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**Issue Date: 01 March 2005**

**CASE NOS.:      2004-CAA-4  
                         2004-CAA-10  
                         2005-CAA-6**

**IN THE MATTER OF**

**CATHERINE A. FOX,  
                         Complainant**

**v.**

**U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA)  
U.S. ENVIRONMENTAL PROTECTION AGENCY, OIG  
U.S. ARMY,  
                         Respondents**

**DECISION AND ORDER GRANTING U.S. ARMY'S AND EPA  
OFFICE OF INSPECTOR GENERAL'S MOTIONS FOR  
SUMMARY DECISION AND  
DECISION AND ORDER DENYING U.S. ENVIRONMENTAL  
PROTECTION AGENCY'S AND COMPLAINANT'S  
MOTIONS FOR SUMMARY DECISION**

**Pending Motions**

Respondent U.S. Army (Army) has filed a Motion to Reconsider Dismissal and for Summary Decision. Respondents U.S. Environmental Protection Agency (EPA) and EPA Office of Inspector General (OIG) have both filed Motions for Summary Decision. Respondents essentially allege that because no genuine issue of material fact exists, and because Complainant fails to establish a *prima facie* case of discrimination pursuant to the environmental employee protection provisions, Respondents are entitled to dismissal and summary decision as a matter of law. In opposition to each Respondent's motion, Catherine A. Fox

(Complainant) has filed responses and cross motions for partial summary decision, asking that she be granted summary decision in her favor on “a subset of genuine material issues supported by evidence that cannot be refuted.” (Compl. Responses at 1). Complainant asks specifically for summary decision with respect to her proving 1) Respondents are covered employers; 2) Complainant and each Respondent had an employee/employer relationship; 3) Complainant engaged in protected activities; and 4) Complainant suffered “discriminatory, adverse employment actions” by Respondents. *Id.* at 42.

### **Factual Background**

Complainant is employed by the U.S. Environmental Protection Agency (EPA), Region Four, in Atlanta, Georgia, as a NEPA Program Analyst. Complainant transferred from Washington, D.C. headquarters to Region Four in 1998 where she worked in the Office of Environmental Accountability (OAE), Office of Technical Support, as a Water Technical Authority. The head of the Region Four OAE was Ms. Phyllis Harris; Complainant’s first-level supervisor was Ms. Sherri Fields and her second-line supervisor was Mr. Bruce Miller.

Complainant was “counseled” regarding her behavior on September 16, 1999. This occurred because managers had received complaints from other employees about Complainant’s “interpersonal skills,”<sup>1</sup> including launching “verbal attacks” when disagreeing with co-workers. Complainant was told that the purpose of the counseling session was to counsel her regarding her behavior, “namely, her poor interactions and demeaning attitude toward other employees.” The session was not a disciplinary action. (EPA Ex. P) Complainant was given a memorandum which outlined the alleged problems and proposed solutions. (EPA Ex. S).<sup>2</sup>

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<sup>1</sup> Mr. Bruce Harris stated in his declaration that “[s]hortly after she joined Region Four, it became apparent that [Complainant] was lacking in interpersonal skills, as [she] often made comments of a demeaning nature that had a negative effect on her coworkers.” For example, employees who worked near Complainant’s cubicle “complained about her having loud phone conversations with unknown persons where she disparaged Region Four employees for what [she] apparently perceived as being slow, or not smart.” EPA Ex. P, paras. 5-6.

<sup>2</sup> Complainant responded to the Memorandum of Counseling by memo dated October 5, 1999, which mainly discussed Complainant’s beliefs of procedural deficiencies regarding “the informal notice of possible disciplinary actions.” She also felt that the accusation of her launching “verbal attacks” was unfounded and stated that the matter was about “different organizational culture experiences, personalities, and communication styles, and not any misconduct or poor performance” on her part. (EPA Ex. T). Mr. Miller replied with another memo dated October 25, 1999, which stated that Complainant appeared to misunderstand that neither the counseling session nor the subsequent memo were disciplinary actions. (EPA Ex. V).

Complainant filed an EEO complaint in August 2000, alleging that she was discriminated against on the basis of gender, age, and race when she was given the counseling memo. She alleged that she was also discriminated against when her permission to engage in outside business activities, originally approved on January 11, 2000, was suspended by Ms. Phyllis Harris on July 18, 2000, pending further inquiry, after EPA received a complaint from outside the agency regarding a possible conflict of interest when Complainant allegedly approached the outside party and offered to assist on EPA grants. (EPA Ex. CC). The suspension notice stated that entities, both inside and outside EPA, had called Ms. Harris' attention to issues involving a possible conflict of interest or misuse of Complainant's position at EPA with regard to her outside activities. In addition, EPA employees allegedly overheard Complainant on the telephone during business hours discussing her outside work.

Complainant's EEO complaint was settled through mediation and a term of the settlement required Ms. Harris to write a letter to Complainant to indicate closure of the issues raised by the ethics investigation; another was to attempt to place her on an Intergovernmental Personnel Act (IPA) assignment. (EPA Ex. FF).<sup>3</sup> Complainant's first IPA took her to Georgia Tech University from January 1, 2001 until March 28, 2002. (EPA Ex. QQ).

When her IPA to Georgia Tech was terminated in March 2002, Complainant responded to a call for proposals from the Department of Defense Pollution Partnership, by preparing and submitting a proposal through the University of Georgia (UGA) to create an Interagency Watershed Advisory Board (WAB). The purpose of the WAB was to establish and support a group of federal and state policy and technical experts who would in turn identify and address water resource issues at military installations located in the southeastern United States. (Complaint at 1). The proposal was selected for funding.

The Department of the Army, U.S. Army Construction Engineering Research Laboratories (CERL), awarded to the University of South Carolina (USC) approximately one million dollars, \$100,000 of which was paid to UGA as a subcontractor, to perform the tasks outlined in the WAB proposal. (Army Ex.

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<sup>3</sup> Ms. Harris wrote the required letter on October 3, 2000, which states in relevant part: "I have investigated allegations concerning whether activities that you engaged in may have resulted [in ethics violations]. After careful review of all known relevant facts, I have determined that no further inquiry by me...is warranted. However, please be advised that notwithstanding my intent, I have no authority to bind any other parts of the [EPA] with respect to that issue." (EPA Ex. GG).

O). After the funds were received by UGA, Complainant was selected to serve as the WAB project manager through an IPA, and commenced work on October 21, 2002. (Army Ex. P). Pursuant to the IPA, the Department of Defense, Southern Region Environmental Office, provided office space for Complainant in Atlanta, Georgia. (*Id.*) Mr. George Carellas was the supervisor of the SREO offices. The IPA lists Complainant's supervisor as Robert Schulstad, Director of the Office of Environmental Sciences at UGA. (Army Ex. P).

Complainant described her duties as WAB project manager as helping develop and support groups which in turn helped to identify challenges faced by military bases in the southeastern United States with respect to the Clean Air Act and Safe Drinking Water Act. The "gaps in knowledge" faced by the bases were then addressed by, for example, planning educational and training opportunities.

On November 27, 2002, Mr. Carellas issued a memorandum where he detailed a meeting that he had with Complainant. (EPA Ex. G, Army Ex. R). He noted that he "discussed...specific examples of improper behavior" with Complainant, including an incident on August 27, 2002 when Complainant passed out business cards for her personal business at a Department of Defense sponsored workshop, and that Complainant had given out the office FAX number and received requests for proposals for her outside business. Written statements from another employee, Ms. Jamie Higgins, indicate that Complainant received faxes relating to her personal business at the office on October 28, two on October 31, and one on November 1. (EPA Ex. I, pp. 12, 14). Ms. Higgins also documented instances of Complainant's alleged tardiness (*Id.* at p. 13) and her behavior at several meetings (*Id.* at 1, 2, 6).<sup>4</sup>

On January 24, 2003, Mr. Carellas sent an email to Mr. Stan Meiburg with Region Four in response to an email he received with the subject line "Conflict of Interest." (EPA Ex. L). The email contained copies of forwarded email messages dated January 23, 2003. The original message was to Steve Blackburn at Region Four from Frank Carubba at the Georgia Environmental Protection Department. It stated that GAEPD had received numerous calls and emails from Complainant asking for grant guidelines, and that Complainant was working as a private consultant and not as an EPA employee when she assisted local governments in preparing grants. Mr. Carubba stated that he needed to know before he met with

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<sup>4</sup> Ms. Higgins' statements include allegations of Complainant's behavior, including arriving late for meetings, working on her laptop during a meeting, taking extended lunch breaks at meetings, Complainant accusing Ms. Higgins of "yelling at her," and telling Ms. Higgins she was glad Ms. Higgins was leaving the office.

Complainant if the situation could be perceived as a conflict of interest. Mr. Blackburn forwarded the email to William Cox and Tom Welborn. Mr. Welborn wrote stating that he had several staff members express concern related to Complainant's outside activities as a consultant; Mr. Meiburg replied that this was not the first such concern he had heard.

On February 4, 2003, Mr. Carellas wrote to Jimmy Palmer, the Regional Administrator for EPA Region Four, because he "felt obliged" to let Mr. Palmer know of an incident where Complainant had left a document related to her outside business on the office copy machine. Mr. Carellas wanted to share this with Mr. Palmer because he could not "make a judgment in regards to the associated ethical questions." On March 3, 2003, Mr. Carellas also wrote a memo to Bill Anderson of EPA Region Four detailing that Complainant had left a document in the office printer which made Mr. Carellas concerned that she was using government time and resources to conduct her business. The document was dated February 27, 2003 and mentioned a meeting she had with the outside entity and tour of its facility earlier in the week. (EPA Ex. E).

Mr. Carellas' concern was that the time mentioned by Complainant in her February 27, 2003 letter was while she was on a government trip to Fort Benning, Georgia. She had been invited to attend the Fort Benning trip on February 24-25, 2003, in the capacity of an observer. He also indicated that the client to whom the letter was addressed was in the same area as Fort Benning. In this memo, Mr. Carellas detailed what others had told him about Complainant's behavior on the trip to Fort Benning, and also stated that Complainant frequently worked with her door shut, and that employees had overheard her having phone conversations in which it appeared that she was soliciting business for her company.

On March 5, 2003, Complainant sent Mr. Carellas an email documenting her observations of the conditions at Fort Benning. (EPA Ex. O). Complainant stated that she observed numerous noncompliance issues, including broken pumps at the wastewater plant, improper sludge disposal, levels of water in the drinking water tanks were above the level of the skimmers (thus rendering the skimmers useless), discussion among plant operators of an illegal discharge into the nearby stream, amounts of mud flowing offsite, incorrect installation of silt fences, storm sewer inlets filled with mud, and truck maintenance being conducted in prohibited areas without the use of drip pans. (*Id.*).

On March 17, Mr. Carellas and Mr. Anderson of Region Four met with Mr. Michael Hill, the Special Agent in Charge of EPA OIG Eastern Resource Center in

Atlanta. Mr. Hill stated that their discussion focused solely on allegations that Complainant had been conducting outside personal business activities on government time and using government equipment to do so. (OIG Ex. 12, p.2). He stated that he was provided Mr. Carellas' memos, a purported proposal from Complainant to an outside business client, and Complainant's formal requests to participate in outside business activities. He stated at no time was he given nor informed of Complainant's recent email to Mr. Carellas concerning Fort Benning. (*Id.* at 3).

Complainant alleges that her IPA to UGA was subsequently terminated without notice on July 1, 2003, and that she was notified of such by Mr. Steve Prince from Region Four Human Resources. (Compl. Resp. to Army, p.11). The WAB July monthly progress report states that "due to a conflict of interest and philosophical difference in how the DoD grant should be administered, the DoD and UGA terminated the IPA with EPA Region Four 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." (Compl. Response to Army Ex. G1). Complainant testified at deposition that she began her current position at the NEPA Program Office in July 2003 (EPA Ex. NNN, p. 6).

Complainant alleges that actions were then taken against her in the context of her employment, including retaliation, intimidation, coercion, blacklisting, and ongoing criminal and civil investigations which were prohibited by various environmental whistleblower provisions, including the Clean Air Act (CAA), CERCLA, Safe Water Drinking Act (SWA), the Federal Water Pollution Control Act (WCPA), and the Transportation Surface Control Act (TSCA).

Claimant filed her first whistleblower complaint on September 17, 2003, when she states that she learned that she was the subject of an OIG investigation. Complainant filed a second whistleblower complaint against EPA and OIG on September 16, 2004, alleging that she was retaliated against, in part, in the form of an ongoing OIG investigation, for filing her earlier complaint. The cases were consolidated and are now before me for trial. The issues raised on motions for summary decision by the parties relate to whether Complainant is capable of establishing a *prima facie* case of discrimination under the environmental whistleblower statutes and include the following issues:

- (1) Whether the named Respondents are "employers" under the relevant statutes and therefore subject to Department of Labor jurisdiction;

- (2) Timeliness of Complainant's complaints;
- (3) Complainant's alleged protected activity/activities, including whether Respondents had knowledge of said alleged activities;
- (4) Allegedly adverse employment actions taken by Respondents against Complainant, including the existence of a hostile working environment; and
- (5) Whether there exists a causal nexus between Complainant's allegedly protected activity and the allegedly adverse actions taken against her.

### **Standard of Review**

Any party may move with or without supporting affidavits for summary decision on all or part of the proceeding. 29 C.F.R. § 18.40(a) (2004). Summary decision is granted for either party when the administrative law judge finds that the pleadings, affidavits, material obtained by discovery or otherwise show that there is no genuine issue as to any material fact. 29 C.F.R. § 18.40(d) (2004). The "party opposing the motion may not rest upon the mere allegations or denials of such pleading, but shall set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c) (2004). A fact is material and precludes a grant of summary decision if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or a defense asserted by the parties. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The evidence and inferences are viewed in the light most favorable to the non-moving party. *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204, 207 (1999).

If the non-moving party fails to establish an element essential to his case, there can be "'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). However, granting a summary decision motion is not appropriate where the information submitted is insufficient to determine if material facts are at issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

### **Arguments and Discussion**

#### **The Relevant Statutes and Elements of Proof**

Pursuant to the Safe Water Drinking Act:

No employer may discharge any employee or otherwise discriminate against any employee with respect to [the employee's] compensation, terms, conditions, or privileges of employment because the employee has

(A) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this title...

(B) testified or is about to testify in any such proceeding, or

(C) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this title.

42 U.S.C. § 300j-9(i). The CAA and TSCA contain essentially identical provisions. *See* 42 U.S.C. § 7622; 15 U.S.C. § 2622. The relevant provisions contained in WPCA and CERCLA provide: “No person shall fire, or in any way discriminate against or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under” the Acts. 33 U.S.C. § 1367; 42 U.S.C. § 9610.

To prevail on a complaint of unlawful discrimination under the whistleblower protection provisions in the environmental statutes, a complainant must establish that she is an employee and that the respondent is an employer. *Demski v. Indiana Michigan Power Co.*, ARB No. 02-084, ALJ No. 01-ERA-36, slip op. at 4 (ARB Apr. 9, 2004). A complainant must also demonstrate that she engaged in protected activity of which the respondent was aware, that the complainant suffered an adverse employment action, and that the protected activity was the reason for the adverse employment action, *i.e.*, that a nexus existed between the protected activity and the adverse action. *Jenkins v. United States Environmental Protection Agency*, ARB no. 98-146, ALJ No. 1988-SWD-2, slip op. at 9 (ARB Feb. 28, 2003). Failure to establish any of these elements defeats a claim under applicable whistleblower statutes. *Id.* at 16.

## **1. Statutory “Employers”**

The “crucial factor” in determining whether an employer-employee relationship existed amongst the parties as is mandated by the statutes, is whether the respondent acted in the capacity of employer, specifically, whether it exercised control over or interfered with the terms, conditions, or privileges of the



complainant's employment. *Seetharam v. Gen. Electric Co.*, ARB No. 03-029, ALJ No. 2002-CAA-21, slip op. at 5 (ARB May 28, 2004); *Lewis v. Synagro Technologies, Inc.*, ARB No. 02-072, ALJ Nos. 02-CAA-12, 14, slip op. at 8 n. 14, 9-10 (ARB Feb. 27, 2004).

Because none of the whistleblower statutes contain a definition of "employee," the Administrative Review Board has provided factors which should be considered in ascertaining whether an employer-employee relationship exists. The Board has held that the correct test to apply is the common-law employee test established by the United States Supreme Court in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992). There, the Court stated:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; the provision of employee benefits; and the tax treatment of the hired party.

*Darden*, 503 U.S. at 323-4 (quoting *Community for Creative Nonviolence v. Reid*, 490 U.S. 730 (1989)). In *Reid v. Methodist Medical Center of Oak Ridge*, 93-CAA-4 (Sec'y Apr. 3, 1995), the *Darden* factors were deemed the appropriate factors to consider when determining whether parties engaged in an employer-employee relationship.

In *Williams v. Lockheed Martin Energy Systems, Inc.*, ARB No. 98-059, ALJ No. 1995-CAA-10 (ARB Jan. 31, 2001), the Board further refined the employer-employee relationship when it reiterated that in appropriate circumstances, protection may extend beyond the immediate employer. *Williams*, ARB No. 98-059, slip op. at 9. The Board explained:

In a hierarchical employment context, an employer that acts in the capacity of employer with regard to a particular employee may be subject to liability under the environmental whistleblower provisions, notwithstanding the fact that that employer does not directly

compensate or immediately supervise the employee....The issue of employment relationship necessarily depends on the “specific facts and circumstances” of the particular case, however.

*Williams, supra*, slip op. at 9 (quoting *Stephenson v. NASA*, ARB No. 98-025, ALJ No. 94-TSC-5, slip op. at 11 (ARB July 18, 2000)). The Board stated that the underlying question is whether the respondent acted as an employer with regard to the complainant, either by exercising control over production of the work product or by establishing, modifying, or interfering with the terms, conditions, or privileges of the complainant’s employment. *Id.*

In situations involving a “joint employer,” where a respondent exercises sufficient day-to-day control over a complainant’s work to be treated as a co-employer of a complainant, the Board has indicated that factors which may result in a finding of joint employer status include control over the hiring, discipline or discharge of employees; control over the work schedules and work assignments of such employees; and the obligation to train or pay such employees. *Williams, supra*, slip op. at 10 (citing B. Lindemann & P. Grossman, *Employment Discrimination Law*, at 1312 (3d ed. 1996)). In *Williams*, the Board affirmed the administrative law judge’s finding that the respondent did not act as an employer with regard to the complainant where the evidence showed that the respondent did not employ the complainant, manage or supervise his work, pay him or withhold taxes, evaluate his performance or have the authority to terminate him. *Id.* Finally, the Board has recently held that in the exercise of control over employment is essential to being an employer. *Lewis v. Synagro Technologies, Inc.*, ARB No. 02-072, ALJ Nos. 2002-CAA-12, 14, slip op. at 4 (ARB Feb. 27, 2004). The Board explained that the factors contained in both the common-law and joint employer tests are “all means of ascertaining whether the requisite control exists.” *Id.*

Accordingly, the relevant inquiry in the instant case is whether Respondents Army and/or OIG exercised sufficient control over Complainant’s employment so as to qualify as employers under the relevant whistleblower provisions. There is no dispute that Respondent EPA is Complainant’s employer. It is also undisputed that EPA is an “employer” under the provisions of the SWDA, CAA, TSCA, SDWA, and CERCLA.

### **Respondent OIG**

OIG argues that it is not Complainant’s employer, exercises no supervisory control over Complainant, and exercises considerable independence from EPA.

OIG points out that it is statutorily independent from EPA, and that it is responsible for conducting “investigations relating to the programs and operations of the EPA.” (Resp. Mot., p. 9). On March 3, 2003, Mr. Carellas met with William Anderson, the Associate Director of the Office of Legal Support, EPA Region Four, to express his concerns regarding circumstances he believed may have constituted a possible conflict of interest with regard to Complainant’s outside business activities. Mr. Anderson contacted Mike Hill, Special Agent in Charge of the Eastern Resource Center, OIG, and scheduled a meeting which occurred March 17, 2003 (OIG Ex. 12, pp.3-4). Mr. Hill reviewed the documentation provided to him and determined that the information warranted an investigation which was initiated on April 3, 2003. (OIG Ex. 13). On July 23, 2003, the case was referred to the Public Integrity Section, Department of Justice for prosecutive determination in determination (*Id.*). In August 2004, the Public Integrity Section informed EPA of its decision to decline prosecution (OIG Ex. 16).

Complainant argues that OIG should be considered an employer pursuant to the ALJ’s decision in *Erickson v. United States Environmental Protection Agency*, 1999-CAA-2 (RD&O Sep. 24, 2002). There, that complainant named respondents EPA and OIG. The Recommended Decision and Order’s only mention of OIG’s employer status is contained in a footnote which states that the ALJ previously ruled that the respondents were subject to the court’s jurisdiction and also found that the respondents and the complainant had an employer-employee relationship, thus, the complainant was covered under the Acts. *Id.*, slip. op. at 35, n.82. The order which the footnote referenced states: “there is no dispute that Respondent EPA and Complainant have an employer-employee relationship. Also undisputed is the fact that Respondents are subject to the jurisdiction of this Court as provided for [in the environmental whistleblower acts]. *Erickson v. EPA*, 1999-CAA-2, slip op. at 9 (Order Granting and Denying in Part Complainant’s and Respondent’s Motions for Summary Decision, Feb. 13, 2002).

In this instance, though not binding, I find persuasive the conclusion of my colleague in *Greene v. United States EPA*, 2002-SWD-1, slip op. at 6 (ALJ Feb. 10, 2003). In *Greene*, the complainant, an EPA administrative law judge, named EPA and OIG as respondents. The ALJ determined that the complainant was not an employee of OIG, and, in addition to the fact it exercised considerable independence from the EPA, the key factor was that OIG exercised no supervisory control over the complainant. *Id.*

I concur that the ALJ in *Greene* considered the proper factors, and I reach the same conclusion. In the facts before me, OIG was acting at the behest of EPA, Complainant's employer, in conducting its investigation, and exercised no supervisory control over Complainant's employment. "If a complainant is unable to establish the requisite control and thus an employer-employee relationship, the entire claim must fail." *Seetharam v. Gen. Elec. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-21, slip op. at 5 (ARB May 28, 2004). Complainant has provided nothing which indicates that she was an employee of OIG or that it controlled her so as to qualify as an employer under the Acts. Accordingly, because Complainant cannot establish that OIG exercised control over her employment, OIG's Motion for Summary Decision is **GRANTED**.

### **Respondent Army**

Respondent Army asserts that the evidence offered by Complainant establishes merely that Mr. George Carellas, an employee of the Army, acted as Complainant's "administrative supervisor," by virtue of his signing Complainant's time cards and providing feedback and oversight on her overall performance; however, Respondent claims that at no time has Complainant alleged or through evidence shown that the Army was able to independently control or take any allegedly adverse actions against Complainant. In other words, Respondent Army urges that it merely served as a conduit of information to UGA and EPA regarding Complainant's job performance, which does not render it an "employer" as defined by the Board's and courts' interpretations of the statutes because there is an absence of evidence establishing that Respondent Army in any way controlled the terms, conditions, or privileges of Complainant's employment.

Unlike the situation discussed above regarding OIG, however, in terms of Respondent Army, Complainant states many examples of the conduct of Mr. Carellas which she claims establish that Respondent qualifies as an employer, some of which are supported by the evidence she has introduced.

Complainant specifically states that Mr. Carellas established Complainant's work location and would not allow her to participate in a flexiplace policy wherein she was allowed to work from home, though such an arrangement had been approved by EPA. She also contends that Mr. Carellas established her work hours, signed her time cards, offered to mentor her, and provided specific guidance and feedback on the manner in which Complainant's assignments were completed. She claims that Mr. Carellas assigned her additional tasks which were outside the scope of the WAB and IPA, that he disciplined her without the knowledge or

participation of either EPA or UGA, that he was responsible for the termination of Complainant's IPA and determined the date on which the project would terminate, he provided false testimony and inaccurate information to OIG investigators, and at no time did he tell Complainant that he was not her supervisor, though he was "fully aware" of Complainant's belief and understanding that he was her supervisor.

As one can see, the evidence submitted by Complainant and Respondent Army regarding the nature of their relationship is conflicting. For example, Respondent Army has submitted a copy of an e-mail written by Mr. Jimmy Bramblett of UGA, addressed to Complainant, a copy of which he forwarded to Mr. Carellas. The e-mail indicates that Claimant had complained that she had "too many bosses," to which Mr. Bramblett replied: "Let me continue to say this for simplification and directness, you have one person to make happy in this whole process. That person is ME." He continued, "DOD has been exceedingly gracious in providing us (you) with office space for this project...My expectation is we will take full advantage of this unique opportunity and that you will be there, in the office, 40 hours per week working on this project." Mr. Bramblett concluded that of Complainant did not follow the guidance of his e-mail, there were two options, either to "stop the project," or "replace the current project manager," i.e., Complainant. (Army Ex. R.) In addition, a memorandum produced after an interview with Mr. Carellas by the Office of the Inspector General reflects that Mr. Carellas stated that Complainant was "collocated in his office space; however, she works for EPA and is on an IPA to UGA...Jimmy Bramblett is her supervisor at UGA." (Compl. Ex. G2). In a memorandum compiled after a "counseling session" with Complainant, Mr. Carellas noted that he "promised EPA and UGA that I would try my best in a mentoring role to get the performance that everyone wants and that the government deserves."

Other evidence, however, tends to demonstrate that Mr. Carellas did exercise some degree of control over Complainant's employment, such as a document produced by an investigation by the Office of the Inspector General after interviewing Mr. Bramblett and Mr. Carellas. This document states: "Carellas provided the following information....He was [Complainant's] second-line supervisor and Jimmy Bramblett was her immediate supervisor under the IPA." (Army Ex. S). In addition, there is a memorandum dated November 27, 2002, signed by Mr. Carellas with the subject line Verbal Notice to [Complainant] that Her Overall Performance to Date was Unacceptable and Needed Improvement. (Compl. Ex. C). Mr. Carellas outlined the contents of his meeting with Complainant on that date, including "specific examples of improper behavior."

One of these examples related to Complainant's tardiness, wherein Mr. Carellas explained that Complainant had approached him about tele-working from home, but he "would not allow it," though he "readily agreed" to a flexi-schedule. Mr. Carellas also noted Complainant's inattention to detail, focusing on an occasion where he "asked [her] to cover a Coastal America meeting...about two blocks away." Finally, in a memorandum to Mr. Jimmy Palmer, Regional Administrator of EPA Region Four, detailing the above meeting he had with Complainant, Mr. Carellas stated that Complainant was hopeful that the situation would improve and as such, he was "still not recommending that we terminate her IPA agreement with the University of Georgia."

In sum, after reviewing the evidence offered in support of and in defense of Respondent Army's motion regarding its status as a statutory employer, I find that there is evidence to support the contention that Respondent Army, unlike OIG, acted as an employer by exercising control of Complainant's employment. Complainant obviously had contact with Mr. Carellas, an employee of Respondent Army. Consequently, I find evidence sufficient to avoid summary decision which indicates that a genuine dispute of fact exists as to whether Mr. Carellas may have exerted control over the terms, conditions or privileges of Complainant's employment, enough to qualify Respondent Army as an "employer" under the Acts.

## **2. Protected Activity**

Activities that are protected under the environmental acts are those that further the purposes of the acts or relate to their administration and enforcement. *See Culligan v. Am. Heavy Lifting Shipping Co.*, 00-CAA-20 (ARB June 30, 2004). The purpose of the Clean Air Act is to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare and the productive capacity of its population. 42 U.S.C.A. § 7401(b)(1); *Culligan*, slip op. at 7 (ARB June 30, 2004). The purpose of the Safe Drinking Water Act is to promote the safety of the nation's public water systems through the regulation of contaminants so as to provide water fit for human consumption. 42 U.S.C.A. 300(f). The purpose of the Toxic Substances Control Act is to regulate chemical substances and mixtures that present risks of injury to health or the environment in their manufacture, processing, distribution in commerce, use or disposal. 15 U.S.C.A. § 2601(b)(2). The purpose of the Solid Waste Disposal Act is to promote the reduction of hazardous waste and the treatment, storage, or disposal of such waste so as to minimize threats to human health and the environment. 42 U.S.C.A. § 6902(b). The main purpose of CERCLA is the prompt cleanup of hazardous

waste sites and the imposition of all cleanup costs on the responsible party. *Culligan*, slip op. at 9 (quoting *Gen. Elec. Co. v. Litton Industrial Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8<sup>th</sup> Cir. 1990)). Finally, the goal of FWPCA (the “Clean Water Act”) is to restore and maintain the chemical, physical, and biological integrity of the nation’s waters, with the goal of eliminating the discharge of pollutants by industry...33 U.S.C.A. § 1251(a).

Under the “participation” provisions of the whistleblower acts, 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 v. United States Env’tl. Prot. Agency*, ARB No. 98-146, ALJ No. 88 SWD-2, slip op. at 16 (ARB Feb. 28, 2003). Protected activity must relate to a safety and/or health concern resulting from the reasonably perceived violation of an environmental statute. *Kesterson v. Y-12 Nuclear Weapons Plant*, ARB No. 96-173, ALJ No.1995-CAA-12, slip op. at 3 (ARB Apr. 8, 1997). The employee protection provisions “afford protection for participation in activity in furtherance of the statutory objectives and traditionally have been construed broadly.” *Tyndall v. United States Env’tl. Prot. Agency*, ALJ Nos. 93-CAA-5, 6, slip op. at 4 (ARB June 14, 1996) (quoting *Jenkins v. United States Env’tl. Prot. Agency*, ALJ No. 92-CAA-6 (Sec’y May 18, 1994)). Protected activity must be grounded in conditions that constitute “reasonably perceived” violation 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. *Kesterson*, slip op. at 4.

In the present case, Complainant alleges that she engaged in numerous protected activities dating back to her arrival at EPA Region Four in 1998. Specifically, Complainant asserts that the following activities, among others, are protected:<sup>5</sup>

- (1) Voicing her concerns to Bruce Miller, Scott Gordon, and Sherri Fields regarding the lack of an inspection report on a Concentrated Animal Feeding Operation (CAFO) she worked on;
- (2) Reporting noncompliance with environmental laws she observed at Fort Benning in an e-mail to George Carellas on March 3, 2003.
- (3) Expressing her concerns to Eric Schaeffer, the former head of the Office of Regulatory Enforcement at the Office of Enforcement Compliance Assurance regarding her observations of EPA Region Four upon her arrival, including her opinion about waste of federal resources, concerns with the

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<sup>5</sup> Complainant’s alleged instances of protected activity have been gleaned from her detailed complaints and pleadings and are often noted verbatim as she described them.

way employees were managed, and how management treated her when she presented ways the office could be more effective;

- (4) Raising concerns regarding the lack of “compliance assistance activities”(defined by Complainant as “education and training”) available to EPA Region Four to “the deputy director of the Office of Compliance” in Washington, D.C. when he visited EPA Region Four, as well as to Bruce Mille and Sherri Fields;
- (5) Notifying her assigned supervisors and other EPA Region Four managers that she had not been provided a position description, performance standards, assignments, office space or equipment for several extended periods of time;
- (6) Raising concerns regarding the untimely completion of a required inspection report from an NPDES inspection in which she participated in 1999;
- (7) Notifying a former colleague from EPA headquarters that EPA Region Four was not meeting its obligations under the Memorandum of Agreement between Region Four and his office;
- (8) Notifying senior managers from EPA headquarters of her observations and personal experiences related to “significant waste, fraud and abuse” by certain managers at Region Four;
- (9) Notifying EPA Region Four management of illegal conduct by an EPA manager regarding personal use of agency contractors during government time and of contract irregularities regarding the University of Georgia;
- (10)Notifying union representatives that she was the subject of adverse employment actions by EPA Region Four management in retaliation for various protected activities;
- (11)Filing EEO complaints regarding reprisal and hostile work environment;
- (12)Filing environmental whistleblower complaints;
- (13)Expressing objections and concerns about the misuse of government funds and noncompliance at Fort Benning (Response Memo to Army, p. 24); and
- (14)Making numerous notifications in writing and by phone to OIG of issues of “waste, fraud and abuse of authority” in EPA Region Four, and making requests for meetings and investigations of illegal instances by OIG (Response to OIG, p.9) (Complainant also lists denials of meetings by OIG counsel as protected activity).

Complainant argues that the environmental acts “protect not only concerns about actual pollution, but conditions that could affect” the environment.



Respondents disagree, and assert that simply being an employee of the EPA does not mean that every action Complainant takes is protected.

The Acts have been interpreted to extend to activity which is in furtherance of the purposes of the Acts, and while many of Complainant's alleged actions do not appear to be protected, I am unwilling to summarily decide that all of her activity was unprotected.

Granted, ordinary employment disputes between supervisors and supervisees are not protected activity under the Acts. *Kesterson*, ALJ No. 95-CAA-12, slip op. at 17. Accordingly, many of Complainant's allegations of protected activity do not qualify as such under the environmental whistleblower acts, but are more properly resolved through employment discrimination channels. For example, Complainant's allegedly protected activity of complaining about mismanagement of the office, including lack of educational opportunities, waste of federal resources in terms of employees taking long lunch breaks, concerns with how employees were managed, filing EEO complaints and management being nonresponsive to her suggestions about how the office could improve its effectiveness, do not constitute a "perceived violation of the environmental laws." Similarly, Complainant's act of notifying her supervisors and managers that she had not been given a position description, performance standards, assignments, office space or equipment, do not further the purposes of the environmental laws under which she brings her claims.

However there was alleged activity prior to 2003 that could arguably constitute activity protected under the environmental statutes and include instances in which Complainant claims she voiced her concerns to Bruce Miller, Scott Gordon, and Sherri Fields regarding the lack of an inspection report on a CAFO inspection in which she participated (Complainant's Ex. YY; Complainant's deposition pp. 18-19). Complainant stated that she questioned another employee at a meeting about his intent to complete an overdue inspection report on an inspection in which she participated, which she views as protected activity. As evidence, Complainant submits an email she sent to Mr. Miller on October 20, 1999, which was carbon-copied to Ms. Fields and Mary-Kay Lynch. (Compl. Memo. In Opp. to EPA Mot., Ex. I). The email states "I followed up on the allegation you made to me on October 6...that I called someone a "liar" at a CAFO Workgroup meeting in July...I did not call anyone a liar at that meeting. What I did do was to question an individual in front of others about his intent to prepare required reports of CAFO inspections in which I had assisted. I understand that in this organization's culture, this issue may have been addressed

in a more effective manner by speaking to Sherri [Fields] and perhaps the individual's supervisor."

In addition to the October 20, 1999 email, Complainant also alleges that she "notified Mr. John Dombrowski, a former colleague from EPA headquarters," that EPA Region Four "was not meeting its obligations under the Memorandum of Agreement between [Region Four] and [Mr. Dombrowski's] office." In support of this allegation, she submits an email dated September 27, 1999, from Mr. Dombrowski to Complainant (Compl. Response Ex. G); and while the email offered by Complainant<sup>6</sup>, without further explanation through deposition testimony or documents, does not establish that she engaged in activity protected under the acts, it does raise the inference that she reported something to Mr. Dombrowski.

Complainant also alleges that she engaged in at least two instances of activity protected under the environmental acts while she served as the Watershed Advisory Board Project Manager: emailing Mr. Carellas her observations of noncompliance with environmental laws at Fort Benning, and reporting UGA's contractual irregularities by allegedly paying a graduate student from a grant she did not work on. Regarding the contract, Complainant testified in her deposition that she raised the issue to "the University of South Carolina, Jeff Beacham" in February 2003, and to the Watershed Advisory Board Steering Committee in March 2003 (EPA Ex. NNN, pp. 82-83). Complainant testified that she "wanted the situation corrected" by those who were able to do so. She said that Mr. Jimmy Bramblett approved payment to his graduate student, and it was her understanding that Mr. Bramblett, Mr. Carellas, and the Steering Committee had the power to correct the situation. The only evidence submitted by any party regarding this issue consists of a photocopy of UGA payroll records submitted by Complainant, which indicate that a graduate student was paid, but not on what account (Compl. Response to Army, Ex. I).

Complainant's email, dated March 5, 2003, details her observations of Fort Benning (EPA Ex. O). She stated though she had never worked as an EPA inspector, she was dismayed at the numerous compliance issues she observed. She

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<sup>6</sup> The email states: "Attached is a message from Region 4 [with regard to] 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. 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 the their [sic] mom program. If this is not correct, we need to let them know."

noted the problems to include all but one of the pumps at the wastewater plant were broken; sludge disposal at the wastewater treatment plant appeared not to be disposed of in the proper manner (it was not mixed into the soil within six hours as required); the water levels at the drinking water tanks were above the skimmers; and she indicated she heard some discussion among plant operators of an illegal discharge of waste material directly into a nearby stream. In addition, she noted problems at the construction site she visited, including large amounts of mud flowing offsite; incorrect installation of silt fences; missing silt fences; and storm sewer inlets filled with mud. She also stated that in the vehicle storage area, she saw soldiers conducting truck maintenance in prohibited areas without using drip pans.

Quite arguably, this March 5, 2003 email is evidence that Complainant engaged in activity protected under the environmental acts. The evidence presented by Complainant of reporting observed noncompliances satisfies the criteria of furthering the purposes of the environmental acts as well as establishing that her beliefs could have been “grounded in conditions” that constitute “reasonably perceived” violations of the environmental laws. Accordingly, I find Complainant has offered evidence sufficient to avoid a summary decision that she engaged in protected activity with regard at least to her email of March 5, 2003.

Additionally, Complainant alleges that upon her return to EPA, following termination of the UGA IPA, she engaged in protected activity for which she was later retaliated against. Specifically, her complaint and pleadings allege that (aside from the instances of alleged protected activity previously discussed), she made “numerous notifications in writing and by phone to OIG” regarding issues of “waste, fraud, and abuse of authority” in EPA Region Four, as well as “requests for meetings [and] investigations of the illegal instances.” (Compl. Response to OIG, p.9). She also states that she was denied meetings by OIG’s counsel. Finally, she asserts that filing her initial whistleblower complaint and EEO complaints are instances of protected activity. (*Id.* at pp. 9-10).

As support of her contention that she engaged in protected activity by requesting meetings and investigations, Complainant offers several pieces of evidence. One is an email she wrote on July 5, 2003, to Mr. Mike Hill of OIG which states she understood that she was under investigation and was requesting to meet with Mr. Hill “to expedite this investigation and resolve it as soon as possible.” (Compl. Response to OIG, Ex. G, p.1). In this email, Complainant also requested that “all representatives from [OIG] stop contacting any of [her] private clients.” She also informed Mr. Hill that Mr. Miller had violated policy by asking

a law librarian to conduct a search of estate laws during work hours, and stated that there were “issues of fraud and abuse of government being carried out in [her] case” at Region Four, and she had “evidence to show that it is the management...that are violating codes of conduct and not [Complainant].” She asked for Mr. Hill’s “assistance in bringing these matters to light.”

Contained in this exhibit also is a letter from Complainant’s previous counsel to the Inspector General and OIG counsel inquiring about the status of the investigation of Complainant and alleging that OIG’s investigation was being conducted in retaliation for her engaging in protected activities such as “the identification of misuse of government funds and personnel, abuse of power by EPA management and...reporting of several major water pollution issues at...Fort Benning.” The letter requested a meeting with OIG. (Compl. Ex. G, pp.2-6). A follow-up letter was sent, again requesting a meeting (Ex. G, p.6), and finally, a letter stating “please let us hear from you about the close of this investigation...[or Complainant] will have no choice but to add additional respondents in her DOL whistleblower case, including each of you and OIG.” (Ex. G, p.7). OIG counsel responded denying Complainant’s former counsel’s request for a meeting (Ex. H, p.1).

If nothing else, clearly the filing of a complaint is protected activity. *See Tyndall v. United States Env’tl. Prot. Agency*, ALJ Nos. 93-CAA-6, 95-CAA-5, slip op. at 5 (ARB June 14, 1996) (complainant’s filing of his first environmental whistleblower complaint “clearly constituted protected activity.”) Consequently, of the instances Complainant has alleged which constitute activity protected under the environmental acts, for purposes of avoiding summary decision, I find Complainant has offered evidence that at least three instances could possibly qualify as protected: 1) notifying Mr. Dombrowski of EPA Region Four’s “failure” to adhere to its obligations pursuant to the Memorandum of Agreement; 2) documenting her observations of noncompliance at Fort Benning; and 3) filing her initial whistleblower claim. Therefore, for purposes of avoiding a summary decision, I find a genuine issue exists as to whether, while employed with EPA, Complainant engaged in protected activity.

### **3. Employer’s Knowledge of Alleged Protected Activity**

In order to establish a *prima facie* case of discrimination or retaliation under the environmental acts, Complainant must also demonstrate that Respondents were aware that she engaged in protected activity. *See Jenkins v. United States Environmental Protection Agency*, ARB no. 98-146, ALJ No. 1988-SWD-2, slip

op. at 9 (ARB Feb. 28, 2003). Knowledge of protected activity cannot be imputed to higher management without proof. *Mosley v. Carolina Power & Light Co.*, 94-ERA-23 (ARB Aug. 23, 1996). In this instance, Mr. Dombrowski was an employee of EPA and his email indicates that he contacted EPA Region Four regarding the subject of the email.

There is no documentation that EPA knew of Complainant's email to Mr. Carellas concerning Fort Benning. However, Complainant stated that she told Region Four managers when she returned to EPA from her IPA, but in their declarations, the managers specifically deny knowledge of the email. Consequently, there exists an issue of fact as to whether EPA knew of Complainant's email to Mr. Carellas. As to the other protected activity of filing her complaint, it is obvious that Respondents were aware of Complainant's first whistleblower claim because they were named respondents. See Complaints 2004-CAA-4; 2004-CAA-10.

#### **4. Alleged Adverse Employment Actions Taken by Respondents**

Not every action taken by an employer that "renders an employee unhappy constitutes an adverse employment action." *Jenkins v. United States Envtl. Prot. Agency*, ALJ No. 88-SWD-2, ARB No. 98-146, slip op. at 19 (ARB Feb. 28, 2003). To be actionable, an action must constitute a "tangible employment action" which has been defined as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)). 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." *Id.* These discrete adverse actions are subject to the acts' thirty-day limitations period. In contrast to discrete adverse actions, a complainant may establish that she was victim to 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)).

Complainant has alleged that she has suffered numerous adverse employment actions as a result of engaging in protected activity. The adverse employment actions she alleges include the following:

- (1) Harassment by Phyllis Harris in July 1999 in the form of verbal admonishment for Complainant's statements to Mr. Eric Schaeffer;<sup>7</sup> also, being "warned at least two times" by her supervisor Sherri Fields that co-workers had overheard Complainant's phone conversations regarding her observations of waste of agency resources and that Complainant "should not do that." Complainant cites the example of her allegedly alerting Mr. Dombrowski about Region Four not addressing one of its "wet weather priorities," for which Mr. Bruce Miller "admonished" her and told her that she "was not a team player;"
- (2) Creation of a hostile work environment, including issuance of letters of counseling on September 16, 1999 and May 27, 2003; covert and overt surveillance; solicitation of complaints about Complainant by Sherri Fields; interference with Complainant's right to file an EEO complaint; false allegations of unprofessional behavior; claims that the memorandum regarding Complainant's counseling session was found, duplicated and distributed; illegal overreaching investigations by EPA Region Four management and OIG (Compl. Response to EPA, p. 13);
- (3) Harassment by Bruce Miller in October 1999 in the form of "verbal admonishment" and denial of the ability to participate in inspections, for allegedly questioning another employee about his intention to complete an inspection report on a CAFO inspection Complainant had participated in; further harassment allegedly occurred in July 2000 when Mr. Miller told Complainant "we have something strong against you," which Complainant states was a voice mail message that did not establish that she violated any code of ethics;
- (4) False allegations of criminal ethics violations by Ms. Harris and Mr. Miller on July 18, 2000, following which Ms. Harris suspended Complainant's approval of outside employment (later reinstated on October 12, 2000, EPA Ex. HH);
- (5) Coercion by Mr. Miller after Complainant filed her first EEO complaint against Mr. Miller and Ms. Harris in August 2000. Complainant states that she and Ms. Harris reached a written agreement via mediation, but that Ms. Harris told Complainant in a memo that others were free to investigate

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<sup>7</sup> Complainant refers to an incident in an elevator shortly after her arrival at EPA Region Four, when Mr. Schaeffer, who was visiting and had known Complainant from headquarters, asked her how she liked Atlanta. Complainant responded that she liked where she lived and the schools "but missed the overachievers in headquarters," (a statement she alleges constitutes protected activity), to which Ms. Harris commented "we call them pushy down here." (EPA Ex. YY, P.13)

Complainant, which she claims is proof that Ms. Harris and others at Region Four intended to subject Complainant to an OIG investigation<sup>8</sup>

- (6) Blacklisting by Bruce Miller when he spoke with Jim Sester at Georgia EPA about a potential partnership Complainant had proposed while on IPA to Georgia Tech; Complainant assumes Mr. Miller told Mr. Sester that she was a “a problem employee at EPA” thereby destroying her opportunity to bring a funding opportunity to Georgia Tech. Another instance allegedly occurred when Complainant learned that Mr. Miller had spoken with Mr. Carellas about her in “October 2003”<sup>9</sup>, Mr. Carellas then “assigned two government contractors to observe [her] closely and identify any information that could be used against [her.]”
- (7) Isolating Complainant at her home and not providing equipment or assignments for “several extended periods of time;” including when she returned to EPA from her IPA at Georgia Tech in 2002 (*Id.* at 14)
- (8) Threats and coercion resulting in forced transfer back to the office headed by Bruce Miller (“a proven hostile work environment”). After her IPA at Georgia Tech was terminated, Complainant was told that she would return to Environmental Accountability Division (her previous office) instead of the Office of Policy and Management, as was previously decided in her mediation, prior to going on IPA to UGA. She claims that Mr. Steve Price “in personnel” told her that if she did not return to EAD, she would not be allowed to go on IPA to UGA. (*Id.*) She returned to EAD for “maybe six weeks or so,” until her IPA paperwork was completed (Compl. Depo, EPA Ex. NNN, p.80).
- (9) Denial of promotions and awards;<sup>10</sup>

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<sup>8</sup> Under the auspice of this allegation, Complainant also claims that she was denied counsel in her EEO mediation which put her at “a severe disadvantage, and that during the “investigation,” Mr. Miller asked a law librarian to perform a search on a legal database for him regarding personal matters (estate law) during business hours. Complainant stated she told Mr. Miller she was aware of him doing this and he told her it was allowed pursuant to the *de minimus* use policy. Complainant alleges that Mr. Miller was never disciplined for this incident, as a result she alleges she was the subject of disparate treatment (*see* Response to EPA’s Motion, pp. 14-16).

<sup>9</sup> Complainant alleges that Mr. Miller spoke to Mr. Carellas about her in October 2003, but this was long after her IPA with UGA was terminated (July 2003) and after she filed her first whistleblower claim (September 2003), so it is questionable whether she meant October 2002, when she began her IPA at UGA. Also, Complainant alleges that after Mr. Miller spoke to Mr. Carellas, Mr. Carellas “assigned two government contractors, Jamie Higgins and Linda Sohns” to observe her. (EPA Ex. YY, p.16). Therefore, the only logical conclusion is that Complainant meant October 2002, since she did not work with any of these individuals in October 2003.

<sup>10</sup> In support of this allegation Complainant submits Exhibit K, which is a “List of New Ideas,” discussed *infra*, but EPA submitted Exhibit LLL which is a list of all positions Complainant has applied for. There are a total of 19 positions, from 1997 to 2000. Complainant testified in her deposition that she has not applied for any jobs since the initiation of the OIG investigation.

- (10) Idling, by denying Complainant her position descriptions, performance standards and assessments;<sup>11</sup>
- (11) Denial of medical flexiplace requested by Complainant to “temporarily alleviate the stress” brought on by the OIG investigation;<sup>12</sup> (Response to EPA Motion, p.14)
- (12) Denial of ethics advice during the OIG investigation by Complainant’s ethics advisor, Kevin Bestwick (who would not provide “clear and timely responses to my written ethics questions) and his supervisor, Bill Anderson as evidenced by emails dated March 15, 2003, June 3, 2003, August 21, 2003, and August 27, 2003;
- (13) Denial of training opportunities in “Fall 2003” by Mr. Lee Pelej, who was in charge of the training, and who Complainant alleges denied her request because he learned of the OIG investigation, and “shunning” by other employees as a result of ongoing OIG investigation (Depo. p. 101). Complainant alleges that on September 9, 2003, Stephanie Fulton told Complainant that she was denied participation in the training because Mr. Pelej was aware of the OIG investigation and did not want Complainant included in the training. In response, EPA submits a sworn declaration by Ms. Fulton in which she states the training was in Spring 2004, and was a field training which she believes was for Water Division senior management. She believed that she offered to inquire whether employees from outside the water division could attend, and Mr. Pelej said that Complainant could not attend the training. (EPA Ex. TT, para.6-8).
- (14) Denial of representation, coercion, and intimidation by OIG (being forced to participate in investigation under “threat of immediate loss of employment”);
- (15) Termination of Complainant’s IPA assignment at University of Georgia, which Complainant alleges was premature. Complainant alleges that Jimmy Bramblett of UGA terminated her IPA on July 1, 2003, and later cited project completeness as the primary reason for early termination, though the initial WAB project report cited a “conflict of interest” and a “philosophical difference in how the grant should be administered” as the reasons Complainant was terminated. Complainant asserts that after her removal, there was no difference in the way the project was administered, and she received high marks from “over 150 military representatives” who

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<sup>11</sup> Complainant does not provide a date when this allegedly adverse action was taken, but from the pleadings, assumedly this is the period she referred to after her IPA with Georgia Tech ended, during February 2002 when she was “forced to work out of [her] house” and was not assigned “any duties or responsibilities,” and “no one conducted appraisals of [her] performance.” EPA Ex. YY, p. 15.

<sup>12</sup> Complainant does not provide a date when this activity allegedly occurred nor supporting documentation from which a date can be inferred.



- attended a training session she organized and participated in as part of the project. She also received positive reviews from members of the WAB after her termination regarding her performance and professionalism;
- (16) Loss of private clients and resulting outside income as a result of the OIG investigation;
  - (17) Permanent damage to Complainant's reputation;
  - (18) Continuing efforts to attempt to create "situations" in order to find fault with her work;
  - (19) Illegally assigning government contractors to oversee her though she was a federal employee;
  - (20) Mr. Carellas provided false and misleading testimony to EPA Region Four and OIG regarding Complainant's questionable activities which were permissible under the *de minimus* use policy of the EPA. Complainant believes that Mr. Carellas' actions were in retaliation for the email she sent him documenting noncompliance at Fort Benning;
  - (21) Daily animus "shown from the beginning" in making unfounded accusations as part of "management discretion" in reviewing her work products, performance and conduct; and
  - (22) Initiation of an OIG investigation which impacted Complainant's employment inside and outside EPA, resulted in her being denied training opportunities, has caused stress to Complainant and her family, and has impacted her professional reputation.

Of the lengthy list of allegedly adverse employment actions Complainant contends she has suffered, most, if not all qualify as "discrete" tangible employment actions and as single acts are time-barred if a complaint was not filed within thirty days of the occurrence of the allegedly adverse action. However, Complainant also claims that she was the victim of a hostile work environment. 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 *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002)). On the other hand, a complaint alleging a hostile work environment is not time-barred if all the acts comprising the claim are part of the same unlawful employment practice and at least one act comes within the thirty-day filing period. *Id.* Therefore, if Complainant can "show that at least one act comprising the hostile work environment occurred within thirty days" prior to when she filed her complaint, her "entire hostile work environment cause of action would be deemed timely" and she could proceed to litigate the merits of the claim. *Id.*

The 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.” *Id.* at 21. Discriminatory jokes, comments, and the use of epithets may create a hostile work environment, as may behavior which strikes fear in the employee for her own personal safety. *Id.*

In sum, “hostile work environment conduct affects the employee’s psyche first, and [her] earning power or prospects secondarily.” *Id.* To prevail on a hostile work environment claim, a complainant must establish that the conduct complained of is “sufficiently severe or pervasive [so as] to alter the conditions of the victim’s employment and create an abusive working environment.” *Meritor Savings Bank, FSB, v. Vinson*, 510 U.S. 17, 21 (1993). Discourtesy or rudeness should not be confused with harassment, nor are the ordinary tribulations of the workplace, such as the sporadic use of abusive language, joking about protected status or activity, and occasional teasing actionable. *Sasse*, slip op. at 22.

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. *Id.*; *Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 01-CER-1, slip op. at 8 (ARB Apr. 30, 2004) (citing *Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-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; *Schlagel*, slip op. at 8.

In the present case, Complainant asserts that in retaliation for engaging in protected activity, she was the victim of a hostile work environment created by Respondent EPA as demonstrated by the letters of counseling issued on September 16, 1999 and May 27, 2003, and claims by Bruce Miller and others that the memo was found, copied and distributed; “covert and overt surveillance;” solicitation of

complaints from other employees against Complainant by Sherri Fields; interference with Complainant's right to file an EEO complaint; false allegations of unprofessional behavior; and "illegal and overreaching investigations" by management and OIG. (Compl. Response to EPA, pp.12-13).

Complainant also asserts in her Response Memo to the Army's Motion that she was "subject to adverse action as evidenced by a hostile working environment," by the Army, regarding Mr. Carellas's alleged harassment of her in the form of "various hostile activities, such as claiming she did not work 40 hours per week" and made "numerous false allegations" against her in his letter to Mr. Palmer dated February 4, 2003.

Complainant testified at deposition that she "felt a great deal of anxiety" working under Bruce Miller "because of the many adverse actions that have taken place over the years." (Compl. Depo., EPA Ex. NNN, p.53). She stated that she "had difficulty coming to work" and began having physical problems after her IPA to Georgia Tech ended, knowing she would have to return to Mr. Miller's office. (*Id.*). Complainant explained that she was "upset" because she "felt threatened" in that she was "boxed in and the subject of many adverse actions...I never knew what was going to happen, when I was going to get another memoranda of counseling, called into a meeting without warning....I felt that my career was being destroyed." (*Id.* at 53-54). Complainant stated that she considered "gossip and gossiping all around [her] and laughing when [she was] in trouble as hostile." She also felt that she was in a hostile environment when she was "forced to go to [an agency] retreat and talk about trust and fall back into the arms of my supervisor the day after [she] was given a memoranda of counseling." (*Id.* at 54).

Complainant alleges that at least one of the acts of conduct complained of occurred within thirty days of her filing a complaint, specifically, the fact that the OIG investigation was ongoing and that several EPA individuals were interviewed within thirty days prior to her complaint being filed on September 17, 2003, as evidenced by a copy of OIG's Investigative Plan. (Compl. Response to EPA, p. 7; Compl. Ex. C). Further, Complainant asserts that prior to filing her second complaint on September 16, 2004, she was intimidated and threats were made against her by EPA Region Four and OIG when on August 3, 2004 she was sent interrogatories, etc. relating to her initial whistleblower claim. Included in the admissions were "numerous allegations that [she] made inappropriate remarks to EPA managers" who were involved in the first whistleblower claim. (Second Complaint dated September 16, 2004, para. 1). Complainant states that "allegations of inappropriate statements and threats of possible disciplinary

actions...is a commonly used technique by Region Four management to intimidate and silence employees that question management's decision-making" relative to environmental regulations. (*Id.* at para. 2). On August 18, 2004, Complainant's counsel received a letter from EPA counsel containing similar "false accusations" and "new allegations of additional supposed inappropriate statements." (*Id.* at para. 3). Complainant also asserts that she was ordered by her supervisor, Mr. Heinz Mueller, to report for an OIG interview because she had failed to answer questions in a previous interview, which she claims is false. (*Id.* at para. 4).

Whether the conduct complained of by Complainant reaches the level for the "high bar" required for a hostile work environment claim, *see Sasse*, slip op. at 23, is a question of fact which I cannot resolve in a summary fashion. Granted, many of the examples of conduct cited by Complainant, such as gossiping, or "discourtesy or rudeness," standing alone, do not constitute a hostile working environment, but the totality of these events and the effect they had or have upon Complainant is a matter for an evidentiary trial.

## **5. Timeliness of Complainant's complaints**

Under the environmental whistleblower statutes, a complainant must file a complaint within thirty days of the alleged violation. *See* 33 U.S.C. § 1367(b); 42 U.S.C. § 300j-9(i)(2)(a)(1); 42 U.S.C. § 6871(b); 15 U.S.C. § 2622(b)(1); 42 U.S.C. § 9610(b); 42 U.S.C. § 7622(b)(1). The Administrative Review Board has clarified that the thirty-day limitations period begins to run on the date that a complainant receives "final, definitive and unequivocal notice of a discrete adverse employment action." *Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 01-CER-1, slip op. at 6 (ARB Apr. 30, 2004). The Board has also applied the "discovery rule" and has held that "statutes of limitations in whistleblower cases begin to run on the date when facts which would support a discrimination complaint were apparent or should have been apparent to a person similarly situated to the complainant with a reasonably prudent regard for his rights." *Kaufman v. United States Env'tl. Prot. Agency*, ALJ No. 02-CAA-22 (Sep. 30, 2002) (citing *Whitaker v. CTI-Alaska, Inc.*, ARB No. 98-036, ALJ No. 97-CAA-15 (ARB May 28, 1999)). The date an employer communicates its decision to implement such an action, rather than the date the consequences are felt, marks the occurrence of the violation. *Id.* The Administrative Review Board explained that "discrete acts of discrimination are easy to identify. Examples are failure to promote, denial of transfer, termination and refusal to hire." *Id.* (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002)).

Here, Complainant alleges that her OSHA complaint, filed on September 17, 2003, was within thirty days of September 3, 2003, the date she learned that she was the subject of an OIG investigation. In support of this assertion, Complainant points to an e-mail provided her by Bruce Miller (Compl. Ex. B) on that date, which “confirmed her suspicions” that she was the subject of an investigation.<sup>13</sup> Complainant also points to the fact that she was denied an EPA training opportunity in the fall of 2003.

In response to Complainant’s assertion that she learned of the OIG investigation within thirty days preceding the filing of her complaint, EPA points to an e-mail from Complainant to Mr. Tom Fox, dated July 24, 2003 which states: “I am really not concerned about EPA-IG because I have followed all appropriate procedures...what I am worried about are the various reactions from my clients...I am concerned how you and my other clients are reacting to Big Brother coming in and asking for all kinds of information, all of which is confidential and not indicative of any wrong-doing at all.” (Resp. Ex. KKK). Also, there is another email from Complainant to Keith Hill, OIG, dated July 5, 2003 which opens “It is my understanding that your office is currently conducting an investigation of me.” (Compl. Response to OIG, Ex. G, p.1). Therefore, it is apparent that the facts were evident to Complainant that she was under investigation, and that she was aware she was the subject of an investigation, by her own admission, on July 5, 2003, clearly not within the applicable limitation period.

The issue of Complainant’s denial of a training opportunity is another matter. Complainant in her deposition recalled the September 2003, but Ms. Fulton, her co-worker, believed the act occurred in Spring 2004. Obviously a dispute exists as to this allegation as well as to Complainant’s assertion of a hostile working environment; consequently, as to EPA I find a genuine issue of fact exists as to the timely filing of Complainant’s complaints. As to Respondent Army, however, I find the complaints to be untimely and **GRANT** Respondent Army’s Motion for Summary Decision.

Complainant, through an IPA, served as the WAB Project Manager from October 21, 2002, until July 1, 2003, when the IPA was terminated and Complainant was relocated to EPA Region Four. I previously found that facts existed sufficient to raise an issue as to the role of Respondent Army during

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<sup>13</sup> The email is from Mr. Hill to Mr. Miller and states “You can respond to [Complainant] that the IG office has instructed you not to process leave at this time since her leave is an issue under investigation by the IG...You can inform her that the leave will most likely be processed after the IG investigation is over.”

Complainant's IPA. Whatever relationship, however, it ended on July 1, 2003, and likewise in the same month Complainant learned of the OIG investigation which she alleges was instituted in part by Mr. Carellas. Beyond that time, Complainant had no further involvement with Mr. Carellas or the Army, and Complainant did not file her complaint alleging any adverse activity on Respondent Army's part until September 2003. Therefore, Complainant was aware of any alleged adverse actions taken by Respondent Army, including termination of the IPA and the initiation of the OIG investigation, months before she filed her complaint in September 2003. Consequently, even assuming all of Complainant's allegations to be true, her complaint for any violations committed by Respondent Army during Complainant's IPA is time-barred.

## **6. Causal Nexus Between Protected Activity and Adverse Action**

The final threshold requirement of Complainant's *prima facie* case is that she must adduce proof of a causal connection between her protected activity and the alleged adverse actions. *Jenkins*, slip op. at 22. Complainant must establish by a preponderance of the evidence that Respondents took adverse action against her because she engaged in protected activity. 29 C.F.R. 24.2(a) (2003). If the complainant succeeds, then her *prima facie* case raises the inference of discrimination and the burden shifts to the respondent to produce evidence that it took the allegedly adverse actions for legitimate, nondiscriminatory reasons. *Jenkins*, slip op. at 22. This element I find by necessity requires an evidentiary hearing.

## **Conclusion**

Because Respondent EPA OIG was never an "employer" of Complainant, and because Complainant's complaint against Respondent Army is time-barred, I find both Respondents entitled to be dismissed from these proceedings. As to the remaining parties, EPA and Complainant, I find, however, that genuine issues of material fact exist sufficient to require a trial.<sup>14</sup>

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<sup>14</sup> While I find the evidence supports the fact that an employee-employer relationship exists between Complainant and EPA, I find there exist genuine issues of material fact as to the remaining elements of Complainant's case. Consequently, I find, just as I did with EPA, that Complainant is not entitled to summary decision as to the remaining elements of her claim.

## **ORDER**

It is hereby **ORDERED**:

- 1) Respondent OIG's Motion for Summary Decision is **GRANTED** and the complaint against this Respondent is **DISMISSED**;
- 2) Respondent Army's Motion for Summary Decision is **GRANTED** and the complaint against this Respondent is **DISMISSED**;
- 3) Respondent EPA's Motion for Summary Decision is **DENIED**;
- 4) Complainant's Motion for Partial Summary Decision is **DENIED**; and
- 5) As to the remaining parties, the matter remains set for formal hearing on March 21, 2005.

**So ORDERED** this 1<sup>st</sup> day of March, 2005, in Metairie, Louisiana.

**A**

**C. RICHARD AVERY**  
**Administrative Law Judge**

**CRA:bbd**