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Report of Investigation: Whistleblower Reprisal Investigation

September 17, 2024 | Report No. 24-N-0062

REDACTED VERSION FOR PUBLIC RELEASE

The full version of this report contained controlled unclassified information. This is a redacted version of that report, which means the controlled unclassified information has been removed. The redactions are clearly identified in the report.

Abbreviations

CBI	Confidential Business Information
C.F.R.	Code of Federal Regulations
EPA	U.S. Environmental Protection Agency
FY	Fiscal Year
LAN	Local Area Network
OIG	Office of Inspector General
OPPT	Office of Pollution Prevention and Toxics
RAD	Risk Assessment Division
U.S.C.	United States Code

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Table of Contents

Report of Investigation

Introduction and Summary **1**

Findings of Fact **2**

Analytic and Legal Framework **15**

Analysis **17**

Conclusions **28**

Recommendation **28**

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Report of Investigation

Introduction and Summary

On June 28, 2021, and August 3, 2021, the U.S. Environmental Protection Agency Office of Inspector General received OIG Hotline complaints filed by the nonprofit organization Public Employees for Environmental Responsibility on behalf of four scientists who worked in the former Risk Assessment Division, or RAD, of the Office of Pollution Prevention and Toxics, or OPPT, in the EPA Office of Chemical Safety and Pollution Prevention. The complaints and subsequent interviews of the scientists raised multiple allegations of misconduct, including that the Agency took a total of eight retaliatory actions against [redacted]: two actions in 2020 and 2021 after [redacted] expressed differing scientific opinions and six personnel actions in 2021 and 2022 after the filing of the June and August 2021 hotline complaints by Public Employees for Environmental Responsibility. We opened an investigation to determine whether the alleged actions were in retaliation for [redacted] differing scientific opinions, in violation of the EPA's *Scientific Integrity Policy* (2012). We also investigated whether the 2021 and 2022 actions were in retaliation for [redacted] complaints made to the OIG, in violation of the Whistleblower Protection Act.

Our investigation first sought to determine whether [redacted] expressed differing scientific opinions, made protected disclosures, or engaged in other activities that were protected under the Whistleblower Protection Act and whether any of these were a contributing factor in any personnel actions taken against [redacted]. We determined that [redacted] expressed differing scientific opinions from 2020 through 2022, engaged in protected activity in 2021, and made a protected disclosure in 2021. We determined that Agency management knew of [redacted] differing scientific opinions, protected activities, and protected disclosure when it took six personnel actions against [redacted] (1) issued [redacted] a performance evaluation for fiscal year 2020 that was lower than [redacted] expected, (2) issued [redacted] a performance evaluation for FY 2021 that was lower than [redacted] expected, (3) denied [redacted] leave, (4) failed to select [redacted] for a [redacted] detail, (5) [redacted], and (6) [redacted]. Our investigation identified [redacted] who issued [redacted] FY 2020 and FY 2021 performance evaluations and denied [redacted] leave. We identified [redacted] as [redacted] who failed to select [redacted] for a [redacted] detail and [redacted] as [redacted] who [redacted] and [redacted]. All six personnel actions occurred within a period such that a reasonable person could conclude that [redacted] differing scientific opinions, protected activity, or protected disclosure were a contributing factor in the personnel actions. We determined that the two remaining alleged retaliatory actions did not constitute personnel actions.

Next, we assessed whether the EPA could establish that it would have taken the same six personnel actions even if [redacted] had not expressed differing scientific opinions, engaged in protected activity, or made a protected disclosure. After reviewing the evidentiary support for the six personnel actions, any evidence of retaliatory motive on the part of officials involved in the decision, and any evidence that the Agency took similar actions against similarly situated employees who were not whistleblowers, we

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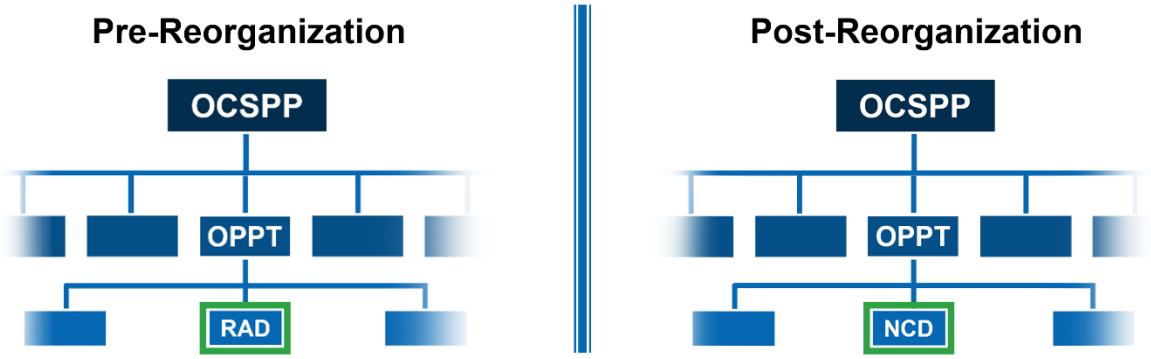
did not substantiate [redacted] retaliation allegations. We make no recommendations regarding corrective action in light of these findings.

Findings of Fact

[redacted] was employed by the EPA as [redacted] in the Office of Chemical Safety and Pollution Prevention from [redacted]. [redacted] was hired in [redacted] to a position in the [redacted]. In [redacted], [redacted] began a detail in RAD, where [redacted] worked on human health assessments of new chemicals.[1] [redacted] was permanently reassigned to RAD in December 2019. In October 2020, during the reorganization of the OPPT, [redacted] was reassigned to the New Chemicals Division. In [redacted], [redacted] resigned from the Agency.

Background

Prior to the OPPT reorganization in October 2020, RAD was responsible for assessing the hazards of new chemicals before they entered U.S. commerce to determine whether they posed an unreasonable risk to human health and the environment. RAD's hazard assessments were sent to the Chemical Control Division in the OPPT, which conducted risk management assessments. These assessments were made under the Toxic Substances Control Act, which requires a final regulatory determination within 90 days of submission.[2] After the two divisions completed their assessments, the OPPT deputy director would review their work and approve a final regulatory determination regarding the risks posed by each new chemical. As a result of the OPPT reorganization in October 2020, the risk assessments and regulatory determinations were assigned to the New Chemicals Division and were subject to the same statutory 90-day deadline.



Notes: NCD = New Chemicals Division; OCSPP = Office of Chemical Safety and Pollution Prevention.
Source: OIG analysis of OPPT reorganization. (EPA OIG image)

The EPA's assessments of new chemicals constitute scientific products. The hazards in new-chemicals assessments are identified by assessing and interpreting scientific data, such as testing on the new-

[1] As a human health assessor; [redacted] worked on assessments of how new chemicals would impact the human health of consumers, workers, and the general population. In addition to human health assessors, RAD had assessors who worked in four other disciplines: engineering, exposure science, fate, and ecological toxicity.

[2] Toxic Substances Control Act § 5(a)(3)(A)-(C), 15 U.S.C. § 2604(a)(3)(A)-(C).

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chemical substance or on analogue chemicals. These hazards, as well as data from the other disciplines, such as exposure and engineering data, are used to inform the EPA's final regulatory determinations.

In 2016, the Toxic Substances Control Act was amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act.[3] RAD staff testified that prior to the 2016 amendment, the division conducted a full assessment of about 20 percent of the new-chemicals submissions. As a result of the 2016 amendment, the EPA was required to conduct a full assessment for *every* chemical within the same statutory 90-day deadline. Despite the increased workload, the division did not receive an increase in staff or contractor resources.

Agency staff testified that the division was not prepared or equipped to satisfy the new requirements. Management consistently testified that 90 days was not enough time to complete the new-chemicals assessment process and that the division lacked the resources to meet this deadline. [redacted] described the statutory deadline as "ridiculous" and stated that everyone knew it could not be met. A human health assessor described completing the new requirements within 90 days as "somewhat impossible." If new chemicals assessments are not completed within the statutory 90-day deadline, they become a part of the "backlog." The backlog existed before the 2016 amendment, but it grew as a result of the increased workload created by the new requirements. While management testified that there had always been pressure to clear the backlog, as the backlog grew, so did the political pressure to eliminate it.

Management called the pressure from Agency leadership to eliminate the backlog "intense." [redacted] testified that Agency leadership was constantly contacting them. One of [redacted] described the pressure as "pushing us like animals in a farm." [redacted] testified that [redacted] was afraid that if it was not reduced, there would be repercussions in [redacted] performance evaluation. Witnesses from RAD and the New Chemicals Division explained that because the human health assessment took the most time and had the most room for disagreement, pressure to reduce the backlog was disproportionally applied to the human health assessors. [redacted] called the human health assessment "the hardest part of the risk assessment." [redacted] testified that a political appointee complained about specific human health assessors as being "slow" and asked their management to be more involved in their work. Agency leadership also characterized these assessors as too "conservative" in their approach.

However, witness testimony indicated that the assessment completion timeline and the backlog size were not entirely in the assessors' control. Companies that submit new chemicals for assessment play a large role in the new-chemicals assessment process. RAD and New Chemicals Division management testified that since 2016, the EPA regulates new chemicals via consent orders. Before a final regulatory determination is made, chemical submitters are told the EPA's tentative conclusion and have an

[3] Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182, § 5, 130 Stat. 448 (2016).

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opportunity to dispute the EPA's assessment or provide additional information. According to [redacted], the division is required to consider anything the chemical submitter supplies, no matter when it is received. As a result, assessors often must review and respond to new information submitted in rebuttal to the initial assessment, a process referred to as "rework." If chemical submitters do not agree with the initial assessment, then they can continue to submit more information for the EPA to consider until an agreement between the submitter and the EPA is reached. This process often extends the timeline beyond the statutory 90-day deadline. [redacted] testified that chemical submitters' desire for a regulatory determination that their chemicals are not likely to present risks to human health or the environment causes "heavy" rework and emphasized that an average case goes through two or three back-and-forth cycles. [redacted] and one of [redacted] explained that assessments that chemical submitters disagree with end up more delayed than assessments that they agree with. This [redacted] also testified that identifying fewer hazards or determining that a chemical was less hazardous led to quicker case completion.

Delays are also caused by internal scientific disagreements that are inherent to the new-chemicals review-and-approval process. Staff from RAD and the New Chemicals Division testified that human health assessors often have little-to-no test data regarding the new chemicals when writing their reports. Instead, hazards in new-chemicals assessments are identified by finding existing chemicals that are structurally similar to the new chemicals to use as analogues. [redacted] testified that the division did not have written guidance to tell them how to select the best analogue chemical, but that instead the decision was based in part on professional judgment and a review of the scientific data. According to [redacted], the New Chemicals Division is working on creating objective measures for analogue selection. The data gap and resulting need for extrapolation leave room for scientific disagreements.

[redacted] *Differing Scientific Opinions*

Once a human health assessor completed an initial assessment, the OPPT deputy director and the OPPT senior science advisor would conduct an extensive technical review and provide edits back to the assessor. According to RAD management, [redacted] and other human health assessors were more likely than other assessors to express disagreements about scientific decisions made in risk assessments. As noted above, hazards in new-chemicals assessments are identified by assessing and interpreting scientific data. OPPT managers' disagreements regarding hazard identification would be included in their edits back to the human health assessors. These disagreements were also raised at weekly disposition meetings, where management and the human health assessors would discuss scientific issues that arose in the new-chemicals assessments.

After starting work in RAD in [redacted], [redacted] spent [redacted] first few months learning the new-chemicals assessment process. While [redacted] had conducted human health assessments in [redacted] previous division, there were many differences between [redacted] work in the [redacted] and in RAD.

In March 2020, the assessors working on new chemicals were split into two groups: a backlog team and an incoming-submissions team. [redacted] was placed on [redacted].

[redacted] testified that [redacted], [redacted] was in "observation mode" and did not express differing scientific opinions. However, from 2020 through 2022, [redacted] expressed scientific disagreements with chemical companies and OPPT management about hazard identification. The earliest scientific disagreement that [redacted] could recall occurred in approximately February 2020 and involved a reproductive toxicity hazard that [redacted] retained in one of [redacted] assessments over the disagreement of the chemical submitter. [redacted] testified that a more significant scientific disagreement with management occurred in May 2020. On May [redacted], 2020, [redacted] submitted a draft assessment of a new chemical to RAD management that used a possible metabolite of the chemical as an analogue to assess its hazards. The analogue chemical was a developmental toxicant, and thus [redacted] identified that developmental toxicity was a hazard of the new chemical. That same day, a coworker who had been communicating with the chemical submitter emailed [redacted] noting that the company was "ready for a fight" regarding [redacted] hazard identification.

On June [redacted], 2020, [redacted] submitted an edited draft assessment to RAD and OPPT management. In this edited draft, [redacted] maintained the developmental toxicant as an analogue chemical. [redacted] also included language noting that studies of the new chemical showed little-to-no developmental toxicity hazards, but [redacted] dismissed these studies because the new chemical was administered to test subjects in a way that could mask its toxicity.[4]

In mid-August 2020, the chemical submitter called the associate deputy assistant administrator for new chemicals to discuss the assessment. On August [redacted], 2020, [redacted] June 2020 draft assessment was edited by OPPT management. Managers left comment bubbles in [redacted] assessment, including one written in all capital letters stating, "WHY WOULD YOU NEED TO USE THIS POOR STUDY WHEN HAVE SO MUCH DATA ON THE NEW CHEMICAL SUBSTANCE." In September 2020, a coworker contacted [redacted] supervisor, and others to "remind" them that the company contacted the associate deputy assistant administrator for new chemicals and said it planned to "fight" the hazard identification. Two days later, [redacted] submitted another draft to RAD management, maintaining [redacted] use of the analogue data. RAD management worked on the assessment for months. Ultimately, [redacted] scientific conclusions were altered. The analogue chemical was replaced with data from a study that [redacted] had dismissed.

[redacted] expressed additional scientific disagreements from 2020 through 2022.[5] Our review of email communications during this time period uncovered several emails from [redacted] that outlined [redacted]

[4] The new chemical was administered to test subjects in an oil that is the same class as the new chemical. Some assessors, including [redacted] were concerned that this could create competition for the enzymes that cause metabolism. Those enzymes might break down the oil, leaving fewer enzymes to break down the new chemical. As a result, the new chemical might not have been entirely broken down, which means the full toxic effects of any metabolite would not be seen.

[5] In this time frame, as discussed earlier, [redacted] was originally assigned to RAD, which was dissolved in October 2020. At that point, [redacted] was assigned to the newly created New Chemicals Division. [redacted] supervisor in RAD was also assigned to the New Chemicals Division.

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disagreements. In these emails, [redacted] cited scientific data to support [redacted] positions, continued to express [redacted] scientific opinions to counteract chemical submitter rebuttals and management opposition, and raised scientific disagreements with [redacted] coworkers' work products. [redacted] supervisor was included on all emails that we identified as scientific disagreements. [redacted] testified about a differing scientific opinion that [redacted] expressed in March 2021. [redacted] said that after this point, interactions between the two of them would "ramp up," and every time [redacted] would ask [redacted] to provide justification for [redacted] scientific decisions, it was a "trigger." [redacted] testified that [redacted] expressed scientific disagreements "almost all the time."

At the time, there was no process in place for addressing and documenting these scientific disagreements. Neither the OPPT deputy director nor the OPPT senior science advisor was officially in the assessors' chain of command. Although they would edit the assessors' work and express disagreements, neither they nor the assessors' supervisors directed the assessors to make the changes. The human health assessors would frequently respond to OPPT management's edits when they disagreed with them. There was no mechanism to end the back-and-forth edits and responses. Thus, when the human health assessors expressed their scientific disagreements with the OPPT deputy director and OPPT senior science advisor's edits, the review process for the given chemical would be delayed, as the two sides would go through multiple rounds of discussions and edits to arrive at a final assessment. [redacted] testified that all assessors had delays, and one noted that assessors who did not express scientific disagreements processed cases faster.

[redacted] *Disclosures to the OIG*

On June 28, 2021, [redacted] was one of four EPA employees to file an OIG Hotline complaint with the help of Public Employees for Environmental Responsibility. The OIG Hotline complaint included allegations of harassment, retaliation, and violations of the EPA's Records Management Policy. That same day, Public Employees for Environmental Responsibility emailed the Office of Chemical Safety and Pollution Prevention's assistant administrator a copy of the complaint, which identified the four complainants by name and indicated that it was sent to the OIG. Immediately after receiving the complaint, the assistant administrator forwarded it to OPPT senior leaders, including the OPPT deputy director. The next day, at the OPPT deputy director's request, the Office of Chemical Safety and Pollution Prevention's deputy scientific integrity official, who also served as the associate assistant administrator for the Office of Chemical Safety and Pollution Prevention, sent the complaint to every individual mentioned in it, including [redacted] supervisor, the New Chemicals Division director, and many of [redacted] former and current coworkers. In [redacted] email, the deputy scientific integrity official mentioned the whistleblower protections under the Whistleblower Protection Act, stating "I believe these allegations qualify as protected disclosures, thus entitling the four complainants to whistleblower protections." Despite recognizing that the complainants should be protected from retaliation, [redacted] did not redact their names prior to distributing the complaint. On August 3 and 31, 2021, Public Employees for Environmental Responsibility filed additional OIG Hotline complaints on behalf of [redacted] and other human health assessors. Encompassed in [redacted] June and August 2021 OIG Hotline complaints were allegations that assessors were verbally attacked in meetings for their disagreements

and that their scientific disagreements were referenced in their performance evaluations as support for a lower rating. Additionally, these complaints included concerns about the way [redacted] supervisor conducted [redacted]. [redacted] testified that, when [redacted] started to raise complaints about [redacted] thought that [redacted] was a "problem" and told [redacted] to work on [redacted] communication style. [redacted] explained that this made [redacted] "frustrated."

[redacted] *Allegations of Retaliation*

[redacted] alleged that EPA management took eight actions against [redacted] in retaliation for [redacted] differing scientific opinions and protected activity: (1) issued [redacted] a final performance evaluation for FY 2020 that was lower than [redacted] expected, (2) issued [redacted] a midyear performance evaluation for FY 2021 that was lower than [redacted] expected, (3) issued [redacted] a final performance evaluation for FY 2021 that was lower than [redacted] expected, (4) denied [redacted] leave in August 2020, (5) failed to select [redacted] for a [redacted] detail in either December 2020 or January 2021, (6) [redacted], (7) [redacted], and (8) harassed [redacted] from 2020 through 2022.[6]

1. FY 2020 Final Performance Evaluation

[redacted] received a final performance rating of "[redacted]" for FY 2019.[7] This rating reflected [redacted] performance while in the [redacted]. The supervisory comments noted that [redacted] work was [redacted]

[6] In addition to these alleged actions, [redacted] made other retaliation claims that do not allege a violation of 5 U.S.C. § 2302(b). For example, the EPA issued a memorandum to [redacted] requiring [redacted] to provide [redacted] documentation to [redacted] supervisor within 15 calendar days after [redacted]. Although the memorandum noted that a failure to produce the documentation could result in an absent-without-leave charge, this is not a concrete manifestation of intent to take a personnel action and thus is not considered a threat of a personnel action. *Koch v. S.E.C.*, 48 Fed. App'x. 778, 787 (Fed. Cir. 2002) (nonprecedential) (holding that a performance counseling stating that "[u]nless you make immediate and profound improvements in your performance, it will be necessary to discharge you" did not constitute threat to take personnel action) (bracket in original text); *Delosreyes v. Gen. Servs. Admin.*, No. NY-1221-14-0379-W-1, ¶ 13 (M.S.P.B. May 5, 2016) (nonprecedential) ("not all general statements setting forth performance expectations and the consequences of failing to meet those expectations or counseling measures directed at particular employees constitute threats to take a personnel action"). In addition, in October 2021, [redacted] requested that [redacted] promote [redacted] to a General Schedule [redacted] position. At the time, [redacted] was at the full promotion potential of General Schedule [redacted] for [redacted] position. [redacted] explained to [redacted] that promotions are typically managed through competition and are announced via USAJobs or Talent Hub, which are the federal government's official employment website and the EPA's internal recruitment platform, respectively. [redacted] encouraged [redacted] to apply for open vacancies with promotion potential. As [redacted] was at the full promotion potential for [redacted] position and as [redacted] had neither applied for nor failed to be selected for another position, we determined that the lack of a promotion does not constitute a failure to take a personnel action, as no action was "due, required, or expected." *Special Counsel v. Brown*, 61 M.S.P.R. 559, 568 (1994).

[7] For the FYs 2019 and 2020 performance periods, the EPA used a five-level performance rating system. The highest level of performance was "outstanding," followed in decreasing order by "exceeds expectations," "fully successful," "minimally successful," and "unacceptable." Starting in the FY 2021 performance year, the EPA went from a five-tiered performance rating system to a three-tiered system, with "distinguished" as the highest rating, followed by "effective" and "unacceptable."

[redacted]. The supervisory comments further stated that [redacted] "do [redacted]."[8]

In [redacted], [redacted] began [redacted] detail to RAD. On March 11, 2020, [redacted] emailed [redacted] supervisor about the coronavirus-pandemic-related closure of [redacted] and the effects it would have on [redacted] ability to telework. On March 15, 2020, [redacted] supervisor sent an email to all of [redacted] direct reports about available telework flexibilities. [redacted] supervisor moved [redacted] to a flexible schedule, so [redacted] could work flexible hours instead of a set daily schedule.

[redacted] notified management of continued struggles due to [redacted] personal situation. [redacted] supervisor provided [redacted] with information regarding various leave options, including how to use leave u[redacted]. At the same time, RAD management began to raise concerns that [redacted] was not completing work when [redacted] was on duty. [redacted] supervisor reassigned some of [redacted] work but also stressed that [redacted] needed to complete work when [redacted] was not on leave. [9]

[redacted] began missing work deadlines. On June 29, 2020, [redacted] was assigned two memorandums to complete by the end of the work week: one to describe a chemical submitter's rebuttal of the EPA's assessment of its chemical and one to document [redacted] completion of an assessment. [redacted] supervisor told [redacted] that [redacted] could skip some of the division's required meetings to complete this work and approved five hours of compensatory overtime for the explicit purpose of completing the memorandums. On July 4, 2020, [redacted] emailed [redacted] supervisor that the memorandums were not complete. From July through August 2020, [redacted] failed to meet multiple deadlines set by [redacted] supervisor to complete the memorandums. In these two months, [redacted] recorded over 180 working hours but did not complete the memorandums. Despite being urged multiple times to skip division meetings to complete the memorandums, [redacted] continued to work on other tasks and attend the meetings.

In August 2020, [redacted] emailed RAD leadership that [redacted] supervisor's daily emails "demanding" the memorandums constituted harassment, and [redacted] requested to be transferred to a different branch. [redacted] was not transferred. [redacted] testified that [redacted] never spoke

[8] Notably, [redacted] FY 2019 performance evaluation referenced [redacted] scientific disagreements under critical element five, "Building Coalitions," for which [redacted] was rated as '[redacted]." It noted [redacted] could improve [redacted] rating in that element by [redacted]." However, [redacted] did not raise [redacted] FY 2019 performance evaluation to the OIG as a retaliatory personnel action.

[9] Multiple times, [redacted] expressed that [redacted] was too distressed to concentrate and requested to be assigned only short tasks. Management discussed internally the difficulty of balancing [redacted] challenging circumstances with the needs of the overburdened division. On July 16, 2020, [redacted] supervisor sent [redacted] information about how to request [redacted], but [redacted] did not initiate the process until October 2021. While [redacted] supervisor continued to assign [redacted] work, [redacted] also made efforts to find easier tasks for [redacted]

to [redacted] about [redacted] communication style. [redacted] testified that [redacted] did not believe that [redacted] supervisor engaged in harassment.

In addition to late work product, [redacted] also displayed performance issues pertaining to [redacted] timecards, leave requests, and work summaries. During the FY 2020 performance period, [redacted] needed at least six reminders to complete [redacted] timecards. Similarly, [redacted] repeatedly had to be reminded to obtain supervisory approval before taking leave. During the FY 2020 performance period, [redacted] supervisor required the members of [redacted] team to email [redacted] their work summaries. In April 2020, [redacted] supervisor reemphasized this expectation and asked for the summaries on a weekly basis. Multiple times, [redacted] supervisor had to remind [redacted] to send this information, but [redacted] did not always provide an update in response to these reminders.

[redacted] supervisor asked a labor and employee relations specialist for advice regarding [redacted] missed deadlines given the context of [redacted]. The labor and employee relations specialist advised that [redacted] conduct should be addressed in [redacted] performance evaluation. In [redacted] FY 2020 final performance evaluation, [redacted] received the same rating as the previous year: [redacted]." However, the supervisory comments noted that [redacted] received a "borderline" rating of "[redacted]." The supervisory comments said that [redacted] [redacted] and [redacted] had [redacted]. In addition, the supervisory comments mentioned that [redacted] Finally, the supervisory comments also stated that [redacted].

In [redacted] response to [redacted] FY 2020 final performance evaluation, [redacted] did not dispute that [redacted] Rather, [redacted] raised the concern that [redacted] performance evaluation did not explain the circumstances beyond [redacted] control that [redacted] alleged led to the missed deadlines, such as the [redacted].

2. & 3. FY 2021 Midyear and Final Performance Evaluations

Many of the performance issues identified in [redacted] FY 2020 final performance evaluation were also reflected in [redacted] midyear and final performance evaluations for FY 2021. For [redacted] FY 2021 midyear performance evaluation, which was issued to [redacted] in June 2021, [redacted] supervisor provided written feedback regarding [redacted] performance to that point in the fiscal year. While the midyear evaluation indicated that [redacted] performance was "trending down," it did not provide a formal rating or indicate what rating [redacted] would receive in [redacted] final evaluation if [redacted] did not improve [redacted] performance.

The midyear evaluation noted that [redacted]. It identified [redacted] as examples [redacted]. Three were assessments that were assigned to [redacted] in January and February 2021 in which [redacted] expressed a scientific disagreement, with two of these assessments remaining incomplete at

the time of [redacted] June 2021 midyear evaluation.[10] The other four identified assessments remained incomplete at the time of [redacted] June 2021 midyear evaluation but were delayed for reasons other than scientific disagreements. One of these four assessments was assigned to [redacted] in November 2020 and was delayed due to a policy dispute.[11] Two were assigned to [redacted] in February and March 2021. The fourth assessment was assigned to [redacted] in May 2021.[12] We reviewed [redacted] emails to [redacted] supervisor and team members regarding these four cases and did not find discussions of scientific disagreements.

The midyear evaluation also described [redacted] inconsistencies reporting [redacted] weekly work summaries and submitting [redacted] work schedule. Multiple times, [redacted] supervisor had to remind [redacted] to keep [redacted] informed of changes to [redacted] schedule and to take leave only after it was approved. [redacted] also had to be reminded to submit [redacted] timecards and work schedule.

In addition to discussing late assignments and timecards, [redacted] midyear evaluation addressed [redacted] performance as it related to [redacted]. It stated that [redacted]. This feedback was also reflected in testimony that we received. [redacted] described [redacted] as harassing, belittling, and attacking them. [redacted] raised these same concerns to New Chemicals Division leadership in emails that described [redacted] behavior as "toxic" and "bullying." [redacted] contacted New Chemicals Division leadership to raise concerns about [redacted] communications, calling them "hate-filled."

For [redacted] FY 2021 final performance evaluation, [redacted] received a rating of "[redacted]," which was the equivalent of the "[redacted]" rating that [redacted] received the two previous years. The supervisory comments described [redacted] performance as "[redacted]" and outlined the same general performance issues that were mentioned in [redacted] FY 2021 midyear performance evaluation and [redacted] FY 2020 final performance evaluation. Specifically, the comments noted that [redacted] needed to work on [redacted]. The supervisory comments also described [redacted] inconsistency in [redacted]

[10] A regulatory determination was issued in the third assessment based on the work of other RAD employees.

[11] [redacted] raised the use of this policy as an alleged violation of the *Scientific Integrity Policy*.

[12] Toward the end of the midyear evaluation period, [redacted] asked [redacted] supervisor and the [redacted] if [redacted] could be relieved of some of [redacted] case work duties. In April 2021, [redacted] supervisor conducted a review of [redacted] case assignments over the past year. From March 2020 to mid-April 2021, [redacted] was assigned approximately 37 assessments, seven of which were completed. Shortly after this review, [redacted] was removed from the rotational assignment of assessments and given official time to [redacted] and work with the Scientific Integrity Office.

4. Denial of Leave

RAD's work involved the assessment of Toxic Substances Control Act confidential business information, or CBI.[13] The Toxic Substances Control Act requires that CBI be protected from disclosure to the public. The OPPT manages a separate local area network, or LAN, on which all TSCA CBI is stored. The CBI LAN is accessible through a virtual desktop infrastructure and houses its own version of Microsoft Outlook email, folder storage, and multiple RAD-specific applications, including the New Chemical Review. RAD used the New Chemical Review application as a repository of formal records and for electronic case tracking.

On Thursday, July 30, 2020, an information technology specialist on the Office of Chemical Safety and Pollution Prevention's CBI information technology team emailed all CBI LAN users, notifying them that multiple applications on the CBI LAN would be inaccessible over the weekend, including the New Chemical Review. The next day, multiple RAD assessors noticed that their Outlook email on the CBI LAN was not functioning.

On Saturday, August 1, 2020, [redacted] emailed [redacted] supervisor, noting that the entire CBI LAN was "down for maintenance" and as a result [redacted] was taking the day off. [redacted] supervisor responded with a denial of [redacted] leave request.[14] [redacted] noted that the CBI LAN was operational and that [redacted] was expected to work the 11 hours [redacted] was scheduled for that day. The supervisor stated that [redacted] expected [redacted] to finish the two memorandums that had been outstanding for several weeks. The supervisor followed up, noting that if [redacted] Outlook email on the CBI LAN was not working, [redacted] could "work around" that issue by placing [redacted] completed memorandums into shared folders on the CBI drives and notifying the supervisor of the file's location via email on the Agency's administrative LAN.

[redacted] testified that [redacted] was "probably" not able to access the CBI LAN. When presented with evidence that CBI applications would be down but not the CBI LAN itself, [redacted] testified that [redacted] needed the CBI applications to upload [redacted] completed memorandums. [redacted] then testified that [redacted] could not remember whether the entire CBI LAN was down.

[redacted] initially testified that [redacted] did not work that day. [redacted] explained that [redacted]. When presented with [redacted] time and attendance record, which reflected that [redacted] worked 11 hours, including two hours prior to requesting leave, [redacted] testified that [redacted] might have worked.

[13] CBI is broadly defined as proprietary information that is considered confidential to the submitter and that, if released, would cause substantial business injury to the owner.

[14] Supervisors have discretion to decide when and how much annual leave to approve and may consider workload in making their decision. Even in cases of emergency or unplanned situations, supervisors may deny the leave request if they determine that the needs of the unit preclude the use of leave or that the employee's reasons are not acceptable.

5. Nonselection for a [redacted] Detail

On November 10, 2020, a [redacted] detail in the New Chemicals Division was posted on Talent Hub. A detail is a temporary assignment made available to current federal employees. [redacted] was one of 13 applicants and was interviewed by a panel of New Chemicals Division managers on December 17, 2020. [redacted] was ultimately not selected.

[redacted] served as the selecting official for this detail, though [redacted] testified that the selection decision was made in concert with the interview panel members, including [redacted] T[redacted] [redacted] testified that in evaluating applicants, [redacted] was looking for leadership and technical skills. [redacted] stressed that, given the resource constraints and infancy of the division, leadership skills were key. [redacted] expected the selectee to keep the team's morale up and help team members prioritize and meet tight deadlines.

[redacted] testified that [redacted] and was less qualified overall than the selectee. [redacted] application materials discussed [redacted] leadership as [redacted] though [redacted] materials also noted that these experiences were more recent. In contrast, the selectee's application materials reflected that he had years of experience leading interdisciplinary technical teams, mentoring and coaching team members, developing training materials, communicating assignments to staff, and leading meetings. His materials reflected that he recently graduated from a 12-month course designed for current and future leaders within the federal government. In 2020, he held an informal leadership role in NCD. The selectee began the [redacted] detail in January 2021 and was selected as a permanent [redacted] in March 2021.

6. & 7. [redacted]

[redacted]

[redacted]

[redacted].[16] [redacted] forwarded seven Agency meeting invites to [redacted] personal email address, as well as several internal Agency documents including draft standard operating procedures and a document marked "Interim Deliberative Draft. Do Not Distribute."

[redacted]

[redacted]

[redacted]

[15] [redacted]

[redacted]. [redacted] explained that the emails that [redacted] did not believe constituted misconduct on their own qualified as misconduct when read in the context of the other emails. [redacted] further clarified that, although some of the emails raised allegations of wrongdoing, it was the manner in which the allegations were raised that was improper, not the making of the allegations on its own. [redacted]

[redacted] clarified that [redacted] could have raised some of the concerns in [redacted] email, including allegations against [redacted], but that the tone and word choice qualified the email as misconduct. Finally, [redacted] included five specifications of a failure to follow instructions. These specifications covered [redacted] failure to follow instructions when [redacted] forwarded [redacted] Agency documents [redacted].

[redacted]. [redacted] resigned from EPA employment in [redacted]. A decision on [redacted] was not issued.

8. Harassment

[redacted] alleged that [redacted] was harassed from 2020 through 2022 by [redacted] supervisor in retaliation for expressing different scientific opinions.[17] [redacted] testified that when [redacted] identified hazards in new-chemicals assessments, [redacted] supervisor would ask "demanding" questions. For example, [redacted] supervisor would ask, "What does the data show you?"; "What -- what do you see?"; and "Look at it again." [redacted] explained that the questions would be asked "over and over again" and "get louder and louder." [redacted] testified that [redacted] supervisor would get "as loud as you could get [] without yelling." [redacted] contrasted the treatment [redacted] received when [redacted] did not agree with [redacted] supervisor with the treatment [redacted] received when [redacted] did. When [redacted] agreed with [redacted] supervisor by removing a hazard, the supervisor would praise [redacted] in front of [redacted] peers for [redacted] "insight" and send [redacted] an email after the meeting thanking [redacted] for speaking up. If [redacted] disagreed by identifying a hazard, however, [redacted] claimed that [redacted] supervisor would give [redacted] a public "scolding." This treatment made [redacted] hesitant to voice [redacted] opinions. [redacted] testified that [redacted] supervisor would also send multiple "demanding" emails establishing short deadlines within minutes of one another. [redacted] recalled receiving an email at the end of the day stating, "I need this [close of business]." [redacted] found these emails so overwhelming that [redacted]

Analytic and Legal Framework

The Whistleblower Protection Act prohibits retaliation against most executive branch employees for making protected disclosures or engaging in protected activity. 5 U.S.C. § 2302(b)(8)-(9). To allege a reprisal violation under section 2302(b), complainants must allege that they made a protected disclosure or engaged in protected activity and that the protected disclosure or activity was a contributing factor in a covered action taken, threatened, or withheld from them. The EPA's *Scientific Integrity Policy* extends the protections of Whistleblower Protection Act to all EPA employees who uncover or report allegations of scientific and research misconduct or who express a differing scientific opinion.[18]

The first step in assessing these retaliation allegations is to determine whether the complainant expressed a differing scientific opinion, engaged in protected activity, or made a protected disclosure.[19] The EPA's *Scientific Integrity Policy* does not define the term differing scientific opinion. However, in October 2020, after the alleged differing scientific opinions at issue in this matter, the EPA's Scientific

[17] [redacted].

[18] We did not assess the EPA's authority to extend the statutory protections of 5 U.S.C. § 2302 via Agency policy.

[19] An individual who has not made a protected disclosure may still be entitled to protection under section 2302 if the individual is perceived to be a whistleblower. *See King v. Dep't of the Army*, 116 M.S.P.B. 689, 694 (Sept. 14, 2011). In such cases, the analysis focuses on the perceptions of the officials involved in the personnel actions at issue and whether those officials believed that the complainant made or intended to make disclosures that evidenced the type of wrongdoing listed in the statute. *Id.* at 694-95.

Integrity Program issued a guidance document, *Approaches for Expressing and Resolving Differing Scientific Opinions*. This guidance document defines "differing scientific opinion" as:

> [A] differing opinion of an EPA employee who is substantively engaged in the science that may inform an EPA decision. It generally contrasts with a prevailing staff opinion included in a scientific product under development. The differing opinion must concern scientific data, interpretations, or conclusions, not policy options or decisions. These approaches do not address personal opinions about scientific issues that are not accompanied by scientific arguments, are not part of a scientific product, and are not made in the context of an EPA decision.

Protected activities are defined as the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation; testifying for or otherwise lawfully assisting any individual in the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation; cooperating with or disclosing information to the inspector general or the special counsel; or refusing to obey an order that would require the individual to violate a law, rule, or regulation. 5 U.S.C. § 2302(b)(9).

A protected disclosure is defined as a communication about actual or suspected wrongful conduct that the employee reasonably believes is evidence of a violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8). Vague, conclusory, or facially insufficient allegations of government wrongdoing are insufficient to state a claim under section 2302(b)(8).[20] A reasonable belief exists if a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the government evidence one of the categories of wrongdoing listed in the statute.[21]

Once it has been established that the complainant expressed a differing scientific opinion, engaged in protected activity, or made a protected disclosure, the next step is to analyze whether a preponderance of the evidence supports that one or more, differing scientific opinions, protected activities, or protected disclosures were a contributing factor in the decision to take, threaten, or withhold a personnel action from the complainant.[22] "Contributing factor" is defined as any factor which, alone or

[20] *Johnston v. Merit Sys. Prot. Bd.*, 518 F.3d 905, 909 (Fed. Cir. 2008) (outlining the jurisdictional threshold for claims under the Whistleblower Protection Act).

[21] *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999).

[22] A preponderance of the evidence is defined as "[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." C.F.R. § 1201.4(q). A personnel action is defined as "(i) an appointment; (ii) a promotion; (iii) an action under chapter 75 of this title or other disciplinary or corrective action; (iv) a detail, transfer, or reassignment; (v) a reinstatement; (vi) a restoration; (vii) a reemployment; (viii) a performance evaluation under chapter 43 of this title or under title 38; (ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; (x) a decision to order psychiatric testing or examination; (xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; and (xii) any other significant change in duties, responsibilities, or working conditions." 5 U.S.C. § 2302(a)(2).

in connection with other factors, tends to affect in any way the outcome of the decision.[23] The whistleblower can establish that a disclosure or activity was a contributing factor through circumstantial evidence showing that (1) "the official taking the personnel action knew of the disclosure or protected activity" and (2) "the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action." 5 U.S.C. § 1221(e)(1)(A)-(B).[24]

Once a preponderance of the evidence establishes that one or more protected activities or disclosures was a contributing factor in the personnel action, the retaliation allegation is substantiated unless clear and convincing evidence establishes that the covered action would have been taken in the absence of the protected activity or disclosure. 5 U.S.C. § 1221(e)(2).[25] In other words, if the evidence shows that it is highly probable that the employer would have taken the personnel actions against the employee regardless of the protected activity or disclosure, the retaliation allegation is not supported. The relevant factors to consider in this determination are (1) the strength of the evidence in support of the Agency's decision, (2) the existence and strength of any retaliatory motive by the officials involved in the decision, and (3) any evidence that the employer has taken similar actions against employees who are not whistleblowers but are otherwise similarly situated.[26]

Analysis

[redacted] alleges that during [redacted] EPA employment individuals with personnel authority took personnel actions against [redacted] in retaliation for expressing differing scientific opinions, protected activity, and protected disclosures. As [redacted] alleged a violation of 5 U.S.C. § 2302(b)(8), § 2302(b)(9)(C), and a violation of the EPA's *Scientific Integrity Policy*, the OIG has jurisdiction over [redacted] retaliation allegations.

Did [redacted] Express a Differing Scientific Opinion, Engage in Protected Activity, or Make a Protected Disclosure?

[redacted] disagreements with [redacted] supervisor, OPPT management, and chemical submitters from February 2020 through [redacted] August 2022 regarding hazard identification in assessments of new chemicals constituted differing scientific opinions. We obtained evidence that [redacted] disagreements concerned interpretations of scientific data, such as the selection of analogue chemicals that were to be used in the assessments. EPA's assessments of new chemicals constitute scientific products. Thus, [redacted] scientific disagreements meet the plain language meaning of a

[23] *Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993).

[24] Although the EPA's *Scientific Integrity Policy* notes that employees who uncover or report allegations of scientific and research misconduct or express a differing scientific opinion are protected "from retaliation or other punitive actions," because it is unclear what "other punitive actions" entails, we did not incorporate this into our analysis.

[25] Clear and convincing evidence is defined as "that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established." It is a higher standard than preponderance of the evidence. 5 C.F.R. § 1209.4(e).

[26] *Carr v. Social Sec. Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

differing scientific opinion and the formal definition of a differing scientific opinion that was later issued by the Scientific Integrity Program in October 2020.

In addition, [redacted] was widely perceived by OPPT and RAD management to have expressed differing scientific opinions. [redacted], testified that [redacted] and others were more likely than other assessors to disagree about scientific decisions made in assessments.

[redacted] engaged in protected activity when [redacted] provided information to the OIG via complaints filed by the Public Employees for Environmental Responsibility PEER in June and August 2021. Providing information to the OIG is a protected activity specifically addressed in 5 U.S.C. § 2302(b)(9)(C).

[redacted] also made at least one protected disclosure in [redacted] OIG hotline complaints. The August 2021 complaint included an allegation that assessors' scientific disagreements were referenced in their performance evaluations as support for a lower rating. Retaliation for differing scientific opinions violates the EPA's Scientific Integrity Policy. EPA Scientific Integrity Policy. As such, it was reasonable for [redacted] to believe that referencing differing scientific opinions in a performance evaluation is evidence of a violation of a rule. Accordingly, [redacted] made at least one protected disclosure. [27]

Was a Personnel Action Taken Against, Threatened, or Withheld from [redacted]?

[redacted] alleged eight retaliatory actions in the information provided in [redacted] hotline complaints to the OIG: (1) a final performance evaluation for FY 2020 that was lower than [redacted] expected (2) a midyear evaluation for FY 2021 that was lower than [redacted] expected, (3) a final performance evaluation for FY 2021 that was lower than [redacted] expected, (4) a denial of leave, (5) a nonselection for a [redacted] detail, (6) [redacted], (7) a [redacted], and (8) harassment. The Whistleblower Protection Act prohibits taking, failing to take, threatening to take, or threatening to fail to take a personnel action in retaliation. We determined that six of these actions constitute personnel actions.

1. FY 2020 Final Performance Evaluation

In November 2020, [redacted] received [redacted] FY 2020 final performance evaluation, in which [redacted] was rated as "[redacted]." A performance evaluation is among the personnel actions specifically enumerated in the statute. 5 U.S.C. § 2302(a)(2)(viii). Accordingly, [redacted] FY20 performance evaluation constitutes a personnel action.

2. FY 2021 Midyear Evaluation

In June 2021, [redacted] received [redacted] FY 2021 midyear performance evaluation. A performance evaluation is a personnel action. 5 U.S.C. § 2302(a)(2)(viii). However, a performance evaluation is the performance rating prepared at the *end* of an appraisal period and does not include a progress review taken *during the*

[27] For the purposes of this analysis, we did not assess whether each allegation contained within the complaints constituted a protected disclosure.

course of an appraisal period.[28] As such, [redacted] midyear evaluation does not constitute a personnel action.

Statements made in a progress review may constitute a threat to lower an employee's rating of record.[29] While [redacted] FY 2021 midyear evaluation mentioned [redacted] it did not provide a formal rating or indicate what rating [redacted] would receive if [redacted] As such, [redacted] FY 2021 midyear appraisal does not constitute a threat to take a personnel action.

3. FY 2021 Final Performance Evaluation

In November 2021, [redacted] FY 2021 final performance evaluation was issued. [redacted] was rated as "[redacted]." A performance evaluation is among the personnel action specifically enumerated in the statute. 5 U.S.C. § 2302(a)(2)(viii). Accordingly, [redacted] FY21 final performance evaluation constitutes a personnel action.

4. Denial of Leave

On August 1, 2020, [redacted] emailed [redacted] supervisor that [redacted] was taking the day off because the CBI LAN was down. [redacted] supervisor responded that the CBI LAN was operational and that [redacted] was expected to work [redacted] scheduled hours. A denial of leave constitutes a personnel action.[30] Accordingly, the denial of [redacted] leave constitutes a personnel action.

5. Nonselection for a [redacted] Detail

In November 2020, [redacted] applied for a [redacted] detail. In January 2021, a different applicant was selected for and appointed to the detail. An appointment is among the personnel actions specifically enumerated in the statute. 5 U.S.C. § 2302(a)(2)(A)(i). Accordingly, the nonselection of [redacted] for the position constitutes the failure to take a personnel action.

6. [redacted]

On May 6, 2022, [redacted] was [redacted]. [redacted] is a significant change in duties, responsibilities, or working conditions, which is a personnel action under

[28] *See generally* 5 C.F.R. pt. 430. A progress review undertaken *during* a performance review period is not an evaluation for the purposes of 5 U.S.C. § 2302(a)(2)(A)(viii). *See King v. Dep't of Health & Human Servs.*, 133 F.3d 1450, 1453 (Fed. Cir. 1998) (holding that a progress review, undertaken during a performance review period, does not constitute a personnel action); *Special Counsel v. Spears*, 75 M.S.P.R. 639, 669 (1997) (finding that a "mid point" counseling memorandum informing an employee that she was failing two of her critical elements was part of a process designed to assist her to bring her performance to an acceptable level, rather than a threatened personnel action).

[29] *See Mastrullo v. Dep't of Labor*, 123 M.S.P.R. 110, ¶ 24 (2015).

[30] *Marren v. Dep't of Justice*, 50 M.S.P.R. 369, 373 (1991) (finding that a denial of annual leave constitutes a "decision concerning a benefit" under 5 U.S.C. § 2302(a)(2)(A)(ix)).

5 U.S.C. § 2302(a)(2)(A)(xii).[31] Accordingly, [redacted] constitutes a personnel action.

7. [redacted]

On August 11, 2022, [redacted] received a [redacted]. [redacted], which is among the personnel actions specifically enumerated in the statute. 5 U.S.C. § 2302(a)(2)(A)(iii). Accordingly, [redacted] constitutes a threatened personnel action.

8. Harassment

[redacted] alleged that [redacted] was harassed by [redacted] supervisor in retaliation for expressing differing scientific opinions and engaging in a protected activity. While harassment is not a personnel action enumerated in the statute, it can be considered a personnel action when it constitutes a significant change in duties, responsibilities, or working conditions.[32] 5 U.S.C. § 2302(a)(2)(A)(xii). [redacted] alleged that [redacted] was subjected to harsh, loud disagreements with [redacted] scientific opinion; repeated questioning; and many emails asking about the status of [redacted] work. Verbal criticism and rudeness are not usually considered personnel actions.[33] Whistleblower Protection Act case law discussing alleged constructive discharge is also instructive here. The Merit Systems Protection Board has consistently held that a feeling of being unfairly criticized or difficult or unpleasant working conditions is generally not so intolerable as to compel a reasonable person to resign and thus is not a personnel action.[34] These cases contemplate that criticism and unpleasantness in the workplace alone are not actionable under the Whistleblower Protection Act. Accordingly, the alleged harassment that [redacted] experienced does not constitute a personnel action.

In summary, of the eight actions that [redacted] alleged were retaliatory, six constitute taking or failing to take personnel actions under 5 U.S.C. § 2302(a)(2): the FY 2020 final performance evaluation, the FY 2021 final performance evaluation, the nonselection for a [redacted] detail, the denial of leave, the [redacted], and the [redacted]. [redacted] FY 2021 midyear evaluation and the alleged harassment do not constitute personnel actions under 5 U.S.C. § 2302(a)(2)(A).

[31] [redacted].

[32] *Covarrubias v. Social Sec. Admin*. 113 M.S.P.R. 583, ¶ 15 n. 4 (2010) (finding harassment constituted a significant change in working conditions when a supervisor monitored the employee's phone calls and whereabouts, including following her to the restroom), overruled on other grounds by *Colbert v. Dep't of Veterans Affairs,* 121 M.S.P.R 677, ¶ 12 n.5 (2014)

[33] *Greenspan v. Dep't of Veterans Affairs*, 94 M.S.P.R. 247, ¶ 22 (2003) *rev'd and remanded on other grounds*, 464 F.3d 1297 (Fed. Cir. 2006); *Special Counsel v. Spears*, 75 M.S.P.R. 639, 670 (1997) (finding that an oral counseling does not constitute disciplinary or corrective action within the coverage of the Whistleblower Protection Act).

[34] *Miller v. Dep't of Def.*, 85 M.S.P.R. 310 ¶ 32 (2000); *Brown v. U.S. Postal Serv.*, 115 M.S.P.R. 609, 616-18 (2011), *aff'd*, 469 F. App'x 852 (Fed. Cir. 2011) (holding that a pattern of poor treatment, including groundless criticism and allegedly throwing and destroying a desk, did not compel the complainant's retirement and thus did not constitute a personnel action).

Were [redacted] Differing Scientific Opinions, Protected Activities, or Protected Disclosure a Contributing Factor in the Personnel Actions Taken Against [redacted]?

A differing scientific opinion, protected activity, or protected disclosure is a contributing factor in a decision to take a personnel action if the official taking the personnel action knew of the differing scientific opinion, protected activity, or protected disclosure and if the action occurred within a period of time such that a reasonable person could conclude that it was a contributing factor in the personnel action.[35] After assessing the two factors, knowledge and timing, we determined that [redacted] differing scientific opinions, protected activity, and protected disclosure were contributing factors in the six personnel actions: [redacted] FY 2020 final performance evaluation, [redacted] FY 2021 performance evaluation, the denial of leave, [redacted] nonselection for a [redacted] detail, [redacted], and [redacted].

FYs 2020 and 2021 Final Performance Evaluations and Denial of Leave

[redacted] expressed differing scientific opinions regarding new-chemical assessments from approximately the summer of 2020 through the summer of 2022. In that same time frame, [redacted] supervisor denied [redacted] requested leave in August 2020, completed [redacted] FY 2020 final performance evaluation in November 2020, and completed [redacted] FY 2021 final performance evaluation in November 2021. [redacted] supervisor had direct knowledge of [redacted] differing scientific opinions. [redacted] was included on all of [redacted] emails that we identified as scientific disagreements. [redacted] also testified as to [redacted] knowledge of [redacted] differing scientific opinions. The timing between [redacted] differing scientific opinions and [redacted] two final performance evaluations and denied leave was less than 18 months, which is a reasonable amount of time to conclude that the differing scientific opinions were contributing factors in the three personnel actions.[36]

[redacted] engaged in protected activities in June and August 2021 when [redacted] filed OIG Hotline complaints. [redacted] OIG Hotline complaints contained at least one protected disclosure. [redacted] supervisor was aware of [redacted] protected activity and protected disclosure, as [redacted] received an unredacted copy of the June 2021 OIG hotline complaint and testified that [redacted] supervisor discussed [redacted] concerns with [redacted] While [redacted] FY 2020 final performance evaluation and denied leave predated [redacted] protected activity, the timing between [redacted] June and August 2021 protected activity and disclosure and [redacted] November 2021 FY 2021 final performance evaluation was less than 18 months, which is a reasonable amount of time to conclude that the protected activity was a contributing factor in the personnel action.

[35] 5 U.S.C. § 1221(e).

[36] The U.S. Merit Systems Protection Board has found time periods longer than a year between the protected disclosure and adverse action to be reasonable in establishing that a disclosure was a contributing factor. See e.g., *Redschlag v. Dep't of the Army*, 89 M.S.P.R. 589, ¶87 (2001) (holding that a suspension proposed 18 months after an employee's protected disclosure was a sufficient time period where a reasonable person could conclude that the disclosure was a contributing factor in the suspension).

[redacted] Nonselection for a [redacted] Detail

The decision to not select [redacted] for the [redacted] detail was made by [redacted]. Although [redacted] was not closely involved in [redacted] work, knowledge of [redacted] differing scientific opinions can still be imputed to [redacted].[37] The nonselection was influenced by a panel of interviewers, including [redacted] and [redacted]. [redacted] testified as to their knowledge of [redacted] differing scientific opinions. [redacted] expressed differing scientific opinions from approximately the summer of 2020 through the summer of 2022. The decision not to select [redacted] was made in either December 2020 or January 2021. The timing between [redacted] differing scientific opinions and the nonselection was less than 18 months, which is a reasonable amount of time to conclude that the differing scientific opinions were a contributing factor in the personnel action.[38] [redacted] nonselection predated [redacted] protected activities and protected disclosure. As such, [redacted] protected activities and protected disclosure were not a contributing factor in the nonselection.

[redacted]

[redacted]. [redacted] testified that [redacted] and [redacted] supervisor directly informed [redacted] about [redacted] differing scientific opinions. [redacted] also had direct knowledge of [redacted] June 2021 protected activity, as [redacted] received an unredacted copy of it via email. [redacted] expressed differing scientific opinions throughout 2020 and 2021 and engaged in protected activities and made a protected disclosure in June and August 2021. [redacted]. The timing between [redacted] differing scientific opinions, protected activities, and protected disclosure and [redacted] was less than 18 months which is a reasonable amount of time to conclude that the differing scientific opinions, protected activities, and protected disclosure were contributing factors in the two personnel actions.

In summary because EPA management had knowledge of [redacted] differing scientific opinions and because these six personnel actions were taken less than 18 months after [redacted] expressed the differing scientific opinions, we determined that [redacted] established by a preponderance of the evidence that [redacted] differing scientific opinions were contributing factors in the six personnel actions. EPA management also had knowledge of [redacted] protected activities and disclosure and issued [redacted] FY 2021 final performance evaluation, [redacted], and [redacted] within eighteen months of these actions. As such, we determined that [redacted] established by a preponderance of the

[37] Constructive knowledge can be shown by demonstrating that an individual with actual knowledge of the disclosure influenced the official taking the retaliatory action. *Dorney v. Dep't of Army*, 117 M.S.P.R. 480, ¶ 11 (2012); *Aquino v. Dep't of Homeland Sec.*, 121 M.S.P.R. 35, ¶ 19 (2014).

[38] *Redschlag v. Dep't of the Army*, 89 M.S.P.R. 589, ¶ 87 (2001) (holding that a suspension proposed 18 months after an employee's protected disclosure was a sufficient time period where a reasonable person could conclude that the disclosure was a contributing factor in the suspension).

evidence that [redacted] protected activities and disclosure were a contributing factor in those three personnel actions.

Would the Agency Have Taken the Personnel Actions Against [redacted] in the Absence of [redacted] Differing Scientific Opinions, Protected Activities, or Protected Disclosure?

Once a preponderance of the evidence establishes that one or more differing scientific opinions, protected activities, or protected disclosures contributed to the personnel actions taken against the complainant, the retaliation allegation is substantiated unless clear and convincing evidence establishes that the action would have been taken in the absence of the differing scientific opinion, protected activity, or protected disclosure. To make this determination, our analysis weighs the following factors: (1) the strength of the evidence in support of each action; (2) the existence and strength of any motive to retaliate on the part of the officials who were involved in the decision, referred to as *animus evidence*; and (3) any evidence that the employer has taken similar actions against employees who are not whistleblowers but are otherwise similarly situated, referred to as *comparators*.

After analyzing the three factors, we determined that the EPA can establish by clear and convincing evidence that it would have taken all six personnel actions in the absence of [redacted] differing scientific opinions, protected activities, and protected disclosure.

FY 2020 Final Performance Evaluation

[redacted] was rated as [redacted]" in [redacted] FYs 2019 and 2020 final performance evaluations in the supervisory comments for [redacted] FY 2020 final performance evaluation, [redacted] supervisor noted that [redacted] received a "borderline" rating of "[redacted]." To explain the rating, the supervisory comments noted that [redacted]. Documentary evidence confirms this. For example, [redacted] was assigned two memorandums in June 2020. Multiple times, [redacted] was told to prioritize these assignments; [redacted] was excused from some of [redacted] required meetings and granted compensatory time to complete them. However, despite working over 180 hours over the following two months, the memorandums remained incomplete at the end of August 2020. [redacted] supervisor raised these issues to a labor and employee relations specialist, given the context of [redacted] at the time. The labor and employee relations specialist advised the supervisor to address the missed deadlines in [redacted] performance evaluation. In [redacted] response to [redacted] performance evaluation, [redacted] did not dispute that [redacted]

As to motive to retaliate, when [redacted] supervisor began to send more frequent emails regarding the late memorandums, [redacted] alleged that the emails constituted harassment. On August 20, 2020, [redacted] sent this allegation to RAD management, including [redacted] supervisor's manager. Another manager sent the allegation to [redacted] supervisor. [redacted] testified that [redacted] never spoke to [redacted] about [redacted] communication style. [redacted] testified that [redacted] did not believe that the supervisor engaged in harassment.

There are no apt comparators for [redacted] FY 2020 final performance evaluation because human health assessors who [redacted] supervisor also rated expressed differing scientific opinions.

We find that the strength of the evidence in support of [redacted] rating outweighs any animus evidence. There was ample documentary evidence throughout the performance period of [redacted] struggles to meet deadlines. This strong supporting evidence outweighs the weak animus evidence and neutral comparator evidence. We have determined that the Agency can establish by clear and convincing evidence that it would have rated [redacted] as "[redacted]" in the absence of [redacted] differing scientific opinions.

[redacted] FY 2021 Final Performance Evaluation

Although the Agency's performance rating system changed in FY 2021 to a three-tiered system, [redacted] still received [redacted] rating in [redacted] FY 2021 final performance evaluation as [redacted] had the two previous years. The supervisory comments associated with [redacted] "[redacted]" rating outlined concerns regarding [redacted]. All three of these issues were documented in email communications throughout the performance year, as well as in [redacted] FY 2021 midyear performance evaluation. [redacted] had multiple assessments that were significantly delayed, including assessments without differing scientific opinions. [redacted] also had to be reminded multiple times to inform [redacted] supervisor of schedule changes and to submit [redacted] timecards. Finally, [redacted] testified about [redacted] communications, which they characterized as harassing, belittling, bullying, and toxic. New Chemicals Division leadership also received similar feedback from outside of the OPPT.

[redacted] supervisor expressed animus regarding [redacted] differing scientific opinions, protected activities, and protected disclosure. Encompassed in [redacted] June and August 2021 OIG Hotline complaints were concerns about the way [redacted] supervisor conducted [redacted] testified that when [redacted] started to raise complaints about [redacted] thought that the [redacted] was a "problem" and told [redacted] to work on [redacted] communication style. [redacted] explained that this made [redacted] "frustrated." [redacted] also testified about a differing scientific opinion that [redacted] expressed in March 2021. [redacted] testified that after this point, interactions between the two of them would "ramp up" and that every time [redacted] would ask [redacted] to provide justification for [redacted] scientific decisions, it was a "trigger."

[redacted] supervisor rated three other employees as "[redacted]" in their FY 2021 final performance evaluations. None of the three comparators' evaluations mentioned delays in work product or interpersonal strife. Two of the employees were human health assessors. We are not aware of any differing scientific opinions expressed by these employees.

We find that the Agency's evidentiary support for [redacted] FY 2021 final performance rating, paired with the comparator evidence, outweighs the animus evidence. Documentary evidence supports that [redacted] had multiple assessments that were significantly delayed, including assessments without differing scientific opinions. Although there was animus evidence, this was outweighed by the support

for the "[redacted]" rating and comparator evidence that showed the same rating was given to comparators who did not have delays cited in their performance evaluations. After reviewing the Agency's evidentiary support for [redacted] rating, the animus evidence, and the comparator evidence, we have determined that the Agency can establish by clear and convincing evidence that it would have rated [redacted] as "[redacted]" in FY 2021 in the absence of [redacted] differing scientific opinions, protected activities, and protected disclosure.

Denial of Leave

On Saturday, August 1, 2020, [redacted] emailed [redacted] supervisor that [redacted] was taking the day off because the CBI LAN was down.[39] [redacted] supervisor responded that the CBI LAN was operational and that [redacted] was expected to work [redacted] scheduled hours. At the time, [redacted] had at least two work products that were overdue, and the supervisor informed [redacted] that [redacted] expected the work products to be completed by the end of that day. The supervisor's decision to deny the leave request is consistent with EPA policy. Supervisors have discretion to deny annual leave, even in emergencies, due to the needs of the unit or if the employee's reasons are not acceptable. Documentary evidence supports the supervisor's statement that the CBI LAN was operational at the time of [redacted] requested leave. An Office of Chemical Safety and Pollution Prevention information technology email notification to staff two days earlier clarified that only certain applications on the CBI LAN would be down for maintenance that weekend, not the entire CBI LAN. [redacted] ultimately could not recall whether the full CBI LAN was down that day or just certain applications. [redacted] time-and-attendance records indicated that [redacted] worked 11 hours on August 1, 2020, including two hours before [redacted] requested leave.

We did not uncover statements of animus made by [redacted] supervisor prior to August 1, 2020. However, at the time, at least one of [redacted] new-chemical assessments was receiving push back from the chemical submitter. [redacted] supervisor was aware that the chemical submitter was "ready for a fight" regarding the hazard identification. Further, the supervisor was included on the email in which [redacted] espressed [redacted] scientific opinion that the hazard identification should not change. Disputes with chemical submitters caused delays, which [redacted] supervisor testified created "pressure."

There are no apt comparators for [redacted] denied leave. Other RAD employees were able to use the CBI LAN but not certain CBI applications during the time in question. We are not aware of any employees who did not express differing scientific opinions and requested leave during this time due to a lack of CBI LAN access.

We find that [redacted] supervisor had support for denying the leave request, as [redacted] had evidence that the CBI LAN was operational and that [redacted] had delayed work product to complete. This support, paired with [redacted] weak testimony as to whether [redacted] could access the CBI LAN, outweighs any animus evidence and the neutral comparator evidence. For this reason, we have determined that the

[39] [redacted] was on a maxiflex work schedule, which allowed [redacted] to work on weekends. [redacted] typically worked on [redacted] of a pay period.

Agency can establish by clear and convincing evidence that it would have denied [redacted] leave request in the absence of [redacted] differing scientific opinions.

Nonselection for a [redacted] Detail

[redacted] applied for a [redacted] detail in the New Chemicals Division in November 2020. The selecting official testified that [redacted] prioritized finding a selectee with leadership experience, given the resource constraints of the new division. While [redacted] application material discussed [redacted] "more recent" experience as [redacted], the selectee's application reflected years of leadership experience. For example, he had recently graduated from a 12-month course designed for current and future leaders within the federal government and had already held an informal leadership position in the unit. [redacted] testified that [redacted] had "much less" leadership experience and was "less qualified overall" than the selectee.

In terms of animus evidence, the interview panel that influenced the selecting official's decision included [redacted] supervisor. At the time of [redacted] interview in December 2020, the supervisor was aware of [redacted] August 2020 complaint against [redacted] to RAD management regarding alleged harassment. However, no actions were taken against [redacted] supervisor based on this complaint. [redacted] made at least two additional complaints regarding [redacted] supervisor's alleged harassment in September 2020 and November 2020 to [redacted] supervisor's manager in the just-created New Chemicals Division, where both [redacted] and [redacted] supervisor were assigned. Our investigation did not confirm whether the supervisor had knowledge of these two complaints at the time of [redacted] interview in December 2020 or [redacted] nonselection in either December 2020 or January 2021. However, [redacted] testified that [redacted] gave [redacted] negative feedback on [redacted] communication style in one of their first meetings in late 2020. [redacted] testified that [redacted] caused "major frictions" between [redacted] and [redacted].

In terms of comparators, [redacted] was one of 12 applicants who were not selected for the detail. Among the individuals who were not selected was an assessor who appeared to be well qualified, as [redacted] was later selected to be a supervisor in the division. We are not aware of any differing scientific opinions expressed by the other applicants who were not selected for the detail.

We find that the Agency's strong evidentiary support for the nonselection outweighs the animus evidence. The selecting official provided a reasoned explanation for seeking leadership experience in the selectee for the detail. The selecting official's testimony that [redacted] had much less leadership experience than the selectee was well supported by the selectee's application materials. Although [redacted] was a panel member with input into the selection decision, we found that the supporting evidence outweighed the animus evidence. After reviewing the Agency's strong evidentiary support for the decision, the animus evidence, and the comparator evidence, we have determined that the Agency can establish by clear and convincing evidence that it would have failed to select [redacted] in the absence of [redacted] differing scientific opinions.

[redacted], was instructed not to access or use any government equipment, network, or system or to conduct any official EPA duties. After receiving the notification, [redacted] forwarded Agency documentation to [redacted] personal email address including draft standard operating procedures and a document marked "Interim Deliberative Draft. Do Not Distribute." Slightly over three months later, [redacted].

[redacted] expressed animus regarding the viewpoints and allegations discussed in some of [redacted] communications cited [redacted]. [redacted] noted that [redacted] accusations that the Agency was engaged in fraud or misconduct were unbecoming.

There are no comparators regarding [redacted].

We find that the Agency's evidentiary support for [redacted] is strong. While there is animus evidence related to the allegations made in [redacted], [redacted] would have been issued in the absence of [redacted]. For this reason, after reviewing the Agency's evidentiary support for [redacted], the animus evidence, and the lack of comparator data, we have determined that the Agency can establish by clear and convincing evidence

that it would have [redacted] in the absence of [redacted] differing scientific opinions and [redacted] protected activity.

Conclusions

We determined that [redacted] expressed differing scientific opinions, which were contributing factors in six personnel actions taken against [redacted] (1) a performance evaluation for FY 2020 that was lower than [redacted] expected (2) a performance evaluation for FY 2021 that was lower than [redacted] expected, (3) a denial of leave, (4) a nonselection for a [redacted] detail, (5) [redacted], and (6) a [redacted]. We also determined that [redacted] engaged in protected activity, which was a contributing factor in three of these personnel actions: the FY 2021 performance evaluation, [redacted], and [redacted]. We did not substantiate [redacted] allegations of retaliation with respect to these personnel actions.

Recommendation

Given the conclusions discussed above, we make no recommendation regarding corrective action.

~~Any request to the EPA for public release must be sent to the EPA OIG for processing under the Freedom of Information Act.~~

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U.S. Environmental Protection Agency

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