



In the Matter of:

**SHARYN ERICKSON,

COMPLAINANT,**

**ARB CASE NO. 03-002
03-003
03-004
03-064**

v.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 4,
ATLANTA, GA**

**ALJ CASE NOS. 1999-CAA-2
2001-CAA-8
2001-CAA-13
2002-CAA-3
2002-CAA-18**

RESPONDENT.

DATE: May 31, 2006

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

***Edward A. Slavin, Jr., Esq., St. Augustine, Florida; Sharon Erickson, pro se,
Lawrenceville, Georgia***

For the Respondent:

***Charles G. Starrs, Esq., Office of the General Counsel, Environmental
Protection Agency, Washington, D.C.; Karol S. Berrien, Esq., Associate
Regional Counsel, Environmental Protection Agency, Atlanta, Georgia; Eric
Hanger, Esq., OIG Office of Counsel, Environmental Protection Agency,
Washington, D.C.***

For the Amicus Curiae:

***Howard M. Radzely, Solicitor of Labor, Steven J. Mandel, Associate
Solicitor, Ellen R. Edmond, Senior Attorney, Carol Arnold, Attorney, United
States Department of Labor, Washington, D.C.***

FINAL DECISION AND ORDER

Between 1998 and 2002, Sharyn Erickson filed 11 whistleblower complaints in which she alleged that her employer, the Environmental Protection Agency (EPA), Region 4, and the EPA Office of Inspector General (OIG or IG) violated the employee protection sections of six federal environmental statutes.¹ A United States Department of Labor Administrative Law Judge (ALJ) concluded that EPA and OIG violated the statutes and recommended that Erickson be reinstated to her previous position and be awarded back pay, compensatory, and punitive damages.² All three parties petitioned us to review the ALJ's Recommended Decision and Order (R. D. & O.). We conclude that EPA did not violate the statutes and therefore dismiss Erickson's complaints.

BACKGROUND

EPA Region 4, located in Atlanta, Georgia, administers contracts with private companies to clean up hazardous waste sites in the southeastern states. Hearing Transcript (Tr.) 1476. Region 4 contract specialists, "contract officers," assure that the contracts meet applicable legal requirements. Environmental scientists, "program officers," are responsible for the contracts' substantive content, such as the cleanup methods to be used and degree of decontamination to be achieved. Tr. 2253, 2261-2262, 2447-2448, 1816-1818, 1822, 1824-1825, 1869; CX 11C-11, 11C-14, 27B-27E, 27L-27M, 11T.³

¹ The Safe Drinking Water Act, 42 U.S.C.A. § 300j-9(i)(1)(A) (SDWA) (West 2003); the Clean Air Act, 42 U.S.C.A. § 7622(a) (CAA) (West 2003); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. § 9610(a) (CERCLA) (West 2005); the Toxic Substances Control Act, 15 U.S.C.A. § 622(a) (TSCA) (West 1998); the Federal Water Pollution Prevention and Control Act, 33 U.S.C.A. § 1367(a) (FWPPCA) (West 2001); the Solid Waste Disposal Act, 42 U.S.C.A. § 6971(a) (SWDA) (West 2001). The Administrative Law Judge held that EPA and OIG were immune from suit under TSCA. Recommended Decision and Order at 52 n.82.

² Erickson names EPA and the EPA Office of the Inspector General each as a respondent in its own right. The EPA IG is employed by, acts on behalf of, and operates for the benefit of EPA. 5 U.S.C.A. app. 3 (West 1996) (Inspector General Act of 1978); *cf.* *NASA v. FLRA*, 527 U.S. 229, 240-241 (1999) (the fact that the Inspector General Act authorizes agency IGs to conduct investigations without interference from the agency does not make the NASA IG "any less a representative of NASA when it investigates a NASA employee."). Thus, Erickson's complaint against the EPA encompasses her allegations against the EPA IG. Therefore, we refer to "EPA" and "EPA IG" simply as the "EPA." We use the terms "Region 4" and "IG" or "OIG" when our discussion pertains to those specific units within EPA.

³ We refer to Erickson's exhibits with the abbreviation, "CX." We refer to EPA exhibits with the abbreviation, "EPAX." We refer to the Inspector General's exhibits with the abbreviation "OIGX."

Erickson served as a contract specialist, GS-12 pay grade, in Region 4's Procurement Section from 1989 until 1994. EPAX 90, 91. Erickson began having conflict with her supervisor, Jane Singley, in 1992. EPAX 32 pp. 3-4. The following year, Erickson's conflicts with Singley escalated and expanded to include supervisors Nancy Bach and Keith Mills. EPAX 17, 18, 25, 28, 29, 31, 34. Mills criticized Erickson's research on whether EPA could disclose confidential business information. EPAX 26, 27. He also criticized her negotiations with Bechtel Environmental Company over the firm's right to reject projects in Region 4. *Id.* In grievances and unfair labor practice complaints, Erickson accused Singley, Bach, and Mills of giving her unnecessary tasks to force her to work unpaid overtime. EPAX 25, 28, 29, 31. Two contractors also complained about Erickson's work during this period. EPAX 15; OIGX 1 p. 14. Furthermore, all three supervisors criticized Erickson's documentation of a Superfund contract with OHM, Inc., and the briefings she gave them about changes to that contract.⁴ EPAX 25, 29. And when Mills or Singley wrote what Erickson considered critical comments in the official OHM file, she wrote rebuttals in the margin. EPAX 26, 27, 28.

The OHM Contract

The OHM contract was a fixed price Superfund contract to clean up an abandoned wood preserving site in Mississippi ("the Southeastern site"). Tr. 1817, 2118; CX 28M. The ground at the Southeastern site was contaminated with carcinogenic residue from creosote that had been used as a wood preservative. Tr. 1837. The contract specified the soil-cleaning techniques to be used and set a 30 parts per million (ppm) limit on the ratio of contaminant-to-soil that could remain after the cleanup. In attempting to comply with the contract requirements, however, OHM discovered that the specified cleaning techniques were unsuited to conditions at the site and that the lowest measurable ratio of contaminant-to-soil was substantially higher than 30 ppm. Tr. 1822-1830, 2155-2158; OIGX 1 pp. 31-32, 35-44; CX 27E, 27F.

Erickson was the contract officer on the OHM contract. Erickson, who is not a lawyer, thought that OHM had grounds to sue EPA and that EPA might have to pay litigation costs, an award to OHM, and the cost of another round of remediation at Southeastern. Tr. 2119, 2155. But OHM chose to work with EPA scientists and Erickson to reform the contract and make the site as safe as possible. OHM wanted to develop more expertise, become a leader in cleaning up the many abandoned wood preserving sites around the country, and maintain good relations with EPA. Tr. 2121-2122, 1832; CX 27F, 28M.

In June 1993, Erickson told Mills she was helping OHM prepare its proposal for the contract reformation. Mills thought that Erickson might not be sufficiently neutral in

⁴ The "Superfund" is a federal trust fund established to underwrite cleaning up certain hazardous wastes, especially wastes that the Comprehensive Environmental Response Compensation and Liability Act of 1980 regulates. *See* 26 U.S.C.A. § 9507 (West 2002).

evaluating a proposal she had helped to write and asked her if she was maintaining her objectivity about this assignment. EPA 1, 4, 5; Tr. 1608-1624, 1715-1719. Erickson took Mills's question as an accusation that she was biased in OHM's favor. Tr. 2124; EPAX 5. Therefore, the next day, June 18, she sent Mills an email, with a copy to the local union president. EPAX 5. In her email, Erickson argued that no one could reasonably question her neutrality because OHM took an overall loss by finishing the project rather than suing EPA. *Id.*

Ultimately, OHM and EPA reached agreement on revised extraction methods, an extension of time for completing the cleanup, and raising the ppm limits. EPA and OHM also decided that EPA would pay an additional \$498,000 to OHM to seal off an area that could not be adequately cleaned. Tr. 1485, 1487, 1817-1822, 1825-1828, 1837, 2155-2158, 2253; CX 11C-14, 27E, 27F.

In late summer, early fall 1993, Singley and Mills signed off on Erickson's revisions to the contract. EPAX 25 p. 8, 28, 91, 92. But after an environmental scientist in the Region 4 Program Office questioned Singley, Bach, and Mills about the additional \$498,000 cost, they took a closer look at the file and asked Erickson for several briefings. EPAX 1-7, 12, 17-25, 28 p. 2.

Erickson was used to working with little supervision, and during these meetings she perceived many of her supervisors' questions as criticism. Tr. 2114; EPAX 25-29. She twice refused Mills's request that she put into the OHM file an arithmetical computation that showed that OHM's profit on the additional \$498,000 did not exceed applicable limits. Tr. 1476-1489, 2127-2130; EPAX 12. Although writing out the actual calculation was very minor work, and the computation was clearly relevant, Erickson told Mills that she should not have to show the actual numbers because it was "obvious" that OHM's profit was not excessive. *Id.* Erickson perceived Mills's request as part of a deliberate strategy of overloading her with spurious assignments. Tr. 1498. Because she refused his requests, Mills removed Erickson as the contract officer on the project so he would have authority to put the calculation into the official record himself. Tr. 1487-1488.

Erickson followed up by filing two grievances and an unfair labor practice (ULP) complaint. EPAX 25, 29, 31, 32. She complained that Singley, Bach, and Mills made unwarranted criticisms about her work with the Bechtel company, her advice about confidential business information, and her documentation and briefings for the OHM contract reformation. She also claimed that they forced her to work unpaid overtime by requiring her to perform unnecessary tasks. EPAX 25, 26, 28, 29, 31, 32; Tr. 2138, 2287, 2294-2295.

In written narratives explaining her grievances, Erickson attributed her supervisors' specific criticisms to technical incompetence and lack of knowledge about what she had actually done. EPAX 32 at 6 ("they did not even comprehend the complexity of my contract"); EPAX 29 p. 2 ("my being accused of giving inconsistent information was, in fact, Mr. Mill's [sic] confusion of the issues"); Tr. 2139 ("then [Mills]

took away Bechtel based on a total misunderstanding [about] the federal facilities issue and indemnification issues”). And she wrote that they began a campaign of harassment against her because she sent a copy of her June email to the union president. Tr. 2138 (“It started the minute I sent the thing [her June email to Mills] to Yeast [the union president].”); EPAX 31 p. 8, 32 p. 4.

Temporary Transfer Out of Procurement Section

In her grievances, Erickson asked to be moved out of the Procurement Section. EPAX 25, 31. Although Erickson ultimately lost the grievances, she was transferred out of Procurement. EPAX 30, 35. This process began in early 1994 when Deborah Maxwell, the Branch Chief responsible for both the Procurement Section and the Grants Section, decided to place Erickson under her own direct supervision. OIGX 1 pp. 46-50. After a month, however, Maxwell decided this arrangement was not working. Maxwell found Erickson “out of control, always bitter, and always arguing.” *Id.* at 48. Therefore, in July 1994, Maxwell temporarily transferred (“detailed”) Erickson to the Grants Section and gave Erickson a mix of contract and other assignments. Maxwell allowed Erickson to work with Region 4 environmental scientists in reviewing other Region 4 cleanup plans for impossibility-of-performance issues as in the first Southeastern contract. Tr. 2154-2455.

But in late 1994 Erickson made changes to a contract file over which she had no authority. OIGX 1 p. 49. At that point, Maxwell, who had concluded that Erickson lacked the judgment to be entrusted with federal contract authority, eliminated contracts work entirely from Erickson’s position description and expressly told Erickson not to do any contract work. *Id.*

Nevertheless, in January 1995, Erickson gave Ed Springer, her Grants supervisor, a copy of a document titled “Contract Requirements vs. Performance Criteria or Standards.” OIGX 1 p. 66. Erickson helped write this guidance to assist contractors to develop effective remediation plans. Tr. 2261. Springer asked her why she was working on a contract and why the document, which was not an official EPA statement, was on EPA letterhead. EPAX 45; OIGX 1 p. 78. Then, in February, when reporting what she planned to do while working at home (“flexiplace”), Erickson told Springer that she planned to look for ideas for improving EPA contracts by reviewing old contracts from the Warner Robins Air Force Base where she previously worked. CX 11C-4. Springer reminded her that she was not to work on contract matters. CX 11C-2 p. 3, 11C-4b, 11C-4d.

The North Cavalcade Remediation Project

Erickson called Jim Cady at OHM in February 1995 to ask that OHM send in a final report on their work at the Southeastern site. OIGX 1 pp. 151-152; OIGX 1 p. 202. During this call, Cady told Erickson that the Texas Natural Resources Conservation

Commission (TNRCC) had invited OHM to bid on a project to clean up an old wood preserving site in North Cavalcade, Texas. *Id.* Cady told Erickson that the TNRCC bid invitation presented the same feasibility problems as had the original Southeastern contract. *Id.*

Even though Erickson knew that OHM was sending a detailed account of the Southeastern experience to TNRCC, she decided that she would try to stop TNRCC from committing itself to a flawed cleanup plan. OIGX 1 p. 82; Tr. 695, 2523. Over the next two weeks, Erickson made numerous calls to TNRCC and EPA Region 6 in Dallas. Tr. 2532; OIGX 1 pp. 80-80A, 94-97, 149. In these calls, Erickson explained what she had learned working with OHM on the Southeastern wood preserving site cleanup and that unlike OHM, which was a “good contractor,” the winner of the North Cavalcade project would probably back out of a half-completed job and sue TNRCC and Region 6. Then the agencies would incur litigation costs and have to pay another contractor to clean the site properly. Tr. 2515-233; OIGX 1 pp. 202-208.

Because Erickson was home on flexiplace when she made the first calls, she had Cady fax documents from OHM to TNRCC and Region 6, including Erickson’s draft “Contract Requirements vs. Performance Criteria or Standards” (on EPA letterhead) and a published article about the Southeastern project that listed Erickson and OHM as coauthors. OIGX 1 pp. 98-140.

When Larry Wright, the Region 6 Superfund Program Chief, saw that the fax was coming from OHM, he became concerned because he knew OHM was one of 33 firms to have submitted a bidder qualification statement to TNRCC on the North Cavalcade project. OIGX 1 p. 95. When Erickson called again the next day, Wright said very little because of his concern with Erickson’s connections to OHM. *Id.* The Region 6 project manager to whom Erickson spoke, Glen Celerier, had many years of government contracting experience but “had never experienced a contracting officer becoming involved in the technical aspects of a contract matter on behalf of a bidder as Erickson did in this instance.” OIGX 1 p. 149. In fact, the TNRCC and the Region 6 people that Erickson had spoken with asked her why she wanted favoritism for OHM. Tr. 2533. She told them that, “I didn’t want favoritism for OHM or any other contractor. This was strictly a matter of government and taxpayer liability” *Id.* Erickson felt she was acting in the best interests of the government and as a taxpayer who has the right to question the use of her tax dollars. OIGX 13 pp.1-203.

Despite Erickson’s efforts, neither Region 6 nor TNRCC was persuaded that the bid invitation was defective, but they did postpone the bid for two weeks and added a no-government-liability proviso. OIGX 1 p. 80A. OHM did not submit a bid. Tr. 2264. Shortly thereafter a Region 6 employee called Region 4 to raise questions about the propriety of Erickson involving herself in the TNRCC bid process. Tr. 1268-1269, 1732; OIGX 1 p. 149. Region 6 forwarded copies of the documents they received from OHM to Region 4. Region 4 Legal Counsel, Phyllis Harris, thought that the information from Region 6 raised the possibility that Erickson had violated federal conflict of interest laws that prohibit a federal employee, for personal gain, to assist a private party in a claim

against the government.⁵ Harris recommended to Region 4 Acting Assistant Regional Administrator, William Waldrop, that the matter be referred to the EPA Office of Inspector General (IG or OIG) for investigation. Tr. 1733. Waldrop accepted the recommendation and made the referral on March 10, 1995. Tr. 1731-1733. He also detailed Erickson out of the Procurement and Grants Branch and into the Information Management Branch (IMB) and ordered her not to discuss contracts work with anyone. EPAX 51.

The OIG Investigation

When Erickson learned that OIG was considering whether to accept Waldrop's referral, she called one of the investigators and "demanded that they open the investigation to get it cleared up right away." Tr. 2180-2181. Shortly after Waldrop's referral to OIG, Erickson also wrote to several members of Congress to complain that Region 4 was using the investigation to punish her for her ULP complaint. OIGX 22, 23; Tr. 2189-2191.

The IG thought that the matter warranted investigation and began interviewing the OHM, EPA, TNRCC and Region 6 personnel who had been involved. Tr. 694; OIGX 1 pp. 3-10. The investigation prompted Erickson, in April 1995, to file a Freedom of Information Act (FOIA) request with OIG, asking for copies of its investigative documents. OIGX 17.

By August 30, 1995, the IG had determined that Erickson had not been lobbying on OHM's behalf and that she had not committed a crime. Tr. 369, 694, 812, 846, 867-868; OIGX 1 pp. 3-10. The IG so notified Region 4 and sent the Region its investigative report with instructions to hold the report confidential and to return it to the IG. OIGX 2.⁶ The IG advised Region 4 that it could not close its investigative file until it received word from the Region about what administrative action, if any, the Region would be taking. *Id.*

Erickson learned that OIG had sent its report to Region 4 and filed a second FOIA request with OIG in September, asking for a copy of the report. OIGX 19. OIG denied both requests because FOIA does not require agencies to disclose information about open law enforcement investigations. OIGX 19 (citing 5 U.S.C.A. §§ 552(b)(5) and

⁵ 18 U.S.C.A. § 205 (West 2000).

⁶ "This report is the property of the Office of Investigation and is loaned to your agency. It and its contents may not be reproduced without written permission. The report is FOR OFFICIAL USE ONLY and its disclosure to unauthorized persons is prohibited." OIGX 1 p. 3. In the covering transmittal memorandum, the IG requested that Region 4 return the report after reviewing it. OIGX 2 p. 2. The record does not reflect whether Region 4 returned the report.

552(b)(7)(A)). The OIG promised Erickson to send her releasable information after closure of the investigative file. OIGX 18, 19.

The administrative action that Waldrop decided to take was to make Erickson's transfer to Information Management permanent. He notified OIG about Erickson's permanent transfer in a memo dated March 28, 1996. OIGX 3. That decision was not finally implemented until then because of intervening personnel freezes. Thus, the IG did not close its file on Erickson until May 1996. OIGX 4. And Waldrop did not give Erickson a copy of the IG's final report. Tr. 1775. Erickson became aware of the permanent transfer in or around late March 1996. R. D. & O. at 28; Tr. 2984-2985.

Erickson at IMB

In September 1995, IMB Chief Sweeney assigned Erickson to the position of Information Resources Coordinator. Tr. 2216-2217, 2228-2229, 2998. Erickson was responsible for, among other things, administering contracts for computer software development. EPAX 102. As in her old position at Procurement, she was responsible for compliance with federal contract regulations, managing the flow of funding, approving contractor travel, and resolving any performance problems contractors might have. Tr. 2218, 2221, 2224. She also worked with work assignment managers (WAMs) who had computer expertise and who worked directly with the contractors' computer specialists. Tr. 2218-2219. Erickson's primary responsibility was to serve as the project officer and point of contact with the General Services Administration (GSA) on Region 4's Interagency Agreement with GSA. Tr. 2217-2219.

But Erickson was not satisfied with her position in IMB as the Information Resources Coordinator. She felt that she was underutilized, lacked and could not acquire necessary computer skills, and was being excluded from her chosen career field as a contract specialist. Tr. 2221, 2458, 2460, 3082. In 1997, she began applying for contracting positions in the Procurement Section, still under Mills's supervision. EPAX 60. In March she received notice that Mills had not selected her. She then filed her first environmental whistleblower complaint on April 9, 1998.

April 1998 to Present

The Occupational Safety and Health Administration (OSHA) investigated Erickson's April 1998 complaint and determined that it lacked merit.⁷ Erickson requested a hearing and the case was assigned to an ALJ.⁸ Meanwhile, OIG responded to Erickson's 1995 FOIA requests in October 1998 with copies of part of the file but not the

⁷ OSHA investigates environmental whistleblower complaints. 29 C.F.R. § 24.4(b)-(d)(2005).

⁸ See 29 C.F.R. §§ 24.4(d)(2), 24.6.

final report. OIGX 20. And during the period September 1, 1998, through December 5, 2001, Erickson filed ten more whistleblower complaints against Region 4 and the OIG, alleging additional adverse actions taken because of her April 1998 environmental whistleblower complaint. These allegations included several more non-selections for employment in the Procurement Section, a written warning in August 1998, subjecting her to a “din of hostile remarks” at a staff meeting in February 2000, suspending her flexiplace privileges in March and May 2001, calling her “paranoid” during a litigation conference call, and making a bad-faith settlement offer. OSHA investigated some of the complaints and found no merit. OSHA did not investigate the other complaints but forwarded them to the ALJ. The ALJ consolidated the ten additional complaints with the April 1998 complaint. After a twelve-day hearing from May 6 to June 18, 2002, the ALJ concluded that EPA had retaliated against Erickson because of her protected activity.

On November 24, 2002, the ALJ issued the R. D. & O. in which he recommended that EPA reinstate Erickson as a GS-13 contract officer, pay Erickson back pay for raises she would have received had she been promoted to a GS-13 on March 10, 1995, pay Erickson compensatory damages in the amount of \$50,000, and pay Erickson punitive damages in the amount of \$225,000. R. D. & O. at 92-98. On February 7, 2003, the ALJ issued an order recommending that Erickson’s petition for attorney fees and expenses in the amount of \$202,378 be denied as a sanction for counsel’s repeated failure to file the petition within time allowed. EPA, OIG, and Erickson each petitioned the Administrative Review Board (ARB or the Board) to review the R. D. & O. Erickson also petitioned for review of the order denying attorney fees and expenses. EPA and OIG contend that Erickson’s complaints should be vacated. Erickson requests that we increase the amount of compensatory and punitive damages, that we order EPA to promote her to GS-14 rather than GS-13, remove the managers who discriminated against her, delete a footnote in the R. D. & O. in which the ALJ criticized Erickson’s counsel, and issue an order protecting Erickson from oppressive EPA managers.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review the ALJ’s recommended decision.⁹ 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.¹⁰ The ARB engages in de novo review of an ALJ’s recommended decision in cases pertaining to the environmental acts.¹¹

⁹ Secretary’s Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 24.8.

¹⁰ See 5 U.S.C.A. § 557(b) (West 2004).

¹¹ *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ No. 97-CAA-2, slip op. at 15 (ARB Feb. 29, 2000).

In weighing the testimony of witnesses, the fact finder considers the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony and the extent to which the testimony was supported or contradicted by other credible evidence.¹² The ARB gives great deference to an ALJ's credibility findings that "rest explicitly on an evaluation of the demeanor of witnesses."¹³

DISCUSSION

I. Sovereign Immunity

"The United States, as sovereign, 'is immune from suit, save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'"¹⁴ Only Congress can waive federal immunity, and Congress must "unequivocally express" any waiver in the statute.¹⁵ States, too, are sovereigns and may invoke sovereign immunity from suits by private parties unless Congress has expressly abrogated state immunity.¹⁶ The requirement that Congress express its intentions unmistakably in the statutory text applies to waivers of federal immunity and to abrogation of state immunity.¹⁷

¹² *Cobb v. Anheuser Busch, Inc.*, 793 F. Supp. 1457, 1489 (E.D. Mo. 1990); *Shrout v. Black Clawson Co.*, 689 F. Supp. 774, 775 (S.D. Ohio 1988).

¹³ *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 00-062, ALJ No. 1999-STA-21, slip op. at 9 (ARB July 31, 2001) quoting *NLRB v. Cutting, Inc.*, 701 F.2d 659, 663 (7th Cir. 1983). *Accord Lockkert v. United States Dep't of Labor*, 867 F.2d 513, 519 (9th Cir. 1989) (court will uphold ALJ's credibility findings unless they are "inherently incredible or patently unreasonable").

¹⁴ *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)).

¹⁵ *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990); *Pastor v. Dep't of Veterans Affairs*, ARB NO. 99-071, ALJ No. 99-ERA-11, slip op. at 23 (ARB May 30, 2003).

¹⁶ *Hans v. Louisiana*, 134 U.S. 1 (1890). *See also Ewald v. Virginia Dep't of Waste Mgmt.*, ARB No. 02-027, ALJ No. 89-SDW-1 (ARB Dec. 19, 2003) (holding Virginia state agency immune from suit under CERCLA, RCRA, CWA, and SDWA whistleblower provisions); *Cannamela v. Georgia Dep't of Natural Res.*, ARB No. 02-106, ALJ No. 02-SWD-2 (ARB Sept. 30, 2003) (holding Georgia state agency immune from suit under CERCLA and SWDA whistleblower provisions).

¹⁷ *Irwin*, 498 U.S. at 95; *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

In *Powers v. Tennessee Dep't of Env't and Conservation*, we held that “while CERCLA, SWDA, TSCA, FWPCA, SDWA, and CAA may require states to comply with the regulatory provisions of these acts, they do not provide for private rights of action for money damages against states and state agencies.”¹⁸ Under CERCLA, a “person” (defined to include a state¹⁹) is prohibited from discriminating against whistleblowers, but only a “party” who discriminated is subject to the process and remedies for discrimination.²⁰ Because “party” is not defined in CERCLA to include states, there is no unequivocal abrogation of sovereign immunity. Further, the fact that CERCLA permits citizen suits for enforcement only “to the extent permitted by the [Constitution]”²¹ suggests only a limited abrogation of immunity.²² The same analysis applies to FWPCA²³ and SWDA.²⁴

Similarly, pursuant to TSCA, an “employer” is prohibited from discriminating against whistleblowers, but only a “person” who discriminated is subject to the process and remedies for discrimination.²⁵ Because “person” is not defined in TSCA to include a state, there was no unequivocal abrogation of sovereign immunity. Under CAA, an “employer” is prohibited from discriminating against whistleblowers, but only a “person” who discriminated is subject to the process and remedies for discrimination.²⁶ Although “person” is defined in CAA to include states,²⁷ “employer” is not defined to include states. There is thus no unequivocal abrogation of sovereign immunity. In addition, the CAA permits citizen suits for enforcement, but only “to the extent permitted by the

¹⁸ ARB Nos. 03-061, 03-125, ALJ Nos. 2003-CAA-8, 2003-CAA-16, slip op. at 7 (Aug. 16, 2005).

¹⁹ 42 U.S.C.A. § 9601(21).

²⁰ 42 U.S.C.A. § 9610(a), (b).

²¹ 42 U.S.C.A. § 9659(a)(1).

²² *Cf. Pastor*.

²³ *See* 33 U.S.C.A. §§ 1367(a)-(b), 362(3), 1365(a)(1)(ii).

²⁴ *See* 42 U.S.C.A. §§ 6971(a)-(b), 6903(1), 6972(a)(1)(A).

²⁵ 15 U.S.C.A. § 2622(a)-(b)(1).

²⁶ 42 U.S.C.A. § 7622(a),(b).

²⁷ 42 U.S.C.A. § 7602(e).

Eleventh Amendment.”²⁸ The same analysis applies to SDWA.²⁹ Thus, we saw no clear intent to abrogate state immunity from liability for noncompliance with the whistleblower provisions.

In light of our decision in *Powers*, the Board afforded the parties an opportunity to brief us on the question whether we lack jurisdiction over Erickson’s complaint against EPA. We invited the Solicitor of Labor to submit an amicus curiae brief on the question.

EPA argues that the text of the environmental whistleblower protection provisions contains no clear, unequivocal waiver of Federal sovereign immunity from whistleblower liability under CAA, CERCLA, FWPCA, SDWA, SWDA, and TSCA. Accordingly, we should dismiss Erickson’s complaint for lack of subject matter jurisdiction. EPA S. Br. at 19.

The Solicitor of Labor argues that the United States has waived its sovereign immunity under the whistleblower provisions of the CAA, SDWA, SWDA, and CERCLA but not under the FWPCA or TSCA. Thus, in the Solicitor’s view, we have jurisdiction over Erickson’s complaint to the extent it alleges violations of the CAA, SDWA, SWDA, and CERCLA. Sol. S. Br. at 14.

In support of his argument, the Solicitor of Labor submitted an unpublished opinion of the Office of Legal Counsel (OLC). The Office of Legal Counsel serves the Attorney General in his function as legal advisor to the President and all the executive branch agencies.³⁰ Specifically, the OLC drafts opinions on behalf of the Attorney General in response to questions from the Counsel to the President and other executive agencies.³¹ The United States Supreme Court long ago held that OLC opinions are binding on executive branch agencies.³²

The OLC opinion holds that Congress waived the federal government’s sovereign immunity with respect to the whistleblower provisions of the SWDA and the CAA but not as to the FWPCA. SOL Br. Attachment. The Solicitor asserts that since OLC

²⁸ 42 U.S.C.A. § 7604(a)(1)(ii).

²⁹ See 42 U.S.C.A. §§ 300j-9(j)(1), (2)(B)(i), 300f (12), 300j-8(a)(1)(B).

³⁰ 28 U.S.C.A. § 512 (West 1993).

³¹ 28 C.F.R. § 9.25(a) (2005).

³² See *Smith v. Jackson*, 246 U.S. 388, 389-391 (1918) (finding that Auditor did not have power to refuse to carry out law and any doubt he may have had should have been subordinated to ruling of the Attorney General); See also Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective From the Office of Legal Counsel*, 32 ADMIN. L. REV. 1303 (2000).

opinions are binding on executive branch agencies, this opinion is binding on the Administrative Review Board because the Board's authority to issue final agency orders in cases under the environmental whistleblower statutes is based on the Secretary of Labor's delegation. SOL Br. at n.2. We agree that the OLC opinion is binding on us because we act in the Secretary's stead in these cases³³ and can exercise only "the powers which [she] would have in making the initial decision."³⁴ Therefore, we proceed to the merits of Erickson's SWDA and CAA claims.³⁵

II. The Legal Standard

To prevail on her environmental whistleblower complaints under SWDA and CAA, Erickson must prove by a preponderance of the evidence that she engaged in protected activity, that EPA knew about her protected acts, and that EPA took adverse action because of her protected activity.³⁶

III. Protected Activity

The environmental whistleblower acts protect employees who commence a proceeding under any of the acts or a proceeding to administer or enforce any requirements the acts impose, or who testify in such a proceeding, or who assist or participate in such a proceeding or in any other action to carry out the purposes of the acts.³⁷ The term "proceeding" encompasses all phases of a proceeding that relates to public health or the environment, including an internal or external complaint that may precipitate a proceeding.³⁸

³³ 67 Fed. Reg. 64,272 (Oct. 17, 2002).

³⁴ 5 U.S.C.A. § 557(b).

³⁵ Thus we deny David L. Lewis's Motion for Reconsideration of the Administrative Review Board's Order Denying Motion to Intervene and Motion of Public Employees for Environmental Responsibility (PEER) and the Government Accountability Project (GAP) to Participate as *Amici Curiae* as moot.

³⁶ *Sayre v. Veco Alaska, Inc.*, ARB No. 03-069, ALJ No. 00-CAA-7 slip op. at 7-8 (ARB May 31, 2005); 29 C.F.R. § 24.2(a).

³⁷ 29 C.F.R. § 24.2(b). *See* 42 U.S.C.A. § 6971(a) (SWDA); 42 U.S.C.A. § 7622(a) (CAA).

³⁸ *Jenkins v. EPA*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 18 (ARB Feb. 28, 2003).

The Board has held that an employee who makes a complaint to the employer that is “grounded in conditions constituting reasonably perceived violations” of the environmental acts, engages in protected activity.³⁹ Similarly, expressing concerns to the employer that constitute reasonably perceived threats to environmental safety is protected activity under the environmental whistleblower protections.⁴⁰

The employee need not prove that the hazards he or she perceived actually violated the environmental acts.⁴¹ Nor must an employee prove that his assessment of the hazard was correct.⁴² And we have also held that an employee need not prove that the condition he or she is concerned about has already resulted in a safety breakdown.⁴³ On the other hand, a complaint that expresses only a vague notion that the employer’s conduct might negatively affect the environment is not protected.⁴⁴ Nor is a complaint that is based on numerous assumptions and speculation.⁴⁵

Erickson contends that she engaged in the following protected activities.

³⁹ See e.g., *Devers v. Kaiser-Hill Co.*, ARB No. 03-113, ALJ No. 01-SWD-3, slip op. at 11 (ARB Mar. 31, 2005); *Kesterson v. Y-12 Nuclear Weapons Plant*, ARB No. 96-173, ALJ No. 95-CAA-12, slip op. at 2 (ARB Apr. 8, 1997). Cf. *Bechtel Constr. Co. v. Sec’y of Labor*, 50 F.3d 926, 931-932 (11th Cir. 1995) (applying “reasonably perceived” test to analogous Energy Reorganization Act, 42 U.S.C.A. § 5851).

⁴⁰ See e.g. *Knox v. United States Dep’t of Interior*, ARB No. 06-089, ALJ No. 01-CAA-3, slip op. at 3 (ARB Apr. 28, 2006).

⁴¹ *Yellow Freight Sys. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992); *Minard v. Nerco Delamar Co.*, No. 92-SWD-1 (Sec’y Jan. 25, 1994); *Crosby v. Hughes Aircraft Co.*, No. 85-TSC-2, slip op. at 25-26 (Sec’y Aug. 17, 1993).

⁴² Cf. *Passaic Valley Sewerage Comm’rs v. United States Dep’t of Labor*, 992 F.2d 474, 479 (3d Cir. 1993) (protecting employee warnings even when the employee is mistaken encourages resolution of the dispute without litigation and affords management the opportunity to justify or clarify its policies to the employee).

⁴³ *High v. Lockheed Martin Energy Sys.*, ARB No. 03-026, ALJ No. 96-CAA-8, slip op. at 8 (ARB Sept. 29, 2004) (“High’s expression of concern did not have to be borne out later in catastrophe to have protected status.”).

⁴⁴ *Kesterson*, slip op. at 2; *Gain v. Las Vegas Metro. Police Dep’t.*, ARB No. 03-108, ALJ No. 02-SWD-4, slip op. at 3 n.3 (ARB June 30, 2004).

⁴⁵ *Crosby*, slip op. at 27-28.

1. June 18, 1993 Email to Mills

After Erickson told Mills that she was helping OHM to reform the Southeastern contract, Mills questioned her objectivity. Erickson then sent an email to Mills on June 18, 1993. Erickson wrote:

Since I am being accused again of doing something wrong in reaching this agreement with OHM, I should just back out of it and let OHM's lawyers handle the matter the way they tried to talk OHM's management into letting them do and see for yourself exactly how much 'favoritism' I was giving them and how much more it will cost the agency in addition to the administrative and legal time and costs.

EPAX 5.

Erickson testified that the email meant, "let them take it to court . . . and then all this stuff will come out about . . . the analytical problems and whether – whether EPA can adequately determine that people are meeting the clean up levels of what they're claiming to the public are cleaned up sites" Tr. 2126.

The ALJ construed Erickson's email and testimony to mean that she "voiced concerns about Superfund environmental regulations, analytical procedures, policies, and practices that wasted funds, and created impossibility of performance issues that retarded the environmental cleanup of the Southeastern Superfund site." He ruled that this constituted protected activity. R. D. & O. at 60. EPA argues that Erickson's concerns about the flaws in the Southeastern cleanup plans were not grounded in reasonable perceptions of violations of law or threats to safety. EPA B. at 9-12. "The fact that a mistake was made in issuing contract specifications, and Complainant and a contractor discovered it, does not evidence a violation of any environmental law, or constitute protected activity." EPA Br. at 10.

The record contains very little evidence about the nature of Erickson's concerns, and her briefs do little to clarify her position. But as we understand Erickson, she believed that EPA should not have used the 30-ppm-limit on aromatic hydrocarbon remnants of creosote because that degree of precision could not be attained or reliably measured in actual practice in the field.

Thus, Erickson was not concerned about possible violations of the environmental acts. Therefore, to be protected, the email must express a reasonably perceived threat to environmental safety. The question then becomes whether Erickson was worried about specific threats to environmental safety or whether she was merely speculating that the environment might be at risk.⁴⁶ Erickson's worst case scenario appears to be that the

⁴⁶ *Crosby*, slip op. at 27-28.

inexpert but lowest bidder gets the contract, discovers that the “safe” limit cannot be met or detected, backs out of the contract, sues EPA and wins, and EPA has to pay that contractor plus a new (but this time more competent) contractor. But even under this scenario, as in the case of the Southeastern site, the site is essentially decontaminated. And as Erickson’s own follow-up scrutiny of other contracts showed, Region 4 seemed well on the way to eliminating the use of impractical cleanup levels from other contracts. Tr. 2153, 2255. Therefore, Erickson’s concerns about the Southeastern project, as described in the email, appear to be speculation.

Nevertheless, because Erickson’s complaints fail on other grounds, we will assume without deciding that the June 18, 1993 email to Mills constitutes protected activity.

2. The February – March 1995 Intervention in North Cavalcade Contract and Letters to Congressmen

Erickson contends that she engaged in protected activity in late February through early March 1995 when she called EPA Region 6 and TNRCC to try to persuade them to revise the bid invitation for cleaning up the North Cavalcade, Texas wood preserving site. Believing that the winning contractor would encounter the same problems at North Cavalcade that OHM had found at Southeastern, Erickson tried to convince the state and federal officials that their bid invitation was based on “bad science” and would result in substantial economic losses. The ALJ found that her calls were protected activity. R. D. & O. at 60.

Erickson’s concerns with the North Cavalcade project and the Southeastern project were the same. For the reasons already stated, we will assume without deciding that Erickson’s February and March 1995 communications with Region 6 and TNRCC persons were also protected.

Erickson also argues that she engaged in protected activity when she wrote to members of Congress in March 1995 to complain that EPA was using the OIG investigation to retaliate for her protected acts in trying to stop the North Cavalcade bidding process. The ALJ ruled that this was protected activity. R. D. & O. at 60. Letters to members of Congress about possible violations of the environmental acts or specific environmental hazards are protected activity.⁴⁷ Our assumption that Erickson’s concerns about the North Cavalcade project were protected necessarily extends to Erickson’s letters to members of Congress concerning the North Cavalcade project.

⁴⁷ *Jenkins*, slip op. at 19

3. April 1998 Whistleblower Complaint; Discussions With Media and the General Accounting Office in 1998 and 1999

Erickson contends that filing the April 1998 whistleblower complaint and discussing it with the news media and the General Accounting Office constitutes protected activity. The ALJ made no findings that these activities were protected.

We find that they are protected. Filing an environmental whistleblower complaint is quintessential protected activity, inasmuch as it falls within the literal meaning of “commenced a proceeding.” And talking about her whistleblower complaint to the news media and a federal agency (GAO) is also protected.⁴⁸

4. Erickson’s Complaint to a Congressman About Possible FOIA Violation

Finally, Erickson contends that she engaged in protected activity in 2000 when she wrote to a Congressman to allege that Region 4 was destroying computerized email records so that it would not have to provide them to FOIA requesters.⁴⁹ The ALJ found that the letter was protected activity merely because it concerned an EPA tape. “Although Complainant never showed what information was on the backup e-mail tapes and how the destruction of that information specifically violated the purpose of the environmental statutes under which she seeks protection, the fact that the tapes were maintained in the Information Management Branch for EPA Region 4, preponderates the conclusion that some of the information would relate to concerns about environmental contaminants.” R. D. & O. 60. EPA argues that this ruling is too broad. EPA Br. at 12.

We agree that the ALJ’s ruling greatly extends controlling precedent that the employee’s concerns must be reasonably related to a violation of the environmental acts or a specific environmental threat. Not every piece of information that EPA maintains in its email records is necessarily related to a violation of the environmental laws or specific environmental threats. Therefore, we find that Erickson’s letter concerning the email records is not protected.

⁴⁸ See e.g., *Dobreuenaski v. Associated Univs., Inc.*, ARB No. 97-125, ALJ No. 96-ERA-44, slip op. at 9 (ARB June 18, 1998) (participating in a media interview concerning contamination at a nuclear plant is protected). Cf. *Delaney v. Massachusetts Corr. Indus.*, No. 90-TSC-2, slip op. at 3 (Sec’y Mar. 17, 1995) (complaints to state and federal environmental agencies are protected).

⁴⁹ The Freedom of Information Act (FOIA), 5 U.S.C.A. § 552 (West 1996).

IV. Alleged Adverse Actions

As we explained earlier, to prevail, Erickson must prove by a preponderance of the evidence that EPA took adverse employment action against her and that it took such action because of her protected activity. Erickson contends that from 1993 through the close of this record in 2002, EPA took numerous adverse actions against her, including subjecting her to a hostile work environment.⁵⁰

According to regulations implementing the environmental whistleblower protections, adverse action occurs when an employer “intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates” because of protected activity.⁵¹ We have held that an employment action is adverse when it results in some tangible negative effect on the employee’s compensation, terms, conditions, or privileges of employment.⁵²

In *National R.R. Passenger Corp. v. Morgan*,⁵³ the United States Supreme Court analyzed what constitutes an adverse action (“unlawful employment practice”) and when that action occurred. An adverse employment action may take the form of a discrete act such as termination, denial of a transfer, or refusal to hire. On the other hand, a hostile work environment claim involves repeated conduct or conditions that occur “over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own.”⁵⁴ To recover, the employee must establish that the conduct complained of was serious and pervasive.⁵⁵ Circumstances germane to gauging

⁵⁰ We limit our review to the adverse actions and conditions that Erickson refers to in her brief. Erickson has abandoned some of the adverse action claims that she alleged in her eleven whistleblower complaints. For instance, Erickson contended below that Mills rejected her for six separate positions in the Procurement Section. The ALJ found that Mills’s six non-selection decisions were not retaliatory, R. D. & O. at 67. Here, Erickson does not challenge the ALJ’s findings as to three of the non-selections.

⁵¹ 29 C.F.R. § 24.2(b).

⁵² See *Jenkins*, slip op. at 21-22; *Shotz v. Plantation*, 344 F.3d 1161, 1181-1182 (11th Cir. 2003) (“an employee must show a *serious* and *material* change in the terms, conditions, or privileges of employment . . . as viewed by a reasonable person in the circumstances.”) (emphasis in original).

⁵³ 536 U.S. 101 (2002).

⁵⁴ *Id.* at 114-115.

⁵⁵ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Sav.s Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

a work environment include “the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee’s work performance.”⁵⁶

To succeed on her hostile work environment claims, Erickson must prove by a preponderance of the evidence that: 1) she engaged in protected activity; 2) she suffered intentional harassment related to that activity; 3) the harassment was sufficiently severe or pervasive so as to alter the conditions of her employment and to create an abusive working environment; and 4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect her.⁵⁷

To facilitate our discussion, we have arranged Erickson’s adverse action claims into three time periods:

1. From 1993 to March 1995, because of her concerns with the Southeastern contract, Erickson claims that:

- a. Mills removed her as contracting officer from OHM and Bechtel contracts (C. Brief at para.79-80, 81, 86);
- b. Supervisors harassed and unfairly criticized her (*Id.* at para. 86);
- c. Supervisors subjected her to a hostile work environment (*Id.* at para. 86).

2. From March 10, 1995, to April 9, 1998, Erickson contends that because of her intervention in North Cavalcade, the following occurred:

- a. Waldrop detailed her to the Information Management Branch (*Id.* at 80);
- b. Waldrop permanently transferred her to IMB (*Id.* at para. 84);
- c. Fellow employees shunned her (*Id.* at para. 88, 92-92);
- d. Supervisors underutilized her in IMB (*Id.* at para. 81, 84);
- e. Supervisors gave her tasks she was not qualified to perform (*Id.* at para. 88).

⁵⁶ *Berkman*, slip op. at 16.

⁵⁷ *Jenkins*, slip op. at 16-17.

- f. Mills rejected her application for contract specialist position (*Id.* at para. 85);
 - g. Waldrop referred her to the OIG for possible conflict-of-interest violations (*Id.* at para. 80, 86);
 - h. Waldrop imposed a “gag order” (*Id.* at para. 88);
 - i. Region 4 and OIG failed to notify her about IG conclusion of no criminal wrongdoing and closure of IG file (*Id.* at 90);
 - j. Subjected to hostile work environment (*Id. passim*).
3. From April 9, 1998, to close of hearing June 2002, Erickson alleges that the following occurred because of various protected activity:
- a. Region 4 issued a written warning (*Id.* at para. 18, 41, 90);
 - b. Coworkers permitted to criticize her for letter to Congress (*Id.* at para. 18);
 - c. Barrow temporarily suspended her from flexiplace twice (*Id.* at para. 74);
 - d. Mills and a Branch chief rejected her for positions as contract specialist in Procurement Section (*Id.* at para. 87, 93-94);
 - e. Subjected to hostile work environment (*Id. passim*).

We have examined all of Erickson’s claims. We conclude that her whistleblower complaints must be dismissed because the adverse actions she asserts are either time barred, not adverse, or were not taken because of protected activity.

V. Time-Barred Adverse Action Claims

The environmental whistleblower statutes carry thirty-day limitation periods, meaning that, for the complaint to be timely, a whistleblower must file a complaint within thirty days of a discrete adverse action.⁵⁸ The thirty-day limitations period begins to run on the date that a complainant receives final, definitive and unequivocal notice of a discrete adverse employment action. The date that an employer communicates its decision to implement such an action, rather than the date the consequences are felt,

⁵⁸ 42 U.S.C.A. § 6971(b) (SWDA); 42 U.S.C.A. § 7622(b); 29 C.F.R. § 24.3(b).

marks the occurrence of the violation.⁵⁹ Discrete acts that occur more than thirty days before the complaint is filed are time barred, that is, not actionable. Likewise, a hostile work environment claim is, like discrete adverse action claims, time barred if at least one of the acts or conditions comprising the alleged hostile work environment did not occur or exist thirty days before the complaint was filed.⁶⁰

Erickson filed her first whistleblower complaint on April 9, 1998. We find that some, but not all, of the discrete adverse actions that Erickson claims EPA took are time barred because they occurred more than thirty days before April 9, 1998. But Erickson's claim that EPA subjected her to a hostile work environment from 1993 to 1998 is not time barred.

1. Discrete Adverse Actions Erickson Claims Occurred From 1993 to March 1995

Erickson makes no attempt to apply the *Morgan* distinction between "discrete" adverse actions and "hostile work environment" conditions to her claims. We therefore consider her claims alternatively as discrete action claims and hostile work environment claims.

If Mills, Bach, and Singley's criticisms and overly time-consuming assignments, and Mills's decision to remove Erickson from the Bechtel and OHM contracts in 1993 and 1994 were discrete acts, the time for filing environmental whistleblower complaints about them expired thirty days after each occurred.⁶¹ Therefore, these adverse action claims are not actionable because they occurred more than thirty days before Erickson filed her first whistleblower complaint in 1998.

⁵⁹ *Jenkins*, slip op. at 14 (ARB Feb. 28, 2003). See generally *Chardon v. Fernandez*, 454 U.S. 6 (1981) (proper focus contemplates the time the employee receives notification of the discriminatory act, not the point at which the consequences of the act become painful); *Delaware State Coll. v. Ricks*, 449 U.S. 250 (1980) (limitations period began to run when the employee was denied tenure rather than on the date his employment terminated).

⁶⁰ *Morgan*, 536 U.S. at 114-117.

⁶¹ Erickson refers in her brief to her detail out of Procurement and into the Grants Section in 1994 as if it were an adverse action. E. Br. at 23. But as we noted earlier, in her grievances Erickson requested to be transferred out of the Procurement Section and away from Mills, and the Branch Chief, Deborah Maxwell, gave Erickson the detail specifically because of Erickson's grievances. Thus, the 1994 detail out of Procurement was not an adverse action.

2. Discrete Adverse Actions Erickson Claims Occurred Between March 10, 1995 and April 9, 1998

Detailing Erickson to IMB on March 10, 1995, and making her position as IMB Information Resources Coordinator permanent in 1996 were definitely discrete personnel actions. They occurred when Erickson received notice of those decisions. Assuming for the moment that Waldrop's order not to discuss contracts (the "gag order") was also a discrete act, the order "occurred" when Erickson learned of it. Erickson received definite notice of the detail to IMB and the "gag order" by memo dated March 10, 1995. EPAX 51. A year later, Waldrop, by memo dated March 28, 1996, notified OIG that the only administrative action Region 4 would be taking toward Erickson was to permanently assign her to IMB. OIGX 3. The ALJ found that although Waldrop did not send a copy of this memo to Erickson, she knew its contents in or around late March 1996. R. D. & O. at 28; Tr. 2984-2985. The record supports this finding and Erickson has not challenged it. Therefore, since Erickson did not file a complaint that alleged these adverse actions until April 9, 1998, they too are time barred and not actionable.

Erickson also contends that at the beginning of her assignment to IMB, her co-workers shunned her and she was "put on display" in the library. Furthermore, she claims that, as the IMB Information Resources Coordinator, she was underutilized and required to supervise computer specialists even though she lacked necessary skills. C. Br. para. 84, 88. If Erickson is arguing that being "put on display" and shunned, underutilized, and required to perform beyond her capabilities are discrete adverse actions, they are time barred because they occurred more than thirty days before she filed the April 1998 complaint. But Erickson appears to argue that the adverse conditions of being put on display, shunned, underutilized, and required to supervise the specialists continued to exist up until she filed her April 1998 whistleblower complaint. Therefore, says Erickson, they are not time barred and she should be allowed to litigate them.

Erickson, however, is actually complaining about the consequences, the "continuing effects," of the decision to detail and then transfer her to IMB. The continuing effects of a prior adverse action must be distinguished from continuing violations.⁶² "[T]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful The emphasis is not upon the effects of earlier employment decisions; rather it is upon whether a present violation exists."⁶³ And to allow a continuing effects theory to revive expired or stale claims would render the filing time periods in the whistleblower provisions a nullity.⁶⁴

⁶² See *Trzebuckowski v. Cleveland*, 319 F.3d 853, 858 (6th Cir. 2003).

⁶³ *Carter v. West Publ'g Co.*, 225 F.3d 1258, 1263-1264 (11th Cir. 2000).

⁶⁴ *Hadden v. Georgia Power Co.*, No. 89-ERA-21, slip op. at 7 (Sec'y Feb. 9, 1994). See also *Varnadore v. Oak Ridge Nat'l Lab.*, Nos. 92-CAA-2, 92-CAA-5, 93-CAA-1, slip op. at 1996 WL 171423 *24 (ARB Jan. 26, 1996) (employee could not challenge a job

Therefore, Erickson's claim that she was displayed, shunned, underutilized, and required to perform tasks she was incapable of is also time barred.

Finally, Erickson asserts that when Waldrop referred the information he had received about possible conflict of interest violations to OIG on March 10, 1995, he did so to retaliate because she had discussed the potential problems in the North Cavalcade contract with Texas and Region 6 officials. The referral to OIG was a discrete act and is time barred because of the thirty day limitations period.

Nevertheless, two of Erickson's claims that arose during this time frame are actionable. Erickson received notice of her non-selection for a GS-13 contract specialist position in the Procurement Section within the 30-day period before she filed her whistleblower complaint. And, according to Erickson, she had still not received notice of the IG's findings and EPA's final closing of her conflict of interest case when she filed the whistleblower complaint. Therefore, these two claims are not time barred.⁶⁵

3. The Hostile Work Environment Erickson Claims Existed from 1993 to 1998

Erickson contends that EPA took adverse action against her because her managers subjected her to a hostile work environment that began in 1993 and continued through the close of this record in 2002. We construe her brief as asserting that all of the discrete adverse actions that the managers took against her from 1993-1998, as well as the non-discrete conditions to which she was subjected during her work at IMB (put on display, shunned, underutilized), should be considered a series of hostile acts that, taken together, comprise a hostile work environment. Since Erickson did not file a whistleblower complaint until April 9, 1998, her hostile work environment claim is actionable only if at least one of the series of allegedly hostile acts occurred or existed thirty days before she filed the complaint.⁶⁶ We conclude that Erickson's hostile work environment claim is not time barred because two of the events or conditions that comprise the hostile work environment claim occurred within 30 days of April 9, 1998.⁶⁷

assignment after the limitations period on the theory that he was feeling the effects of the assignment – isolation and exposure to mercury vapor).

⁶⁵ All of Erickson's claims that arose after her April 1998 complaint are actionable because each occurred within 30 days of the time she filed a complaint.

⁶⁶ *Morgan*, 536 U.S. at 116-117.

⁶⁷ We take no position on the question whether a hostile work environment claim can be based on a combination of discrete acts and hostile conditions.

VI. Erickson Did Not Prove Adverse Action and Causation

Thus, we have determined that some of Erickson's whistleblower claims are time barred. Here, we also conclude that, even if not time barred, all of Erickson's claims fail because they are either not adverse or because EPA did not take the adverse action because of Erickson's protected activity. As we discussed above, to prevail, Erickson must prove by a preponderance of the evidence that EPA took adverse action and that it did so because of her protected activity. To help organize our discussion again, we have arranged Erickson's claims into the same three time periods we used above.

1. 1993 to March 1995

Erickson contends that Mills, Bach, and Singley harassed her, overworked her, removed her from the OHM and Bechtel contracts in 1993 and 1994, and subjected her to a hostile work environment because she expressed concerns to Mills that the Southeastern contract required levels of decontamination that could not be achieved or measured, causing EPA to waste money on flawed cleanup projects. E. Br. at 18-20. EPA argues that Erickson's supervisors disciplined her because she was combative and uncooperative, citing, for example, her repeated refusal to prepare a simple profit calculation for the OHM file. EPA Br. at 2-25. The ALJ concluded that these adverse actions reflected personality conflicts rather than any retaliatory purpose. R. D. & O at 78-79. For instance, he found that Mills took Erickson off the Southeastern contract because of their dispute on how to document the file and Erickson's insubordinate refusal to follow his orders. The record supports the ALJ's findings, and Erickson did not present evidence contrary to those findings, nor does she assign error to those findings. And since Erickson argues that these same adverse actions, taken together, comprise a hostile work environment, that claim also fails because the adverse actions were not taken to retaliate for protected activity.

Erickson wrote detailed contemporaneous accounts of her conflicts with Mills, Bach, and Singley, and never connected the conflicts with her concerns about the infeasibility problem. EPAX 5, 25, 28, 29, 31, 33, 34, 38, 122. Rather, in her grievances, unfair labor practice complaint, and other contemporaneous writings, she attributed all the conflict to her union activity, which the environmental statutes do not protect. *Id.*; OIGX 14. Moreover, far from retaliating, all three of Erickson's supervisors agreed with her that the original Southeastern cleanup plan was deficient and that changes should be made to the OHM contract. Tr. 1483; EPAX 92, 93. Furthermore, they let her create a team to find similar deficiencies in other contracts. Tr. 2154, OIGX 1 p. 46.

Therefore, we find that Mills, Bach, and Singley acted solely for legitimate reasons in criticizing her work, requesting that she perform additional tasks, and in removing her from the Bechtel and OHM contracts.

2. March 10, 1995 to April 9, 1998

a. Put on Display, Shunned, Underutilized; OIG Referral; Detail to IMB

After Region 4 learned in March 1995 that officials in Region 6 and at TNRCC thought Erickson had lobbied them on OHM's behalf concerning the North Cavalcade project, Acting Assistant Regional Administrator Waldrop detailed Erickson out of the Procurement and Grants Branch into the Information Management Branch (IMB) and ordered her not to discuss contracts issues. He also referred the conflict-of-interest question to the IG. EPAX 51.

IMB Chief Jack Sweeney assigned Erickson to a cubicle in the library adjacent to the area where most of the IMB offices and cubicles were located. Tr. 2203, 2216-2217. At first, Erickson had little to do, but around September 1996, Sweeney created an official position for her, IMB Information Resources Coordinator. Tr. 2998, EPAX 102. Erickson contends that when Sweeney "put her on display" in a library cubicle, kept her "idle," and then made her Information Resources Coordinator, he was retaliating because of her concerns with the Southeastern and North Cavalcade contracts. E. Br. at 12. She also contends that co-workers "shunned" her because of her protected activity. *Id.* at 22; Tr. 2208.

The ALJ rejected Erickson's argument that Sweeney assigned her to a cubicle in the library because of protected activity. He found, based on un rebutted testimony, that all new IMB employees were placed in the library cubicle until a better location opened up. R. D. & O. at 64, 73. Therefore, we find that Sweeney did not take adverse action or put Erickson on display because of protected activity.

The ALJ also concluded that Erickson's claim that her co-workers shunned her was not an adverse action because it had no tangible effect on the terms, conditions or privileges of Erickson's employment. We agree because Erickson did not prove that the shunning had tangible consequences.⁶⁸ In addition, we find that Erickson did not prove that the co-workers knew about her protected activity regarding Southeastern and North Cavalcade. Thus, she failed to establish a causal connection between protected activity and the alleged shunning.

With respect to her claim that she was underutilized, six months after she was detailed to IMB, Erickson was given the position of Information Resources Coordinator. She claims that she was underutilized in that position because of her protected activity. But the record does not support this claim. Erickson had enough work to do that she consistently described a full day's worth of work for the one day each week she was allowed to work at home. EPAX 104 at p. 18; 110; 111; 112; 114; 113 at pp. 1, 2, 6, 7. Furthermore, she testified that sometimes she even worked on her days off, got calls from her office at home, and worked late. Tr. 2511-2512, 2573.

⁶⁸ See *Jenkins*, slip op. at 21-22.

On the other hand, the ALJ did find that the IG referral, the IMB detail, the initial lack of work, and subsequent assignment as Information Resources Coordinator were intended to punish Erickson because she called Region 6 and interfered in the North Cavalcade project. R. D. & O. at 63, 79, 83. The record does not support these findings.

EPA asserts that Waldrop referred Erickson to the IG because the information it received from Region 6 suggested that she might have violated conflict-of-interest laws by lobbying on OHM's behalf. EPA Br. at 18-21. The IG has sole authority to investigate conflict of interest charges against an EPA employee. *Id.*; Tr. 749. In addition, EPA argues that detailing Erickson to IMB was not adverse. *Id.* at 16-18. Erickson contends that Region 4 made the referral to OIG and the detail to IMB because she intervened in the North Cavalcade bidding process and because it wanted to increase control over her. E. Br. at 16-17. The ALJ found that both the referral and the detail were retaliatory adverse actions. R. D. & O. at 80. We find that Erickson did not prove by a preponderance of the evidence that EPA referred her to OIG or detailed her to IMB because of protected activity.

The Region 4 managers (the record does not reflect which ones) who received Region 6's call (the record does not reflect who called) about Erickson turned the matter over to Region 4 legal counsel, Phyllis Harris. Tr. 1268-1269. Harris assigned a staff attorney, Leslie Bell, to evaluate documents, including those Erickson sent to Region 6, and to speak with Erickson's supervisors "to see if there's an ethics issue here. There may be a personnel issue. Look into it and report back to me." Tr. 239. When Bell reported that Erickson might have violated federal conflict of interest laws, Harris determined that the matter must be referred to EPA OIG for a decision on whether a criminal investigation was necessary. Tr. 232-233.

We find that Harris's recommendation to refer the matter to OIG was commensurate with the evidence then before her: (1) EPA Region 6 and TNRCC officials thought Erickson had been lobbying on OHM's behalf and called Region 4 to complain; (2) Erickson sent TNRCC and Region 6 a published article about the Southeastern project that listed her as a co-author with OHM, an article she had never told her supervisors about; (3) Erickson sent TNRCC and Region 6 her paper, "Contract Requirements vs. Performance Criteria or Standards," on EPA letterhead even though a supervisor had not cleared it as an official EPA statement and even though Erickson's Grants supervisor had questioned her about it just weeks before; and (4) OHM sent all this material to TNRCC and Region 6 at Erickson's request. OIGX 1 *passim*. We find, therefore, that Harris had reason to be concerned that Erickson was lobbying for OHM. Erickson offered no evidence that Harris recommended that the matter be referred to OIG because of Erickson's protected activity.

Waldrop testified that he made the referral based on Harris's advice, the nature of the evidence, and the fact that EPA contracting had been under Congressional scrutiny in the recent past. Tr. 1911. And the IG investigator who made the decision that there was enough evidence to warrant an investigation testified that, "at first, I've got to say, as a

criminal investigator, when it first came in, it had the appearance of some problems, possible criminal activity.” Tr. 746. Again, the record contains no evidence that Waldrop or the IG investigator took these actions because of Erickson’s protected activity in speaking to Region 6 and TNRCC about the North Cavalcade contract. Thus, we find that Erickson did not prove that the decision to refer her to the IG for investigation was because of protected activity.

The ALJ found that Waldrop not only referred Erickson to OIG, but also detailed her to IMB, because she had contacted Region 6 and interfered in the North Cavalcade project. R. D. & O. at 62, 71, 80-81. He concluded that EPA had retaliated because he determined that Waldrop allowed the IG to believe that Erickson had a “long history of disciplinary problems” even though she had never been formally disciplined. To the ALJ, Waldrop also evidenced retaliation when he deliberately failed to correct Erickson’s impression that he had forbidden her to talk about contracts. In the ALJ’s words: “Respondent EPA’s retaliatory animus is evidenced by its attempt to bias the OIG investigation by providing false information to the OIG investigator, and in failing to clarify the meaning and scope of Mr. Waldrop’s instruction not to have discussion about contracts.” R. D. & O. at 80.

The “long history of disciplinary problems” issue came about as a result of a memo that Waldrop had included in the materials he provided to the IG. Leslie Bell, the staff attorney Harris had assigned to review the Region 6 referral, wrote those words in the memo. During her review, Bell did not see Erickson’s official personnel file, which would have contained evidence of any formal disciplinary actions, but she did interview the various supervisors whom Erickson had refused to obey. Tr. 130-131, 225-226. Thus, the record demonstrates that the “long history of disciplinary problems” comment referred, not to any formal discipline, but to Erickson’s unwillingness to do what her supervisors asked, from refusing to prepare a profit margin calculus for the OHM file in 1993 to calling OHM in February 1995 despite repeated orders not to engage in contract work. Therefore, the record does not support the inference that Waldrop retaliated when he did not correct the comment because Waldrop did not intentionally provide false information to the IG.

The ALJ also found that Waldrop retaliated against Erickson when he deliberately did not clarify an instruction he had given to her. R. D. & O. at 80. In his memo that notified Erickson of the IG referral, her temporary transfer to IMB, and the termination of her authorization to make contract commitments on EPA’s behalf, Waldrop wrote:

Until further notice you are to have no involvement with contracts. This includes:

- a. No discussion about contracts with other EPA personnel;
- b. No contact with contractors for contract administration, contract management, or

technical direction. If contacted by a contractor, refer them to the appropriate contracting officer/supervisor. . . .

C 11C-3d.

Erickson protested about these instructions at the meeting when Waldrop gave her the memo. Tr. 2180. And several days later, in an email to Waldrop, she wrote:

I merely wished to report that a short while ago, someone came up to me in the bathroom and asked me about what was going on, since they had heard that I was under investigation by the IG. Someone earlier had stopped me in the hall and had heard about my detail, but didn't specifically mention the IG. I just wish to document that this information did not come from me, since I have told no one at EPA about the situation, and merely replied that I am not allowed to discuss it.

Furthermore, I think that it is totally wrong and illegal that I am not allowed to say anything to anyone, so I have to leave people with the mistaken impression that I have done something wrong – which I have not done. I believe that this is another violation of my rights – particularly of free speech. I believe that it is also a violation of my right to defend myself from a false charge. Until these issues are resolved, however, I will continue to reply that I am not allowed to discuss it.

CX 42.

In other words, Erickson construed Waldrop's instructions as a "gag order," forbidding her to discuss "anything to anyone."

The ALJ found that when Waldrop became aware of Erickson's interpretation of his instructions, he had an "affirmative duty to explain the scope of his order." By not doing so, Waldrop demonstrated to the ALJ that he intended to retaliate against Erickson for interfering in the North Cavalcade bid offer. R. D. & O. at 80. But unlike the ALJ, we do not infer that Waldrop's not responding demonstrates retaliation. The record does not support the ALJ's finding that Waldrop had an "affirmative duty" to clarify his orders. For instance, we have no evidence that EPA policy requires its managers to clarify instructions to subordinates. Moreover, we find that Waldrop's instructions to Erickson could not reasonably be construed to be an order not to say "anything to anyone." Therefore, Waldrop's silence in the face of Erickson's email does not evidence retaliation. Consequently, we find that Erickson did not prove by a preponderance of evidence that EPA detailed her to IMB because of protected activity.

b. Permanent Transfer to IMB

In March 1996, Region 4 completed its review of the IG's final report. Waldrop notified the IG that Region 4 "did not find any basis for any administrative/disciplinary action." OIGX 3. However, he went on, Region 4 managers decided that it would be "in the best interest of the Agency and Ms. Erickson to permanently reassign Ms. Erickson to the [IMB]." *Id.*; Tr. 1764-1765 ("[T]he best action would be to reassign Ms. Erickson to [IMB], where the new branch chief was welcoming her, had a position for her and there did not seem to be any kind of clouds or whatever hanging over the relationship."); Tr. 1771 ("[S]he was cleared – she was cleared criminally, and we didn't think there was justification there for a disciplinary action. It was just – the relationship had broke[n] down between management [in the Grants and Procurement Branch] and employee.").

The ALJ found that Region 4 decided to make Erickson's detail to IMB permanent in retaliation for her protected activity of trying to intervene in the North Cavalcade bidding process. R. D. & O. at 79-80. He pointed to the same evidence and employed the same reasoning as when he found EPA referred Erickson to OIG and detailed her to IMB. But, as discussed previously, the "gag order" and the presence of inaccurate information in Region 4's IG referral papers do not evince a retaliatory purpose.

c. Non-selection for Procurement Section

In March 1998, Erickson received notice that Mills had selected someone else for a GS-13 procurement specialist in the Procurement Section, a position for which she had applied and been designated as "highly qualified." Erickson alleges that Mills rejected her application because of her June 18, 1993 email to him in which she alluded to her concerns about the impossibility problems with the first Southeastern contract. E. Br. at 20, 24. The ALJ found, "it more plausible that Mr. Mills [sic] retaliatory motive, if any, stemmed from Complainant's filing of grievances against him and his apparent inability to exercise management authority over complainant. Mr. Mills simply did not want to work with a person who had specifically requested as her remedy in her FLRA complaint that she no longer work under his supervision." R. D. & O. at 86.

We agree with the ALJ because the record supports this finding. Moreover, Erickson's testimony brings into question whether she really believed Mills's failure to select her was adverse to her. On the one hand, she complains about Mills not selecting her. But on the other hand, she testified that she did not want to work under Mills but wanted a contracting job created specifically for her. Tr. 2416-2422. At any rate, we find that Mills did not retaliate against Erickson when he selected another candidate.

d. Refusal to Disclose Results of OIG Investigation

In March 1995, immediately after Region 4 made the IG referral, Erickson wrote letters to Congressmen to complain that Region 4 was using the investigation to punish her for her North Cavalcade activities. OIGX 22, 23. In April 1995, Erickson submitted a FOIA request to the IG's office, asking to see the investigative file. Erickson also spoke by phone with IG desk officer Fugger in the summer of 1995, asking to see the investigative file. Tr. 2188. On August 30 1995, the IG issued a report of its investigation and its conclusion that there was no basis for a criminal prosecution against Erickson. In September 1995, Erickson submitted a second FOIA request, this time asking for a copy of the final report. In April 1996, OIG officially closed its file.

Erickson claims that, because of her protected activity in writing to the Congressmen about the investigation, OIG and Region 4 deliberately failed to tell her the IG had cleared her of criminal wrongdoing to keep a "sword of Damocles" over her head. E. Br at 23. EPA responds that the OIG did not notify Erickson because it relies on the employee's own supervisor to do that. OIG Br. at 26-27; EPA Br. at 8-9. OIG asserts that it did not respond to Erickson's FOIA requests because its FOIA office was chaotic. OIG Br. at 33-34.

The ALJ found that OIG did not disclose the results of its investigation because Erickson had complained about the IG investigation to members of Congress. R. D. & O. at 82. He also found that Region 4 did not inform Erickson about the results, "in an effort to keep [Erickson] under control, to keep her out of contracting and to prevent her engaging in similar behavior such as jumping the chain of command and unilaterally interfering in the Region 6 contract." *Id.* at 82.

In concluding that OIG retaliated, the ALJ relied heavily on Erickson's testimony that in the summer months of 1995, Fugger, "related to Complainant that she had better not take any more actions because her contact with Congressmen had not done her any good." R. D. & O. at 82. The ALJ rejected the IG's explanation that Erickson's request and the IG's promise to respond later were lost due to administrative oversight. "In light of multiple Congressional inquiries, the OIG's role in responding to Congress, and the two separate promises by the OIG under FOIA to disclose information once the case was closed, I do not find the OIG's excuse of an 'administrative oversight' is credible." *Id.*

In finding "multiple Congressional inquiries," the ALJ apparently determined that Erickson and Congressmen repeatedly inquired about Erickson's case throughout the period 1995 through 1998. But in fact, other than a very brief follow up note from a United States Senator in January 1996, OIG received no inquiries about Erickson's case after September 1995. Furthermore, according to its internal rules of procedure for handling FOIA requests, OIG is required to notify the investigated employee's EPA region, but not the employee herself. Tr. 698; CX 9.

OIG promised to respond to Erickson's FOIA requests once it closed the investigative file, but it did not do so. R. D. & O. at 81. The record shows that in 1997, the IG brought in a new man, Edward Gekosky, to manage the office that handled OIG's FOIA requests because the entire office had been poorly managed and staff were demoralized. Gekosky learned that OIG had once had a FOIA specialist, but that person had left and FOIA requests were being handled by "whoever was available." Tr. 919, 920, 939. The office had no tickler system for tracking promises like the one it made about sending Erickson documents once her file was closed. Tr. 926. Gekosky hired a person with FOIA expertise, and it was she who found the 1995 letters promising to send Erickson material when her file closed. Tr. 921, 923. The FOIA expert brought her discovery to Gekosky's attention, and on October 2, 1998, Gekosky sent Erickson documents from her file and an apology for administrative oversight. Tr. 922-924; OIGX 20. These facts constitute substantial evidence that OIG's non-response to Erickson's FOIA requests was unintentional.

With respect to Fugger, the ALJ credited Erickson's testimony that Fugger told her in the summer of 1995 that the IG could keep the file open indefinitely and that she should realize that the letters she sent to Congress would not help her. R. D. & O. at 82; Tr. 2188-2189. Erickson also testified that when she called the IG's office in 2001, Fugger answered the phone and recognized her even though she last spoke with him six years earlier. Tr. 2195-2199. Therefore, according to Erickson and the ALJ, Fugger's statements to Erickson and his remembering her demonstrate that the IG retaliated against her because of her complaints to Congress. R. D. & O. at 82.

Erickson and the ALJ ask us to infer that OIG was retaliating because, according to Erickson, Fugger said, "Well, you saw what happened with your congressionals. You better not try anything else." Tr. 2189. And because Fugger told her that "nothing was going to happen about my complaints, so I better not complain anymore." Tr. 2191.⁶⁹ Nevertheless, the preponderance of the evidence indicates that OIG did not inform Erickson of its investigation results and did not respond to her FOIA requests in a timely manner because OIG did not have the responsibility to do so and because of the chaotic situation in the FOIA office. This evidence outweighs any inference to be drawn from Fugger's statements to Erickson.

The ALJ also inferred that Region 4 retaliated from the fact that neither Waldrop nor Erickson's immediate supervisor informed her that OIG had cleared her in August 1995. R. D. & O. at 81. But again, we find that this circumstantial evidence does not withstand Waldrop's plausible testimony that he did not inform Erickson because he assumed that her immediate supervisor, Sweeney, would tell her. Tr. 1774. The fact that Sweeney did not testify at the hearing, and thus did not offer an explanation for why he did not inform Erickson of the results of the investigation, does not diminish Erickson's burden to prove by a preponderance of the evidence that Region 4 did not inform her because of protected activity. Since she has not done so, this claim fails.

⁶⁹ At the hearing, Fugger denied making the statements Erickson attributes to him. The ALJ credited Erickson's testimony about what Fugger told her. R. D. & O. at 82-83.

Finally, Erickson claims that, by not telling her about the results, EPA held a “sword of Damocles” over her for nearly three years. This contention is specious because, by at least February 27, 1996, Erickson knew that OIG had cleared her of criminal wrongdoing. EPA points to a second ULP complaint Erickson filed on February 27, 1996. EPAX 122. In this complaint Erickson updated her first two grievances and her first ULP complaint. She dictated a 14-page affidavit to a Federal Labor Relations Administration agent to support her ULP complaint. Erickson reviewed the typed affidavit, initialed each page, and acknowledged its truthfulness. *Id.*

In this affidavit, Erickson stated three times that she had been “cleared” by the IG. “While the IG cleared me of charges in August 1995, and the EPA has failed to take administrative action for lack of grounds, they have failed to restore me to my position and career field. . . .” EPA 122 pp. 1-2. “I have been working for Sweeney [Grants supervisor] ever since, despite the fact that the IG office cleared me of any wrong doing in August of 1995.” *Id.* at 12. “It should be noted that although I have been cleared of the charges brought against me with the IG, Region IV management has blocked my attempts to get a copy of the report stating this.” *Id.* at 14.

Despite what the affidavit reveals, Erickson testified that when she dictated the affidavit, she was not sure that the OIG had cleared her but was trying to convey the impression that she “should have been cleared” or “assumed” she would be cleared because she had provided exculpatory evidence to OIG. Tr. 2302, 2304, 2306, 2308. Under cross examination, Erickson testified as follows:

Q. We agree, Ms. Erickson, that you did not receive a copy of the report until 1998. We agree, Ms. Erickson that the IG did not notify you . . . in writing with a copy of the report until 1998, but my question goes to your statement, Ms. Erickson. Did you or did you not know - -

A. I didn’t.

Q. - - before 1998 that you were cleared?

A. No, I did not.

Q. Why, then, Ms. Erickson, did you tell the Federal Labor Relations Authority that you were cleared?

A. It [referring not to the affidavit but to the FLRA findings] says “contend.” But the EPA has not closed it, so I don’t know what - -

Q. I understand that - -

A. - - their position is going to be when they do close it, or when they issue the report.

Q. Is that a misrepresentation by the Federal Labor Relations Authority?

A. I don't even know exactly what I said, but - - what they said, but a contention - - when I clearly stated, okay, now could they assume that that was official when I specifically said EPA refuses to close the case.

Q. But didn't you tell us earlier, didn't you tell Judge Kennington earlier that you - -

A. You are twisting things.

Q. I haven't asked the question yet, ma'am. Did you not tell Judge Kennington earlier that you knew nothing of the outcome of the report until 1998, that you knew nothing of the outcome of the investigation?

A. Not in terms of what EPA was going to decide. I knew the evidence I had given them and what it should have been, but that didn't necessarily mean that EPA was going to issue the report that way.

Tr. 2307-2308.

Erickson testified why she did not revise the discrepancy between the clear statements the affidavit contained and what she says that she meant to convey to the FLRA agent: "She [the agent] wrote it. It was her – her statement or her interpretation of them, but – I mean, I didn't see any – anything grossly untrue that I recognized." Tr. 2311. "We were hurrying. It was late in the afternoon and I reviewed it and she asked if it was okay, sign the pages." *Id.*

The ALJ credited Erickson's explanation that she was in a hurry for her failure to notice the discrepancy between the affidavit she initialed on every page and her testimony that she did not know OIG had cleared her until 1998. R. D. & O. at 56. We do not. In light of the fact that Erickson displayed a prodigious memory and grasp of detail throughout the hearing, we find incredible her testimony that she did not notice the difference between the typed statements she signed and what she claims she told the agent.

Therefore, since we find that neither Region 4 nor OIG intentionally withheld the investigation results because Erickson notified Congressmen about the investigation, this claim fails.

e. Hostile Work Environment

As explained earlier, a whistleblower who alleges that his or her employer created a hostile work environment must demonstrate by a preponderance of the evidence that a hostile work environment existed because of the whistleblower's protected activity. Barrow and the co-workers did not know about Erickson's protected activity.

Erickson claims, and the ALJ concluded, that she was subjected to a hostile work environment at IMB. The ALJ found that Barrow knew of Erickson's protected activity in 1993 and 1995. R. D. & O. at 76. He found a hostile work environment because Barrow (1) put her in a position of perpetual incompetence by requiring her to oversee the creation of computer software even though she had little computer expertise and severe carpal tunnel syndrome, and (2) because Barrow let work assignment managers (WAMs) withhold technical information from her that she needed to oversee the software projects. R. D. & O. at 70-72.

In late 1996 Ron Barrow became Erickson's supervisor at IMB, and he continued to be her supervisor throughout the course of this litigation. The ALJ found that Barrow knew about Erickson's protected activity. He first found that Waldrop, Jamison (Procurement supervisor), Springer (Grants supervisor), Harris (Region 4 legal counsel) and Maxwell (Chief, Procurement and Grants Branch) all knew about Erickson's concerns about contract infeasibility when they met in March 1995 to discuss whether to ask the IG to investigate Erickson. R. D. & O. at 76. Then the ALJ also found that Sweeny, Erickson's first supervisor in IMB, "knew that [Erickson] was transferred to the Information Management Branch pending an OIG investigation." *Id.* Added to this, the ALJ found that Barrow knew that Erickson's removal from contracts "was pursuant to a grievance and that he could not remove her from her present position." *Id.* Given these findings, the ALJ concluded that "all of Complainant's supervisors, at some point in time, had knowledge that Complainant had engaged in protected activity." *Id.*

The record does not support the ALJ's finding that Barrow knew about Erickson's protected activity. Merely because Barrow knew that Erickson had filed a grievance before being transferred to IMB does not constitute knowledge of her protected activity. We find that neither Barrow nor her co-workers at IMB knew about Erickson's protected activity in 1993 and 1995 when she expressed concerns about the cleanup goals at Southeastern and North Cavalcade.

Barrow testified that he knew, probably from Erickson herself, that she landed in IMB because of a "grievance" of some kind in the Procurement and Grants Branch and that the IG had been involved in some unspecified way. But he made a point of not learning any details to preserve a clean slate with Erickson. Tr. 504-505, 508-509, 982, 1006. "I told her that I wanted to start with a clean slate and did not want to be involved or to know about the previous – I wasn't interested, didn't see where it affected us." Tr. 506. And, as the ALJ correctly noted, the record contains no evidence that any of

Erickson's co-workers in IMB knew about her 1993 and 1995 concerns about Superfund contracting. R. D. & O. at 87.

Moreover, Erickson does not argue that Barrow or her IMB coworkers knew about her protected activity. Her only argument, vague at best, is that people throughout the Region 4 offices knew she was a whistleblower, and since EPA has an anti-whistleblower culture, any adverse action against her can only be explained by antipathy to whistleblowers generally. "Everyone at EPA in Atlanta knew that Ms. Erickson was an outcast, and they all treated her as such. . . . EPA work assignment managers (WAMs) and others might not know the full details of what Ms. Erickson was accused of, but everyone was aware of her being moved out of her career field, into the library, into make-work projects, and into career oblivion." E. Br. at 22.⁷⁰

Furthermore, the record does not support the ALJ's finding that Barrow required Erickson to supervise contract employees who developed software for Region 4 but allowed WAMs to withhold information from Erickson that she needed to accomplish this job. In IMB, WAMs were responsible for all technical aspects of software development. WAMs have the necessary IT expertise and work with the contract employees daily. Erickson was responsible only for managing funding paperwork, approving travel, and signing off on monthly reports that the contractors had to submit in order to be paid. Tr. 2218-2223, 2226. Indeed, Erickson complained that she was underutilized and cited her limited responsibilities for software development as an example of how little she had to do. "[S]ince I don't have much to do, I don't need to know much to be able to do it." Tr. 2081. "If I were able to do what should be this job [administering the software contracts *and* supervising the contract employees as they develop the software] then I would need extensive computer expertise that I don't have." Tr. 3082.

Furthermore, the record does not support a finding that Barrow allowed WAMs to withhold technical information that Erickson needed for supervising software development. First, the record reflects that Barrow gave Erickson an overall rating of "exceeds expectations" in 1997 and "successful" in 1999 and 2000, when successful and unacceptable were the only two choices. EPAX 95, 98, 100. This evidence does not support a finding that Barrow was hostile or trying to undermine Erickson's work. Secondly, Erickson never complained that WAMs withheld technical information; her complaint was that they tried to go around her on contracting issues. For example, Erickson testified that WAMs tried to increase pay for contract employees by arbitrarily raising the employees' skill levels. When the WAMs made such attempts, they would take the papers to the contractor supervisor instead of Erickson because Erickson would know they were violating contract laws. Tr. 2223-2224.

⁷⁰ Erickson made the same vague argument below with almost no effort to present evidence or argue in a manner that related to the legal elements of her claims. The ALJ did a masterful job of placing Erickson's evidence and arguments in the appropriate analytical framework, thereby greatly facilitating our review.

The ALJ based his findings in part on the testimony of Robert Place, a contract employee who had worked with Erickson at IMB. R. D. & O. at 83. Place testified that Erickson lacked computer skills and that the WAMs did not keep her informed about the daily work of software development. Tr. 280, 314-315. But, as Erickson herself explained, Place's testimony was not about her Resources Coordinator job as it actually existed, but about the position as Place thought it should be. Place thought one person should be both the contract administrator and the day-to-day software supervisor. Tr. 3081. Therefore, Place's speculative opinion about what should have been happening in IMB does not support a finding that Barrow was underutilizing or undermining Erickson.

Therefore, since neither Barrow nor Erickson's co-workers knew about the protected activity in 1993 or 1995, Erickson's hostile work environment claim fails because she must demonstrate by a preponderance of the evidence that the hostile work environment occurred because of protected activity. Moreover, the record does not support the ALJ's finding that Barrow harassed Erickson.

3. April 9, 1998, to Close of Record, 2002

As we noted above, Erickson filed a total of ten additional complaints after April 9, 1998, but her brief indicates that she has abandoned all but five of the claims she asserts in those complaints. Erickson contends that EPA took these additional adverse actions against her because of protected activity

a. Written Warning

On August 5, 1998, Waldrop issued Erickson a written warning that she had exceeded her role as Chair of the Atlanta Federal Center (AFC) People with Disabilities Advisory Council. EPAX 103. The ALJ found that the written warning was not an adverse personnel action because it was not placed in her personnel file and had no adverse impact on the terms, conditions, or privileges of Erickson's employment. R. D. & O. at 66. We agree with this finding because the record and legal precedent support it.⁷¹

b. Co-Worker Criticism

In February 2000, Erickson attended a regularly scheduled IMB staff meeting. Tr. 1050-1051. A staff member who worked in IMB's FOIA office reported that they had received an inquiry from a Congressman who had received a written complaint that

⁷¹ *Shelton v. Oak Ridge Nat'l Labs.*, ARB No. 98-100, ALJ No. 95-CAA-19, slip op. at 8 (ARB Mar. 30, 2001) (written criticism is not adverse action unless it directly causes a tangible job consequence, such as loss of pay).

Region 4 was destroying email records to make them unavailable to FOIA requesters. *Id.* The FOIA staff member said she wished the person who had complained to Congress would have asked the FOIA staff first about the matter. *Id.* The FOIA staff could then have explained that the email records were being destroyed pursuant to a neutral routine policy and that the Region created and kept hard copies of all the emails. EPAX 107.

According to Erickson, everyone at the meeting knew that she was the person who wrote to Congress, and several staff members subjected her to a “din of hostile remarks.” Tr. 3031-3033. Erickson cited this episode as evidence of a hostile work environment. The ALJ concluded that the hostility at the meeting was not severe enough to contribute to a hostile work environment. Furthermore, the “din of hostile remarks” was not an adverse personnel action because it had no tangible job consequences. R. D. & O. at 72-73. Again, we agree with these findings because the record and precedent supports them.⁷²

c. Not Selected for Procurement Section in July 1998 and November 2000

In May 1998, Erickson applied for a GS-13 contract specialist position in the Procurement Section. EPAX 66. In June 2000, Erickson applied for a detail to the Procurement Section. EPAX 75. She was not selected either time, and she characterizes these non-selections as “denial of promotion through non-selection.” She alleges she was not selected because of her protected act of filing an environmental whistleblower complaint in April 1998. E. Br. at 18, 21.

To prevail on her discriminatory non-selection claims, Erickson must prove that she engaged in protected activity, that she was qualified for each position for which she applied, that she was rejected, and that a causal connection exists between her protected activity and her non-selection.⁷³ Again, Erickson’s claim fails because the record contains no evidence of a causal connection between her protected activity in 1993 and 1995 and her non-selection on these two occasions.

⁷² Cf. *Sasse v. Office of the United States Attorney*, ARB Nos. 02-077, 02-078, 03-044, slip op. at 34 (ARB Jan. 30, 2004) (loud, shouting criticism is “a normal part of the give and take expected in [a prosecutor’s] office.”); *Dierkes v. West Linn-Wilsonville Sch. Dist.*, ARB No. 02-001, ALJ No. 00-TSC-002, slip op. at 10 (ARB June 30, 2003) (strongly worded criticism by co-workers is not hostile, per se; complainant must show that the criticisms had a “severe negative impact on her working environment”); *Petrosino v. Bell Atlantic*, 385 F.3d 210, 223 (11th Cir. 2004) (the hostile work environment complainant must prove that her “workplace was permeated with discriminatory intimidation, ridicule and insult” since anti-discrimination laws are not “general civility codes.”)

⁷³ *Shirani v. Comed/Exelon Corp.* ARB No. 03-100, ALJ No. 2002-ERA-28, slip op. at 8 (ARB Sept. 30, 2005).

d. Hostile Work Environment

In addition to the “din of hostile remarks” allegation, Erickson cites other incidents that she claims were part of a hostile work environment. After Barrow asked Erickson several times to organize and file large piles of documents in her cubicle and the piles remained, Barrow suspended her flexiplace privilege in March 2000. Tr. 999-1002. Barrow also photographed Erickson’s cubicle to document the disarray. *Id.*; EPAX 116. Barrow reinstated Erickson’s flexiplace privilege in early August, after she organized the documents. EPAX 113 p.27. Barrow briefly suspended Erickson’s flexiplace privilege again in May 2001 while Erickson was unable to use her home computer. Tr. 529-530. The ALJ concluded that these events did not contribute to a hostile work environment because they were not severe, were not humiliating, and did not interfere with Erickson’s job performance. R. D. & O. at 73. The record supports these findings, and we therefore adopt them as our own.⁷⁴

CONCLUSION

Erickson does not prevail on any of her whistleblower complaints. Even assuming that her claims under SWDA and CAA are not time barred, and thus actionable, Erickson did not prove by a preponderance of the evidence, as she must, that the actions she complains of were both adverse and taken because of her protected activity. Therefore, we **DISMISS** all of Erickson’s complaints.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge⁷⁵

⁷⁴ See *Petrosino*, 385 F 3d. at 223.

⁷⁵ Judge Beyer participated in Part 1 (Sovereign Immunity) only.