



In the Matter of:

DAVID W. HALL,

**ARB CASE NOS. 02-108
03-013**

COMPLAINANT,

ALJ CASE NO. 1997-SDW-00005

v.

DATE: December 30, 2004

**UNITED STATES ARMY
DUGWAY PROVING GROUND,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

For the Complainant:

Mick G. Harrison, Esq., Jersey Shore, Pennsylvania

For the Respondent:

Jack Skeen, Esq., U.S. Army Dugway Proving Ground, Dugway, Utah

FINAL DECISION AND ORDER

This case arises under the whistleblower protection provisions of the Clean Air Act, 42 U.S.C.A. § 7622 (West 2003) (CAA); the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. § 9610 (West 1995) (CERCLA); the Federal Water Pollution Prevention Control Act, 33 U.S.C.A. § 1367 (West 2001) (CWA); the Safe Drinking Water Act, 42 U.S.C.A. § 300j-9 (West 2003) (SDWA); and the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act of 1976, 42 U.S.C.A. § 6971 (West 2003) (SWDA).¹

¹ The parties and the ALJ refer to the Solid Waste Disposal Act as “RCRA.” This is common practice. See *Wilshire Westwood Assoc. v. Atlantic Richfield Corp.*, 881 F.2d 801, 806 (9th Cir. 1989). Administrative Review Board decisions routinely refer to the Solid Waste Disposal Act as “SWDA” rather than as RCRA. We continue to do so here for consistency’s sake.

David Hall alleges that his employer, Dugway Proving Ground, constructively discharged him by subjecting him to a hostile work environment because he complained about environmental hazards. To succeed on this claim, Hall must first prove by a preponderance of the evidence that Dugway subjected him to an abusive working environment because of his complaints. Since Hall failed in this proof, we dismiss the complaint without deciding whether Dugway constructively discharged Hall.

BACKGROUND

Dugway Proving Ground is a closed military facility about 80 miles southwest of Salt Lake City, Utah. Dugway is a munitions test and evaluation range. Military and civilian personnel at Dugway test new military weapons and equipment, develop and apply methods for safely disposing weapons contaminated with hazardous chemicals, and laboratory test small amounts of warfare, or chemical, “agent” such as mustard, lewisite, and sarin.

David Hall worked as a civilian chemist at Dugway’s Chemical Laboratory Division (the Chem Lab) from February 1986 until June 12, 1997. Hall helped identify and test methods for safely disposing obsolete or spent ordnance that was contaminated with hazardous chemicals. Hall also tested personal protective equipment for effectiveness against chemical agent exposure on the battlefield.

Hall’s position as a chemist with access to warfare agents required him to enroll in the Department of the Army Chemical Surety Program, also known as the Chemical Personal Reliability Program, or “CPRP.” CPRP enrollees must undergo a security clearance investigation and have a valid security clearance. Supervisors designated as “certifying officials” continuously monitor CPRP enrollees for good judgment and reliability and must restrict an enrollee’s access to chemical agents whenever the enrollee shows signs of unreliability.

Hall had conflicts with superiors over environmental safety issues. In the late 1980s, Hall criticized Dugway for not adequately addressing skin contact hazards. In 1989, Hall reported Dugway to state and federal agencies, including the Occupational Safety and Health Administration (OSHA), for unsafely storing hazardous chemicals. In 1996 and 1997, Hall criticized Dugway for overestimating the accuracy of PINS, a device that helped identify the contents of obsolete munitions. Hall also complained about other environmental safety matters during his tenure at Dugway.

On February 13, 1997, Hall filed the instant whistleblower complaint with OSHA. Hall complained of “acts of retaliation” and a hostile work environment. ALJ X 1. OSHA investigated and on April 17, 1997, determined that Dugway had not retaliated against Hall because of his whistleblower activities. ALJ X 2. Hall timely requested a hearing and the matter was assigned to an Administrative Law Judge (ALJ). Then, on May 21, 1997, Hall retired effective June 12 and his complaint was amended to allege that Dugway had constructively

discharged him.² *Hall v. United States Army, Dugway Proving Ground*, ALJ No. 1997-SDW-00005 (ALJ Aug. 8, 2002) (Recommended Decision and Order, “R. D. & O.”).

The ALJ found that because of Hall’s environmental safety complaints Dugway created a hostile work environment that caused Hall to retire. R. D. & O. at 30-33, 97-98. He awarded Hall substantial damages and attorney fees. Dugway timely petitioned for review of the Recommended Decision and Order.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB) has jurisdiction to review the ALJ’s recommended decision. 29 C.F.R. § 24.8 (2004); Secretary’s Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). Under the Administrative Procedure Act, the ARB, as the Secretary’s designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB reviews, de novo, the ALJ’s recommended decision. See 5 U.S.C.A. § 557(b) (West 2004); 29 C.F.R. § 24.8; *Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ No. 97-CAA-2, slip op. at 15 (ARB Feb. 29, 2000).

DISCUSSION

I. The Legal Standard

We construe Hall’s complaint as alleging that Dugway forced him to retire by subjecting him to a hostile work environment over an eight-year period because of complaints he made about Dugway’s management of hazards that CAA, CERCLA, CWA, SDWA, and SWDA regulate.

The environmental whistleblower protection provisions prohibit employers from discharging or otherwise discriminating against any employee “with respect 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. See 29 C.F.R. § 24.2.

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. Cf. *Sasse v. Office of the United States Attorney*, ARB Nos. 02-077, 02-078, 03-044, ALJ No. 98-CAA-7, slip op. at 34 (ARB Jan. 30, 2004). An “unlawful employment practice” includes a hostile work environment. *Id.* 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 create an abusive work environment. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67

² Hall did not formally amend his complaint; the amendment was effected by the consent of the parties.

(1986). A constructive discharge “can be regarded as an aggravated case of . . . hostile work environment.” *Pennsylvania State Police v. Suders*, ___ U.S. ___, 124 S.Ct. 2342, 2354 (2004).

To establish that Dugway subjected him to a hostile work environment, Hall must prove by a preponderance of the evidence that: (1) he engaged in protected activity of which Dugway was aware; (2) Dugway intentionally harassed him because of that activity; (3) the harassment was sufficiently severe or pervasive so as to alter the conditions of Hall’s employment and to create an abusive working environment; and (4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect Hall. *See Sasse*, slip op. at 34 and cases cited therein. Only then would Hall have a basis for arguing that the work environment was so far beyond “ordinary discrimination” that it amounted to a constructive discharge. *See Suders*, 124 U.S. at 2354.

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. *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002). Therefore, for us to consider all of the hostile acts Hall alleges, he must establish that at least one of them occurred within thirty days of February 13, 1997, when he filed his complaint, since the five environmental whistleblower statutes require that the complaint be filed within thirty days of the employer’s “discriminatory” action.³

II. Findings of Fact

A. Protected activity

SWDA is a comprehensive environmental statute that governs generation, treatment, storage, and disposal of solid and hazardous waste. *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996); *Culligan v. American Heavy Lifting Shipping Co.*, ARB No. 03-046, ALJ Nos. 00-CAA-09, 01-CAA-11, slip op. at 9-10 (ARB June 30, 2004). The Act’s purpose 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. Dugway generates solid and hazardous wastes that are SWDA regulated. Tr. 3910 (Gray).

Utah’s Solid and Hazardous Waste Division (SHWD) issues Dugway permits that govern Dugway’s treatment and storage of solid and hazardous wastes. Tr. 3915 (Gray). Hall repeatedly complained to SHWD and to Dugway supervisors and officers about SWDA-regulated hazards during the period 1988 through 1997. Hall filed a written complaint in 1989 with Dugway’s Judge Advocate General (JAG) about skin contact with objects contaminated with SWDA-regulated hazardous chemicals. Tr. 2928, 7122, 8039, 8083 (Hall).⁴ Hall

³ 42 U.S.C.A. § 7622(b)(1) (CAA); 42 U.S.C.A. § 9610(b) (CERCLA); 33 U.S.C.A. § 1367(b) (CWA); 42 U.S.C.A. § 300j(i)(2)(A) (SDWA); 42 U.S.C.A. § 6971(b) (SWDA).

⁴ Hazards relating to skin contact are occupational safety hazards. SWDA deals with environmental and occupational safety. 42 U.S.C.A. § 6971(f). Tr. 7205 (Nudell); *cf.* 66 Fed. Reg. 27,266, 27,282 (EPA lists SWDA wastes according to toxicity characteristics that cause injury to

complained to SHWD about chemicals and implements Dugway used in laboratory experiments. CX 40, 60, 61, 62, 40, CX 168 pp. 22 *et seq.* Hall complained to his supervisors and to SHWD about Dugway's testing and managing SWDA-regulated mustard and lewisite by-products in 1995 and 1996. Tr. 1203, 1422-1425, 1432, 2137-2138, 9607 (Hall), CX 77, 78, 85. Hall complained to JAG in 1995 that Dugway personnel were interfering in two decontamination projects he was working on that involved SWDA hazards. CX 8 No. 27, Tr. 2179, 2181 (Hall); Tr. 8415 (Kiskowski). In 1996, Hall alleged to his superiors and to Utah's Office of Attorney General that Dugway violated SWDA requirements for transporting an obsolete bomb. CX 8; CX 65. Hall made complaints about other environmental hazards as well. *See R. D. & O.* at 12-22.

Hall's actions constituted protected activity to the extent they advanced the purposes of SWDA. *See e.g., Jenkins v. EPA*, ARB No. 98-146 ALJ No. 88-SWD-2, slip op. at 17 (ARB Feb. 28, 2003) (complaining to supervisors and managers or to outside agencies about possible environmental violations, requesting a legal opinion from in-house counsel about the legality of activity regulated by the environmental acts, and preparing reports documenting possible noncompliance with statutory or regulatory requirements advance the purposes of SWDA and are, therefore, protected acts). Accordingly, we find, as did the ALJ, *R. D. & O.* at 12-24, that Hall proved that he engaged in protected activity throughout the period he claims Dugway subjected him to a hostile work environment.

Dugway asserts that none of Hall's complaints about environmental hazards were protected activity because they did not specify violations of the federal environmental acts. DPG Br. at 28. To the extent Dugway argues that an environmental complaint is not protected unless it describes a violation of a federal environmental statute, Dugway is incorrect. An employee engages in protected activity when he reports actions that he reasonably believes constitute environmental hazards, irrespective of whether it is ultimately determined that the employer's actions violate a particular environmental statute. *Oliver v. Hydro-Vac Services, Inc.*, No. 91-SWD-00001, slip op. at 9 (Sec'y Nov. 1, 1995).

Dugway also contends that the federal environmental whistleblower acts do not apply to conditions that states regulate. DPG Br. at 28. This is incorrect. The Utah Solid and Hazardous Waste Act is a state SWDA plan that federal SWDA authorizes. Accordingly, Hall's complaints about conditions that the Utah Solid and Hazardous Waste Act regulates are covered by the federal SWDA whistleblower protection provision. *Cf. Oliver*, slip op. at 12 (applying federal SWDA whistleblower provision to complaint about conditions that the Tennessee state SWDA plan regulates).

Dugway further argues that CERCLA, the CAA, the SDWA and the CWA do not apply. DPG Br. at 15-22. But because we decide that SWDA applies to the activities Hall claims are protected, we need not determine whether the other environmental whistleblower statutes apply.

skin). Therefore, despite Dugway's contention that SWDA does not cover skin contact, we find that it does.

B. Employer knowledge

The supervisors and officers who Hall claims retaliated against him knew of Hall's protected activity. Dr. Brauner and Dr. Hoffman, who ordered Hall's mental health evaluations in 1989, were aware of Hall's skin contact hazard complaint. Tr. 2091-2092, 6242 (Bowcutt); Tr. 4733 (Brauner); RX 72A. Colonel Ertwine knew of Hall's unsafe storage complaint when he arranged to have Hall transferred to the Joint Operating Directorate (JOD). CX 63. Chem Lab Chief William Dement, who failed to notify Hall of his temporary removal from the Chemical Personal Reliability Program (CPRP) and signed off on the two performance evaluations of which Hall complains, knew of Hall's objections to the BZ and PINS studies. CX 2A, CX 51, CX 654 CX 65. First-line supervisor Steelman knew about Hall's complaints in 1995 through 1997 about the ITAP, BZ and PINS studies when he evaluated Hall's performance in 1996 and reprimanded Hall in 1997. *Id.* Christine Wheeler was aware of Hall's objections to the BZ study when she edited Hall's draft report in 1997. RX 13, RX 19. Commander Como was aware of Hall's protected activity when he concurred that Hall's security clearance be revoked. RX 1.

C. Hostile Acts

According to Hall, Dugway subjected him to a hostile work environment when it: (1) required him to undergo mental health examinations in May and June 1989, (2) transferred him out of the Chem Lab in 1991, (3) attempted to lower his 1992 performance evaluation and included unwarranted criticisms in his 1995 performance evaluation, (4) subjected him to an unfair and unnecessary security reinvestigation in 1995, (5) told him that an officer had called Hall a traitor and issued a gag order in January 1996, (6) failed to notify Hall of his temporary removal from the Chemical Personal Reliability program in June 1996, (7) subjected his BZ report to bad faith editorial review in early 1997, and (8) issued a written reprimand in February 1997. Hall Br. at 6-7.

This series of related acts, if taken in retaliation for protected activity, might constitute hostile work environment discrimination. The last two acts, the editing of his BZ report and the reprimand, occurred in the thirty days before February 13, 1997, when Hall filed this whistleblower complaint. Therefore, in determining whether Dugway unlawfully subjected Hall to a hostile work environment, we will examine all of these acts. *See* 42 U.S.C.A. § 6971(b) (SWDA's 30-day statute of limitations); *Morgan*, 536 U.S. at 116-117.

1. 1989 mental health evaluations

Hall argued below that after he made internal complaints about inadequate management of contact hazards, Dugway retaliated by subjecting him to mental health evaluations. The ALJ agreed and found that Dugway subjected Hall to fitness-for-duty mental health evaluations in 1989 because of Hall's whistleblower activity. R. D. & O. at 65, 95. Here Hall asserts that the ALJ was correct but presents no supporting argument or analysis of the record. Hall Br. at 6. Hall has therefore waived argument on this claim. *See Entertainment Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1217 (9th Cir. 1997) (failure to present argument or pertinent authority waives argument).

As for the ALJ's finding, the record does not support it. Instead, we find that Dugway required Hall to undergo mental health evaluation solely because Hall's behavior indicated that he might be a security risk.

Hall testified that Chem Lab Chief Brauner referred him for a mental health evaluation because of a complaint Hall filed concerning skin contact hazards. Contact hazards can be created when items such as military uniforms, weapons, or vehicles are exposed to hazardous chemicals on the battlefield or used in laboratory experiments. Tr. 6820, 7202-7205 (Nudell). Persons who touch contaminated items may absorb chemical agent through the skin. Tr. 2898-2899 (Hall). People in the vicinity may also inhale the chemicals as they are "off gassed" from the contaminated item. CX 46.

During the relevant period, Army Regulation 70-71 required that all United States Army materiel developed to perform mission-essential tasks be tested for nuclear, biological, and chemical contamination survivability. RX 272. That is, AR 70-71 required the Army to evaluate items before use for their ability to survive decontamination processes. In January 1988, Lothar Salomon, Chief Scientist at Dugway, presented a paper at John Hopkins University on procedures for achieving compliance with AR 70-71. CX 116; Tr. 2897 (Hall). The paper reported on the effectiveness of procedures for eliminating inhalation hazards but did not mention that the decontaminated items might still pose contact hazards. *Id.*

In January 1989, Hall wrote a letter to the Dugway Judge Advocate General (JAG) in which he alleged that Salomon misrepresented the efficacy of the decontamination procedures described in the John Hopkins paper. Tr. 2091-2092, 6242 (Bowcutt); Tr. 7122, 8039, 8712 (Hall). In Hall's view, Salomon falsely implied that the decontaminated items were "safe" because he reported that the decontaminated items did not present an inhalation hazard without expressly mentioning that there might still be a residual contact hazard. *Id.*, CX 21, 110.

A month later, Hall sent a copy of this letter to Charles Bowcutt in Dugway's Office of Counterintelligence. Tr. 2091-2092, 6242 (Bowcutt). Bowcutt already had five or six letters from Hall about Hall's personal business. RX 70, 71, 240, 261, 128; Tr. 5848 (Hall), Tr. 2091-2092, 6242 (Bowcutt). Bowcutt added Hall's JAG complaint to Hall's other letters and took the entire file to Kenneth Brauner, Chief of the Chem Lab and Hall's CPRP certifying official. Tr. 2092-2093 (Bowcutt).

When Brauner saw Bowcutt's file, he became concerned about the personal letters Hall had sent Bowcutt. These included copies of romantic notes that Hall had sent to a young woman at Dugway. RX 117, 118, 119; Tr. 4734, 7505 (Brauner). Brauner testified that Hall's decision to make and send copies of his romantic notes to Bowcutt caused him to doubt Hall's good judgment and, consequently, Hall's reliability as a CPRP enrollee with access to warfare agent. *Id.* Accordingly, Brauner temporarily restricted Hall's access to surety materials and consulted with Dugway's chief medical officer, Clark Hoffman, M.D. RX 72; Tr. 4733-4735 (Brauner).

While Hoffman and Brauner were considering what to do, three of Hall's co-workers complained to Brauner that Hall was engaging in inappropriate personal conduct. One of the co-

workers complained that Hall was sexually harassing her. RX 56, RX 75, RX 94A; Tr. 5742, 8025, 9363 (Hall); Tr. 4744-4746, 5466, 7413, 7498 (Brauner); Tr. 30 (Hoffman deposition).

Given all this, Brauner and Hoffman thought Hall might be a security risk and should be given a mental health fitness-for-duty evaluation. Tr. 13-14 (Hoffman); RX 72, RX 73. At Hoffman's direction, Hall submitted to a mental health fitness-for-duty evaluation by a psychologist in May 1989 and by a psychiatrist in July 1989. RX 108, RX 83; Tr. 13-14 (Hoffman). The psychologist and the psychiatrist concluded that Hall had a personality disorder and difficulty in dealing with women but that he was not a security risk. RX 77, RX 2. Based on these evaluations, Brauner removed Hall's temporary CPRP restriction. Tr. 5506 (Brauner); RX 112.

Brauner made detailed notes of his conversations with Hoffman, Hall, and other Dugway staff from the day in February 1989 when Bowcutt brought him Hall's letters until he cleared Hall for renewed access to warfare agent in August 1989. The notes corroborate Brauner's testimony in all respects. RX 92 (Feb. 9, 1989), RX 72 (Feb. 16, Feb. 28, 1989), RX 73 (March 1, 1989), RX 93 (March 7, 1989), RX 95 (March 14, 1989), RX 96 (April 25, 1989), RX 97 (April 25, 1989), RX 75 (April 25, 1989), RX 99 (April 27, 1989), RX 100 (May 1, 1989), RX 102 (May 4, 1989), RX 103 (May 4, 1989), RX 76 (May 4, 1989), RX 77 (May 18, 1989), RX 78 (June 13, 1989), RX 106 (June 15, 1989), RX 82 (June 26, 1989), RX 83 (June 28, 1989).

Hall testified that it was Brauner, not Hoffman, who made the decision to require him to submit to mental health evaluations and that Brauner did so because he disagreed with Hall's position that Dugway was not dealing adequately with contact hazard. Tr. 7138-7139, 7144-7148, 8039 (Hall); RX 79.⁵ According to Hall, the fact that Brauner did not question Hall's judgment until Hall complained to JAG about Salomon's paper compels the inference that Brauner acted in response to the complaint. Tr. 5393 (Hall). But on the same day that Brauner saw Hall's JAG letter for the first time, he also saw for the first time the love notes Hall copied for Bowcutt. Brauner testified that he approached Dr. Hoffman because of the personal notes. Tr. 4734-4735 (Brauner). Therefore, the mere fact that Brauner questioned Hall's stability after receiving the JAG letter does not support the inference that he retaliated because of Hall's complaint about Salomon's paper. Furthermore, Hall's theory that his JAG complaint provoked Brauner ignores Hall's other testimony that Brauner knew about Hall's contact hazard views long before February 1989. Hall had criticized his colleagues about this issue repeatedly in 1987 and 1988. Tr. 2926-2928, 7122-7123 (Hall); CX 21, 110.

Hall also testified that Hoffman told him that no mental exams were necessary. Tr. 7131, 7138-7139, 9338-9340 (Hall). Thus, Hall would have us disbelieve Brauner's testimony that Hoffman thought Hall needed to be evaluated and decided to send Hall to a psychiatrist and a psychologist. However, Hoffman testified that Hall needed a psychiatric evaluation to determine

⁵ Hall also took the position that Brauner could not have been genuinely concerned about Hall's judgment for sending Bowcutt copies of love notes. Hall testified that Brauner knew Hall sent the letters to Bowcutt in connection with a personnel matter that Bowcutt was monitoring. Tr. 8760-8761, 2927-2928 (Hall); RX 240. We reject this reasoning, because Hall wrote the notes to someone who was not involved in the personnel matter.

whether he should be precluded from working in the CPRP program. Tr. 7, 19 (Hoffman). Hall's suggestion that Hoffman was not concerned about Hall's stability is also inconsistent with Hall's other testimony that Hoffman once called Hall "one of the most schizophrenic people he [Hoffman] had met." Tr. 9348-9349 (Hall); RX 267.

And Hall gave conflicting testimony on another point. Despite his testimony that Brauner orchestrated the mental health evaluations, Hall also testified that Keith Dumbauld, a manager in Dugway's Materiel Test Command, ordered the evaluations. Tr. 5428, 5707, 8055 (Hall); RX 241, 244. According to Hall, Dumbauld ordered the evaluations because Hall sent him a letter relating details of Hall's personal relationships with female co-workers. Tr. 5701 (Hall).

We find that a preponderance of the evidence demonstrates that Hoffman and Brauner arranged the mental health evaluations because they feared that Hall might be too unstable for participation in the CPRP program. Furthermore, Brauner's contemporaneous notes support his and Hoffman's testimony and rebut Hall's conflicting and illogical testimony to the contrary.

2. Transfer to Joint Operating Directorate

The ALJ found that Dugway retaliated against Hall when it transferred him to the Joint Operating Directorate (JOD) because he complained to OSHA about hazardous chemical storage. R. D. & O. at 72. And Hall agrees, contending that in June 1991, Colonel Ertwine transferred him out of the Chem Lab and into JOD. He argues that Ertwine took this action in retaliation for Hall's OSHA complaint and that Ertwine tried to cover up his retaliatory purpose. Hall Br. at 8. But the record does not support either the ALJ's finding or Hall's argument.

In 1991, the Chem Lab and JOD were part of Dugway's Materiel Test Command, which Ertwine headed. Tr. 3 (Ertwine deposition). Early that year, Hall complained internally and to Utah's SHWD that the Chem Lab was storing chemicals without adequate precautions against fire and explosion. Tr. 11799-11800, 11806 (Hall). In April or May, Hall complained to OSHA. Tr. 11806 (Hall). OSHA inspected the site and cited Dugway for three violations of OSHA safety standards. CX 40. Hall's immediate supervisor, Frank Bagley, testified that he felt sabotaged by Hall's complaint to OSHA because the Chem Lab was in the process of correcting the problem and Hall complained to OSHA without first telling Bagley. Tr. 8974-8975 (Bagley).

Ertwine thought Bagley was frustrated with Hall and decided to offer Hall a short-term voluntary transfer, or "detail," to JOD. Tr. 7, 10 (Ertwine). JOD was expanding its operations at the time and needed more staff. Tr. 7 (Ertwine). Ertwine spoke with the head of JOD, Dr. Christiansen, about Hall coming to JOD for a trial period. Tr. 8 (Ertwine); Tr. 14-15 (Christiansen deposition). Christiansen agreed to take on Hall for a trial period because Hall had a Ph.D. in chemistry and Christiansen wanted as many Ph.D.s as possible at JOD. Tr. 16 (Christiansen).

In late May, Christiansen called Hall to offer him the detail. Hall then asked to meet with Ertwine "to learn more about the proposed situation where I would be detailed for one year to Joint Operations Directorate. Dr. William Christiansen . . . called me about that possibility last

Thursday morning.” CX 63 p. 1. After meeting with Ertwine, Hall decided to accept the detail and moved to JOD in June 1991. Tr. 5816 (Hall); Tr. 10 (Ertwine).

Hall’s brief does not suggest that the detail to JOD was adverse to him. Nor does the record support such a finding. Indeed, the evidence about its impact on Hall shows that the opportunity to move to JOD was a positive development in Hall’s career. Hall liked the work at JOD, and JOD offered Hall more promotion opportunities than the Chem Lab. Tr. 5754 (Hall); Tr. 12007-12008 (Kelly); Tr. 4458 (Dement); Tr. 6, 17 (Christiansen); Tr. 7, 11 (Ertwine); Tr. 11268 (Black). In fact, Hall had applied for a position at JOD twice before Christiansen offered him the detail. Tr. 5773-5775 (Hall). Furthermore, while Hall was on detail to JOD, he applied for a permanent position there at the GS-13 level, a grade higher than his current GS-12. *Id.* Moreover, Hall considered JOD so desirable that he filed a grievance when Christiansen decided that Hall was not working out and terminated the detail in November. RX 291.

Hall also claims that Ertwine admitted an unlawful purpose when he told Hall he was offering him the detail partly “as a result of the OSHA inspection.” Hall Br. at 8 citing CX 63 p. 1. But even assuming that Ertwine did tell Hall this, such a statement does not demonstrate discrimination because Hall was not adversely affected. When considered in light of all the relevant evidence – that Hall wanted to go to JOD even before Ertwine offered the detail and that Hall was free to turn down Ertwine’s offer – a statement that Ertwine was offering a detail to JOD “as a result of Hall’s OSHA complaint” does not bespeak whistleblower animus.

The sinister purpose that Hall would impute to Ertwine is also inconsistent with other positive actions Dugway took in response to Hall’s OSHA complaint. Dugway Commander Cox, to whom Ertwine reported, ordered a formal investigation into Hall’s chemical storage complaint. CX 61. The investigator concluded that Chem Lab Chief Brauner and Deputy Chief Bagley had displayed inadequate leadership and that Hall should be commended for his efforts. CX 60; CX 61. In fact, Cox later issued a formal commendation to Hall for making the OSHA report. CX 14.

Lastly, Hall insinuates in his brief that Ertwine admitted in his 2001 deposition that the JOD detail was retaliatory. Hall Br. at 8. This is not so. Ertwine testified at his deposition that the JOD detail was an opportunity for Hall that Hall could take or leave. Tr. 10 (Ertwine).

We find that Hall failed to prove by a preponderance of the evidence that the JOD detail was either adverse or retaliatory. Therefore, it cannot support his claim of a hostile work environment.

3. Unfair performance evaluations

The ALJ ruled that Dugway gave Hall unfairly low performance ratings because of Hall’s protected activity. R. D. & O. at 30, 39, 76. And Hall contends that Dugway subjected him to a hostile environment by “attempts to lower his performance ratings and negative statements in his

appraisals.” Hall Br. at 6.⁶ We disagree with the ALJ’s finding and Hall’s argument because a preponderance of the evidence demonstrates that Dugway did not evaluate Hall based on protected activity.

Hall cites his performance evaluation for the year April 1991 through March 1992 for which his immediate supervisor, Captain Timothy Moore, gave Hall a “fully successful” rating in May 1992. Hall Br. at 8, citing Tr. 118-119, 123-124 (Hall deposition). Moore based the evaluation on five performance elements: technical and lab ability, communication, technology development, safety, and policy adherence. RX 245. Moore rated Hall as “meets” the performance standards for technical and lab ability, communication, and technology development. Moore rated Hall as “exceeds” standards on safety and policy adherence. *Id.* Moore’s original May evaluation cannot fairly be characterized as an attempt to “lower” Hall’s rating because it was not lower than Hall’s previous evaluations. It was consistent with all of Hall’s previous performance evaluations. RX 246 (1986), 246B (1987), 249 (1988), 244 (1989), 247 (1990), 241 (1991).

Hall objected to the evaluation. Tr.118 (Hall deposition). As a result, Lieutenant Colonel Birdsong changed the evaluation to a “highly successful.” Tr. 118 (Hall depo); CX 134. On the upgraded performance evaluation, the rating for technical and lab ability remained a “meets,” but communication and technology development were raised from “meets” to “exceeds.” CX 134. Hall’s second level reviewer, Frank Bagley, attached a note explaining that Hall did not get an “exceeds” for technical and lab ability because he did no lab work from June 1991 through March 1992. *Id.*

The mere fact that Birdsong raised Hall’s rating to highly successful does not prove that the fully successful evaluation was retaliatory. Hall’s reasoning is that whenever an employee gets the same evaluation he has always gotten after he has engaged in protected activity and then persuades a higher authority to upgrade the evaluation, it necessarily follows that the first evaluation was retaliatory. This is manifestly illogical. Furthermore, we note that Birdsong’s upgrade is consistent with other efforts at Dugway to reward Hall for his chemical storage complaint. As noted, Commander Cox gave Hall a commendation for reporting the storage problem. Thus, we find that Hall failed to prove by a preponderance of the evidence that the first version of Hall’s 1992 performance evaluation was punishment for whistleblowing.

Hall complains about a second evaluation that was issued in September 1995. Hall Br. at 6, citing CX 19. Jerry Steelman, Hall’s immediate supervisor, was the rating supervisor. CX 19. William Dement, then head of the Chem Lab, was the senior rater. *Id.* Steelman gave Hall an overall performance rating of successful and included four bullet comments. Two of the comments were positive: “highly knowledgeable,” and “excellent literature reviews on all programs assigned.” However, two bullets were critical on timeliness: “Needs to improve timeliness to complete the plan and execute the BZ Bomblet Test after volunteering to do so,”

⁶ Hall presents this claim categorically without argument or discussion of conflicting evidence. To support this argument Hall cites his testimony about an e-mail he received from Utah’s SHWD. Tr. 4883. But this event is not related to Hall’s performance appraisals. Likewise, Hall points to his unrelated testimony about completing security questionnaire DD Form 398-2. Tr. 8750.

and “[n]eeds to improve timeliness to provide a procedure for the testing . . . for the ITAP program.” *Id.* at p. 1. Dement added three bullet comments: (1) “told his supervisor on 6 occasions he would have the BZ procedure completed the following Monday but did not perform”; (2) “provided schedules himself on the BZ test which he failed to complete the first action items on and the schedule time ran out with no progress made”; and (3) “highly knowledgeable.” *Id.* at p. 2.

The BZ project required Hall to survey the scientific literature to identify the two best available methods for decontaminating munitions that had been filled with BZ (an hallucinogenic agent), perform the methods on bomblets that contained BZ residue, and measure and report on the efficacy of the two decontamination processes. Tr. 670 (Steelman); Tr. 10535-10536 (White). For the Integrated Toxic Agent Protection, or “ITAP,” project, Hall was to conduct tests on protective clothing to measure its capacity to block penetration of hazardous chemicals and to measure and report the results.

In early 1995, Hall and another chemist in the Chem Lab were assigned the BZ project. Tr. 501 (Steelman). After about two months, Hall asked Steelman to let him take over the entire project. *Id.* Being in charge of the entire project meant preparing a test plan, executing the plan, gathering the test data, and preparing a written report about the test and its results. Tr. 501-503 (Steelman); Tr. 9907-9908, 9949-9950 (Jorgenson). On April 17, 1995, Steelman agreed on condition that Hall make the BZ project his top priority. 501-502 (Steelman); RX 9 p. 2. On May 9, 1995, Dement advised the Materiel Test Commander that Hall was late with his BZ test plan because of necessary work on the PINS project, but he would have the plan ready for execution in early May. But by September 13, 1995, the date of his performance evaluation, Hall had not yet produced the test plan. CX2A.

The BZ assignment was a simple one; the entire project should have been completed in weeks, at most two months. Tr. 4496 (Dement); Tr. 525 (Steelman). Hall did not deny that he was late with BZ. Rather, he took the position that he was late because he was busy with other assigned work. Tr. 1696 (Hall); CX 90, CX 95. But Hall spent at least some of his time during May to September 1995 voluntarily “consulting” with other Chem Lab staff on their projects. Tr. 4363-4364 (Dement); Tr. 658-659 (Steelman); Tr. 1661-1666 (Hall); CX 92. And Hall had a smaller workload than others. Tr. 4440, 4443 (Dement). Jim Hanzelka, for example, who did not have a Ph.D., carried a workload five to ten times greater than Hall’s. Tr. 4443 (Dement). Moreover, Hall’s own exhibits document a continuing struggle with Steelman about missed deadlines. *See e.g.*, CX 95, CX 97. As Hall himself testified, everyone at the Lab was always under pressure to meet deadlines. Tr. 1683 (Hall). Therefore, we find that Steelman and Dement did not retaliate but justifiably criticized Hall concerning his tardiness in completing the BZ assignment.

With respect to the ITAP project, the record shows that instead of spending time performing the tests that Dugway had contracted to perform, Hall spent time doing research and drafting memos to make the case that the tests were not worth doing. Tr. 1445-1446 (Hall); CX 90. Dugway was under contract with an outside agency to perform agreed-upon procedures and to document the results. Steelman and Dement took the position that under these circumstances, Dugway’s – and Hall’s – only role was to meet its contractual obligation in a timely manner.

Again, Hall has failed to establish by a preponderance of the evidence that Steelman criticized him about the ITAP study because of his whistleblowing. Rather, Steelman was only recording the fact that Hall had not completed his work on ITAP on time.

4. Security Clearance

a. The clearance requirement and process

Hall's position as a chemist at Dugway required that he be a member in good standing of the Chemical Surety Personal Reliability Program (CPRP). Tr. 1455-56 (Bowcutt). "The chemical surety program is a system of safety and security control measures designed to provide protection to the local populations, workers, and the environment by ensuring that chemical agent operations are conducted safely; that chemical agents are secure; and that personnel involved in those operations meet the highest standards of reliability." RX 19.

Army Regulation 50-6 (AR 50-6) governed the Chemical Surety Program. AR 50-6 required CPRP enrollees to pass a Personal Security Investigation (PSI). Hall passed a PSI and became a CPRP enrollee shortly after he was hired in 1986. Tr. 6163-6164 (Bowcutt). At that time, the AR 50-6 did not require periodic reinvestigation. Tr. 1490, 1809 (Bowcutt).

In 1995 the Department of the Army revised AR 50-6. CPRP enrollees with PSIs more than five years old would be reinvestigated immediately and every five years from then on. "Personnel assigned or scheduled for assignment to chemical duty positions must have a valid (completed within the past five years) favorably completed National Agency Check (NAC) and/or National Agency Check Plus Written Inquiries (NACI) or higher Personnel Security Investigation (PSI) and possess a security clearance at a level commensurate with the security classification of information required in the position." RX 19 § 2-6a. The purpose of the revision was to bring the Army CPRP in line with the Department of Defense Nuclear Weapons Personnel Reliability Program, which required its enrollees to be reinvestigated every five years. Tr. 11 (Reynolds Deposition); RX 19 p. 1. The Secretary of the Army issued revised AR 50-6 on February 1, 1995, with an effective date March 1, 1995. RX 19.

Dugway received revised AR 50-6 in June 1995. Tr. 1769 (Bowcutt). Chris Dunn, head of Dugway's Chemical Surety Office, was responsible for implementing revised AR 50-6. Tr. 7780, 1185 (Dunn). He immediately compiled a list of 87 CPRP enrollees whose CPRP investigations were more than five years old and who would therefore require an immediate reinvestigation. Tr. 7791 (Dunn); RX 21. And Dunn revised Dugway's local Chemical Surety Program regulation, DPG Reg. 50-1, to comply with AR 50-6 as amended. Dunn amended DPG Reg. 50-1 to provide at § 9(d)(3) that the Chief of Counterintelligence will "ensure personnel selected for [CPRP] positions have investigations before assignment, and currently enrolled personnel have appropriate investigations that are within 5 years and meet the criteria of para 2-6, AR 50-6." RX 234 p. 6; Tr. 7793-7796 (Dunn). Dunn gave the list of 87 enrollees to Bowcutt with orders to distribute instructions and forms to the certifying officials so the reinvestigation process could begin. Tr. 7797 (Dunn); Tr. 1459-1462 (Bowcutt).

Bowcutt had no expertise in the Chemical Surety Program or in interpreting or implementing AR 50-6 and was not responsible for assuring that Dugway complied with AR 50-6. Tr. 1459 (Bowcutt). At first Bowcutt thought AR 50-6 might require reinvestigation only for CPRP employees with PSI more than 5 years old and a break in service between their initial PSI and initial CPRP assignment. Tr. 1809-1811 (Bowcutt). Bowcutt based this idea on language in the supplement guidance section of AR 50-6 § 2-6: “The investigative requirements in *a* above will have been met when the PSI was completed within 5 years of the date of initial assignment to a PRP position and no break in active Federal service or employment longer than two years occurred between completion of the investigation and initial assignment.” Tr. 1768-1770 (Bowcutt). Dunn disagreed with Bowcutt; Dunn read the interpretive guidance language as relevant to initial enrollment in CPRP only. Tr. 7800-7801 (Dunn); Tr. 1769 (Bowcutt).

Bowcutt testified that though it had been in his interest to argue against the five-year periodic review because it affected his work load, he realized his reading of AR 50-6 was incorrect. “I have every month three or four people, sometimes more, sometimes less, that their investigation goes over five years old and we have to supply this. So it was in my interest on the job to argue against it. And I thought it was with some justification.” Tr. 1770 (Bowcutt). “But as subsequent communications came down . . . higher headquarters all of the way to the Department of the Army made it quite clear that a five-year requirement was there.” *Id.*

Edward Reynolds, Chemical and Biological Arms Control Analyst, Headquarters, Department of the Army, National Security Policy Division, testified that “as soon as the regulation [AR 50-6] went into effect, then anybody whose Personnel Security Investigation was older than five years and they had not had a periodic reinvestigation would be required to resubmit, or submit for a periodic reinvestigation.” Tr. 7 (Reynolds deposition).

By memo dated July 5, 1995, Bowcutt notified the certifying officials of the 87 enrollees about the new requirement and set July 20, 1995, as the deadline to submit completed Forms DD 389-2, the National Agency Questionnaire. RX 21, RX 22. The Defense Investigative Services (DIS) would investigate the information reported on the forms. Tr. 1462 (Bowcutt); Tr. 34-35 (Thompson deposition); RX 1.

Hall was one of 13 CPRP enrollees from the Chem Lab Division whose PSI was more than five years old. RX 21. When Hall received word of the reinvestigation requirement, he sent a memo to Bowcutt citing pre-February 1995 documents as proof that a new PSI was not necessary. He claimed that he was being singled out for harassment and complained about the deadline. RX 1; CX 130; Tr. 1479 (Bowcutt). Bowcutt sent Hall a copy of his July 5 memo and a note stating, “Mr. Hall, this is a copy of my letter to certifying officials, sent out 5 July 95, 87 individuals are impacted.” RX 22. Once Hall received this information, he withdrew his objection and submitted his DD Form 398-2. RX 215; Tr. 5930, 5998, 8365 (Hall).

Shortly thereafter, Hall wrote his psychologist that he realized he was not being singled out and that AR 50-6 was the source of a new five-year-reinvestigation requirement:

There was a change in Army regulations and in spite of our people here questioning the matter way up the line, it seems those

of us who had chemical personnel reliability background checks over five years ago are required to do everything again. . . . I thought I was being retaliated against when I found the request to fill out background paperwork in my mailbox just as I was trying to get ready for my son's hearing on July 17 in Tooele District Court. I did not know about 80 other similar requests. . . .

RX 215. Hall testified that, "I would never have raised the issue that there was something discriminatory about my having to fill out the form [398] had I been given that nice little note that apparently a lot of people got saying, gee there's a whole bunch of you and there's a five-year PRP update now." Tr. 5930; Tr. 5998 ("I believe that I knew that within two or three days. But I went through a few days of real hell"); Tr. 8365 ("I felt singled out because I did not get proper information and that was cleared up within a day, the first working day").

Bowcutt received completed security questionnaires from people on Dunn's list before, on, and after July 20, 1995. Bowcutt forwarded the completed questionnaires, including Hall's, to DIS in Maryland. Tr. 1479 (Bowcutt).

In a National Agency Check (NAC), DIS collects information from national federal agencies such as OPM, FBI, INS, and Department of the Army. Tr. 1523-1525 (Bowcutt). DIS may expand a NAC investigation into a National Agency Check with Inquiries (NACI) based on information the NAC generates or based on information in DD Form 398-2. *Id.*; Tr. 14-15 (Thompson deposition). A history of psychiatric treatment requires a NACI investigation. *Id.*

Hall reported on his DD Form 398-2 that he had received treatment from a number of psychiatrists and psychologists and was currently being treated by a psychologist and a psychiatrist and taking xanax, an anti-anxiety drug. RX 19. DIS assigned a field investigator to conduct a National Agency Check with Inquires. RX 1 tab F; Tr. 4, 12 (Thompson).

The DIS investigator followed up on the mental health information Hall provided. Tr. 11-12 (Thompson). He interviewed both Hall's treating psychologist and the psychiatrist who conducted one of Hall's 1989 fitness-for-duty mental health evaluations, examined Hall's medical record at the Dugway Clinic, and reported his findings in an investigation report. In this June 1996 report, the investigator included summaries of Hall's 1989 psychiatric evaluation, his interview with Hall's treating psychologist, and parts of Hall's DPG Clinic medical record. RX 1. DIS forwarded the report to the United States Army Central Personnel Security Clearance Facility (CCF) in Ft. Meade, Maryland. Tr. 27 (Thompson). CCF was the agency with authority to make the favorable or unfavorable personnel security determination. Tr. 1530, 2053, 2071-2072 (Bowcutt); RX 20 ¶ 3-504.1.

On September 5, 1996, the CCF Adjudications Division notified Dugway that the DIS investigation report concerning Hall "provides indications of possible behavior, mental or emotional condition, or illness which could cause a defect in judgment, reliability or stability." RX 19. CCF requested that "a mental evaluation be conducted by a credentialed mental health professional . . . so that potentially disqualifying and mitigating information may be fully and

properly evaluated.” *Id.* CCF instructed Dugway to give the mental health examiner a copy of the DIS report. *Id.*

Dugway arranged for its contract psychiatrist, David McCann, M.D., to interview Hall on October 1, 1996. RX 35. McCann evaluated Hall based on information Hall provided during and after the interview, the DIS investigative report, psychological test results, and the Dugway Clinic record. McCann concluded, among other things, that “[t]he subject’s condition could cause significant defect in psychological, social and occupational functioning. It is possible that the subject’s psychiatric condition has contributed to some difficulties in each of these areas.” RX 35 p. 10.

CCF reviewed McCann’s report, and on January 17, 1997, the CCF Adjudications Division issued to Hall a notice of Intent to Revoke Security Clearance. RX 127. “A preliminary decision has been made to revoke your security clearance. Adverse information from an investigation of your personal history has led to the security concerns listed in enclosure 1 and has raised questions about your trustworthiness, reliability and judgment.” *Id.* para. 2. The notice informed Hall how to get a copy of his investigative file and that he could file a response with CCF within 60 days. *Id.* para. 4. The notice further advised Hall that his access to classified information was suspended pending final adjudication of his case. *Id.* para. 7.

On February 27, 1997, Bowcutt forwarded a package of materials relating to Hall’s security clearance to Dugway Commander Como. The package included a copy of CCF’s preliminary decision to revoke clearance, CCF’s September 1996 request for a mental health examination, the DIS report, Hall’s DD Form 398-2, and a copy of Hall’s February 13, 1997 whistleblower complaint against Dugway. RX 19, 23. Como reviewed the file and on March 20, 1997, signed a statement that he concurred in CCF’s preliminary decision to revoke Hall’s security clearance. RX 23-4; RX 3. Hall had already submitted a response to CCF on March 19. CX 14.

On July 30, 1997, more than a month after Hall left Dugway, CCF requested further information from Dr. McCann. “On 16 May 1997, we discussed this [Dr. McCann’s] evaluation with our consulting psychologist, who felt that we need further clarification before a determination can be made in this case. To assist this command and expedite the security clearance determination process, request you have the evaluator, Dr. McCann, furnish answers to the following questions.” RX 36. “This case will be held in suspense pending receipt of the requested information.” *Id.* Thus, though CCF had made a preliminary decision to revoke Hall’s security clearance, it had not actually revoked it when Hall left Dugway in June 1997.

b. *The Supreme Court’s Egan decision*

The ALJ found that Dugway took hostile action against Hall in 1995 by (1) requiring him to undergo a new background investigation, by (2) seeking to bias the investigation against Hall when it resurrected old sexual harassment charges of which he had been cleared and sent unduly negative information to Dr. McCann, and by (3) Dugway Commander Como recommending that Hall’s security clearance be revoked partly because of Hall’s February 13, 1997 hostile work environment complaint against Dugway. R. D. & O. at 31, 35, 37, 38. Hall urges us to affirm

these findings. Hall Br. at 6, 13-14, 15, 20. But we do not have authority to review CCF or Dugway's reasons for recommending that Hall's security clearance be revoked.

In *Department of the Navy v. Egan*, 484 U.S. 518 (1988), the Court held that the Merit Systems Protection Board (MSPB) did not have authority to review a claim that the United States Navy violated the Civil Service Reform Act (CSRA) by refusing to issue Egan a security clearance. The Court noted that trying to predict whether an individual will be a security risk in the future is "an inexact science at best" and that the agency making the prediction may legitimately choose to apply a wide margin of error. *Id.* at 529. Therefore, the Court concluded, "it is not reasonably possible" for a nonexpert body like a court to second guess the agency on the question whether a particular individual is a security risk. *Id.* Additionally, the Court noted, national security is an Executive Branch responsibility. "Unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Id.* at 530 (citations omitted).

Applying these principles to the CSRA, the Court ruled that the CSRA did not authorize the MSPB to review the Navy's decision to terminate Egan's employment for lack of a security clearance. Furthermore, the standard of proof under the CSRA – preponderance of the evidence – was incompatible with the standard for security clearances – "clearly consistent with the interests of national security." *Id.* at 531.

Although *Egan* decided only a claim brought under the CSRA, its basic reasoning – that courts lack expertise to make national security predictions and that the Executive Branch is entitled to extreme deference on national security matters – is broad. Thus, courts consistently apply *Egan* to cases involving anti-discrimination legislation similar to the environmental whistleblower protections. *See Hill v. White*, 321 F.3d 1334 (11th Cir. 2003) (Title VII age discrimination and Rehabilitation Act disability discrimination); *Hesse v. Department of State*, 217 F.3d 1372 (Fed. Cir. 2000) (CSRA whistleblower discrimination); *Weber v. United States*, 209 F.3d 756 (D.C. Cir. 2000) (CSRA whistleblower discrimination); *Ryan v. Reno*, 168 F.3d 520 (D.C. Cir. 1999) (Title VII national origin discrimination); *Becerra v. Dalton*, 94 F.3d 145 (4th Cir. 1996) (Title VII national origin discrimination); *Brazil v. United States Dep't of the Navy*, 66 F.3d 193 (9th Cir. 1995) (Title VII race discrimination); *Perez v. FBI*, 71 F.3d 513 (5th Cir. 1995) (Title VII retaliation); *Guillot v. Garrett*, 970 F.2d 1320 (4th Cir. 1992) (CSRA and Title VII disability discrimination).

Like the environmental whistleblower statutes, Title VII, the CSRA, and the Rehabilitation Act do not specifically authorize a court to review an agency's decision to suspend, revoke, or otherwise change an employee's security clearance. *See* 42 U.S.C.A. § 2000e (West 2004) (Title VII); 29 U.S.C.A. § 791 (West 2004) (Rehabilitation Act); 5 U.S.C.A. § 2302(b) (West 2004) (CSRA Whistleblower Protection Act); 42 U.S.C.A. § 6971(a) (SWDA); 42 U.S.C.A. § 7622(a) (CAA); 42 U.S.C.A. § 300j-9(i)(1) (SDWA); 42 U.S.C.A. § 9610(a) (CERCLA); 33 U.S.C.A. § 1367(a) (CWA). In each of the cases cited above, the court held that in the absence of express statutory authority to review security clearance decisions, review of the employee's claim that the clearance process was discriminatory would violate the principles of *Egan*. The courts reasoned that they could not properly determine whether an agency decision affecting an employee's security clearance was a pretext for discrimination without evaluating

the agency's reasons for changing the security clearance. And evaluating an agency's reasoning pertaining to security clearance decisions amounts to second guessing the agency, which is precisely what *Egan* prohibits. *See Egan*, 484 U.S. at 531.

Hall argues that “[n]otwithstanding *Egan*, suspension and revocation of a security clearance can still be prima facie evidence of retaliatory motive. Even if the remedy is not available of undoing a security clearance decision on its substantive merit, the circumstances surrounding the decision can nevertheless be taken as evidence of retaliatory motive, a hostile work environment, irregular procedure, disparate treatment and a form of discrimination under the environmental statutes.” Hall Br. at 20-21. But this argument misses the whole point of *Egan* and its progeny. *Egan* prohibits us from reviewing either Dugway's reasons for or its ultimate decision to concur in the preliminary decision to revoke Hall's security clearance.

c. Neither the requirement to undergo reinvestigation nor the manner of the reinvestigation was retaliatory

Notwithstanding *Egan*, we will nevertheless examine Hall's contention that Dugway's actions concerning his security clearance were in retaliation for his whistleblowing. Therefore, we examine each of his claims in this regard.

(i) AR 50-6 required a new investigation of Hall

Hall claims, and the ALJ found, that Dugway's decision to reinvestigate Hall's security clearance was hostile because the regulations did not require it. Hall Br. at 6; R. D. & O. at 31, 37.⁷ But Hall himself recognized that AR 50-6 established a new requirement for a personal security investigation (PSI) update; he realized it at the time and repeatedly conceded the point at the hearing. *See* discussion in section 4-a above. Bowcutt, too, changed his mind that reinvestigation was not required. Yet, unaccountably, the ALJ asserts that it was a “hotly contested” question whether revised AR 50-6 required Hall's reinvestigation in 1995. R. D. & O. at 96.⁸

⁷ Again, we note that none of the record citations Hall provides relate to the question whether the reinvestigation was required. *See* Tr. 1785-88, 1794-98, 3496-99, 3535-36. Nor does Hall discuss the testimony that the new AR 50-6 required five-year reinvestigations or evidence about DIS and CCF's authority.

⁸ The ALJ also found – without a single citation to the record – that Dugway required Hall to submit his completed DD Form 398-2 within a few days but allowed others to take one to two years. R. D. & O. at 38, 75. This is incorrect. Dugway did not subject Hall to a special deadline.

Dugway set one deadline, July 20, for all 87 CPRP enrollees. RX 21, RX 22. In June 2001, Bowcutt was able to locate some of the completed DD Form 398-2s he received in response to his July 1995 request. Those records showed that at least twenty enrollees, including Hall, submitted their completed forms to Bowcutt in July 1995, and at least fourteen enrollees did not submit their completed forms until 1996. Tr. 6136-6142 (Bowcutt); RX 129. The gap between the July 1995 submissions and the 1996 submissions was due to an Army moratorium on PSI investigations. On

Furthermore, Hall asserts, and the ALJ found, that it was Dugway that controlled the reinvestigation. Hall Br. at 6, 12; R. D. & O. at 31, 37. This attributes powers to Dugway that it did not have. Department of the Army Headquarters amended AR 50-6 to require five-year reinvestigations and ordered Dugway to comply. RX 19; Tr. 7 (Reynolds); Tr. 7797 (Dunn). Defense Investigative Services (DIS) controlled the investigation and determined the scope of the investigation according to general criteria. CCF then decided that information in the investigative report called Hall's reliability into question and required an expert mental health evaluation. Thereafter, CCF made the decision that Hall was not reliable and preliminarily revoked his clearance. Even so, CCF did not permanently revoke the clearance but gathered more information from the evaluating psychiatrist. Thus, DIS and CCF, not Dugway, controlled the investigation.

(ii) Dugway did not try to influence the reinvestigation

Likewise, we reject Hall's contention, and the ALJ's finding, that Dugway improperly influenced the investigation by resurrecting old sexual harassment charges and by trying to bias Dr. McCann against Hall. Hall Br. at 6, 13, 14; R. D. & O. at 32, 37, 76. According to Hall, Dugway "raised the old allegations [of sexual harassment] from the grave in 1996 in an attempt to influence the outcome of the third mental exam and Dr. Hall's CPRP and security clearance review." Hall Br. at 14. But Hall himself reported the sexual harassment allegation to DIS. Hall reported on his DD Form 398-2 that in 1989 he was required to undergo a fitness-for-duty mental health evaluation in part because of a sexual harassment charge against him. RX 1 Tab E, continuation page 4. The DIS investigator followed up on this information by, among other things, examining Hall's Dugway Clinic medical record. The Clinic record included more information on the sexual harassment incident, both in health care provider notes and in letters Hall wrote to the Clinic. RX 1 Tab F DIS report p. 6. The DIS investigator interviewed Hall's treating psychologist, who also mentioned the sexual harassment episode. *Id.* at p. 7.

True, one of Hall's supervisors told the investigator that he "heard secondhand that a sexual harassment complaint was made against Subject a number of years ago. He knew no details." RX 1 tab F p. 2. But given Hall's prior report to DIS, it is simply not accurate to say that Dugway injected the harassment complaint into the investigation.

Hall also claims that Dugway managers tried to bias McCann against him. Hall Br. at 13. However, Hall does not state of what these attempts consisted.⁹ The record shows only that McCann based his evaluation on his interview with Hall, documents Hall provided before and after the interview, the results of psychological testing, Hall's Dugway Clinic medical record,

August 8, 1995, Army Headquarters ordered Dugway, among others, to stop submitting PSI requests. RX 130; Tr. 6165 (Bowcutt). The Army lifted the moratorium in September 1996, and the majority of the CPRP enrollees who missed the July 1995 deadline submitted their DD Forms 398-2 by November 1996. RX 131; Tr. 6165-6175 (Bowcutt).

⁹ Yet again, Hall cites transcript pages that have no relevance to his argument. *See* Tr. 5084, 5326-5327, 8137.

and at DIS's request, the DIS investigative report. RX 35. This evidence demonstrates that Dugway did not improperly try to influence McCann but instead that McCann relied upon preexisting medical records, information that DIS required him to consider, and information Hall supplied, including his interview with McCann and his performance on psychological tests.

McCann did not keep his file on Hall. Tr. 8130 (McCann). From this, Hall urges us to infer that Dugway supplied McCann with negative information that McCann used but did not list in his report. Hall Br. at 13. We reject this suggestion. McCann issued his report on Hall on October 30, 1996. CX 35. When asked to produce his Hall file at the hearing in November 2001, McCann could not find it. Tr. 8130 (McCann). McCann testified that he keeps medical records for five years, but he does not keep personnel evaluations such as Hall's because they do not pertain to medical treatment. Tr. 5186-5188, 8177-8178 (McCann). Hall did not rebut McCann's explanation. Therefore, again, the evidence does not support Hall's suggestion of bad faith.

(iii) Como concurred in CCF's recommended revocation due to Hall's mental instability

Hall's February 13, 1997 whistleblower complaint against Dugway was part of the file that Como reviewed in March 1997 in deciding to concur in CCF's intention to revoke. RX 1, RX 3; Tr.397 (Como). From that fact, Hall argues that Como agreed with CCF's preliminary intention to revoke because of his whistleblower complaint. Hall Br. at 9.

But the file also contained CCF's preliminary view that Hall was a security risk and had an extensive psychiatric history. The PSI psychiatrist's report, also in the file, concluded that Hall's condition "could cause significant defect in psychological, social and occupational functioning." RX 35, p. 10. Como testified that he was aware of Hall's whistleblower complaint but concurred in CCF's recommendation to revoke Hall's security clearance because information in the file showed that Hall was depressed and taking medication. He was also troubled by the confused and lengthy personal memos in the file that Hall had written to Chem Lab Chief William Dement. Tr. 399 (Como).¹⁰

And even Hall conceded that the information presented to Como in the file justified a determination that Hall should not remain in CPRP. Tr. 5959 ("if I were working at CCF I'd say my Heavens, this guy is accused of sexual harassment, all this stuff. And even though they returned him to duty, I'd have great concern. That would impact my decision on what I might do").

¹⁰ The ALJ badly mischaracterized Como's testimony. He called it "one of the most blatant admissions of an employer acknowledging, as it does, that one of the key adverse actions contributing to Dr. Hall's forced early retirement was made by Dugway at least in part because Dr. Hall had filed an environmental whistleblower complaint with DOL. . . ." R. D. & O. at 35.

Therefore, we find that Como concurred in CCF's intention to revoke Hall's security clearance because of the information about Hall's emotional state, not because of Hall's whistleblower complaint. Accordingly, Como's role in the reinvestigative process was not retaliatory and did not contribute to a hostile work environment.

5. Traitor comment and chain of command order

The ALJ found that in January 1996, Dugway Test Center Commander Lieutenant Colonel Kiskowski told Hall that General George Akin, who was Commanding General at the Army Test and Evaluation Command (TECOM) at Aberdeen Proving Ground, Maryland in 1990,¹¹ once called Hall a traitor because Hall made environmental complaints. R. D. & O. at 36, 71, 88-89. Without discussing the evidence, Hall makes the conclusory assertion on appeal that we should affirm this finding and that it evidences hostility. Hall Br. at 8. But a preponderance of the evidence does not support the ALJ's finding.

In late 1995, Kiskowski learned that Hall had complained to an outside government agency about his BZ project, claiming among other things that someone was falsifying data or records. Tr. 8415, 8488 (Kiskowski); *cf.* CX 8 No. 27. Kiskowski immediately called in Hall's supervisor, Steelman, and Chem Lab Chief Dement. Tr. 8416-8418 (Kiskowski). Steelman and Dement told Kiskowski that Hall had not expressed his concerns to them. Kiskowski instructed Dement to investigate. *Id.* Dement reported back that he could find nothing to support Hall's complaint. Tr. 8420 (Kiskowski). Kiskowski then appointed a safety officer to conduct a formal inquiry. *Id.* In December 1995, the safety officer reported that Hall had raised valid points about deficient management practices and Dugway interaction with State regulators and recommended steps for improving project management. CX 163.

In January 1996, Kiskowski met with Hall and told him about the investigation, findings and recommendations. Tr. 8415 (Kiskowski). Kiskowski followed up with a note to Hall: "As I indicated at our mtg, there is room for a lot of improvement in the way we're managing the . . . program. Let's work together to fix it." CX 163. And shortly thereafter, Hall described the meeting in positive terms to Dement: "I have to trust that some well-intentioned things are happening since our meeting with LTC K." RX 284 p. 199.

But Hall now claims that this meeting contributed to the hostile work environment. Hall Br. at 8. He testified that when they met in January 1996, Kiskowski told Hall that, "he had been adjacent to Gen. Aiken's [sic] office when Gen. Aiken [sic] called me a traitor in 1990, I believe it was, late 1990 for having involved the Department of Defense and Inspector General. So that was the only negative thing that came up there." Tr. 5891 (Hall).¹² But Kiskowski testified that he did not tell Hall that Akin had called him a traitor. Tr. 8455 (Kiskowski). Thus, Kiskowski and Hall's testimony on this point are in direct conflict.

¹¹ Tr. 8412-8413 (Kiskowski).

¹² Kiskowski worked for Akin at the United States Army Test and Evaluation Command in Aberdeen, Maryland from 1988 to 1990. Tr. 8413 (Kiskowski).

The ALJ accepted Hall's testimony over Kiskowski's because he did not find Kiskowski believable. "I do not credit the one witness who denied making that remark to Dr. hall [sic]." R. D. & O. at 88. But the ALJ does not explain why he does not believe Kiskowski on this particular point. Furthermore, the ALJ makes no reference to Steelman's testimony that he was present at the meeting and did not recall Kiskowski making such a comment. Tr. 780 (Stelman).

The ALJ also found that "[a] similarly blatant statement by General Aiken [sic] was published in a Dugway newsletter in which the General stated that he had a deep concern with employees who reported concerns to the Inspector General's Office outside the chain-of-command. See CX 59." R. D. & O. at 73. Exhibit CX 59, however, contains no statement by General Akin or, indeed, any reference whatsoever to employee whistleblowing. Therefore, this finding is not based upon the record and is error. Thus, we will not defer to the ALJ's finding that Kiskowski was not credible on the traitor comment issue. *Cf. Paredes-Urrestarazu v. INS*, 36 F.3d 801, 817 (9th Cir.1994) (reviewing court need not accept blindly an ALJ's conclusion that a witness is not credible. "Rather, we examine the record to see whether substantial evidence supports that conclusion, and to determine whether the reasoning employed by the [ALJ] is fatally flawed").

Even if Kiskowski had made the comment, Hall has not proved that he perceived the comment as hostile at the time or that a reasonable person would have perceived it as hostile. "Offhand comments and isolated incidents (unless extremely serious)" and "merely offensive utterances" are not the stuff of which hostile work environments are made. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-788 (1998). The "objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Id.*, 524 U.S. at 787; *see also Sasse v. Office of the United States Attorney*, ARB Nos. 02-077, 02-078, 03-044, ALJ No. 98-CAA-7, slip op. at 34 (ARB Jan. 30, 2004). Considering the entire context, especially Kiskowski's responsive actions and Hall's contemporaneous note, we are not persuaded that Hall found the comment seriously disturbing at the time or that a reasonable person would have found it so.

Hall also claims that Kiskowski imposed a gag order on him in the January meeting. Hall Br. at 7. Hall testified that "that is the meeting in which he [Kiskowski] told me I shouldn't even talk to you, Mr. Skeen [Dugway counsel], without clearing it with him." Tr. 5891 (Hall). Kiskowski, on the other hand, testified that he was concerned about the fact that Hall had complained about his projects to an outside agency without telling his own supervisors about his concerns. "[H]e can send letters to anyone he wants. . . . That's a constitutional right. What I was concerned about is that there were potential safety or environmental problems somewhere down in the lab concerning a particular test, and he had not informed his immediate supervisor of those problems . . ." Tr. 8418 (Kiskowski). "[A]fter I really didn't get a satisfactory reason why he didn't bring it up to his, to the leadership within the chem lab, I . . . treated it as a kind of counseling session. I think he needed a little bit of guidance as to what his responsibility as a scientist, as an employee of Dugway [was] . . . to bring these matters to the attention of the people down there that could actually do something about it." Tr. 8418-8419 (Kiskowski).

The ALJ found that “the Colonel informed Dr. Hall via ‘counseling’ that Dr. Hall should not be testifying to Congress or to compliance agencies such as the State or EPA, or even to Mr. Skeen’s office, the Dugway legal office, about his concerns, at least without first going to his management and giving them the information.” R. D. & O. at 36.¹³ “Dr. Hall took this communication for what it was, i.e., the imposition of a gag order in a hostile work environment.” *Id.*¹⁴ The ALJ characterized Kiskowski’s instructions as a gag order because he found that Dugway had a policy of punishing employees who go to outside agencies. *Id.* at 36. But the record does not support this finding. First of all, Kiskowski’s response to Hall’s complaint was anything but punitive. Second, as we discuss more fully *infra*, employees other than Hall made complaints within Dugway but outside their chain of command, or even to outside agencies, and Dugway did not punish them.

We find that Kiskowski merely instructed Hall to follow the chain of command and that he was also free to report outside the chain of command. Therefore, Kiskowski’s instruction cannot be characterized as a gag order because it was not an order to be silent. “He can send letters to anyone he wants. . . . That’s a constitutional right.” Tr. 8418 (Kiskowski). Hall has never disputed this testimony.

Thus, a preponderance of the evidence does not support the ALJ’s finding that Kiskowski explicitly or implicitly ordered Hall not to speak out about his environmental concerns.¹⁵

¹³ The ALJ cites to “TR 5889-5890; TR June 11 p 18 – 20.” None of the cited pages relates to Kiskowski’s instructions to Hall. At TR 5889-5890, Hall is testifying about his medical condition. Neither Hall nor Kiskowski testified on June 11. None of the June 11 witnesses testified about Hall’s January meeting with Kiskowski except Steelman, who testified that Kiskowski never called Hall a whistleblower in Steelman’s presence. Tr. 537.

¹⁴ We note that Hall never testified that he thought Kiskowski issued a “gag order” or told him he could not make complaints to outside agencies. Hall testified only that Kiskowski told him not to go to Dugway counsel without clearing it with Kiskowski. Hall first characterized Kiskowski’s instructions as a “gag order” in his post-hearing brief. Opening Post-Hearing Br. at 27-28, 32.

¹⁵ It is true that we have stated that “an employer may not, with impunity, discipline an employee for failing to follow the chain-of-command, failing to conform to established channels or circumventing a superior.” *Talbert v. Washington Pub. Power Supply Sys.*, ARB No. 96-023, ALJ No. 93-ERA-35 (ARB Sept. 27, 1996). But this statement should not be understood to mean that employers have no right to require employees to tell them immediately about hazardous conditions. *Cf. Saporito v. Florida Power & Light Co.*, Nos. 89-ERA-7, 89-ERA-17, slip op. at 2 (Sec’y Feb. 16, 1995) (Energy Reorganization Act whistleblower provision does not prohibit employers from requiring employees to report safety hazards immediately to the plant operator); *Jones v. E G & G Def. Materials, Inc.*, ARB No. 97-129, ALJ No. 95-CAA-3, slip op. at 13-14 (ARB Dec. 24, 1998) (important goal of whistleblower provisions is to encourage front-line employees to bring their unique knowledge of workplace hazards to supervisors and the chain of command so that persons in authority can take corrective action quickly). At the same time, an employer may not rely on its chain of command policy as a pretext for disciplining an employee who reports safety concerns outside the chain of command. *Cf. Pogue v. United States Dep’t of Labor*, 940 F.2d 1287 (9th Cir.

6. Temporary removal from CPRP in June 1996

In January, March, and May 1996, Hall reported to the Dugway Clinic that he was experiencing drowsiness, fatigue, dizziness, reduced coordination, restlessness, nervousness, and tremors and was taking several prescription medications, including an antidepressant, Zoloft. Hall made these reports because of his CPRP enrollment. Clinic physicians advised Hall's certifying official, William Dement, of Hall's reports and recommended that Dement observe Hall. RX 284 pp. 193-104.

On June 3, 1996, Hall had a dizzy spell at the Chem Lab. Dement and Steelman insisted that an ambulance take Hall to the Dugway Clinic. They were concerned that Hall might be having a heart attack. Tr. 10304-10305, 10317 (Hall). On June 13, the Clinic physician notified Dement that he was recommending a temporary CPRP restriction for Hall: "temporary restriction/disqualification for the following reason(s): multiple medical problems including disequilibrium affecting balance. Re-eval in 30 days." RX 284 p. 187. Hall did not learn about this medical restriction until the hearing in 2001 when he examined discovery documents. One of the documents was CX 132, a personnel form that reflected that Hall was temporarily disqualified on June 13, 1996. Tr. 10319 (Hall).

Hall asserts that removing his CPRP approval for access to chemical agents, without giving him required notice, contributed to the hostile work environment. Hall Br. at 6, 12.¹⁶ The ALJ found that failing to notify Hall was an instance of irregular procedure indicating a hostile motive. R. D. & O. at 74. But the June 13 medical restriction had no effect on Hall's employment status because Hall did no agent work from 1994 until his retirement. Tr. 4347, 4520 (Dement). Moreover, the medical restriction had no effect on Hall's state of mind during his employment because he did not know about it. "If the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment" and there is no violation. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). Accordingly, this event does not support Hall's claim of a hostile work environment.

7. Hostile editing

Hall contends that Dugway technical editor, Christine Wheeler, made it impossible for him to complete a report on time. This, he says, constitutes additional evidence of hostility because of his protected activities. Hall Br. at 6, 14-15.¹⁷

1991) (upholding ALJ finding that supervisor's testimony that he punished complainant because she did not follow his instructions to communicate through the "chain of command" was pretext).

¹⁶ Again, Hall offers no analysis of the relevant evidence and cites no supporting authorities.

¹⁷ None of Hall's supporting references to the record pertain to his hostile editing claim. *See* Tr. 3185-3186, Tr. 3660, 4210-4213.

We have carefully examined the record on this point and find that it shows the following. The report to which Hall alludes is the BZ Treatability Data Report. On February 11, 1997, Hall turned in a draft BZ report that was still a work in progress. RX 14, Tr. 795 (Steelman). His supervisor, Jerry Steelman, ordered Hall to work with Wheeler in developing the final version of the report. Tr. 520 (Steelman). Steelman assigned Wheeler to Hall's project because Steelman required that Wheeler edit all reports that he supervised. Tr. 625-626 (Steelman). Wheeler, Hall and Steelman met to discuss the editing process on March 5, 1997. RX 40. At this meeting Hall had difficulty staying focused and had several emotional outbursts. *Id.*, Tr. 521 (Steelman). Wheeler and Hall exchanged drafts and proposed revisions in March and April. RX 13, RX 39.

Hall testified that Wheeler's edits made the BZ report "less readable and comprehensible." Tr. 2844 (Hall). But the record demonstrates that, in her editing, Wheeler merely posed questions such as "what happened to the second canister?" "Should methods I and II be separated, or were the residues treated/disposed of together?" RX 12. These questions left it up to Hall to decide whether and how to clarify his own text. Wheeler also injected headings, broke up some paragraphs, and suggested additional statements. Wheeler made these format changes in compliance with regulation. Tr. 2560, 2562 (Barnett).

Wheeler's actions are inconsistent with an effort to slow production of a final report. She returned Hall's drafts to him with her editorial comments promptly. RX 12. She was clear about what she wanted Hall to change or to consider changing. She tried to make it easy for Hall to use her edits by giving him both a hard copy and a computer disk of the edited draft. RX 13. She made herself available to meet with Hall. Tr. 2693-2694 (Wheeler).

Michael LeFevre, a union official, was Hall's most sympathetic witness and the witness who came closest to supporting Hall's claim that Wheeler tried to block rather than to edit Hall's BZ draft. However, his strongest statement in Hall's favor was only that he thought it was "possible" that Wheeler blocked Hall's draft, and that he thought this because he had heard complaints about Wheeler from others. Tr. 4206 (LeFevre). True, some people disliked Wheeler's editing because they disliked her manner. Tr. 700 (Steelman); Tr. 1005 (Bodily); Tr. 4206 (LeFevre). The ALJ specifically noted that he found her to be arrogant. R. D. & O. at 41. But the fact that people complained about Wheeler's style does not prove that she obstructed Hall's efforts to finish the BZ report because of his protected activity. As we have already discussed, Wheeler's edits of the BZ report were routine, prompt, and clear. Therefore, LeFevre's testimony does not support Hall's contention that Wheeler blocked his efforts because of his protected activity.

And another fact undermines Hall's arguments about Wheeler. In March, Hall complained to Jim Barnett, a union vice president, that Wheeler's editing was part of a conspiracy against him because of Hall's whistleblowing activities. Tr. 2542-2545 (Barnett). Barnett was a test director who had written 60 to 70 reports of all types that Wheeler had edited. Tr. 2549 (Barnett). Barnett examined Wheeler's edits on Hall's draft BZ report and met with Wheeler to discuss them. Tr. 2563 (Barnett). Barnett concluded that Wheeler's editing of Hall's draft was like her editing of other people's work, including Barnett's. Tr. 2560, 2562 (Barnett).

Notwithstanding his alleged problems with Wheeler, by May 5, 1997, Hall thought he needed only 35 more hours to finish the BZ report. Steelman agreed to give Hall that additional time. CX 124. Yet when Hall submitted his formal resignation three weeks later, he had still not finished the report. Hall presented no evidence to explain why he could not meet his self-imposed 35-hour deadline or how Wheeler contributed to his lack of productivity from May 5 on.

We find that Hall has not established by a preponderance of the evidence that Wheeler, either by her own design or at the instigation of someone else, tried to do anything other than provide routine editing for Hall's BZ draft. Accordingly, Wheeler's editing was neither hostile nor motivated by Hall's protected activity.

8. 1997 Letter of reprimand

In late 1996, the Department of the Army agency that requested and paid for the BZ study complained to Kiskowski that the report had not been issued. Tr. 8431, 8433 (Kiskowski). A complaint of this kind was unusual, and Kiskowski was concerned. Tr. 4487 (Dement); Tr. 8434 (Kiskowski). Kiskowski made it clear to Dement and Steelman that the BZ report had to get out and ordered that another chemist be assigned to help Hall complete the report. Tr. 8441 (Kiskowski).

In February 1997, Steelman met with Hall and asked for a copy of Hall's draft BZ report. Tr. 660 (Stelman). Hall produced part of an appendix but not the report. Tr. 795 (Stelman). On February 10, Steelman reprimanded Hall: "You currently have the BZ report to finish which you have had for action for 9 months (since 6 May 1996). Our customer is upset that they have not received the report in a timely manner." RX 6. The next day Hall submitted an incomplete draft report. Tr. 794 (Stelman); CX 27.

Without argument or record analysis, Hall cites the February 10 reprimand as a retaliatory act that contributed to a hostile work environment. Hall Br. at 6. He testified that he felt he deserved no criticism because he had spent some of his time working on other assignments and he had health problems. Tr. 4631(Hall), *cf.* Tr. 658, 673 (Stelman). Thus, in Hall's view, Steelman's decision to reprimand him must have been because of his protected activities. The ALJ also attributed the reprimand to Hall's protected activities rather than to his failure to produce the BZ report on time. R. D. & O. at 30, 82.

But the record does not support Hall's position or the ALJ's finding. Hall could control the relative amounts of time he devoted to his various assignments, and he did not give BZ as much time as he could have. Tr. 9830-9831 (Hall); Tr. 736 (Stelman). Hall took time away from the BZ study throughout October, November, and December 1996 to prepare and present to a Utah Assistant Attorney General a massive documentary record in support of a claim that Dugway committed a SWDA violation in 1995. Tr. 9830-9831 (Hall); CX 8; Tr. 2545 (Barnett). Dugway managers were not aware of this. Tr. 510 (Stelman).

Stelman reprimanded Hall because he was under pressure from Kiskowski to get the BZ report out. Kiskowski held Steelman and Dement responsible for the BZ delay and felt that Hall

had a performance problem with which his supervisors must deal. Tr. 8600; 8595-8596 (Kiskowski). Kiskowski was so dissatisfied with the Chem Lab's productivity that he demoted Dement at the end of 1996 and replaced him with Major Stansbury. Tr. 8451-8452 (Kiskowski); Tr. 4428-4429 (Dement). "I needed somebody to get down there and energize the management team to pay attention to what was going on, to set and enforce standards, and to make sure everybody down there was earning their living." Tr. 8453 (Kiskowski). Cf. Tr. 1683 (Hall) ("One has to recognize that these supervisors were also under great pressure [] being demoted").

Steelman had previous problems with Hall missing deadlines on the BZ project. Steelman assigned Hall the BZ project in May 1995. It had two components, testing and reporting. Hall missed so many deadlines on the testing component in 1995 and early 1996 that Steelman assigned someone else to complete the test phase of the project. Tr. 502 (Steelman); Tr. 9906, 9944-9945 (Jorgensen). Hall had been late on other assignments as well. RX 8, RX 9. In September 1996, Steelman was so concerned about Hall's low productivity that he recommended that Hall be placed on a performance plan. RX 8.¹⁸

Hall wants us to infer that Steelman issued the reprimand because of his protected whistleblowing activities. But a preponderance of the evidence shows that Hall was late on the BZ report and that Steelman and Kiskowski used the reprimand to push Hall to get the report out because they were feeling pressure from the agency that had paid for the report.

THE RECOMMENDED DECISION AND ORDER

We generally consider the ALJ's findings "along with the consistency and inherent probability of testimony." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951); cf. *Seda v. Wheat Ridge Sanitation Dist.*, Nos. 91-WPC-1, 91-WPC-2, 91-WPC-3 (Sec'y Sept. 13, 1994). And we generally defer to ALJ findings of fact when based on the credibility of witnesses as shown by their demeanor or conduct at the hearing. *Svensen v. Air Methods, Inc.*, ARB No. 03-074, ALJ No. 02-AIR-16, slip op. at 6 (ARB Aug. 26, 2004). In this case, however, the recommended decision is marked by error so fundamental that its fact findings are inherently unreliable.

I. Burden of proof

The ALJ misapplied the burden of proof. In environmental whistleblower cases the complainant must prove each element of his claim by a preponderance of the evidence. *Schlagel v. Dow Corning Corp.* ARB No. 02-092, ALJ No. 01-CER-1 (ARB Apr. 30, 2004). But here the ALJ, in effect, placed the burden of proof on Dugway. "On the basis of the totality of this closed record and *resolving all doubts in favor of Dr. Hall to effectuate the spirit and purposes of the*

¹⁸ Steelman naturally thought that he had to document any warning he gave Hall. While Dement was Chief of the Chem Lab, Steelman tried to downgrade Hall's September 1995 performance evaluation because he had been late on the BZ project. Dement said no because Steelman had not created a written record of counseling Hall about the problem. Tr. 654-655, 815 (Steelman); Tr. 4356-4358 (Dement); RX 8; CX 16, CX 17. Dement considered Steelman's failure to document Hall's lateness a performance deficiency on Steelman's part. Tr. 4359 (Dement).

whistleblower statutes, I find and conclude that Dr. Hall was constructively terminated by means of the hostile work environment created at Dugway as part of the conspiracy against him. . . .” R. D. & O. at 92 (emphasis added). This constitutes error because the preponderance of the evidence standard requires that the employee’s evidence persuades the ALJ that his version of events is more likely true than the employer’s version. Evidence meets the “preponderance of the evidence” standard when it is more likely than not that a certain proposition is true. *Masek v. The Cadle Co.*, ARB No. 97-069, ALJ No. 95-WPC-1, slip op. at 7 (ARB Apr. 28, 2000).

If the ALJ is doubtful about whether to believe the employee’s evidence, he must resolve the doubt against the employee, not against the employer. *Cf. McCafferty v. Centerior Energy*, ARB No. 96-144, ALJ No. 96-ERA-6, slip op. at 20-21 (ARB Sept. 24, 1997) (because complainant had burden of proving damages by a preponderance of the evidence, ALJ not free to fill gaps in Complainant’s evidence and “resolve any doubts in their favor”); *cf. Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981) (the employee must persuade the court that a discriminatory reason more likely motivated the employer).

The decision to resolve all doubts in Hall’s favor reflects the fact that 72 pages of the ALJ’s recommended decision are taken directly from Hall’s post-hearing briefs. *Compare* R. D. & O. at 12-84 *with* Hall Opening Post Trial Br. at 4-12, 13-36, 41-90; Hall Post Trial Reply Br. at 2-7, 21-23. Hall’s post-hearing briefs focused almost exclusively on evidence – primarily his uncorroborated testimony – that supported his factual claims and rarely even mentioned conflicting evidence. For an ALJ to consider only evidence that supports a particular conclusion is error. An administrative adjudicator must consider not only evidence that would support a particular finding of fact but also “whatever in the record fairly detracts from its weight.” *Universal Camera*, 340 U.S. at 488, citing the Administrative Procedure Act at 5 U.S.C.A. § 556(d) (an order may not be issued except on consideration of the whole record). *See also* 29 C.F.R. 18.57(b) (the ALJ decision “shall be based upon the whole record”).

What is more, when the ALJ drew an adverse inference because Dugway did not call General Akin as a witness to rebut the traitor comment Hall testified about, the ALJ also erred. R. D. & O. at 88. Evidence relevant to Hall’s January 1996 conversation with Kiskowski included Hall’s testimony that Kiskowski made the traitor comment, Kiskowski’s testimony that he did not make the statement, and Steelman’s testimony that he was present and could not recall Kiskowski making the statement. Also relevant were Hall’s contemporaneous note describing his meeting with Kiskowski in positive terms, and the documentary and testimonial evidence showing that Kiskowski met with Hall to explain that he had formally investigated Hall’s safety complaint and had concluded that Hall’s complaint had some merit and that he wanted to enlist Hall’s support. The ALJ discussed only Hall’s testimony that Kiskowski made the comment and Kiskowski’s testimony that he did not. Without explaining why, the ALJ stated that he did not “credit” Kiskowski. And he stated that he would infer that Kiskowski made the statement because Dugway did not depose Akin and “[t]here is no evidence that General Aiken [sic] was unavailable for such deposition.” *Id.* at 89.¹⁹

¹⁹ The ALJ also seemed to think that Akin was at Dugway when Kiskowski allegedly overheard the traitor statement. R. D. & O. at 36. This is not correct. Akin was at Aberdeen Proving

The adverse inference rule applies when, among other reasons, “there exists an unexplained failure or refusal of a party . . . to produce evidence that would tend to throw light on the issues.” *Gilbert v. Cosco Inc.*, 989 F.2d 399, 405-406 (10th Cir. 1993) (internal quotations omitted) and cases cited therein. General Akin’s testimony would not tend to throw light on the question whether Kiskowski told Hall that Akin had called Hall a traitor. Akin would have no basis for confirming either Hall or Kiskowski’s testimony on this point since he was not at their meeting. The most that Akin could testify to would be whether he ever called Hall a traitor in a place where Kiskowski could have overheard the remark and thus have a basis for his purported statement to Hall. Therefore, Akin’s testimony would not tend to throw light on Hall and Kiskowski’s conflicting testimony, and though it is impossible to tell from the R. D. & O. what weight he gave it, ALJ erred in drawing the adverse inference.

Moreover, by drawing the adverse inference, the ALJ effectively relieved Hall of the burden of proving his claim that Kiskowski made the statement. Without the adverse inference, the relevant evidence is Hall’s uncorroborated testimony that Kiskowski made the statement, Kiskowski and Steelman’s denial, Hall’s contemporary writing describing his exchange with Kiskowski in favorable terms, and the inconsistency between Kiskowski’s encouraging actions and the alleged hostile comment. The preponderance of this evidence weighs in Dugway’s favor, not Hall’s.

II. Special duty of care

The ALJ also placed an affirmative burden on Dugway to accommodate Hall’s performance problems. “Yes. Complainant did have pre-existing personal, family and psychological problems [I]t is well to keep in mind that an employer takes each employee ‘as is’ and with all of our human frailties and the employer will be responsible for the aggravation and exacerbation of such pre-existing problems. . . .” R. D. & O. at 93-94. As authority for this proposition the ALJ cites *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968), a worker’s compensation case that is not relevant here. And the ALJ compounded this error when he wrote: “Respondent, in my judgment, should have taken steps to provide Dr. Hall with the time, help and resources that he needed” R. D. & O. at 94. But the whistleblower protections prohibit employers from discriminating against whistleblowers. They do not require employers to treat whistleblowers more favorably than other employees.

III. Credibility, conflicts in the evidence, and citations to the record

As the presiding officer at the hearing, the ALJ has the opportunity to observe the witnesses and assess their credibility based on those observations. Although the Board reviews the evidence de novo and is otherwise not bound by the ALJ’s credibility determinations, we generally defer to an ALJ’s credibility findings that “rest explicitly on an evaluation of the demeanor of witnesses.” *Svensen*, slip op. at 5.

Ground in Maryland. RX 183. Thus, the ALJ’s related conclusion, that Akin was part of an anti-whistleblower culture at Dugway, is unfounded.

More than 50 witnesses testified and more than 40 of them against Hall. Yet the ALJ explicitly evaluated only one witness's credibility – Hall's. At the hearing the ALJ said:

In these cases I have one determination to make: do I believe the whistleblower? If I do, everything else falls into line. In these cases, there is no gray area, even though factually it may seem that there are. All I have to do is come to a conclusion that the whistleblower is credible. If he's not credible or she's not credible, then everything else goes out the window.

Tr. 8889. Thereafter, the ALJ wrote in his decision: "I observed Complainant's demeanor during fifty-seven (57) days of trial and I have credited his testimony, and any confusion as to dates or events can simply be attributed to the passage of time." R. D. & O. at 97. This general and conclusory finding about Hall's credibility is not entitled to deference because an ALJ may not evade his responsibility to evaluate conflicting testimony by many witnesses on various disputed issues of fact by the expedient of decreeing the complainant as the most credible witness on any issue. See *Be-Lo Stores v. NLRB*, 126 F.3d 268, 278-279 (4th Cir. 1997) (rejecting ALJ's undifferentiated conclusion that he credited all 37 witnesses for the union and discredited all 43 witnesses for the company). "Otherwise, savvy ALJ's [sic] could simply ground their judgments in broad, categorical statements that they credit all of one party's witnesses and discredit all of the other party's witnesses, and thereby effectively insulate their decisions from meaningful judicial review." *Id.* at 279.²⁰

Consistent with his sweeping approach to witness credibility, the ALJ made fact findings without even acknowledging Dugway's evidence. R. D. & O. at 80-82, 85. We particularly note that the ALJ accepted Hall's testimony that the 1989 mental health evaluations were retaliatory without discussing important evidence about the effect of Hall's behavior on Brauner and Hoffman. *Id.* at 39, 71, 76, 86, 94. Nor did the ALJ discuss relevant evidence, such as the fact that the detail was voluntary, when he accepted Hall's testimony that the transfer to JOD was retaliatory and the argument in Hall's post-hearing briefs that Ertwine sought to cover up the unlawful purpose of the transfer. *Id.* at 30, 34, 87. Similarly, the ALJ found Hall's 1992 and 1995 performance evaluations to be retaliatory based on Hall's testimony without reference to rebuttal evidence such as Hall's failure to meet deadlines. *Id.* at 30, 34, 78, 88. And the ALJ ignored Dugway's evidence on Kiskowski's supposed "gag order," *id.* at 32, 36, 71, Hall's hostile editing claim, *id.* at 31, 41, 92, the security clearance reinvestigation, *id.* at 37, 75, 87, 90, 96, and Steelman's February reprimand, *id.* at 30, 82. Weighing conflicting evidence is the essence of an ALJ's responsibility. Cf. *Brindisi v. Barnhart*, 315 F.3d 783, 786 (7th Cir. 2003) (reversing ALJ findings for lack of adequate discussion of conflicting evidence because "the

²⁰ To match his in-for-a-penny-in-for-a-pound ruling on Hall's credibility, the ALJ airily waved away the absence of corroborating testimony for Hall: "[W]hile Respondent points out that Complainant's own witnesses were unable to cite any such examples [of Dugway animus toward Hall], the answer is simply that Dr. Hall did not get together with these witnesses and rehearse or suggest their testimony in any way."

ALJ's opinion is important not in its own right but because it tells us whether the ALJ has considered all the evidence" as required by law).

Finally, lack of citation to the record further undermined the utility of the ALJ's evidentiary analysis. The record is exceptionally large – 56 days of trial and more than 50 witnesses. Yet a majority of the ALJ's findings of fact do not identify the parts of the record on which he relied and often cite to irrelevant portions of the record. The evidentiary issues spanned a ten-year period. The witnesses testified in no particular order; indeed, witnesses for the defense testified during Hall's case in chief and vice versa. Record citations are always essential, both to the ALJ to confine his thinking to the actual record and not to vague recollections, and to the Board, so it may know precisely the basis for the ALJ's fact findings. In a case as complicated as this, those necessities are only magnified.

IV. The autocratic Army

The ALJ stated that "[t]his case is compounded by the fact that Complainant, a highly-educated professional chemist, is a civilian employee at a military facility and subject to its dogmatic, autocratic and hierarchical structure. . . ." R. D. & O. at 93. The record does not support this broad indictment of Dugway.

Hall was a civilian employee whose supervisors were mostly other civilian employees. Hall's specific complaints were primarily against civilian supervisors – Brauner, Bagley, Steelman, and Dumbauld. And military personnel frequently helped rather than hindered Hall. For instance, Commander Cox formally commended Hall after he reported the chemical storage problem. Tr. 4867 (Hall). Likewise, Hall's military supervisors gave him the only two highly successful performance evaluations he received. RX 129, CX 134. And Lieutenant Colonel Birdsong upgraded Hall's 1992 performance evaluation to highly successful after Brauner signed off on a fully successful.

Consistent with his distrustful view of the Army, the ALJ found, against the weight of the evidence that the Army issued gas masks that would not protect against ambient chemical agents because they were made with silicone rubber, a substance that is especially permeable to chemical agent. R. D. & O. at 16-17. The ALJ relied partly on the testimony of Mike LeFevre, a union official. LeFevre did not explain where he got his information. Tr. 4302-4303 (LeFevre). Nor did he have personal knowledge of or expertise in gas mask production. Yet, when he complained about the silicone mask to Dugway Commander King he received what he considered an "outrageous" reply – that the mask was adequate. Tr. 4312-4313 (LeFevre).

Curiously, the ALJ ignored the testimony of James Hanzelka, coordinator of protection testing at Dugway. Hanzelka testified that the masks were made with butyl-rubber-coated silicone edges. Tr. 11487 (Hanzelka). The silicone provided pliability necessary for a safe and comfortable seal, and the butyl coating prevented the silicone from acting as a wick into the mask. Tr. 11488 (Hanzelka); CX 112. The mask also had a hood assembly that created a "second skin." Tr. 11489 (Hanzelka). Hanzelka testified that troops were never issued silicone masks without butyl attachments. Tr. 11510 (Hanzelka).

The ALJ also accepted at face value Hall's testimony that Dugway manipulated gas mask testing when it instructed workers performing effectiveness tests on the masks to "fake" agent penetration by putting the agent on the glass part of the mask rather than the silicone parts. R. D. & O. at 16-17; Tr. 2220-2221 (Hall); Post-hearing Br. at 8. However, Hall did not explain why putting agent on the glass would invalidate the tests, and the few details he provided do not support his testimony. As noted, the masks in question were gas masks. Effectiveness testing for gas masks would naturally include measuring the mask's capacity to filter toxins out of the air that flows through the mask into the breathing zone. See Tr. 11511 (Hanzelka); Tr. 6767, 6819 (Nudell). Placing liquid agent on the glass outside of the mask and testing the air inside would be one way of determining whether airborne particles of the agent penetrated into the breathing zone. Hall assumed that the tests were meant to measure how much liquid agent penetrated the mask's silicone components. If that were so, putting the agent on the glass would obviously defeat the test's purpose. But nothing in the record supports Hall's – or the ALJ's – assumption or that Dugway manipulated the gas mask testing.

Again treating Dugway as an undifferentiated whole, the ALJ stated that "if there was any remaining doubt that Dugway would retaliate against an employee for reporting an environmental violation, one need look no further than Dugway's actions towards Ms. Judy Moran. . . ." R. D. & O. at 35. "Ms. Moran was an environmental compliance officer at Dugway and Dugway records reflect unambiguously that twice Dugway took disciplinary action against Ms. Moran explicitly because she also reported potential environmental violations and dangers to the state." *Id.* at 35-36. Yet the record belies this finding.

Dugway disciplined Moran on three occasions. It issued a reprimand and suspended Moran's security clearance in 1994 because she revealed classified information without authorization. Tr. 2970 (Moran); Tr. 9972 (Jorgensen). Dugway also suspended Moran's security clearance in 1998 because she was diagnosed with bi-polar disorder. Tr. 2971 (Moran); RX 158. The third occasion occurred in May 1998 when Moran's supervisor issued her a letter of reprimand.

The reprimand cited eight offenses, seven of which involved misconduct.²¹ The other offense involved a phone call she made to Utah's SHWD about a possible SWDA violation at Dugway. Dugway reprimanded Moran for the call to Utah because she did not consult her supervisor before she made the call, she had no personal knowledge about the incident, and she was undermining Dugway's position on an issue that her supervisor considered subject to reasonable dispute. CX170.

Moran's reprimand does not support the ALJ's blanket finding that Dugway retaliates against whistleblowers. For instance, Carol Nudell, a compliance specialist and test director who worked with Hall, testified that after she had contacts with a Congress person about environmental issues, a Dugway colonel sent her a letter saying she was free to express her views about environmental matters but should be clear that she was expressing her personal

²¹ Moran's misconduct included loud and profane confrontations with her supervisors, refusal to perform assigned duties, telling an official at a meeting that "if you had half a brain you'd know," and similar misbehavior. CX 170.

views only. Tr. 6736 (Nudell). And Jimmy Lee White, a test officer and union representative who worked with Hall testified that he complained to Congress about a Dugway contract with Lockheed. Dugway did not retaliate – it promoted him. Tr. 10530 (White). Furthermore, in 2001, Dugway hired Gary Miller, a whistleblower formerly employed by an Air Force contractor. Tr. 11691 (Miller). Thus, in light of all the evidence, Moran’s reprimand does not establish a culture of repression at Dugway.

A final observation about the R. D. & O. - one of Hall’s supervisors allegedly remarked that Hall should be “turkey farmed.” Tr. 634 (Steelman); Tr. 9713 (Condie). The ALJ interpreted the comment as an expression of hostility toward Hall because of his whistleblowing activities. R. D. & O. at 33. But we find that if the supervisor made the remark, he was referring to Hall’s lack of productivity. The record is overwhelmingly clear that Hall had great difficulty meeting deadlines and producing clear reports. Hall’s colleagues, supervisors, and managers all testified that he was unable to work at a normal pace and produce clear reports. Tr. 502, 511, 513 (Steelman); Tr. 4419-4420, 4482, 4496 (Dement); Tr. 5459-5460 (Brauner); Tr. 8812 (Bagley); Tr. 8436 (Kiskowski); Tr. 1107-1108 (Brimhall); Tr. 26, 48 (Chinn); Tr. 2239 (Proctor); Tr. 7185, 7224, 7287-7288 (Nudell); Tr. 9906-9907 (Jorgensen); Tr. 9708-9710 (Condie); Tr. 87 (Ertwine); Tr. 10538 (White); Tr. 12005 (Kelly); Tr. 1230, 1235-1236, 1239-1240, 1265 (Warr); Tr. 1327 (Bilthof); Tr. 7 (Christiansen); Tr. 296 (Stansbury).

CONCLUSION

Hall alleged that Dugway subjected him to a hostile work environment from 1988 to 1997 while he repeatedly complained to Dugway supervisors and Utah officials about conditions he believed to be environmentally unsafe, including SWDA-regulated hazards. Hall claims that Dugway’s hostile actions compelled him to resign in 1997. But we must dismiss Hall’s complaint because he did not carry the burden of proof necessary to prevail in a hostile work environment whistleblower case. That is, Hall did not prove by a preponderance of the evidence that Dugway created a hostile work environment because of his protected complaints about SWDA-regulated hazards. Hall did not prove that any of the alleged hostile acts were taken in retaliation for his protected activity. As well, he did not prove that the transfer to JOD, the temporary removal from CPRP, or the hostile editing acts were sufficiently severe so as to constitute abuse. Therefore, it is ordered that Hall’s complaint be **DISMISSED**.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge