U.S. Department of Labor

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Issue Date: 16 March 2006

CASE NOS.: 2004-CAA-4
2004-CAA-10
2005-CAA-6
2005-CAA-14[1]
2006-SDW-2

IN THE MATTER OF

CATHERINE A. FOX,

Complainant

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Respondent

APPEARANCES:

Richard Hubert, Esq.
M. Lynn Reichert, Esq.
On behalf of the Complainant

Karol S. Berrien, Esq.
Robin B. Allen, Esq.
On behalf of the Respondent

Before: C. Richard Avery
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

[1] Post-hearing, Complainant brought two additional complaints (2005-CAA-14 and 2006-SDW-2) alleging continued adverse action, including termination; and by Order dated January 12, 2006, these cases have been consolidated with the original three and will be addressed herein.

I. OVERVIEW

These consolidated cases arise pursuant to the employee protection provisions of the Safe Water Drinking Act (SWDA), 42 U.S.C. § 300j-9(1) and Water Pollution Control Act (WPCA), 33 U.S.C. § 1367.[2] Catherine Fox (Complainant) filed multiple complaints against several parties including the U.S. Environmental Protection Agency (EPA or Region Four or Respondent), the University of Georgia (UGA), the United States Army (Army), and the EPA Office of the Inspector General (OIG). All parties except EPA were dismissed in pretrial motions. ALJX 11. After a year and one-half of events in the case, a three-day formal hearing held in Atlanta, Georgia, on March 22-24, 2005, at which sixteen witnesses testified and the following exhibits were admitted: ALJ Exhibits 1 through 12; Complainant's Exhibits 1 through 149, (with the exception of Exhibits 5, 8, 10, 14, 21, 76, 84, 100 page 1, 132, 133, 136, 137, 138, and 144); and Respondent's Exhibits 1 through 99. The parties made oral and written arguments, and examined and cross-examined witnesses.[3]

Complainant is a former environmental scientist for U.S EPA Region Four, in Atlanta, Georgia. She arrived at Region Four in 1998, where she worked as a Water Technical Authority in the Environmental Accountability Division (EAD). Complainant later went on an Intergovernmental Personnel Act (IPA) agreement to Georgia Technical University; when she returned from the IPA she worked from her home for six months until she was reassigned to EAD. Following the reassignment, she went on another IPA to University of Georgia; when she returned from that IPA she was eventually reassigned to the National

[2] Complainant originally also brought these actions under the Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971; the Clean Air Act (CAA), 42 U.S.C. § 7622; and the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9610; however, Complainant's counsel conceded at the formal hearing that evidence to support those acts was not adduced at the hearing, and agreed that those acts were not applicable to the instant case. See Tr. 1095-1098.

[3] The parties were granted additional time to file post-hearing briefs; both parties did so. Accompanying its post-hearing brief, Respondent submitted proposed exhibits 105 and 106. RX 105 is a bench decision from an EEOC ALJ; RX 106 is a sworn declaration by Mr. Heinz Muller. I find these exhibits both untimely and irrelevant and did not consider either exhibit. However, post-hearing and following a telephonic conference of January 19, 2006, both were granted an opportunity to file evidence concerning Complainant's termination and each party has now done so, along with comments. Specifically, Respondent has filed Exhibits 107 through 111 and Complainant has filed one binder consisting of her June 14, 2005, letter and attachments regarding her then proposed termination. (CX 150).

Environmental Policy Act (NEPA) Program Office in August 2003, where she worked until she was terminated from EPA on December 6, 2005. Throughout her tenure at EPA, Complainant engaged in several instances of alleged protected activity, for which she alleges she was retaliated against by Respondent when it created a hostile working environment; and suffered other adverse employment actions including termination of her IPA at UGA and an ongoing investigation by OIG, as well as her ultimate termination.

Following mutual delays by the parties in order to engage in extensive discovery, these cases were formerly tried during the week of March 21, 2005. Following that trial, the parties sought and were granted time extensions by which to file post-trial briefs. The last such brief arrived November 7, 2005. Subsequently, however, Complainant filed another complaint following her termination on December 6, 2005; and a telephonic conference on January 19, 2006, confirmed by a letter of even date, acknowledged that while a second trial was unnecessary, given these post-trial events each party was granted time to offer additional evidence and file supplemental briefs. Each has now done so, the last received on February 22, 2006. Following the closing of the record and after having considered over a thousand pages of hearing transcript, hundreds of exhibits, detailed post-hearing briefs, the parties' arguments and the controlling law, I find that Complainant has failed to satisfy the ultimate burden of establishing that she was intentionally discriminated against by Respondent because she engaged in protected activity.

II. BACKGROUND

Complainant lives with her husband and their two young children in Atlanta, Georgia. Complainant possesses a Bachelor's degree in biology from University of Missouri, a Master's degree in Oceanography from Texas A&M, and began a Ph.D. program at the University of Virginia. (Tr. 557). She transferred to EPA Region Four from headquarters in Washington, D.C. in 1998 because she and her husband could make more money; she went on maternity leave that same year when her first son was born. (Tr. 125, 492). Complainant said when she arrived at Region Four, she did not have a position description and was not given assigned duties; rather, she was told to be a "resource." (Tr. 125). About six months later, Complainant was assigned the position of Clean Water Technical Authority, where her position was to work with the Water Enforcement Branch to help them meet obligations under the memorandum of agreement (MOA) between headquarters

and Region Four.[4] At this time, Complainant's first-line supervisor was Ms. Sherri Fields, her second-line supervisor was Mr. Bruce Miller.

A. The CAFO Inspection, Wet Weather Priorities and The Counseling Session: 1999

1. The CAFO Incident

During the time Complainant's work involved the MOA, Concentrated Animal Feeding Operations (CAFO) were a targeted priority pursuant to an MOA. As a Clean Water Act Technical Authority, Complainant had the responsibility of ensuring that CAFO priorities were addressed pursuant to Region Four's agreement with headquarters. Complainant was assigned to accompany two staff members, Dave Olsen and Darrell Shoemate, to several CAFOs in Georgia to perform inspections; one regarding dairy cattle concerned Complainant because she observed a potential violation. The CAFO in question had a lagoon into which the animal waste was placed as required, but in front of the lagoon was a stormwater runoff area and a pipe, which collected the runoff. (Tr. 128). Complainant believed that the pipe ran underneath the lagoon and exited into a dry creek bed down the hill, therefore, she was concerned that there may have been a connection between the pipe and the lagoon, and it seemed to her to be a violation, though no tests were performed. (Tr. 129-131). Complainant was also concerned by the different ways in which Mr. Shoemate and Mr. Olsen conducted the inspection because Mr. Shoemate made notes and used checklists, but Mr. Olsen did not. (Tr. 129).

Complainant said she alerted Mr. Al Havinga and Ms. Gina Mortenson, two people in headquarters of her concerns and held a CAFO work group meeting that was attended by Mr. Scott Gordon, the Branch Chief of the Water Enforcement Branch.[5] The inspection was discussed at the meeting, as was the tardiness of Mr. Olsen's report. Complainant wanted to see Mr. Olsen's report to ascertain whether

[4] Complainant explained that there were certain set priorities, which all EPA Regions were supposed to work on; she said a memorandum of agreement (MOA) is when EPA writes a strategic plan regarding how statutory acts are administered and contain goals and objectives. (Tr. 126-127).

[5] Complainant believed she mentioned Mr. Havinga and Ms. Mortenson's names in her deposition, but when asked on cross-examination if she would be surprised to learn their names were not contained in her deposition, she said she did not know. (Tr. 502-504). Complainant provided no evidence other than her testimony that she reported anything to these two individuals.

he reported a violation, but she never saw the report, which led her to believe that Region Four was not meeting its obligations under the Clean Water Act. (Tr. 133-134).

2. The Counseling Session and Subsequent Memorandum

On September 7, 1999, Complainant was told by her second-line supervisor, Mr. Miller that a counseling session would be held in two days. She testified that he said one of the issues to be discussed was Complainant's request for a CAFO report. (Tr. 134). On cross-examination, she explained that her handwritten notes indicated that Mr. Miller said three problem issues would be discussed: that Complainant was overheard talking on the phone saying negative things about EAD; that when she presented her opinion she did so in a way that made others feel poorly; and her poor relationship with the Water group due to the e-mail to headquarters, which Complainant identified as one she sent to Mr. Jim Dombrowsky. (Tr. 505).[6]

On September 9, 1999, approximately two hours prior to the counseling session, Complainant was notified of the counseling session by her first-line supervisor, Ms. Fields. In attendance at the session were Complainant, Mr. Miller, Ms. Fields, Ms. Mary Kay Lynch acting for Ms. Phyllis Harris who was on maternity leave, and Ms. Karol Berrien, the personnel attorney.[7] (Tr. 138). Complainant recalled that she was told the session was held to discuss the manner in which she interacted with people, and said there was no written agenda. She said Mr. Miller did most of the talking and stated the meeting had been called because complaints had been received regarding the manner in which Complainant interacted with other people. Complainant was not provided with any specific instances of such complaints. (Tr. 140).

Mr. Miller gave Complainant a document entitled "Memorandum of Oral Counseling," dated September 16, 1999. (CX 18). On her own volition, Complainant provided a response to the memo on October 5, 1999. (CX 19). She received a document in response to her response (CX 20). Complainant testified that the counseling session was a surprise to her, and that proper notification was not provided to her. She said she was not informed that an attorney would be

[6] This e-mail is discussed thoroughly below.

[7] While employed at the Environmental Accountability Division, Complainant's immediate, or first-line supervisor was Ms. Sherri Fields; Mr. Miller was a supervisor in the department, and Ms. Phyllis Harris was the Division Director of EAD and also served as Regional Counsel. (Tr. 125).

present at the session, and she had neither a representative nor a witness present. Complainant was not able to properly respond during the session because she was "overwhelmed" and felt intimidated. (Tr. 143-145).

Mr. Miller, Ms. Fields, Mr. Gordon and Ms. Harris all testified about the events leading to the September 9, 1999 counseling session. Ms. Harris testified that she had received complaints regarding Complainant; she specifically recalled receiving feedback from Mr. Miller and Ms. Fields with respect to Complainant's relationships with her co-workers. (Tr. 442). Ms. Harris had conversations with Complainant regarding interpersonal skills and said she felt "responsible" because she had hired Complainant and brought her to Region Four from headquarters, so she tried to act as a mentor to Complainant.[8] Ms. Harris recalled that on the occasions she spoke to Complainant, Complainant said she would try to improve, or that she felt she had not done anything wrong. (Tr. 446-447). Ms. Harris did not recall Complainant making reports to her that environmental violations were occurring. (Tr. 445). Ms. Harris said it was very unlikely that she had anything to do with the preparation of the memorandum of oral counseling, because she was on maternity leave during September 1999, though she vaguely recalled receiving a call at home about the document and saying something to the effect of "do what you need to do." (Tr. 449-450).

Ms. Fields, the Chief of the Accountability Management Branch at the time, testified that she received at least three complaints from employees regarding Complainant's interpersonal skills, two of which related to comments Complainant made during a telephone call overheard by other employees[9]. (Tr. 911). Ms. Fields wrote three documents entitled "Note to File" to document the incidents: On May 13, 1998, Ms. Fields indicated that an employee reported to her that Complainant was engaged in a phone call "with what sounded to be someone from headquarters" and that the employee took offense to remarks made by Complainant that personnel at Region Four took two-hour lunches. The reporting employee also indicated that Complainant made statements on the phone that only minority women are promoted in Region Four, to which the employee, a minority woman, took offense. (CX 1). On May 14, 1988, Ms. Fields noted that a different employee reported to her that another employee told him that Complainant made remarks on the telephone that employees took two-hour lunches, did not care about

[8] Ms. Harris is currently the Deputy Assistant Administrator for the Office of Enforcement, Compliance Assurance at EPA in Washington, D.C., a position she has held since 2002. (Tr. 440-441).

[9] Ms. Fields is currently the Division Chief of the Division of Science and Natural Resource Management at the National Parks Service, a position she has held since April 2003. (Tr. 910).

their jobs, and had businesses on the side. The employee brought the matter to Ms. Fields' attention out of concern about how such statements would affect the morale of the agency. (CX 2). Ms. Fields said the third complaint related to Complainant causing confusion in the workplace. (Tr. 911-912).

Ms. Fields testified that in each case she engaged in individual verbal counseling with Complainant. She said that she advised Complainant she was entitled to her opinion but asked her to keep her voice down as the workspace was a cubicle format and it was easy to overhear conversations of others. (Tr. 921). It was because such individual counseling sessions did not produce the desired result, upper management was involved and the September 9, 1999 counseling session was held as a result of prior instances and because of a phone call Ms. Fields received from Mr. Scott Gordon of the Water Enforcement Branch, wherein he alleged that Complainant had called one of his employees a liar in a work group meeting. (Tr. 912-913). Ms. Fields said that Complainant was not reprimanded for raising concerns about perceived violations; rather, she was reprimanded for making offensive remarks to employees. (Tr. 930).

Mr. Gordon testified that in 1999 he was the Branch Chief for the enforcement program in the Water Division, and Complainant as a Water Technical Authority served as a liaison to Mr. Gordon's branch.[10] (Tr. 834). Mr. Gordon spoke to Complainant's managers in September 1999 regarding her behavior and interactions with his staff. He explained that there was an issue regarding how individual CAFO inspections were to be approached and how the inspections would be related into regulatory determination and compliance. A regular meeting was held, consisting of fact-finding discussion about where the agency needed to proceed, wherein Complainant called Mr. Olson a liar. (Tr. 838-839). Mr. Gordon said that Complainant took exception to Mr. Olson's representation of timing of completion of inspection reports, and how soon he would complete the reports; she did not have any complaints about the substance of the reports. (Tr. 839).

Mr. Gordon told Ms. Fields that Complainant's actions were unprofessional and disturbing to the workplace, and asked that she speak to Complainant about controlling her feelings and not making personal attacks on employees. He also spoke to Mr. Miller about Complainant's conduct. (Tr. 840). Mr. Gordon said that employees had expressed that they thought Complainant was at times abrupt, that

[10] Mr. Gordon no longer holds that position; he is currently the Deputy Director of the Water Management Division for EPA. (Tr. 833).

she was not a good listener, and that she was more combative than she was a problem-solver, but none of the concerns were as serious as the incident he witnessed with Mr. Olson. (Tr. 841). Mr. Gordon acknowledged that he believed the appropriate step was a conversation between Complainant and her supervisor, which was why he contacted Ms. Fields. He said Mr. Miller and Ms. Fields told him they had spoken with Complainant and were working on the issue. (Tr. 848).

Mr. Miller testified that when he first began receiving complaints about Complainant, he and Complainant went to lunch one day and discussed the concerns; another time they met in his office and he asked her to be careful, saying he did not think she "had some agenda to be nasty" to anyone, but in certain interactions "she tended to personalize things" which people took offense to. (Tr. 933-934). Mr. Miller said that Ms. Fields, Complainant's first-line supervisor, frequently came to him to discuss issues with Complainant, she was frustrated by interactions with Complainant and found her somewhat difficult to work with. He said when Ms. Fields and Complainant discussed programmatic issues or Complainant's interactions with people, Ms. Fields found Complainant to be defensive and hostile as opposed to focused on how to remedy the situation. (Tr. 935). Mr. Gordon reported the incident at the CAFO work group meeting to Mr. Miller and said Complainant questioned the competence and truthfulness of one of his staff people in front of the entire staff, which Mr. Gordon found inappropriate. (Tr. 922-923). Mr. Miller testified that informal meetings had not been successful in remedying the situation, so he went to Ms. Lynch and Ms. Berrien and asked for ideas of how to proceed in order to rectify the situation; it was then decided to hold the counseling session. (Tr. 967).

Mr. Miller issued the Memorandum of Oral Counseling to Complainant; he said the purpose of the memo was to put in writing to Complainant that although the issue had been discussed previously, complaints continued her talking about people in a derogatory manner, and the memo pointed out that the issue needed to be addressed. (Tr. 936; CX 18; RX 19). Specifically, the memo stated that the purpose of the counseling session "was to discuss some difficulties in [Complainant's] interactions with other employees," and was "precipitated by complaints over a period of time from various employees" who had "taken offense at what they perceive as a tendency…to turn discussions of technical issues into personal attacks that question their ethics and aptitude." The memo indicated that Complainant's relations with others had at times "deteriorated to a point where program officials have called [Ms. Fields or Mr. Miller] to request that [Complainant] not be allowed to attend certain meetings." The memo indicated that at the counseling session, Complainant "readily acknowledged" her weakness

in interpersonal skills and resolved to concentrate on working to rebuild relationships and be mindful not to launch personal attacks. Also in the session, Complainant agreed to work with Ms. Fields to explore training in interpersonal skills, continue working with her mentor to improve skills and interactions with personnel, and to engage in dialogues with Ms. Fields for coordination and support before deciding courses of action, to pause before reacting, and to meet with Mr. Miller once per month to review progress on improving her interpersonal skills. (CX 19, p. 2)

Mr. Miller said that the purpose of the session was not to prevent Complainant from discussing work related issues, but to make sure that discussions did not become personalized in a way that offended others. (Tr. 937). The memo stated that it was not a disciplinary action, and no record of the counseling would be placed in Complainant's personnel folder, however, future disciplinary action could result if Complainant failed to "heed the warnings or follow the resolutions" set forth in the memo. (CX 19, p. 2.). Mr. Miller testified that the term in the memo instructing Complainant to "pause before acting to offer constructive criticism" related only to personal issues, not work related issues. (Tr. 972). Mr. Miller did not believe the process was "heavy-handed," or very restrictive; rather, the process was an attempt to fix the situation, though he agreed that the session was different than for other employees because of the unique circumstances that caused the need for the memo. (Tr. 973).

Complainant responded to the memo on October 5, 1999, and stated that she did not believe the actions taken against her were warranted. She noted what she believed to be procedural deficiencies in the process, including lack of notification of the session or the right to have a witness or representative present. She also believed that she was prejudged as having committed the alleged offense without being questioned about it, and noted that no conduct codes were cited which she might have violated. Complainant stated that the issues focused on "different organizational cultural experiences, personalities, and communication styles, and not on any misconduct or poor performance" on her part. Complainant listed her contributions and performance at Region Four, and requested additional information, including a written summary of first-person complaints received about her, including the circumstances of each alleged offense and the code of conduct that the alleged offense violated; she requested that any future complaints be promptly brought to her attention; and she requested an agreement on a timeframe to provide resolution to the matter. (CX 19). Further, Complainant sent Mr. Miller an e-mail on October 20, 1999 with the purpose of providing additional

information to "clarify one misconception," specifically, the incident with Mr. Olson.

Complainant relayed to Mr. Miller that she followed up on the allegations he made and spoke to Water Enforcement Branch employees and Ms. Fields to "confirm that events happened at the July meeting as [Complainant] remembered them," which was that she "did not call anyone a liar at that meeting;" rather, she "questioned an individual in front of others about his intent to prepare required reports of CAFO inspections." (CX 9). Complainant said she realized that "in this organization's culture, this issue may have been addressed in a more effective manner" by speaking to Ms. Fields. Complainant hoped that the information she provided cleared up that particular issue. (CX 9).

Mr. Miller responded to Complainant's memo on October 25, 1999. He emphasized that neither the counseling session nor the memo were disciplinary actions, that everyone present at the meeting recalled that Complainant agreed to the listed items, and denied Complainant's request for additional information because the individuals who complained "wished to remain anonymous and particularly want to avoid you confronting them now." The memo stated that Complainant should be aware that "because the individuals did not wish to be identified, management chose to forego a disciplinary action." (CX 20).

Complainant offered the testimony of Ms. Camilla Warren, an EPA employee for twenty-one years, and a supervisor for thirteen years. Ms. Warren testified that the difference between informal counselings and written reprimands is that a written reprimand must document the times that an employee engaged in inappropriate conduct and the fact that the employee was informally counseled by a supervisor; written reprimands also require a second-line supervisor to approve what was written by the first- line supervisor. (Tr. 638). Ms. Warren's understanding was that a situation like Complainant's, involving I nsensitivity or an uncivil remark, should be handled informally by a first-line supervisor. (Tr. 637). She did not recall any category for a "Memorandum of Oral Counseling" in the Conduct Manual, and believed it was an inappropriate use of a memo to document a counseling session. (Tr. 633-634).

In rebuttal, Respondent called Mr. Carlos Asencio, a human resources specialist for EPA Region Four, who advises management and employees on labor and employee relations and advises management on disciplinary and non-disciplinary actions. Through his work, Mr. Asencio is familiar with the EPA Disciplinary Process Handbook and EPA Order, Conduct and Discipline, 3120.1.

(Tr. 1079-1080). Mr. Asencio was familiar with a memorandum of oral counseling and said that the use of such a method of documenting counseling is not out of the ordinary at Region Four. He said that a memo of oral counseling is equivalent to a written warning because it meets the criteria stated in the order: It specifies the infraction, what occurred, how to correct it, and warns of future instances of that specific infraction. He said the language "this is not a disciplinary action" is standard language in that type of memoranda. (Tr. 1085). Mr. Asencio opined that the memo of oral counseling issued to Complainant fell within EPA Order 3120 in terms of being an informal action. (Tr. 1086). Mr. Asencio said that an oral warning does not have to precede a written warning; rather, the supervisor may proceed directly to a written warning, and an oral warning is not required before a written warning can be issued. He said too that whether one or three levels of supervisors are present at a counseling session is at the discretion of the manager. (Tr. 1091). Mr. Asencio believed that the policy regarding written warnings did not mandate an oral warning to be issued first. (Tr. 1089-1090; CX 147B)[11].

Regarding the possible violation concerning the CAFO inspection, Ms. Fields said Complainant was reprimanded for making offensive remarks to other employees, not for raising concerns about alleged violations. (Tr. 930). Mr. Miller did not recall telling Complainant that the counseling session was related to any issue she raised regarding a CAFO inspection report, and said that when Mr. Gordon informed him about the issue with Mr. Olson, Mr. Miller did not know exactly what the issue was, but at a later time, Complainant sent him an e-mail indicating that the incident had something to do with CAFO inspections. (Tr. 940). Mr. Miller did not recall telling Complainant she was not allowed to have anything to do with reporting CAFO issues, and said that when Mr. Gordon informed him of the incident, he did not go into detail, so Mr. Miller did not know the circumstances surrounding the incident. (Tr. 966). He did not recall a conversation wherein Complainant asked him if Mr. Olson, who failed to complete the CAFO report, would be disciplined. (Tr. 977-978). Ms. Harris testified that she had no recollection of Complainant making any reports to her that violations of environmental laws were occurring. (Tr. 445).

3. The Wet Weather Priority/MOA Incident

Around the same time as the incident regarding the CAFO inspection occurred, Complainant was also working on the "wet weather priority," which was

[11] The relevant paragraph states "The most common corrective action is usually the face-to-face session between employee and supervisor…" (CX 147B).

another part of the MOA between Region Four and headquarters addressing combined sewer overflows and sanitary sewer overflows. Complainant testified that she sent an e-mail to Mr. John Dombrowsky, a colleague in Washington, D.C. and the Region Four MOA contact, in which she stated her belief that Region Four was not meeting the wet weather priority regarding combined dumping of stormwater and wastewater. (Tr. 136). Complainant testified that in sending the e-mail, she did not "try to tattletale on Region Four" because she believed "we're all in it together." (Tr. 137). Complainant said she did not hear back from Mr. Dombrowsky right away; his e-mail response to her is dated September 27, 1999. (Tr. 137; CX 7).

Mr. Dombrowsky testified that he knew Complainant as a colleague in the Office of Compliance, in the Office of Enforcement and Compliance, where they previously worked together for two to three years.[12] (Tr. 421). In September 1999, Mr. Dombrowsky was an environmental engineer in the Office of Compliance. He agreed that he wrote an e-mail to Region Four in response to an e-mail he received from Region Four relating to what it identified in its MOA to address wet weather priorities. (Tr. 422). The e-mail, dated September 27, 1999, is from Mr. Dombrowsky to Complainant and states:

> FYI – (Kathy, per my voicemail to you). Attached is a message from Region 4 w.r.t MOA commitments for wet weather priorities. I replied to Region 4 explaining that we fully support their MOM program, but that does not exclude them from addressing the priority areas outlined in the MOA guidance. I further explained that since the MOM program is very good, they should be able to address the MOA guidance for the wet weather priorities using the mom program, just describe it in their moa [sic]. I also explained to them that when the MOA guidance was developed for this priority area, we never discussed excluding Region 4 from addressing this because of their MOM program. If this is not correct, we need to let them know. Thanks. (CX 7).

Mr. Dombrowsky did not recall the specifics of the Region Four program, so he could not recall whether the program was specifically addressing wet weather

[12] Mr. Dombrowsky is currently the Associate Director of the Toxics Release Inventory Program Division at EPA headquarters in Washington, D.C. (Tr. 491).

priorities. He did not "necessarily" agree that the e-mail was indicative of Region Four's failure to meet MOA requirements. Mr. Dombrowsky said that he was not an MOA coordinator. If an MOA was not being met, a complaint could be made to management in the EPA, such as his office director at that time. (Tr. 428). He did not recall Complainant making a complaint regarding enforcement of the MOA. He said all he recalled was based on Complainant's e-mail, which indicated that it did not seem that Region Four had addressed the wet weather priorities in its MOA. He did not interpret the e-mail as anyone reporting anything to him; rather, it could have been part of the development process of the MOA between regions and headquarters. (tr. 430). He did not recall the events that led up to the e-mail. (Tr. 431). Mr. Dombrowsky explained that his responsibility was to report on how MOA negotiations and development processes were progressing in the regions, and to report to his management how MOA agreement negotiations were proceeding. (Tr. 437). Mr. Miller said he did not speak to Mr. Miller or Mr. Gordon regarding Complainant or the e-mail. (Tr. 423).

Complainant testified that she believed she was retaliated against for sending an e-mail to Mr. Dombrowsky, even though Mr. Dombrowsky did not respond to her until September 27; she explained that she sent an e-mail to him prior to Mr. Miller notifying her of the counseling session, though she acknowledged that she did not have a copy of the e-mail she sent him.[13] She agreed that Mr. Dombrowsky's e-mail did not reference the e-mail she sent him, and acknowledged that she did not have a copy of the e-mail she sent to him. She testified that she understood Mr. Dombrowsky's e-mail to indicate that he had already addressed her concerns with Region Four, and said that it was obvious from Mr. Miller's comments to her on September 7, 1999, preceding the counseling session, that Mr. Dombrowsky had done so. (Tr. 508). Complainant acknowledged that she had no evidence that Mr. Miller knew of her e-mail to Mr. Dombrowsky, aside from the comments she alleged he made and her handwritten notes of that conversation.[14] (Tr. 509).

Mr. Miller testified that he did not know Mr. Dombrowsky, did not recall seeing Mr. Dombrowsky's e-mail, and never spoke to Mr. Dombrowsky regarding

[13] When asked on cross-examination why she would keep a copy of Mr. Dombrowsky's e-mail, but not her original, Complainant replied that she makes mistakes. (Tr. 506).

[14] Complainant's handwritten notes are on a calendar page dated September 7. Under the heading "Bruce," Complainant wrote that there were "problems in three areas" including "overheard on phone saying negative things," "when I present my opinion I do it in a way that makes others feel like I am putting them down," and "poor relationship with Scott's group due to HQ e-mail and asking about inspection requests in front of staff." (CX 5).

Complainant. (Tr. 939-940). He said he did not tell Complainant that the subject of her e-mail to Mr. Dombrowsky would be a subject of the counseling session. (Tr. 940).

Complainant testified that in a conversation on October 27, 2000, Mr. Miller told her that Mr. Tom Hansen found a copy of Complainant's response to his memo on the copy machine and that copies were made and distributed; she said that later in the day, Mr. Miller told her that he asked Mr. Hansen to destroy the copies and that had been done to the best of his knowledge. Complainant believed that this affected her reputation. (Tr. 581).[15]

Mr. Miller testified that he supposed that Mr. Hanson gave him the copy of the memo left on the copy machine, but he did not recall commenting that he asked Mr. Hansen to destroy the distributed copies, because he presumed it was Complainant who had made the copies and did not know that anyone else had made copies, so he would not know if any had been distributed. He gave the copy that "whoever" gave him to Complainant. (Tr. 978-979).

B. Outside Employment and the Georgia Tech IPA: 2000 and 2001.

1. Outside Employment

Following the counseling session and the subsequent memoranda, Complainant maintained that "a host of adverse actions" began to be taken against her. She was sent on detail to the Superfund Program where she worked under Mr. Phil Vorsatz for six months as "in effect, a regional project manager for Superfund sites." (Tr. 146). However, Complainant did not believe the detail was a demotion; rather, she viewed it was a neutral act and a cooling off period, because she wanted to get out of EAD. Complainant located the detail herself and obtained permission from Ms. Fields and Mr. Miller to go. (Tr. 147). Complainant received a successful evaluation. Subsequent to the detail, Complainant did not want to

[15] Though Complainant acknowledged that she had been known to leave documents in the copy machine, she stated that this issue here was that "Mr. Miller said that someone took it, found it, made copies and distributed them. That is an unethical activity that is a conduct violation." When asked how that constituted harassment, Complainant replied, "If I told [sic] that a document that contains my response and includes a description of an oral counseling session to me and a written reprimand to me and my defense of that and all attachments it shows I'm trying to survive and that I feel threatened and that I'm in trouble. And then this document was distributed, according to Miller, to everyone…thereby affecting my reputation." (Tr. 581).

return to EAD but felt she was forced to do so, where she resumed her position as a Clean Water Technical Authority. (Tr. 148-149).

About this time, Complainant wanted to perform outside employment, and following procedure, she requested approval from Ms. Harris, which was granted. (Tr. 149-150).[16] Complainant's request, dated December 16, 1999, indicated her intent to work as a self-employed consultant, where she planned to engage in technical writing, summarizing current research and policy initiatives and analysis and display of publicly available demographic and environmental data. (RX 25). Ms. Harris approved Complainant's request on January 11, 2000, with the standard caveats that she should not contact federal agencies, and should take precautions to prevent any implication that her EPA title suggested government endorsement of her private business. (RX 26).

Once she obtained approval, Complainant attempted to offer services in the areas for which she was approved, but did not perform any activities during working hours. (Tr. 153). She explained that at that point, she did not know much about consulting and was not performing outside work for the money; rather, she wanted to help resolve problems in communities which lacked funds, but she learned there was no work available in that area (referred to as environmental justice), and she believed there was possibly more work available in more technical areas such as performing watershed adjustments. (Tr. 153-154). Complainant eventually acquired private clients, for example, she worked as a sub-consultant to a primary consultant who worked for a local government.

After receiving permission to engage in outside employment, Complainant created her own company, Fox Environmental, a sole proprietorship. The company offered technical support to identify areas of concern with clients. (Tr. 155). During this time, Complainant continued to perform her work at EAD without incident, she said she "did fine" and "was productive." (Tr. 156).

2. The Counseling Session with Ms. Harris

The situation at EAD changed when Complainant was taken into a meeting where her permission to engage in outside employment was revoked. She recalled that she was asked to attend a "surprise meeting" where she was handed a

[16] Complainant explained that a written request to engage in outside employment required revealing for whom the employment would be performed and how many hours would be worked. She said she took every ethics class required by EPA, but did not list the information in her request because such information was not required. (Tr. 150-152).

document, dated July 18, 2000, suspending her outside employment. (Tr. 157; CX 22). Ms. Harris testified about the circumstances prompting the suspension of Complainant's outside employment.

Ms. Harris said she received a report from Ms. Cynthia Peurifoy, the head of the Environmental Justice program at Region Four that Ms. Peurifoy had been told by Mr. Hal Mitchell, the head of Rareness, a community organization to whom Complainant solicited her outside consulting services as someone who knew something about the grant he was going to get or had received from EPA. [17] (Tr. 451). As deputy ethics official, Ms. Harris felt that in order to ascertain whether the report was valid, she had to suspend Complainant's outside employment activities pending an investigation. She said she had known Mr. Mitchell for years and had no reason to believe that his perception of what occurred with Complainant was not accurate, and she felt it was inappropriate in appearance for a federal employee to solicit someone regarding work pertaining to issues performed in the office. Ms. Harris testified that at a minimum, there was an appearance of impropriety, and it was her duty to suspend Complainant's activities until she could ascertain what had occurred. (Tr. 451-452).

Ms. Harris testified that she did not view revoking Complainant's approval to engage in outside employment as a disciplinary action. She explained that the allegations made by Mr. Mitchell were serious enough to obligate her, as the deputy ethics official, to revoke approval while she investigated the allegations. (Tr. 461). Ms. Harris agreed that Complainant was qualified to perform the work she offered to do for the community group, but said the issue was the appearance of impropriety. She explained that the group was receiving a federal grant which was "let out" of the EAD Ms. Harris had staff members who worked on the group's grant on a daily basis, so when another staff member approached the group offering to help it manage federal funds, she believed an appearance of impropriety resulted. (Tr. 464-465).

Ms. Harris sought to investigate the allegations to determine whether they needed to be referred to another agency, and to determine whether there was additional activity that needed to be addressed. She acknowledged that she did not speak with Complainant prior to revoking her approval, but gave Complainant an

[17] The transcript of the phone message from Mr. Mitchell to Ms. Peurifoy states: "…Ms. Fox, yesterday she called and she just basically wanted to know if she could be any assistance to us as a TAG advisor, give any technical advice and to tell me she talked with Gloria and that our check was in the mail, which is not accurate, comparing what I've been told with how the money is wired to the account…" (RX 29, p. 4).

opportunity to respond to her memo. (Tr. 467). When asked why she did not suspend only the activities related to the allegations, Ms. Harris explained that she viewed outside employment as a privilege, and the issue was serious enough that if Complainant violated that trust, she did not deserve the privilege of additional outside employment. (Tr. 479-480). Ms. Harris said that Complainant's was "probably" the first request for outside employment where the employee sought to perform work in the same areas they did on a daily basis; most employees who seek permission for outside employment do so for work very different than their daily work activities. (Tr. 488).

Ms. Harris' memo stated it was necessitated by receipt of information from parties regarding offers by Complainant to provide technical grant-writing assistance on EPA-administered grants, which violated the Standards of Ethical Conduct for Employees of the Executive Branch. Ms. Harris stated in the document that Complainant was required to notify her of changes and amend her initial request for outside employment, and that Complainant's solicitation of community groups exceeded the scope of permissible activities permitted in her initial request. (CX 22, p. 1). Ms. Harris stated that Complainant's original request to provide consulting services in the form of technical writing assistance was approved, but since that time, several entities, both inside and outside EPA, called to Ms. Harris' attention a possible conflict of interest or misuse of Complainant's EPA position, for example: employees overheard Complainant's phone calls wherein she appeared to be discussing outside employment; she was overheard telling someone she was possibly traveling to Oak Ridge, Tennessee where she wanted to be a technical assistant for a community group in the acquisition of an EPA grant; Ms. Harris was contacted by members of community groups questioning Complainant's contacting them to offer assistance in writing grants administered by EPA; and that Complainant asked an EAD employee during duty hours for a list of TAG grant recipients which she allegedly used to contact one group regarding her private business and purported to provide information to the group regarding the status of EPA grant funds. (CX 22, pp. 1-2).

Ms. Harris indicated that the information presented to her established that Complainant's activities varied from those listed in her original request and created at least the appearance of a conflict with her EPA duties; accordingly, she suspended approval of outside employment. Complainant was offered the opportunity to submit comments, and upon review of additional information, Ms. Harris would then determine if a full revocation of approval of outside employment was warranted. Complainant was also advised that Ms. Harris was looking into the allegations brought to her attention to determine if they resulted in

actual violations of the Standards of Ethical Conduct. (CX 22, p. 2).[18] Complainant was not given notice of the meeting, advised who would attend, or told what the subject matter of the meeting. Complainant was told that her permission to engage in outside employment was revoked immediately and was told that the incident was being investigated; she was advised that significant outcomes could result, including disciplinary action or removal. (Tr. 159).

Complainant issued a response to the meeting on August 1, 2000. (CX 23). She stated that the memo from Ms. Harris contained many allegations but did not provide any evidence that actual violations occurred. Complainant maintained that her activities had focused primarily on identifying potential outside employment opportunities and she had not agreed to perform any work, nor had she performed any work, outside the scope of her original request. (CX 23, p. 1). Complainant stated that she met with Mr. Neville, her ethics advisor, on several occasions for advice. Pursuant to his advice, Complainant had conversations with several potential employers in which she "clearly and expressly advised" that she was offering services in a private capacity and not representing EPA. She included a disclaimer to that fact on her resume. (CX 23, p. 2). Complainant denied offering technical grant-writing assistance to community groups on EPA-administered grants; rather, she insisted that she only offered to prepare maps and conduct analysis of publicly available data for community groups. (CX 23, p. 3). Complainant said she did not ask an EPA employee for a list of TAG grant recipients, but said during her "personal time during the work day" she did ask an EPA employee for a copy of a public document containing a list of environmental justice grant recipients, which was available on an EPA website, which she believed to be permissible activity under the *de minimus* use policy[19]. (CX 23, p. 2).

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[18] Presumably Ms. Harris was referring to 5 C.F.R. § 2635, et. seq., the Standards of Ethical Conduct for Employees of the Executive Branch, specifically, those sections relating to outside activities. (RX 55).

[19] The *de minimus* use policy in effect at that time was an interim order issued on June 18, 1998, which stated that the Agency recognized that *de minimus* (limited) use of agency computers, e-mail, copy machines, fax machines, and other office equipment "may, in some instances, be advantageous to the Government when it otherwise aids the employee in performing his or her official duties." (RX 45, p. 1). The memo authorized uses of office equipment by employees "during their **personal** time" (emphasis in original). (RX 45). The de minimus use policy was amended on July 26, 2000 to include limited use of the Internet, but forbade certain personal uses such as sending or receiving large, non-work related attachments or files. (RX 46). Finally, on December 19, 2002, EPA issued EPA Order No. 2100.3 regarding limited personal use of government office equipment. (RX 47). The Order replaced the 1998 interim order, though was substantially the same, but clarified that government equipment may be used only for authorized

Complainant testified that when she was approved for outside employment, she was assigned an ethics advisor, Mr. Lawrence Neville. (Tr. 162-163). Complainant consulted Mr. Neville both before and after the meeting where her approval was terminated, but said he did not assist her in writing her response. (Tr. 164-165). Subsequently, Complainant said Mr. Miller began having a series of meetings with her, in one of which he said "we have something good against you." Complainant said she told Mr. Miller he was harassing her. (Tr. 167). Complainant learned through conversations with another employee, Ms. Heather Turnbull, that Mr. Miller asked Ms. Turnbull to pull a case in the law library regarding Mr. Miller's mother's estate. When Complainant confronted Mr. Miller with this information, he "ran off and talked to" Ms. Harris. (Tr. 168-169). She said he returned and gave Complainant a transcript of a phone message the office had received from someone Complainant had contacted offering her services to assist on an EPA grant. Complainant explained that the call was "just a clarification," that someone called to verify Complainant's ability to perform outside employment "and they think it's a complaint and go crazy." (Tr. 169).

A meeting was held with Complainant, her legal counsel, Mr. Miller, Ms. Harris, and Ms. Fields, in an attempt to rectify the obviously tense work situation. Complainant said Mr. Miller suggested the meeting to work things out between Complainant and Ms. Harris because they "seemed to be at odds." (Tr. 172). No progress was made at the meeting; Complainant expressed her desire to leave Ms. Harris' division, and recalled that Ms. Harris said if she did not like it there, she could call headquarters, and she could not give full-time employees away. (Tr. 170).

Complainant's ability to engage in outside employment had been revoked for nearly eight months and efforts to negotiate had been ineffective, so Complainant filed an EEO complaint against Ms. Harris and Mr. Miller for discrimination based on sex, age, and race. Complainant testified that at the time, she believed Ms. Harris and Mr. Miller were discriminating and retaliating against her, and the only mechanism she was aware of for redress was an EEO complaint.

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purposes, "Limited personal use is authorized during non-work time" if it involves minimal expense to the government, does not reduce employees' productivity or interfere with their official duties. The Order states that there is no right of privacy in limited personal use, the employee must ensure that personal use does not give the appearance that she is acting in her official capacity, and must not engage in inappropriate personal uses, including transferring or storing large files, or "[u]sing government office equipment for commercial purposes or in support of other "for profit" activities such as outside employment or businesses." (RX 47, p. 7).

(Tr. 174). Complainant said that also during this time, Ms. Fields denied her travel opportunities. Specifically, she said Ms. Fields would not allow Complainant to attend a national enforcement targeting meeting, which was Complainant's area of expertise, but allowed other employees to attend who did not work in the area of enforcement targeting. (Tr. 327). Complainant said she was granted significantly less travel opportunities in retaliation for her protected activities, and said that a table from the Accountability Management Branch dated July 31, 2000 shows that she took only one trip. (Tr. 326; CX 117). Complainant complained to Ms. Fields about the denial, which she said constituted "hostile work environment." (Tr. 328).

Complainant testified that after filing the EEO complaint, Mr. Miller came to her and asked her to drop the complaint against Ms. Harris because Ms. Harris would hold it against her forever. (Tr. 174-175). Complainant sent an e-mail to Ms. Freda Lockhart, the Director of the Office of Civil Rights for Region Four, informing her of Mr. Miller's actions, and asked if it constituted coercion. (Tr. 175-176). She said that Ms. Lockhart responded that Mr. Miller should not have approached Complainant, but that he probably did it in an informal way to give advice. (Tr. 176). Mr. Miller testified that he did not learn he was a party to the Complaint until 2003; he never received anything related to the complaint and was not a party to any negotiations. He denied ever telling Complainant to drop her complaint against Ms. Harris. (Tr. 983).

The EEO complaint proceeded to mediation with Complainant, Ms. Harris, and a shared neutral from another agency in attendance. A written agreement was reached on September 9, 2000[20]. (Tr. 177-178; RX 32). One term of the settlement required Ms. Harris to issue a letter indicating closure of any ethics investigation; she did so on October 3, 2000 (RX 33; CX 24). The resolution also provided that Complainant was allowed to go on an IPA if she could find an entity willing to pay fifty-one percent of her salary within thirty days of the agreement

[20] The terms of the resolution agreement are as follows:

1) By October 13, 2000, Ms. Harris was to issue a letter to Complainant to indicate closure of the issues raised in the ethics investigation; the letter was to indicate that all matters discussed in the July 18, 2000 memo were completed and closed.
2) By October 13, 2000, Ms. Harris was to issue a letter in response to Complainant's request for approval of outside employment.
3) Ms. Harris was to discuss with the ARA whether or not Region Four could recommend an IPA assignment for Complainant.
4) Within 30-60 days of the date of the agreement, Complainant was to identify and submit to Ms. Harris an approved entity willing to pay at least 51% of her salary for an IPA assignment. (RX 32).

being reached. Ms. Harris testified that Complainant entered the mediation "very much" wanting to go on an IPA; Complainant agreed that she wanted to go on an IPA in order to get out of EAD. (Tr. 457-458). Complainant said that Mr. Miller, at the request of Ms. Harris, tried to find a position for Complainant in another division, but when the division directors asked why and Mr. Miller told them, they did not want Complainant to work in their divisions, though she acknowledged that Mr. Miller did not provide the names of those directors. (Tr. 519).[21]

3. The Georgia Tech IPA

Complainant began her IPA at Georgia Tech University in January 2001 and worked there until February 2002. (Tr. 500). Complainant worked at the Georgia Tech campus where an office, computer and printer were provided for her. She did not have a budget for equipment; rather, she would alert "Ken", her supervisor for any equipment she needed. (Tr. 187). Complainant said she wanted a PDA (handheld computer) because other employees had them. She asked Ken, who told her to ask someone else who had more knowledge of equipment. Complainant and the "expert" compared different models and when she returned to the office, Ken was not present, so she placed her order with the secretary. (Tr. 190-191). When the PDA arrived, a secretary told Ken, who instructed her not to let Complainant open the box. Complainant sent an e-mail to Ken explaining that she believed she had permission to order the PDA, if she did not, she would return it. Complainant said later that night, she received an e-mail informing her that her IPA was terminated because she purchased a PDA without approval. (Tr. 191). On cross-examination, Complainant agreed that she sent an e-mail on February 27, 2002 from her private account to Nicky Hartnett, an acquaintance and former EPA employee. In the e-mail, Complainant told Mr. Hartnett that the IPA ended due to budgetary constraints. (Tr. 505; CX 103).

During her IPA to Georgia Tech, Complainant met with Mr. Jim Setser, a senior manager at the Georgia Environmental Protection Department, about a potential partnership opportunity that would have been a significant funding opportunity for Georgia Tech. Mr. Setser said he would contact Mr. Miller to

[21] Complainant later attended a training regarding EEO in which she learned that the procedures used in her mediation were not correct, that she was supposed to have a representative in attendance and there was supposed to have been a decision-making authority available by phone. (Tr. 180-181). Complainant said that Ms. Harris acted as both the decision-making authority as well as the respondent, which she felt put her at a disadvantage. As a result, Complainant asked that her complaint be reinstated as a result of failure to follow proper procedure, but dropped the complaint once she was on the IPA at Georgia Tech. (Tr. 183, 189).

further define the project, but Complainant said after he met with Mr. Miller he would no longer meet with Complainant or take her calls. Complainant believed that Mr. Miller told Mr. Setser she was a problem employee. When asked what information she had that Mr. Setser met with Mr. Miller, Complainant related that Mr. Setser was very interested in the project, but after he said he would meet with Mr. Miller there was a "very abrupt change in his behavior." (Tr. 586-587). Mr. Miller testified that he had nothing to do with reporting on Complainant's IPA at Georgia Tech. He said he did not meet with Mr. Setser regarding partnership opportunities with Georgia Tech, and had nothing to do with defining the scope of the project. Mr. Miller said he never discussed that project or Complainant with Mr. Setser. (Tr. 984-985).

4. Return to EPA

Following the termination of the IPA to Georgia Tech, Complainant was instructed by Mr. Steve Prince, the head of personnel at Region Four, to report back to Mr. Miller's group. (Tr. 193). Complainant said this was contrary to the terms in the mediation resolution; she said that Mr. Prince checked with Ms. Harris who agreed with Complainant that she should not be sent back to EAD. Complainant said that she was placed in the Office of Policy Management (OPM), but OPM did not want her, so she was sent back to Region Four. (Tr. 193-194). Complainant explained that on paper, she was still in OPM, but in reality she was sent back to EPA where she reported to Mr. Prince. Complainant worked from her home for eight months. During that time, she had no position description, was not given a computer, did not have EPA e-mail access or access to the EPA network through which announcements are distributed. She did not have assigned office space at EPA or any government equipment. (Tr. 193-195). Complainant reported to Mr. Prince via weekly e-mails wherein she documented her activities. She explained that she "would propose different activities" to Mr. Prince in which she was interested, she worked with state officials and represented EPA. (Tr. 196-197; CX 103). Complainant had located another possible IPA in 2002 when she was notified that she was required to report back to Mr. Miller.

Mr. Prince sent Complainant an e-mail on September 18, 2002 informing her to report to work in EAD on September 23. (CX 25, p. 4). Complainant responded to Mr. Prince and stated her understanding that the mediation resolution included reassignment to another organization. She did not believe it was in the best interest of EPA to reassign her to EAD under Mr. Miller and suggested that she be allowed to continue in her current home situation until the IPA went into effect. (CX 25, p. 3).

Complainant forwarded her correspondence with Mr. Prince to Mr. Russell Wright, stating that she was unsure why the situation had resurfaced. She suggested the solution of remaining in OPM while on the IPA and said she was open to discussing the issue when she returned, but said her reassignment to Mr. Miller was not a viable option. (CX 24, pp. 2-3). Complainant also forwarded all the e-mails to Ms. Lockhart in the Office of Civil Rights to make her aware of the situation and state her hope that the reassignment would not occur as she felt working for Mr. Miller would place her in "a hostile work environment."[22] (CX 24, p. 2). Ms. Lockhart replied that she reviewed a copy of the resolution agreement because she did not recall an agreement that Complainant would not return to EAD at the end of her IPA. Ms. Lockhart said there was nothing in the agreement that specified such, nor was there any indication that Complainant had problems with Mr. Miller. Ms. Lockhart did recall that the agreement would temporarily assign Complainant to OPM for timecard purposes during the IPA, and she was aware that had occurred. (CX 24, p. 1).

Complainant testified that "they threatened that if I did not go back into this hostile work environment…that I would not be able to go on the IPA, they would not finalize the signatures," so Complainant reported to Mr. Miller. (Tr. 201). Complainant returned to EAD for approximately one month before she started the new IPA. During that time, she was given a cubicle and computer, and because the IPA was to begin in several weeks, she started performing work for the IPA. Complainant's first-line supervisor was Ms. Becky Allenbach, Mr. Miller was her second-line supervisor. Mr. Miller testified that Complainant was reassigned back to EAD in September 2002, and she was not happy about it, but did not say anything to Mr. Miller about a hostile working environment. (Tr. 986).

C. The University of Georgia IPA: 2002 – 2003

1. The IPA

Approximately one month after returning to EAD, Complainant left to perform another IPA with the University of Georgia (UGA), funded through the University of South Carolina, wherein UGA was a subcontractor. Complainant was physically located at the Southern Regional Environmental Office (SREO) of the Army in Atlanta, Georgia, where she worked as a Watershed Advisory Board

[22] Complainant stated, "As you may recall, Bruce [Miller] has threatened me in the past and I feel that working for him would place me in a hostile work environment and his persistence to place me under his supervision may be considered retaliation for my previous EEO complaint against him." (CX 24, p. 2).

Program Manager for UGA. (Tr. 199, 203). Complainant and Ms. Jamie Higgins, an employee at SREO, initially developed the idea of submitting a grant proposal to UGA to perform water resources work, and the two approached Mr. George Carellas, the head of SREO, who discussed the proposal with contacts at UGA. Mr. Carellas said that EPA was also contacted to ascertain if the grant was feasible, because the IPA was between UGA and EPA, so those two parties had to reach an agreement regarding the IPA. (Tr. 1006-1007).

Mr. Carellas was not responsible for hiring Complainant, but said he had a large part in UGA and EPA working out the agreement for her to be chosen for a one-year assignment. (Tr. 1039). In their discussions preceding the IPA, Mr. Carellas learned from Complainant that she was working out of her home, which struck Mr. Carellas as unusual. Mr. Carellas met with Mr. Stan Meiburg, EPA's deputy regional administrator, who said there had been some "difficulties" at EPA, but he supported Complainant going on the IPA because he believed it could be a fresh start for her. Mr. Meiburg did not discuss details regarding Complainant's past performance with Mr. Carellas. (Tr. 1007-1008). Eventually, Complainant began the IPA in October 2002, after Mr. Carellas agreed to allow her to be located at SREO. Complainant could not work at UGA in Athens, Georgia because of childcare arrangements, so she was provided the equipment necessary to perform her IPA duties at SREO. (Tr. 1009). The IPA agreement states that DOD/SREO would provide office space, internet capabilities, phone and other typical administrative support. (RX 44, p. 3).

The Watershed Advisory Board (WAB) was a project designed to help federal facilities identify their critical water resource issues under the Clean Water Act and the Safe Drinking Water Act. (Tr. 203). As program manager, Complainant's duties included organizing steering committee meetings of personnel from the Army, Navy, Air Force, Marines and Corps of Engineers. The committee identified priorities by voting; Complainant coordinated the voting. She also organized trainings and taught some of the trainings, and brought speakers in for such trainings. (Tr. 205). Complainant said during her IPA to UGA, she continued to have permission to engage in outside employment. (Tr. 206).

2. The Counseling Session with Mr. Carellas

At the SREO, Complainant worked with Mr. Carellas, the DOD Army Regional Environmental Coordinator and the head of the SREO, whom she viewed

as the overall decision-maker on whether or not she was successful on the IPA[23]. (Tr. 209). Complainant testified that for the first month of the IPA, she and Mr. Carellas "worked pretty well," but at the end of October 2002, Mr. Carellas called Complainant into his office and counseled her on behaviors he believed were inappropriate. Complainant recalled that Mr. Carellas said that her problems at EPA were not merely personality differences with Ms. Harris, that "there was a lot more to it than that," though he would not explain his statement. (Tr. 210).

Mr. Carellas testified that he counseled Complainant in November because a "continual evolution of different problems" had occurred since she started the IPA. Mr. Carellas issued a memorandum of the counseling session on November 27, 2002, which stated the issues that were discussed. (RX 7). Mr. Carellas was not certain whether he was asked to do so, but he agreed to perform some of the administrative aspects of verifying Complainant's time schedules because she was allowed to work at SREO and there was no one from EPA there to verify her schedules or her time. He asked the administrative assistant to help him in this effort because he traveled frequently. The counseling session stemmed from problems related to timekeeping; Mr. Carellas said that early in the IPA Complainant indicated she wanted to use an alternate work schedule wherein she would work nine-hour days and be off one day every ten days, which Mr. Carellas was willing to accommodate. Complainant's schedule was 9:00 a.m. to 6:30 p.m. with a thirty-minute lunch break; however, Mr. Carellas noted that Complainant did not arrive until 9:30 or 10:00, so he believed she was not working nine- hour days. (Tr. 1009-1010). The memo stated that Mr. Carellas discussed the issue with Complainant, and at the meeting Complainant agreed to revert to a five-day workweek, from 9:45 a.m. to 6:00 p.m. (RX 7, p. 2). Mr. Carellas also stated in the memo that there were "many, many examples of [Complainant's] inattention to detail" which reflected poorly on SREO; the example he provided was when he asked Complainant to attend a Coastal America meeting two blocks from SREO where Complainant did not arrive until 10:00, did not "network" at lunch, and ate lunch during the meeting. (RX 7, p. 3).

Another reason for the counseling was an incident that had occurred in August. Mr. Carellas explained that though Complainant did not officially begin the IPA until October, she attended a low-impact development course in Augusta, Georgia in August, as an educational tool. Mr. Carellas testified that a number of issues arose at the training, explaining that allegations were made that Complainant

[23] Mr. Carellas no longer holds that position; he is currently the Assistant for Sustainability and the Deputy Assistant Secretary of the Army at the Pentagon in Washington, D.C. (Tr. 1003).

distributed her private business cards at the training. (Complainant explained that she did not have government business cards and was trying to make contacts.) Also, some of the attendees complained that Complainant was promoting her private business; she was late returning from lunch on several occasions which Mr. Carellas said did not make a good impression; and Mr. Carellas observed Complainant answer her cell phone during a meeting, rather than turn it off or step outside. Mr. Carellas conceded that Complainant spoke for less than thirty seconds, and used a low tone of voice, but maintained that the action was disruptive to the thirty attendees. (Tr. 1011-1012; RX 7, p. 2). Another incident discussed in the counseling session related to Complainant receiving faxes at the office. Mr. Carellas recalled that a fax arrived at the office, the administrative assistant attempted to determine whom the recipient of the fax was; Complainant admitted it was hers. The fax was a request for proposal from Newton County, Georgia regarding stormwater permitting and other work. (Tr. 1012-1013; RX 7, p. 2). Mr. Carellas told Complainant that it was inappropriate to provide a government number for the purpose of receiving faxes. (Tr. 1013).

Also, Mr. Carellas testified that one of the purposes of the counseling session was to establish some rigidity in Complainant's schedule because it was "creating a bad perception and not helping morale in the office" when other workers saw Complainant arrive late. (Tr. 1014-1015). He discussed the above issues with Complainant; he said she listened, and the next Monday Complainant told Mr. Carellas she appreciated him being honest with her and pointing out the issues, and she said she would work on them. (Tr. 1015). Mr. Carellas said that his purpose in having the counseling session was to "lay everything on the table," due to the above incidents and the complaints he received from SREO employees that Complainant was discussing her private business with them and becoming a growing disruption in the office.

Mr. Carellas said that in November, Mr. Jimmy Bramblett, Complainant's "real" supervisor at UGA sent a "very strong" e-mail to Complainant to make clear his expectations of her. Mr. Carellas said he could see that things were building to a point such that UGA was ready to terminate the IPA. (Tr. 1016).

Mr. Bramblett wrote Complainant an e-mail on November 7, 2002 to "clarify and/or reiterate" a discussion that was held. He stated that he was the PI on the project, Complainant was the Project Manager, which meant that Complainant was responsible for doing most of the work, and her activities were under his supervision as PI. He stated that the Army graciously provided Complainant with office space for the project and he expected Complainant to be

at that office forty hours per week working only on the project, and could not conceive of how Complainant could not perform the work in the time allowed. (RX 9, p. 1). Mr. Bramblett told Complainant that if anything was unclear or made Complainant uncomfortable to let him know. He believed that if Complainant followed the guidance in the message then there would not be any problems, but if she did not, the options would be to stop the project or replace Complainant; he expected "smooth sailing" by December. (RX 9, p. 2).[24]

By having the counseling session, Mr. Carellas hoped to give Complainant some time to improve, point out the shortfalls, and document the issues. He did not provide the memo to EPA because he hoped that corrective actions and improvements would follow the session. (Tr. 1016). He said that around the time of the counseling session, he likely spoke to a variety of people at EPA because the difficulties were more severe than he anticipated. He said he "bounced ideas" off of or asked for feedback from parts of EPA he knew Complainant had worked with, or asked for their experiences with Complainant so he could obtain a better understanding of the situation in order to have a productive counseling session. (Tr. 1017). Mr. Carellas knew that Complainant had worked for Mr. Miller, and

[24] Mr. Bramblett's e-mail was in response to an e-mail by Complainant which stated there were "too many chiefs and not enough indians"; that she read the planning team description and determined that it looked as if she was "responsible for performing most of the tasks" but not making any decisions and had "yet another boss to make happy." (RX 9, p. 2). Mr. Bramblett replied that Complainant had "one person to make happy in this whole process," and that person was Mr. Bramblett. His e-mail states:

1. My role on this project is PI! This means that I am responsible to DOD for ensuring deliverables are being developed as agreed to in our contract with USC. My expectation is that these deliverables will be developed in close coordination, cooperation, and concurrence with DOD (i.e. planning team).
2. This process is designed so that group decisions are made. No individual should have an inordinate share of decision making in this process. It is a consensus base planning effort.
3. Activities from UGA are grounded in my role as PI and your role as Project Manager. As Project Manager, you are representing UGA, and are responsible for much of the activities associated with this project.
4. Your role on this project is Project Manager!!!!! This means that I, as PI, am looking to you to 'do the work'. Yes, you are responsible for doing most of the work, including developing the deliverables. This is what you, as a UGA representative, are being paid for. You have indicated that you have one project, this one. There is no conceivable reason why you should not be able to accomplish the tasks associated with this project. Everyone else associated with this project has many other projects, which justifies your role as a Project Manager (i.e. to do the work).

(RX 9, p. 1).

said he probably talked to Mr. Miller, but did not recall specifics of their conversation. (Tr. 1017-1018).

Mr. Miller testified that around Thanksgiving 2002, he had met with Mr. Carellas who said he had some problems with Complainant and wanted to know if Mr. Miller had the same problems. Mr. Carellas went through a list of concerns, including his opinion that Complainant's dress was too casual, to which Mr. Miller explained that EPA's dress code is very relaxed. Mr. Carellas mentioned Complainant's time and attendance, explaining that the records from the card key system showed she was arriving late and leaving early.

Mr. Miller recalled that there had been some similar problems at EPA but it had never been a formal issue. (Tr. 949-950). Mr. Miller said the only time there had been a problem with Complainant's attendance at a workshop was just after Complainant arrived at Region Four. (Tr. 950-951). Mr. Carellas told Mr. Miller that he found a document on the SREO fax machine related to Complainant's outside employment. Mr. Miller relayed the incident of the community group member calling Ms. Peurifoy; he stated that he was asked to sit in on a call the ethics attorney was having with headquarters to see if the terms of Complainant's outside employment were compatible with the work she was performing, but after listening to the call it was unclear to Mr. Miller what the rules were regarding outside employment, so he suggested that if Mr. Carellas had a question, he should contact someone at EPA "because the rules may be more liberal than a layman would think." (Tr. 951-952). Mr. Miller felt that his conversation with Mr. Carellas was fairly positive, and presumed the situation would work itself out between Mr. Carellas and Complainant. He did not know whether Mr. Carellas met with Complainant, and Mr. Carellas never reported back to him. (Tr. 952).[25]

Regarding the counseling session, Complainant agreed that some of the events Mr. Carellas discussed did occur, but she said, "he biased them and made a huge deal out of them." (Tr. 215). For example, Complainant acknowledged that she received a call on her cell phone during a meeting, but she did not know she

[25] The other conversation Mr. Miller recalled having with Mr. Carellas was around March 2003 and regarded a reconciliation of timecards. When Complainant took leave she e-mailed Mr. Miller and he signed her time slips. Mr. Carellas was at the EPA office and mentioned that he had been using a "two week blocks of time cards," which Mr. Miller was not aware of. Mr. Carellas sent over copies of those schedules, and Mr. Miller noticed some discrepancies, which he told Ms. Allenbach to discuss with Complainant. Complainant indicated that the forms accurately reflected her schedule and leave, so Ms. Allenbach signed the leave slips "and that was the end of it." (Tr. 953-954).

was not allowed to receive calls; she did not "think it was a big deal," but supposed Mr. Carellas did. (Tr. 216). Complainant did not believe the memorandum was justified; rather, she thought that Mr. Carellas should have brought his concerns to her or made her aware of policies. (Tr. 217). Complainant agreed that she received a fax at SREO from Newton County, Georgia, but said that she was awaiting the fax at home and did not give the sending party the office fax number. (Tr. 219). She said that this occurred only once, and after Mr. Carellas told her it was unacceptable, she agreed it was an error and would not happen again. (Tr. 219). Regarding the allegation that she did not work nine-hour days, Complainant obtained copies of the logs generated by the card reader at the building, which show her entry and exit times, and establish that she was working the required hours. (CX 75).[26] Complainant did not receive a copy of the memo of counseling at the time; rather, she ultimately obtained it through a FOIA request. (Tr. 219-220).

Mr. Carellas testified that he noticed improvement in Complainant's time and attendance for several weeks, and recalled that Complainant said she arranged a better situation with childcare arrangements. (Tr. 1018-1019). Mr. Carellas was encouraged, and December 2002 went "pretty well"; however, on January 4, 2003, a memo Complainant had written to the City of Oxford, Georgia, was left on the SREO copy machine. (Tr. 1019). Mr. Carellas was particularly concerned about a statement in the memo indicating Complainant was on a one-year assignment from EPA to UGA, and that one of her activities there involved working with the Cooperative Extension Service to promote activities related to stormwater drain management, thus Complainant was "able to utilize these no-cost resources to assist the City of Oxford in meeting its NPDES regulatory requirements." (RX 10, p. 1). Mr. Carellas testified that the "no-cost resources" statement gave the appearance that Complainant may have been trying to leverage her private business with some activities, which were really government business. (Tr. 1021). Mr. Carellas felt that in light of everything else, which had occurred, he had no choice but to bring the issue to the attention of EPA. (Tr. 1019).

Mr. Carellas met with Mr. Palmer, the regional administrator at EPA, to discuss the most appropriate method for transferring information regarding such incidents to EPA. On cross-examination, he explained that he went to "top

[26] Mr. Carellas said that after viewing the card reader report, it was "very suspect" that Complainant was putting in forty hour weeks; he explained that if an employee leaves the building prior to 5:00 p.m., scanning a card is not required, so the report implied to him that while Complainant worked late several nights, there were many times she left before 5:00 because the exit time was not scanned. (Tr. 1067).

leadership" at EPA to ensure that he reflected the issues in the appropriate way, because differences exist among agencies. (Tr. 1056-1057). Mr. Carellas then sent an e-mail to Mr. Meiburg the last week of January alerting him that a memo would be sent discussing the document found in the copy machine and would also include the memo he issued in November after the counseling session. (Tr. 1021-1022; RX 12, p. 1).

As a result of several meetings, Mr. Carellas wrote a letter to Mr. Palmer, EPA's Regional Administrator, on February 4, 2003, which "laid everything out," including activities he had not previously shared with anyone. In the letter, Mr. Carellas explained that Complainant had headed up the effort of the Watershed Advisory Board, and since Thanksgiving, he had seen "a remarkable turn-around in her efforts," however, he had learned of the document left on the copy machine, the contents of which he stated he wanted to share with EPA because he "certainly cannot make a judgment in regards to the associated ethical questions." (RX 6, p. 1). Mr. Carellas enclosed the document as well as the memo he wrote following the counseling session. He said he had not shared the previous counseling session with Mr. Palmer because his goal was "for things to quietly work out to everyone's benefit." (RX 6, p. 1). Mr. Carellas stated that he did not recommend termination of Complainant's IPA, but he felt obligated to let Mr. Palmer know of the recent incident as he was not qualified to make a judgment regarding the seriousness of the letter. On cross-examination, he explained that part of the reason for the memo was "to say we're not sure that this is appropriate to continue much longer," also to document the issues, and then to let EPA make decisions regarding the ethics issues involved in the memo. (Tr. 1059-1060).

After the February 4, 2003 letter was sent, another document was found on the copy machine. The letter, dated February 27, 2003, regarded a proposal to assist Chattahoochee County, Georgia, with stormwater planning and industrial permitting requirements. (RX 5). The letter indicated that Complainant enjoyed a meeting and tour she had earlier in the week. (RX 5, p. 1). Mr. Carellas testified that Complainant had attended an orientation to Fort Benning on Monday and Tuesday, did not come to work Wednesday because her son was ill. The letter was dated on a Thursday, so he concluded that Complainant probably went to that meeting on Monday morning, which caused her to arrive late to a meeting she attended that day at Fort Benning. (Tr. 1024). Mr. Carellas gave the letter to Mr. Ben Anderson at EPA Region 4 Regional Counsel's office when they met at a later time because he felt Mr. Anderson should have the information because of the discrepancies it contained. On March 3, 2003, Mr. Carellas sent a memo to Mr. Anderson which described his concerns related to the timing of the visit mentioned

in Complainant's correspondence to Chattahoochee County. Also he indicated that he was informed that Complainant was late for the initial meeting at Fort Benning, late for the assigned meeting time the next day so that the team had to leave without her, and did not demonstrate professionalism. (CX 68, p. 1). He also mentioned that a pattern had emerged at SREO of Complainant working or talking on the phone with her door closed, and a new employee told him that when he met Complainant she "quickly started telling him about her business," a pattern Mr. Carellas said was disturbing and disrupting to the office. (CX 68, p. 2).

When Mr. Carellas met with Mr. Anderson, he provided a copy of Complainant's document, which was left on the copy machine, and Mr. Anderson asked Mr. Carellas if he would meet with OIG and then set up a meeting for him. Mr. Carellas, Mr. Mike Hill of OIG, and Mr. Anderson were present at the meeting. (Tr. 1026). Mr. Carellas could not recall whether he provided OIG with any documentation other than the memo he had previously given Mr. Anderson, and he knew that Mr. Anderson had access to the memo he sent to Mr. Palmer. Mr. Carellas said the meeting consisted of him answering Mr. Anderson and Mr. Hill's questions. (Tr. 1026-1027).

3. The Fort Benning Incident

Complainant asserted that she engaged in protected activity while on the orientation trip to Fort Benning. Mr. Carellas said he arranged for Complainant to accompany an Army team to Fort Benning as part of an orientation visit to learn about the installation and to make contacts with people there. (Tr. 1023). The visit began with an orientation followed by tours and discussion of various issues for the two-day period. (Tr. 1023-1024). Complainant recalled that on February 24, 2003, she joined the Army member of the WAB steering committee and attended Fort Benning as an observer to determine what the problems were at the site regarding the Clean Air Act and Safe Drinking Water Act. She testified that she observed "many, many violations" of the Acts, which concerned her. She mentioned the violations to several people and ultimately documented her observations and sent them to Mr. Carellas in hopes that they would be addressed by the WAB. Complainant said the problems were not addressed and she was not allowed to participate in further inspections. (Tr. 206-208).

Complainant documented her observations and concerns in an e-mail to Mr. Carellas on March 5, 2003. (RX 15; CX 134**)**.[27] Complainant discussed her trip to Fort Benning and explained that the second day consisted of an extended tour of the base including a water treatment plant, the drinking water plant, a large construction site, and several truck maintenance and storage areas. (RX 15, p. 1). Complainant stated she was "very impressed with the knowledge and dedication of all the representatives from Fort Benning," but that "many significant problems" existed which she felt she needed to call to Mr. Carellas' attention. Complainant stated that though she had never worked as an EPA inspector, she was dismayed by her observations of what appeared to be numerous compliance issues at the sites. Complainant's areas of concern included: broken pumps at the wastewater plant, improper disposal of sludge at the wastewater treatment plant (it was not mixed into the soil within six hours as required), water levels being above skimmers at the water plant, discussion by plant operators of an illegal discharge of waste material directly into the nearby stream, the environmental staff's lack of authority to institute behavioral changes among the Corps of Engineers and soldiers at the base. Complainant also documented problems at the construction site she viewed including large amounts of mud flowing offsite, incorrect installation of silt fences, missing silt fences, storm sewer inlets filled with mud, and performance of truck maintenance in prohibited areas without the use of drip pans. (RX 15, p. 1). Complainant stated that she understood that Mr. Don North, an inspector from the Georgia Environmental Protection Department, had observed the compliance issues but was asked by base representatives not to issue a notice of violation. (RX 15, p. 1). Complainant asked Mr. Carellas for any assistance as she was not aware of any plan to address the issues. (RX 15, p. 2).

Complainant testified that after she reported the violations she observed at Fort Benning to Mr. Carellas, he said he would "get to it," and when she asked him several times if they could "move on it," he did not respond. Complainant believed that Mr. Carellas "put it off." (Tr. 243). She said she later notified Mr. Miller of the violations and he did not respond either. (Tr. 243-244). Mr. Carellas acknowledged that Complainant notified him of what she believed may have been violations at Fort Benning. (Tr. 1028). He said they discussed her concerns and he recommended that she document the concerns in writing or in an e-mail so he would "have something to work with." Mr. Carellas had been previously involved

[27] The email was from Complainant to Mr. Carellas, entitled "Draft Trip Report to Fort Benning, GA," and began with the statement: "Let me know what you think – perhaps it is a bit too much detail but I thought we could always cut it back….Remember, I am sending this because I care and want to help." (RX 15, p. 1). For ease of citation, the document cited is RX 15, but CX 134 is the same document.

with Fort Benning and was aware that the installation had some serious problems years earlier, as he had previously accompanied the EPA team to the site. (Tr. 1029). Mr. Carellas testified that he followed up on Complainant's concerns after she gave him the draft e-mail. Mr. Carellas called Ms. Ann Gabriel, the water program manager at Fort Benning, who had accompanied Complainant on the visit; Ms. Gabriel did not express the same concerns as Complainant did. (Tr. 1029-1030).

Mr. Carellas explained that an outside agency is hired every three years to perform an independent inspection of the military installations, and in the summer before Complainant's visit to Fort Benning, the Center for Health Promotion and Preventive Medicine had conducted a detailed, multimedia, internal inspection of the same plant and observed no unusual issues that were not being addressed. He said that part of the problem stemmed from the fact that the plant was in the process of being privatized, moved from a government operation to a contract operation, and anytime such a transition occurs, issues arise.[28] (Tr. 1030).

After speaking with Ms. Gabriel, and "from a logical standpoint," Mr. Carellas was satisfied that Complainant's concerns did not merit further investigation. He explained that the trip was simply an orientation visit, and the people who accompanied Complainant were not as concerned as she was. (Tr. 1030-1031). Mr. Carellas stated that if such serious violations regarding the water and wastewater plants did exist, he would "find it amazing" that a host of new people would be taken through the plant "just to point out serious problems that they were neglecting to fix." (Tr. 1031). From Mr. Carellas' standpoint, and considering that Complainant did not understand how things worked on a military installation, he did not think that her concerns had the credibility required to justify continued pursuit. Mr. Carellas did not specifically address Complainant's e-mail with EPA, but said he may have contacted EPA employees because EPA had previously performed an inspection of the installation. He said the two people he worked with in the past from EPA regarding inspection of Fort Benning were Ms. Carol Teras and Ms. Lisa Beulle. (Tr. 1031-1032).

Mr. Carellas acknowledged that Complainant was not allowed to participate in future visits to Fort Benning, but explained that it was requested that she not be allowed to do so. He said that problems on the Fort Benning trip led to the request; he learned from Ms. Gabriel that Complainant was late for the introductory

[28] Mr. Carellas testified that at the time of the hearing the privatization of the plant had been completed. (Tr. 1030).

briefing, was late in returning from lunch on one occasion, did not seem to be engaged in conversation and missed meeting the group at the hotel the second morning of the trip. He described this as a "series of events that was disturbing regarding timing," because it required handling more problems than were necessary. (Tr. 1024-1025).

4. UGA "Contract Irregularities"

Complainant asserted that she engaged in protected activity in April 2003 when she noticed and reported "contract irregularities" involving the payment of a UGA graduate student. She explained that as the Project Manager, she had "a lot of decision-making authority" on the project. (Tr. 254). Complainant said that her responsibilities, as defined in the IPA agreement, were to oversee the contractual agreement.[29] Complainant raised concerns regarding a graduate student. She had documentation evidencing that the student was receiving funding, though Complainant said she never met the student, the student did not produce any work product, never participated in any meetings, and never reported to the work station. The student was a student of Mr. Palmer's, who Complainant said admitted in March that the student had not produced any product. (Tr. 254).

Complainant voiced her concerns regarding the situation to the WAB steering committee, though she believed that "University of Georgia wanted to terminate me even before I raised concerns regarding the contract irregularities." (Tr. 256). On March 30, 2004, Complainant wrote an e-mail to Mr. Steve Maloney, thanking him for his "time and thoughts on February 26, 2004," and noting that they discussed that Complainant had observed questionable recordkeeping related to charges UGA made to the WAB program involving payments to a graduate student. Complainant asked that a financial audit of the grant be performed. (CX 53). Mr. Carellas testified that the issue of a graduate student was discussed at a WAB steering committee meeting; he said Complainant was not in favor of UGA bringing on some help and the issue was presented to the WAB steering committee which made the decision as to how grant money was spent. He believed that Complainant made accusations regarding the graduate student to Mr. Bramblett and Ms. Christine Stigall at USC, but was unsure of the subsequent timeline or whether Complainant's duties were restricted thereafter. (Tr. 1072-1072).

[29] The IPA agreement states that one of Complainant's "other duties" was to oversee the grant "to ensure that all requirements are met. (RX 44, p. 2).

Complainant asserted that her responsibilities were diminished after she reported the alleged contract irregularities. Specifically, she said that Mr. Bramblett told her that Ms. Debbie Borden was taking over the project. On March 10, 2003, Complainant received an e-mail from Ms. Susan Varlamoff at UGA regarding the upcoming Georgia Water Resources Conference, which indicated that Ms. Borden "will be working with us" and needed to be included in all the correspondence. (CX 71, p. 1). Complainant characterized her work environment while on the IPA to UGA as "a hostile work environment," but said she felt she had no choice. (Tr. 245). Complainant did not know whether Mr. Carellas had been in contact with Mr. Miller, but she said both were involved in "monitoring" her with regard to her reporting hours and requesting leave. (Tr. 210-211). Complainant said that Mr. Carellas paid a lot of attention to her time cards, though Mr. Miller was the person who actually signed the time cards. (Tr. 211). Complainant testified that there was also a secretary who monitored her closely. (Tr. 212). Complainant said that her duties in the project were diminished, and that Mr. Bramblett of UGA told her that she was project manager "in name only," and that Ms. Debbie Borden would take over Complainant's role. Complainant believed that these actions were taken because she questioned Mr. Bramblett's management of money. Complainant testified that Mr. Carellas did not terminate the IPA after the November 2002 counseling session, and she believed the IPA was terminated because she reported the violations she observed at Fort Benning. (Tr. 257).

5. Memorandum of Counseling from Mr. Miller

In May 2003, Complainant contacted her ethics advisor, Mr. Kevin Beswick, as she had done frequently before. She explained that there exists a library of ethics decisions, and on this occasion, she inquired if Mr. Beswick had any cases relating to a certain area she was interested in; Mr. Beswick said he did and would print the cases out. (Tr. 329-220). Complainant was stationed at SREO at the time, and she said that Mr. Beswick said she could come to his office and retrieve the decisions. Complainant could not recall if they agreed on a certain time, but she went to his office and waited for twenty minutes, but Mr. Beswick did not arrive. (Tr. 330-332). She said that Mr. Beswick's office door was open, so she entered with the intent to leave him a note. Complainant testified that she went to write the note and the cases "were sitting right there," and were "easy to see," sitting atop Mr. Beswick's desk. (Tr. 332). Complainant said she did not forage around on the desk. She removed the cases from his office, made copies on the Xerox machine, and returned the cases to where she found them. (Tr. 333).

Complainant said she believed that Mr. Beswick returned to his office and she told him that she made copies and then left, and "didn't think anything of it." (Tr. 333).

Complainant later learned that Mr. Beswick was "mad" at her for entering his office or taking things without his approval, but she said he did not express that to her; rather, she learned of this when she received a memorandum of counseling from Mr. Miller via interoffice mail dated May 27, 2003. (Tr. 334; CX 34). The memo from Mr. Miller stated that Mr. Beswick relayed that an appointment had been scheduled for April 29, 2003 for Complainant to pick up the documents. (CX 34). Complainant was told what she did was inappropriate, and Mr. Miller explained that attorneys are given private offices because of the confidential nature of their work. Complainant was warned not to enter the workspaces of others with whom she had no functional work relationship in their absences, without explicit invitation or consent. (CX 34). Complainant stated that the memo seemed as though she had "pilfered through" Mr. Beswick's belongings, which was not the case. Complainant could not recall whether she and Mr. Beswick made an appointment to meet. Mr. Miller did not call her to tell her she had done anything wrong, and she did not contact Mr. Miller when she received the memo; rather, she sent Mr. Beswick an e-mail expressing her disappointment. (Tr. 336). Complainant said she later requested a new ethics advisor and was assigned Ms. Susan Schub, and received a letter indicating that ethics advisors represent the agency, not employees. (Tr. 340).

Mr. Beswick testified at the formal hearing regarding the incident.[30] Mr. Beswick was familiar with Complainant he worked with her on a number of ethics issues in past years. Most often, he said, Complainant requested that he provide opinions regarding her ability to engage in outside employment, and he estimated between four and six such documents were provided to her. (Tr. 853). Mr. Beswick recalled that Complainant once had one of her private clients, Mr. David Howerin, contact him regarding whether Complainant could assist his group in writing grants; Mr. Beswick opined that she could, and provided restrictions and conditions that might be placed upon her work. He said he had researched some ethics issues and had five or six documents Complainant requested. He agreed to give the documents to Complainant, but she entered his office and either took copies of the documents or made notes from the originals. Mr. Beswick testified that he did not ask Complainant to enter his office and remove the documents, nor

[30] Mr. Beswick is an associate regional counsel in the Superfund section at EPA; his primary duties involve working with the Superfund program but he is also on the four-person ethics team and performs ethics counseling wherein he interprets ethics regulations and handles employees' questions regarding acceptable conduct for federal employees. (Tr. 854-855).

did he indicate that she was allowed to enter his office and remove the documents while he was not present. He said the documents were not stacked neatly in a pile making it obvious they were for Complainant, and there was not any type of note on the documents. Mr. Beswick was concerned upon learning that Complainant entered his office and removed the documents because he deals with a number of issues, some of which are confidential ethics issues. (Tr. 867-868). On April 30, 2003, Mr. Beswick notified Mr. Anderson by e-mail that Complainant entered his office. (CX 30). In his e-mail, he stated that none of his notes were available, and there was "no harm done," but now Complainant "considered herself an expert on these issues." (CX 30). Mr. Beswick recalled a subsequent conversation with Mr. Anderson wherein he requested a lock be placed on his door. (Tr. 869). Mr. Beswick also sent an e-mail to Mr. Hill at OIG regarding the incident, because when he was previously contacted by OIG it was requested that Mr. Beswick provide any relevant follow-up information. (Tr. 869-870; CX 31).

6. The Termination of the UGA IPA

The IPA with UGA was terminated in June 2003. The monthly progress report for the WAB steering committee for June indicated that "[d]ue to a conflict of interest and philosophical difference in how the DoD grant should be administered, the Department of Defense and the University of Georgia terminated the IPA with EPA, Region IV for [Complainant]. DoD and UGA feel the purpose of the grant is to leverage university resources to assist southeastern military bases on water issues. [Complainant] believed the emphasis should be on regulations and policy." [31] (CX 77, p. 1). The report noted that Ms. Borden would act as project manager for the remainder of the grant period. (CX 77, p. 2). An e-mail from Ms. Varlamoff to the WAB steering committee members on July 21, 2003 indicated that after internal review of the June monthly report, changes were made; the final draft was attached, which deleted the language above and stated that the "IPA with EPA Region 4 [Complainant] has been terminated." (CX 78). Complainant sent an e-mail on July 23, 2003 to members of the WAB steering

[31] An "example" was provided in the report where Complainant hired someone to speak about BMPs but did not have full approval of the Steering Committee. "There was discussion at the May Steering Committee meeting about the prudence of engaging one consultant over others and if DoD funds could be used for this purpose. There was no resolution of the issue." The report stated that the room, nametags, AV equipment, etc. were not set up ahead of time and several out-of-town speakers required reimbursement as did the consultant. "[Complainant] did not discuss these expenses with the Steering Committee." (CX 77, p. 2). Complainant points to an e-mail she sent Dr. Mark Risse on April 17, 2003 wherein she stated "I like your idea of asking [the speaker] to participate and compensate him for his time." (CX 80).

committee notifying them that the report was changed in response to Complainant's statement that "much of what was written on the…7/8/03 version was inaccurate, unprofessional, and inflammatory." (CX 52, p. 2).

Complainant strongly requested that the WAB steering committee "take a critical look at the way UGA has performed on the WAB project" and stated she thought the members would agree that UGA should not be a part of the project's future "not only because of the inappropriate and unprofessional way they treated me, but also in the way they have misused the project funds (e.g., funding a non-contributing graduate student since January 2003 without the Project Manager's knowledge)". (CX 52, p. 2). Along with members of the WAB steering committee, Complainant sent the e-mail to Mr. David Buxbaum with the Army; an e-mail from Mr. Buxbaum dated July 23, 2003, indicates that he forwarded Complainant's original e-mail to Mr. Anderson, Mr. Miller, Mr. Bramblett. Mr. Allan Barnes, Mr. Carellas, and Ms. Varlamoff. Mr. Buxbaum stated to the recipients: "As mentioned to a few of you, I believe that [Complainant] is trying to insert herself back into the WAB or at least stir-up the members." (CX 52, p. 1). Mr. Anderson replied to the recipients: "As we discussed, [Complainant] has been informed that her new EPA duties do not include any work with the Watershed Advisory Board, and therefore she should not be using any of her official duty time for WAB matters. However, as we also discussed, we can't dictate what she does on her own time." (CX 52, p. 1). Complainant said that the initial version of the report damaged her reputation. (Tr. 259-260). She said that she was lead author of a paper for a national conference, but after the termination of the IPA, Ms. Varlamoff went to the conference and presented Complainant's paper. (Tr. 258-259; CX 72).

Complainant testified that Mr. Bramblett told her that the IPA was terminated because "most if not all of the deliverables had been completed, they no longer needed me, therefore the IPA was terminated." (Tr. 260). Complainant believed that Mr. Bramblett's reasons for terminating the IPA were pretext; she believed that "he wanted to get rid" of her after she complained about the graduate student but could not do so because Mr. Carellas made those decisions. She said she did not know if Mr. Carellas made the decision or approved the decision to terminate the IPA, but said he was the one who decided when the termination would occur. (Tr. 266).

Mr. Carellas testified that he spoke with Mr. Bramblett regarding the termination of the IPA; as early as November 2002 Mr. Carellas intervened on Complainant's behalf, because there were "difficulties and frictions" between

Complainant and Mr. Bramblett. (Tr. 1032). He said that Mr. Bramblett indicated that Complainant was unwilling to accept his guidance and leadership and that she was argumentative, and he wanted to terminate the IPA between EPA and UGA in November 2002. After Mr. Carellas sent the memo to Mr. Palmer in February, he was asked to continue working as usual, which he did, and he asked Mr. Bramblett to continue to try to make the situation work. (Tr. 1032-1033). Mr. Carellas was not certain how the agreement to terminate the IPA was reached, but he knew from an e-mail he received that Mr. Bramblett told Complainant he was going to terminate the IPA. Because Mr. Carellas was leaving at the end of June for a new position, he did not want to leave the office in a situation which was uncomfortable, and believed it was not beneficial for anyone to have Complainant work in the SREO office past June. (Tr. 1033-1034).

Mr. Miller testified that he only had one conversation with Mr. Bramblett which only indirectly regarded Complainant; he said that Mr. Bramblett called him before the IPA was terminated, indicated he thought it was a good project, and would like to continue to have someone from EPA on an IPA with UGA. Mr. Miller told Mr. Bramblett he should speak with Mr. Russ Wright or Mr. Jimmy Palmer, the regional administrator. (Tr. 999). The first indication Mr. Miller had that Complainant's IPA would be terminated was in that conversation with Mr. Bramblett, though he said he had previously heard rumors that the project would not be continued. Mr. Miller said that Mr. Bramblett was very direct in asking how he might get another EPA employee for an IPA, and said Complainant would not be working on the project in the near future and her IPA would be terminated. (Tr. 999-1000). Mr. Miller said that an IPA could be terminated by whoever held the IPA, and Mr. Miller had nothing to do with employees going on IPAs. (Tr. 1001). The IPA agreement contract indicates under applicable policies that the assignment could be terminated at any time at the option of the federal agency or the state or local government; Complainant signed indicating that had been explained to her. (RX 44, p. 4).

D. Return to EPA and the OIG Investigation: 2003 – Present

1. Return to EPA Region Four

Following the termination of the IPA with UGA, Complainant returned to EPA where Ms. Becky Allenbach was her first-line supervisor and Mr. Miller was her second-line supervisor. (Tr. 495). Complainant testified that the arrangement existed for only a short period of time because she was then reassigned from the Accountability Management Branch to the NEPA Program Office, under OPM.

(Tr. 496). Complainant testified that in July 2003, she requested a medical flexiplace work schedule, which would allow her to work from home, because she had just been "transferred back into a very hostile work environment" of which she was fearful. (Tr. 596-597; CX 41). She said that Mr. Miller denied her request. Mr. Miller testified that he did not deny Complainant's request, but referred the request to personnel; he did so because Complainant had a note from a physician indicating that Complainant should work from home, and Mr. Miller said he "hardly felt" he had the expertise to make the decision, whereas personnel had medical doctors on staff who could speak with Complainant and make an informed judgment. Mr. Miller spoke to Mr. Prince and determined that referring Complainant's request to personnel was the fair and appropriate way to resolve the situation.[32] (Tr. 993-994).

Subsequently, Complainant determined through an analysis she performed on information obtained in a FOIA request that over ninety percent of all medical flexiplace requests in that time period were granted by the division director level (i.e., Mr. Miller's level). (Tr. 310). Complainant believed that the denial of medical flexiplace was "evidence of disparate treatment," but said she did not file a separate complaint regarding it or ask for reconsideration. (Tr. 313).

Complainant filed a whistleblower complaint with OSHA on September 18, 2003. (RX 93). In the complaint, Complainant stated that "various harassment and retaliatory acts" had taken place over the last five years since her transfer to Region Four, and stated three specific examples had occurred within thirty days prior to her filing the complaint. Complainant said on September 3, 2003, she learned in a conversation with Mr. Miller and Ms. Allenbach that Mr. Miller would not process Complainant's leave requests because he had been instructed not to do so while Complainant was under investigation by OIG. She said Mr. Miller showed her an e-mail from Mr. Hill at OIG, which confirmed her suspicion that she was the subject of an investigation; she believed OIG was notified in a conspiratory effort to force her to leave EPA in retaliation for engaging in protected activity. (RX 93, p. 1).

[32] Apparently, Complainant's medical flexiplace request was denied; a letter from James W. Allen, M.D., MPH, Certified Independent Medical Examiner to Mr. Carlos Asencio of EPA Personnel indicates that Dr. Allen reviewed documentations and discussed Complainant with her mental health therapist. Dr. Allen stated that neither the mental health nurse practitioner nor he could confirm Complainant's self-report of stress at work. (CX 41, p. 1). Dr. Allen opined there was not medical basis to support Complainant working at home, and based on the information he had, he said Complainant could work in an office environment. (CX 41, p. 2).

Complainant said that on September 5, 2003, she received via a FOIA request a copy of the memo sent by Mr. Carellas to Mr. Palmer; she believed Mr. Carellas wrote the memo in retaliation for her reporting observed violations at Fort Benning and also due to his belief that Complainant was a problem employee as described to him by EPA managers. (CX 93, p. 1.) Finally, on September 16, 2003, Complainant learned from Mr. Miller that Mr. Bramblett contacted him in late March 2003 requesting that Complainant be replaced with another EPA employee. Complainant said she was successful at her job and believed Mr. Bramblett wanted to replace her because she reported to the WAB steering committee the payment of funds to the graduate student. (RX 93, p. 2).

2. The OIG Investigation

Though she stated in her whistleblower complaint that September 3, 2000 was when her suspicion was confirmed that she was the subject of an OIG investigation, Complainant admitted writing a letter to Mr. Hill of OIG on July 5, 2003 which stated "[i]t is my understanding that your office is currently conducting an investigation of me." (Tr. 268; CX 86). In the letter, Complainant reiterated that she left Mr. Hill a voicemail message the previous week indicating her wish to meet in order to resolve and expedite the investigation. Complainant also "formally" requested that OIG representatives stop contacting her private clients. She indicated that she believed Mr. Miller had violated ethics regulations when he asked a librarian to pull a case for him, and stated that there were "issues of fraud and abuse of government being carried out…at Region Four," and it was the management of EAD who were violating codes of conduct, not Complainant. (CX 86). Complainant testified that she wanted to alert OIG of issues of waste and fraud, and also wanted OIG to "stop going after" her private clients, but OIG refused to meet with her. (Tr. 268-270). Further, Complainant received an e-mail from one of her private clients, Mr. Tom Fox, on July 31, 2003 which indicated that he learned "from the EPA investigators" that day that the 319 grant proposal would not be considered by EPD because the City of Porterdale, Georgia, was not a qualified local government and the grant should "not have been done in the first place." [33] (CX 87).

Mr. Michael A. Hill, the Special Agent in Charge with the EPA Office of the Inspector General, testified that EPA OIG is not considered a part of EPA Region

[33] Mr. Fox is no relation to Complainant. Complainant testified that she had approval to prepare a grant application for the city and did not mislead Mr. Fox; in fact, the application was reviewed but not funded and she was terminated. (Tr. 318-319).

Four; rather, it is an independent agency which operates outside the scope of EPA.[34] Mr. Hill testified regarding how matters involving Complainant first came to his attention. In March 2003, Mr. Hill received a phone call from Mr. Bill Anderson, part of the Regional Counsel's office at Region Four, informing Mr. Hill that there was a matter he wished to discuss with him. Mr. Hill went to Mr. Anderson's office where Mr. Carellas was also present. Mr. Anderson explained that there were concerns that Complainant was operating a personal business out of the office using government equipment, and Mr. Anderson and Mr. Carellas were not certain what they were supposed to do about the matter. They provided Mr. Hill with copies of documents they had accumulated; Mr. Hill said OIG would take over the matter. (Tr. 774). Mr. Hill identified the documents he was provided that day, including Mr. Carellas' memo to Mr. Anderson on March 3, 2003, including Complainant's letter to Chattahoochee County; Mr. Carellas' February 4, 2003 letter to Mr. Palmer which included his November memorandum of counseling and Complainant's proposal to the City of Oxford; and an e-mail from Mr. Carellas to Mr. Meiburg stating he would send the memo regarding the document found on the copy machine to Mr. Palmer.[35] Mr. Hill testified that he believed Mr. Carellas' and Mr. Anderson's concerns were valid at the time, and based on that, an investigation was opened. (Tr. 775-776).

Mr. Hill explained that when OIG opens an investigation, Region Four has no involvement in the direction of the investigation. Region Four does not tell OIG who to interview or what findings to make; rather, its role is inactive. (Tr. 776-777). The evidence establishes that OIG agents interviewed numerous individuals regarding Complainant. Mr. Carellas was interviewed on April 28, 2003; his statement contains facts regarding the IPA and how he met Complainant,

[34] Mr. Hill has been the Special Agent in Charge since October 1, 2002; previously he was a supervisory special agent from 1997 until 2002. (Tr. 773).

[35] Apparently Mr. Meiburg forwarded Mr. Carellas' email to Mr. Tom Wellborn, Ms. Carol Kemker, and Mr. Jim Giattina, with a note stating, "Tom, if you have a minute, come see me. This is not the first such concern I have heard." Mr. Wellborn wrote to Mr. Meiburg and Mr., Giattina: "I'm not sure who [Complainant] reports to but I have had several staff express some concern with [her] activities outside the agency in her role as consultant." (RX 12, p. 1). These messages appear to stem from an e-mail from Mr. Frank Carruba at Georgia EPD to Mr. Steven Blackburn at Region Four. The e-mail states: "GAEPD has received numerous telephone and e-mail requests from [Complainant], an employee with the USEPA, concerning the GAEPD Section 319(h) Grant Program… As per my telephone conversations with [Complainant], she stated that she is working as a private consultant and NOT as an USEPA employee when she is assisting local governments…before we meet with [Complainant], could this situation be perceived as a conflict of interest since [Complainant] is currently an employee with the USEPA?" (RX 12, p. 3).

but it also indicates that he said she had problems related to time and attendance, and that Mr. Carellas received information that Complainant received personal work during working hours on a government fax machine and a written proposal on a government printer. (RX 13). Mr. David Buxbaum of the SREO office was interviewed by OIG the same day; he indicated his office was next to Complainant's and on several occasions he overheard her telephone conversations, which clearly related to her private business. Mr. Buxbaum was the individual who found Complainant's private business documents on the fax and copy machines. He said he told Mr. Carellas that Complainant did not come into the office on a regular basis and did not work a regular eight-hour day. (RX 14).

Complainant maintained she first learned an investigation against her had commenced on September 3, 2003 when Mr. Miller gave her an e-mail from Mr. Hill, which instructed Mr. Miller not to process Complainant's time card requests because she was under investigation. (Tr. 237-238; RX 24). She said that this was her "first hard fast verification" that she was under investigation, and took action within thirty days of learning this information because she believed she was being retaliated against for engaging in protected activity. (Tr. 319-320). She testified that she reviewed the OIG investigation file in August 2004, which indicated that a meeting between Mr. Hill, Mr. Carellas, and Mr. Anderson discussed the letter Mr. Carellas sent to Mr. Palmer and the decision was made to initiate the investigation. (Tr. 253). Complainant believed that UGA and the Army acted as agents of EPA and retaliated against her because of her engaging in protected activities including her earlier EEO complaint, the CAFO matter, the contract irregularities at UGA, and her observations at Fort Benning. (Tr. 271-272).

3. The OIG Interview of Complainant

Mr. Hill explained that eventually it was necessary to interview Complainant. Complainant was informed that the Department of Justice declined criminal prosecution and was told that any information she provided could not be used against her in a criminal matter, but that OIG was proceeding with an administrative matter and she had a duty to respond. Complainant arrived to the prescheduled interview with her counsel on August 26, 2004; however, the interview was terminated shortly after it began because Complainant's counsel did not want her to sign a waiver informing her she had immunity from prosecution and had a duty to respond truthfully. (Tr. 777-778; RX 72). Mr. Hill explained that he had a lengthy conversation with Complainant's counsel regarding the warning. He attempted to explain to counsel that when a case is declined for criminal prosecution, and an administrative investigation proceeds, the employee

has a duty to respond and does not have a right to remain silent. He recommended that counsel review the relevant case law prior to the interview so he would understand the waiver. (Tr. 778-779; RX 71). However, at the meeting, Complainant declined to sign the waiver on advice from counsel.[36] Complainant testified that when her counsel advised she not sign the waiver, Agent Hanna terminated the interview and Complainant returned to work. (Tr. 273-274).

Complainant recalled that later that afternoon, her supervisor, Mr. Mueller, said that she needed to attend a meeting at 1:00. She said her EPA identification badge stopped working, so she could exit but not reenter the building. Complainant said it was clear to her that the badge suddenly stopped working for the first time in her career "the moment" she was dismissed from the interview. (Tr. 627-628). She said she went to the office in charge but no one knew why the badge did not work, so she had to use a temporary badge for a day or two until a replacement could be obtained. (Tr. 628-629). Mr. Meuller signed a memo ordering Complainant to participate in the OIG investigation and to respond to questions. (Tr. 274-275; CX 93). Complainant could not contact her counsel, but she attended the meeting where she was told to sign the waiver from the earlier interview. Complainant signed the waiver because she felt her job would be threatened if she did not comply. Complainant signed a form which indicated that she previously refused to answer questions and required her to attend another interview, which she did, with Special Agents Marianne Hanna and Sean Earle; Agent Hanna had a tape recorder at the interview. (Tr. 276).

Complainant testified that the investigators would not wait for her counsel, so in lieu of having him present, she called her sister, an attorney, who was present during the interview by telephone. (Tr. 277-278). Complainant said she felt very intimidated and believed she had no other option than to comply, so she answered the investigator's questions. (Tr. 278). Complainant said her sister made objections on the record, and Mr. Hill, who was present, agreed that the interview would not wait for Complainant's counsel to arrive. The interview lasted approximately four to five hours; Complainant said she answered all questions in a forthcoming manner. Complainant's interview, as summarized, indicates she was asked questions regarding her outside employment. (RX 74). Complainant

[36] The transcript from the interview establishes that the waiver was read aloud. The waiver, entitled "Warning and Assurance to a Federal Employee Required to Provide Information," instructed that Complainant had a duty to respond truthfully to questions, and that neither her answers nor any information gained through her answers could be used against her in a criminal proceeding, but may be "used in the course of agency disciplinary proceedings which could result in disciplinary action, including dismissal." (RX 71; RX 72, p. 2).

believed that in the interview, OIG was looking for potential ethics violations; many questions centered on faxes, phone calls, copies and e-mails. (Tr. 282). Complainant said OIG interviewed many people, including some of her private clients, whom she is certain she will no longer work for.

During the interview, Complainant was shown long lists of telephone calls, and noted that some calls were not placed during her normal working hours. (Tr. 295). She was not aware that her cell phone records had been reviewed, and did not authorize examination of them. The phone was her personal cell phone, but she said she used it for many reasons, including calls from her children and "EPA type business." (Tr. 295). She did not recall the OIG agents asking her about an EPA fax number on her private business cards, and did not recall printing business cards containing an EPA fax number or invoices for private clients which contained EPA fax and phone numbers. (Tr. 526-527). Complainant said she could have used the copy machine at SREO after hours, but not on a regular basis. Since only two examples of copy machine use were brought to her attention, she believed the use of the copy machine fell under the *de minimus* use policy. (Tr. 298). Complainant described the policy as allowing federal employees to use government equipment in a minor way that does not cause excess costs or inconvenience to the government's work. (Tr. 299). However, when she was shown the policy on cross-examination, Complainant could not indicate where the policy stated it covered anything other than personal use, not business use. (Tr. 563-564; RX 45-47).

Complainant understood that OIG took hard drives from all the computers it knew she had access to with the exception of her personal laptop, and said no one asked her permission to obtain such information. (Tr. 623). Complainant said the computer at Georgia Tech was not a government computer, so there was at least one occasion where she burned a disc with all the information from her personal laptop and put it on the Georgia Tech computer, including information she used in water resource management. She said in the process of transferring information, it was possible that some information relating to her outside employment could have been transferred along with the resource materials. (Tr. 623-624). Complainant was aware of instances where EPA employees posted information on bulletin boards at work regarding items for sale or condominium rentals, and used EPA phone numbers as contact numbers. (Tr. 625-626; CX 102). Complainant believed that OIG extended the investigation for some reason, and did not believe OIG had any evidence of significance. (Tr. 283).

Complainant was instructed to prepare a written statement and provide it the following day. (Tr. 279). Complainant returned the following day to deliver her statement and learned that Agent Hanna wanted her to sign additional forms; Complainant telephoned her sister and then signed the forms after crossing out certain items.[37] (Tr. 281; CX 95). Agent Hanna did not tell Complainant that the investigation would be closed, but Complainant assumed that it would; however, to her knowledge, the investigation had not been closed as of the date of the formal hearing. Complainant said that OIG turned the information over to EPA, who had thirty days to act, but instead continued to "hang it over" Complainant. (Tr. 282). She believes that her "reputation is still tarnished." (Tr. 302).

Mr. Hill also testified regarding the interview of Complainant in August 2004. He said that after Complainant initially declined to sign the waiver on advice of counsel and the interview was terminated, he relayed the situation to one of the regional counsel and requested that Complainant's supervisor issue a written order for Complainant to appear for the interview, which was accomplished later that day. (Tr. 779). Mr. Hill said that Complainant appeared and could have had counsel present. He did not know whether the interviewing agents were wearing guns at the time of the interview, but stated that policy permitted them to do so. (Tr. 781).

Around the time of the interview, Complainant reported that her EPA badge was not operating. Mr. Hill asked Complainant for her badge and tested it himself, then asked an employee to check the system, and was informed the badge was still active. Mr. Hill asked what could be done to make the badge operational. The next day, he was told that the badge had been bent; a crease prevented it from working properly with the sensors, and was told that Complainant was being issued a new badge.[38] (Tr. 782-783; RX). Mr. Hill did not agree that the interview was

[37] In her statement, Complainant reiterated her objections to the interview, including that she was "forced to participate in the interview without representation by my attorney under expressed threat of disciplinary action." She stated that EPA and OIG deactivated her identification badge to unlawfully intimidate and coerce her participation in the interview. Complainant asserted that to the best of her knowledge and belief, she did not knowingly and intentionally violate any government rule or regulation, that any *de minimus* use of government property for outside employment was performed on her own time, that she did not influence or attempt to influence any government employee for personal gain, and that she never received compensation from any private party or government entity in connection with an IPA or private business. Finally, Complainant asserted that EPA initiated the investigation in retaliation for her protected activities. (CX 95, p. 2).

[38] Complainant testified that she did not deliberately crack her badge and did not see any cracks on the badge. She said she was "never able to narrow down" who gave the order to deactivate

an attempt to obtain Complainant's deposition; rather, he explained that standard procedure was followed in that when criminal prosecution is declined, the case is immediately followed up with an interview of the employee. (Tr. 787).

Mr. Hill did not conduct the interview of Complainant; he came at the beginning but spent the duration of the interview in his office. (Tr. 791). Mr. Hill testified that he spoke with Complainant's counsel at 1:43 p.m. that day, and counsel's "exact words" were that he was not available but that they were to go ahead and proceed with the interview. (Tr. 793). He regarded the conversation as Complainant's counsel's agreement to proceed, but said that the interview did not start for another ninety minutes because Complainant was given the option to contact other counsel. (Tr. 795-796). Mr. Hill said that when he was with Complainant, she was "actually quite friendly" and "a little bit arrogant," though she did not verbally express how she was feeling. (Tr. 796). He agreed that the interview proceeded without the physical presence of an attorney, but said that Complainant's sister was available by speakerphone and Complainant's counsel eventually arrived. (Tr. 798).

Mr. Hill acknowledged that OIG's procedural guidance form on case administration regarding "simple employee investigations" indicates that OIG's goal is to complete such investigations within ninety days of the time they are opened, and agreed that the investigation of Complainant exceeded that period. (Tr. 805; CX 111, p. 7). However, there is another procedural guidance section dealing with complex investigations, which Complainant's was. (CX 111, p. 7).[39] Mr. Hill said that as long as there is ongoing activity, which OIG deems to be criminal, OIG can continue the investigation, which stops only after DOJ declines criminal prosecution. (Tr. 810-811). When DOJ denied prosecution, OIG proceeded with DOJ's approval to what OIG terms an "administrative investigation" to "wrap up" the matter. (Tr. 807). He explained that OIG must receive approval from DOJ to "Kalkines" an employee (i.e., provide them immunity from prosecution). He said DOJ does not usually issue written

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her badge or change the system. She believed the deactivation of her badge was part of OIG's plan to intimidate her and shake her up to see if she would say something that could be used against her. (Tr. 603-605).

[39] The OIG Procedural Guidance Manual indicates that OIG's goal is to complete "simple employee investigations" in ninety days; "complex employee investigations," involving the use of investigative techniques such as search warrants, subpoenas, or joint investigations which require coordination and shared investigative resources do not require the ninety day restriction, but should still be conducted expeditiously. (CX 111).

permission for OIG to proceed, and in Complainant's case, he received such permission by phone. (Tr. 808-809).

Mr. Hill said that technically, a case continues to be open until administrative action is complete. Following the interview of Complainant, OIG may have conducted one or two additional interviews, then it assembled a report of investigation, which was forwarded to the assistant regional administrator who was the administrative action official. Mr. Hill said that Complainant's case was "investigatively closed," meaning that the file "is just sitting there waiting for them [Region Four] to respond with any action they may take." (Tr. 812). Mr. Hill said that OIG agents did not gather evidence or obtain statements to be used in any civil proceeding. (Tr. 812-813). He opined the investigation would be over when Complainant received notice from the action official; once the decision of whether action is necessary is made OIG is notified in writing, closes the file and sends it to the records center. (Tr. 813-814). OIG's record of investigation was sent to Region Four in January or February 2005. (Tr. 818). Mr. Hill said that normally OIG requests the agency to notify it within thirty days if it will take action against the employee, but extensions are allowed for voluminous records. (Tr. 820-821). He believed that the request of thirty days was given in Complainant's case, and sent an e-mail to the assistant regional administrator one week before the hearing in an attempt "to push him along," but he was not sure of the exact date when review of Complainant's file by EPA would be completed. He explained that if EPA took action against Complainant, it would be required to give her thirty days notice to propose the action so she has an appeal process, and OIG would not close its file until that thirty-day period is over and any action taken is finalized. As of the date of the trial, Mr. Hill testified that the assistant regional administrator had the report and would make the ultimate decision, over which OIG had no control. (Tr. 828).

4. Complainant's Trial Testimony Concerning Economic Ramifications of the Investigation

Since the meeting with OIG, Complainant said her work situation is "still damaged" and she has a "horrible reputation" at work; people look away when they see her and everyone knows about the OIG investigation. She said she has "idled" in her position working in the NEPA program office, and has been in the position for nearly two years. Complainant explained she has fifteen years of government service and is a senior environmental scientist, but is acting as an assistant to someone at the office and has not been given an environmental impact

statement (EIS) of her own to review.[40] She said she currently assists Mr. Gerald Miller as he reviews EIS's for the Corps of Engineers, she provides information for him but is not involved in any meetings. She reviews environmental assessments which are "simple EIS's" that EPA is not required to review, and she reviews letters from HUD, which she said are not required to be reviewed and involve small projects. (Tr. 304-305). Complainant "absolutely" does not consider herself employed at the full levels of her competency, training and experience. She makes it a "regular habit" of asking her supervisor for more work and offers to assist other employees with their projects. (Tr. 306). Regarding her private business, Complainant said that some clients did not want to speak to her again after being contacted by OIG; another client was contacted by OIG twice and told Complainant she was going to jail. Complainant was told by Ms. Schub, her ethics advisor, that she was not required to show clients a copy of her approval to engage in outside employment, so she now tries "not to bring it up" with potential clients. She said she has disclaimers on her contracts and resume, which indicate she does not represent EPA. (Tr. 315).

Complainant said the OIG investigation also resulted in a denial of training opportunities. Ms. Stephanie Fulton, a "former friend" of Complainant's, told her there was going to be a training offered by the wetlands staff of EPA; Complainant was interested in attending because it was important to her job of reviewing EA's and EIS's. (Tr. 320-321). Complainant said she obtained approval from her supervisor, Mr. Mueller, to attend the training, but Ms. Fulton told her the next day that Mr. Lee Pelej, a Water Division employee and wetlands expert, said he was uncomfortable with Complainant attending the training because of the OIG investigation related to Complainant's private business. (Tr. 321-322). Complainant did not speak to Mr. Pelej but did contact his supervisor to document the incident. She did not attend the training, and believed she was denied the training in retaliation for being investigated by OIG. (Tr. 322-323).

Ms. Fulton, an ecologist in the Wetlands Regulatory Section, testified that she had prepared a declaration for Respondent's counsel; she was satisfied with the document when she read and signed it. (Tr. 700). Ms. Fulton discussed the circumstances surrounding the wetlands training, explaining that Mr. Pelej was to put on a training for everyone in the wetlands group, but she later learned that the training was only for senior management. (Tr. 701). Ms. Fulton acknowledged

[40] Complainant explained that an EIS is an interdisciplinary study undertaken for federal projects to make a determination of what the impact on the environment will be and options for reducing those impacts; the statements are reviewed by the federal government and others. (Tr. 303-304).

that Mr. Pelej told her that Complainant could not attend the training because he did not want to be involved with anything unethical, and he felt Complainant was perhaps engaging in unethical behavior and did not want to be connected with Complainant in that way. (Tr. 704-705). Ms. Fulton explained that Mr. Pelej was concerned about his reputation, and was concerned that he would be doing something wrong by inviting Complainant to the training session. (Tr. 706).

Ms. Fulton acknowledged that she assisted Complainant for about one hour in making some maps that were used for Complainant's private business. She agreed that she engaged in the same conduct Complainant did, which she thought was unethical. (Tr. 706-707). Ms. Fulton explained that she felt she could assist Complainant because Complainant wanted to use GIS in work activities, but the project Complainant brought to Ms. Fulton was not work-related; however, she did teach Complainant about the GIS system for approximately one hour. (Tr. 707). Ms. Fulton was not certain that Complainant did not have authorization to engage in the project, but she felt Complainant was "treading a fine line," and was uncomfortable, so she stopped assisting Complainant. (Tr. 708-709).

On cross-examination, Complainant testified that Ms. Fulton told her she no longer wished to be Complainant's friend because of the OIG investigation. (Tr. 545-546). Complainant reviewed Ms. Fulton's signed declaration, and denied that the maps Ms. Fulton testified about were to be used in her private business. (Tr. 549-550). Complainant also denied Ms. Fulton's statement that Complainant told her she attended meetings to obtain personal business while on government time, and Ms. Fulton's statement that Complainant took numerous calls related to her outside business on EPA time. (Tr. 550-552).

Mr. Michael M. Wylie, the wetlands enforcement coordinator for Region Four, testified that he has a role in training water division employees and is occasionally asked to train employees in other sections on wetlands identification. (Tr. 711-712). Mr. Wylie said that several times, he took part in training with Mr. Bill Ainsley and Mr. Pelej, two members of his section.[41] (Tr. 712). Mr. Wylie recalled conducting a Section 404 training, regarding Section 404 of the Clean Air Act, within the past few years. His calendar for the week of September 8, 2003 included a notation indicating that he, Mr. Ainsley, and Mr. Pelej conducted some wetlands training for the new division director, Mr. Jim Giattina, and a new deputy director, Ms. Carol Kemker. (Tr. 714; RX 92). Mr. Wylie did not recall conducting any other wetlands training in the month of September 2003, and did

[41] Mr. Pelej retired from EPA in January 2005. (Tr. 712).

not recall anyone other than Mr. Giattina and Ms. Kemker present at the training since they had requested the training. (Tr. 714-715). Mr. Wylie's calendar from April 18, 2002 indicated that he, Mr. Ainsley, and Mr. Pelej conducted intensive field training on wetland identification for NEPA staff on that date. (Tr. 715; RX 92). On that occasion, NEPA staff was taken on a five to six hour training, and said between ten and twelve staff attended. (Tr. 716-717). Mr. Wylie had no recollection of Complainant requesting to attend the training, and did not recall any conversations with Mr. Pelej regarding Complainant. (Tr. 717).

Complainant also contended at trial that the OIG investigation resulted in retaliation from UGA and the Army; specifically, she said she wrote Mr. Schulstadt at UGA on August 18, 2003, because UGA was withholding payment of some of her expenses. Complainant recalled that Ms. Varlamoff of UGA said the policy of UGA and the Army was to withhold payment "until they received everything," but Complainant believed she was being retaliated against because there was no such policy. (Tr. 377; CX 81). The correspondence indicates that Complainant submitted a voucher for reimbursement of $1031.62; Ms. Varlamoff stated that the Army and UGA's policy was to withhold payment on "the last expenses until all deliverables have been furnished," and were still awaiting workshop survey forms. (CX 81).

Complainant further alleges that that the OIG investigation has resulted in a loss of current and future income. Mr. Kevin Couillard testified on Complainant's behalf in support of this contention. Mr. Couillard is a valuation and financial consultant who met with Complainant to discuss her case and analyzed her tax returns, timesheets, proposals, and invoices in order to render an opinion regarding Complainant's economic damages.[42] Mr. Couillard explained that the customary practice in evaluating damages is to develop projections of income for the business if the alleged acts had not occurred, which are then compared to the actual circumstances. (Tr. 752-753). Mr. Couillard opined that Complainant's economic loss as a result of the alleged discriminatory acts were $423,000. (Tr. 757-758). He derived this figure by calculating the expected profits of Complainant's business but for the alleged interference by Respondent, starting with the expectations of billable time provided by Complainant, extended by her billing rate

[42] Mr. Couillard conducts a business called Valuation Strategy Associates, Inc. He holds a bachelor's degree in chemical engineering and a master's degree in business administration in finance. He has worked for several large firms performing valuation practice, passed a series of comprehensive exams, has had reports reviewed by peers and documented 10,000 hours of valuation experience. No licensing bodies govern his practice, but organizations confer designations such as "senior appraiser," which Mr. Couillard possesses. (Tr. 743-744).

to derive total revenue. Subcontract revenue was added to arrive at total revenue, and expenses were subtracted to arrive at pre-tax profits for the business. (Tr. 758). Mr. Couillard also derived a figure of lost profits for each year as a result of the alleged acts of Respondent from 2003 through 2019. (Tr. 759; CX 126).

Mr. Couillard summarized that in 2001, before the analysis began, Complainant netted $9,497 and billed approximately 128 hours. In 2002, she tripled her billable time to 410 hours and generated profits of $32,178. (Tr. 763). He did not include pro bono work in the analysis. He assumed Complainant worked full-time for Respondent in 2003; part-time in 2004 and 2005; assumed she would likely work full-time though 2007 with Respondent then part-time in 2008 and 2009, after which she would devote one hundred percent of her efforts to her private business. (Tr. 764). That information was gained through his interview with Complainant. (Tr. 765). On cross-examination, Mr. Couillard said that in 2004 Complainant billed 1400 hours on her private business, and agreed that the figure would break down to twenty-six hours per week. He said that he assumed that Complainant worked only half time for Respondent in 2004 because she was expected to bill 1400 hours. (Tr. 769).

5. Complainant's Trial Testimony Concerning Her Mental Health

Complainant testified that she takes antidepressant and antianxiety medications. (Tr. 348). She did not have any depression prior to transferring to Region Four, but explained that her career is very important to her and it "died" when she came to Region Four, which made her depressed. Complainant said the more she was retaliated against and the more hostile the work environment became, the more depressed she became. (Tr. 349). Complainant recalled that she began taking medication in June or July 2000. She is under the care of a physician and has been diagnosed with adjustment disorder, non-specific, and also with adjustment disorder with depression and anxiety. (Tr. 350). Complainant began seeing a therapist regularly in 2000. (Tr. 351).

Complainant has seen Ms. Karen Horne, M.Ed., with the Employee Assistance Program, more than any other mental health professional. (Tr. 352). Complainant said that Ms. Sara Mintz, a nurse practitioner, is in charge of her medication. (Tr. 353). Dr. Daniel Patterson performed a psychiatric evaluation of Complainant on August 4, 2004, where Complainant reported to him that conflicts with her supervisors caused her to experience sleep loss, nervousness, crying,

anger, loneliness, and depression.[43] (CX 124, p. 1). After interviewing Complainant and reviewing her medical records, Dr. Patterson opined that Complainant had "no diagnosable psychopathology." (CX 124, p. 2). He explained in his deposition that at the time, he did not have adequate information to made a diagnosis. (CX 125, p. 12). He noted that Complainant had performed well in her career, but said that the culture of her current office was different from headquarters; in her current office she appeared to be assertive, aggressive, and frustrated with the pace of regional office activities. However, Dr. Patterson opined that based on the interview and review of records, it appeared that her anxieties and depression did not occur prior to 1998 and that their occurrence could be directly attributed to the "harassment, retaliation, and hostile work environment" Complainant appeared to have experienced at Region Four. (CX 124, p. 2). Dr. Patterson recommended that "if EPA continues its current pattern of harassment and retaliation," Complainant should leave federal service and move to the private sector where she would be appreciated and rewarded. He explained in his deposition that he had no independent knowledge that Complainant was being harassed or retaliated against, and said that it should have stated "alleged" harassment and retaliation. (CX 125, p. 15). He stated he hoped some mediation would result in future resolution so Complainant could move on in her professional life. (CX 124, p. 2).,

Complainant testified there are periods when she feels better, but the OIG investigation has been a "huge load" on her, which she tries to deal with by focusing on her family. (Tr. 355). Complainant cannot attribute her emotional issues to anything other than her work condition; she said her life outside work is very good and work has caused her "great anxiety." (Tr. 356). On cross-examination, Complainant acknowledged that she spoke with therapists about her personal problems at Region Four, and that she reported her belief that her people skills were holding her back at work; she said she did so because management told her repeatedly that she had poor people skills. (tr. 530-531). She also acknowledged that she discussed respecting other people's boundaries with her therapist, but said she did so because she is an "extrovert." (Tr. 534). Complainant agreed that she could have discussed in therapy the matter regarding her passing out private business cards, and that Mr. Carellas was unhappy with her, and that her therapist indicated "unaware of boundaries/consequences." (Tr. 536; RX 86, p. 12).

[43] Dr. Patterson, M.D., MPH, is a psychiatrist in Wilmington, North Carolina. (CX 124). He explained in his deposition that Complainant contacted him on the recommendation of an attorney he had worked with previously. (CX 125, p. 7).

E. Other Trial Evidence / Character Evidence

1. Trial Testimony of Ms. Camilla Warren

Ms. Warren met Complainant at work function in the 1980s, and after Complainant returned to Region Four, their children attended the same school and Ms. Warren and Complainant live in the same neighborhood. (Tr. 633). In addition to her testimony above, Ms. Warren testified that she was familiar with EPA's *de minimus* use policy, and though she had not seen documents Complainant allegedly left on the SREO copy machine, she opined that a two-page document relating to outside employment would not violate the policy. (Tr. 652-653). Ms. Warren was asked by both parties to provide a statement in the instant proceeding. She met with Respondent's counsel and answered her questions, but said when she returned to view the written draft, the document appeared incomplete and did not contain all the information she provided. A final version was not completed because Respondent's counsel "kept insisting that what she had written was correct"; Ms. Warren did not sign the document. (Tr. 658). Ms. Warren recalled that Complainant described two situations to her which she understood to be whistleblowing activity: one related to calling headquarters to let them know that "there was some type of irregularity going on with activities at Region Four"; the other regarded the situation at Fort Benning. (Tr. 671). She said it seemed that after Complainant called headquarters, the 1999 counseling session was held, and after she reported concerns regarding Fort Benning, her IPA was terminated. (Tr. 672). Ms. Warren agreed that Complainant asked her to write a declaration, and acknowledged that she does not personally know Mr. Miller. (Tr. 684).

2. Trial Testimony of Ms. Olga Perry

Ms. Perry is a Brownfields project manager in the Waste Division of Region Four, and has worked for EPA for fourteen years. (Tr. 723). She issued a declaration regarding the matter, alleging that she requested an assessment of the Anniston Army Depot in 1997 or 1998 "to determine the potential for impacts to human health and the environment" due to waste management practices; she stated Mr. Carellas was aware of her recommendation. (CX 115). She stated it was her understanding that Mr. Carellas volunteered to perform an "objective" analysis of the cross-agency workgroup she served on. Ms. Perry filed a complaint against EPA in connection with her employment. She said that Mr. Carellas supplied information in her case based on his activity with the Army. She learned in a conversation with her supervisor, Mr. Bozeman, that Mr. Carellas agreed to

perform an assessment of the team she worked on; that sixteen-page document was given to her in a meeting with Mr. Bozeman. She said that the letter given to her by her supervisor stated that the document generated by Mr. Carellas was being used to extend the performance improvement plan she was under. (Tr. 728-729). Ms. Perry was later proposed for removal from federal service by Mr. Green, her division director. (Tr. 730). Ms. Perry testified that she was a "little bit" familiar with Complainant's case, and from what she was told, she recognized some parallels between their situations. She said that she was told that the Army prepared documents against Complainant as it did her, and believed that the claims against them both were untrue. Ms. Perry said her claim was being settled and she is currently in government service. (Tr. 731). On cross-examination, Ms. Perry acknowledged that there was already a performance plan in effect when Mr. Carellas' document was issued. She agreed that the members of the team she worked with were interviewed by Mr. Carellas' group, and that of the thirteen interviewed, several had complaints about Ms. Perry's performance. (Tr. 734-735).

Mr. Carellas testified regarding the issue with Ms. Perry, explaining that he was at a State of Alabama cleanup meeting, where military installations discuss the progress of their cleanup actions, when he learned that Mr. Larry Bryant, the head of cleanup for the State of Alabama, was frustrated by the lack of progress at Anniston. Mr. Carellas volunteered to have a new SREO staff member, Mr. Engbert, conduct interviews of the team members to ascertain why no progress was being made. Mr. Bryant agreed and Mr. Engbert contacted everyone on the team, whether EPA, Army, or contract staff. (Tr. 1036-1037). Mr. Carellas testified that he was not asked by Mr. Bozeman of EPA to conduct an assessment to obtain information about Ms. Perry; rather, the idea came about at the cleanup meeting. He believed that the problem would ultimately rest with an Army employee, and could then take corrective action, but the assessment indicated that the most significant and overriding problem was the EPA project manager (Ms. Perry) relied too heavily on the support contractors and was not very good at decision making. (Tr. 1037). Ms. Perry was interviewed as part of the team and alluded to the reason she was not more effective as being the lack of empowerment given to her by EPA to make decisions; Mr. Carellas felt that information needed to be shared with Mr. Bozeman. (Tr. 1038-1039).

3. Trial Testimony of Ms. Becky Allenbach

Ms. Allenbach served as Complainant's first-line supervisor for a short time, but testified that Complainant sits near her workstation and they used to discuss

their children and school. Ms. Allenbach received a promotion in August 2004, and Complainant articulated that she was happy for Ms. Allenbach and congratulated her, then said "and you didn't even have to sleep with Bruce [Miller], or did you?" Ms. Allenbach found Complainant's comment inappropriate but did not say anything to her. (Tr. 895-896). Complainant denied making this statement. (Tr. 598-599). Subsequently, Complainant came to Ms. Allenbach's office one day and said she had received a letter from an attorney, and that she did not like receiving "nasty grams" so was not going to speak to Ms. Allenbach anymore. Ms. Allenbach testified that she felt uncomfortable at times when Complainant attempted to "pump" her for information to use in her case, so Ms. Allenbach suggested they limit their conversations to their children. (Tr. 896). On cross-examination, Ms. Allenbach said that she attempted to maintain neutrality and made Complainant aware of that fact; nonetheless, Complainant continued to ask her questions which prompted Ms. Allenbach to approach Respondent's counsel and provide a declaration. (Tr. 905).

Events Post-Trial

Following the formal hearing, Respondent terminated Complainant on December 6, 2005. (RX 109). Complainant had filed an additional complaint with OSHA on May 17, 2005, alleging that the Notice of Proposed Removal (RX 107) she received on May 3, 2005, was issued in retaliation for her whistleblower activities "prior to, during and after [her] assignment" to UGA in October 2002. Complainant asserted that the reasons for the proposed removal were based on allegations of hearsay, incomplete, or inaccurate information. [44]

Complainant filed an additional complaint on December 12, 2005 wherein she alleged the following adverse actions were taken against her in retaliation for her "previous protected activities": 1) On December 6, 1005, Complainant received a Notice of Removal signed by Mr. Palmer in which he recommended her removal from EPA, based on the Proposed Notice of Removal she received seven months earlier. The basis for the removal was alleged misuse of government time and equipment; 2) the removal was based on allegations contained in the notice of proposed removal which Complainant contended were based on incomplete information and intentional mischaracterizations; 3) EPA took action before this recommended decision and order was issued. Complainant contended that in

[44] Complainant's May 17, 2005 complaint contains the same arguments as the December 12, 2005 complaint. Because the first complaint involved proposed removal, which did not occur, and the second involved Complainant's actual termination and contains the same arguments and subject matter, the complaints will be addressed together.

addition to the previously alleged protected activity, she was removed also in retaliation for her letter to the National Archives and Records Administration (NARA) alleging unauthorized disposal of sixty-four boxes of personnel related records from 1999 to 2004 by Region Four. Mr. Howard Lowell of NARA replied to Complainant on June 21, 2005 informing her that NARA is obligated to investigate any allegation of unauthorized destruction of federal records, and that EPA had been requested to conduct an investigation of the allegation.

The termination letter from Mr. Palmer states that Mr. Russ Wright, OPM Division Director issued a notice of proposed removal on May 3, 2005, which charged Complainant with misuse of office equipment provided for her personal use, misuse of official time, and use of public office for private gain. Mr. Palmer indicated that Complainant was given a period of time to provide a response to the allegations, and also that he met with Complainant and her attorney on July 15, 2005 to hear her oral reply.(CX 150). Mr. Palmer stated that he gave full consideration to the information supporting the charges against Complainant and to her reply, and decided not to sustain specific allegations contained in the notice of proposed removal regarding certain dates where Complainant was alleged to have attended meetings that were reported to have constituted incidents of misuse of official time. However, Mr. Palmer stated that the rest of the reasons for Complainant's proposed removal were "fully supported by the evidence." He indicated that in deciding what penalty to impose, he considered the fact that she had no prior disciplinary record and had not been rated less than successful in the past three years, but he also considered the nature and seriousness of the offenses, the fact Complainant had been counseled regarding appropriate conduct and specifically directed not to use official time or government equipment for her personal business, and the impact of her actions on the agency, and he chose to terminate her employment effective immediately.

In her OSHA complaint, which was timely filed, Complainant alleges that Respondent took the most severe disciplinary option available, despite the fact that other individuals have shown much more significant conduct violations. Complainant stated that by terminating her employment prior to this decision being rendered, Respondent has caused significant physical, mental, emotional and financial hardship to her and her family. Complainant alleges that Respondent took this action in retaliation for her protected activities, "including the current whistleblower case against the Agency" as well as her notice to National Archives and Records Administration on June 11, 2005 and its "subsequent investigation of discoverable evidence relevant to two pending EEOC class action lawsuits brought by employees of the EPA in Atlanta, Georgia."

Respondent submitted the Notice of Proposed Removal, supporting documentation, and the termination letter. (RX 107, 108 and 109). The termination letter was based on the notice of proposed removal, issued May 2, 2005. The notice, written by Mr. Russell Wright, Assistant Regional Administrator and Director, Office of Policy Management, provided the relevant background, which has been discussed above, culminating in Mr. Carellas reporting the documents found at SREO to EPA, which led EPA to present the concerns to OIG. As apart of its investigation, OIG apparently also looked into the matter of Complainant engaging in outside employment while on her first IPA to Georgia Tech. OIG concluded that Complainant inappropriately used her EPA employment for personal gain by using government equipment to conduct her outside consulting business during official duty time, and that she made inappropriate contact with EPA employees regarding her personal business activities. Complainant's proposed removal was based on three charges: misuse of office equipment, misuse of official time, and use of public office for private gain.

Regarding the charge of misuse of government equipment, the letter indicates that OIG investigators obtained the hard drives of computers assigned to Complainant at Georgia Tech and SREO; a review of the information obtained demonstrated that Complainant "maintained and/or generated numerous documents" related to her private business on both hard drives. The letter states that the documents were "voluminous" and included e-mails related to her private business, detailed proposals that she wrote for various municipalities, PowerPoint presentations, maps, invoices, and business card templates for her private business (some of which contained EPA phone and/or fax numbers), resumes, Statements of Qualifications, and treatises. The letter enclosed samples of such documents. Mr. Wright stated that Complainant had been previously warned not to use official equipment in conjunction with her private business; and such actions led him to conclude that Complainant "chose to ignore such warnings."

As relates to the charge of misuse of official time, Mr. Wright explained that while on her IPA to UGA, Complainant was allowed to work from 9:30 a.m. to 6:00 p.m.; she also had permission to engage in outside employment but was "repeatedly advised that no activities were to be conducted using official duty time." The OIG investigation revealed that despite such warnings, Complainant used "significant amounts of official time to conduct business on behalf of Fox Environmental," including attending meetings on behalf of her private company during the business day without taking leave from EPA. Seven specific examples

are provided.[45] Mr. Wright stated that sometime in August 2003, after learning of the OIG investigation, Complainant attempted to amend several of her timecards, despite the fact that the time covered by the attempted amendment had purportedly been reconciled weeks earlier with Complainant's assistance. Mr. Wright indicated that Complainant sent and responded to a significant number of e-mails related to her private business during official duty hours. Mr. Wright said that many of the e-mails involved "a significant amount of effort in composition and thought" related to her private business, which supported the conclusion that Complainant engaged in private business during regular duty hours while she was being paid by EPA or EPA and UGA. Respondent provided forty-one examples of such e-mails, but indicated that the list was not inclusive of all e-mails retrieved which indicated her involvement in conducting outside work; rather, those documents were "so voluminous" that it was impractical to include them in the letter but they were furnished to Complainant.[46]

Finally, regarding the charge of use of public office for private gain, Mr. Wright stated that Complainant had been advised that she could not contact federal agencies on behalf of others or use her position to avail herself of resources to obtain a benefit for herself or another, not available to the general public. Mr. Wright provided four examples of Complainant engaging in that alleged behavior. A letter dated January 2, 2002, written on her private letterhead, regarding a proposal to assist the City of Oxford, was found in the SREO fax machine. In the letter, Complainant stated that in the capacity of her IPA, she was able to use the "no-cost resources" of the Cooperative Extension Service in assisting the city in

[45] The letter indicates that a review of e-mail established that Complainant indicated her intent to meet with Georgia EPD on June 13, 2003, from 9:30 to 10:30 a.m.; she did not request leave in advance and apparently did not report for duty though she submitted a certification stating she worked eight hours that day. On August 14, 2003, Complainant attempted to submit an amendment to her time records for that date whereby she would use four hours of annual leave and four hours of sick leave. In addition, Respondent cites similar examples regarding time and attendance on May 30, 2003; March 7, 2003; November 12, 2002; February 25, 2003; October 10, 2002; and August 20, 2002. These examples range from meeting with private clients without taking leave but certifying she worked eight hours to appearing as a speaker on behalf of her private company without requesting or taking leave.

[46] The e-mails list the recipient, date, time and subject matter. The times range from 9:40 a.m. to 6:18 p.m., and all relate to Complainant's private business, though specifically regard separate matters. Respondent noted statements in the e-mails which indicated Complainant was working on private business while on duty, including but not limited to: telling a recipient he could e-mail Complainant at her government e-mail address ("especially large files); stating at 1:03 p.m. that she was "working on the template now" and would have it for the recipient later that afternoon; referencing her intent twice to stay home "tomorrow" but not taking leave; and referencing meeting with the recipient the previous Friday when no leave was taken.

meeting its regulatory requirements. Mr. Wright stated that the implication was that Complainant was able to avail herself of resources that would not ordinarily be available to the general public. In an e-mail dated March 31, 2003 to David Howerin of the Coosa Valley Regional Development Center, for whom Complainant was attempting to obtain a Section 319(h) grant funded by EPA, Complainant stated she "met with EPA" on March 31, 2003 to discuss matters related to the grant. Mr. Wright stated that Complainant had been warned not to appear before EPA on behalf of others. EPA employee Mark Nuhfer told OIG that Complainant met with him on October 10, 2002 regarding a Section 319(h) grant on behalf of a potential grantee. Finally, on April 17, 2003, Complainant left a voice mail message for EPA employee John Hamilton regarding her desire to provide consulting services to Paulding County, Georgia, a recipient of an appropriation grant funded by EPA; Mr. Hamilton suggested that Complainant discuss the matter with an ethics advisor. Complainant contacted Mr. Beswick who advised her that contacting a federal agency on behalf of another is prohibited and a potential criminal violation.

Mr. Palmer, the Regional Administrator, issued the termination letter on December 6, 2005. After considering the evidence and Complainant's oral and written arguments, Mr. Palmer did not sustain four allegations against her: the allegation regarding the November 12, 2002 meeting because of a discrepancy in the date; allegations regarding the February 25, 2003 meeting because the meeting could have occurred on Complainant's own time or during a lunch period; allegations of misuse of official time on February 17 and 21, 2003 and March 7, 2003 because of discrepancies regarding whether Mr. Carellas certified time sheets without Complainant's knowledge; and the allegations regarding inappropriate contact or discussion with Mark Neufer because his recollection was unclear. Otherwise, Mr. Palmer indicated that the reasons for Complainant's proposed removal were fully supported by the evidence. (EX 109).

In response to these post-trial decisions by Respondent which resulted in Complainant's termination, Complainant, aside from filing the two additional complaints on May 17, 2005, and December 12, 2005, filed a response on June 14, 2005, with attachments, to her then proposed removal. (CX 150). Most of these attachments were included in evidence presented at trial; however, the exhibit contains allegations of denial of performance award, retaliation against other employees, and misuse of his position at EPA by Jim Palmer. Additionally, Complainant alleges that following her termination, her photograph has been posted at the main guard desk at the Federal Center in Atlanta.

As to the picture at the guard's station, by RX 110, Respondent offers the affidavit of security officer Barry Carrington who stated that following her termination Complainant was only allowed in EPA controlled spaces after signing in and receiving a visitors pass; however, on December 12, 2005, Complainant gained entrance to Russell Wright's office and told him EPA's actions were "bullshit." As a result her entry into EPA space has been placed on a "restricted access list." Regarding the two news articles, Respondent points out that not only is the one involving a Florida EPA employee dated October 19, 2003, but EPA asserts the employee resigned rather than terminated. As to the article about Palmer, it concerns a trial he testified in "on his own time under subpoena." In sum, Respondent urges that Complainant has pointed to no other employees who used work time and equipment while engaging in outside business pursuits to the extent which Complainant did and despite continuing warnings not to do so.

III. DISCUSSION

The employee protection (whistleblower) provisions of the environmental statutes prohibit an employer from discharging or otherwise discriminating against an employee with respect to compensation, terms, conditions, or privileges of employment, i.e., take adverse action, because the employee has notified the employer of an alleged violation of the Acts, has commenced any proceeding under the Acts, has testified in any such proceeding, or has assisted or participated in any such proceeding. *See* 42 U.S.C. § 6971(a); 42 U.S.C. § 300j-(9)(1). To prevail on a complaint of unlawful discrimination under these Acts, a complainant must establish by a preponderance of the evidence that the respondent took adverse employment action against her because she engaged in protected activity. *Jenkins v. United States EPA*, 1997-WPC-1, slip op. at 15 (ARB July 31, 2003).

A. The Parties' Contentions

1. Complainant

In her post-hearing brief, Complainant asserts that Respondent and the Army are employers covered by the Act.[47] Complainant maintains that her complaints

[47] I agree with Complainant that Respondent EPA is a statutory employer; however, the issue of the responsibility of the Army was decided in a pretrial motion. In that Order, dated March 1 2005, the Army was dismissed as a named Respondent, and that finding is reiterated here. Complainant was always an employee of EPA; the IPA was an agreement between EPA and UGA. The Army, through Mr. Carellas, extended an offer for Complainant to be physically housed at one of its offices because it was not feasible for her to work in Athens at UGA.

were timely; stressing that she filed her first OSHA complaint on September 17, 2003, which was within thirty days of receiving documents through a FOIA request, on September 5, 2003. Complainant states that these documents were significant, because through them, she learned that the Army was working in conjunction with EPA to initiate an OIG investigation. (Complainant's Brief at 18). Complainant contends that the communications between Mr. Carellas and high-ranking officials at EPA were evidence of a "joint effort designed to fabricate a 'legitimate reason' to take action against her when the actual reason was retaliation for her previous protected activities." (Id. at 19). Further, Complainant stated that on September 3, 2003, her suspicions were confirmed that she was being investigated by OIG when Mr. Miller showed her the e-mail from Mr. Hill, she had "definitive and unequivocal notice" that she was the subject of an OIG investigation. Finally, Complainant testified that she was denied a training opportunity on September 3, 2003; she was informed by Ms. Fulton on September 9, 2003 that Mr. Pelej did not want Complainant to participate because she was the subject of an OIG investigation. (Id.).

Complainant asserts that the evidence establishes that she engaged in "at least five activities that qualify as protected" under the relevant acts since her arrival at Region Four in 1999. These activities include: (1) notifying Mr. Dombrowsky that Region Four was not meeting its obligations under the Water Pollution Control Act pursuant to the MOA; (2) notifying Mr. Al Havinga and Ms. Gina Mortenson of Region Four's failure to complete a CAFO inspection report; (3) documenting and reporting "numerous violations" of the WPCA and SDWA and reporting "successful coercion of a state inspector to not document his observations of violations" at Fort Benning; (4) documenting her observations of contract fraud by UGA as related to the payment of a graduate student; (5) notifying the National Archives and Records Administration on June 11, 2005, of EPA's destruction of boxes of personnel records, some of which involved EEOC complaints; and (6) filing her whistleblower complaints on September 17, 2003, September 16, 2004, and May 17, 2005. (Id. at 21-22). Complainant contends that EPA was aware of her engaging in protected activities, and states that documents and testimony adduced at the hearing confirm Region Four's knowledge of protected activity.

Complainant argues that numerous adverse employment actions were taken against her as a result of engaging in protected activity.[48] (Id. pp. 29-35).

[48] The alleged adverse actions are discussed fully below.

Complainant asserts that temporal proximity between her protected activities and the actions taken against her are evident, and states that she was the victim of disparate treatment. She asserts that the evidence establishes that Mr. Miller "played a key role in nearly every adverse action" taken against her. (Id. at 39). Further, Complainant maintains she was subjected to a hostile work environment in retaliation for protected activity; she testified that she felt a great deal of anxiety working under Mr. Miller and felt threatened. (Id. at 43). Finally, Complainant contends that Respondent's proposed rationale for the adverse actions against her is pretextual. She believes that EPA's response to the alleged complaints regarding her interpersonal skills was "more severe than the allegations of criminal conflict of interest charges," because her performance appraisals were always rated as successful. (Id. at 48-49). Complainant maintains that EPA's proffered reason of her alleged misuse of government time, equipment or official position is a pretext because she has "consistently asserted" that she has not violated any ethics rule and EPA has not presented any evidence that establishes that any policy or procedure has been violated; even if alleged activity did violate an EPA policy or procedure, Complainant asserts that many other EPA employees engage in such activity regularly without correction. (Id. at 49).

2. Respondent

In opposition, Respondent asserts that Complainant cannot establish a prima facie case of discrimination, specifically, she failed to prove that she engaged in protected activity of which Respondent was aware, failed to prove that she suffered an adverse employment action within the limitations period, and that some of the allegedly adverse activities were not within control of Respondent. Respondent maintains that Complainant did not prove she was subjected to a hostile work environment, because she failed to prove she engaged in protected activity Respondent was aware of, and failed to establish that EPA harassed her in retaliation for protected activities. Further, Respondent argues that Complainant failed to show a temporal proximity between alleged protected activities and alleged adverse acts. Respondent asserts that Complainant failed to demonstrate a nexus between any alleged protected activity and adverse action, nor did she show that the reasons proffered by Respondent were a pretext. Respondent maintains that it presented ample evidence to support any action taken against Complainant. In sum, Respondent's position is that Complainant failed to shoulder her ultimate burden of persuading the trier of fact that Respondent intentionally discriminated against her.

3. Credibility

It is well-settled that in arriving at a decision, the finder of fact is entitled to evaluate the credibility of the witnesses and to weigh the evidence. When the proof of one's case depends on subjective evidence, a credibility determination is a critical factor. Complainant asserts in her brief that Ms. Fulton is not a credible witness because at the hearing, she could not recall the date of the training held by Mr. Pelej, and that any assistance she may have provided to Complainant with mapmaking may have been for a federal project. Complainant contends that Ms. Fulton's testimony was inconsistent with her signed declaration demonstrating that she is not a credible witness. (Complainant's Brief at 19). In response, Respondent asserts that Complainant presented no testimony to establish that she was denied training, but merely cites the testimony of Ms. Fulton that she thought the training occurred in Spring 2004. (Respondent's Brief at 49). I find that Ms. Fulton's veracity is not of issue: whether the training occurred in Spring 2004 or not, a credible witness, Mr. Wiley, produced his calendar to establish that the training occurred on September 8, 2003. Further, Complainant testified she learned from Ms. Fulton the reason for the denial of the training on September 9, 2003. Therefore, Complainant's testimony and Mr. Wiley's testimony corroborate that the training likely occurred in September 2003, and Ms. Fulton's recollection of the date is not controlling.

Respondent asserts that if Ms. Fulton's testimony is deemed not credible due to an uncertainty regarding a date, then there is ample basis in the record for discounting "the majority of Complainant's allegations based on inconsistent dates" including when she learned of the OIG investigation, and allegations in her complaints, deposition, at the hearing and in her post-hearing brief, that are unsubstantiated by evidence. Respondent contends "few, if any, of Complainant's assertions are worthy of credence, and the majority, if not all, are unsupported." (Respondent's Brief at 49, n.12). I will consider Respondent's assertions in the discussion of each element below.

B. The Burden of Parties

To establish a *prima facie* case of discrimination under the environmental whistleblower statutes, a complainant needs only to present evidence sufficient to raise an inference, a rebuttable presumption, of discrimination. *Schlagel v. Dow Corning Corp.*, ALJ No. 2001-CER-1 (ARB Apr. 30, 2004). A complainant meets this burden by initially showing that the employer is subject to the applicable whistleblower statutes, that the complainant engaged in activity protected by the

statute of which the employer was aware, that the complainant suffered adverse employment action, and that a nexus existed between the protected activity and the adverse action. *Jenkins v. U.S. EPA*, ARB No. 98-146, ALJ No. 1997-WPC-1, slip op. at 16-17 (ARB July 31, 2003); *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 933-934 (11th Cir. 1995). Once a complainant meets her initial burden of establishing the *prima facie* case, the burden then shifts to the employer to simply produce evidence or articulate that it took adverse action for a legitimate, nondiscriminatory reason. This is a burden of production, not of proof. When the respondent produces evidence or articulates that it took adverse action against the complainant for a legitimate, nondiscriminatory reason, the rebuttable presumption created by the complainant's *prima facie* showing "drops from the case." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981). At that point, the inference of discrimination disappears, leaving the complainant to prove intentional discrimination by a preponderance of the evidence. *Jenkins*, slip op. at 16; *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

The ultimate burden rests always with the complainant. To meet the burden, the complainant may prove that the legitimate reasons proffered by the respondent were not the true reasons for its actions, but rather were a pretext for discrimination. *St. Mary's Honor Center v. Hicks*, 590 U.S. 502 (1993). In other words, a complainant may prove that she suffered intentional discrimination by establishing that the respondent's proffered justification is not worthy of credence. *Burdine*, 450 U.S. at 256. An adjudicator's rejection of the respondent's proffered legitimate reason permits, rather than compels, a finding of intentional discrimination: "It is not enough…to disbelieve the employer; the factfinder must believe the [complainant's] explanation of intentional discrimination." *Burdine*, 450 U.S. at 519. If the complainant proves by a preponderance of the evidence that a retaliatory or discriminatory motive played at least some role in the respondent's decision to take an adverse action, only then does the burden of proof shift to the respondent to prove an affirmative defense and to show that the same action would have been taken even if the complainant had not engaged in protected activity. *Schlagel*, *supra*.

After a whistleblower case has been fully tried on the merits, the ALJ does not determine whether a *prima facie* showing has been established, but rather whether the complainant has proved by a preponderance of the evidence that the respondent discriminated against her because of protected activity. *Williams*, slip op. at 1, n.7; see also *Maourfield v. Frederick Plass & Plass, Inc.,* ARB Nos. 00-005, 00-006, ALJ No. 1999-CAA-13 (ARB Dec. 6, 2002). The Administrative Review Board discourages the unnecessary discussion of whether a whistleblower

has established a *prima facie* case when the matter has been fully tried. *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31 (ARB Sep. 30, 2003). The ARB explained that in a fully litigated case, an analysis of the *prima facie* case serves no analytical purpose because the final decision will rest on the complainant's ultimate burden of proof; however, the ARB noted that working through the analysis can be useful because the ultimate burden of proof still involves many of the elements covered in the *prima facie* analysis. Further, even in a fully litigated hearing, if a complainant fails to establish an element of the *prima facie* case, evaluating whether the ultimate burden on proof is met may not serve any purpose. *Niedzielski v. Baltimore Gas & Electric Co.*, 2000-ERA-4 (ALJ July 13, 2000) (ALJ discussion of ARB's reasoning).

For the sake of thoroughness, and because the parties generated a great deal of testimony and evidence regarding Complainant's engaging in alleged protected activities and alleged adverse actions taken against her, and because I believe reiteration of those elements is useful in performing the ultimate analysis, I will briefly discuss the elements of the *prima facie* case before moving to Complainant's ultimate burden of proof.

1. Protected Activity

Protected activity furthers the purpose of the environmental statutes. Under the "participation" provisions of the whistleblower statutes, the term "proceeding" encompasses all phases of a proceeding that relate to public health or the environment, including an internal or external complaint that may precipitate a proceeding. *Jenkins*, slip op. at 16. While the whistleblowing employee protection provisions and their statutory objectives are construed broadly, an employee should have more than a mere subjective belief that the environment might be affected. *Kesterson v. Y-12 Nuclear Weapons Plant*, 95-CAA-12 (ARB Apr. 8, 1997). Protected activity must relate to a safety and/or health concern resulting from the reasonably perceived violation of an environmental statute. *Id.* slip op. at 3. Protected activity must be grounded in conditions that constitute "reasonably perceived" violations of the environmental laws, but do not protect an employee simply because she subjectively thinks that the conduct she complains of might affect the environment. *Id*., slip op. at 4.

Here, Complainant alleges that she engaged in at least six examples of protected activity: (1) Notifying Mr. Dombrowsky at headquarters that Region Four was not meeting its wet weather priorities under the Memorandum of Agreement; (2) notifying individuals at headquarters that Region Four was not

completing required CAFO inspections; (3) reporting to Mr. Carellas her observations of multiple violations of environmental regulations at Fort Benning; (4) voicing concerns about "contractual irregularities" at UGA in the form of payments from a pollution grant to a graduate student, (5) notifying the National Archives and Records Administration on June 11, 2005, of EPA's destruction of boxes of personnel records, some of which involved EEOC complaints; and (6) filing whistleblower complaints with OSHA.

Of the above, I find that Complainant's raising concerns regarding the payment to a graduate student at UGA does not constitute protected activity because it does not implicate safety or any environmental concern, and because UGA is not a party to this proceeding; therefore, the alleged protected activity has no relation to Respondent. Likewise, Complainant has failed to set out why notifying National Archives and Records Administration, post-hearing, of destruction of personnel records relates to protected activity under these environmental statutes. I do, however, find that Complainant voiced concerns about what she perceived to be environmental violations at Fort Benning, and her raising those concerns clearly constituted protected activity. Also, filing a whistleblower complaint is protected activity. *Tyndall v. United States Environmental Protection Agency*, ALJ Nos. 93-CAA-6, 95-CAA-5, slip op. at 5 (ARB June 14, 1996).

Obviously, Respondent had knowledge of Complainant's whistleblower complaints, as it was a named party to the complaints. Further, Complainant made clear that Mr. Miller and Ms. Lynch had knowledge that she questioned Mr. Olson regarding his failure to complete a required CAFO inspection, but I do not find any evidence that supports her statement that she notified Mr. Havinga and Ms. Mortenson, the individuals at headquarters, of the CAFO incident. It can be assumed from Mr. Dombrowsky's e-mail that he spoke with individuals at Region Four regarding the priorities under the MOA. As regards Complainant's e-mail to Mr. Carellas, however, there is no evidence that Respondent was aware of Complainant's voicing her concerns. The e-mail was sent only to Mr. Carellas; he agreed that he received it but testified he did not share it with anyone from EPA. Complainant testified that she informed Mr. Miller when she returned to EPA following the IPA, but Mr. Miller did not recall her doing so. Complainant argues that Respondent had knowledge of her report because Mr. Carellas testified that he followed up on Complainant's concerns with EPA staff who were aware of previous inspections of Fort Benning. However, Respondent maintains that no one at EPA who took alleged adverse action against Complainant was aware of the issues she reported at Fort Benning and there is no direct evidence to the contrary.

2. Alleged Adverse Employment Actions and Timeliness of Complaints

Environmental whistleblower protection provisions prohibit employers from discharging or otherwise discriminating against an employee "with regard to the employee's compensation, terms, conditions, or privileges of employment" because the employee engaged in protected activities such as initiating, reporting, or testifying in any proceeding regarding environmental safety or health concerns. *Hall v. U.S. Army Dugway Proving Ground*, 1997-SDW-5, slip op. at 3 (ARB Dec. 30, 2004); 29 C.F.R. S 24.2. Not every action taken by an employer that renders an employee unhappy constitutes an adverse employment action. *Jenkins*, slip op. at 19. To be actionable, an action must constitute a "tangible employment action," which is a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a change in benefits." *Id*., quoting *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1988). The action must amount to a "serious and material change" in the terms, conditions, or privileges of employment. *See Davis v. Town of Lake Park*, 245 F.3d 1232, 1239-40 (11th Cir. 2001). Less overt actions are actionable if they have tangible effects, such as stripping an employee of job duties or altering the quality of an employee's duties. *Jenkins*, slip op. at 19. These discrete adverse actions are subject to the Acts' thirty-day limitations periods, and are not actionable if time-barred, even when they are related to acts alleged in timely filed charges. *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

The term "discrimination" in the environmental whistleblower provisions carries the same meaning as the term "unlawful employment practice" in Title VII of the Civil Rights Act of 1964, and an unlawful employment practice includes a hostile work environment. A hostile work environment exists when supervisors or co-workers engage in hostile acts that do not tangibly alter the employee's conditions of employment, such as salary or promotion opportunity, but are sufficiently severe or pervasive to create an abusive work environment. *Hall*, *supra.* In contrast to discrete adverse actions, a complainant may establish that she was the victim of a hostile work environment, which may occur "over a series of days, or perhaps years, and a single act of harassment may not be actionable on its own." *Schlagel v. Dow Corning Corp.*, ALJ No. 01-CER-1, ARB No. 02-092, slip op. at 8 (ARB Apr. 30, 2004) (quoting *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002)). A discrete act of retaliation or discrimination "occurred on the day it happened"; therefore, a party must file a charge within the statutory limitations period "or lose the ability to recover for it." *Sasse v. Office of*

the United States Attorney, United States Dept. of Justice, ARB No. 02-077, ALJ No. 98-CAA-7, slip op. at 22 (ARB Jan. 30, 2004) (quoting *Morgan*, 536 U.S. at 114). On the other hand, hostile work environment claims are different from discrete acts in that their "very nature involves repeated conduct"; therefore the unlawful employment practice cannot be said to have occurred on any particular day; such claims are based on the cumulative effect of individual acts. *Morgan, supra*.

The Administrative Review Board has clarified the difference between discrete acts and hostile work environment, explaining that the "essential difference between conduct that amounts to discrete adverse employment action and conduct that amounts to a hostile work environment is that the former has an immediate and tangible effect on the employee's income or employment prospects while the latter does not." *Sasse,* slip op. at 21. Further, a hostile work environment claim is comprised of a series of separate acts that collectively constitute one unlawful employment practice. Providing that an act contributing to the claim occurs within the filing period, the entire time period of the hostile work environment may be considered. *Morgan, supra*.

Here, Complainant alleges at least the following adverse employment actions have been taken against her as a result of her engaging in protected activity:

1. July 1999: Admonishment by Ms. Harris for Complainant's response to whether she missed headquarters; she stated she missed the overachievers, to which Ms. Harris responded: "We call them pushy down here." (Compl. Brief, p. 29).
2. Admonishment by Mr. Miller: He told Complainant she was not a team player after she allegedly alerted Mr. Dombrowsky that Region Four was not focusing on wet weather priorities. (Id. at 29-30).
3. The September 9, 1999 counseling session with three lines of management present. (Id. at 30).
4. The September 16, 1999 Memorandum of Counseling issued by Mr. Miller which reduced her duties and authority. (Id.).
5. Covert and overt surveillance; solicitation of complaints about Complainant by Ms. Fields; interference with her right to file an EEO Complaint; false allegations of unprofessional behavior; claims that the memo of counseling was found, copied and

distributed; and illegal and overreaching investigation by Region Four management and OIG. (Id.)

6. Harassment by Mr. Miller in the form of "verbal admonishment" and denial of participation in future CAFO inspections; telling Complainant "We have something good against you"; issuance of a memorandum after she entered Mr. Beswick's office. (Id. at 30-31).
7. False allegations of criminal ethics violations by Ms. Harris and Mr. Miller on July 18, 2000 and immediate suspension of her approval for outside employment. (Id. at 31).
8. Coercion by Mr. Miller to drop the EEO complaint against Ms. Harris (Id.);
9. "Disparate treatment" by Ms. Harris when she failed to discipline Mr. Miller for asking a librarian to pull a case during business hours (Id. at 31-32);
10. Blacklisting by Mr. Miller when he spoke to Mr. Carellas in "October/November 2002" and when he spoke to Mt. Setser at Georgia EPD. (Id. at 32);
11. Blacklisting by "other EPA officials" as indicated by Mr. Buxbaum's statement to OIG that "Army was warned" Complainant was a problem employee before she started the IPA. (Id.).
12. Being required to return to EAD after the IPA at Georgia Tech ended which was against the terms of the EEO settlement she reached with Ms. Harris. (Id. at 32-33).
13. Isolating Complainant at her home and not providing an office, computer or assignments. (Id. at 33).
14. Denial of travel opportunities, promotions and awards. (Id.).
15. "Idling" by denying Complainant assignments commensurate with her grade and position. (Id.).
16. Mr. Miller's denial of Complainant's medical flexiplace request. (Id.).
17. Reduction of duties and termination of position as Project Manager of the Watershed Advisory Board on the IPA to UGA. (Id).
18. Denial of ethics advise regarding outside employment during OIG investigation by Mr. Beswick and Mr. Anderson. (Id.).
19. Denial of a wetlands training opportunity held on September 3, 2003 by Mr. Pelej and "shunning" by other employees as a result of the OIG investigation. (Id. at 34).
20. Denial of representation, coercion and intimidation when forced to participate in the OIG interview on August 26, 2004. (Id.).

21. Premature termination of Complainant's IPA to UGA. (Id. at 34-35).
22. False statements and intimidation on the part of OIG agents when interviewing Complainant's private clients causing loss of current and future income and damage to reputation. (Id. at 35).
23. Permanent damage to Complainant's reputation. (Id.)
24. Continuing efforts to "attempt to create 'situations' in order to find fault in Complainant's work. (Id.
25. Daily animus shown to Complainant "from the beginning." (Id.)
26. A retaliatory and hostile work environment that caused significant impacts to Complainant's mental and physical health and family. (Id.).
27. Complainant's termination on December 6, 2005.

Of the above alleged adverse actions, those which are discrete, meaning that there was a tangible effect on Complainant's terms, conditions, or privileges of employment, and which occurred more than thirty days prior to her filing the September 16, 2003 complaint, are necessarily time barred. I find that the following constitute discrete acts which effected the terms, conditions or privileges of Complainant's employment and which occurred outside the statutory filing period: (1) The September 16, 1999 memorandum of counseling which "reduced" Complainant's authority; (2) the July 18, 2000 suspension of Complainant's permission to engage in outside employment; (3) "Blacklisting" by Mr. Miller when he spoke to Mr. Carellas and Mr. Setser in October or November 2002, therefore causing Complainant to allegedly lose a funding opportunity; (4) Being required to return to EPD after her IPA at Georgia Tech ended in 2002; (5) Isolating Complainant at her home and not providing an office, computer or assignments after the Georgia Tech IPA ended in 2002; (6) Denial of travel the travel opportunity by Ms. Harris in 2000; and (7) Reduction of duties and termination of the UGA IPA on July 1, 2003. As these alleged events had a tangible effect on Complainant's employment, they are discrete acts of alleged discrimination; therefore, Complainant had thirty days from the date of the alleged act to file a complaint. She did not do so, so these acts are time-barred. However, Complainant is not barred from using these acts as background evidence in support of a timely claim, and I will consider them as such.

3. Respondent's Legitimate, Nondiscriminatory Reasons

Respondent asserts that any alleged adverse action taken against Complainant was justified for reasons not related to any protected activity. For

example, Respondent has produced evidence demonstrating that Complainant was counseled in 1999 as a result of complaints her supervisors had received about her interpersonal skills. Complainant's permission to engage in outside employment was revoked in 2000 because of allegations that she may have been involved in a conflict of interest. Respondent maintains that it referred Complainant's case for investigation by OIG because it had legitimate grounds for doing so; namely that evidence was produced which established possible misuse of government time and equipment. Respondent argues that it had no role in the termination of Complainant's IPA at UGA; rather, the decision was made by UGA. Finally, Respondent contends that the OIG interview was conducted by OIG agents, not Respondent's employees and that Complainant's termination is supported by Exhibits 108, 108 and 109 detailing Complainant's misuse of government time and equipment. Consequently, I find that Respondent has demonstrated legitimate, nondiscriminatory reasons for actions taken against Complainant, and that is all that is required of Respondent. In fact, however, I do not have to accept the proffered reasons as true; rather, it is Complainant's burden to show that the reasons are not worthy of belief.

Because Respondent has proffered legitimate, nondiscriminatory reasons for the alleged adverse actions taken against Complainant, there is no need to ascertain whether Complainant has established a nexus between those acts and her alleged protected activity. Instead, the focus of the inquiry is whether Complainant succeeds in her ultimate burden, showing that Respondent intentionally discriminated against her for engaging in protected activity. For the following reasons, I find that despite her efforts, Complainant has not done so.

C. The Merits of Complainant's Timely Allegations

1. Complainant's September 18, 2003 Complaint

Complainant's first complaint, dated September 18, 2003, stated that "various harassment and retaliatory acts" had taken place over the previous five years, and three specific examples had occurred within thirty days preceding the complaint: 1) On September 3, 2003, she learned from an e-mail given to her by Mr. Miller that she was the subject of an OIG investigation which she claimed was conspiratorially done in retaliation for her protected activity; 2) On September 5, 2003 she received documents in response to a FOIA request which included the memoranda written by Mr. Carellas to Mr. Palmer, the memos she believed were written in response to her trip report from Fort Benning; and 3) On September 16, 2003 she learned from Mr. Miller that Mr. Bramblett at UGA contacted him in late

March expressing his desire to replace Complainant on the IPA which was eventually terminated on July 1, 2003; Complainant asserted that these actions were taken against her in retaliation for her reporting contract irregularities at UGA. (ALJX 11, pp. 6-7).

A. The OIG Investigation

On September 3, 2003, Complainant gave time slips to Mr. Miller who informed her he could not process them and showed her an e-mail from Mr. Hill which stated Complainant's time requests could not be processed because her leave was an issue under investigation by OIG. (RX 24). Complainant testified that this was the "first hard and fast" verification she had that she was under investigation, and that her "suspicions were confirmed." (Tr. 319-320). However, evidence establishes that Complainant was aware that she was the subject of an investigation far before September: her e-mail correspondence with her private client Mr. Fox on July 24, 2003, wherein Mr. Fox stated he had been visited by OIG investigators and Complainant's response that she was "really not concerned about EPA-IG" because she had "followed all appropriate procedures and that is what will come out of this," but she was worried about how her clients would react "to Big Brother coming in and asking for all kinds of information." (RX 80). Further, Complainant wrote a letter to Mr. Hill on July 5, 2003 stating she understood she was under investigation and wished to request a meeting with Mr. Hill to "expedite this investigation" and resolve it; she also requested that OIG stop contacting her private clients. (CX 86).

It appears Complainant was aware of the investigation in July, prior to when Mr. Miller showed her the e-mail from Mr. Hill. If that is the case then Complainant's complaint would not be timely, as the action was taken more than thirty days before she filed the Complaint. However, giving Complainant the benefit of the doubt, and considering that an adverse action occurs when the decision is communicated to the employee, rather than when its consequences are felt, see *Sasse*, slip op. at 6; *Jenkins*, slip op. at 14, even if Complainant was not certain she was under investigation until September, it matters not because I do not find that the OIG investigation was initiated in retaliation for Complainant's protected activity.

The evidence of record establishes that the investigation was initiated on March 3, 2003, when Mr. Carellas spoke to Mr. Anderson, however, the evidence also establishes that the events triggering the investigation had been set in motion before that date. There had been allegations made relating to Complainant's

outside employment and possible conflicts of interest as early as 2000. Mr. Carellas testified that he counseled Complainant in November 2002 for several reasons, including her time and attendance and other behaviors including distributing personal business cards and receiving a fax from Newton County related to her outside employment on a government fax machine. (Tr. 1011-1012). Eventually, another document relating to Complainant's private business, the proposal to the City of Oxford, was found on the SREO copy machine on January 4, 2003. Mr. Carellas said in light of earlier events he felt he had no choice but to raise the issue to Respondent's attention, which he did in a February 4, 2003 memo to Mr. Palmer. The memo did not mention or allude to any protected activity on Complainant's part, rather it concerned an ethical question related to outside employment which Mr. Carellas felt he was not in a position to judge. (Tr. 1019; RX 6). On February 27, 2003, yet another document was found on SREO's copy machine, Complainant's letter to Chattahoochee County, which Mr. Carellas gave to Mr. Anderson on March 3, 2003.

Mr. Carellas testified that on that date, Mr. Anderson asked him to meet with OIG, which he did, and where he discussed issues that had arisen including finding Complainant's private business document on the copy machine and her receiving a fax at SREO. Mr. Carellas' testimony was bolstered by Mr. Hill's testimony, wherein he made clear that at the meeting with Mr. Carellas and Mr. Anderson, an OIG investigation of Complainant was initiated. Mr. Hill testified that he believed that Mr. Carellas' and Mr. Anderson's concerns were valid and sufficient to initiate an investigation. There is absolutely no evidence that Mr. Carellas discussed with anyone Complainant's report about Fort Benning at that time or that he provided Complainant's trip report to Respondent or to OIG.

In an attempt to establish that Respondent's reasons for the investigation are pretextual, Complainant claims that she was the victim of disparate treatment and raises the issue of temporal proximity between her protected activity and the adverse action of the investigation. I find neither sufficient to deem Respondent's reasons unworthy of credence. First, though the investigation was initiated in early March 2003, and Complainant engaged in protected activity after her trip to Fort Benning, culminating in her trip report on March 5, as the above discussion indicates, I find that the events leading to the investigation were already in motion prior to Complainant's protected activity. Further, another of Complainant's private business letters was allegedly found in the SREO office the week she went to Fort Benning. Finally, there is no evidence that Complainant's protected activity was considered or discussed in context of initiation of the investigation, and Mr. Carellas testified that he followed up on Complainant's concerns and

determined they had no merit. I cannot find that an inference of discriminatory intent is raised by the alleged temporal proximity at hand.

As regards disparate treatment, Complainant asserts that though she has "consistently stated that she has not violated any ethics rule" and that Respondent has not presented any evidence to show that she did so, for sake of argument, she maintains that other employees engaged in the same activities without reprimand, so it "is considered an acceptable practice in her workplace." (Compl. Brief at 49). Complainant points to several examples of what she contends establish that Respondent's *de minimus* use policy is discriminatory in nature, including Mr. Miller's use of a subscription database regarding his inheritance (CX 130; CX 142), a planning zone request form that lists an EPA manager's government phone number as his private business phone [49](CX 143), a real estate development proposal received by government fax during the day, and a real estate rental announcement listing a government phone number (CX 102).

I do not find that the above constitutes evidence of disparate treatment. First, I cannot assume that the employees Complainant refers to are similarly situated employees, and there is no evidence that those employees engaged in such behavior on any other occasion, whereas there are numerous instances in the record of Complainant engaging in such behavior. Second, as regards Mr. Miller, his alleged activity did not relate to outside employment but was a personal matter. Finally, real estate business is dissimilar to the work that Complainant performed in her outside employment, which was closely related to the work she performed as a government employee. In sum, EPA's *de minimus* use policy states that "[l]imited personal use is authorized during non-work time" with several caveats. (See RX 46-48). The evidence presented by Respondent establishes that Complainant's alleged use was not limited and violated the *de minimus* exception. Therefore, I cannot accept Complainant's contention that she was treated differently under the policy.

While I do agree that learning one is the subject of an investigation is undoubtedly unpleasant, I cannot agree that the initiation of an investigation is in itself an adverse employment action that was committed in retaliation for Complainant's protected activity. EPA has the right to initiate investigations of its employees if it believes that reasonable circumstances warrant such action, and in the absence of discriminatory evidence, I have no place in questioning the validity

[49] Assumedly Complainant refers to the number listed under "Business" as it has a (404) area code, as is EPA, whereas the "Home" and "Fax" headings contain (707) area codes.

of such action. I find that Respondent has produced adequate evidence to establish that it believed an investigation of Complainant's outside employment was warranted, and Complainant did not prove that the investigation was initiated in retaliation for her protected activities.[50]

B. Mr. Carellas' Memo to Mr. Palmer

Complainant received a copy of Mr. Carellas' memo to Mr. Palmer through a FOIA request. She believed this memo was issued in retaliation for her protected activities. As discussed above, Mr. Carellas issued this memo on February 4, 2003, after finding one of Complainant's private business documents on a government copy machine and felt he had the duty to report the issue to Respondent because he was not qualified to make an ethical determination. Complainant did not attend the Fort Benning trip until February 24, 2003, three weeks after the memo was written, and there is no evidence that Mr. Carellas was aware of any of the earlier alleged instances of protected activity (i.e. CAFO or MOA priorities). Mr. Carellas adequately explained the reasons for issuing the memo in his testimony, and further, he is not an EPA employee. He approached Mr. Palmer; there is no evidence that any employee of Respondent solicited complaints regarding Complainant.

Neither do I find the testimony of Ms. Perry establishes evidence of a pattern and practice of conspiracy or collusion between Respondent and Mr. Carellas. Ms. Perry may have had some interaction with Mr. Carellas, but she admitted that her employment was essentially on probation and that members of her team expressed dissatisfaction with her performance. Ms. Perry and Complainant did not have the same supervisors at EPA. Mr. Carellas' testimony established that EPA did not initiate the assessment of Ms. Perry's team, but the idea was borne by him and a representative from the state of Alabama. Though Mr. Carellas testified that he had conversations regarding Complainant, and knew that she had some difficulties at EPA, he testified that he did not know the extent of the problems. Further, even if he was aware that Complainant was a "problem employee," there is no evidence that he was aware of any protected activity on Complainant's part at EPA, or at Fort Benning, at least until the end of February 2003. Therefore, there is no evidence that his memo of February 4, 2003 was issued in retaliation for protected activity.

[50] This is not to say that initiation of an OIG investigation could never constitute an adverse action; but there must be evidence of retaliatory animus, which is not present here. *See Marcus v. United States EPA*, 96-CAA-7 (ALJ Dec. 15, 1998) (noting in dicta that an OIG investigation would appear to constitute an adverse action if motivated by a retaliatory animus).

C. Termination of the IPA at UGA

Finally, Complainant contended that on September 16, 2003, Mr. Miller told her that Mr. Bramblett had contacted him in March expressing his desire that Complainant be replaced, and that the IPA was terminated on July 1, 2003, which she asserts was done in retaliation for her engaging in protected activity, namely, reporting contract irregularities. As previously discussed, I do not find that such behavior constituted protected activity. In addition, Mr. Bramblett terminated Complainant's IPA, Respondent did not. Finally, the terms of the IPA clearly state that the agreement may be terminated by either party. (RX 44). I find that this allegation has no merit as regards Respondent.

D. Denial of Training by Mr. Pelej

In the Order Denying Respondent's Motion for Summary Decision, I stated that Complainant raised an issue of fact as to whether Complainant suffered a denial of training in September 2003. This issue was thoroughly visited at the hearing; Complainant testified that she was denied the wetlands training opportunity because of her protected activity. Mr. Pelej, the alleged decision maker, has since retired from Respondent's employ, but in his place, Mr. Wiley testified regarding the training. The evidence established that the training was held on September 8, 2003 (RX 92), and that only two new senior employees attended. Mr. Wiley testified that those two employees arranged the training as they were new and wished to learn about the work the section performed. Further, the only other related training conducted by Mr. Wiley's team (which included Mr. Pelej), was for NEPA section employees and occurred in April 2002. Given that Mr. Wiley was clear and concise in his testimony regarding the matter, whereas Complainant did not mention the alleged denial of training in her complaint despite testifying that it was a very important training, I accept Mr. Wiley's testimony. Further, Complainant produced no evidence that she was "denied" the training opportunity because of her protected activity. Ms. Fulton testified that Mr. Pelej did not want Complainant to attend a training because she had allegedly engaged in unethical activity which he did not wish to be associated with, which does not constitute protected activity. I find that Complainant has not shown that Respondent's explanation for the alleged denial of training is not worthy of credence.

2. Complainant's September 16, 2004 Complaint

Complainant filed her second complaint on September 16, 2004, wherein she alleged that she was being harassed and retaliated against because of her protected activity when: 1) on August 3, 2004, she received a second set of interrogatories containing numerous allegations that she made inappropriate remarks; 2) on August 18, 2004 her attorney received a letter from Respondent's counsel alleging the same false accusations, she stated her belief was that the statements were an attempt by EPA to justify the memoranda of counseling issued against her as a result of her protected activities; 3) on August 24, 2004 when she reported to OIG offices for an interview which was prematurely terminated, she returned to work and her identification badge was inactive and she later learned that her contact information was removed from the web-based locator indicating she was no longer employed by EPA; 4) two hours after the interview was terminated she was told by her supervisor to report to another interview because she had previously refused to cooperate. Complainant believed that noncompliance with the "coerced interrogation" would lead to termination; 5) Complainant was pressured and intimidated at the interview and had no counsel; 6) she answered OIG's questions under great duress and under the threat of immediate termination; and 6) the following day, she tried to deliver her statement but was ushered into the conference room against her will and asked to sign several forms under oath. (ALJX 9).

Respondent provided legitimate, nondiscriminatory reasons for the above actions through the testimony of Mr. Hill. He explained that the waiver form was a routine part of the interview and informed Complainant that she had a duty to respond as the Department of Justice had declined criminal prosecution; however, Complainant's counsel advised her not to sign the form. Complainant later attended the interview and answered the questions, after having been given an opportunity to secure other counsel and eventually her counsel arrived at the interview. Mr. Hill explained that interviewing the employee is a routine procedure after the DOJ declines prosecution. Further, the only employee of Respondent who had anything to do with this matter was Mr. Mueller, Complainant's supervisor, who signed the order for her to appear at the request of Mr. Hill. Complainant testified that she believed that the deactivation of her identification badge was done in an attempt to coerce and intimidate her into participating in the interview, but Mr. Hill testified that he contacted the EPA employees in charge of the system after determining that her badge was inactive. E-mails from Mr. Hill to that individual establish that he asked for an explanation

and was assured that Complainant would receive a new badge because hers had been damaged.

These actions were taken because Complainant's first interview did not proceed, not because she engaged in any protected activity. In addition, even if timely filed, I cannot find that sending interrogatories and requests for admissions constitute adverse action as they are a routine part of litigation: allegations are made which are admitted, denied and proceed to a trial on the merits. Complainant has not established that any of these actions were taken against her because she engaged in protected activity.

Complainant's May 17, 2005 Complaint

Following the trial, Complainant filed another complaint against EPA Region 4, EPA, OIG and the U.S. Army alleging "recent adverse actions": (1) Notice of Proposed Removal signed by Mr. Ross Wright and based on the retaliatory investigation of the OIG initiated by the University of Georgia and the Army; (2) threats of loss of job; (3) incorrect and unsubstantiated allegations of EPA; (4) threats of firing prior to the decision being rendered in this case rather than awaiting a ruling; and (5) continuing hostile work environment.

Complainant's December 12, 2005 Complaint

Following Complainant's termination on December 6, 2005, Complainant filed another complaint against EPA Region 4, EPA OIG and the U.S. Army alleging that because of her pending whistleblower case, as well as her notice to the National Archives and Records Administration on June 11, 2005 of the destruction of personnel files involving pending EEOC class action lawsuits, that she was terminated on December 6, 2005. This complaint alleges (1) that the removal was the most sever ever rendered for "alleged ethics violations"; (2) the removal was based on an old investigation that included dated and unsubstantial findings and (3) the removal ignores this Court's forthcoming decision.

As to the naming of the OIG and the U.S. Army, for the reasons given at the time of their dismissal from the other related complaints (March 1, 2005) as well as discussed in this decision, I do not find either to be appropriate parties to this action.

EPA was Complainant's employer and is a potentially liable party. The Army, however, only provided a work site for Complainant during her IPA in 2002

and 2003, and the evidence does not support a finding that Mr. Carellas encouraged or initiated the OIG investigation which resulted in Complainant's termination. To the contrary, he only reported to Mr. Anderson concerns he had about Complainant's attendance and use of government time and equipment. Mr. Hill of OIG, who is independent from EPA, conducted the investigation, and it was the result of that investigation which supported Mr. Wright's Notice of Proposed Removal and ultimately Mr. Palmer's Notice of Removal. OIG was not Complainant's employer and there is no evidence it carried out the investigation as a result of any protected activity on Complainant's part.

That this action should have awaited my decision, I do not agree. Absent a finding on my part that the initiation or results of the OIG investigation was a form of adverse action, I have no involvement in either the investigation or its results. In this instance, the investigation, which was in motion both before and after this trial, had every right to continue. Likewise, once the result of that investigation was known, Mr. Wright and Mr. Palmer both were entitled to act in their discretion without seeking approval or a decision from me. Of course, if I had found their actions were in retaliation for Complainant's protected activity, I could have ordered damages and reinstatement, but I have not so found.

As previously noted, I am not certain how destruction of EEOC files relates to protected activity under the statutes here involved, and I note such activity occurred some six months before Complainant's termination. Notwithstanding, however, I find the evidence such that it only demonstrates Complainant's termination was based on the results of the OIG investigation and Mr. Wright's proposal, not some report by Complainant of the destruction of personnel files. (See EX 107, 208, 109).

Of course, with the lingering OIG investigation and having received Mr. Wright's proposal, I am certain Complainant was uncomfortable; however, for reasons discussed hereinafter under hostile work environment, I do not find this to have been by design on EPA'S part to retaliate against Complainant for any protected activity she might have engaged in. That neither she nor her Employer were overly fond of each other there seems no doubt, but the evidence does not support a finding that EPA was motivated by actions on Complainant's part that would be considered protected activity under these whistleblower statutes. If Complainant feels the remedy bestowed on her too harsh for the offenses for which

she was accused that possibly could be the subject of an action in another forum, but not whistleblower relief. [51]

3. Hostile Work Environment

Complainant asserts that she was subject to a hostile work environment, and assumedly every other alleged adverse action falls into this category, as they were not mentioned in her complaints and would only be timely and therefore actionable if she can establish the existence of a hostile work environment. In order to establish such, and therefore for the other alleged adverse actions to be actionable, Complainant must show that at least one of the alleged actions occurred within thirty days of filing her complaint.

In order to prove the existence of a hostile work environment, a complainant is required to prove that 1) she engaged in protected activity; 2) she suffered intentional harassment related to that activity; 3) the harassment was sufficiently severe or pervasive so as to alter the conditions of her employment and create an abusive working environment; and 4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect the complainant. *Meritor Savings Bank, FSB v. Vinson*, 510 U.S. 17,21 (1993); *Schlagel v. Dow Corning Corp.*, 01-CER-1, slip op. at 8 (ARB Apr. 30, 2004) (citing *Jenkins v. U.S. EPA*, 1998-SWD-2, slip op. at 38 (ARB Feb. 28, 2003)). Whether a work environment can be considered hostile or abusive "can be determined only by looking at all the circumstances," which may include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Meritor*, 510 U.S. at 23; *see also Morgan*, 536 U.S. at 116; *Schlaegel*, slip op. at 8. Discourtesy or rudeness should not be confused with harassment; the ordinary tribulations of the workplace, such as the sporadic use of abusive language, joking about protected status or activity, and occasional teasing are not actionable. *Sasse v. Office of the United States Attorney, United States Dept. of Justice*, slip op. at 22.

A hostile work environment exists when supervisors or co-workers engage in hostile acts that do not tangibly alter the victim's conditions of employment, such as salary or promotion opportunity, but are sufficiently severe or pervasive to

[51] Though not mentioned in her complaint, but brought up in her brief, is the allegation concerning Complainant's picture posted at the security guard station post termination. The reason for that I find to have been explained by Mr. Courvington's affidavit. (Ex 110).

create an abusive work environment. *Hall v. United States Army Dugway Proving Ground*, 1997-SDW-5 (ARB Dec. 30, 2004). To establish that Respondent subjected her to a hostile work environment, Complainant must prove by a preponderance of the evidence that 1) she engaged in protected activity of which Respondent was aware; 2) Respondent intentionally harassed her because of that activity; 3) the harassment was sufficiently severe so as to alter the conditions of her employment and create an abusive working environment; and 4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect Complainant. A court may consider all of the purported hostile acts in determining liability if at least one of them occurred within the statutory filing period. *Morgan*, 536 U.S. 101, 117 (2002).

1. Protected Activity

As discussed, the examples of protected activity which could possibly predicate Complainant's hostile environment claim are the CAFO issue, her report to Mr. Dombrowsky, the Fort Benning incident, and filing whistleblower complaints. Of the above, there is no evidence that Respondent was aware of Complainant's report to Mr. Carellas regarding Fort Benning.

2. Alleged Harassment

Obviously, any adverse actions occurring prior to any alleged protected activity are not actionable, therefore, claims that she was "admonished" by Ms. Harris in 1999 is not actionable and can only be considered as background evidence in support of Complainant's hostile work environment claim. As for the rest of the alleged hostile actions, they are numerous and can only be gleaned from Complainant's testimony, post-hearing brief, and original complaint. Some of the alleged hostile acts do not involve Respondent's employees, and instead had to do with UGA, DOD, or OIG employees; therefore, they will not be addressed. Though I found that the alleged "denial" of training by Mr. Pelej did not constitute an adverse employment action, I find that the statement he made regarding not wanting to be associated with Complainant because she was engaged in unethical behavior could be construed as a hostile remark, which would allow me to consider the merits of Complainant's hostile work environment claim. However, after considering the merits of the claim, I find that regardless of whether the allegations are timely, the conduct complained of does not meet the "high bar" required for a finding of hostile work environment.

In addition to the above alleged incidents, Complainant testified that Mr. Miller "threatened" her on seventeen occasions over the years. (Tr. 574). Of these alleged incidents of harassment, some were discrete incidents that are time-barred[52] but may still be considered as relevant background evidence for timely complaints. Of the remaining eight alleged instances of harassment, I do not find them severe or pervasive enough to constitute a hostile work environment. Mr. Miller denied ever telling Complainant they "had something good" on her. Telling Complainant there would be a counseling session is not harassment, nor is having the counseling session, which never alluded to any protected activity on Complainant's part but instead was workplace management. Though time-barred, Complainant's assertion that Mr. Miller denied her medical flexiplace request has no merit, as the evidence establishes that the request was denied by a physician who examined her request. The record establishes that Complainant may have not been comfortable working with Mr. Miller, but his demeanor during the hearing led me to wonder if he was the same person Complainant claimed threatened and harassed her over the years. The evidence shows that Complainant's workplace, at least in part of her own doing, was perhaps not the most nurturing, but I cannot find that Mr. Miller engaged in a pattern of intentional harassment based on Complainant's protected activities.

3. Merits of Hostile Work Environment Claim

A hostile work environment is one that is necessarily comprised of repeated conduct. While I agree that certain statements made to Complainant were of a hostile nature, for example, the allegation that Mr. Pelej did not want to be associated with Complainant because of the investigation of her activities, and I agree that the medical evidence establishes that Complainant was anxious and experienced stress; considering the record as a whole, there is no evidence of a pattern or practice of discriminatory activity that is either severe or pervasive

[52] The time-barred discrete incidents involving Mr. Miller include (1) the September 16, 1999 memo of counseling; (2) the alleged lessening of Complainant's duties when he informed her she could no longer participate in CAFO inspections; (3) His October 25, 1999 response memo denying her request for additional information; (4) His participation in the July 18, 2000 counseling session with Ms. Harris suspending Complainant's outside employment; (5) Alleged blacklisting to Mr. Setser in October 2002; (6) Complainant being reassigned to Mr. Miller's section on February 15, 2002; (7) Complainant's September 22, 2002 reassignment to Mr. Miller; (8) Mr. Miller's May 27, 2003 memorandum of counseling "accusing" Complainant of entering Mr. Beswick's office; and (9) Mr. Miller's alleged denial of Complainant's medical flexiplace request on July 20, 2003. All of these events affected the terms, conditions or privileges of Complainant's employment and she did not complain of them in the time provided by the relevant provisions.

enough to constitute a hostile work environment. Assuming that Complainant engaged in protected activity regarding the CAFO and wet weather priority issues, the events she alleges constitute a hostile work environment are sporadic and were allegedly committed by several different actors. Further, Complainant appears to confuse being reprimanded regarding interpersonal relations with harassment. Complainant has failed to show how any of these alleged acts were intentionally committed because of her protected activity.

As regards the post-complaint harassment Complainant complains of, I similarly find that these instances were not committed because of Complainant's protected status. Complainant's later complaints focus on events that occurred with OIG investigators, specifically in terms of her interview. First, Respondent was not the actor in those instances. Second, it appears that OIG was carrying out its duty of conducting an investigation, and while I agree that this was likely stressful for Complainant and caused her anxiety, as being the subject of such an inquiry would for most people, there is no evidence that the investigation was carried out in retaliation for her protected activities; rather, all the evidence establishes that the investigation centered around alleged conflicts of interest related to Complainant's outside employment.

I believe that Complainant felt hostility in her workplace, which has been sufficiently demonstrated. However, after examining all the circumstances, I do not find that the evidence of record establishes a workplace permeated with discrimination that was severe or pervasive enough to create an abusive environment that detrimentally affected Complainant's work. I agree that Respondent acted imprudently in failing to timely act on the record of investigation generated by OIG, for Mr. Hill testified that OIG sent the record to Respondent in January or February 2005, and the normal procedure is that the agency has thirty days in which to decide whether to take action; however, Mr. Hill testified that the voluminous record in this case may have caused some delays in Respondent's actions. Nonetheless, Complainant has offered no evidence that shows that this delay was done in response to her protected activities or that her ultimate termination was for any reason other than the results of the OIG investigation.

D. Conclusion

Complainant appears very intelligent, a motivated employee, and possesses obvious concern for both the environment and her career. The evidence establishes that she was successful and driven in her positions over the years, and there can be little doubt that she is a knowledgeable environmental scientist;

however, her tenure at EPA Region 4 has not existed without a great deal of conflict. The entire record demonstrates that Complainant and Respondent did not have a perfect working relationship. One wonders how the two parties were able to maintain a working relationship for the length of time they did. However, Complainant has not shown that the actions she complains of were taken against her because she reported environmental or safety concerns. Rather, Respondent has shown that the actions taken were justified by legitimate, non-discriminatory reasons which Complainant has failed to show were not the true reasons for the actions taken, and accordingly, with limited jurisdiction, I cannot afford Complainant the relief she requests. In other words, to provide Complainant the remedy she seeks n her complaint, I would have to find that EPA, OIG, the Army, and the University of Georgia all conspired against Complainant because of her occasional expressed environmental concerns, and I would have to ignore any demonstrated misconduct on her part. I simply do not find the evidence of record supports such a result. There was too much evidence concerning poor interpersonal conduct with management and fellow employees, loss of IPA project assignments, attendance issues and misuse of government time and equipment for me to find that EPA was motivated by any protected conduct on Complainant's part.

ORDER

Complainant's complaints for relief are **DENIED**.

So ORDERED this 16th day of March, 2006, at Covington, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's Recommended Decision and Order. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution

Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file your Petition with the Board, you must serve it on all parties to the case as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001. *See* 29 C.F.R. § 24.8(a). You must also serve copies of the Petition and briefs on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's recommended decision becomes the final order of the Secretary of Labor. *See* 29 C.F.R. § 24.7(d).