

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 29 December 2014**

**CASE NOS.: 2004-CAA-00007  
2004-CAA-00011  
2005-CAA-00010  
2005-CAA-00012  
2005-CAA-00015  
2006-CER-00003  
2007-CER-00002**

**In the Matter of:**

**SHARYN A. ERICKSON,  
Complainant,**

**v.**

**U.S. ENVIRONMENTAL PROTECTION AGENCY,  
Respondent.**

Appearances:

Sharyn Erickson, pro se, Lawrenceville, GA  
For Complainant

Robin B. Allen, Esq., Jade Rutland, Esq., Karol S. Berrien, Esq.  
Environmental Protection Agency, Atlanta, GA  
For Respondent.

Before: Pamela J. Lakes  
Administrative Law Judge

**DECISION AND ORDER GRANTING IN PART AND  
OTHERWISE DISMISSING FIRST SET OF COMPLAINTS  
EXCEPT FOR HOSTILE WORK ENVIRONMENT ALLEGATIONS**

The above-captioned matters (collectively referenced as “Erickson III”), which have been brought under the employee protection (whistleblower) provisions of various environmental

statutes (with implementing regulations appearing at 29 C.F.R Part 24)<sup>1</sup> have been consolidated for hearing purposes and have been severed from a group of cases subsequently brought by Complainant (collectively referenced as “Erickson IV”), except for the allegations related to a continuing hostile work environment, which will be tried along with the later cases. The cases now before me relate to the period from November 2003 through January 2007.

All of these cases, as well as prior cases brought by Complainant (resolved against her as “Erickson I” and “Erickson II”) arise out of the assertion by Complainant Sharyn Erickson (“Complainant”) that she has been retaliated against in the terms and conditions of her employment by her employer, Respondent Environmental Protection Agency (“Respondent”), due to her participation in protected activities. The complaints assert reprisal with respect to individual actions taken as well as a continuing hostile work environment and sequelae. In the instant group of cases, she also alleges that she has been retaliated against for bringing and pursuing these and her prior whistleblowing complaints against Respondent.

For the reasons set forth below, I find that these cases must be dismissed except for Complainant’s allegation that she was retaliated against when she was returned to the Contract office in a manner that prevented her from succeeding and the allegations of hostile work environment. With respect to the remaining individual allegations, I find that Complainant cannot establish by a preponderance of the evidence that she engaged in protected activity that was a contributing or motivating factor to the alleged adverse employment actions taken against her and she has therefore failed to establish a cause of action cognizable under the environmental statutes (or the ERA). Moreover, even if she were to establish such a connection, except with respect to the initial reassignment to contracting, Respondent has established that there was a legitimate, nondiscriminatory reason for the specific actions of which she complains and those actions would have likely occurred absent her protected activity. These complaints will therefore be dismissed, with the exception of the allegations in the first complaint relating to her reassignment, which I find to be meritorious, and the hostile work environment allegations, which will be considered collectively along with the allegations made in the later group of complaints. Inasmuch as the reassignment issue is intertwined with the hostile environment allegations, the damages issue will be reserved until the latter part of the case is tried (including later individual allegations of retaliation and hostile work environment allegations).

## **PROCEDURAL BACKGROUND**

These consolidated cases (which may be deemed “Erickson III”) were brought under the employee protection (whistleblower) provisions of the Clean Air Act, 42 U.S.C. §7622; and various other environmental protection statutes<sup>2</sup> (all of which have implementing regulations appearing at 29 C.F.R Part 24). This group of cases consists of (1) Case No. 2004-CAA-00007 (relating to Complainant’s appeal of OSHA’s February 24, 2004 determination in Case # 4-5070-

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<sup>1</sup> None of the complaints in this group of cases raises the employee protection provisions of the Energy Reorganization Act, 42 U.S.C. §5851. Although OSHA referenced subsequent cases (beginning with 2009-ERA-0008) as also arising under the ERA, they did not.

<sup>2</sup> The other statutes relied upon are CERCLA, 42 U.S.C. §9610; the Safe Drinking Water Act (SDWA), 42 U.S.C. §300j-9; the Solid Waste Disposal Act (SWDA), 42 U.S. C. §6971; the Toxic Substances Control Act (TSCA), 15 U.S.C. §2622; and the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1367.

04-06, relating to her complaints of November 3, 2003; January 28, 2004; and February 6, 2004), beginning with allegations relating to her failure to be advised of employment opportunities with a closing date of October 24, 2003; (2) Case No. 2004-CAA-00011 (relating to Complainant's May 5, 2004 appeal of OSHA's April 29, 2004 determination in Case # 4-5070-04-032, relating to her complaint of April 7, 2004); (3) Case No. 2005-CAA-00010 (relating to Complainant's March 30, 2005 appeal of OSHA's March 24, 2005 determination in Case # 4-5580-04-021, relating to complaints of May 11, 2004, May 24, 2004, August 28, 2004, and December 16, 2004); (4) Case No. 2005-CAA-00012 (relating to Complainant's appeal of OSHA's April 21, 2005 determination in Case #4-5580-05-018, relating to a complaint of March 22, 2005); (5) Case No. 2005-CAA-00015 (relating to Complainant's July 1, 2005 appeal of OSHA's June 28, 2005 determination in Case #4-5580-05-029, relating to a complaint of June 8, 2005); (6) Case No. 2006-CER-00003 (relating to Complainant's July 31, 2006 appeal of OSHA's July 21, 2006 determination in Case #4-5070-06-020, relating to a complaint of March 21, 2006); and (7) Case No. 2007-CER-00002 (relating to Complainant's January 11, 2007 appeal of OSHA's January 8, 2007 determination in Case #4-5070-06-035, relating to a complaint of August 14, 2006).

Pursuant to multiple Orders, the cases were stayed until 60 days after the Eleventh Circuit Court of Appeals issued a decision on Erickson I (ARB Case Nos. 03-002, 03-003, 03-004; ALJ Case Nos. 1999-CAA-2; 2001-CAA-8, -13; 2002-CAA 3, -18) and Erickson II (ARB Case Nos. 04-024, 04-025; ALJ Case Nos. 2003-CAA-11, 2003-CAA-19, 2004-CAA-1), and the stay was subsequently extended until the Eleventh Circuit ruled on Complainant's reconsideration motion and until 90 days after all actions on her pending EEO hearing case were completed.<sup>3</sup> However, Complainant subsequently, on November 13, 2009, withdrew the request for a stay based on EEO proceedings and the stay was lifted by Order of December 11, 2009. That order also scheduled proceedings, including the completion of discovery and filing of summary disposition motions. Discovery was conducted by both parties and the schedule was modified.

On May 25, 2010, Complainant moved for a stay in all actions until OSHA had ruled on all currently pending complaints, "so that they can be appealed and included in the pending discovery and hearing, for judicial economy" and also to avoid the financial and psychological wearing down of Complainant, in view of duplicative actions requiring that she "have to repeat the same or similar documents and filings numerous times for separate complaints." In support, she indicated that the most serious retaliatory acts and "gravest hostile work environment" have occurred in "the unincluded complaints." In a response filed on June 8, 2010, Respondent EPA opposed the stay. In support, Respondent asserted that these proceedings had been delayed too long and noted that numerous complaints have been filed over the past five years and would likely continue to be filed.

In an Order of June 14, 2010, I indicated that I could not stay proceedings because of cases that were not before me, so I denied the stay. However, I noted the following:

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<sup>3</sup> Erickson I arose out of eleven complaints filed between 1998 and 2002, alleging retaliation because Complainant engaged in protected activity. Following a hearing held in May and June of 2002, the administrative law judge found merit to some of the complaints (including a hostile work environment claim) in a decision of September 24, 2002. Erickson II involved seven complaints filed in 2002 and 2003, was heard in May and July 2003, and led to another partially favorable decision, dated November 13, 2003. In a decision of May 31, 2006, the ARB rejected the favorable portions of the ALJ's decisions and dismissed all eighteen complaints. The U.S. Court of Appeals for the Eleventh Circuit affirmed the ARB on July 14, 2008 and denied reconsideration on October 7, 2008.

With that being said, I am sympathetic to Complainant's assertions concerning the problems associated with pursuing multiple complaints in two different forums. I too would like to avoid piecemeal litigation and agree that it would be more expeditious to handle all outstanding complaints in one single proceeding. In that regard, I disagree with "the Agency's position that claims pending before OSHA are separate and independent, and stand on their own merit" where, as here, there are allegations of a hostile work environment. See *Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 2001-CER-1 (ARB Apr. 30, 2004), citing *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113-15 (2002) (noting that "[i]n contrast to discrete adverse actions, a hostile work environment occurs over a series of days, or perhaps years, and a single act of harassment may not be actionable on its own"). See also *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998) (in a title VII sex discrimination case, a hostile work environment is one that is "both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so"); *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ No. 1997-ERA-14 (ARB Nov. 13, 2002) (complainant must show that the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment, and that it would have detrimentally affected a reasonable person and did detrimentally affect the complainant). It would not be possible to assess each claimed act separately out of context and then decide whether there was a hostile work environment.

On the other hand, Respondent has validly questioned further postponement of these cases, which are the oldest ones on my docket. These cases have already been postponed significantly pending disposition by the U.S. Court of Appeals for the Eleventh Circuit of two prior consolidated cases filed by Complainant, "Erickson I" (ARB Case Nos. 03-002, 03-003, 03-004; ALJ Case Nos. 1999-CAA-2; 2001-CAA-8, -13; 2002-CAA 3, -18) and "Erickson II" (ARB Case Nos. 04-024, 04-025; ALJ Case Nos. 2003-CAA-11, 2003-CAA-19, 2004-CAA-1). Those cases have been finally disposed of by the Eleventh Circuit, and the decisions of the Administrative Review Board have been affirmed. Further, Complainant has abandoned her argument that the instant cases should be stayed until 90 days after all actions on her pending EEO hearing case have been completed. Her request that these cases should be further stayed until OSHA has ruled on all of her pending complaints is impractical. While I cannot agree to a stay of proceedings until some indefinite time in the future at which the pending matters are ruled upon by OSHA, I do agree that consolidation of all the claims would be in the interest of administrative judicial economy.

In view of the above, it may be advisable to remand these cases back to OSHA so that the actions may be consolidated with the claims pending before OSHA and then all of the cases filed up until now may be returned together for the conduct of a single hearing and resolution, based upon allegations of a hostile

work environment. *See generally Ford v. Northwest Airlines, Inc.*, ARB No. 03-014, ALJ No. 2002-AIR-21 (ARB Jan. 24, 2003) (dismissing interlocutory appeal of remand order remanding post-complaint actions for investigation). *See also Sasse v. Office of the United States Attorney*, ARB Nos. 02-077, 02-078, 03-044, ALJ No. 1998-CAA-7 (ARB Jan. 30, 2004), *aff'd sub nom Sasse v. United States Dept. of Labor*, 409 F.3d 773 (6th Cir. 2005) (precluding consideration by ALJ of post-complaint actions taken by respondent when respondent did not agree to amendment of complaint.)

The parties were allowed thirty days to address the issue of whether these consolidated cases should be remanded and consolidated with the other cases pending before OSHA. In a response filed on July 7, 2010, Complainant moved for a remand to OSHA. In support, she argued that a combined investigation of all issues would resolve all issues without resulting in harassment and the cost of separate appeals. In a Reply filed on July 15, 2010, Respondent argued that the claims pending before OSHA constituted discrete acts and should be adjudicated separately from complaints pending before this tribunal, and “[s]ubsequent allegations of hostile environment and retaliation must not be used to further delay and defer proceedings.” Complainant’s Renewed Motion for Remand or Stay, dated September 27, 2010, was filed on October 13, 2010. In support, she argued that a remand was mandated under pertinent authority and that this case is not covered by cases addressing whether an administrative law judge had authority to remand a case for investigation. Further, she argued that a decision on the consolidated cases, without the inclusion of the later cases, would not conclusively determine the hostile work environment issue. Respondent filed an Opposition by facsimile on October 7, 2010 in which Respondent argued, *inter alia*, that any consolidation should occur at the ARB level. Respondent distinguished *Morgan [National R.R. Passenger Corp. v. Morgan]*, 536 U.S. 101, 113-15 (2002) by pointing out that *Morgan* stood for the proposition that a series of alleged discriminatory actions constitute a hostile work environment under certain circumstances but that “actions involving different parties, different supervisors and employees, and/or incidents separate and independent of one another, to include discrete acts, were not held by the Court to constitute a single unlawful employment practice.” Thus, Respondent argued that complaints filed in 2009 and 2010, including Complainant’s three-day suspension, constitute a series of separate and discrete actions that were distinguishable from the above complaints.

After considering the arguments by both parties, I issued an Order Denying Remand, Addressing Discovery Issues, and Scheduling Proceedings on November 19, 2010. In that Order, I denied remand, determined that the allegations in the eight cases before me would be considered as both separate complaints and as components of a continuing retaliation and hostile work environment claim, and provided that the hearing would relate to complaints covering the period from October 2003 through December 2008.<sup>4</sup> The Order also set up a schedule for discovery and prehearing filings, with the hearing to be conducted in April and May of 2011. The schedule was later modified on April 29, 2011.

In order to accommodate Complainant due to her *pro se* status coupled with the health issues, the hearing was conducted in parts. The hearing was held from October 25, 2011 through

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<sup>4</sup> Subsequently, the case was bifurcated to go through OSHA’s determination letter of January 6, 2007 in Case No. 2007-CER-00002.

October 28, 2011; from March 20, 2012 to March 23, 2012; and from July 24, 2012 through July 27, 2012. (As discussed below, following bifurcation, the first group of cases was concluded with Complainant's testimony from July 24, 2013 to July 26, 2013.)

At a Conference Call held on April 17, 2013, I suggested bifurcation of the first seven cases so that the hearing in those cases (with the following docket numbers) could be completed:

**2004-CAA-00007**  
**2004-CAA-00011**  
**2005-CAA-00010**  
**2005-CAA-00012**  
**2005-CAA-00015**  
**2006-CER-00003**  
**2007-CER-00002**

The cases were to be decided apart from the other pending cases brought by Complainant, which at the time of this decision consisted of the following (with the latter two cases filed after the bifurcation order):

**2009-ERA-00008**  
**2011-CAA-00004**  
**2012-ERA-00001**  
**2012-CAA-00003**  
**2012-ERA-00016**  
**2013-CAA-00004**  
**2013-CAA-00005 (docketed later)**  
**2014-CAA-00001 (docketed later)**

Respondent agreed to the bifurcation but Complainant objected, noting the overlap between the issues in the two cases. I indicated to Complainant that the record from the first seven cases could remain a part of the record in the later cases and be taken into consideration when those cases were heard. In particular, the events falling within the purview of those complaints would be taken into consideration with respect to Complainant's overall hostile work environment claim. Thus, there would be no prejudice to any party. Moreover, although Complainant has expressed concern at the fact that she would have to write two briefs, all of the events and issues would have to be briefed anyway, so no additional time would be required. Indeed, by breaking the work up, it would be more manageable for all parties, and the parties could incorporate their prior briefing in the later cases.

In a Notice of Assignment, Order of Consolidation, and Order of Partial Bifurcation of April 18, 2013, I bifurcated the cases for the limited purpose of completing the hearing on the first group of cases and allowing them to be resolved separately, but allowing the record from those cases to be a part of the record for the other cases. In doing so, I took into consideration Complainant's objections but overruled them in the interest of administrative judicial economy and efficiency.

The hearing on the first group of cases was concluded from July 23, 2013 through July 26, 2013.<sup>5</sup> A briefing schedule was set up.

An Order Extending Briefing Schedule was issued on November 27, 2013. Under the briefing schedule, the briefing deadlines were extended to February 18, 2014 for initial briefs and March 4, 2014 for reply/response briefs, with no further extensions to be granted except by agreement of the parties. The Order was issued in response to an emergency motion filed by Complainant that was opposed by Respondent.

On February 20, 2014, Respondent filed a request for an extension to file closing briefs until March 26, 2014 [although it appears that February 26, 2014 may have been the intended date]. In support, Respondent indicated that its counsel had misread the date on the Order as being February 28 and had therefore missed the deadline. Respondent noted that Complainant had also missed the deadline and Complainant indicated in an email to counsel for Respondent that she would be hand delivering her brief on February 20. Respondent advised Complainant of her mixup on dates.

Complainant filed her brief on February 24, 2014, but did not contemporaneously serve Respondent with a copy. Respondent moved for sanctions on March 4, 2014, but withdrew the motion by counsel's letter of March 6, 2014, in which she advised that she had received a copy of Complainant's brief without the service sheet on March 5, 2014.

Respondent filed its brief/closing argument on March 5, 2014 and served it upon Complainant by mail on February 26, 2014.

Complainant moved to strike Respondent's brief on February 27, 2014, via a facsimile "Sworn, Verified Motion to Strike EPA's Opening Brief or, in the Alternative, to Draw Adverse Inferences from EPA's Misrepresentations of Fact and Failure to File Affidavits, Declarations, or Any Documents Establishing Good Cause for Missing Briefing Deadlines." Respondent filed a response to the motion on February 28, 2014, in which Respondent disputed Complainant's allegations, noted that Complainant's brief was untimely and was not served upon Respondent, asked that Respondent's brief be accepted, and moved for Complainant's brief to be stricken. Respondent also noted that this tribunal "has been extremely lenient with Complainant and has granted numerous stays and extensions since 2004 through 2013," a point with which I agreed.

By Order of April 3, 2014, I accepted both briefs as timely and allowed the parties until May 1, 2014 to submit reply briefs, with date of mailing to be deemed date of filing. I denied all other pending motions as moot or meritless.

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<sup>5</sup> References to the transcript (which includes proceedings from October 25, 2011 through October 28, 2011; from March 20, 2012 to March 23, 2012; from July 24, 2012 to July 27, 2012; and from July 24, 2013 through July 26, 2013) appear as "Tr." followed by the page number. Administrative Law Judge's Exhibits are referenced as "ALJ" followed by the exhibit number; Complainant's Exhibits are referenced as "CX" followed by the exhibit number; and Respondent's Exhibits are referenced as "RX" followed by the exhibit number.

Both parties filed reply briefs, both of which were mailed on May 1, 2014. Complainant's Brief was received on May 6, 2014 and Respondent's Brief was received on May 6, 2014. Both briefs are timely and this part of the consolidated cases is ready for disposition.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **PRIOR DECISIONS AND ALLEGATIONS**

#### *Background on Prior Cases*

Complainant has been employed by the Environmental Protection Agency in Atlanta, Georgia since 1989, and she worked as a GS-12 contract specialist in Region 4's Procurement Section from 1989 until 1994.<sup>6</sup> EPA Region 4 administers contracts with private companies to clean up hazardous waste sites in the southeastern states. During the course of her employment, she had difficulties with various supervisors, including Jane Singley, Nancy Bach, and Keith Mills, whom she accused of giving her unnecessary tasks to force her to work unpaid overtime. Her disagreements with supervisors Singley, Bach and Mills centered around a Superfund contract with OHM, Inc. relating to cleanup of an abandoned wood preserving site in Mississippi for which Complainant was the contracting officer. After difficulties arose concerning the specified cleanup techniques, Complainant was concerned that OHM had grounds to sue EPA; however, when OHM chose to reform the contract, she assisted the contractor with contract compliance. She was removed by Mills from the contract due to a perceived lack of objectivity.

After she filed grievances and an unfair labor practice complaint, in which she complained about other matters as well as the OHM matter, she was transferred out of Procurement in 1994 and detailed to the Grants Section. She also experienced difficulties with her supervisor there, Deborah Maxwell, the branch chief responsible for both the Procurement Section and the Grants Section, who removed her from contract work entirely. When notified by OHM about a similar bid relating to a project to clean up an old wood preserving site in North Cavalcade, Texas, she reported similar concerns as she had with respect to the prior Superfund contract to the Texas Natural Resources Conservation Commission and Region 6 of EPA (including the contract manager, Glen Celerier). OHM was one of 33 firms to have submitted a bidder qualification statement but it did not ultimately submit a bid. However, Complainant's involvement ostensibly on behalf of a bidder resulted in the matter being referred to the Inspector General by Legal Counsel Phyllis Harris based upon a perceived violation of conflict of interest laws. Although the Inspector General found no crime, the OIG did not close its investigative file and it did not respond to Complainant's FOIA requests or advise her of the results of the investigation. Although she learned that she had been cleared of criminal charges by OIG in 1996, Complainant did not receive a copy of the report until 1998.<sup>7</sup>

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<sup>6</sup> These facts have been taken from the Administrative Review Board's decisions of May 31, 2006 and October 31, 2006 (which are incorporated by reference herein) and are provided to clarify what allegations were involved in Erickson I and II. The findings of the Board as affirmed by the Eleventh Circuit are the "law of the case."

<sup>7</sup> Although Complainant raised issues about the Inspector General investigation before me, the parties agreed that those matters were covered in Erickson I and II, except for Complainant's allegation that "the EPA never did admit that [she] was cleared or that there hadn't been an issue or that there were no criminal acts" and that the Deputy I.G. was still testifying that she had "created an appearance of conflict." (Tr. 1582-83).

Complainant was transferred to Information Management in September 1995, where she was responsible for administering contracts for computer software development. She was dissatisfied with the level of work and began applying for jobs in procurement but was not selected. Her supervisor at IMB was initially Sweeny and beginning in 1996 was Ron Barrow

Complainant filed her first whistleblower complaint in 1998. On investigation, OSHA determined that it lacked merit. She subsequently filed 10 more complaints between 1998 and 2002 that collectively became Erickson I. OSHA found no merit to the ones it investigated; others, it merely forwarded. Following a hearing held from May 6 to June 18, 2002 on the consolidated complaints, Administrative Law Judge Clement J. Kennington determined that EPA and its OIG had retaliated against her because of her protected activity, in a Recommended Decision and Order of November 24, 2002 in Erickson I.<sup>8</sup> He recommended that Complainant be reinstated to her former position as a contract officer but that she be promoted to GS-13; he also awarded compensatory damages of \$50,000 and punitive damages of \$225,000 but denied a request for attorney fees.

Following the hearing, between 2002 and 2003, Complainant filed seven additional complaints that became Erickson II. Essentially, she claimed continuing retaliation based upon her 1993 and 1995 Superfund criticisms and her whistleblower litigation against EPA, and she claimed that she was subjected to a hostile work environment. Specifically, she claimed that her supervisor, Barrow required her to certify the accuracy of bills that she could not verify; she complained about the flawed computer budget recordkeeping system; and she ultimately refused to make the certifications absent a written agreement that she would not be held personally responsible. She also complained about the way her tardiness and absences (some of which were related to her health problems) were monitored by Barrow, and she complained of remarks made at a meeting by new Assistant Regional Administrator Russell Wright. The allegations in Erickson II were found to lack merit by OSHA. However, following a hearing held from May through October of 2003, Judge Kennington (on November 13, 2003) determined that EPA had violated the environmental whistleblower provisions with respect to some, but not all, of her claims. He again ordered reinstatement to a contractor officer position, back pay, compensatory damages, and punitive damages.

In its decision of May 31, 2006 on Erickson I, the ARB determined that there was no waiver of sovereign immunity with respect to Complainant's FWPCA and TSCA claims and proceeded to consider the SWDA and CAA claims, without indicating its determination with respect to the SDWA and CERCLA claims.<sup>9</sup> It also reached the following conclusions:

(1) With respect to Complainant's protected activity, the ARB noted that Judge Kennington found that Complainant had engaged in protected activity when she voiced concerns about the

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<sup>8</sup> At that time, administrative law judges made recommended decisions and the final decisions were issued by the Administrative Review Board.

<sup>9</sup> The Solicitor of Labor determined that there was a waiver of sovereign immunity under the SDWA and CERCLA as well as the CAA and the SWDA but agreed that there was no waiver under FWPCA and TSCA, based upon an opinion of the Office of Legal Counsel of the Department of Justice holding 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." See ARB Decision of May 31, 2006 at p. 12. The ARB agreed that the OLC decision was binding on it.

Superfund contract and the subsequent bid, and it assumed without deciding that she had done so. Although not addressed by Judge Kennington, the Board found that Complainant engaged in protected activity when she filed her 1998 whistleblower complaint and when she discussed it with the media and the General Accounting Office in 1998 and 1999. The Board agreed with Judge Kennington that she had not engaged in protected activity when she complained to a Congressman about destruction of email records in 2000.

(2) Based upon *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113-15 (2002), the Board found that Complainant's whistleblower complaints (which it grouped into three periods, from 1993 to March 1995; from March 10, 1995 to April 9, 1998; and from April 9, 1998 to the close of the hearing in June 2002) were either time barred, not adverse, or not taken because of protected activity. The Board found that the allegations in the first group were time barred because they occurred more than 30 days before the 1998 whistleblower complaint. With respect to the second group, it found that the allegations relating to the continuing effects of the decision to assign her to IMB were time barred but that her claims for non-selection for a GS-13 position and for failure to receive notice of the IG's findings were not. The Board also found that the hostile work environment claim for the period from 1993 to 1998 was not time barred because two of the events occurred within 30 days of April 9, 1998, when the first complaint was filed.

(3) Considering the claims that were not time-barred, the Board found that all of the claims lacked merit either because they were not adverse or because EPA did not take the adverse action because of her protected activity (considering both complaints about discrete actions and a hostile work environment). With respect to the first period, the Board found that Mills, Bach, and Singley acted solely for legitimate reasons in criticizing Complainant's work, requesting her to perform additional work, and removing her from Bechtel and OHM contracts. With respect to the second and third periods, the Board found that Harris's recommendation to refer the conflict of interest matter to OIG was commensurate with the evidence before her and Complainant did not establish that the decision to refer her to the IG for investigation was because of protected activity; that Acting Regional Administrator Waldrop's failure to clarify instructions that she interpreted as a gag order was not evidence of retaliation; that Complainant did not prove that EPA detailed her to IMB [the Information Management Branch], or made the detail permanent, because of protected activity; that Mills did not retaliate against Complainant when he selected another candidate for a GS-13 position; that (despite advice by IG desk officer Fugger that she "saw what happened with her congressionals" and she "better not try anything else") the preponderance of the evidence showed that OIG did not provide its investigation results or respond to her FOIA requests "because OIG did not have the responsibility to do so and because of the chaotic situation in the FOIA Office"; and that there was no causal connection between her nonselection for the Procurement Section in July 1998 and November 2000 and her protected activity. The Board also agreed with Judge Kennington that neither a written warning nor hostility at a meeting rose to the level of an adverse personnel action.

(4) With respect to the hostile work environment claim, the Board found that her supervisor at IMB, Barrow, and her coworkers knew about her grievance but not about her protected activity and she did not establish that the hostile work environment occurred because of the protected activity. The Board agreed with Judge Kennington that suspension of her flexiplace privilege in

March 2000 and May 2001 due to disarray of her workplace did not contribute to a hostile work environment because the actions taken were not severe, humiliating or interfering with her job performance.

The ARB addressed the allegations in Erickson II in a Final Decision and Order of October 31, 2006. Although agreeing with some of Judge Kennington's findings, the ARB rejected his finding of retaliation. The ARB found no merit to Complainant's hostile work environment claim based upon her failure to prove (1) that she had been given impossible-to-perform work relating to verifying invoices and tracking balances; (2) that she had been left without work to do by Barrow ("idling"); (3) that she had been singled out by new Assistant Regional Administrator Wright, to her detriment, at a meeting of November 6, 2002; (4) that she was subjected to "disparate surveillance" by Barrow; and (5) that she was subjected to false and unfounded criticism by Barrow. The ARB also found no merit to two discrete acts of discrimination, and specifically: (1) a claim that she was retaliated against when she was not considered for two contract specialist positions, because she was not currently a contract specialist, as Judge Kennington's decision was a recommended one and Respondent was not required to implement it; and (2) a claim that she was improperly charged with annual leave when she was actually working, as Barrow had ample reason to believe she was out on annual leave and acted in good faith.

In a per curiam decision of July 14, 2008, the U.S. Court of Appeals for the Eleventh Circuit affirmed the ARB's decisions in Erickson I and Erickson II. Noting that it reviewed legal conclusions de novo and factual findings under the substantial evidence standard, it found substantial evidence supported the ARB's findings. The Eleventh Circuit concluded:

Most of the ARB's disagreements pertained to inferences to be drawn from the evidence, and where the ARB rejected the ALJ's conclusions it duly explained its reasons for doing so. That is all that is required by the principles of review involved in this type of proceeding. Affording the ARB the deference it is owed, its determination of the merits of Erickson's whistleblower claims in both Erickson I and Erickson II is supported by substantial record evidence and is reasonable.

*Erickson v. U.S. Department of Labor*, No. 06-14120 (11<sup>th</sup> Cir. July 14, 2008) (unpub.)

Complainant sought rehearing, which was denied by Order of October 7, 2008 (issued by the same panel).

### ***Allegations in the Complaints Before Me***

The complaints before me complain of continuing retaliation against Complainant due to her protected activity and the continuation of a hostile work environment. Generally, Complainant alleges that "[e]ven after Erickson II was decided [by Judge Kennington] on November 13, 2003, EPA continue[d] retaliating against, bypassing, excluding, gagging, ridiculing, mocking and refusing to reinstate [her] to equivalent responsibilities in Contracting, equal to what she had in 1993 and enhanced by the responsibilities she would have had if she had

eleven more years of contracting experience.” (*Feb. 6, 2004 Complaint in 2004-CAA-0007* at p. 3; Tr. 1577). In the February 6, 2004 complaint (which was part of Case No. 2004-CAA-0007), she indicated that while, “[o]n superficial view,” her return to Contracting “could be perceived as a victory,” the transfer was retaliatory because of the duties, supervisor, location, and timing of the job. *Id.* Further, she complained that Respondent had not reinstated her contracting warrant at the level it was or “would have been but for ten years of discrimination.” *Id.* She has also alleged additional specific acts of retaliation occurring from 2003 to 2006, including the following:<sup>10</sup>

Case No. 2004-CAA-0007: Complainant alleged that she was discriminated against when (1) the EPA failed to reinstate her to her former position with full back pay and interest at the GS-13 level in accordance with Judge Kennington’s decision; (2) her ADA disability accommodations were taken away effective February 9, 2004; (3) she was assigned to work for Keith Renard Mills, “the original retaliator”; and (4) the EPA in general and Mills in particular continued his retaliation against her by, inter alia, failing to notify her of promotional opportunities and denying her consideration for a promotion. She claimed gastrointestinal problems and eye damage requiring surgery (on January 16, 2004) as a result of the workplace stress.

Case No. 2004-CAA-0011: Complainant alleged that (1) Mills continued to give her “scut work assignments” instead of contracting officer positions as order by Judge Kennington (referencing CX 88);<sup>11</sup> and (2) Mills gave her an “illegal gag order” on April 6, 2004 (referencing CX 89A).<sup>12</sup>

Case No. 2005-CAA-0010: Complainant alleged that (1) she was humiliated by Russell Wright at an August 24, 2004 meeting and by Frieda Lockhart who agreed with him;<sup>13</sup> (2) Carlos Asencio harassed her by making a doctor’s appointment for her at a distant location for the purpose of denying her reasonable accommodation for her hand condition and EPA failed to provide her with reasonable accommodation for that condition; (3) she was subjected to continued nitpicking and harassment concerning her retention of boxes of evidence; (4) she was required to come in early for a teleconference meeting to use the bathroom despite her irritable bowel syndrome; and (5) she was precluded from even applying for GS-14 positions for which she was qualified due to continuing retaliation.

Case No. 2005-CAA-0012: Complainant alleged continuing harassment, denial of promotions (referencing CX 95 and attaching CX 93), and wrongful denial of disability accommodation and status (referencing CS 96A,B and CX 97). Specifically, she alleged that (1) Sam Jamison required that she notify him in person or by phone whenever she was going to be away from her desk for more than one or two minutes (referencing CX 94); (2) she was humiliated because she had to report to a person with less experience, at a lower grade level (referencing CX 98A and

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<sup>10</sup> Some of the allegations appear in more than one complaint and have not been repeated. The above is not an exhaustive list of all of the allegations. Complainant compiled some of the complaints and they appear in the record as ALJ 5.

<sup>11</sup> Where pertinent, exhibits referenced in the complaints have become part of the record in the instant case. (Tr. 1618-19). CX 88 listed contracts that Complainant was assigned to close out.

<sup>12</sup> CX 89A addressed Complainant’s request for accommodations for her claimed medical conditions and directed her to limit communications regarding legal issues to those between her attorney and Regional Counsel attorneys.

<sup>13</sup> The meeting involving Mr. Wright in Erickson II took place on November 6, 2002.

B); and (3) although she was rated most qualified for the Management and Program Analyst detail to IMB, Hector Buitrago was chosen for the position (referencing CX 99).

Case No. 2005-CAA-0015: Complainant alleged continuing violations and specifically that EPA retaliated against her by issuing a determination of May 17, 2005 finding her non-disabled and not in need of an accommodation “for [her] hands or the workplace stress,” after misrepresenting her doctor’s statement (referencing CX 101 and CX 102). She claimed to have also developed diabetes as a result of workplace stress (referencing CX 101).

Case No. 2006-CER-0003: Complainant alleged continuing violations including her nonselection for a GS-14 Regional Diversity Program Manager position.

Case No. 2007-CER-0002: Complainant alleged continuing violations, and specifically (1) her failure to be chosen for two GS-13 positions, which were filled by persons with lesser qualifications and (2) her denial of awards based upon her latest evaluation, after being told that she would have to drop all complaints in order to receive anything more than a satisfactory rating and that her rating was dependent upon how people perceived her and not on her performance.

The complaint in the last of these cases was dated August 16, 2006 and the OSHA determination letter was dated January 8, 2007. The next group of complaints, addressed in 2009-ERA-0008, begins with events addressed in Complainant’s complaint of November 20, 2007 that led to OSHA’s May 6, 2009 determination letter, which addressed actions taking place from January 2007 through 2008.

## FACTS

### *Complainant Erickson’s Testimony (All Issues)<sup>14</sup>*

#### **Background and Employment at the Information Management Branch**

Sharyn Erickson [hereafter “Complainant”] started her government employment with the federal prison system as a correctional officer in 1977; however, in January of 1982 she transferred to the Air Force Warner Robbins Air Logistic Center to participate in a two-year training program in contracting. (Tr. 1566-67). She worked for the Air Force at Warner Robbins for about seven years, after which she transferred to the EPA, in January 1989. (Tr. 1567). At the Air Force, she started as a GS-5 and moved up to GS-11. (Tr. 1568). When she started at EPA, she was a GS-12 contracting officer. (Tr. 1567). She stayed in the GS-12 contracting position at EPA until March of 1995, when she was transferred to I.T. (the Information Management Branch). (Tr. 1568; Tr. 1540). At the time of her transfer, she had a \$3 million warrant. (Tr. 1530). Her supervisor at I.T. was originally Jack Sweeney and, after his retirement, Ron Barrow. (Tr. 1531).

At the beginning of the period covered by this set of complaints, starting in 2003, Complainant was still employed in I.T. under Ron Barrow’s supervision. (Tr. 1539). She continued to complain about being put in a position for which she was not qualified, being given

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<sup>14</sup> Exhibits will be discussed as relevant with respect to the testimony of the witnesses.

impossible tasks, and being kept idle.<sup>15</sup> (Tr. 1538, 1540-47). She was also told not to talk at meetings. (Tr. 1578-79). This alleged pattern of retaliation continued until she left I.T. in 2004. (Tr. 1545). Allegedly as a result of the stress, her blood pressure spiked and she started seeing flashes of light; her attorney at the time, Ed Slavin, told her that meant her retina was detaching, so she obtained an emergency referral to Emory Retina Clinic, leading to the January 2004 surgery (Tr. 1548-51; CX-123). Upon her return to work on January 28, 2004, she started hemorrhaging with a gastrointestinal bleed and had to go to the Emergency Room. (Tr. 1551-52). Her family practitioner, David W. Kunz, M.D., felt that she had ulcerative colitis that was attributable to her work stress. (Tr. 1553; CX 90 [attached to April 7, 2004 complaint in 2004-CAA-0011], CX 100, CX 101, CX 102; see also RX 10, 16).<sup>16</sup>

### **Complainant's Supervisors at Contracting**

Complainant was transferred back to Contracting in February 2004 and she was still in that position through the time of the hearing before me. (Tr. 1530-31). Upon her return to Contracting, Keith Mills (who had been involved in Erickson I and Erickson II) was her supervisor. (Tr. 1531). At the time, he became Acting Deputy Assistant Regional Administrator for Russ Wright (who had also been involved in the previous litigation).<sup>17</sup> (Tr. 1531-32). Toward the end of 2004, when Mr. Mills was detailed as deputy assistant regional administrator, the position of her immediate supervisor was rotated. (Tr. 1532). These included Charles Hayes and Fran Harrell, who were at the GS-13 level; however, Complainant was not asked to be a supervisor, as she was a GS-12. (Tr. 1558-1600, 1609-10). That continued until Lucy Yarborough became permanent section chief some time around 2006, and Ms. Yarborough supervised her for about one year. (Tr. 1532). Next, Charles Hayes took over as her immediate supervisor, in an acting capacity. (Tr. 1532). Various individuals would act for up to 120 days in view of federal government restrictions, and some of them served in the acting capacity more than once. *Id.* Other supervisors included Debbie Hoover (who had been involved in the previous litigation) and Anita Wender. (Tr. 1533-34). Sam Jamieson also was acting for a while; he was also a GS-13. (Tr. 1611). In 2008, Raquel Hill became the permanent supervisor; however, by the time of the July 2013 hearing, she had been moved to a non-supervisory GS-14 position and Dorothy Rayfields, the head of grants, was acting supervisor, and Keith Mills was working there part time, "trying to get contracting going again." (Tr. 1534).

### **Work Assignments in Contracting**

Upon her transfer to Contracting, Complainant was not given any contracts and all she had to do were closeouts, which is "the grunt work of contracting." (Tr. 1560-61; see also 1576-77, 1587-89). Even for these low level jobs, she had to ask people with far less experience to sign for her as they had taken away her \$3 million warrant (which authorized her to obligate taxpayer money up to that amount) when they transferred her out of contracting. (Tr. 1560). As

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<sup>15</sup> According to Complainant, Patty Bettencort, the Controller, harassed her and disagreed with her about the amount of funding for GSA contracts. (Tr. 1450-48). In an email to Ron Barrow in late 2003, Ms. Bettencort suggested that he "get rid of the problem," meaning her. (Tr. 1540-42).

<sup>16</sup> Her treating physician identified multiple stress-related conditions in Declarations of March 3, 2005 and May 20, 2005. (Tr. 1579-80; RX 10, RX 16).

<sup>17</sup> Mr. Wright was the Assistant Regional Administrator. (Tr. 1678).

of the time of the hearing, she only had a \$100,000 warrant which Lucy Yarborough requested for her in 2007. (Tr. 1561). After she complained of idling, Mr. Mills assigned her a couple of small purchases, which she considered to be "GS 5-7 work." (Tr. 1562). Mr. Mills also assigned her to Shayla Jenkins (now Patillo), who was a GS-9, to sign off on the small purchases. (Tr. 1563, 1584-85). Her assignment to work as part of the new simplified acquisition team with Shayla Jenkins as the lead, along with Karen Gardner (who was on detail from the accounting office) and Jessica Ross (who was a GS-7 intern, an environmental protection specialist) was announced on the LAN system on February 28, 2005. (Tr. 1629-31: CX 98A, CX 98B). She found it humiliating as a GS-12 to have her work reviewed by a GS-9 and to have the appointment announced to the whole region. (Tr. 1584, 1630).

At this point in time, although she had continued to work on contracts, she had been outside of the Contracting Office from 1995 to 2004. (Tr. 1564). Complainant disagreed with the testimony of Mr. Mills (discussed below) to the effect that she needed to be retrained and brought up to speed on the new way that they were doing contracting, because there were constant changes in contracting and referral to updated provisions was always necessary. (Tr. 1564-65). As an example, she pointed out that Mr. Mills had recently returned to the contracting area as head of contracting despite being out of contracting longer than Complainant had been. (Tr. 1565).

Besides the work assignments, Complainant was not selected to go to any conferences. (Tr. 1660). She was also not allowed to attend contract related training. (Tr. 1660).

### **Promotion Opportunities**

Complainant would have been at the GS-13 level if Judge Kennington's decision had been followed. (Tr. 1558-1600). However, as she was returned to Contracting in a GS-12 position, she was not eligible to even apply for GS-14 positions. (Tr. 1608-09, 1615). She could have been promoted noncompetitively as they had done with Mr. Mills but they instead kept her at the GS-12 position. (Tr. 1615).

Complainant also felt that she was treated unfairly when Hector Buitrago was selected instead of her for a GS-13 position in the Information Management Branch doing what she had been doing when she was there. (Tr. 1631-32; CX 99). Karen James, the personnel specialist from the division, had advised her that her application was rated best qualified and referred to the selecting official but that Mr. Buitrago had been selected for the position. (Tr. 1631-32; CX 99). Phyllis Mann was the selecting official. (Tr. 1631-33). As discussed below, Ms. Mann testified that she had selected Mr. Buitrago because of his grants experience (Tr. 227, 234-41) but Complainant maintained that was only a small part of the job and the other stuff was what she had been doing. (Tr. 1633).

Complainant continued to maintain that she was not provided with the opportunity to compete for jobs for which she was qualified due to EPA's failure to implement Judge Kennington's Order. (Tr. 1647-50; see also CX 104A-D). One of the positions that she was

precluded from applying for was Program Management Officer, GS-14, which was open from February 2 to 15, 2005 (CX 95; see also Tr. 1620).<sup>18</sup>

### **Disparate Treatment/“Gag Order,” Nitpicking, Harassment, and Boxes**

Complainant also believed that she had been given a “gag order” by Mr. Mills when he banned her from discussing anything about the retaliation and discrimination with anyone other than lawyers or managers. (Tr. 1569-70). In support, she referenced RX 33 (which was attached to the April 7, 2004 complaint as CX 89A), a memorandum from Mr. Mills to Complainant referencing an email message she sent on March 31, 2004 (warning her supervisors and other persons that they could incur individual liability for damage to her health as a result of willful disregard of her doctor’s instructions); advising her that she has failed to provide documentation supporting her accommodation request; advising her that “[f]urther communications regarding legal issues should be limited to those between your attorney and our Regional Counsel attorneys”; and notifying her that she should contact Freda Lockhart in the Office of Civil Rights if she felt she was discriminated against based on disability, race, color, age, gender, or religion. (CX 89A).

Further, Complainant felt that she was singled out at various meetings because of her whistleblowing activities.<sup>19</sup> At one point, they were having “training on building high performance organizations” and they were told that “employees had to get on board and move forward with the group and leave anything in the past behind and specifically drop it.” Those sentiments were expressed by Mr. Wright on one day (May 19, 2004) and the next day (May 20, 2004), Freda Lockhart (Acting Deputy Assistant Administrator) repeated the same thing. Keith Mills, who was her supervisor at the time, made the same statement on May 17, 2004. (Tr. 1589-92).<sup>20</sup> There was another meeting on August 24, 2004 where Mr. Wright again brought up his philosophy about leaving the past behind and he used the image of geese flying in formation. (Tr. 1594-96). When he talked about teamwork and awards, she asked “how could people expect to treat people fairly on awards and stuff when he was refusing to [take] personal responsibility to end EPA’s widespread retaliation” and he said: “Sharyn, I’ll tell you what. If you don’t think you’ve been treated fairly, come talk to me.” At that point, everyone laughed because they knew about the previous case and that he had been found to be retaliatory, and Complainant felt that he was insulting her by saying that. (Tr. 1594-96).

Complainant was also required to attend a May 27, 2004 planning meeting at a location that was about 40 miles or so southwest of downtown Atlanta, and she lived approximately 30 to 35 miles northeast of town. There was no way that she could get her son to daycare and arrive in time for the scheduled meeting. Even though other employees were told not to worry about conflicts and to just get there when they could, Complainant was told that she would be found AWOL if she did not arrive prior to the time the meeting started. (Tr. 1586-87).

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<sup>18</sup> In her March 22, 2005 complaint, Complainant referenced CX 95, the job announcement. (Tr. 1620).

<sup>19</sup> Allegations that Mr. Wright had singled her out at a November 22, 2002 meeting were addressed in Erickson II.

<sup>20</sup> Complainant asserted that it was common knowledge at EPA that anyone who angered a manager at EPA would never be forgiven. According to Complainant, Pat Tobin, the former deputy regional administrator, stated that, and Region 4 managers themselves acknowledged the retaliatory attitude, as reflected by surveys. (Tr. 1592-94.)

Complainant also alleged that she was subjected to continued nitpicking and harassment, including Management bothering her about boxes of documents she was retaining in case they were needed for evidence or discovery. (Tr. 1600-02). She explained that when she transferred to I.G. in 1995, they boxed up everything in her cubicle and she did not know whether there were any contracting documents in the boxes. (Tr. 1601-02). Some of “the stuff” was sent to the I.G. and then returned, and as she did not have room for it all in the small area they assigned her, she stored it elsewhere in a storage area. (Tr. 1603). She had gradually gone through some of the boxes but had not gone through all of them. (Tr. 1603). These boxes did not include documents from Erickson I and II, as she had boxes for those cases at home. (Tr. 1604). When she moved to Contracting, they boxed up the documents again, and she did not know whether records from the Information Management Branch were in the boxes. (Tr. 1604-05). At that time, in 2004, Keith Mills told her that she had to get rid of the boxes in storage and in her cubicle. (Tr. 1605-06). She did not want to bring the boxes home because they included supplies and she did not want to be accused of taking supplies. Also, she had been accused of removing records in the past and she was not sure that they did not include records or duplicates of records. (Tr. 1606-08). In 2004, she did not have access to all of the boxes, as some were in the basement in a closet, and in her cubicle while others were in a locked room down on the 8<sup>th</sup> floor. (Tr. 1608). At one point, there were an estimated 20 boxes at her cubicle and an additional 34 boxes in storage that were brought up to the contracting file room for her to review in 2009 and 2010. (Tr. 1607).

Complainant felt that she was being subjected to harassment due to her disparate supervision. As had been the case when she was at Information Management, Complainant had very little to do at times when she was back in Contracting, and she was used to going to other offices to help them out. These had included Raphael Santa Maria in the E.E.O. office and Solomon Pollard in the Air Division, who was working on children’s health issues. (Tr. 1611-12). Sam Jamison, one of the acting supervisors, objected to this and instructed her that she had to notify him whenever she was going to be away from her desk for a minute or two. (Tr. 1612-13, 1619-20; CX 94).<sup>21</sup> That rule was not applied to anyone else. (Tr. 1613).

Another example, involving EPA’s counsel Robin Allen, was when she was accused of misusing franked envelopes for sending out pleadings in a letter from Ms. Allen of October 3, 2005, when, in fact, she had hand delivered them. (Tr. 1652-57; CX 113). Complainant found the letter intimidating. (Tr. 1656.)

Complainant also felt that she was treated differently from other employees in the use of office equipment. (Tr. 1658-60, CX 111). Although there was a policy allowing limited personal use, it was not applied to her with respect to the envelopes. *Id.*

Complainant also sent an email dated 7-27-2006 to her supervisor, Lucy Yarborough, subject PARS evaluation, relating to the performance rating system. She inquired as to what she

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<sup>21</sup> In her March 22, 2005 complaint, Complainant referenced CX 94, a February 28, 2005 email. (Tr. 1619-20). In that email, Sam Jamison, Acting Chief, directed her to advise him when she had meetings scheduled or when she “anticipated being away from [her] desk for more than a few minutes” (not including bathroom breaks). He also asked for a written status of her projects so he could review it and assign her more work. (CX 94).

could have done apart from doing more typing and not complaining or disagreeing to obtain a rating above satisfactory; however, she did not receive a response. (Tr. 1661-63; CX 111 p. 32).

Complainant also produced an email she sent to various persons concerning alleged retaliation and false accusations. (Tr. 1663-69, 1674-75; CX 112). As the retaliation had not been placed in writing, she documented it in the email. *Id.* Essentially, Mr. Wright had received a complaint from Mike Peyton that he discussed with Ms. Yarborough, who chewed her out, and she was essentially responding to the criticism, which was unfair. *Id.* There were no other repercussions as a result of the incident. (Tr. 1669). However, the incident was just an example of a continuing situation. (Tr. 1674-77).

### **Disability Accommodation for Hand/Dragon**

Complainant felt that she was discriminated against in the treatment of her requests for disability accommodation when she returned to the contract area. Complainant suffered from problems typing and had been provided an accommodation in the form of a voice-activated system (VAS) while she was back in I.T., where she had her own office and did not have to do much typing. (Tr. 1556-58).<sup>22</sup> The system (called Via Voice) would not work with Windows '98 and IBM sold out to Dragon, so she needed an updated system due to the volume of typing required in Contracting; however, they would not get her the new version of the voice activated computer and took away her accommodation. (Tr. 1558). Mr. Mills initially denied her hand disability accommodation on the basis that he required updated medical documentation; however, Complainant asserted that EPA had the documentation. (Tr. 1572-73; RX 35). Her original hand surgery had taken place in the 1990's and she had first requested accommodation in 1993. (Tr. 1573). Mr. Mills requested the documentation on April 1, 2004. (Tr. 1575). However, Complainant believed that he did not require more recent documentation because she had a permanent disability and had the accommodation from 1994 until the time she came back to work for him in February of 2004. (Tr. 1575, 1621-22; CX 97). While Complainant no longer had the accommodation, she was required by Mr. Mills to do more typing when she returned to contracting:

WITNESS: Well, that was just it. The three--- I had already had three hand surgeries. I had been waiting for a fourth one on the other thumb when the Office of Workers' Compensation erroneously closed the case and so I hadn't had the other surgery yet, but he kept adding more typing and a lot of this hadn't been an issue because with Ron down in the Information Management Branch, I didn't have to type. I didn't have to do any typing basically and I could do leave slips and things like that, handwritten and if stuff needed [to be] typed, he would have somebody else type it, but Keith not only --- a lot of the things like leave slips and things like that, I had been able to handwrite. Now, Keith wouldn't even let me do them, submit a handwritten copy. I had to type them in the system and besides

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<sup>22</sup> Complainant had previously been granted an accommodation (consisting of a voice activated computer system and office space that would allow it to work correctly, without interference from other noise). (Tr. 1597). On July 8, 1997, as verified by a document entitled "Seating Arrangements and Accommodation," Mr. Barrow provided Complainant with an accommodation for her hand disability. (CX 97; Tr. 1621-22).

all the contracting stuff, typing and contracting, but they wouldn't continue my accommodations that I had had down there.

(Tr. 1581-82).

When Complainant was told that EPA required more medical documentation, even though she believed that they were legally precluded from removing the permanent disability for her hands, she agreed to a new examination. (Tr. 1596). However, Carlos Asencio made an appointment for her to be examined for her hand condition in Milledgeville, Georgia, which was 250 miles away, at 3:00 in the afternoon, which made it impossible for her to pick her son up from daycare. (Tr. 1596). She did not attend the examination for that reason. (Tr. 1597). However, she was examined by Dr. Gary McGillivray at Emory, who prepared an examination report of December 9, 2004. (Tr. 1623, 1624-35; CX 96C, RX 7). In a report dated December 9, 2004, Dr. McGillivray noted the presence of two trigger fingers on her right hand that could be aggravated by typing but did not recommend any treatment or any accommodation apart from a voice-activated system for typing. With respect to major life activities, he indicated that walking and most day-to-day activities were not at issue but that “[s]he has trouble with anything requiring strong pinch, strong grip, and type for prolonged periods becomes painful in both of her hands.” (CX 96C, RX 7). After reviewing the report, Mr. Ascencio denied the accommodation on January 20, 2005 because there was “no definitive evidence that the medical condition substantially limits any major life activity or activities.” (CX 96A; Tr. 1623). Keith Mills determined that she did not need a disability for her hand in a determination of January 26, 2005. (CX 96B, Tr. 1622). As a result of Complainant’s complaint on the matter, it was referred to mandatory mediation and, when EPA agreed to provide her with the software and purchased a copy of the Dragon software for her, she dropped her complaint.<sup>23</sup> (Tr. 1616). They could not get it to work on her computer, however. (Tr. 1616-17). She kept on complaining because the cheap headphone and microphone that came with the system did not work in her job setting due to the background noise. (Tr. 1617). They (CAP) refused to update the system, find a better microphone, or do anything else to get the system to work because of the finding that she was not disabled. (Tr. 1617-18). The system did not work properly from 2005 to 2012 and she rarely used it. (Tr. 1626-28).

### **Disability Accommodation for Stress-related Health Problems**

Complainant continued to have stress-related health problems for which she was not provided an accommodation. She had problems with her eye and her blood pressure, resulting in ruptured veins for which she required laser eye surgery in May 2004. (Tr. 1584-85). She developed ulcerative colitis which required her to use the bathroom frequently, and she would routinely use the bathroom after her hour-and-one-half commute. Mr. Mills would set up meetings exactly at the time she was due in to work, and when she told him she needed to use the bathroom before the meetings due to her condition, he told her to come in early to use it. (Tr. 1585-86). She felt that she was being treated differently from other employees, who did not need to come in early to use the bathroom. (Tr. 1586). Her problems with her eyesight continued to

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<sup>23</sup> Complainant later indicated that she was provided the software due to a Congressional inquiry she filed. (Tr. 1626-27).

worsen as did her ulcerative colitis. (Tr. 1600). She also developed diabetes and put on weight. (Tr. 1640, 1641).

Complainant had asked for accommodation for ten severe stress-related illnesses (some of which could be fatal) that she and her physician associated with her 12 years of work-related stress. (Tr. 1651). In support, she submitted declarations from Dr. Kunz, her treating physician, of March 3, 2005 and May 20, 2005. (Tr. 1579-80, 1634; RX 10, RX 16; see also CX 101).<sup>24</sup> Dr. Kunz asserted that any one of the conditions was serious but that together, they were more than any human being could be expected to cope with well, and he expressed concerns that Complainant could die if EPA did not reduce her work stress. (Tr. 1635; RX 10, 16). Dr. Kunz also stated that he agreed with Dr. Daniel Y. Patterson, her psychiatrist, who had participated in Erickson II. (Tr. 1635-36).

Complainant made a formal request that she be detailed to another agency as an accommodation through an Interagency Personnel Agreement, beginning in 1996. (Tr. 1637-38). She also made the same request in 2004. (Tr. 1038-39).

On April 25, 2005 and on reconsideration on May 17, 2005. EPA found that she was not disabled or in need of an accommodation for her hands and workplace stress. (Tr. 1641, CX 102, RX 15). Although Mr. Mills had left by March 2005, Complainant maintained that the acting supervisors continued to treat her the same way. (Tr. 1636). The request was denied by William Haig, the national reasonable accommodation coordinator. (Tr. 1641). The basis for the denial was that the only life activity affected (as determined by EPA Consulting Physician Dr. Neal L. Presant, who had spoken with Dr. Kunz) was her ability to work.<sup>25</sup> (CX 102). Complainant disagreed, and pointed out that in his original declaration, he stated that her conditions had severe effects on major life activities including breathing, sitting, standing, climbing stairs, walking, driving, lifting, hand movements, typing, filing, housework, gardening, child care, and other activities involving manual dexterity and movement. (CX 100, Tr. 1642-43). There was a hearing at which Dr. McGilivray described how typing would cause her pain and Dr. Kunz described all of the effects on her life activities. (Tr. 1643-44; ALJ 1). Dr. Presant also appeared, even though he did not examine Complainant. (Tr. 1644, ALJ 1). In response to the reconsideration denial, Dr. Kunz offered the second declaration, in which he expressed outrage at his opinions being misrepresented.<sup>26</sup> (Tr. 1644-45; CX 101).

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<sup>24</sup> The initial listed conditions were high blood pressure, retinopathy, ulcerative colitis, irritable bowel syndrome, repetitive motion hand injuries, osteoarthritis, sciatica, degenerated spinal disks, chronic asthma, and anxiety disorder. (RX 10; CX 100). Subsequently, in Dr. Kunz's second declaration, Type II diabetes mellitus was added. (RX 16; CX 101).

<sup>25</sup> Dr. Neal L. Presant sent a letter to Mr. Haig dated May 17, 2005 based on his conversation with Dr. Kunz, in which he stated that "[t]he only life activity interfered with by Ms. Erickson's ailments that Dr. Kunz knows about is her ability to work." (RX 14).

<sup>26</sup> In a letter of June 7, 2005 to Mr. Haig, Dr. Presant stood by his account of the telephone call with Dr. Kunz but acknowledged that "there certainly may have been a miscommunication between us." He recommended that Dr. Kunz's clinical record over the past two years be reviewed. (RX 18).

## *Testimony of Other Witnesses*

### **Testimony of Keith Mills (Reassignment to Contracts Area, “Gag Order,” and Disability Accommodation/Dragon)**

Keith Mills was involved in Erickson I and Erickson II. His testimony in the instant case focused on Complainant’s reintroduction to the Contracts area, and he also addressed the hand disability issue. (Tr. 94-225). Based upon his demeanor, which was polite but strained, he appeared to have some animosity toward Complainant.

Mr. Mills testified that he worked with Complainant at Warner Robins Air Force Base and that they both started at EPA in January 1989; he came in as a GS-9 and she came in as a GS-12. (Tr. 95). Mr. Mills worked in Contracting until July of 2004, when he was assigned to the assistant regional administrator for the office of policy management, to work as his special assistant. (Tr. 96). The position became permanent in 2005. (Tr. 95, 120-21). When Complainant returned to Contracting in February 2004, he was the chief of the procurement section. (Tr. 97, 100). Thus, she only worked for him for a period of six months, from February to July 2004. (Tr. 111, 118-20). It was his understanding that Complainant had asked to leave Contracting [in 1995] and that there was a decision to return her to Contracting because of some other charges that she filed. (Tr. 97). The decision to return her to Contracting was made at the senior management level, and the assistant regional manager at that time was Russell Wright. (Tr. 98-99). He was not aware of her medical issues or whether they played any part in her transfer at that time. (Tr. 157). Although he recalled saying that they would not have the best working relationship, he did not recall testifying that he did not want her back in Contracting. (Tr. 158). He was just told that she would be returning to Contracting. (Tr. 159, 177-78).

Mr. Mills was aware that Complainant worked on project related administration of contracts when she was in I.T. (Tr. 103). However, he did not believe that the contracting done in the I.T. shop was the same as they were handling in Contracting, as they dealt with the largest contracts in the region, which had a host of different kinds of complex issues. (Tr. 109, 118). The contracts at Contracting were cradle to grave, meaning that they awarded, administered, and closed the contracts; however, as the contracts extended over a 10-year period, the amount of time limited to awarding the contracts was limited. (Tr. 104-06, 108).

Because Complainant had been out of Contracting since the late 1990’s, Mr. Mills developed a plan that would phase her in to Contracting, taking into consideration the things that had happened in the interval both from a regulatory standpoint and from an office and work needs standpoint. (Tr. 100-01, 116-17).<sup>27</sup> He used a phased approach and listed at every phase what he thought was relevant to her returning, including training on changes to the Federal Acquisition Regulations and guidance on simplified acquisitions and closeouts. (Tr. 101, 111-14). There had been changes in the dollar amounts for simplified acquisitions, which had increased to \$5 million, and they had received pressure from Washington D.C. to close out the contracts after she left Contracting. (Tr. 113-14, 118, 127-28). She initially received training, then simplified acquisitions, and at some point in time she was assigned contract closeouts;

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<sup>27</sup> The Plan [discussed below] appears as part of RX 26.

however, at that time, everyone in the office was doing closeouts. (Tr. 115-16). However, Mr. Mills did not recall anyone else having been reintroduced to Contracting with a phase-in plan (Tr. 124-25). He did not use such a plan for a person (who may have been Charles Hayes), whom he hired from the Department of Navy, where he was doing the same type of work. (Tr. 125). From his perspective, Complainant was fully functioning (i.e., the plan was implemented) at the end of his time in that position, in July 2004. (Tr. 190; RX 26).

Mr. Mills explained that after he left Contracting, there was a rotation of the GS-13s in the Contracting Shop who acted as Complainant's supervisor. (Tr. 120-21). These included Charles Hayes, Debbie Hoover, Fran Harrell, and Sam Jamison. (Tr. 120-21). The GS-13s had the signatory authority to sign off on the closeouts. (Tr. 128). Mr. Mills acknowledged that there was a difference in the responsibilities of a GS -9 versus a GS-13. (Tr. 128-30). He explained that a purchasing agent had responsibilities for purchasing the lower dollar items for the agency, a contracting officer would have signatory authority up to a delegated warrant to obligate the government, and a contract specialist was responsible for doing the administrative work on a contract. (Tr. 130-32). A contracting officer was GS-13 while a contract specialist was GS-12, and the lower level employees (e.g., GS-7 and GS-8) were purchasing agents. (Tr. 133). When asked about Shayla Jenkins, he did not recall that she was responsible for reviewing contract work but he did remember her being a team lead in simplified acquisitions, and he did not recall her reviewing Complainant's work but, rather, thought that she had been designated to enter work for her because Complainant could not use the computer. (Tr. 134-36, 194-99). He advised Complainant and Debbie Hoover by email at the time that she could consult with Ms. Jenkins and others but that Debbie Hoover was the simple acquisitions lead; he denied sending the email due to Complainant's complaints about reporting to a GS-9. (Tr. 223-24; RX 39.) He did not recall selecting anyone for Contracting during the period from February to July 2004. (Tr. 199-200).

Mr. Mills recalled coordinating with Nancy Barron, the union president, concerning Complainant's move from I.T. and the packing of her boxes. (Tr. 136-38, 178-81; see also RX 26-32). He was advised they were not to pack anything that was labeled as including personal information; however, nothing was so labeled. (Tr. 138). He received an email from Ms. Barron indicating that the contractor was using his best judgment in separating everything and placing it in appropriate boxes. (Tr. 136; RX 32).

On April 2, 2004, he sent a memo to Complainant directing her to limit communications concerning legal issues between her attorney and regional counsel attorneys; the memo was sent in response to an email she sent to the regional administrator, Jimmy Palmer; the assistant regional administrator; and other senior officials entitled "notice of individual liability." (Tr. 139-40; RX 33). He didn't consider that memo or any other that he sent to be a "gag order." (Tr. 141).

On the issue of requiring Complainant to come in early to use the bathroom prior to a scheduled meeting, he explained that there were weekly conference calls concerning closeouts that were at 8:30 a.m., that Complainant's reporting time was 8:30 a.m., and that everyone who had a contract closeout was expected to participate (Tr. 172-73).<sup>28</sup> Likewise, on the issue of her

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<sup>28</sup> Complainant's work hours were from 8:30 a.m. to 6:00 p.m. (Tr. 191; RX 34).

having a meeting at Peachtree Plaza at 8:30 a.m., he again stated that he had merely told her what the meeting starting time was, and he did not recall telling other employees that they could arrive late due to child care responsibilities. (Tr. 174).

On the issue of the accommodation for Complainant's hand condition, as noted above, Mr. Mills determined that she did not establish a hand disability in determinations of July 30, 2004 and January 26, 2005, based upon her April 1, 2004 request (RX 5, CX 96B).<sup>29</sup> Mr. Mills testified that he was aware of the determination by the branch chief at the time, Ron Barrow; however, when Complainant asked for updated software, he followed up with the local reasonable accommodation person at the time, Carlos Asencio. (Tr. 147-48). He also spoke with William Haig. (Tr. 151). At the same time, he worked with the IRM branch chief, Kelly Sisario, to order the voice activated system that Complainant had requested. (Tr. 148-49). At the time that they bought the software [Dragon], there was a demonstration that showed that it worked, in that it printed what was spoken. (Tr. 149-53, 194-99, 214). The accommodation was denied due to insufficient medical information but he was advised that he could still purchase the equipment, and he did so. (Tr. 153). He did not recall having information from a prior claim available to him. (Tr. 154-55). He recalled there being a mask for talking into the machine to keep the noise down that came with the software. (Tr. 2010-12). Although the system worked when it was tested, and he coordinated with Gay Prejean who was knowledgeable about the contracts management system to work with the I.T. people, he had no knowledge about what happened to it after he left or whether it worked with software such as Lotus Notes. (Tr. 211-15).

Mr. Mills denied Complainant's handwritten request to work at home (FLEXIPLACE), which was accompanied by a note from her doctor, because, upon consultation, he was advised that he needed something more comprehensive from the physician. (Tr. 192-94; RX 1). He requested additional documentation on February 13, 2004. (Tr. 193; RX 2). He never received anything in response. (Tr. 194). Complainant was, however, permitted to work at home on an intermittent basis. (Tr. 194).

### **Testimony of Carol Wallace (Procurement/Contracting)**

Carol Wallace was retired; however, she had worked for EPA in procurement from 1972 to 2002, after which she worked in the Super Fund program for two years followed by work in the SEE program starting in 2006. (Tr. 1139). After 2006, her only involvement in procurement was in small purchasing. (Tr. 1146-47). As she was not an EPA employee in 2006, she was not a warranted contracting officer and she had to get someone else to sign off on her contracts. (Tr. 1153-54). Her testimony focused on procurement, and Respondent objected because she did not work in procurement (apart from small purchases) during the period relevant here. I let those objections go to the weight of the evidence. (Tr. 1143-47). She also testified about her work with Complainant, much of which occurred during the second time period (i.e., after 2007).

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<sup>29</sup> As noted above, the EPA Determination of Disability dated January 20, 2005, relating to the April 1, 2004 request, was issued by Carlos Asencio. (CX 96A).

Ms. Wallace testified that her role over purchasing agents was one of oversight, and most of them were at the grade 7 (GS-7) level, although one was a GS-9.<sup>30</sup> (Tr. 1143). The purchasing agents strictly worked on the small purchases whereas the GS-12 and GS-13 contract specialists strictly worked on large contracts. (Tr. 1143). She described the procedures for awarding and administering contracts and she explained that large contracts were much more complex than simplified acquisitions. (Tr. 1149-51). While an SEE employee, she worked with a Contracting Officer, which was Complainant most of the time after she returned in 2006, but she would have to have the work signed off by a supervisor. (Tr. 1153). She noticed that she got more comments and corrections from the supervisor (specifically, Raquel Hill) when Complainant signed off than when somebody else did, and she was frustrated by the extra work she had to do because of the nitpicking Ms. Hill did for Complainant's work. (Tr. 1157-61). She also discussed the work assignments appearing on CX 129. (Tr. 1161 et seq.) She explained that simplified acquisitions was a misnomer, because there was a lot of extra work for something that was to simplify the process and with a simplified acquisition, it was necessary to start from scratch each time. (Tr. 1174).

### **Testimony of Frida Lockhart (Training/Meetings and "Gag Order")**

Frida Lockhart had been employed in EPA Region 4 since 1996, first as a staff development analyst in human resources, then as EEO officer, and next as work force and strategic development program manager. She also worked as acting human resources officer on numerous occasions. At the time she testified, she was chief of the Office of Superfund public affairs and outreach, a position she held since 2008. (Tr. 830). She was involved in several training sessions on PARS (the new performance appraisal review system), but she was not the trainer, and she was also in charge of the high performing organization training between 2000 and 2005 (possibly 2003). (Tr. 830-32; RX 62). She did not recall Complainant bringing up an issue about the PARS system not accurately assessing performance if people were not assigned equivalent work. (Tr. 831). Everyone was required to attend the high performance organization training. (Tr. 834-35). She recalled Complainant asking whether that training would actually change the organization, and she responded that given the investment the organization was making, it was a great opportunity for them to individually and collectively make a difference. (Tr. 835-36). She did not recall Complainant mentioning grievances. (Tr. 836). She did not recall receiving an email addressed to her dated January 26, 2006 referencing "Yesterday's Training," in which Complainant asserted that she was told to "start with a clean slate" and "forget the past.." (Tr. 838-39; CX 104(c)).<sup>31</sup> She suggested that the memo related to organizational development training rather than PARS training, although the email referenced PARS training, because the other email recipients did not do PARS training. (Tr. 840-45; CX 104(c).) She was also asked by Complainant about a case reference in CX 104(a), that related to nonselection of an applicant who did not interview well, and she explained that there was no

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<sup>30</sup> On cross examination, Ms. Wallace agreed that EPA no longer had GS-7 to -9 purchasing agents. (Tr. 1180).

<sup>31</sup> In the email, which was also addressed to Iris Ashmeade and Shea Giddy, Complainant recalled that she had "asked questions about the ability to receive a fair evaluation under the new PARS system, when [she was] supposed to be doing GS-13 work, but [was] assigned only GS 5/7 level work." She also indicated that some of the statements were "word-for-word" the same as those made by Mr. Wright at the November 6, 2002 meeting addressed by the judge in Erickson I, which she attached. (CX 104(c)).

requirement that interview notes be kept, but that they have to be able to explain why they selected one individual over another. (Tr. 851).

### **Testimony of Phyllis Mann (Non-selection of Complainant for GS-13 Position)**

Phyllis Mann was the section chief for the GIS section in the Information Management Branch in the fall of 2004. (Tr. 226-27). She was a very credible witness. Ms. Mann was the selection official for the GS-13 management program analyst position for which Complainant applied and for which Hector Buitrago was selected. (Tr. 227-28, 261; RX 64.) In that capacity, she received a list of three qualified candidates: Mr. Buitrago, Complainant, and Douglas Deakin.<sup>32</sup> (Tr. 229). They received rankings, and Mr. Buitrago was ranked 97.5; Complainant was ranked 96.56; and Mr. Deakin was ranked 85.31.<sup>33</sup> (Tr. 263; RX 64). Ms. Mann did not interview any of the applicants. (Tr. 276). After receiving the names, Ms. Mann read all of the information, made the best choice on what she felt was the most important part of the job, and sent them the answer. (Tr. 238; see also RX 66, 67, 68, 69, 70, 113). She explained that she did not just look at the position description, but she looked at what was actually being done in that position. (Tr. 233). The position had evolved into a situation where a new program within EPA was giving money to the states through exchange network grants, and the person in that job (Rich Nawyn, who was being detailed elsewhere) had 27 grants to manage. (Tr. 235, 237-38, 249). As monitoring the grants had become a “really huge part of that job,” it was the part of the job she was most concerned about at the time. (Tr. 235). The applicant who was selected, Mr. Buitrago, was a grants specialist for 14 years at EPA in region 4. (Tr. 234). She explained that Mr. Buitrago had “very specific grant management experience” and it was his knowledge and experience in handling a lot of grants at the same time that outweighed other considerations, such as where he came from. (Tr. 253-54). Ms. Mann was not aware that Complainant was a grants project officer; however, she knew Complainant was a contracting project officer because they had “worked together pretty successfully on the GIS contract.” (Tr. 234; see also Tr. 242-43, 246). Ms. Mann testified that she was always “very happy” with Complainant’s contract work. (Tr. 246). Further, she indicated that she would have hired Complainant if Mr. Buitrago had not been on the list as Complainant would have been the best qualified. (Tr. 246, 277). Her supervisor at the time was Ron Barrow, the branch chief; however, he was not involved in the hiring process. (Tr. 248).

### **Testimony of Karen James (Non-selection of Complainant for GS-13 Positions)**

Karen James was retired but she was previously employed at EPA Region 4, where she served as a human resources specialist in July 2004. (Tr. 1035). She was also involved in the application process for a GS-13 contract specialist position advertised in April of 2006 and she recalled that Complainant made an inquiry to her office about the position.<sup>34</sup> (TR. 1036). After she provided input to Michelle Jackson, her supervisor at the time, Ms. Jackson responded to Complainant’s inquiry via email (dated July 20, 2016) and advised her that they did not receive an online application from Complainant although they had received hard copies of supporting documents. (Tr. 1037-98; RX 46-49, CX 111). The online servicer for these applications was

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<sup>32</sup> The list was admitted as RX 114; however, as there is another R 114, it will be referenced as RX 114A.

<sup>33</sup> Ms. Mann testified that she had no knowledge as to how those numerical ratings were made. (Tr. 275-76).

<sup>34</sup> There were actually two GS-13 Contract Specialist positions. (CX 111).

“Monster.gov” and the system was “Easy Hire”; the Government had purchased or leased the online system from the commercial company Monster. (Tr. 1037, 1041-43). At that time, Ms. James contacted Monster to let them know that they had a person who indicated she had applied for the position but that they did not show a record of the application being received, after which they went into their system and provided information (Tr. 1037-38). As she recalled, Monster (specifically, Deanna Sorenson) advised that the applicant started working on the application but did not complete and submit it. (Tr. 1055, 1070-74; see also CX 111 at 27, RX 50). There was a procedure whereby a person without computer access could request assistance; however, Complainant did not request assistance. (Tr. 1039-40). Once an applicant input information and “hit submit,” the system would state that the application had been successfully transmitted. (Tr. 1045). However, if the applicant does not hit “submit,” then it just sits there. (Tr. 1055).

### **Testimony of Elana de Leon Jenkins (Denial of Level Three FAC-C Certification)**

Elana de Leon Jenkins was an employee of the Department of Veterans Affairs; however, she was previously employed at EPA from September 2008 to February 2011. (Tr. 1088). At that time, she was the manager of the acquisition policy and training service center, in which capacity she was responsible for all EPA acquisition policy and training for contracting personnel (including contracting officers, technical representatives and program managers.) (Tr. 1088-89). The training included an FAC-C [Federal Acquisition Certification in Contracting] level certification, and she was the approving official for those certificates. (Tr. 1089-90). Her testimony related to Complainant’s submission of an application for a FAC-C level certification in 2008 and her determination in April 2009 that she satisfied FAC-C level two but not level three under the OPM criteria, contrary to the original determination. (Tr. 1090-1118, RX 84, CX 125). Her testimony therefore relates primarily to the second group of cases. At the time she made her determination, she was unaware that Complainant had filed any kinds of complaints or grievances. (Tr. 1095).

### **Testimony of William Haig (Disability Determinations)**

William Haig was the national reasonable accommodation coordinator for EPA and he served in that position since October of 2003.<sup>35</sup> (Tr. 287). At the time he testified, he had worked in the disability field dealing specifically with reasonable accommodation issues for 39 years. (Tr. 294). His testimony was relevant to both the period covered by the first group of cases and the later period. (Tr. 300-02). Mr. Haig appeared at least at first to be evasive and somewhat hostile to Complainant.

Mr. Haig recalled that Complainant’s initial request for reasonable accommodation had been made in March 2004 and he recalled that it was done through an email request from her. (Tr. 287-88, 381). He did not recall any previous determinations. (Tr. 288). He received documentation after March of 2004 in the file from Carlos Asencio. (Tr. 289). The documentation included a February 6, 2004 document from a healthcare provider, Dr. Kunz.

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<sup>35</sup> Mr. Haig’s deposition transcript was marked as RX 113 but was not admitted. Documentation relating to Complainant’s requests for accommodation and their resolution appear at RX 1 to 24; see also CX 96A-C, 100 to 103.

(Tr. 290, 381; see also RX 3).<sup>36</sup> He recalled that the initial medical condition was carpal tunnel. (Tr. 291-92). At that time, he made the determination that there was insufficient documentation to determine that Complainant was a person with a disability, because it did not show that she had “a covered impairment that substantially limited a major life activity,” as required by the Rehabilitation Act. (Tr. 291, 293-95). He denied her request for voice activated computer software on November 10, 2004. (RX 6; Tr. 391-92). Mr. Ascencio denied the request on reconsideration on January 20, 2005, after considering Dr. McGillivary’s medical examination report. (RX 8). Mr. Haig explained that the general procedure was that the local accommodation coordinator (Mr. Ascencio) would coordinate with the national reasonable accommodation coordinator (him) prior to issuing a determination, and this is something that he would have reviewed and offered comments on. (Tr. 393-94).

Prior to the 2009 amendments, Mr. Haig testified that they would be “looking for such things as what are the ameliorative effects or positive effects of any mitigating measures that are used to treat the condition” and making a comparison as to whether or not the individual’s major life activity is substantially limited,” looking at the “average person in society.”<sup>37</sup> (Tr. 305). Mr. Haig indicated that stress itself had not been recognized as a disability. (Tr. 383, 390). He testified that someone could be incapable of performing their job due to a condition but could still be unable to establish a disability. (Tr. 419-21). Thus, prior to the amendments, even if Complainant were incapable of performing her work because of her hand disability, EPA was not required to accommodate her for that condition unless she established a substantial limitation of a major life activity and could simply deny her request for accommodation, as it did with respect to Complainant. (Tr. 420-23). Mr. Haig indicated that in the majority of his determination letters he would say to management that, in spite of the fact that the person is not disabled, management has the option of providing whatever resources they need for the person, but that they were not required to do so. (Tr. 424).<sup>38</sup>

Complainant’s March 14, 2004 request for alternate work location (at home) was denied by an EPA Determination of Disability of March 10, 2004. (RX 3). After receiving additional documentation from Dr. Kunz dated March 12, 2004, he again denied the request by a determination of March 30, 2004. (RX 4).

With respect to Complainant’s April 12, 2005 followup application for approval of an alternate work location, he explained:

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<sup>36</sup> Dr. Kunz’s opinion was handwritten on a prescription form and stated: “Requires work-from-home telecommuting accommodations due to medical condition.” (RX 3).

<sup>37</sup> Although the definition of disability remained the same, the standards changed effective January 1, 2009 and the standard for substantial limitation have changed drastically and the definition of major life activities is much broader. (Tr. 295-96). Mr. Haig explained that prior to the ADA Amendments Act, one would look to determine if a major life activity (such as walking, talking, reading, seeing, hearing, interacting with people, or working) were affected; however, the amendments added the functioning of a major body system (such as the endocrine system, the cardiovascular system, and the respiratory system) and specific organs (such as the liver or the brain.) (Tr. 297-98). Also, the meaning of substantial limitations became broader in terms of duration and was assessed without the use of mitigating measures. (Tr. 299).

<sup>38</sup> When I questioned Mr. Haig about EPA’s ostensibly unreasonable position with respect to disabilities that may not have fit the definition but would be easy to accommodate, he was evasive and contradicted himself, ultimately saying that they would seek to accommodate the individuals even though they didn’t have to. (Tr. 426). Mr. Haig’s testimony suggested disparate treatment of Complainant.

In terms of major life activity, I recall that in your initial request you were indicating that you were substantially limited in your ability to work. That major life activity requires the individual to show that they are unable to perform a broad range of occupations, not just any aspect of their particular job, before that major life activity would be appropriate.

(Tr. 305).

Complainant showed Mr. Haig the two Declarations of Dr. Kunz. The first, dated March 3, 2005, commented upon ten separate stress-related conditions that affected Complainant's ability to engage in other life activities besides working, including "breathing, sitting, standing, climbing stairs, walking, driving, lifting, hand movements, typing, filing, housework, gardening, child care and other activities involving manual dexterity and movement." (Tr. 318, 384-85; CX 100; RX 10 [corrected date]). Mr. Haig conceded that the first Declaration mentioned other major life activities. (Tr. 332). When asked why the statement was insufficient, Mr. Haig referenced prior correspondence that he sent to her at the time. (Tr. 320-21). However, when pressed, in response to my questioning, he explained further:

THE WITNESS: Well, again, if someone says to me I'm substantially limited in my ability to sit because I have sciatica, the kinds of questions -- and the medical information that is necessary. Then the kinds of questions that we would ask the doctor to identify the answers to would be, well, how long is this person unable to sit, to identify it, is it for five minutes or no more than two hours.

Or if walking is substantially limited how far can they walk, how far can't they walk without having to stop and rest or something like that. So it's more than just the person is substantially limited in sitting. It's, okay, well, tell us more about what that means in terms of substantially limits when you compare them to, again, the average person.

(Tr. 323). In the EPA Determination of Disability of May 17, 2005, which he characterized as a reconsideration, Mr. Haig indicated that "[w]hereas Dr. Kunz states that Ms. Erickson has a number of medical conditions, he states that the only life activity interfered with by Ms. Erickson's medical conditions is her ability to work" and "there remains insufficient information to conclude that any major life activity of this employee is, in any way, substantially limited and therefore she is determined not to be an individual with a disability." (CX 102; RX 15; see also Tr. 386-87). As noted above, the second declaration of Dr. Kunz, dated May 20 2005, took issue with that conclusion. (CX 101, RX 16). In response to the recommendation of Dr. Present, Mr. Haig claimed that he asked Complainant for medical records from the past two years.<sup>39</sup> (Tr. 334). To elaborate, he referenced RX 20, including emails between him, Complainant, and Deborah Hoover and the Denial of Reasonable Accommodation Request form issued by Deborah

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<sup>39</sup> See footnote 25 above.

Hoover on August 15, 2005.<sup>40</sup> (RX 20; see also Tr. 388). He acknowledged that Complainant advised him in an email that these were new conditions so there were not two previous years of records. (Tr. 337-38). He testified that it was unusual to receive a request with that many conditions listed (10 or 11), and it was the only one of that nature that he had received, although some people had two to four conditions. (Tr. 404).

Mr. Haig also discussed Complainant's requests for accommodation of June 2009 and December 2009, which relate to the second group of cases. (Tr. 345 *et seq.*, Tr. 393 *et seq.*) Of interest, he testified that in each instance, Complainant's supervisors (Keith Mills, Deborah Hoover, and Raquel Hill), all requested medical documentation for Complainant to process her accommodation requests. (Tr. 402-03).

### **Testimony of Carlos Asencio (Disability Accommodation/Dragon)**

Carlos Asencio was an employee labor relations specialist with Region 4 of the EPA, and he was in that position since 1991 or 1992. (Tr. 902, 950). In that capacity, he acts as the liaison between management and the unions and also advises managers on disciplinary issues; he is also the local reasonable accommodations coordinator. (Tr. 950-52). He explained that the procedures for reasonable accommodation were put in place in 2003 or 2004 and prior to that, an employee would request an accommodation informally.<sup>41</sup> (Tr. 953-54, 982-83). As he explained it, the procedures required to obtain a disability accommodation were significantly more cumbersome when the procedure was formalized and it remained that way until the law was changed in 2008. (Tr. 986-92). Mr. Asencio clarified that the only determination he recalled making was in early 2005; after that, the determinations were made by Mr. Haig. (Tr. 953). He was not involved in the determinations made by Mr. Haig, apart from being provided copies, as were the supervisors. (Tr. 941).

Mr. Asencio had little independent recollection of the specifics of Complainant's case without referring to documentation. (Tr. 906-08, 916, 927-28). He recognized some of the documents from her workers' compensation claim and he recalled asking for updated information. (Tr. 930-31, CX 124). He recalled Complainant having made a request for reasonable accommodation in early 2004. (Tr. 903). He vaguely remembered a claim relating to her eye surgery with retinopathy photographs. (Tr. 903-05, CX 123, CX 100). He testified that he spoke with Complainant's supervisor after her reassignment, Mr. Mills, concerning her request to work from home, and he advised Mr. Mills in drafting the request for additional medical documentation of May 21, 2004, in followup to his request of February 13, 2004. (Tr. 955-58, 965-66; EX 1, EX 5). He did not recall that Mr. Mills received the documentation but he recalled the agency offering to provide Complainant with an examination. (Tr. 954).

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<sup>40</sup> According to a memorandum for the record from Mr. Haig, Ms. Hoover advised him and Mr. Asencio (LORAC) in a teleconference of June 9, 2005 that she would like to discuss Complainant's case with an HR attorney and he asked that he and LORAC participate at such a meeting. (RX 19).

<sup>41</sup> On redirect, Complainant showed Mr. Asencio a statement from her supervisor Ron Barrow dated in July 1997 indicating: "This is a reasonable accommodation for your disabling condition. . . ." (Tr. 985-86; CX 97). She also showed him her ADA request of September 23, 1996 and supporting treatment records. (Tr. 993-96; RX 9; CX 124).

Mr. Asencio did recall engaging in what he characterized as “the interactive process,” whereby he located a doctor and made an appointment for her in Macon or Milledgeville. (Tr. 912). He recalled that he selected the doctor because he did not initially find a doctor in the data base who was certified in the convenient area. (Tr. 970). He also remembered her objecting because of the distance that she would be unable to pick up her child from day care. (Tr. 913). Complainant was satisfied with the doctor who ultimately performed the examination, who was an orthopedist as she had requested. (Tr. 970-71). When asked whether he believed it to be acceptable to require an employee to endure pain in order to keep their job, and specifically the finding that she was not disabled and would have to do her own typing, he pointed out that typing was not a major life activity. (Tr. 918-22). He conceded that the doctor who performed the examination, Dr. McGillivary at Emory, also referenced limitations on grip and pinch, which were major life activities, in his letter report; however, he indicated that the limitations related to when a “tremendous” pinch was required. (Tr. 915-16, 923-24, 938-39; CX 96(c)). He did not consider Dr. Present’s opinion in his initial determination as that came much later. (Tr. 940).

With respect to the Dragon software, Mr. Asencio recalled that he was told to procure the software even though no disability was found and he remembered there were issues raised by Complainant with the headset, the microphone, and background noise. (Tr. 942-45, 948-49). He also recalled there were some IT issues, such as compatibility with software such as email or Lotus notes. (Tr. 949). Complainant’s supervisor at the time, Lucy Yarbrough, was more involved with the issues with the IT people. (Tr. 945-47, 973-74). According to an invoice dated May 12, 2004, the first Dragon software was purchased with training included. (Tr. 974-75; RX 38). He talked to Ms. Yarbrough and, after she left the agency, Complainant’s acting supervisor, Patty Bettencort, in an attempt to resolve the issues concerning the system. (Tr. 977-80).

### **Testimony of Rachel Malcolm (Dragon/EAS/Compusearch)**

Rachel Malcolm was not currently employed by the EPA; however, she worked as an IT project manager until she left the agency in 2009. (Tr. 445-46). She never met Complainant personally until the time of the hearing but had conversations with her. (Tr. 446-47, 451). In 2006, Complainant was one of the volunteers that was not selected for the main working team (which consisted of work groups) but she participated on the line at various virtual meetings involving up to 40 people from all over the county.<sup>42</sup> (Tr. 447, 449, 494-95). The idea was to go through an agenda in order to pull information as the project matured. (Tr. 447-48). She recalled that Complainant was in the first meeting involving volunteers. (Tr. 452). The project involved the EPA acquisition system and was called the EAS project: EAS was going to replace the prior systems (ICMS and SPEDI) which were not completely section 508 compliant and would not work with Dragon or any manual dexterity system. (Tr. 449-50). At that time, the law required that all software that the government acquired meet section 508 standards. (Tr. 455, 547). However, they would rely upon the self-certification of compliance made by the contractors. (Tr. 457-58). The EPA solicitation required a COTs product, meaning a Commercial Off-the-Shelf product, i.e., “you could buy it and play it.” (Tr. 481-83). The COTS commercial product was Prism and EAS was the implementation of the commercial product.

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<sup>42</sup> Although Ms. Malcolm had initially thought the meetings occurred in 2008 and 2009, with the money obtained in 2007, after reviewing an email (RX 60), she corrected her answer to 2006. (Tr. 496).

(Tr. 525-28). For this project, she selected Rodney Neely to work on a broad spectrum of accommodation issues as a sub-project, and they also discussed the issues raised by Complainant. (Tr. 466-67, 512). Suzette Creed was involved in desktop support. (Tr. 473-476, 513). Paul Hopke was one of the contractor's representatives, working for Cindy Amora, the designated project manager for Compusearch. (Tr. 484). Although Ms. Malcom was the project manager, she had no access to the evaluation by the technical evaluation panel. (Tr. 481).

During the two calls at which Complainant participated, she focused on the Dragon Naturally Speaking application. (Tr. 454, 495). When Complainant joined, she dominated the conversation and kept coming back to her issue which, while it was an important issue, was not the only issue. (Tr. 494). She instructed Complainant to go to her regional accommodations coordinator for issues relating to Dragon as the accommodations center (which was headed by Amanda Babcock) would be involved at the project acceptance point. (Tr. 478, 488). There was no requirement that the application be rebuilt to fit in with a brand name software such as Dragon. (Tr. 462-63, 514). A certification would mean that it would work with multiple softwares but each one would probably have to be tweaked for the individual user. (Tr. 463; see also 526-28).

Ms. Malcolm also recalled notifying the sponsor (Denise Benjamin-Sirmons), who was also the Director, of her concerns about Complainant providing directions to the contractor. (Tr. 488-89, 494, 514). She explained that Complainant had required the contractor to report to her and told them the software did not meet section 508 compliance because it didn't work with Dragon and, as she had identified herself as a contracting officer in the inquiry she made, they tried to accommodate her. (Tr. 490-91, 550-51; see also RX 60). Through Compusearch's website, Complainant had asked what testing had been done to assure Prism's total functionality with Dragon because she didn't see it described on their website and she identified herself as a contract specialist/contracting officer from EPA in the email.<sup>43</sup> (Tr. 501-04, 540-45; ALJ 2, RX 60 at 19, 21-22). Ms. Malcolm was concerned as under this type of time-and-material contract, the contractor would be able to charge them for any additional time or testing. (Tr. 504-05.) Ms. Benjamin-Sermons wanted this situation to not happen again; however, Ms. Malcolm felt that she had the situation under control because she had told the contractor to treat Complainant like any other person who came on to their website. (Tr. 488-89, 505-06).

Ms. Malcolm was also concerned because Complainant sent her email messages that she found to be threatening, and she also made threats verbally. (Tr. 506-10). For example, Complainant raised the issue of EPA being subject to a class action lawsuit if they didn't test the equipment. (Tr. 508, RX 60 at 11). However, as discussed below with respect to Ms. Sirmons' testimony, that occurred in 2008 and relates to the second group of cases.

### **Testimony of Denise Benjamin Sirmons (Dragon/Compusearch)**

Denise Benjamin Sirmons was director of the Acquisition Management Office, which was responsible for overseeing the acquisition of the EAS system. (Tr. 602-03). Much of her testimony echoed that of Ms. Malcolm's and she also provided some general information about section 508 and its implementation. Her understanding from consultation with lawyers was that

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<sup>43</sup> Complainant's title may have appeared automatically as part of her signature block. (Tr. 532-36).

the law does not assure compliance with a particular software as that would be an anti-trust violation. (Tr. 611). She had ongoing conversations with the EPA section 508 coordinator, Amanda Babcock, and with counsel, until she was satisfied that the matter was resolved. (Tr. 626-27). When Complainant raised the issue, her immediate concern was the allegation that Compusearch did not comply with 508 and, after she checked and made sure it was complying, that was the basis for moving forward. (Tr. 630, 634). In addition to consulting with counsel, she did her own research and, for example, checked Compusearch's website. (Tr. 632). She indicated that if for some reason the system was not compatible with Dragon, which was not case, they would have to have a separate acquisition system to provide reasonable accommodation. (Tr. 672-73).

Ms. Sirmons also addressed the inquiry Complainant made on Compusearch's website. She explained that her concern about Complainant's assertions was that she was raising the issue in a very inappropriate manner, and it was disruptive. (Tr. 626). She conceded that the message sent by Complainant on the Compusearch website did not reference the EAS system. (Tr. 639-43, 649-50; CX 108). Ms. Sirmons indicated that, while the incoming standing alone was not necessarily objectionable, it became impermissible once it was referred to the EPA project team and a communication began between Complainant and them. (Tr. 644). Rather, she should have raised the issue with the integrated project team. (Tr. 645). Because of the manner in which she raised it, including the signature block and the lack of a reference to commercial use, Compusearch routed her inquiry to the EPA team, Paul Hopke, who responded to Pamela Legare and Rachel Malcom, who were members of the integrated project team. (Tr. 648-55). Ms. Sirmons was concerned because Complainant stated that she would appreciate being apprised of the status of their research so that she could assure that the issue was adequately addressed, and she had no authority to do that. (Tr. 693-95, 697-98; RX 60). It also could have resulted in additional costs. (Tr. 700-01).

Ms. Sirmons was also questioned about the email Complainant sent to Rachel Malcolm dated January 11, 2008, suggesting that EPA could be subject to a major class action lawsuit for denying handicap accessibility, which relates to the second part of this case. (Tr. 667 *et seq.*; Tr. 690 *et seq.*; RX 60). Ms. Sirmons indicated that, in addition to the emails, Complainant made the statements repeatedly and it disrupted the ability of the team to proceed with their implementation plan and had a chilling effect for those involved because of the prospect of a lawsuit. (Tr. 693).

Following Ms. Sirmons' testimony, Complainant was permitted to make arguments concerning the relevant exhibits. (Tr. 779-85; CX 108; RX 60).

### **Testimony of Wanda Johnson (Dragon/Compusearch)**

Wanda Johnson had worked at EPA since 1997 and Region 4 since 2005; at the time of the hearing, was a senior advisor. (Tr. 852). During the period relevant to the second part of this case, in 2008, she was Acting Assistant Regional Administrator. (Tr. 852-53). When asked about a statement from Patty Bettencourt recounting the Compusearch incident (discussed above), which stated that Complainant's "inability to adhere to the above directives may result in [her] removal from the EAS team, a Letter of Warning or other disciplinary action," she stated

she was aware Ms. Bettencourt had the discussion and showed her the memo. (Tr. 855-56; CX 108).<sup>44</sup> She became involved because she got a call from Denise Benjamin Sirmons due to the issues of national work group performance, section 508 compliance, and inappropriate contact with the contractor. (Tr. 857).

### **Testimony of Margaret Lynch (Dragon/Compusearch)**

Margaret Lynch had been employed by EPA since 1986 and was employed as the IT service center manager for the Office of Acquisition Management, a position she held since January 2006. (Tr. 1401-03). She assumed that position for the purpose of being the IT service center manager who was responsible for the acquisition systems ICMS (integrated contracts management system) and she was also involved in the development of requirements for EAS. (Tr. 1402-05). She had been informed that the product they bought was 508 compliant from the vendor; however, her team (OAM) later determined that they would test with Dragon. (Tr. 1406). The team's final determination was that it worked with Dragon but there were some issues with the drop-downs that did not prevent use of the system. (Tr. 1416). According to Ms. Lynch, "it's compliant now." (Tr. 1438).

### **Testimony of Union Witnesses (Disparate Treatment)**

Three witnesses from the two unions at EPA Region 4 provided testimony that related primarily to the second group of cases and the allegations of hostile work environment:

(1) **Andrew Dunn**, the union President for the National Association of Government Employees (NAGE), having been in that position since 2007 (although he worked at EPA at the same branch as Complainant since 1988) (Tr. 704-74, 785-827). Of interest, he testified that in 2011 or 2012, he and the other union president, Ray Gregory, offered to help to get rid of the boxes that Complainant had been criticized for maintaining at her work area due to safety health risks and her supervisor, Raquel Hill, prevented them from assisting. (Tr. 718-19, 808). On cross examination Mr. Dunn agreed that Ms. Hill did not want him to be involved because of concerns about CBI [confidential business information] in the boxes. (Tr. 738-39). He also talked about the amount of time employees were allowed to visit the clinic during work hours. (Tr. 745-47; CX 109). He testified that Complainant was scrutinized more than other employees and Ms. Hill had told him that Complainant was "unique." (Tr. 735, 805). He also indicated that Complainant's situation was different from that he had encountered when other employees consulted him, as it lasted longer and involved a wider variety of issues. (Tr. 801-02).

(2) **Priscilla Oliver** was the union executive vice president for the American Federation of Government Employees (AFGE), Local 534, at EPA in Atlanta. (Tr. 1187-88). She was the recipient of numerous emails from the Complainant, and she expressed regret for the way Complainant had been treated at EPA. (Tr. 1188-89). The bulk of her comments related to Complainant's supervision by Ms. Hill as a first line supervisor and by Vickie Tilles as a second

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<sup>44</sup> The memo, included in CX 108, was dated May 2, 2008 and directed Complainant to cease inappropriate threats of a lawsuit directed at EPA during team discussions and meetings and bore signature lines for Ms. Bettencourt and Complainant; however, Complainant did not sign due to disagreement. CX 108 also includes Complainant's version of what happened with respect to the inquiry she made to Compuserve about Dragon.

line supervisor, which will be addressed in the second group of cases. (Tr. 1193). However, she testified that she had been on the same floor as Complainant since 1996 and Complainant was “probably harassed more than anybody on the floor,” as Complainant had recounted to her in emails (Tr. 1201). She also indicated that Complainant’s cubicle was not significantly different from anybody else’s cubicle at EPA. (Tr. 1200).

(3) **Raymond Gregory** was president of Local 534 of the American Federation of Government Employees (AFGE) in EPA Region 4. (Tr. 1230-31). Like Ms. Oliver, he had received numerous emails from Complainant; however, he admitted that he had not read them all. (Tr. 1231-32). He indicated, based on those that he did read, that he had never seen any other employee subjected to the detail and length of instructions given to Complainant, and he felt that she had been subjected to disparate surveillance. (Tr. 1233-34). He noted, with respect to the Dragon software, that the supervisor keep on telling Complainant that it worked well and Complainant kept on pointing out that it did not. (Tr. 1234, 1247). He also noted that he was not aware of anyone else who was required to take leave to go to the health center. (Tr. 1234-35). Mr. Gregory was involved with Mr. Dunn in the incident involving the boxes, which occurred with Ms. Hill and relates to the second part of this case. (Tr. 1237-38, 1249-50, 1255-56). He indicated that Complainant would be covered by NAGE, not his union, but he didn’t know whether she was a member. (Tr. 1248).

#### **Testimony of Michael A. Hill (Inspector General)**

Michael Hill was the special agent in charge with the EPA Office of Inspector General, Office of Investigations, Atlanta Field Office, a position he held since October 1, 2002; from 1997 to 2002, he was a supervisory special agent with the EPA IG in Atlanta.<sup>45</sup> (Tr. 1370-71). He attended the previous hearing in Complainant’s case, but the investigation in that case was closed long before he became a member of the EPA OIG.<sup>46</sup> (Tr. 1372). He testified about the IG’s procedures and the IG’s investigation of Complainant. (Tr. 1372-95; RX 168).

#### **Testimony of Judy Trawick (Health Unit)**

Judy Trawick, a licensed nurse, was deputy director of the Health Center Services for Federal Occupational Health in Atlanta (Health and Human Services), in which capacity she would oversee the operations managers who oversee the health centers for Federal Occupational Health. (1473-74). She testified about ventricular tachycardia and ventricular fibrillation in general, about the symptoms presented by Complainant on February 27, 2009 and March 19, 2009, about Dr. Kunz’s letter of November 22, 2011, and about Complainant’s use of the health center. (CX 100, CX 101, CX 109, CX 131, RX 169; Tr. 1474-1516). Although she also was asked about Complainant’s symptomatology in 2005, her testimony related primarily to the second part of the case.

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<sup>45</sup> Mr. Hill was represented telephonically by Susan Charen, associate counsel with the EPA OIG Office of Counsel. (Tr. 1369).

<sup>46</sup> Complainant indicated that the case was opened in March of 1996 and she did not find out about it until October 1998; the first hearing was conducted in 2003. (Tr. 1373-75).

### **Testimony of Scott Gordon (Front Office/Disagreement with Supervisor re Health Unit)**

James Scott Gordon, deputy division director in the Office of Environmental Accountability, held a number of positions (primarily in enforcement programs) in his 29 years with the EPA, including a 20-month stint as the Acting Chief of Staff for Acting Regional Administrator Stan Meiburg from January 21, 2009 until September 2010. (Tr. 1267-68). His first interaction with Complainant was during that period (in 2009), when she came to the front office in a worried state, flushed and distressed; she asked to see the regional administrator due to her frustration with her supervisor concerning her visit to the health unit. (1269-1310, CX 131). His focus was on calming her down as the resolution of any problems would be left to her chain of command, and he made sure that the division director, Russell Wright, was aware of the situation. (Tr. 1270, 1285-86). Mr. Gordon's testimony related to the latter part of the case.

### **Testimony of Stanley Meiburg (Front Office/Disagreements with Supervisors)**

Dr. Albert Stanley Meiburg had served as Deputy Regional Administrator in Atlanta since April of 1996 and he also served as the acting regional administrator in Atlanta from January 21, 2001 through 2002 and from January 21, 2009 until September 3, 2010, when Keith Flemming was appointed as the regional administrator.<sup>47</sup> (Tr. 1310-12). Dr. Meiburg testified in Complainant's previous whistleblower case; however, he did not recall whether he was told that it was a whistleblower case and, apart from knowing that the Agency was upheld, did not recall the outcome. (Tr. 1310, 1312-13, 1356, 1360). By demeanor, Dr. Meiburg appeared to be impatient with Complainant and dismissive of her complaints.

Dr. Meiburg testified generally about how he would address complaints by individuals and by Complainant in particular, and his testimony extended from the time of the first litigation through the time that he testified in July 2012, during which time period he received numerous emails from Complainant. (Tr. 1330-68, CX 133). He recalled an incident involving sick leave in 2009 and he recalled being told about her litigation in 1996. (*Id.*) With respect to Complainant's complaints, he was struck by the sheer volume of them and he concluded that Complainant and her supervisors had "a pretty contentious relationship." (Tr. 1348-49, 1352-53). The volume of communications had been most acute since he returned to the Agency in 2009. (Tr. 1367). However, he testified that it was neither his "responsibility nor role to intervene in individual relationships between supervisors and employees as a general rule." (Tr. 1350-51). He also testified that he was "aware that people believed that [Complainant] had the capability to be a capable contracting officer." (Tr. 1353, 1367-68). Although he could not recall any specific conversation, he felt that he had communicated to her supervisory chain that there was not to be reprisal against her. (Tr. 1360-63). He later clarified that he did not expect there to be any reprisal and his evaluation of the communications was "not an issue of reprisal, but rather an issue of the relationship between the employee and her supervisor." (Tr. 1367).

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<sup>47</sup> Dr. Meiburg was one of several witnesses who addressed an employee satisfaction survey conducted during the period of time relevant to the second group of cases, from 2008 to 2009. (Tr. 1314-29.1361; CX 106).

## LEGAL BACKGROUND

My consideration will be limited to the employee protection provisions of four environmental statutes: the Clean Air Act (CAA), the Safe Drinking Water Act (SDWA), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), and the Solid Waste Disposal Act (SWDA). As noted above, the ARB determined that there was no waiver of sovereign immunity with respect to Complainant's Federal Water Pollution Control Act (FWPCA or WPCA) and Toxic Substances Control Act (TSCA) claims, and, as the Eleventh Circuit did not disturb that ruling, it is binding upon me. *But cf. Jenkins v. United States Environmental Protection Agency*, 1992-CAA-6 (Sec'y, May 18, 1994) at 2 -6, wherein the Secretary of Labor noted that the WPCA, as well as the SDWA, could be construed as waiving immunity generally and that the definition of "person" under CERCLA, the SDWA, and the CAA was broad enough to include the EPA.) Likewise, none of these cases arises under the Energy Reorganization Act (ERA), although OSHA included the ERA in its later determinations.

The employee protection/whistleblower provisions of Clean Air Act (CAA), appearing at 42 U.S.C. §7622, provide:

**(a) Discharge or discrimination prohibited**

No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)-

- (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan,
- (2) testified or is about to testify in any such proceeding, or
- (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

The corresponding provision in the Safe Drinking Water Act (SDWA) appears at 42 U.S.C. § 300j-9(i), which provides, in pertinent part:

- (1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has--
  - (A) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this subchapter or a proceeding for the administration or enforcement of drinking water regulations or underground injection control programs of a State,
  - (B) testified or is about to testify in any such proceeding, or

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

The employee protection provision in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), 42 U.S.C. §9610(a), provides:

**(a) Activities of employee subject to protection**

No person shall fire or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

The corresponding provision in the Solid Waste Disposal Act (SWDA), 42 U.S.C. §6971(a), Employee protection, provides:

No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter or under any applicable implementation plan, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter or of any applicable implementation plan.

The implementing regulations for the six environmental whistleblower statutes, appearing in 29 C.F.R. Part 24, were recently amended to implement changes with respect to the Energy Reorganization Act and to make the regulations consistent with other OSHA statutes to the extent possible. 76 Fed. Reg. 2808 (Jan. 18, 2011).<sup>48</sup> The regulations provide that no employer subject to any of the statutes “may discharge or otherwise retaliate against any employee with respect to the employee’s compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee’s request, engaged in any of the activities specified in this section.” 29 C.F.R. §24.102(a). They also provide that it is a violation “to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate against any employee” because he commenced, testified, assisted, or participated in any manner in a proceeding under one of the statutes “or in any other action to carry out the purposes of such statute.” 29 C.F.R. §24.102(b). Special provisions are applicable to the ERA.

The burdens of production and persuasion in whistleblower cases brought under environmental statutes are based on the framework applied under Title VII of the Civil Rights Act of 1964. *Odom v. Anchor Lithkemko*, ALJ Case No. 1996-WPC-1 (ARB, Oct. 10, 1997).

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<sup>48</sup> References are to the 2011 edition of the regulations unless otherwise indicated.

As set forth in the regulations, to establish a prima facie case of a violation of the employee protection provisions (at the investigatory stage), the employee must show that (1) he (or she) engaged in protected activity; (2) the respondent knew or suspected that the employee engaged in the protected activity; (3) the employee suffered an adverse action; and (4) circumstances were sufficient to raise the inference that the protected activity was a motivating factor in the unfavorable action.<sup>49</sup> 29 C.F.R. §24.104(e). See also *Bartlik v. U.S. Department of Labor*, 73 F.3d 100, 103 n. 6 (6th Cir. 1996) (listing different standards applied by Courts and finding “slight variation,” in that “the common thread is that plaintiff must set forth facts which justify an inference of retaliatory discrimination”). The inference may be raised by direct or circumstantial evidence, such as by the temporal proximity between the whistleblowing activities and the adverse action. 29 C.F.R. § 24.104(e). See also *Tyndall v. U.S. Environmental Protection Agency*, ALJ Case Nos. 1993-CAA-6, 1995-CAA-5 (Administrative Review Board, June 14, 1996), citing *Couty v. Dole*, 886 F.2d 147 (8th Cir. 1989); *Simon v. Simmons Foods, Inc.*, 49 F.3d 386 (8th Cir. 1995).

To be actionable, the alleged adverse employment action must involve a tangible job detriment (such as dismissal, failure to hire, or demotion) or it may take the form of harassment that is sufficiently pervasive as to alter the conditions of employment and create an abusive or hostile work environment. *Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ No. 1997-CAA-2 (ARB Feb. 29, 2000). See also *Martin v. Dept. of Army*, ARB No. 96-131, ALJ No. 1993-SDW-1 (ARB July 30, 1999). While a reassignment or lateral transfer unaccompanied by a reduction in earnings, benefits, work hours, or duties is not an adverse action, transfer to a job that the employee knows he cannot perform may constitute adverse action. See *Jenkins, supra*. See also *Dilenno v. Goodwill Industries of Mid-Eastern Pennsylvania*, 162 F.3d 235, 236 (3d Cir. 1998). Although isolated or trivial incidents may shed light on Respondent’s motivation, vague allegations are insufficient to establish harassment that is sufficiently pervasive as to alter the conditions of employment or create an abusive or hostile work environment. See *Berkman, supra*. “Employer criticism, like employer praise, is an ordinary and appropriate feature of the workplace. . . [T]o permit discrimination lawsuits predicated only on unwelcome day-to-day critiques and assertedly unjustified negative evaluations would threaten the flow of communication between employees and supervisors and limit an employer’s ability to maintain and improve job performance.” *Shelton v. Oak Ridge National Laboratories*, OALJ No. 1995-CAA-19, ARB No. 98-100 (Admin. Review Board March 30, 2001). at 7, quoting *Davis v. Town of Lake Park, Florida*, 245 F.3d 1232, 1242 (11th Cir. 2001).

In *Burlington Northern*, the Supreme Court found that an adverse employment action would include any act by an employer that would dissuade an employee from engaging in

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<sup>49</sup> Although establishment of a prima facie case is relevant at the investigatory stage of proceedings, once a case is tried on the merits before an administrative law judge, “the ALJ does not determine whether a prima facie showing has been established, but whether the complainant has proved by a preponderance of the evidence that the respondent discriminated because of protected activity.” *Williams v. Baltimore City Public Schools System*, ARB No. 01-021, ALJ No. 2000-CAA-15 (ARB, May 30, 2003) at n. 7, *aff’d* 157 Fed. Appx. 564, No. 03-1749 (4th Cir. Nov. 18, 2005) (unpub.) See also *Jiminez v. Mary Washington College*, 57 F.3d 369, 377 (4th Cir.), *cert. denied* 516 U.S. 944 (1995) (Title VII case). In *Williams* at footnote 3, the Fourth Circuit questioned the ARB’s suggestion in footnote 7 of its decision that a prima facie case in a charge of discrimination did not need to be established by a preponderance of the evidence but stated that if the footnote was “meant to emphasize that following a trial on the merits in such cases, the proof of a prima facie case is usually inconsequential,” it was consistent with *Jiminez*.

protected activity for fear of retaliation. *See Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 57 (2006). In that regard, the Supreme Court determined that the limitation to tangible harms in the workplace (i.e., the provision relating to compensation, terms, conditions, and privileges of employment) was not applicable to the anti-retaliation provision in Title VII which makes it unlawful for an employer to discharge or discriminate against the employee because of protected status. *Id.* With respect to the latter provision, a tangible employment consequence is still required, but a violation occurs whenever it is found that an employee would be deterred from making a protected complaint. *See Melton v. Yellow Transportation, Inc.*, ALJ No. 2005-STA-002, ARB No. 06-052 (Admin. Review Board Sept. 30, 2008)(disagreement among panel as to whether *Burlington Northern* applies to STAA).

Although variations of the two standards are included in the environmental whistleblower statutes, as discussed above, there is one set of regulations (and the same standard) applicable to all of the environmental statutes except for the ERA. As revised in 2011, Section 24.102 of the regulations includes prohibitions that an employer “discharge or otherwise retaliate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment” or “intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate against any employee” because that employee engaged in protected activity. 29 C.F.R. §24.102.

As revised, the regulations also set forth the burdens of proof on the issue of causation before the administrative law judge:

(2) In cases arising under the six environmental statutes listed in Sec. 24.100(a), a determination that a violation has occurred may only be made if the complainant has demonstrated by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint. If the complainant has demonstrated by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint, relief may not be ordered if the respondent demonstrates by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity.

29 C.F.R. §24.109(b)(2).

The complaining employee always bears the burden of proving by a preponderance of the evidence that retaliation was a motivating factor in the respondent's actions.<sup>50</sup> *Jackson v. The Comfort Inn, Downtown*, ALJ Case No. 1993-CAA-7 (Sec'y, March 16, 1995). Once an employee has established a prima facie case of discrimination, the respondent has the burden of producing evidence that the adverse action was motivated by legitimate, nondiscriminatory reasons. *See Guttman v. Passaic Valley Sewerage Comm'rs v. Department of Labor*, ALJ No. 1985-WPC-2 (1992), *aff'd sub nom, Passaic Valley Sewerage Comm'rs v. Department of Labor*, 992 F.2d 474 (3d Cir.), *cert. denied*, 510 U.S. 964 (1993). *See also Dysert v. United States*

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<sup>50</sup> As amended in 1992, the ERA requires that the behavior complained of be a “contributing factor” rather than a “motivating factor.” *See Remusat v. Bartlett Nuclear, Inc.*, ALJ Case No. 1994-ERA-36 (Sec'y Feb. 26, 1996). The motivating factor standard is still applicable to the environmental statutes.

*Sec’y of Labor*, 105 F.3d 607, 609-610 (11th Cir. 1997) [ERA case]. The complainant, as the party bearing the ultimate burden of persuasion, must then show that the proffered reason was not the true reason, but was a pretext for retaliation. *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502 (1993).

When the employee has established that illegal motives played some part in the discharge (or other adverse action), the employer must prove that it would have taken the same actions in regards to the employee even if he had not engaged in protected conduct. *Kester v. Carolina Power and Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31 (ARB Sept. 30, 2003) [ERA case], slip op. at pages 3 to 6 and n. 19. In such “dual motive” cases, the employer bears the risk that the influence of legal and illegal motives cannot be separated. *Pogue v. U.S. Department of Labor*, 940 F.2d 1287 (9th Cir. 1991). As amended, the regulations specifically state that relief will not be ordered if the respondent demonstrates by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity. 29 C.F.R. §24.109(b)(2).<sup>51</sup>

## DISCUSSION

### ***Protected Activity***

The first element that needs to be established in a whistleblower case -- that the employee has engaged in protected activity -- has been satisfied, both as part of Complainant’s prima facie case and based upon a preponderance of all of the evidence of record. Complainant has established that she engaged in protected activity because (besides reporting activity that she believed violated the environmental statutes) she commenced and participated in whistleblower proceedings under the environmental statutes. The protected activity in this matter includes Complainant’s filing of, and participation in, previous whistleblower suits against the Respondent as well as her filing of, and participation in, the instant whistleblower complaints. Furthermore, I agree with Judge Kennington’s finding that Complainant engaged in protected activity when she reported concerns about the Superfund Contract to her supervisors, including Keith Mills.

### ***Respondent’s Awareness of Protected Activity***

The second element, that respondent was aware of the protected activity, has also been satisfied with respect to most, but not all, of the specific allegations. Complainant emailed multiple parties concerning her whistleblowing activities. Also, managerial officials in Complainant’s supervisory chain and personnel involved in her disability accommodation requests testified as to their awareness of the prior actions. However, with respect to the specific allegations concerning her non-selection for particular positions, the selecting officials and other persons involved were not always aware of the protected activity.

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<sup>51</sup> For ERA cases, the standard is “clear and convincing evidence.” 29 C.F.R. §24.109(b)(1).

### ***Adverse Actions and Causal Relationship***

With respect to the third and fourth elements, Complainant has alleged several adverse actions or groups of adverse actions that she alleges were precipitated by her protected activity. Here, I will only address the allegations to the extent that they constitute separate adverse actions. Although Complainant's earlier difficulties in the Contracting Office are not before me as they were addressed in the previous litigation, and Judge Kennington's decisions were vacated and are not enforceable, there is one significant adverse action raised in this group of cases that is before me: Complainant's assignment back to the Contracting Office and the manner in which it was conducted. EPA was under no obligation to return her to the Contracting Office but apparently did so because of her whistleblower litigation, which involved allegations that she was subjected to a hostile work environment in IT. While the assignment itself was not adverse, as she wished to return to the Contracting Office, she complained that she was not treated the same as other similarly situated employees. She also complained of other alleged adverse actions, including EPA's denials of her requests for disability accommodation and her non-selection for other jobs and inability to apply for others. Complainant has also complained of continuing retaliation, harassment and nitpicking by her superiors. The bulk of these other allegations are trivial when considered as individual adverse actions but may in the aggregate constitute evidence of a hostile work environment. Whether Complainant has made an actionable claim for retaliation based upon a hostile work environment will be addressed separately, along with the allegations made in the latter group of cases. I will address the major allegations of retaliatory adverse actions made in the first group of cases individually.

### **Reassignment to Contracting Office without Promotion**

Based on Judge Kennington's decision, Complainant complained that when EPA returned her to the Contracting Office, it did so without promoting her to GS-13 and without restoring her to equivalent responsibilities equal to what she had in 1993 **enhanced** by responsibilities she would have had if she had remained in that area. However, as Judge Kennington's decision was vacated with respect to that relief, EPA was under no duty to promote her to the GS-13 level or to provide her with enhanced responsibilities. The failure to promote her was not an actionable adverse action.

### **Reassignment to Contracting Office without Restoration of Equivalent Responsibilities.**

Complainant also complains of the manner in which she was returned to the Contracting Office ["Contracting" or "Contracts"], EPA's failure to restore her to responsibilities equivalent to those she held in 1993, and EPA's failure to restore the warrant that she had at the time of her previous assignment there. Complainant's claims based upon her assignment of less desirable, lower level work, also naturally resulted from the manner in which she was reassigned. At the time of her reassignment, Complainant was assigned to work for Keith Mills, who was implicated in her initial whistleblowing activities. The assignment was a sensitive one due to their difficulties in Erickson I. Mr. Mills admitted that he did not want her to work for him; however, he set up a plan so that she could be reintegrated into the Contracts area. At first blush, the plan that he put together seems neutral; however, upon closer scrutiny, it appears that Complainant was set up to fail.

A copy of the plan that Mr. Mills devised for the ostensible purpose of reintegrating Complainant in to the Contracts area falls far short of doing so, even if each of the objectives set forth in the plan were achieved. The plan was provided as part of RX 26, along with an email dated February 6, 2004 from Mr. Mills to Complainant, advising her that he would be expecting her on Monday morning, February 9th and would advise her of her work assignments and where she would be sitting when he met with her at that time. The plan itself (entitled “Contracting/Workload Phase-In Plan For Sharyn Erickson”) provided for five phases:

PHASE I --- WORKLOAD

Contract Closeouts  
Refresher Contract Training  
Contracting Rule Changes/Revisions/Updates  
i.e., Federal Acquisition Streamlining Act (FASA), Federal Acquisitions Regulations (<sup>52</sup>  
Contract Management Manual (CMM), EPAAR, and other regulations, as appropria

PHASE II --- WORKLOAD

Contract Closeouts  
Refresher Contract Training  
Policy Reviews/Comments

PHASE III --- WORKLOAD

Contract Closeouts  
Refresher Contract Training  
Policy Reviews/Comments  
Simplified Acquisition Processing

PHASE IV --- WORKLOAD

Contract Closeouts  
Refresher Contract Training  
Policy Reviews/Comments  
Simplified Acquisition Processing  
Contract Placement (s)

PHASE V --- WORKLOAD

Contract Closeouts  
Refresher Contract Training  
Policy Reviews/Comments  
Simplified Acquisition Processing  
Contract Administration

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<sup>52</sup> So in original. Something appears to have been cut off on this line and the one below, also reproduced accurately.

(RX 26). Thus, the Plan primarily consists of a training plan, with the responsibility for Simplified Acquisition Processing added in Phase III, Contract Placement(s) added in Phase IV, and Contract Administration added in Phase V. No time frames are set forth for these phases. More importantly, there is no indication that full implementation of the Plan would result in the restoration of Complainant's prior responsibilities and privileges in the Contracting area. The Plan does not provide for her to have her warrant, or any portion of it, restored.<sup>53</sup> It simply does not provide a means for Complainant to be restored to her previous level of responsibility.

In view of the above, I find that the manner in which Complainant was restored to the Contracts area, with no plan for her to be restored to her previous responsibilities, was an adverse action.

To prevail in an environmental whistleblower case, an employee must produce enough evidence to raise the inference that the motivation for the adverse action was protected activity; to prevail on the merits, the employee must establish that element by a preponderance of the evidence. Under the regulations relating to the environmental statutes, as amended, the complainant must demonstrate by a preponderance of the evidence that the protected activity "caused or was a motivating factor" in the alleged adverse action.<sup>54</sup> 29 C.F.R. §24.109(b)(2). Before me, the question is whether Complainant has established a causal relationship by a preponderance of the evidence, through direct and/or circumstantial evidence. I find that Complainant has satisfied this burden.

According to Mr. Mills, Complainant's reassignment was precipitated by litigation in which she was involved, apparently a reference to Erickson II (discussed above). There is thus a direct causal link between her whistleblower activities and her reassignment.

There is also substantial evidence from which the inference may be drawn that Complainant's reassignment was retaliatory in nature. On the one hand, the motivation to return her to the Contracts area itself may have been neutral and was ostensibly based upon the problems she was having in her assignment at the Information Management Branch (which was part of Erickson II). However, she was assigned to work for Mr. Mills, the supervisor implicated in her initial protected activity, and he was apparently given free rein in his supervision of her to put whatever obstacles he chose to put before her. Here, Mr. Mills was candid about the fact that he did not have a good working relationship with Complainant and did not expect to have one. He neither disputed that he did not want Complainant to work for him nor testified that he lacked any animosity toward her. He was personally attacked by her in Erickson I, suggesting a basis for retaliatory animus. He also conceded that the additional steps that he required Complainant to take with respect to her reintegration into the contracts area were not uniformly applied. He also admitted that the other senior employee who had been assigned to work under him, who

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<sup>53</sup> Although her original warrant was never restored, Complainant had a \$100,000 warrant which Lucy Yarborough requested for her in 2007. (Tr. 1561)

<sup>54</sup> In the Preamble to the amended regulations, in discussing the standards derived from the case law, the Department of Labor stated: "Under these standards, a complainant may prove retaliation either by showing that the respondent took the adverse action because of the complainant's protected activity or by showing that retaliation was a motivating factor in the adverse action (i.e. a 'mixed-motive analysis')." 76 Fed. Reg. 2808, 2811 (Jan. 18, 2011).

came from another agency, was not required to undergo the same reintegration plan that he utilized for Complainant. Further, Mr. Mills himself was not required to take those additional steps when he returned to the Contracts area, after a hiatus. Moreover, the Plan itself that Mr. Mills put together did not contemplate that Complainant would ever be restored to her previous warrant, nor did it set forth any timeframes for her to assume additional responsibilities.

Under these circumstances, there is both direct and circumstantial evidence of a causal relationship between the adverse action of assigning her to the Contracts area without the warrant and privileges she previously held and her protected activity. I find that Complainant's reassignment and the manner in which she was reassigned to the Contracts area was motivated, at least in part, by a retaliatory animus

Even if Mr. Mills were motivated to retaliate against Complainant without the participation of the rest of upper management, Respondent would still be liable. *See generally Chen v. Dana-Farber Cancer Institute*, ARB No. 09-058, ALJ No. 2006-ERA-009 (ARB, March 31, 2011) (Royce, J. dissenting). In *Chen*, an ERA case, the majority opinion found that substantial evidence supported the administrative law judge's finding that the protected activity was a contributing factor to the adverse action, as required by the ERA. The dissent agreed on that point, and noted that the ALJ, while not specifically referencing it, "appeared to apply reasoning consistent with the 'cat's paw' theory of liability recently approved by the Supreme Court" in *Staub v. Proctor*, 131 S.Ct. 1186 (2011), which "held that an employer may be held liable for the discriminatory actions of a lower level supervisor who influences the decision to take adverse action by a higher level supervisor who lacks discriminatory animus." *Chen* (Royce J. dissenting), slip op. at 17-18.<sup>55</sup>

As Complainant has produced substantial evidence establishing that her reassignment was motivated at least in part by her protected activity, the question then is whether Respondent has produced evidence supporting a finding that there was no causal relationship between the protected activity and the retaliatory action taken. The Respondent has failed to do so. First, the only evidence of the motivation for her reassignment was provided by Mr. Mills, who associated it with her litigation, thus suggesting a direct causal link. Second, it is true that, given the lapse of time, there is no basis for a temporal inference of causation with respect to the initial whistleblowing activities and the reassignment; however, that is not true with respect to Complainant's whistleblower litigation.<sup>56</sup> The reassignment was contemporaneous with whistleblower litigation in which Complainant was involved and continues to be involved. Third, the only testimony concerning similarly situated employees – a senior employee from another agency who was hired to work in contracting and Mr. Mills, who returned to Contracting after a hiatus -- indicated that they were not required to take the additional steps required of Complainant. Fourth, in some ways, Complainant is her own worst enemy and her actions

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<sup>55</sup> The Supreme Court explained the derivation of the principle in note 1 of its decision in *Staub*:

The term "cat's paw" derives from a fable conceived by Aesop, put into verse by La Fontaine in 1679, and injected into United States employment discrimination law by Posner in 1990. [Citation omitted.] In the fable, a monkey induces a cat by flattery to extract roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing. A coda to the fable (relevant only marginally, if at all, to employment law) observes that the cat is similar to princes who, flattered by the king, perform services on the king's behalf and receive no reward.

<sup>56</sup> See *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, *rehearing denied*, 533 U.S. 912 (2001)).

precipitated much of the alleged retaliation, as is more fully discussed below. That is not true, however, with respect to her reassignment to Contracts and the manner in which it was implemented, which was effectuated independent of her input. Apart from the weak justification provided by Mr. Mills, no cogent explanation for her reassignment under the circumstances set forth above, which required her to go through procedures not required of other similarly situated employees, has been offered.

Assuming, arguendo, that Respondent has articulated a valid basis for the reassignment and the manner in which it was implemented, the Respondent has nevertheless failed to establish by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity. 29 C.F.R. §24.109(b)(2). To the contrary, the preponderance of the evidence establishes a retaliatory motivation for the adverse action.

### **Failure to Grant Disability Accommodation for Hand Disability**

Complainant has alleged disparate treatment with respect to her hand disability. In that regard, she had previously been granted an accommodation for her hand disability that Mr. Mills refused to recognize when she was reassigned to him. In conjunction with reasonable accommodation coordinators Mr. Haig and Mr. Asencio, who acted at Mr. Mills' behest, Complainant's request for accommodation was considered anew, additional documentation was required, and she was required to be reexamined. Her disability determination was never restored and was, in fact, denied in 2004 and 2005. Although she was required to go through additional steps to establish her disability, unrefuted testimony established that those additional steps were required as a result of EPA replacing an informal disability system with a more formal one in 2003 or 2004; these enhanced requirements remained in effect until the standards were changed in 2009. Furthermore, even though she was denied the disability accommodation, Mr. Mills nevertheless ordered the Dragon naturally-speaking software, which was the accommodation Complainant requested, and her subsequent supervisors, including Ms. Yarbrough, made efforts to ensure that it worked for Complainant. Although those efforts were not entirely successful, there is no indication that the outcome would have been different if her accommodation request had been granted. Taking all of this information into account, I find that the denial of Complainant's hand disability accommodation was not significant enough to constitute an adverse action. It will, however, be considered along with Complainant's hostile work environment claim.

There was considerable testimony concerning Complainant's actions with respect to the Dragon software and Compuserve, to whom she gave the mistaken impression that she was the contracting officer for their project, and there was testimony concerning her actions on the conference calls relating to the EAS system, which she apparently monopolized due to her own concerns about Dragon. Further, there was testimony concerning emails that she sent to various parties, suggesting that they might be subject to personal liability, which they found to be threatening. While these actions are relevant to Complainant's hostile work environment claim, they suggest that Complainant herself precipitated at least some of the difficulties about which she has been complaining.

## **Failure to Grant Disability Accommodation for Stress-Related High Blood Pressure, Retinopathy, Ulcerative Colitis, Irritable Bowel Syndrome, Repetitive Motion Hand Injuries, Osteoarthritis, Sciatica, Degenerated Spinal Disks, Chronic Asthma, Anxiety Disorder, and Type II Diabetes Mellitus**

Complainant also alleged disparate treatment in EPA's failure to provide her with an accommodation for ten stress related illnesses, later amended to include an eleventh (diabetes), supported by the statements of her treating physician, Dr. Kunz. There was, however, extensive testimony concerning the way the disability system worked and the requirement that the conditions be specifically tied into activities of daily living. By lumping ten or eleven disabilities together and by having her physician explain their aggregate effect on her capabilities, as opposed to how each affected her activities of daily living, she submitted a disability accommodation claim that was different from any that Mr. Haig and Mr. Asencio had previously addressed. Under these circumstances, the initial denial of her accommodation request was warranted and she failed to amend the request to satisfy the disability criteria. Taking all of the evidence on this issue into account, I find that the denial of her request for accommodation for these ten or eleven stress-related disabilities did not rise to the level of an adverse action and Complainant has failed to demonstrate that she was treated in a disparate manner. This claim will, however, be considered along with Complainant's hostile work environment claim.

## **Non-selection of Complainant for GS-13 Position by Karen James**

Complainant alleged that she was treated in a disparate manner when Phyllis Mann selected Hector Buitrago over her for a GS-13 position in the Information Management Branch. However, Ms. Mann, a credible witness, explained at length why she selected Mr. Buitrago for the position because of his extensive experience in the Grants area and she indicated that Complainant was her second choice for the position. Complainant's non-selection was neither adverse nor retaliatory and does not constitute an actionable adverse action.

## **Non-selection of Complainant for Various GS-13 Positions**

Complainant also complained that she was not considered and therefore not selected for various GS-13 positions even though she filled out an online application and submitted supporting documentation, and she asserts in her reply brief that EPA failed to demonstrate the fairness and reasonableness of its personnel actions when it failed to accept her applications. Thus, she seems to be suggesting that EPA ignored these applications due to a retaliatory animus. There is no substance to that claim, however. Karen James, a human resources specialist, reviewed Complainant's complaint about her applications not being considered at the time. She credibly testified about her consultation with the contractor and the results of her investigation, which revealed that Complainant apparently failed to hit "submit" at the end of her online application process. The applications were therefore not submitted and she was therefore not considered for the positions. Complainant's non-consideration for these positions was neither adverse nor retaliatory and her non-selection is not actionable.

## **Hostile Work Environment and Later Claims**

As noted above, Complainant has made additional claims relating to her being singled out at meetings, subjected to gag orders, subjected to closer supervision and “nit-picking” than other employees, required to have her work reviewed by lower-level employees, treated in a disparate manner with respect to her disabilities and family responsibilities, unfairly criticized for using a franked envelope, subjected to “Catch-22” requirements, and otherwise treated differently from other similarly situated employees. These complaints are too trivial when considered alone to constitute adverse actions; however, these claims relate to a hostile work environment and will be preserved and addressed along with the second group of cases. Furthermore, Complainant has made specific complaints concerning actions taken during the second period of time involved here (2007 and later), which will be addressed in the second group of cases. There were significant issues concerning her treatment during this latter period, discussed in part above, that are difficult to explain. There may be other explanations that EPA has for some of the disparate treatment Complainant has alleged during this latter period, as EPA’s evidence related solely to the first group of cases. Moreover, I would be remiss if I did not note, as I also mentioned above, that Complainant has contributed to the problems that she has had at work by her own actions, as, for example, by sending out threatening emails.<sup>57</sup> The hostile work environment claims and the specific claims concerning 2007 and later will be addressed in subsequent proceedings.

## ***Conclusion/Damages***

In view of the above, Complainant has established by a preponderance of the evidence that she engaged in protected activity that was a motivating factor in a single adverse employment action taken against her – her reassignment to the Contracting Office without restoration of her warrant and other privileges -- putting aside the issue of hostile work environment. Respondent has not established that it would have taken the same action in the absence of her protected activity. However, with respect to the remaining allegations, either the actions complained of did not rise to the level of adverse actions (although they may in the aggregate establish a hostile work environment) or Respondent has established by a preponderance of the evidence that there were legitimate, nondiscriminatory reasons unrelated to the protected activity for the actions (with the exception of her reassignment to contracting without a warrant or restoration of privileges). These remaining allegations will, however, be considered as potentially establishing a hostile work environment along with the allegations in the latter group of cases. Case Nos. 2004-CAA-00011, 2005-CAA-00010, 2005-CAA-00012, 2005-CAA-00015, 2006-CER-00003, and 2007-CER-00002 will therefore be dismissed and the allegations relating to hostile work environment in the dismissed cases will be merged into Case No. 2004-CAA-00007. A notice of appeal rights will be issued relating solely to the individual adverse action allegations in the dismissed cases.

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<sup>57</sup> For example, Complainant’s supervisor, Ms. Yarborough (who did not testify) sent out an email to higher level recipients apologizing for an email that Complainant sent to them alleging retaliation. (CX 112). As discussed above, Complainant had sent the email in response to criticism leveled against her; instead of simply addressing the source of the criticism, she claimed retaliation. Likewise, as also discussed above, other employees complained that Complainant sent them threatening emails. It is not a “Gag Order” for an employee to be told not to send out threatening emails.

The issue of damages resulting from the actionable reassignment is inextricably intertwined with the hostile work environment allegations. In that regard, Complainant was placed at a disadvantage due to her reassignment to Contracting without her warrant or previous responsibilities, but the damages attributable to the reassignment cannot be assessed in a vacuum. Accordingly, the damages to which Complainant is entitled in Case No. 2004-CAA-00007 will be addressed in the subsequent proceedings in Case Nos. 2009-ERA-00008 through 2014-CAA-00001 and Case No. 2004-CAA-00007 will be consolidated with those cases.

## **ORDER**

**IT IS HEREBY ORDERED** that (1) the above-captioned claims by Complainant Sharyn Erickson for relief under the employee protection (whistleblower) provisions of the environmental statutes be, and hereby are, **GRANTED IN PART AND DENIED IN PART**, as set forth above; and (2) Case No. 2004-CAA-00007 is **GRANTED** to the extent set forth above; and Case Nos. 2004-CAA-00011, 2005-CAA-00010, 2005-CAA-00012, 2005-CAA-00015, 2006-CER-00003, and 2007-CER-00002 are **DISMISSED**; provided, that the issue of damages awardable in Case No. 2004-CAA-00007 and the allegations relating to hostile work environment in all of these claims will be preserved as a part of Case No. 2004-CAA-00007; and

**IT IS FURTHER ORDERED** that Case No. 2004-CAA-00007 is **CONSOLIDATED WITH** Case Nos. 2009-ERA-00008, 2011-CAA-00004, 2012-ERA-00001, 2012-CAA-00003, 2012-ERA-00016, 2013-CAA-00004, 2013-CAA-00005, and 2014-CAA-00001 for the purposes of assessing damages and addressing hostile work environment claims.

PAMELA J. LAKES  
Administrative Law Judge

Washington, D.C.

**NOTICE OF APPEAL RIGHTS** [limited to Case Nos. 2004-CAA-00011, 2005-CAA-00010, 2005-CAA-00012, 2005-CAA-00015, 2006-CER-00003, and 2007-CER-00000 and not including hostile work environment allegations]: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW, Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. See 29 C.F.R. §§ 24.109(e) and 24.110.