 1994 or whenever it was about moles within the program." Tr. at 1712. He understood this to mean that Duncan was the "mole" referred to by Howecamp. Tr. at 1712. According to Munz, at about 3:00 p.m. on January 28 Spinelli went to his office and personally handed him a copy of the Messing letter along with a "Post-It" note stating, "this was in my printer." Tr. at 393-94, 397. Munz further testified that she then asked him, "is it all true, especially the part about the criminal investigation?" Tr. at 394. Munz also testified that around noon that same day, he had been in Duncan's cubicle and had observed Duncan repeatedly made unsuccessful attempts to print out a copy of the Messing letter. Tr. at 396-97.

According to Duncan, he had not intended to have the Messing letter printed on the network printer. Tr. at 2604. He testified, as well, that the routing of the Messing letter to the network printer was the first and last time that something he had tried to print on his desktop printer had come out somewhere else. Tr. at 2609. Duncan also testified that, ultimately, the Messing letter was never sent. Tr. at 2601. According to Kevin Williams, the District employee primarily responsible for administering the District's internal computer network, print jobs are normally routed to each computer user's "local" printers and if such a printer is not working, the print job will not be automatically rerouted to one of the District's two network printers. Tr. at 2219-2223. Instead, he testified, if a local printer is not working the user would have to go to the network printer icon and "point and click" to send the document to the network printer. Tr. at 2222-23. As well, he testified, even if a document is printed on the network printer, subsequent documents will not go to that printer, unless specifically selected on each job. Tr. at 2223. In his opinion, if a user intended to print a document on the user's local printer and the document was instead printed by a network printer, the user must have inadvertently selected the network printer for the document. Tr. at 2225-26. Williams also denied resetting the printer default on Duncan's printer in January of 1997. Tr. at 2225.

On January 29, 1997, the District held a workshop on preventing sexual harassment. Tr. at 1363-64. According to Grose, Duncan and Munz were present, but Duncan was about 40 minutes late for the meeting. Tr. at 1364. The next day, Jane Doe complained to Grose that she was being subjected to a hostile work environment by Munz, Duncan and a third Enforcement Section employee. Tr. at 1364-66 (testimony of Grose), CX 19. In particular, she alleged that Duncan and the other employee, "had blocked [a] doorway and not allowed [Jane Doe]to pass through." Tr. at 1369. As well, it was alleged that "in order to pass through the passageway, [Jane Doe] had to come into physical contact" with Duncan and the other employee. Tr. at 1370. About three weeks later, Munz sent a memo to Grose in which Munz quoted Grose as having told him that he had determined, after conducting a thorough investigation, that the allegation against Duncan and the other employee were "bogus" and that the complaint against Munz was "foundationless as well." CX 19. During his trial testimony, Grose confirmed that his investigation into the complaint against Duncan had been closed and that in his opinion there had been "a lack of evidence to support the claim." Tr. at 1377, 1418.

On February 4, 1997, Grose sent Duncan a "Notice of Proposed Disciplinary Action" in which he indicated an intention to recommend to Covell that Duncan be suspended from work for

five days without pay. RX 2 at 349-51. In a section summarizing the facts warranting the suspension, Grose wrote that on January 9 he had observed Williams locate computer records showing that Duncan had transferred the file containing the THREECON memo to an Enforcement Section computer drive ("W Drive") on November 14, 1996; that on January 10 Duncan had denied any knowledge of anyone using his computer or having access to his password; and that on January 21 Duncan had denied being the person who had transferred the THREECON memo to the W-Drive. The Notice then asserted that the "nature of the confidential correspondence" between Johnson and Dozier was such that "the act enabling it to be made available publicly is very serious and cannot be condoned under any circumstances and indeed, puts the District at risk of great liability." The Notice further asserted that Duncan's conduct had violated the District's Initial Terms and Conditions of Employment in four specific respects. In particular, it was alleged: (1) that making the document "available to a general audience" demonstrated a failure to "analyze situations accurately and adopt an effective course of action," and therefore constituted an "inexcusable neglect of duty," (2) that the "inconsistencies" between Duncan's January 10 and January 21 statements constituted dishonesty, (3) that making a confidential memo publicly accessible constituted "discourteous treatment" of the fellow employees who wrote, received, and were the subjects of the memo, and (4) that making the memo available to the members of the Enforcement Section put the District "at great liability," and therefore constituted a "failure of good behavior."

Pursuant to a California Supreme Court decision governing disciplinary actions against state government employees,[9/] on February 10, 1997 Taylor began a so-called *Skelly* inquiry into the justification for the proposed five day suspension. On the same date, Duncan provided Taylor a memo setting forth his written response to the suspension allegations. RX 2 at 342. In the memo's first paragraph, Duncan asserted that "[i]n all cases I am INNOCENT of the above allegations." As well, he specifically denied transferring the THREECON memo to the W-Drive and offered two alternate theories to explain how his password could have become associated with the transfer of the THREECON file. First, he contended, knowledge of his work station password could have been disclosed to "any of the management team" by Williams or his assistant, and added, in an apparent reference to the disclosure of the Messing letter, that there had already been "deliberate work station tampering" that had caused print jobs from his work station to be rerouted "to the printer used by management staff and the District Counsel." Second, Duncan contended, "[a]nyone who wished to harm me could simply wait until I went to lunch and they would merely sit at my work station (within 15 minutes) and transfer the file." He then asserted that "[t]here are people in my area who wish me harm and I would not put this method of injuring me beyond their ethical boundaries." Next, Duncan contended that he should be regarded as a victim because his alleged disabilities "were maliciously exposed to the District staff by someone and I insist you find that person(s) and discipline THEM" (capitalization in original). He then contended that "[t]he TRUE FAULT [in this matter] lies with [Johnson and Dozier] who negligently transmitted confidential information on an insecure system" (capitalization in original). Duncan then gave the following description of how he had previously read Dozier's e-mail (capitalization in original):

> Some time ago, I proxied LaShelle Doziers' [sic] mail to retrieve a document I had mistakenly deleted. This document was found in a file labeled [sic] "5150". The correspondence I was looking for was my safety shoe memo to Lashelle. The file contained many of my E-mails, as well as E-mails from [Munz, Clark, and two other employees]. This strange label bothered me and finally I searched California Code

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[9/] Skelly v. State Personnel Board, 15 Cal. 3d 194 (1975).

> for “5150". What I found was very disturbing. 5150 is the section in the California Welfare and Institutions Code which enables the state to seize a mentally disturbed person for observation in a mental health facility for 72 hours (attached). This person must be deemed a danger to himself or herself or others to envoke this section of the code. Additionally, this is the slang term utilized by the police and mental health people for the mentally ill. I was horrified that our correspondence was contained in a file which labeled us, as “Mentally Disturbed.” I was allowed to access LaShelles' [sic] Groupwise “preferences” through her proxy and I found that she had approved “read and write” access for EVERYONE, to Email, Appointments and Tasks. This meant that ANYONE could access her E-Mail and read, write, copy and transfer her files as well as viewing who she labeled as mentally ill.
>
> This callous disregard of those individuals she labeled 5150 dramatically reveals her personality flaws in employee relations and explains her Her [sic] aristocratic behavior and condescending treatment of Eric, Linda and myself. . . . I insist that the District pursue disciplinary action against Carolyn and LaShelle with the same zeal it took with me.

During his trial testimony, Duncan repeated the foregoing account of how he came to discover Dozier's 5150 file and again explicitly denied that he was the person who had transferred the THREECON memo to the W drive. Tr. at 83, 2250-72. He also asserted that he felt that his initial electronic search through Dozier's computer files to find his memo about safety shoes was necessary because Dozier was so hostile to him that she would not have voluntarily given him the memo even if he had directly asked her for it. Tr. at 2623-24. When asked if he believed it was unethical to have read Dozier's e-mail, he first testified that he believed Dozier’s placement of his memo in a file titled 5150 was “extremely unethical,” and then testified “[s]o I mean it’s just a matter of which is more unethical.” Tr. at 2512. Duncan also admitted that after finding and printing out the safety shoe memo he had “checked on the law to see if there was anything illegal” about going into Dozier's e-mail because it had “seemed unethical” to him when he did it. Tr. at 258-59.

According to Grose, in late January he became aware that Covell would soon be issuing a memo ending informal telecommuting by District employees and therefore verbally informed Munz on February 3 that he was “pulling the plug” on telecommuting. Tr. at 2658. Munz agrees that Grose spoke to him on February 3 about terminating telecommuting privileges, but implied during his trial testimony that the termination of such privileges applied only to Duncan. Tr. at 397-98. As anticipated by Grose, on February 5 Covell issued a memo formally directing District managers to terminate all informal telecommuting. RX 26. Six days later, Grose himself issued a memo to Stationary Source staff on “Telecommuting Policy.” CX 34. The memo stated, first, that “all telecommute arrangements are rescinded.” It then stated that until a new telecommute policy was established, “all requests for overtime work at home must be approved by me. No regularly scheduled work shall be done at home.” On the same day, Grose also issued a memo titled “Hours of Work.” RX 22. This memo, which was addressed to all Stationary Source Section staff members directed that (1) effective February 24, 1997, all work shifts were required to begin and end within the hours of 6:00 a.m. and 6:00 p.m., with any work outside that period subject to Grose’s prior approval, (2) all schedule changes were to be approved by Grose, and (3) by February 24, 1997, all employees were to inform Grose of their intended work schedules. According to Grose, when he asked Duncan for his work schedule, Duncan merely provided a copy of his ADA accommodation

request. Tr. at 2664. Likewise, Duncan testified that when Grose asked what his schedule was, "I told him I was waiting, pending my accommodation." Tr. at 2434.

According to an internal EPA memorandum, on February 11, 1997 Spinelli met with two agents in the EPA's Criminal Investigation Division in an attempt to learn the nature of the investigation referred to in the Messing letter. CX 33 at 62420. The memo indicates that she was told that the agents did not at that time consider the investigation to be "criminal in nature" and that at that point they were "attempting to evaluate" information they had received. During the meeting, Spinelli asked for the source of the information but the agents declined to disclose their source. The agents also told Spinelli that if they continued the investigation, the inquiry would focus on whether the District had spent money provided by the EPA in the manner intended, whether environmental laws were violated when permits were issued or inspections conducted, and whether there was any conspiracy between the District's Board and anyone else to violate federal laws. There is no evidence in the record indicating that this investigation ever led to any charges against the District or its employees.

On February 21, 1997, Taylor issued a report setting forth the results of his *Skelly* investigation. RX 18. According to the report, he conducted a "hearing" on February 10, interviewed Williams on February 12, and conducted e-mail testing on February 12 and 18. The report also set forth the respective contentions from Grose's February 4 Notice and Duncan's February 10 response. He also noted a contention of Duncan's, apparently raised at the hearing, that management had forged the document showing that Duncan's password had been used in moving the file. Regarding this contention, he concluded that it was "possible but highly unlikely that management would create a conspiracy to falsify this evidence . . . ." Regarding Duncan's contention that others had used his password or computer, Taylor concluded, after conferring with Williams, that it was "highly unlikely that anyone other than Mark accessed the mail." Taylor also concluded that the information about Duncan contained in the THREECON memo was not "particularly embarrassing" to Duncan, but would be embarrassing to Jane Doe if it were generally known. Taylor then set forth, inter alia, the following findings:

> •I find this act of violating someone else's personal mailbox reprehensible. To compound such an inexcusable act by blaming the person whose mailbox was violated is even more unforgivable. To further fail to notify the person that their preferences had been set so that others could access their email makes the violation even worse. Add to that the fact that the person is a supervisor with a higher level of authority and responsibility and it is, to me, incomprehensible.
>
> •This act alone, without any copying or moving of the email, is sufficient in my mind to warrant a suspension

Taylor added that the issue of Dozier allegedly maligning Duncan by naming her e-mail file "5150" was outside the scope of the disciplinary action, and that he saw no "retaliatory component" to the proposed suspension. According to Taylor's trial testimony, during the course of his *Skelly* inquiry he had investigated the theories that someone else had used Duncan's password, or "snuck up to Mark's computer" while he was away from it. Tr. at 1990. However, he testified, he found that there was no directory of passwords in the system. Tr. at 1990. As well, he testified, he determined that it would be difficult for someone to have used Duncan's computer undetected and noted that

there was a policy in the Stationary Source Division prohibiting employees from using other employees' computers. Tr. at 1991-92.

On February 27, 1997, Covell sent Duncan a letter notifying him that he had reviewed Taylor's report and had determined to suspend him without pay for the five-day period between March 3 and March 7, 1997.[10/] RX 2 at 337. The final paragraph of the letter informed Duncan that he had the right to appeal the suspension within seven calendar days and that any appeal should be in writing. During the trial, Covell testified that in making his decision to suspend Duncan he gave no weight to Duncan's whistleblowing activities. Tr. at 2186.

According to Duncan, during the week of his suspension he went into the District's office for "the purpose of sending an e-mail to all the people concerned with the appeal to tell them I wished to appeal the suspension." Tr. at 91. Duncan further testified that as soon as Grose saw him in the District's office, Grose told him that he was not allowed to be there. Tr. at 92. Duncan described Grose's demeanor as "combative" and testified that "his face was scrunched up," and his tone of voice was angry. Tr. at 93-94. Duncan further asserted that Grose "came up very close next to me and told me to get out," but did let him e-mail his appeal before escorting him out of the building.[11/] Tr. at 93-94. Duncan also testified that while he was in the office Grose walked "extremely close behind me so to make sure that I didn't veer off in any direction . . ."[12/] Tr. at 94. Duncan also intimated in his testimony that it was appropriate for him to have gone into the District's office during the suspension period because he had not been explicitly told that he "couldn't come to [the office]." Tr. at 92. However, Duncan also admitted that when Grose first encountered him he was sitting at the District's "internet station" trying to "pull up something" for Munz rather than writing an appeal and that, on the day this occurred, he had entered the District's office through its back door. Tr. at 2310-11. Grose acknowledges that after seeing Duncan in the District's office he told him that

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[10/]On the same day, Taylor sent Duncan a letter notifying him that he was recommending that Covell sustain the proposed suspension. RX 2 at 340.

[11/]Duncan's appeal was eventually considered by an independent arbitrator who held an oral hearing on December 1 and 2, 1997, at which both Duncan and the District were represented by counsel. ALJX 4. On March 25, 1998, the arbitrator issued a decision finding that the suspension was fully warranted. Id. According to the arbitrator's decision, during the oral hearing Duncan indicated that, since Dozier's electronic files were accessible to him, he did not consider them to be private, but insisted that "he read such files only if they were damaging to himself." Further, the decision indicates, Duncan "admitted to looking through some 50 e-mail files in search of 'suspicious' material for the [EPA] and perhaps in connection with a lawsuit." It is also indicated in the decision that Williams appeared at the arbitration hearing and testified that "he had no doubt, given the manner in which the system operates, that [Duncan] was the person who had placed the [THREECON] memorandum on the W drive." In a final section of the decision, the arbitrator noted that Duncan had admitted that "he had rifled some 50 or more files" and that he had even unsuccessfully attempted to gain access to files of one of the District's attorneys. ALJX 4 at 17. The arbitrator also observed that Duncan's "evasive answers and obfuscation show guilty knowledge" on the question of whether he should have accessed Dozier's e-mail. ALJX 4 at 18.

[12/]Initially, Duncan testified that this event occurred on the first day of the suspension period, but later acknowledged that it had occurred on the third day. Tr. at 2287-90. Grose also testified that the incident did not occur on the first day of Duncan's suspension, but on the third day, Wednesday, March 5. Tr. at 1403.

he had no reason to be there and he also agrees that he escorted Duncan from the office. Tr. at 1404-09. However, Grose testified, he was not angry and only "a little bit ... nervous." Tr. at 1405-06.

On March 18, 1997, Dozier sent Duncan's treating psychiatrist (Dr. Clopton) a letter setting forth a number of questions regarding Duncan's mental condition and the accommodations proposed in Duncan's Americans with Disabilities Act request. RX 11 at 2.

On or shortly after March 18, Duncan, Clark, and Munz sent a letter to EPA's Office of the Inspector General that invoked the provisions of section 322 of the Clean Air Act in complaining about Howecamp's alleged "mole" comment to Covell and of alleged harassment by District employees.[13/] CX 33 at 62134. Under the heading "subject" was written:

> Complaint of Malfeasance and Willful Misconduct in the Performance of Duty Against David Howecamp, Director of EPA Region IX, for Interfering with an Ongoing Undercover Criminal Investigation of [the District].
>
> Intentional and Malicious Breach of our Confidentiality by Howecamp to Norm Covell . . . After We Supplied Criminal Investigators Information About Suspicious Activities ....
>
> Also, for their Malicious Use of Position and Process to Perpetuate a Hostile Work Environment for the Purpose of Removing us from our Rightful Positions within the Sacramento District [a list of District employees follows]

In the text of the letter, the complainants requested a "formal investigation" into David Howecamp's putative wrongdoing and asserted that sometime between July of 1996 and January of 1997, Covell had "boasted in a District manager's meeting that David Howecamp . . . had disclosed to him that the District had 'moles' supplying information about the District to EPA . . . . As a result of this and assuming that we were the 'moles,' Covell enlisted the help of various District staff, outside of their normal duties, to closely monitor, harass, allege misconduct and obstruct us in our daily activities." The letter went on to allege that "[w]e recently have been confirmed as the 'moles' through management's tampering with Mark Duncan's computer." This "tampering" was, according to the letter, effected by the District management "re-rout[ing] Duncan's printer cable connection." In addition, the letter described the complainants' workplace as "so oppressive and vicious that we have been forced to seek refuge by filing complaints with the California Department of Fair Employment and Housing and by declaring emotional and mental disabilities under the Americans with Disabilities Act, these conditions actually being precipitated and exacerbated by our hostile workplace environment." The letter concluded that David Howecamp's "callous disregard for us requires a thorough investigation."

On March 20, 1997, Duncan has asserted, there was a second confrontation between himself and Grose. In particular, Duncan asserted in an April 21, 1997 memo to Covell entitled "Persistent Intimidation, Physical Aggression and Workplace Harassment by David Grose" that while he was in Grose's office on March 20, Grose accused him of making an offensive remark to another employee, asked him to explain his whereabouts on February 21, and criticized his "leadership" of

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[13/] It is noted that although the letter is dated March 18, 1997, notations on the letter indicate that it was not received by EPA until April 4, 1997. CX 33 at 62134.

his section. RX 2 at 328. According to Duncan, the other employee had denied having been offended by Duncan's remark and the inquiry concerning his whereabouts on February 21 was really a ruse to catch him in a lie. In Duncan's words:

> I explained to him that off the top of my head, I didn't know (a month had elapsed). I asked him if he had checked the sign out sheet at the front desk. He told me that he had not, though he would check the sheet later. I thought back on it and I told him that I had been out spot checking visual emission sources and some problem sources in the District. He replied that he felt any surveillance that I embarked upon should be with the zone inspector. I told him that with my many years of experience as an inspector and supervisor I merely wanted to check the "pulse" of County concerning these problem sources. He acknowledged the value of surveillance but told me not to go out into the field without a "purpose." He added, that on February 21, LaShelle Doszier [sic] was looking for me in the afternoon to "serve me" with papers and they could not locate me. I said that my check out sheet should've told them what I was doing and that I recalled that I was patrolling the Del Paso/North Highland areas. Grose agreed with me and then told me that I had written "surveillance — Java City and RC Collet" on the sign out sheet. I was very disturbed by his statement. Grose had tried to trap me in a lie by not revealing that he had checked the sign out sheet that day. I told him that it had all worked out because La Shelle did "serve" me and I had appealed my suspension... . . I was very uncomfortable with our "meeting" and wished it to be over, especially with the predominant overtones of counseling/discipline.

Duncan further alleged that Grose's concerns about complaints of neglect Grose claimed to have received from Duncan's subordinates were in fact an "arbitrary and subjective appraisal of my skills." Duncan also wrote that he told Grose that his subordinates could not expect him to have the same enthusiasm as before because his morale had been adversely affected by a number of "issues that were plaguing" him: "unequal treatment and pay (gender related), discriminating hiring and promotion policies, the hostile workplace, and the noncompliance with labor, ADA, and Civil rights laws as well as the civil service system." Duncan then asserted that the following occurred:

> He then interrupted me and angrily asked whether I wanted to be a "field person or a supervisor". Surprised at his intensity, I replied that I am a supervisor working out of class and being threatened with disciplinary action for not violating sexual harassment policies. Additionally, I have been disciplined for something I did not do to cover the ineptness and the negligence of the Management Staff. His face became red. He leaned towards me and in an angry voice repeated "what do you want to do, be a field person or a supervisor?" I replied that I was a supervisor but not currently compensated for my work. . . . I told him that I had filed a complaint with the California Department of Housing and Employment and his interrogation of me amounted to harassment. Grose became enraged and said "I thought you would say that". He rose from his chair, moved from his desk and stood in front of me. I was still sitting, stunned, and frozen in disbelief. I was scared. Grose loomed over me and angrily yelled "I don't have to tolerate this. Get out of my office!".... Shaken and upset, I left my cubicle to report this incident to Eric Munz my Supervisor. [Munz and Duncan then proceeded back to Grose's office, where Grose] stated that I had angered him when I wouldn't answer his question. He stated that he

> needed to get the work completed and he was tired of the classification issues. I explained that my position on the Union Board required me to take a purist approach to classification and I could not in good conscience work "out of class" without compensation. Grose said that he also was a purist about work and needed to get the inspections completed. Grose stated that according to management we were not civil service employees. Therefore these classification issues were irrelevant. We both agreed to disagree and committed to respecting each other's position. . . . I told him I was still going to file a complaint for harassing me. He glared at me and said "Go ahead, take you best shot, Go for it!" We then left his office.[14/]

On or about March 24, 1997, Duncan, Clark and Munz sent a written complaint under section 322 of the Clear Air Act to the Washington, D.C. office of the Department of Labor's Wage and Hour Division. CX 30 at 27. The text of the letter was essentially identical to the text of the March 18, 1997 letter sent to Inspector General of EPA. As a result of this complaint, in early April of 1997 OSHA investigator Charles Byers informed the District of the complaint and began interviewing District employees, including Grose. According to Grose, it was at this time (i.e., on April 8 or 9, 1997) that he first learned that Duncan, Munz and Clark were cooperating with an EPA investigation. Tr. at 1362, 1833. Before then, he testified, he didn't "have a clue" about any "whistleblowing." Tr. at 1833.

On April 16, 1997, Duncan, Clark and Munz sent a memo to Roger Dickinson, a member of the District's Board, in which they alleged that "[t]hings are totally out of control at the air district" and that they were "afraid that someone is going to get seriously hurt, or worse, unless you and the other Board members immediately intervene." (emphasis in original). CX 30 at 34. The memo then alleged that because they had provided information to the EPA they were being subjected to "severe and malicious" harassment by the District's management. (emphasis in original). In concluding, they requested that they be placed on paid administrative leave, effective immediately, "until such time as both Federal investigations have been completed." Attached to the memo were two memorandums from Munz in which he alleged specific incidents of harassment against himself, Duncan and Clark. The next day, Spinelli sent the complainants a letter informing them that since it was inappropriate to address a request for administrative leave directly to the Board, the Board would not act on the request. Spinelli also noted that any request for a leave of absence should be submitted to Johnson in writing and comply with the guidance set forth in Article 9 of the General Unit's Labor Agreement. RX 2 at 335.

On April 18, 1997, Grose sent Duncan a certified letter captioned "Order to Report to Work." RX 2 at 334. In this letter, Grose noted that earlier that day Duncan had left a message indicating that he would not report to work "until the Board of Directors made a decision" regarding his request for administrative leave. The letter then informed Duncan that District employees cannot request administrative leave but could request leaves of absence in the manner described in Spinelli's letter of April 17. Grose also wrote that Duncan should either submit such a request by April 21, 1997 or report to work by 8:30 on the same date. Grose concluded that "upon your return, there are several performance issues to discuss with you. Your absence from the office has prevented me from discussing these issues with you at an earlier date." According to Grose's trial testimony, the performance issues included the "zone plan" and Duncan's cellular phone use. Tr. at 1438.

[14/]During the trial Duncan claimed that this incident occurred after he had filed his Department of Labor complaint. Tr. at 99.

On April 21, 1997, Duncan sent Covell a memo entitled "Persistent Intimidation, Physical Aggression and Workplace Harassment by David Grose." RX 2 at 328. In the memo, Duncan alleged that Grose had "advance[d] at me in an aggressive fashion and is verbally combative." According to the letter, this behavior first occurred when Grose had ordered Duncan to leave the District's offices during his five-day suspension. According to Duncan, at that time Grose's behavior was so confrontational, "I thought he was trying to pick a fight (physical combat) with me." According to Duncan, Grose also "assailed" him a second time during their confrontation on March 20, 1997. The letter then alleged that a third "altercation" had occurred near a District copy machine on April 7, 1997 as Duncan was "copying the transcripts from a meeting" attended by Jane Doe, Covell, Johnson, Munz, and Duncan. Duncan wrote that Grose "moved very close to me to observe what I was copying, again in my personal space." According to Duncan, Grose told him to stop his copying because it did not involve District business and Grose repeated his order when Duncan replied that it was "an issue of District business." In the memo, Duncan also complained that at some unspecified time Bridget Tollstrup, one of the District's managerial employees, had disrupted a meeting between Duncan, Munz and Clark. According to Duncan, Tollstrup was "angry and out of control," as well as "inappropriate and hostile." Duncan ended the memo by asking Covell to "[p]lease talk to your staff and ask them to refrain from creating a workplace that is hostile and intimidating."

According to Duncan, beginning on either April 21 or 22, 1997 he became so distraught by the alleged harassment that he had become "afraid to go to work" and was therefore medically disabled. Tr. at 97-105, 1865, 2311-12, 2349. In particular, Duncan testified that "earlier in the week" there had been a confrontation with Grose that caused him so much "anxiety and apprehension" that his stomach became upset and he went home.[15/] Tr. at 103-04. Thereafter, Duncan testified, he went to see his family physician and a psychiatrist and told them about his stomach aches and work situations. Tr. at 104. According to Duncan, the family physician gave him an off-work slip for 30 days and a heart monitor, and the psychiatrist gave him an off-work slip for two weeks, based on the psychiatrist's conclusion that it was "too dangerous" for Duncan to return to work. Tr. at 104, 2349, 2354. For awhile thereafter, Duncan testified, he called in sick every day. Tr. at 105. Duncan testified that although he had the slips mentioned above, he "withheld them" because both physicians "had asked to stay out of this hearing." Tr. at 105. He testified that, instead, he only told Grose about these "leave notices" and referred Grose to his previously-submitted request for accommodation under the Americans with Disabilities Act. Tr. at 105.

[15/] During the trial, Duncan described the confrontation as follows:

> Earlier in the week David Grose had been yelling at me in his office concerning my request for out of class pay and my cooperation with EPA. And he ordered me out of his office. Stood over me in a chair and ordered me out of the office when I told him that I thought I was being harassed. And he said, "I thought you would say that. I don't have to take that. Get out of my office." And I said, Are you ordering me out of the office? That's kind of — I mean, disbelief. And he said, yes, get out of my office. And he was standing over me and I had to squirm out of my chair and head out of my office. And as I was heading back to my desk he was on me again really close. And I slowed down and he bumped, bumped into me and went around me. Tr. at 98.

On April 25, 1997, Duncan signed a workers' compensation claim for "psyche/stress, migraines, anxiety, stomach/ulcer," purportedly caused by his work as a District employee. RX 2 at 273. However, the claim was apparently not received by the District until June 6, 1997. RX 2 at 269-71. Shortly thereafter, it was referred for processing to the District's workers' compensation insurance carrier. RX 2 at 272.

On May 6, 1997, Grose sent a certified letter to Duncan regarding leave usage and attendance. RX 2 at 325. In the letter, he noted that in the previous four months, Duncan had used 26.3 hours of sick leave, 35.1 hours of vacation leave, and 202.6 hours of leave without pay. He wrote, further, that "[t]his attendance pattern is atypical, and shows a tendency to be getting worse based on [the previous week] when you were absent the entire week." Accordingly, Grose announced that for the next three months Duncan would be on "controlled leave." Controlled leave, according to the letter, required Duncan's adherence to the following requirements: (1) any work absence would be subject to Grose's prior approval with approval for sick leave having to be obtained by 8:00 a.m on the date of illness and approval for other types of absences requested in writing at least one day in advance, (2) substitutions of types of leave would require written approval, (3) detailed medical verifications setting forth a diagnosis, prognosis and work limitations would be required for any absences due to sickness, (4) Duncan would be required to contact Grose each work day between 7:00 and 8:00 to report any expected absences, and (5) Duncan's work hours, break, and lunch times would be on a fixed schedule. As well, Grose added, any proposed work activties that would require Duncan to leave his office would have to be approved in advance by Grose. See also Tr. at 1424-29 (Grose testimony).

Nine days after sending Duncan the May 6 letter placing him on controlled leave, Grose sent a second letter to Duncan informing that he was already failing to comply with the letter's requirements. RX at 324. In particular, Grose asserted that although the May 6 letter clearly required Duncan to personally report each absence to Grose before 8:00 a.m. on the date of the absence, Duncan had failed to make such personal reports for absences on May 13, May 14, or May 15 and that on May 12, he had notified Grose of his absence by fax, rather than in a phone call. According to Grose's letter, the fax stated "I CANNOT COME IN TO WORK TODAY. I AM ILL!"(capitalization in original). The letter also reiterated Grose's requirement that Duncan provide a signed medical verification for his alleged illness and insisted that Duncan provide such verification by May 20, 1997. In concluding, Grose noted that Duncan's non-compliance with leave requirements was considered insubordinate and that if he did not immediately comply with these requirements, he would be subject to discipline "up to and including termination." On this same day, the California Employment Development Department (hereinafter also referred to as "EDD")sent the District a "Notice to Employer of State Disability Claim Filed." RX 2 at 362. The notice included a number of boxes to be checked by the employer, but did not provide any medical information about Duncan's medical condition or the basis for his disability claim. Nor did the form in any way suggest that the claim had been granted or otherwise approved. One of the questions in the notice asked "Did the employee stop work for any reason other than illness, injury or pregnancy?" (emphasis in original). In responding to this question, Johnson checked "yes" and wrote "employee has provided no substantiation for time missed from work."

On May 21, 1997, Duncan sent Grose a response to his May 15 demand that Duncan comply with the controlled leave requirements. RX 2 at 321. In the letter, Duncan wrote: "I informed Diane Vaira [the District employee responsible for maintaining employee attendance records] May 13, 1997 that I was going on long term disability, I assumed you would have been informed." Duncan

then added that he had also "received correspondence from the Employment Development Department confirming that [the District] has been informed of the fact that I am on extended disability leave." Duncan further asserted that, contrary to Grose's allegation, he had in fact made "telephone contact" with the District to report his absences on May 13, 14, and 15, but did not give the name of the person or persons who had supposedly received his calls. Next, the letter contended that the written medical verification required by Grose's May 6 letter "has been provided by my physician in accordance with the requirements of the Employment Development Department's Disability Program." Duncan then added, "I am not aware of any legal requirement that I continue to contact my employer each day, when proper documentation of my long-term illness has already been provided." He concluded that "my physician has determined that the current estimate of my ability to return to work is not before October 21, 1997."

On June 3, 1997, Grose responded to Duncan's May 21 letter and, in doing so, informed Duncan that EDD's reporting requirements are for payments of disability and that "EDD has no authority over the [District]." RX 2 at 319. As well, Grose enclosed with the letter a form entitled "Medical Substantiation of Illness/Injury and Sick Leave Usage" and directed Duncan to have the form completed by his physician and returned to the District by June 9, 1997. The letter also disputed Duncan's assertion that he had in fact contacted the District on May 13, 14 and 15, and informed Duncan that his absences from work would be considered unexcused for each day that he failed to comply with the controlled leave procedures. However, Grose also indicated that once Duncan provided the requested medical information, he would not be required to call in on a daily basis during the period when the medical authorization was in effect. Finally, Grose informed Duncan that if the medical information he requested was not received by June 9, Duncan's absences would continue to be considered unexcused and Duncan would be subject to disciplinary action, including possible dismissal.

On this same day, Covell sent Duncan a written response to his April 21 memo alleging that he was being harassed by Grose. RX 2 at 316. In the response, Covell indicated that he found Duncan's complaints to be without merit and that, as manager of the Stationary Source Program, Grose was "well within his rights to question you on your performance, attendance, behavior and work product." Covell also noted that on the occasion when Tollstrup had allegedly harassed Duncan, he and Munz had been engaged in an unauthorized meeting with Clark and had not followed instructions regarding any such meetings. He then wrote "[y]ou were given the opportunity to state the purpose of your meeting, yet Mr. Munz answered Ms. Tollstrup's question by saying the reason for the meeting was 'none of your business.'" Covell added that Duncan was not a victim in these matters, but "like all other employees, [was] accountable for [his] day's work." In concluding, Covell commented that he was "concerned about your perception of events and your apparent feelings of victimization." For this reason, Covell, added, he was encouraging Duncan "to seek professional help" through the District's Employee Assistance Program.

On June 9, 1997, Duncan sent Covell a "formal grievance" alleging "deliberate miscalculation of my retroactive accrued vacation and sick time, for the period between July 1, 1996 through May 1, 1997." RX 2 at 305. According to Duncan's grievance, he had been told by Diane Vaira that Dozier had told her to calculate Duncan's leave differently from other employees. As a result, Duncan alleged, he had been "shorted" approximately 34 hours of sick leave and 41 hours of vacation leave.

On June 11, 1997, Duncan sent Grose a response to Grose's letter of May 21. RX 9 at 8. According to Duncan's letter, he had "made several attempts to acquire the information" Grose was seeking but that his physician had "unfortunately" not completed and returned the District's form. Duncan apologized for any inconvenience this may have caused and indicated that he was faxing Grose a copy of original State Disability Insurance (SDI) form completed by Dr. Clopton. Duncan added, "I am aware that you put me on controlled leave May 6, 1997. I notified the District of being put on disability, verbally, when I called in sick weeks ago. I hope the SDI form will document my disability and rectify any unexcused absence, from April 21, 1997 through October 21 1997." The form Duncan provided is an undated form filled out by Dr. James Kirk Clopton. RX 9 at 1. The form listed Duncan's symptoms as including "marked concentration and memory impairment. Depressed [illegible] cognition. Anhedonia. Irritability. [Decreased] energy and appetite. Impaired [illegible]." According to the form, Dr. Clopton's diagnosis was "depression, [illegible], severe" and his treatment plan included prescriptions for Prozac, Wellbutrin, and Adderall. The form also indicated that Duncan's disability commenced on April 21, 1997, and would last until approximately October 21, 1997.

During the trial, Duncan acknowledged that neither he nor any doctor had provided medical verification to the District before June 11, 1997, but asserted that "[t]he District had received early medical verification" from an SDI form that he believed was included in his personnel file.[16/] Tr. at 2496-98. As well, Duncan admitted that he had "ignored" the requirements in the letter from Grose regarding controlled leave, but in the following testimony in effect contended that his "disability" excused him from complying with those requirements:

> I got a letter to put me on controlled leave while I was on disability. So I followed my disability, I didn't follow controlled leave. I was off. I was sick. And it was onerous to make me call in every day and make me talk to the person that I was trying to avoid. And it caused my suffering when he wanted me to call in and talk to him personally early in the morning against my doctor's wishes who said, you know, don't have any contact with the District, these people are making you ill.

Tr. at 2490-91.

On June 17, 1997, Covell responded to Duncan's June 9 grievance by informing Duncan that under the collective bargaining agreement applicable to District employees, his grievance should have first been submitted to his division manager and was therefore being denied. RX 2 at 302. However, in the same letter, he also informed Duncan that his grievance could be properly considered by Grose. According to Grose, while reviewing Duncan's time sheets in order to respond to this grievance, he noticed discrepancies between the entries on Duncan's time sheets and a "matrix" he personally maintained of the times worked by the personnel in his section. Tr. at 2675-78.

On July 1, 1997, Duncan arrived at the District's office and apparently told Munz that he was returning to work. RX 2 at 291, Tr. at 112. According to a letter Johnson wrote to Duncan later that

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[16/] As previously indicated, by this date the only information the District had received concerning Duncan's SDI disability benefits was a form which indicated that an application for such benefits had been filed. Moreover, the form did not contain any medical information or suggest that the application had been approved.

day, Duncan was informed by Johnson that he would have to leave the premises because the "incomplete medical information" the District had so far received indicated that he was unable to return to work until October 21. The letter further indicates that before Duncan would be allowed to return to work, he would have to obtain a medical release from his physician certifying that he was capable of returning to work and inform Grose of his expected return date. As well, she indicated, he would have to undergo a fitness-for-duty exam by a physician selected by the District, which she indicated would be scheduled once he submitted a medical release from his physician and discussed a return-to-work date with his supervisor. Duncan was also cautioned that unless he had an appointment with his supervisor, he was to remain away from District premises until such time as the above procedures were satisfied. RX 2 at 292.

On July 11, 1997, Duncan wrote to Johnson, asking when the fitness-for-duty exam would be scheduled. RX 2 at 293. Four days later, Johnson sent Duncan a reply in which she reiterated her prior statement that a fitness for duty examination would not be scheduled until he had received a medical release from his own physician and discussed a return to work date with his supervisor. RX 2 at 290.

On July 16, 1997, Grose wrote to Duncan regarding his leave accrual grievance. RX 2 at 286. In the letter, Grose noted that on June 25 Duncan had made an appointment to discuss the grievance with Grose that afternoon, but had failed to keep the appointment. Accordingly, Grose concluded, the grievance was considered "settled" because Duncan's had failed to satisfy the SADEA contract requirement that grievances be orally discussed. On July 31, 1997, Duncan filed a "level 2" appeal of his leave accrual grievance. RX 2 at 60. Attachments set forth what Duncan believed to be the appropriate calculations of his vacation and sick leave balances. RX 2 at 61.

On August 15, 1997, Grose sent to Duncan a document entitled "Notice of Proposed Disciplinary Action — Discharge." RX 2 at 78. The Notice listed as the contractual bases for the proposed discipline Duncan's history of prior disciplinary actions and several new charges, which were purportedly supported by an extensive number of attachments accompanying the notice. The prior disciplinary actions consisted of Duncan's five-day suspension in March, the April 18 letter directing Duncan to report to work, and the May 6 letter putting Duncan on controlled leave. The new charges that purportedly justified Duncan's termination were three-fold.

First, the Notice alleged that Duncan had "misused/abused" the cellular phone that had been issued to him in January of 1994. In particular, Grose alleged that although a January 24, 1994 memo from Munz had limited the use to the cellular phone to "county business" and emergencies, between November 22, 1996 and May 31, 1997 Duncan had repeatedly used the phone for other purposes. In fact, it was alleged that during that period, Duncan had used the cellular phone to make (1) 174 calls while "on leave from District service," (2) 29 calls during weekends, and (3) 87 calls outside of his " normal work/commute hours (including some made as late as 2:14 a.m., 2:10 a.m., 11:07 p.m., 3:29 a.m.)." Grose further noted that 110 of the calls were made to "the private residence of a fellow employee" and that 53 of the calls were "made while roaming in El Dorado County both during off hours and during hours for which you were allegedly working." He also alleged that the total cost of the unauthorized calls was $212.48.

Second, the Notice alleged that a review of Duncan's time sheets showed that Duncan had engaged in "a continuous pattern and practice of falsification of records." In particular, the Notice alleged that "[o]n 17 separate occasions noted in Exhibit B you falsified your time sheet in not

claiming leave time that was taken."[17/] Although some of the 17 alleged falsifications appear to involve inadvertent clerical errors, others appear to indicate that Duncan had repeatedly claimed on his time sheets to have been working at times when he was not in fact in the District's office. For example, the Notice alleges: (1) that on January 15 Duncan called at 1:00 p.m. to say he would not be in until 2:00 p.m but recorded only 1.5 hours of leave on his time sheet; (2) that on January 29 Duncan was 45 minutes late to a sexual harassment training, but did not account for this absence on his time sheet; (3) that on January 31 Duncan called the office at 10:00 a.m. and reported that he would be telecommuting until 2:00 p.m. even though, according to Grose, "telecommuting was not authorized and there was no evidence of any work product for that day," (4) that on February 3 Duncan called at 10:35 a.m. to say he was having car trouble but did not report any leave taken on his time sheet; (5) that on February 4 Duncan did not arrive until 10:00 a.m. but did not report any leave on his time sheet, (6) that on February 5 was Duncan not observed in the office all morning but took only two hours of vacation leave, (7) that on February 10 he allegedly telecommuted until 10:00 without authorization and took no leave for his actual commute time, (8) that on February 20 Duncan left office at 1:00 p.m. but reported only three hours of leave without pay instead of four; (9) that on March 21 Duncan did not arrive until 10:00 a.m. but did not record any leave taken on his time sheet; (10) that on March 29 Duncan took four hours of time paid for "standby duty" but did not provide evidence to support the claim; (11) that on April 3 Duncan reported that he was on leave from 9:00 a.m. to 1:00 p.m. for a dental appointment, but also claimed a commute subsidy for the day as a driver of a car pool; (12) that on April 4 Duncan called to say he would be out all day, but claimed on his time sheet to have worked for eight hours; (13) that on April 10 and 11 Duncan was gone all day without reporting any leave on his time sheet. It was further alleged in Exhibit B that Duncan's failure to call in pursuant to the controlled leave procedures and his failure to meet the various deadlines for providing medical justifications for his absences from work constituted "insubordination."

Third, the Notice alleged that Duncan had failed to perform four assigned tasks. First, it was asserted that Duncan had failed to prepare a Zone Inspection Plan despite receiving repeated requests from Grose for the plan. According to Grose, he reassigned the project to another worker on April 17 and received an acceptable final product on April 18. See also Tr. at 1460-61. Second, Grose alleged that although Duncan had been assigned to draft a letter to auto body vendors on January 6, he had never completed the assignment. Third, it was alleged that although Duncan had scheduled a meeting with two people on April 22, but did not appear for the meeting and "[a]s a result, other employees conducted the meeting on overtime to avoid discredit to the District." Finally, Gross alleged that Duncan also failed to attended a previously scheduled CPR training session and as a result the District was billed $25. See also Tr. at 1869.

When questioned during the trial concerning his reasons for preparing the Notice of Proposed Discharge, Grose testified that Duncan's putative whistleblowing was not among the factors motivating the notice. Tr. at 1927-28. Grose further testified that neither Covell nor Dozier, nor anyone else in a management position at the District ever hinted, directly or indirectly, that he should find reasons to discipline Duncan. Tr. at 1933. When Grose was asked how he had come to discover the cellular phone misuse alleged in the Notice of Proposed Discharge, he testified that the discovery of these alleged abuses had occurred while he was preparing the District's budget in the middle of March, 1997. Tr. at 1450. During that process, he testified, he examined the telephone

[17/]Exhibit B is contained in the record at RX 2 at 127-31.

billing records for about 12 of his subordinates who had phones provided by the District. Tr. at 1451. His inquiry, he indicated, focused on calls made after working hours, on weekends or holidays, and during periods when employees were on leave. Tr. at 1452. Grose testified that he found that few calls were made during those times, with the exception of calls made by Duncan. Tr. at 1452. Grose further testified that although he asked phone users other than Duncan to explain their calls during non-business hours and received good explanations for all of those calls, he did not ask Duncan about his calls because "the frank quantity and magnitude of these indicated that those types of explanations were not present." Tr. at 1454-56. Grose also indicated that although cellular phone bills average $9.00 to $20.00 per month for each of his inspectors, Duncan's bills ranged from $30.00 to $80.00 per month. Tr. at 1850-52. Grose further testified that he felt Duncan's cell phone abuse was "serious enough and broad based enough" that he "may have considered" it a firing offense standing alone. Tr. at 1928. When asked about the portions of the Notice of Proposed Discharge alleging that Duncan had falsified his time sheets, Grose testified that he had first discovered the alleged falsifications while reviewing Duncan's time sheets to determine the merits of Duncan's June 9 grievance asserting that his vacation and sick leave had been miscalculated. Tr. at 1859-66, 1917, 1924. When the undersigned administrative law judge asked Grose about disciplinary actions he had initiated during his prior job as a supervisor at the Bay Area Air Quality Management District, Grose testified that he had recommended the termination of two employees and the suspension of one. Tr. at 1929. According to Grose, one of the terminations involved an employee who was found to have spent work time attending a three-hour law school class once a week for a period of several weeks and was fired solely on that basis. Tr. at 1930-31. Similarly, he testified, the other terminated employee was fired for only one act of dishonesty: falsely representing that she had a valid driver's license. Tr. at 1931-32, 2191.

On August 21, 1997, Duncan sent Grose a fax in which he informed Grose that he been authorized by Dr. Clopton to return to work on August 22. In addition, the fax asked Grose to schedule a fitness for duty exam so that Duncan could return to work. Also included in the fax was a copy of a prescription form on which Dr. Clopton had written "Mark is released to return to work as of 8/22/97 without restriction." In a reply letter sent to Duncan this same day, Grose informed Duncan that a fitness-for-duty exam would be scheduled and that until such exam was performed, Duncan would be placed on administrative leave, with pay, effective August 22, 1997. RX 2 at 54. Grose also noted that: "Administrative Leave with pay is neither punitive nor is it to be used as vacation time. You are to be available by phone during your normal work hours."

On September 4, 1997, Dozier sent Duncan a letter informing him that she had reviewed Duncan's appeal from Grose's denial of his leave accrual grievance and had concluded that Grose was correct in dismissing the appeal because of Duncan's failure to appear at the appointment where the grievance was to be orally discussed. RX 2 at 52.

On September 5, 1997, Duncan sent Taylor, who was again the designated *Skelly* officer, a written response to the allegations in Grose's August 15 notice. CX 28. In the response, Duncan asserted that the discharge proposal was "the culmination of a series of retaliatory actions that have been levied toward me due to my 'whistleblowing' and cooperation with Federal Criminal Investigators" and contended that it "violate[d] the basic notion of due process and the concept of progressive discipline." Duncan also contended that (1) the five-day suspension cited by Grose was based on an incident for which he had been "falsely accused," (2) Grose's April 18 order to report to work "was a directive and not a disciplinary action," and (3) he had not been placed on controlled leave until "<u>after</u>" (emphasis original) the District "had been properly notified that my physician had

placed me on 100% State-approved disability leave." Duncan then set forth a detailed response to each of the new allegations cited by Grose as supporting Duncan's termination. Among other things, Duncan asserted that his use of the District's cellular telephone "has always been for official business and any personal calls made on the District phone were always of a brief and prudent nature." He also referred to an attachment which purportedly showed that he had incurred a total of $137.68 in charges on his personal phone bill for calls on District business and asserted that all the telephone calls he "made to Linda Clark (688-5625) and Eric Munz (351-0514) are related to District business and sometimes pertain to our protected activity." He then concluded that if he were given credit for the business use of his personal phone and if all the calls to Clark and Munz were removed from the $212.48 in allegedly unauthorized calls, there would be a balance in his favor. In response to the allegation that many of the calls were made during non-working hours, he asserted that as a "public officer" he was on duty "24 hours a day" and responsible for addressing any code violations he might observe "at any time of day or night." Duncan then set forth a detailed response to each alleged falsification of time sheets prior to April 4, 1997, but did not respond to the allegation that he failed to report leave taken on April 10 and 11.[18/] As part of this response, he commented that he had come "to the conclusion that the time sheets are not precise records of time but grossly inaccurate predictions in future scheduling" and asserted that, as he had stated to Grose when Grose first came to work for the District, his "work day has always been flexible." He also added that his flexible work hours were "detailed" in the ADA request for accommodation he previously gave Grose and Dozier. In responding to the charge that he had failed to promptly prepare the Zone Inspection Plan, Duncan asserted that Grose had "never indicated an urgency for this project" nor given him "any timetables or deadlines." In addition, he directly disputed the assertion that he had failed to draft the letter to the auto body vendors and contended that he had in fact given the letter to Munz. Finally, he asserted that he had missed the April 22 meeting because on that same day he had been placed on disability leave by his physician and contended that he had never signed up for the CPR training he had allegedly failed to attend.

[18/] The item by item responses are as follows: (1) January 15: use of sick leave was appropriate because he was at a meeting "with the school psychologist and medical team concerning my son's disabilities;" and before the meeting had "worked at home (with the permission of Eric Munz);" (2) January 29: he and Munz had been, in fact, early to the sexual harassment training; (3) January 31: "[m]y workday began at 06:00 hours that day. A work product was generated that day which was titled 'SEXUAL HARASMENT [sic] AND DISCRIMINATION OF MY PERSON BY [. . .]'; (4) February 4: "I arrived at 09:00 hours and as was the custom, made up any lost time at the end of my shift;" (5) February 5: "[m]y time off request was a prediction of the upcoming appointment, which took less time than predicted. The leave was approved by my supervisor, Eric Munz;" (6) February 10: "I began work at 06:00 hours that day. I did work at home until 10:00 hours. It takes almost one hour to drive to the District from my home. I properly called to estimate my arrival one hour from departure at 11:00 hours. A copy of my work product was given to Mr. Grose. It was titled, RESPONSE TO ALLEGATIONS OF MISCONDUCT AND THE PROPOSED FIVE DAY SUSPENSION [. . .]. David Gros [sic] and Eric Munz, my supervisor, authorized my telecommuting;" (7) February 20: "I arrived early that day and there were only three hours of leave taken," (8) March 21: "I came to work at 09:00 hours and left at 18:00 hours;" (9) March 28: "I had no 'sick leave' so it was reported as vacation and leave without pay" in "accordance with policy and traditional reporting practices;" (10) March 29: "I claimed 4 hours and the appointment took 4 hours. . . . I carried two other riders to their destinations prior to arriving at the District;" (11) April 3: "I claimed 4 hours and the appointment took 4 hours;" (12) April 4: "I did work 8 hours. I telephone [sic] Jeannie to let her know I would be at CARB for the entire day. I did carpool. Jeannie must have misunderstood."

On September 9, 1997, Johnson notified Duncan that he had been scheduled to receive a fitness-for-duty exam from Dr. Michael Meek on September 29. RX 2 at 32.

On September 11, 1997, Duncan sent Covell a fax appealing his leave accrual grievance to "level 3." RX 2 at 22. In the fax, Duncan contended that the alleged miscalculation of leave and the delay in processing his grievance were retaliatory acts by Covell and his staff. RX 2 at 22-23.

On September 23, 1997, Taylor sent Covell a report setting forth his *Skelly* findings regarding Duncan's proposed discharge. RX 17. At the outset of the report, Taylor noted that he had met with Duncan, Munz, and Duncan's attorney for approximately one hour on September 5, 1997 and that he had he subsequently interviewed Dozier, Grose, and two other District employees in the course of his investigation. In discussing the alleged misuse of the District's cellular phones, Taylor noted Duncan's various defenses, but concluded that the 64 calls made by Duncan between April 22 and May 29 constituted a clear "abuse of agency resources" because during that period Duncan was "on medical disability leave" and "completely relieved of all work responsibilities." Taylor also wrote that his discussions with Dozier concerning the use of a business phone as a resource in developing a defense in a pending disciplinary action indicated that it is "not permissible under the current SMAQMD employment contract." He added that Duncan's use of his personal property on District business was "commendable but cannot be represented as offsetting personal use of District property."

In discussing Duncan's alleged falsification of time records, Taylor's report initially noted that "several" of the purported falsifications were "minor and/or simple transpositions" that did not result in any harm to the District. However, the report then specifically rejected various assertions Duncan had raised to explain the remaining discrepancies. Most significantly, Taylor rejected Duncan's assertion that many of his purported absences were attributable to efforts "to perform surveillance on stationary sources located along his commute route" by noting that Duncan had not written any violation notices at all in 1997, was no longer certified to write such notices and was supposed to supervise the inspectors who wrote such notices, not write the notices himself. Similarly, Taylor rejected Duncan's assertion that he had flexible work hours by noting that Grose had reported that each employee in the Stationary Source Division was committed to specific work hours. As well, Taylor pointed out that although Duncan had requested flexible work hours in his ADA request, the request was never approved and further noted that on February 3 Grose had reportedly instructed Munz that telecommuting was not authorized for employees in the Stationary Source Division. In addition, Taylor acknowledged that Munz had reported that some absences occurred too late in a pay period to be reflected on the time sheets for that pay period, but discounted this argument on the grounds that many of the discrepancies occurred "well in advance of the time sheet turn-in due dates and could easily have been logged correctly." Taylor then concluded that "[t]here are sufficient instances of late arrivals, early departures and missed work time for which no accounting is made . . . to warrant the charge of falsification of time sheets." He added that the fact that Munz had signed off on the time sheets did not "automatically make the ... time sheets valid," since Munz either knew of the falsification and did nothing or did not have a system in place to verify work time.

In addressing Grose's allegation that Duncan had failed to perform required duties, Taylor's report concluded that Duncan had failed to act professionally in carrying out his assignment to produce a Zone Map plan," but that "it is not clear that a timeframe was sufficiently well established to find a failure to perform required duties." Similarly, he found that it could not be "clearly

established" whether or not Duncan drafted the letter to auto body vendors and concluded that since Duncan had in fact informed the District of his absence on April 22, he could not be faulted for failing to attend the CPR training and meeting on that day. Thus, Taylor concluded, there was "insufficient cause to uphold a finding of failure to perform required duties."

In a summary of the report, Taylor concluded that "discharge is appropriate" in view of Duncan's history of progressive discipline and the report's finding that two of the three most recent charges against him were warranted.

On the day after Taylor submitted his report to Covell, Johnson sent Duncan a letter advising him that, while on administrative leave with pay, time spent during a work day as a party to a legal matter was considered personal time. RX 2 at 41. Accordingly, she advised him, a request for time off would have to be filed with Grose, and vacation leave or leave without pay would have to be taken for the period used to pursue the legal action. RX 2 at 41. According to Johnson, this was in accordance with the District's "time off to comply with a subpoena" policy. RX 2 at 41. The letter also informed Duncan that "from this date forward, you are to remain at home and be available for contact at your home telephone number for the duration of Administrative Leave, with the exception of requested time off as stated above." RX 2 at 41.

Two days after Taylor issued his report, Covell sent Duncan a "Notice of Disciplinary Action — Discharge" notifying Duncan that his employment by the District would terminate on September 27, 1997. RX 2 at 71. The notice listed the contractual bases for discharge and noted as "prior discipline and corrective actions on which this discipline is based," Duncan's five-day suspension, Grose's April 18 Order to Report to Work, and the May 6 imposition of controlled leave procedures. RX 2 at 73. The notice further indicated that the alleged misuse of a District-issued cellular phone and the alleged falsification of time sheet records supported the disciplinary action, but that Grose's third charge (failure to perform required duties) was determined to lack evidentiary support. RX 2 at 75. Covell added that "[c]harges 1 and 2 each independently would warrant dismissal and together provide overwhelming support for dismissal." RX 2 at 75. In a concluding sentence, Covell informed Duncan that he had a right to appeal his termination and that if such an appeal were filed it would be resolved by arbitration.[19/] Covell testified that, in making his decision to discharge Duncan, he gave no weight to Duncan's whistleblowing activities. Tr. at 2185.

On the same day Covell notified Duncan that he was being terminated, Covell also sent Duncan a letter rejecting Duncan's leave accrual grievance. RX 2 at 19. In the letter, Covell asserted that the grievance had to be rejected because of Duncan's failure to discuss it orally with Grose, but then went on to address the merits of the Duncan's grievance. In doing so, Covell indicated that he had made inquiries concerning Duncan's allegation that Dozier had told Diane Vaira to calculate Duncan's leave differently from other employees and reported that he had determined the allegation to be false. Covell also quoted sections of the collective bargaining agreement between SADEA and the District which specifically provide that sick and vacation leave are to accrue in the manner that Duncan alleged was improper, i.e., according to the number of "straight-time hours"an employee actually works instead of being calculated according to the employee's normal duty hours.

[19/]Duncan did in fact file such an appeal, but it was still pending before an arbitrator when the record in this proceeding closed.

According to Duncan, on the Monday after he received the termination notice he returned to Dr. Clopton, who then immediately put Duncan "back on disability." Tr. at 2368. As the trial of this matter concluded, Duncan was still receiving state disability benefits and Dr. Clopton had not changed his prognosis. Tr. at 2368. Duncan also testified that he has not made any effort to find alternative employment because he is so depressed and forgetful that he cannot "even imagine myself interviewing" for another job. Tr. at 2502. As well, he testified, pursuing his litigation against the District (i.e., participating in the workers' compensation, whistleblower and arbitration proceedings) is to him "a full-time job." Tr. at 2503. Duncan is seeking a total of $1,100,000 in damages, including front pay and compensation for emotional distress. Tr. at 28.

ANALYSIS

There is a well established legal standard for determining if there has been a violation of the employee protection provisions of environmental statutes such as the Clean Air Act. In particular, an employee must initially present a prima facie case consisting of a showing that he or she engaged in protected conduct, that the employer was aware of that conduct, and that the employer took some adverse action against the employee. In addition, as part of the prima facie case the employee must present evidence sufficient to raise the inference that his or her protected activity was the likely reason for the adverse action. If the employee establishes a prima facie case, the employer then has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, non-discriminatory reasons. At this point, however, the employer bears only a burden of producing evidence, and the ultimate burden of persuasion of the existence of intentional discrimination rests with the employee. If the employer successfully rebuts the employee's prima facie case, the employee still has the opportunity to demonstrate that the proferred reason was not the true reason for the employment decision. This may be accomplished either directly, by persuading the factfinder that a discriminatory reason more likely motivated the employer, or indirectly, by showing that the employer's proferred explanation is unworthy of credence. In either case, the factfinder may then conclude that the employer's proferred reason is a pretext and rule that the employee has proved actionable retaliation for the protected activity.[20/] Conversely, the trier of fact may conclude that the employer was not motivated in whole or in part by the employee's protected activity and rule that the employee has failed to establish his or her case by a preponderance of the evidence. Finally, the factfinder may decide that the employer was motivated by both prohibited and legitimate reasons, i.e., that the employer had "dual" or "mixed" motives. In such a case, the burden of proof shifts to the employer to show by a preponderance of the evidence that it would have taken the same action with respect to the employee, even in the absence of the employee's protected conduct. See Darty v. Zack Company, 80-ERA-2 (April 25, 1983).

[20/] In this regard, it is noted that in Zinn v. University of Missouri, 93-ERA-34 and 36 (Sec'y Jan. 18, 1996), the Secretary pointed out that when considering an allegation that an adverse action was the result of illegal retaliation, "[i]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." As well, the Secretary has observed that a respondent's explanation may be pretextual, but nonetheless found to be a pretext for actions other than prohibited discrimination. Frady v. Tennessee Valley Authority, 92-ERA-19 and 34 (Sec'y Oct. 23, 1995). See also Galbraith v. Northern Telecom, 944 F.2d 275, 282-83 (6th Cir. 1991).

As previously noted, there has been a full trial of this matter and the District has presented evidence of lawful reasons for terminating Duncan. Therefore, the question of whether Duncan has established a prima facie case is moot and the analysis of the facts can be limited to the issue of whether Duncan has proven a violation of the CAA by a preponderance of the evidence. See USPS Board of Governors v. Aikens, 460 U.S. 711, 713-16 (1983). See also St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993); Adjiri v. Emory University, 97-ERA-36 (ARB July 14, 1998); Olsousky v. Shell Western E & P, Inc., 96-CAA-1 (ARB April 10, 1997) n. 2.

Review of the record indicates that Duncan has alleged that essentially three different types of adverse actions were taken against him in retaliation for providing information to the EPA: the five-day suspension in March of 1997, various acts of so-called harassment and discrimination, and the termination of his employment in September of 1997. A discussion of the evidence pertaining to each of these types of adverse action is set forth below.

1. Five-Day Suspension

As previously explained, the five-day suspension was not formally imposed on Duncan until about a month after Duncan's cooperation with the EPA became known to the District's management as a result of the disclosure of the so-called Messing letter. Indeed, on the first day of the trial, Duncan testified that neither the investigation of the THREECON memo's disclosure nor Grose's verbal notification of disciplinary action occurred until after the Messing letter had been discovered.[21/] By itself, the fact that the suspension was not formally imposed until after the

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[21/]In particular, Duncan testified as follows:

> Q: All right. Did you have an understanding, did you ever determine when Kevin Williams purportedly conducted his investigation into the November 1996 incident with the 3-CON memo?
>
> A: Yes. David Grose told me that he was going to discipline me for moving the file to an accessible drive for everyone out of the e-mail. And he said that Kevin, this was in response to this memo being distributed to the engineering staff---
>
> Q: Exhibit two; right?
>
> A: Yes. ---in February.
>
> Q: That Kevin Williams investigated the 3-CON movement of that memo, he investigated that November incident in February; is that your testimony?
>
> A: Yes.
>
> Q: Okay. And the investigation of that movement of that file in November that was conducted in February was after Exhibit 1, the letter to your attorneys detailing your contact with EPA, had been discovered in the district; correct?

(continued...)

Messing letter's disclosure provides some basis for possibly inferring that the suspension was in retaliation for protected activities, and if, as Duncan alleged, the THREECON investigation did not even begin until after the disclosure of the Messing letter, there would be very strong grounds for inferring that the suspension was in fact retaliatory. However, there is a variety of evidence which strongly indicates that, despite Duncan's testimony, the investigation and disciplinary action were in fact well underway before the disclosure of the Messing letter and that the District had legitimate reasons for imposing the five-day suspension.[22/]

First, there is a substantial amount of evidence indicating that Duncan was incorrect in testifying that neither the investigation into the THREECON memo's disclosure nor Grose's decision to initiate disciplinary action occurred until after the disclosure of the Messing letter on January 28, 1997. For example, Grose and Williams both testified that the investigation into the unauthorized transfer of the THREECON memo began during early January and Grose also testified that on January 21 (a full week before the disclosure of the Messing letter) he explicitly informed Duncan that he would be disciplined for having transferred the THREECON memo to the W drive. Tr. at 1461-62, 1824, 2199 (Grose testimony), Tr. at 2233 (Williams testimony). As well, Grose's February 4, 1997 Notice of Proposed Disciplinary Action sets forth a chronology of events which explicitly states that Grose began his investigation on January 7, observed Williams locate the relevant computer records on January 9, and notified Duncan of his findings on January 21.[23/] RX 2 at 349-50. Significantly, there is no indication that Duncan challenged the accuracy of this chronology during either the *Skelly* hearing or the arbitration hearing concerning his suspension. In fact, at the trial's conclusion, Duncan even conceded that perhaps he "could be off" in asserting that he was not notified of Grose's intent to impose discipline until after the disclosure of the Messing letter. Tr. at 2274-75.

Second, even though Duncan has consistently asserted that he was not the person who transferred the THREECON memo to the W drive, there are convincing reasons for concluding that the District had a good faith basis for disbelieving these denials and concluding that Duncan was in fact the person responsible for that act. Most significantly, the computer records retrieved by Williams clearly indicate that the memo had been transferred to the W drive by someone using a password assigned only to Duncan, thereby making it extremely unlikely that anyone else could have

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[21/](...continued)

A: Yes.

Tr. at 87-88. See also Tr. at 66-67.

[22/]It is noted that the District contends that to the extent Duncan seeks relief for the five-day suspension, any such relief is barred as a result of his failure to file a complaint within 30 days after being notified that the suspension was being imposed. However, review of the record indicates that Duncan did not receive notice of Covell's decision to impose the suspension until sometime after February 27, 1997 and that Duncan apparently mailed a Section 322 complaint to the Department of Labor on or about March 24, 1997. Hence, the complaint was timely. See 29 C.F.R. §24.3(b).

[23/]It is noted that although this document does not explicitly state that Grose informed Duncan that he intended to impose discipline during their January 21 conversation, Duncan has testified that when Grose first confronted him with the computer records showing his access to Dozier's e-mail, he also verbally informed Duncan he intended to impose discipline. Tr. at 2274.

been the culprit. In addition, since the THREECON memo contained embarrassing information concerning a known adversary of Duncan's (i.e., a statement indicating that Jane Doe was being placed on administrative leave pending evaluation of her "mental state"), it would have been reasonable for the District's management to conclude that Duncan had a greater motive to copy or publicly disclose the memo than other District employees.[24/]

Third, even though Dozier inadvertently failed to take the steps necessary to secure her e-mail files from outside access, it is clear that she nonetheless had a reasonable expectation that the privacy of her e-mail files would be maintained. In this regard, Duncan is unconvincing in arguing that because of the absence of written rules prohibiting employees from accessing other workers' e-mail and Dozier's failure to block such access, Dozier had no privacy interest in her e-mail. Indeed, such an argument is akin to contending that an employee is free to search the desks, briefcases or purses of any co-worker who forgets to lock an office door or desk drawer. Thus, the District unquestionably had justifiable grounds for imposing discipline on any District employee who copied Dozier's e-mail without her permission. In addition, the level of punishment imposed on Duncan was not so disproportionate to the misconduct as to suggest retaliatory motives. Indeed, the fact that Jane Doe was "shocked" and "upset" when she became aware of the memo's disclosure by itself provided the District with a clear justification for imposing significant sanctions on the culprit. It is also noted that these conclusions are consistent with the findings of the arbitrator who reviewed the propriety of Duncan's suspension pursuant to the collective bargaining agreement applicable to District employees. See Straub v. Arizona Public Service Company, 94-ERA-37 (ARB April 15, 1996)(holding that arbitration decisions cannot be ignored in evaluating complaints under whistleblower statutes). See also Dartey v. Zack Company of Chicago, 82-ERA-2 (Sec'y Apr. 25, 1983) (holding that even though a complainant had in fact engaged in protected activity, his employer was nonetheless justified in disciplining him because he was found to have about fifteen personnel files of other workers hidden in his car as he attempted to leave the employer's plant site).

Finally, it is recognized that the critical comments that Duncan made to EPA representatives in the meetings held during 1994 and 1996 were apparently known to some of the District's senior managers before January of 1997 and therefore could have conceivably prompted Duncan's five-day suspension. However, the 1994 comments were so far removed in time that it is unlikely that they were a motivating factor and there has been no showing that Grose (who did not begin working for the District until January of 1997) was ever aware of any of these protected activities. It is also noted that evidence that a complainant engaged in wholly unprotected misconduct immediately prior an adverse employment action may belie a causal connection between earlier, on-going protected action and the adverse action. See Gibson v. Arizona Public Service Co., 90-ERA-29, 46 and 53 (Sec'y Sept. 18, 1995), citing Monteer v. Milky Way Transp. Co., Inc., 90-STA-9 (Sec'y July 31, 1990).

Accordingly, I find that Duncan's five-day suspension was in fact solely motivated by the District's legitimate interest in ensuring the confidentiality of the sensitive personal information in the computerized files of its chief administrative official and that the suspension was not even in part motivated by retaliatory animus.

[24/]It is of course recognized that the THREECON memo also referred to requests for reasonable accommodation made by Clark and Duncan. However, the memo does not indicate the nature of the alleged disabilities underlying either Duncan's or Clark's request.

2. Alleged Acts of Harassment and Discrimination

Duncan also alleges that during 1996 and 1997 he was subjected to various types of harassment and discrimination as a result of his protected activities. Most significantly, he complains (1) that he was forbidden to associate with co-complainant Linda Clark, (2) that he was ridiculed and humiliated by Dozier's decision to include memos from or about him in a file entitled "5150," (3) that Grose physically intimidated him by bumping into him and otherwise invading his "space," and (4) that Grose and the District refused to grant him paid administrative leave when requested during April of 1997. For the reasons set forth below, I find that these alleged adverse actions either didn't occur at all or, if they did occur, weren't the result of unlawful discrimination.

Limitations on Association with Linda Clark. As previously set forth, an August 27, 1996 memo from Covell to Munz indicates that in June of 1996 Covell informed Munz that because of "performance issues" between Clark and her supervisors, Duncan and Munz were to cease their work time meetings with Linda Clark. CX 30 at 14. The evidence also indicates that Covell later received reports that Clark and Duncan were nonetheless continuing to meet together during working hours and therefore sent the August 27 memo to Munz reminding him that, as Duncan's supervisor, it was his obligation to ensure that Duncan cease the work time meetings with Clark. Id. Since the record indicates that Covell initially ordered Duncan to cease meeting with Clark in June of 1996, the only protected activity known to Covell that could have even conceivably prompted Covell's directive occurred in August of 1994 when Munz and Duncan made critical comments about the District's management EPA employees in San Francisco, i.e., almost two years earlier.[25/] Moreover, the record contains evidence indicating that by June of 1996 Clark's work performance and attendance were so deficient that her supervisors had clear justification for asking Covell to direct that she avoid spending work time with Munz and Duncan. See Tr. at 1202-1356 (testimony of Aleta Kennard), RX 1 (personnel file of Complainant Clark), RX 19A and 19B (supervisor's working file regarding Complainant Clark). It is also clear that as a rule writer Clark had very few, if any, business-related justifications for spending work time with Enforcement Section personnel like Duncan. Tr. at 1246-47 (Kennard's testimony that Clark was not required to work with anyone but her supervisor in drafting rules), Tr. at 818-19 (Clark's testimony that "I worked by myself"). The record further shows that the deficiencies in Clark's job performance progressively worsened throughout 1996 and that by February of 1997 Clark had essentially stopped coming to work at all. CX 17 (notice of termination indicating that between February 1 and May 16, 1997 Clark worked only 49.8 hours and was absent from work a total of 502.2 hours). It is further noted that the District's termination of Clark's employment in June of 1997 was later upheld by an independent arbitrator who concluded that because of Clark's "atrocious attendance record and her lack of performance, the District had good cause to dismiss her." RX 15 at 10. Accordingly, I find that the restrictions on Duncan's work time contacts with Clark were fully justified and that Duncan has failed to show that this alleged act of harassment was even in part retaliatory.

Alleged Humiliation Resulting from Being Referred to in an Electronic File Named 5150. As previously set forth, in responding to Grose's Notice of Proposed Disciplinary Action Duncan alleged that he was "horrified" to discover that Dozier had placed a memo from him in a file entitled "5150" because such an action labeled him as being "Mentally Disturbed." RX 2 at 342. Duncan

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[25/]It is noted that there is no evidence indicating that any of the District's senior management became aware of any protected activities by Linda Clark until the disclosure of the Messing letter in January of 1997.

also repeated similar assertions during his trial testimony. I find this allegation to be completely meritless. As Dozier credibly testified, the "5150" file was the only file she had for saving e-mail and it contained mail from a variety of people on a variety of subjects. Moreover, as Dozier also credibly testified, she had no expectation that anyone other than herself would have access to the file. It is also important to recognize that although there is some evidence in the record indicating that California police officers and medical care workers sometimes use the term "5150" to refer to mentally disturbed individuals, there is no evidence that the term is otherwise known or used by any other category of California residents.[26/] In short, even if Dozier had intended to somehow humiliate Duncan by publicly suggesting that he was mentally disturbed, it is highly improbable that she would have attempted to use the "5150" file name to accomplish such a goal.

Physical Intimidation by Grose. As previously indicated, Duncan has repeatedly alleged that on various occasions Grose engaged in acts of physical intimidation, such a bumping into him, yelling, and getting into Duncan's "space." In fact, Duncan alleges that he was so fearful of acts of physical violence by Grose that he sought to be placed on administrative leave on April 16, 1997 and was later medically excused from returning to work by a psychiatrist who feared that Duncan would be in physical danger if he continued working for the District.[27/] Virtually the only evidence of this alleged physical intimidation consists of Duncan's testimonial and written allegations concerning subtle aspects of Grose's behavior, such as how loudly Grose spoke on particular occasions or how closely he stood to Duncan. Consequently, the validity of these allegations depends almost entirely on Duncan's reliability as a witness. In this regard, I find that Duncan was an unreliable witness and that therefore his testimony should be given almost no weight when considering his allegations against Grose. There are a number of reasons for this conclusion.

First, there are so many contradictions between Duncan's testimony and other, more credible evidence that it appears that Duncan is either incapable of accurately recalling events or has consciously decided to give false testimony. For example, as previously indicated, Duncan's testimony on the first day of trial that the THREECON memo investigation did not begin until after disclosure of the Messing letter directly conflicts with a plethora of evidence indicating that the investigation began three weeks earlier and that Duncan had been notified of the pending disciplinary action a full week before the Messing letter's disclosure. Given the dramatic nature of these events, it seems unlikely that Duncan could have mistakenly placed them in the wrong sequence. Similarly, Duncan's testimony that he referred to his cooperation with the EPA's "Criminal Division" during the January 21 meeting when Grose first accused him of transferring the THREECON memo is inconsistent with the evidence showing that the Messing letter was not disclosed until a week later.[28/]

[26/]Indeed, Duncan's own testimony indicates that neither he nor Munz suspected the meaning of the term "5150" until Duncan found and read section 5150 of the California Health and Welfare Code. Tr. at 2216-18.

[27/]For example, Duncan testified that in April of 1997 Dr. Clopton excused him from work for two weeks because, based on Duncan's description of being bumped by Grose and other events, "it was too dangerous for me to go back." Tr. at 2354.

[28/]It is also noted that when Duncan was asked how this allegation could be consistent with his assertion that no one knew of his cooperation with the EPA until disclosure of the Messing letter, he asserted that he had been "confused" and changed his testimony to indicate that he didn't mention the EPA's Criminal (continued...)

Tr. at 2327, 2328-29. In addition, Duncan's assertion that his confrontation with Grose over his job duties was so traumatic that later that same week Duncan's psychiatrist placed him on medical disability, is inconsistent with documentary evidence showing that the confrontation over Duncan's job duties actually took place on March 20---a full month before the onset of Duncan's alleged medical disability. See RX 2 at 328 (Duncan memo to Covell reporting that the incident occurred on March 20), Tr. at 98 (Duncan testimony that the confrontation with Grose occurred "earlier" during the week of April 21). Also highly dubious is Duncan's trial testimony that he first accessed Dozier's 5150 file because he was searching for a safety shoe memo that Dozier would not have voluntarily given him if he had asked her for it. Tr. at 2624.

There is also evidence that during the course of Duncan's pre-trial dealings with other District employees, Duncan made various factual misrepresentations in addition to his apparent misrepresentation concerning the transfer of the THREECON memo. For example, Taylor's report of his *Skelly* inquiry into the transfer of the THREECON memo indicates that during the course of that inquiry Duncan referred to Jane Doe as his "friend"---an assertion clearly inconsistent with documentary evidence indicating that the relationship between Duncan and Jane Doe was so hostile that Duncan attempted to "resign" as her supervisor and had been accused of sexually harassing her only ten days before Taylor's hearing. See RX 18 at 2 (Taylor report), RX 29 (Duncan memo alleging that Jane Doe had been defaming him), Tr. at 1363-66 (Grose testimony indicating that on January 30 Jane Doe accused Duncan of sexual harassment). Similarly, it is very hard to believe the representation in Duncan's February 10, 1997 memo to Taylor that Duncan had determined that the term "5150" is a "slang term....for the mentally ill" by conducting an electronic search of the California Code for "5150." See RX 2 at 343. Although "5150" is in fact used by California police officers and a few others as a term for the mentally ill, it is highly unlikely that Duncan could have discovered that information simply by electronically searching the California Code for the number 5150.[29/] It is also noted that although Duncan now admits that he never provided information about alleged environmental violations to the Justice Department, his draft of the Messing letter asserts that "the Department of Justice is currently utilizing the information [he, Munz and Clark provided] and investigating various District practices and staff for criminal neglect of duty and fraud." Tr. at 2611, CX 1 at 19 (Messing letter).

As well, it must be recognized that although Duncan has denied suggestions that he deliberately disclosed the Messing letter in an attempt to protect himself from being disciplined for having transferred the THREECON memo to the W drive, the preponderance of the evidence

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[28/](...continued)
Division to Grose until some later occasion. Tr. at 2330.

[29/] In this regard it is noted that during the trial Duncan testified that at some point after discovering Dozier's 5150 file, he went to an Internet website and did a search of the whole California Code to find out what "5150" meant because "it sounded like code section" and when the search was completed the only section 5150 he saw displayed was the Welfare & Institutions Code provision governing the mentally ill. Tr. at 2216, 2243-46. This story seems dubious in view of the fact that the California Code actually contains nine separate sections titled 5150 (Business and Professions, Corporations, Family, Labor, Probate, Public Resources, Revenue and Taxation, Streets and Highway, and Welfare and Institutions). Also questionable are Duncan's assertion that he thought he could find the meaning of the term "5150" by searching the California Code and his assertion that by merely reading section 5150 of the Welfare and Institutions Code he could tell that "5150" was a slang term.

suggests that, in fact, this denial was untrue. Most significantly, Duncan's denial of any deliberate disclosure is inconsistent with the following statement from a May 8, 1997 letter that Duncan sent to his attorney (RX 4) and later inadvertently disclosed to the District:

> Enclosed are the reference materials and miscellaneous documents used by Eric, Linda, and I to defend ourselves against management's attacks on us. Our strategy was taken from Mao Zedong. Contained in Mao's "Little Red Book" is his formula for battle against a more powerful foe which he utilized against Chiang Chi Shek. This strategy never allowed the enemy to fight on his/her terms; the tactics simply stated are, "Enemy attacks, we retreat; enemy rests we harass, enemy retreats, we attack". We kept our disabilities and our cooperation with the Inspector General and the Criminal Division of EPA (CID), as "Aces in the Hole" only revealing them when it looked as if we might be disciplined or terminated. (emphasis added).

While it could be argued that the foregoing passage was merely an attempt to rationalize past events as having been the result of strategic maneuvering, there are several considerations that suggest that in fact Duncan did in fact deliberately disclose the Messing letter. First, the disclosure of the Messing letter did indeed occur at a time when, in Duncan's terminology, "it looked as if" Duncan "might be disciplined or terminated." In fact, the disclosure occurred only one week after Grose verbally informed Duncan that he would be disciplined, but before there had been any final decision on that discipline. Second, Duncan has testified that, just as claimed in the above letter, he made his Americans with Disabilities Act request disclosing his alleged psychiatric disabilities to the District in a deliberate attempt to prevent the District from possibly firing him for his attempt to "resign" as Jane Doe's supervisor. Tr. at 2612-15. Third, Duncan has failed to provide any other credible explanation for the emergence of the Messing letter from the printer used by the District's top management instead of the printer on his own desk. In fact, although Duncan now argues that the District's management must have secretly changed the printer routing for his computer station, he admits that the Messing letter was the only document that he ever printed, either before or after January 28, that didn't emerge from the printer on his own desk. Tr. at 2609. Moreover, Williams credibly testified that there is no way for print jobs to be automatically rerouted from a default printer and that if a computer user does not want to use the default printer, an alternate printer has to be selected on a document-by-document basis.[30/] Tr. at 2222-26.

Finally, it is noted that Duncan's demeanor while testifying in this proceeding was not a demeanor that would inspire confidence in his credibility. Rather, his demeanor while testifying and occasionally shouting out comments while sitting at his counsel's table was more consistent with the behavior of an overly excited, high-pressure salesman than with the demeanor of a person who is too depressed to even begin searching for new employment. In addition, there is merit in the observation of the arbitrator who sustained Duncan's five-day suspension and in the process found that his "evasive answers and obfuscation show guilty knowledge." ALJX 4 at 18.

[30/]The fact that Munz observed Duncan's supposedly unsuccessful attempts to print the Messing letter on his own desktop printer does not necessarily conflict with a finding that Duncan deliberately disclosed the Messing letter in an attempt to forestall disciplinary action. In fact, one could conclude that Duncan arranged to have Munz in his office when attempting to print the letter so that Munz would mistakenly believe the letter's disclosure was an accident, instead of a deliberate act.

Accordingly, on the basis of the foregoing credibility determinations, I find that Duncan has failed to meet his burden of showing by a preponderance of the credible evidence that he was the victim of any physical or verbal harassment by Grose.

Failure to Grant Paid Administrative Leave. Duncan also asserts that the refusal to grant him paid administrative leave when such leave was requested from the District's Board in April of 1997 was discriminatory because, as shown in the THREECON memo, Jane Doe was granted paid administrative leave in November of 1996. These assertions are not convincing. As review of the record indicates, the request for administrative leave sent to the District's Board was not considered by the Board because, as pointed out to Duncan in a letter immediately sent to him by Spinelli, under the applicable collective bargaining agreement any such request should have been sent to Johnson, not the Board. RX 2 at 335. Although Spinelli's letter also told Duncan what kind of information should be included in such a request to Johnson, he apparently never submitted that information. In addition, Dozier's testimony concerning Jane Doe's administrative leave indicates that she was paid for such leave only because there was a brief period of uncertainty about whether a stress disability documented by her physician was work-related.[31/] Tr. at 1963-65. In contrast, Duncan's request for paid administrative leave was not accompanied by any medical documentation. Indeed, Duncan's request for administrative leave did not even purport to be based on any sort of medical disability. It is also worth noting that the day after the District received Dr. Clopton's August 21, 1997 certification that Duncan was able to return to work, Duncan was in fact granted paid administrative leave until such time as Duncan could undergo a fitness for duty exam, i.e., until the District could resolve the uncertainty concerning Duncan's ability to return to work.

3. Termination

The final adverse action that is alleged to have been motivated by illegal retaliatory motives is Duncan's termination as a District employee in September of 1997. As previously explained, Grose's initial notice of proposed discharge listed as grounds for the termination three past disciplinary actions and three new charges. The past disciplinary actions cited in Grose's notice were Duncan's five-day suspension for having transferred the THREECON memo to the W drive, the April 18, 1997 letter sent to Duncan because of his unauthorized failure to report to work pending a decision on his demand for paid administrative leave, and the May 6, 1997 imposition of controlled leave based on Duncan's numerous work absences. As also previously explained, the three new charges consisted of allegations that Duncan had repeatedly misused the District's cellular telephone, had engaged in a continuous pattern of falsifying his time sheets, and had failed to perform four assigned tasks.

It is apparent from review of the text of Grose's notice of proposed termination that Grose elected to set forth in the notice almost every potential act of alleged misconduct that could conceivably be used to support Duncan's termination, no matter how trivial or technical such an act of misconduct might be. For example, Grose apparently listed every questionable use of the District's cellular telephone, every occasion when Duncan seemed to have failed to have worked the entire period reported on a time sheet, and even such minor events as Duncan's lateness for a sexual harassment seminar. In addition, the new charges consisted of allegations that had not been previously discussed with Duncan. Arguably, such actions could be viewed as circumstantial

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[31/]Dozier's testimony also indicates that the administrative leave was terminated after about ten days because Jane Doe reported that her condition was not work related. Tr. at 1965.

evidence of hostility and such evidence might in turn support an inference that Grose's efforts to fire Duncan were at least partially motivated by a desire to retaliate against Duncan's protected activities. However, I find that when all of the relevant evidence is considered, Duncan has failed to meet his burden of showing by a preponderance of the evidence that the District's decision to terminate his employment was at least in part motivated by retaliatory motives. There are three reasons for this conclusion.

First, although the reasons cited in Grose's proposed notice of termination were so numerous and in some cases so trivial that someone might infer that there was an animus against Duncan, Grose also had such a significant number of legitimate reasons for proposing Duncan's termination that the legitimate reasons alone were likely to have generated animus against Duncan. For example, Duncan's obviously untruthful statements denying that he had transferred the THREECON memo to the W drive, Duncan's continued use of the District's cellular phone to call Clark while supposedly too disabled to work, and the numerous questionable entries on Duncan's time sheets could have by themselves generated an animus and convinced Grose that Duncan was too dishonest to be employed by the District. Significantly, Grose's animus toward dishonesty in his subordinates is illustrated by his testimony that while working for the Bay Area Air Quality Management District, he terminated two subordinates for single acts of dishonesty. Similarly, Grose might well have determined that such acts of insubordination as Duncan's appearance at the District's office and use of its internet station during the week of his suspension, Duncan's resistance to Grose's determination that Duncan should spend less time in the field, Duncan's unilateral decision not to come to work until the District acted on his administrative leave request, and Duncan's prolonged refusal to comply with Grose's controlled leave procedures were collectively so serious that termination was warranted on the basis of insubordination alone or at least in combination with Duncan's acts of dishonesty. In addition, Grose may well have been further motivated by Duncan's atrocious attendance record, i.e., by the fact that during the four-month period ending on May 6, 1997 Duncan used up all his sick and vacation leave and was absent from work in a leave-without- pay status for an additional 202 hours. It is also worth noting that although Grose was aware of Duncan's cooperation with the EPA by the time he recommended Duncan's termination, the fact that Grose didn't begin working at the District until January of 1997 made it highly unlikely that Grose would have believed that any of the information Duncan provided to the EPA could have been about him personally.

It is further noted that the only indication that Grose was not a credible witness consists of allegations in Duncan's post-trial brief that two statements made during Grose's testimony in a May 14, 1998 arbitration proceeding somehow undermine his earlier testimony in this case. First, Duncan's post-trial brief alleges that comparison of Grose's statement in the arbitration proceeding that by May of 1998 he had "pitched" some pink receptionist message slips concerning the work absences of employees in his section with Grose's March 1998 testimony that he then still had such a collection of message slips raises the inference "that Grose only saved notes relating to Duncan's whereabouts." Second, Duncan's post-trial brief contends that Grose's testimony in this proceeding that he was "not aware" that Duncan was ever allowed to work "telecommute hours" is inconsistent with Grose's testimony before the arbitrator that "as far as I know" Duncan was "never" authorized to telecommute. Neither of these challenges to Grose's credibility is convincing. Grose's testimony that he "pitched" the message slips by May of 1998 is hardly suspicious in view of his further testimony to the arbitrator that, as many people do, he periodically "pitches" his message slips when his collection gets too big. ALJX 9 at 206. Likewise, the allegation that Grose has given inconsistent testimony on the question of Duncan's authority to telecommute is mere semantic quibbling, especially in view of the fact that Grose volunteered in his testimony in this proceeding

that there was one instance when he had allowed Munz to let an unnamed employee telecommute and that in that instance the employee might have been Duncan. Tr. at 2657-58. It should also be pointed out that the assertion in Duncan's post-trial brief that Grose engaged in retaliatory acts against Duncan whenever possible is inconsistent with the fact that in February of 1997 Grose found Jane Doe's sexual harassment charges against Duncan to be without merit. Finally, it is also noted that Grose's demeanor during his testimony in this proceeding was consistent with the demeanor of a person who is telling the truth to the best of his ability, regardless of whether the answers given would or would not be favorable to his side of the litigation.

Therefore, based on the foregoing considerations and on Grose's truthful demeanor during the trial, I conclude that Grose testified honestly when he asserted that Duncan's whistleblowing activities were not among the factors that motivated his proposal to terminate Duncan.

Second, even if Grose might have been so hostile to Duncan as a result of his protected activities that Grose was motivated to include some trivial, technical or less than fully substantiated acts of misconduct in the proposed termination notice, any such minor or unsubstantiated acts of misconduct were filtered out of the termination process by Taylor's *Skelly* inquiry into the proposed termination. As previously explained, Taylor gave Duncan a full opportunity to respond to the charges in Grose's notice and after considering Duncan's reply found some of those charges to be too minor or insufficiently substantiated to provide a basis for termination. However, at the same time, Taylor also found that there were enough calls made on the District's cellular phone during a one-month period when Duncan was on medical disability leave (64) and a sufficient number of unsatisfactorily explained instances of late arrivals, early departures and missed work time to warrant termination of someone with Duncan's prior history of disciplinary actions. In considering Taylor's conclusions, it should be noted that it was hardly unreasonable for him to have determined that while Duncan was supposedly too disabled to work he had no need or right to use the District's cellular phone to make numerous toll calls to Clark and Munz.[32/] In addition, it is also worth noting that for almost a full year before Duncan's psychiatrist found him to be too ill to work Duncan had been subject to a directive from Covell precluding him from spending work time talking to Clark and that therefore Taylor would have in fact been justified in finding that every one of Duncan's 110 cellular phone calls to Clark were unauthorized personal calls, not just those calls occurring after the commencement of Duncan's disability. Such a conclusion would have been further supported by the evidence indicating that by February of 1997 Clark had essentially ceased coming to work at all and was therefore unlikely to have been engaged in work-related discussions with Duncan during the following months.

It is recognized that during the trial Taylor could not recall specifically which of Duncan's unreported work absences warranted his conclusion that in at least in some instances Duncan failed to honestly record his work hours. However, review of the evidence indicates that Grose submitted evidence that definitely would have justified such a conclusion by Taylor. For example, Duncan's written representation to Taylor that he left Grose a message on April 4 indicating that he would be at a California Air Resources Board (CARB) meeting all day is of dubious accuracy in view of the e-mail message Grose's receptionist prepared on April 4 quoting Duncan as telling her "'something

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[32/] In this regard, it should be recognized that although some of Duncan's cellular calls might have pertained to his whistleblower activities, such a fact would hardly excuse Duncan from having made unauthorized use of the District's cellular phone. Although employers are prohibited from punishing employees for engaging in protected activities, they are not required to subsidize such activities.

has come up of a personal nature.'" CX 28 at 6 (Duncan's submission to Taylor), RX 2 at 158 (receptionist message to Grose).[33/] Likewise, Taylor would have been justified in concluding that in view of Covell's February 5, 1997 memo terminating all telecommuting, Duncan had engaged in a misrepresentation when he informed Taylor that his work absence on February 10 was attributable to telecommuting that had been authorized by both Munz and Grose. It is further noted that Duncan's written submission to Taylor failed to respond at all to the allegations that he had failed to account for leave taken on April 10 and 11, 1997, and that while being cross examined during the trial Duncan conceded that it was "probably true" that he did not correct his time sheet to show that he was off work on April 10. Tr. at 2488.

It is further noted in this regard that Taylor's detailed written report and trial testimony, including his demeanor while testifying, indicate that, in performing his role as a *Skelly* officer, Taylor made a good faith effort to consider the allegations against Duncan on the merits and that he testified truthfully when he represented that he did not allow his conclusions to be influenced by any animosity arising out of Duncan's protected activities. Tr. at 2007-08. Indeed, the evidence suggests that Taylor gave Duncan the benefit of the doubt on charges that could have in fact been sustained (e.g., the allegations that Duncan's calls to Clark before April 22 were unauthorized).

Third, even though the evidence suggests that Covell was probably angered by Duncan's protected activities, Duncan has failed to meet his burden of showing by a preponderance of the evidence that discriminatory reasons are the more likely reason for Covell's approval of Taylor's findings or that the reasons given in the final notice of termination are in fact a pretext. Although Covell was clearly aware of Duncan's protected activities since at least January of 1997 and may have suspected Duncan's involvement in such activities even earlier, there has been no showing that those activities had any substantially adverse impact on either Covell or the District.[34/] For example, there has been no showing that the EPA used information provided by Duncan as a basis for denying funds to the District or as grounds for commencing some sort of civil or criminal enforcement action against the District. Indeed, it appears that the EPA has taken no action whatsoever in response to

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[33/]Given the fact that Taylor had previously found Duncan's denial that he had transferred the THREECON memo to conflict with computer records showing that Duncan was almost certainly the one responsible for the transfer, it would have clearly been reasonable for Taylor to have doubts about Duncan's veracity and to have therefore concluded that the receptionist's contemporaneous memo concerning Duncan's whereabouts on April 4 was more reliable than Duncan's assertion that the memo was inaccurate. In this regard, it is also noted that during the trial the District produced evidence showing that Duncan's representation to Taylor that he was at the CARB meeting for eight hours on April 4 conflicts with a CARB agenda showing that on that particular day the meeting ended at noon. RX 25 (agenda for the CARB meeting). Although this agenda was apparently not available to Taylor when he conducted his *Skelly* inquiry, it nevertheless provides further support for a finding that Duncan misrepresented his whereabouts on April 4 and raises further doubts about his credibility in general. It is also noted that since April 4 fell in the first part of Duncan's pay period, it was not one of those days on which he would have been required to make an advance prediction about his future attendance. RX 24.

[34/]Likewise, it should also be recognized that although there is evidence that Covell was disturbed by the possibility that "moles" were supplying derogatory information to the EPA, there is no evidence to support the allegation in Duncan's post-trial brief that for two years Covell "had been actively hunting" for those "moles."

the information provided by Duncan. In contrast, there is ample evidence indicating that by September of 1997 Covell and the District had a number of other more compelling reasons for accepting a recommendation to terminate Duncan. The most significant among these reasons is the fact that beginning by at least the summer of 1996 Duncan had been engaged in an almost relentless series of acts of insubordination and hostility against the District's management that were unrelated to Duncan's whistleblowing activities. Most notable among these acts were Duncan's efforts to forestall the change in the District's status as a county agency, Duncan's confrontational approach when Covell failed to acquiesce to his demands that Jane Doe be transferred to another supervisor, Duncan's insubordinate refusal to comply with Covell's directive to cease meeting with Clark during work hours, Duncan's invasion of Dozier's e-mail files and the resulting disclosure of sensitive personal information about Jane Doe, Duncan's farfetched demand that Dozier be disciplined for having labeled her e-mail file 5150, Duncan's appearance at the District's office and use of the District's internet computer during his five-day suspension, and Duncan's repeated resistence to Grose's legitimate managerial directives, including Grose's directives limiting Duncan's field work and imposing controlled leave procedures. Significantly, the insubordinate and hostile nature of the foregoing activities is fully corroborated by the statements in Duncan's May 8, 1997 letter indicating that he treated the District's management as an "enemy" that he would "harass" when it rested and "attack" when it retreated. In addition, Taylor's two *Skelly* reports gave Covell clear reasons for concluding that Duncan's insubordination had been compounded by repeated acts of dishonesty such as Duncan's refusal to admit that he was the person who transferred the THREECON memo to the W drive, Duncan's extensive use of the District's cellular phone to make obviously personal cellular phone calls to Clark during periods when neither of them was working, and Duncan's failure to accurately report his work absences. The foregoing factors, as well as Covell's credible demeanor while testifying, all strongly indicate that the District's stated reasons for firing Duncan were not a pretext and that in fact these reasons were the more likely cause for Duncan's termination.

Finally, it is noted that even if it could be concluded that Duncan's termination was at least partly motivated by his protected activities, the District has more than met the burden of showing by a preponderance of the evidence that it would have taken the same action even if it had never learned of Duncan's protected activities. As already explained, the record shows that in the 14 month period immediately preceding Duncan's termination he repeatedly engaged in unprotected acts of insubordination and hostility toward the District's management and in the nine month period prior to the termination also engaged in a series of acts of dishonesty. While it might be argued that any one or two of these acts of insubordination and dishonesty were by themselves insufficient to warrant Duncan's dismissal, when these acts are considered collectively, as any rational employer would, it is clear that very few if any employers would have retained Duncan as an employee. As the Secretary of Labor has previously noted:

> Although whistleblowers are protected from retaliation for blowing the whistle, the fact that any employee may have blown the whistle does not afford him protection from being disciplined for reasons other than his whistleblowing activities nor does it give such an employee carte blanche to ignore the usual obligations involved in an employer-employee relationship. Dunham v. Brock, 794 F.2d 1037 (5th Cir. 1986). As the court found in Dunham: "[a]n otherwise protected 'provoked employee' is not automatically absolved from abusing his status and overstepping the defensible bounds of conduct." 794 F.2d at 1041 (citations omitted).

Lopez v. West Texas Utilities, 86-ERA-25 (Sec'y July 26, 1988). Thus, as in this case, an employer legitimately may discharge a worker for insubordinate behavior, work refusal, and disruption. See also Hale v. Baldwin Associates, 85-ERA-37 (Sec'y Sept. 29, 1989) (affirming an administrative law judge's finding that there was no statutory violation where a whistleblowing employee was discharged for not accepting assignments and for disrupting the work place); Couty v. Arkansas Power & Light Co., 87-ERA-10 (Sec'y Feb. 13, 1992); Abu-Hjeli v. Potomac Electric Power Co., 89-WPC-1 (Sec'y Sept. 24, 1993).

ORDER

The complaint of Complainant Mark Duncan is hereby dismissed.

Paul A. Mapes
Administrative Law Judge

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