

**Internal Audit Division
Finance Department
DeKalb County**

**PUBLIC WORKS DEPARTMENT
SANITATION DIVISION**

FINAL REPORT

**EMPLOYEE TRANSFER REVIEW
ALLEGATION OF EMPLOYER
RETALIATION**

April 2016

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**Finance Department
Internal Audit Division**

**Interim Chief
Executive Officer**

Lee May

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TRANSMITTAL MEMORANDUM

DATE: April 13, 2016
TO: Zachary Williams, Chief Operating Officer/Executive Assistant
FROM: Cornelia Louis, Deputy Director of Finance-Internal Audit (DIA)
SUBJECT: Allegation of Retaliation Review
RE: Employee Transfer

Attached is the report of the employee transfer review. The issues raised in the report were discussed with you on April 7, 2016, and Dale Phillips, William Malone, and Tracy Hutchinson during the Exit Conference on April 13, 2016.

If you have any questions about the audit or this report, please feel free to contact me at 404-371-2639.

Sincerely,



Cornelia Louis

cc: Appendix F



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EXECUTIVE SUMMARY

Background

JB has been employed with the Public Works Department, Sanitation Division as a Landfill Equipment Operator (LEO), since 2013. Effective February 29, 2016, JB was transferred to the North Transfer Station. Prior to his employment with DeKalb County, JB worked at the Seminole Road Landfill (here in after referred to as 'Landfill') through a contract vendor.

The Allegation

JB alleges that his recent transfer is retaliatory in nature as prior to the notification of his transfer, he reported Landfill pond overflow/ leakage of leachate into nearby Conley Creek and eventual into the South River to his supervisor on multiple occasions. JB further stated that he provided pictures of the leakage to his supervisor. Shortly after reporting the issue on February 3, 2016, JB was notified, in a memo, of his transfer to the North Transfer Station and the reason for the transfer was stated as "to promote harmony in the workplace." The transfer involved a change in location and work shift change from, 7:00am to 3:30pm, to 2:00pm to 10:30pm. JB alleges that the transfer would impose a hardship on him and his family, as he is the legal guardian of his 6-year-old grandson, since the child's mother died a year ago.

What is retaliation? Retaliation occurs when an employer punishes an employee for engaging in legally protected activity. Retaliation can potentially include any negative job action, such as demotion, discipline, firing, salary reduction, negative evaluations, transfer, and change in job assignments, job duties, shift, or change in other terms and conditions of employment. However, retaliation can also be more subtle. The U.S. Supreme Court has held that in those cases, consideration must be given to the circumstances of the situation.¹

In a retaliation case, the law is not concerned with why something happened or why someone did something. In a retaliation case, the only concern is whether an "adverse action" (following from a complaint or "protected activity") would tend to discourage other people from complaining. It does not matter the motive or intent. It also does not matter whether the original complaint was valid. It is a subtle, but important distinction. **See Appendix C** – for case laws that provide further insight on the meaning and context of retaliation in the workplace.

Numerous legislations provide protection for employees, who engage in "protected acts," as defined by the related legislation, against retaliation from employers. For example, The Solid Waste Disposal Act (SWDA) prohibits employers from retaliating against employees for engaging in

¹ [JOSEPH ONCALE v. SUNDOWNER OFFSHORE SERVICES, INCORPORATED, et al., \(1998\)](#)



protected activities pertaining to alleged violations of environmental laws and regulations related to the disposal of solid and hazardous waste at active and future facilities.

DeKalb County takes very seriously any allegation of retaliation against employees for reporting potential issues, including environmental concerns. The County continues to foster an open and fair environment where employees can report concerns without fear of retaliation. Given the potential significance of this allegation, the Division of Internal Audit (DIA) was asked by the Office of the Chief Operating Officer to review the circumstances surrounding the transfer of JB.

Objective and Approach

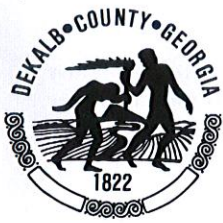
The primary purpose of this report is to review the circumstances to determine if any evidence exist that may potentially be considered or perceived as supporting or not supporting the allegation that JB's transfer was potentially retaliatory in nature. Specifically considering if:

- The employee engaged in a potential "protected activity."
- The employer/County took action against the employee that is likely to have a major adverse impact on the employee. In addition, if there is a causal link between the employee protected activity and the employer's action (in other words, the employer took action against the employee because of the activity).

This report is not intended to provide legal advice or opinions. The focus and scope of this report is to identify relevant facts and circumstances to support senior management and County legal personnel in evaluating the circumstances and making a determination regarding the alleged retaliation, within the context of all potentially relevant legislation, including those, which may not have been considered / identified in this report.

Our review methodology included consideration of legislation, case laws, County policies and procedures, interviews of key individuals, and review of other key documents.

Please see **Appendix B** for further details on our engagement scope and approach.



Summary of Observations

In general, the evidence and statements received suggest that on February 3, 2016, JB did report an incidence of landfill pond overflow, potentially sending leachate in to a nearby Conley Creek, which is possibly protected activity. Within a few days of reporting the incident, JB was notified of his transfer to a new work location and shift change. The close timing of the transfer following the reported incident may probably support JB's allegation of retaliation. Furthermore, explanations for the transfer and shift change, provided by the Landfill senior management was not consistent with PeopleSoft (County's HR management Software) vacant position data.

Please see pages 6 – 11 for a summary of our observations.

Overall Recommendation and Next Steps

The appropriate department(s) should closely review the circumstances of the transfer and information outlined in this report with relevant legislations and case laws to evaluate the risk that JB's transfer could be viewed as retaliatory, and if deemed necessary, take remedial actions.



Approvals:

Original Signed by:

Cornelia Louis

Deputy Director of Finance

Internal Audit Division

Department of Finance

DeKalb County



SUMMARY OF OBSERVATIONS

Based on the documents reviewed and discussions with key stakeholders, the following are our observations:

1. Determining evidence of employee engaging in a potentially protected activity.

A protected activity is one that is defined as such by relevant legislation. Employers are generally prohibited from taking action, which may have a major adverse impact, against an employee who engages in a protected activity. The Solid Waste Disposal Act (SWDA) prohibits employers from retaliating against employees for engaging in protected activities pertaining to alleged violations of environmental laws and regulations related to the disposal of solid and hazardous waste at active and future facilities.

The SWDA states, "A person may not discharge or in any manner retaliate against an employee because the employee:

- Provided (or is about to provide) information relating to a violation of the SWDA to the Environmental Protection Agency (EPA) or other appropriate Federal agency or department."

JB Allegations

JB alleges on February 3, 2016, he reported to his immediate supervisor, the Solid Waste Plant Supervisor – Post Closure and Closure (the Supervisor), that Pond 12 at the County Landfill overflowed and trash washed into the pond. JB took photos of the overflow of trash into the pond. He sent those photos, via text message, to his Supervisor on February 3, 2016. DIA reviewed the text messages that were from a phone belonging to JB to a phone number belonging to the Supervisor. (See Appendix D – for sample text messages sent). JB claims that on February 4, 2016, his Supervisor informed him someone sent photos of the trash overflowing into the pond to Georgia Department of Natural Resources, Environmental Protection Division (EPD). JB explained he denied, to his Supervisor, sending the photos or calling EPD.

Landfill Management Interviews

An interview with JB's Supervisor confirmed JB did report the issue with the pond to him in February 2016; however, the Supervisor stated he too observed the issue and it is the responsibility and expectation of all LEOs to report issues with the Landfill. The Supervisor further stated he informed the Deputy Director of Processing and Disposal, Sanitation Division (the Deputy Director),



of the issue but did not inform her of the employee's name who reported the issue. The Deputy Director also confirmed she was informed of the overflowing pond by the Supervisor, but was not told by the Supervisor who reported the incident to him.

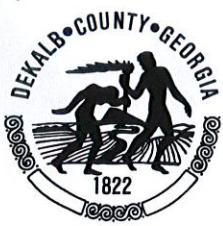
Based on an interview and follow-up emails, the Deputy Director affirmed, since December 2015, she received two formal complaints from EPD about the Landfill. The December 2015 call was about pond overflow issues at the landfill after the heavy rainfall in December 2015. The EPD did not visit the landfill, but performed a routine inspection on January 26, 2016. The Landfill was, in general, found to be in compliance by the EPD, with one noted deficiency, "bare spots on the landfill slopes that need to be stabilized." A corrective measures plan was in place to address that issue.

The Deputy Director stated the second complaint, received on February 4, 2016, was not related to pond overflow, but relating to Landfill construction. She further acknowledged the EPD called to confirm whether construction activity was being performed at the Landfill. The EPD has not visited the Landfill since January 26, 2016.

The Deputy Director expressed, receiving too many EPD complaints could lead to the closure of the Landfill, as was the case with the Live Oak Landfill, where she previously worked. In addition, she expressed she tries to minimize complaints, by fostering a good relationship with the EPD inspector(s) so they trust the landfill management will address issues in a timely manner. In addition, she has held meetings with her management team to discuss EPD complaints and potential measures that can be taken to minimize risk of receiving more EPD complaints.

The DIA made a Georgia Open Record Act (GORA) request to the EPD Atlanta offices for all documents relating to complaints received against the DeKalb County Landfill. No record exists of complaints/calls made in December 2015 and February 2016, at the EPD Atlanta offices. The EPD's most recent recorded complaint was dated back to 2005.

The text messages obtained from JB's phone indicates photos of pond overflow were forward to the Supervisor in February 2016. However, due to the inconsistencies between the EPD records and statements of landfill senior management, we are unable to determine if the alleged environmental concern/ pond overflow at the landfill was reported to the EPD and if so, when or who reported the issue. JB has stated, he did not make any complaints to the EPD. However, there is a risk that the act of reporting the pond overflow issue to management and the potential to report to the EPD could be perceived as a protected activity.



Recommendation

We recommend that the County's Law Department review the circumstances to determine whether it would fit the criteria for a protected activity, under the Solid Waste Disposal Act or any other related act/legislation.

2. Reviewing the employer action taken, potential link to the protected activity and the potential adverse impact to the employee.

JB Allegations

JB alleges on February 8, 2016, he was informed by the Superintendent of Processing and Disposal (the Superintendent), that the Deputy Director directed his transfer to the North Transfer station, with a new shift of 2:00pm to 10:30pm, effective February 9, 2016. The memo to JB, dated February 5, 2016, stated, "*In an effort to promote harmony in the work place, your work location will change.*" The memo also stated, "*Management can change your revised schedule at any time, based on operational requirements.*" JB contends when he asked the Superintendent for the reason for the transfer, he expressed his uncertainty as "to promote harmony" meant and the Deputy Director told him JB was "not allowed to work in the Landfill."

On February 10, 2016, JB met with the Supervisor and the Deputy Director to discuss his transfer. The Deputy Director stated there was an operational need for JB at the North Transfer station and he was being transferred to meet the need. JB claims the Superintendent told him the Deputy Director said he could not work at the Landfill anymore. In contrast, JB asserts during the meeting the Deputy Director declined to comment on discussions she had with the Supervisor and reiterated the transfer was for operational needs only. JB expressed concerns with the change in location and shift because it would impose a hardship on his family, as he was currently the legal guardian of his 6-year-old grandson since his mother died the prior year.

JB also stated, in the meeting, he insisted he had nothing to do with reports or calls to the EPD. He stated the Deputy Director informed him of the two complaints from the EPD. However, the Deputy Director again, reiterated his transfer had nothing to do with any complaints to EPD and his transfer was for operational needs.



Landfill Management Interviews

When DIA asked, the Deputy Director explained, the phrase “*to promote harmony*” was a standard phrase use sometimes in memos to suggest the action taken would help support harmony in the organizational operations.

The Deputy Director confirmed she and the Supervisor met with JB to discuss his transfer. She stated JB believed his transfer was related to complaints made to the EPD and offered to provide his phone for review as proof he did not send photos or make complaints to the EPD. The Deputy Director stated his transfer had nothing to do with complaints made to EPD; she further indicated she was unaware who made the EPD complaints; the identity of complainant is not important to her. She reiterated to JB, he was transferred to meet an operational need at the North Transfer Station.

The Deputy Director confirmed, JB explained the impact the transfer/shift change would impose on his family as he was raising his 6-year old grandson. She extended the effective start date to the February 29, 2016 to give JB more time to make alternate family arrangements.

When interviewed by DIA, both the Deputy Director and the Supervisor stated JB was a good worker with no disciplinary issues. They stated JB was hired as a Land Equipment Operator (LEO), as per his HR Personnel file, his duties included doing the duties of an LEO as well as environmental compliance associated with renewal fuel facility and gas collection at the Landfill. Both the Supervisor and the Deputy Director stated other staff members were also trained to conduct the required tests and readings and could easily assume the testing and maintenance duties of JB.

In addition, both the Deputy Director and the Supervisor, stated he was not very skilled on operating all the large vehicles at the landfill and they believed the reassignment to the North Transfer Station would be more beneficial since that location only has one type of equipment (loader) to operate and learn.

However, the following statements, from our interview with the Superintendent, are inconsistent with statements received from the Deputy Director and the Supervisor. The Superintendent states:

- He was given direction to transfer JB to the North Station. At the time of the directive, he informed the Deputy Director there was no need for JB at the North Transfer Station or any transfer station, as no positions were currently available.



- He suggested to the Deputy Director there were two LEO positions available at the Compost Section of the Landfill where JB could be transferred. However, the Deputy Director told him, JB was “not allowed to work at the landfill anymore.” He was not given a reason for JB’s transfer.
- He was not sure what the transfer memo meant by “to promote harmony” and was not able to explain to JB the reason for the transfer.
- He reiterated no positions were available for JB, and he was planning to use JB as a floater LEO to visit the different transfer stations to make repairs etc., this would have been a new position. However, one of the loaders at North Transfer Station resigned on Friday, February 26, 2016, which was before JB’s transfer became effective, creating a vacancy for a loader position. Thus, JB was assigned to that position.
- The Superintendent further stated, he is aware JB and the Deputy Director had a meeting to discuss JB’s transfer. After the meeting on February 10, 2016, the Superintendent stated he met with the Deputy Director. She stated he (the Superintendent) “is supposed to have her back” and “they are supposed to look out for each other...” referring to his (the Superintendent) communication to JB about the Deputy Director statement that he (JB) was not allowed to work at the landfill anymore.

The DIA also reviewed the DeKalb County HR management Software data as of February 23, 2016. The vacant position report revealed there were no vacant positions available at the North Transfer Station (Cost center: 8110). The Seminole Road Landfill (cost center: 8145) as of February 23, 2016 had five (5) vacancies listed for the position of Landfill Equipment Operator. An interview with the Solid Plant Waste Supervisor - Compost Section, also confirmed available LEO positions at the Landfill, Compost Section.

Review of circumstances

To allege retaliation, it is not enough for an employee to allege he or she engaged in a “protected activity” and then was subjected to a job action he or she believes is negative: The two events must be connected. However, based on case law, an indirect causal link between the potential “protected activity” and employer’s action maybe sufficient evidence to show retaliation.

Based on the information mentioned above, the following factors should be considered:

Timing. This is the most common way to prove retaliation: If the adverse action comes right after the employee complains, retaliation may be likely.



In this situation, the alleged adverse action, the direction to change work location and work hours occurred a few days after the employee reported the alleged leakage of trash and overflow of leachate in the pond. This issue is a potential violation of environmental laws and reportable to the EPD.

Knowledge. An employee claiming retaliation has to be able to show the person who took the adverse action knew about the complaint or other protected activity. Otherwise, it will be impossible to show that person acted "because of" the complaint.

The employer was aware JB made the report/communicated the issue to senior management. JB sent photos, via text message, to his Supervisor prior to receiving the memo directing his transfer.

Lack of Other Explanations. If the employer had no other reason for taking the adverse action or the employer's reason for taking action is inconsistent with other evidence or factors considered, in that case, there is a greater risk that the action maybe perceived to be retaliatory in nature.

There were conflicting senior management statements as it relates to the operational need for JB's transfer and a lack of available positions at the North Transfer Station, as per the County's HR Employee Management System, at the time the transfer was initiated.

These factors/circumstances, may give the perception that the employer had no other reason to initiate the transfer of JB and there is an indirect causal link between the transfer (employer action) and the potential protected activity.

Recommendation:

The DIA recommends that the County's Law Department further review the circumstances surrounding this allegation and the information contained in this report to help evaluate and determine the likelihood that the transfer action is potentially retaliatory.



Appendix A – Acknowledgements

We appreciate the cooperation and assistance we received from the Public Works Department, Sanitation Division personnel during the course of this review.

Conducted by:

Lavois Campbell
Principal Auditor
Finance Department - Internal Audit Division

Reviewed by:

Cornelia Louis
Deputy Director of Finance
Finance Department - Internal Audit Division



Appendix B – Engagement Objectives and Scope

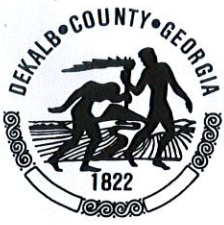
Engagement Objectives and scope

The primary purpose of this report is to review the circumstances to determine if any evidence exist that may potentially be considered or perceived as supporting or not supporting the allegation that JB's transfer was potentially retaliatory in nature. Specifically determining if:

- The employee engaged in a potential "protected activity."
- The employer/County took action against the employee that is likely to have a major adverse impact on the employee.
- There is a causal link between the employee protected activity and the employer's action (in other words, your employer took action against the employee because of the activity).

This report is not intended to provide legal advice or opinions. The focus and scope of this report is to identify relevant facts and circumstances to support senior management and County legal personnel in evaluating the circumstances and making a determination regarding the alleged retaliation, within the context of all potentially relevant legislation, including those, which may not have been considered/identified in this report.

Our review methodology included consideration of legislation, relevant case law, County policies and procedures, interviews of key individuals, and review of other key documents.



Appendix C – Relevant Retaliation Case Law

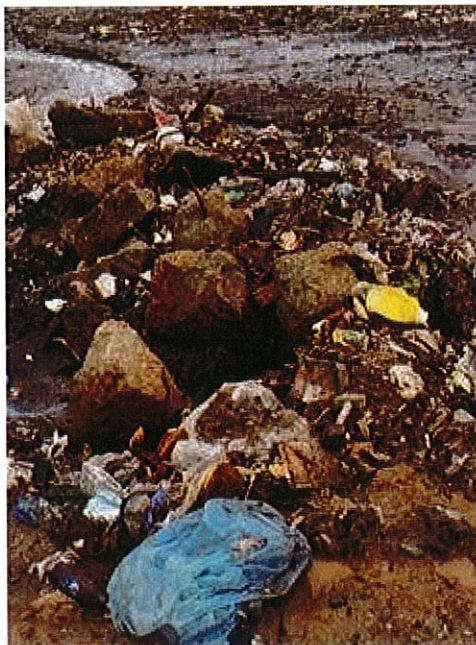
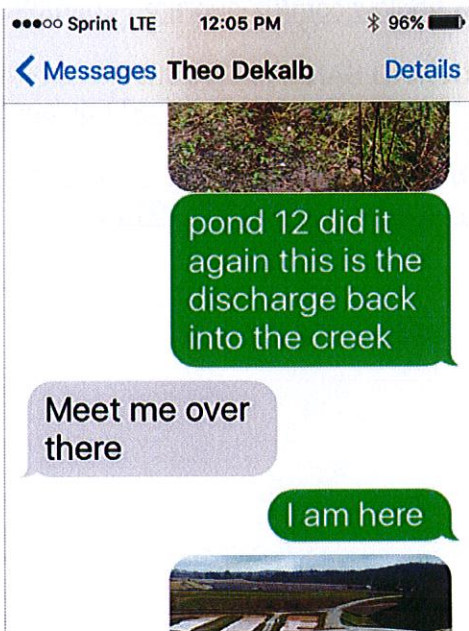
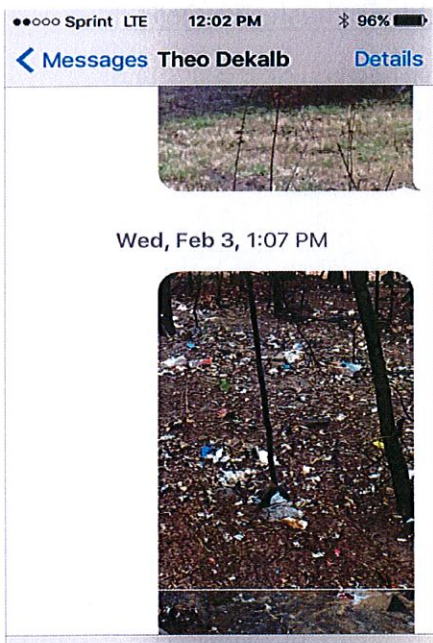
The Supreme Court rulings on retaliation law can be understood by reading these three cases, each of which was decided by a unanimous vote:

- 1) JOSEPH ONCALE v. SUNDOWNER OFFSHORE SERVICES, INCORPORATED, et al., (1998) -
See more at: <http://caselaw.findlaw.com/us-supreme-court/523/75.html#sthash.r1SHQoIR.dpuf>
- 2) BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, PETITIONER v. SHEILA WHITE (2006)– see more at : <https://www.law.cornell.edu/supct/html/05-259.ZO.html>
- 3) THOMPSON v. NORTH AMERICAN STAINLESS, LP (2011). – see more at:
<http://www.supremecourt.gov/opinions/10pdf/09-291.pdf>



Appendix D – Text Messages sent by JB to his Supervisor

Screenshots of text messages sent on February 3, 2016 from: Tel: 1-770-527-XXXX, belonging to JB to Tel: 678 939 XXXX belonging to his Supervisor.





APPENDIX E – DEFINITIONS AND ABBREVIATIONS

Acronyms and Abbreviation

EPA	Environmental Protection Agency
EPD	Environmental Protection Division
GORA	Georgia Open Records Act
LEO	Landfill Equipment Operator
SWDA	The Solid Waste Disposal Act

PeopleSoft - The HR Management software used by the DeKalb County to maintain some HR records and resource management information.

Protected Activity - is a legal term used in labor policy to define employee protection against employer retaliation in the United States. It is a legal principle under the subject of the freedom of association. It defines the activities workers may partake in without fear of employer retaliation.²

Leachate - Any liquid that, in the course of passing through matter, extracts soluble or suspended solids, or any other component of the material through which it has passed.

JB – The complainant/employee

The Supervisor - Solid Waste Plant Supervisor – Post Closure and Closure Section, Seminole Road Landfill.

The Deputy Director - Deputy Director of Processing and Disposal, Sanitation Division

The Superintendent - Superintendent of Processing and Disposal, Sanitation Division

² https://en.wikipedia.org/wiki/Protected_concerted_activity



APPENDIX F – DISTRIBUTION LIST

This report has been distributed to the following individuals:

DeKalb County Board of Commissioners

Lee May, Interim Chief Executive Officer

Zachary L. Williams, Chief Operating Officer/ Executive Assistant

O.V. Brantley, County Attorney

William Malone, Associate Director, Sanitation Division, Public Works Department

Claudette Leak, Assistant to the Chief Operating Officer