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Report of Investigation: Whistleblower Reprisal Investigation

September 17, 2024 | Report No. 24-N-0063

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

C.F.R.	Code of Federal Regulations
EPA	U.S. Environmental Protection Agency
FY	Fiscal Year
[redacted]	[redacted]
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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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 six retaliatory personnel actions against [redacted]: five in 2019 and 2020, after [redacted] expressed differing scientific opinions and one in 2022, after [redacted] filed a union grievance in November 2020, and after the June and August 2021 hotline complaints by PEER. We opened an investigation to determine whether the alleged actions were in retaliation for [redacted] differing scientific opinions, in violation of the EPA Scientific Integrity Policy (2012). We also investigated whether the actions were in retaliation for [redacted] union grievance and complaints made to the OIG, in violation of the Whistleblower Protection Act.

Our investigation first sought to determine whether [redacted] expressed differing scientific opinions or made disclosures or engaged in other activities 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, engaged in protected activities, and made a protected disclosure, which Agency management knew of when it took three personnel actions against [redacted]: (1) issued [redacted] a performance evaluation for fiscal year 2020 that was lower than the previous year, (2) withheld a cash or time-off award in FY 2020, and (3) failed to select [redacted] for a [redacted] position. Our investigation identified [redacted] as the [redacted] who issued [redacted] performance evaluation, withheld [redacted] cash or time-off award in 2020, and failed to select [redacted] for the [redacted] position. We determined that these three personnel actions occurred within a period of time such that a reasonable person could conclude that [redacted] differing scientific opinions, protected activities, or protected disclosure were contributing factors. We determined that the three remaining alleged retaliatory actions did not constitute personnel actions.

Next, we assessed whether the EPA could establish that it would have taken the same three personnel actions even if [redacted] had not expressed differing scientific opinions, engaged in protected activities, or made a protected disclosure. After reviewing the evidentiary support for the three 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 substantiated [redacted] retaliation allegations with respect to [redacted] FY 2020 performance evaluation and [redacted] withheld award, in violation of the EPA's *Scientific Integrity Policy.* We did not substantiate [redacted] retaliation allegations with respect to [redacted] nonselection for the [redacted] position. We recommend that the EPA administrator consider appropriate corrective action considering these findings.

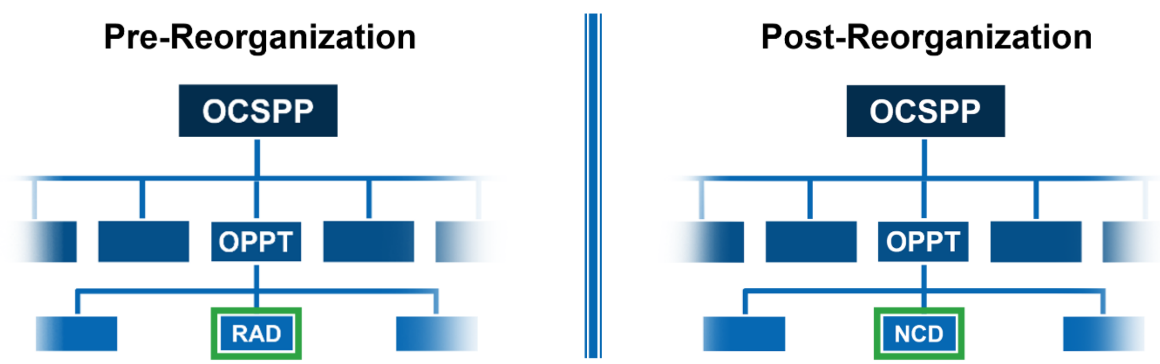
On August 27, 2024, we provided [redacted] with a tentative conclusions letter containing our preliminary report of investigation and gave [redacted] an opportunity to review and comment before we finalized our report. We requested [redacted] response by September 6, 2024, but we did not receive a response by the requested date.

Findings of Fact

[redacted] is a [redacted] in the Agency's [redacted], within the OPPT. [redacted] began [redacted] EPA career in [redacted] working at the EPA as part of [redacted]. [redacted] [redacted] joined the Office of Chemical Safety and Pollution Prevention, where [redacted] conducted human health assessments [redacted]. In [redacted], [redacted] began a detail in RAD, where [redacted] worked on human health assessments of new chemicals.[1] The position became permanent in [redacted]. In October 2020, during the reorganization of the OPPT, [redacted] was moved to the [redacted].

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)

[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 from 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).

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 new-chemical substances 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 divison conducted a full hazard assessment of about 20 percent of the new chemical 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 amendments, 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 OCSPP leadership to eliminate the backlog "intense." [redacted] who were responsible for [redacted] testified that OCSPP leadership was constantly contacting them.[4] 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 potential 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." A [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. OCSPP 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

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

[4] In March 2020, the assessors who worked on new chemicals were split into two groups: a backlog team and an incoming-submissions team. [redacted] was assigned to [redacted]. A [redacted] served as the [redacted] manager. Although the [redacted] manager oversaw [redacted] day-to-day work, [redacted] was not [redacted] supervisor of record.

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 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. [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. A [redacted] testified that the division did not have written guidance to tell them how to select the best analogue chemical but instead that the decision was based in part on professional judgment and a review of the scientific data. According to [redacted], the division is working on creating objective measures for analogue selection. The data gap and resulting need for extrapolation leaves room for scientific disagreements.

[redacted] *Differing Scientific Opinions While in RAD*

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 [redacted], the OPPT deputy director and the OPPT senior science advisor believed that the [redacted] human health assessors who were on [redacted], including [redacted] took an overly conservative approach in their assessments, particularly with regard to hazard identification. 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.

[redacted] testified that between July 2019 and July 2020 [redacted] expressed differing scientific opinions to RAD and OPPT management concerning their edits to [redacted] assessments of new chemicals. [redacted] that was involved in [redacted] work during this time and that attended the disposition meetings where these disagreements took place testified that [redacted] disagreements were about hazard identification and analysis in assessments of new chemicals. OPPT management disagreed with [redacted] analogue chemical and point of departure selection in certain assessments.[5] For example, in May 2020, [redacted] was asked to change the point of departure in one of [redacted] assessments to align with a prior assessment of a structurally similar chemical in which the OPPT deputy director and OPPT senior science advisor had revised the point of departure. [redacted] disagreed with the OPPT deputy director and OPPT senior science advisor's approach to the assessment, and a [redacted] asked [redacted] to set up a meeting to discuss it. After the meeting, the [redacted] emailed [redacted] recommendation to use the analogue chemical and point of departure from the prior assessment; asked [redacted] to "please make revisions" to the assessment; and, if needed, set up a disposition meeting for final resolution. On June 2, 2020, [redacted] sent an email to the [redacted] and the [redacted], stating that [redacted] proposed path would cause [redacted] to designate a fetal effect as a maternal effect, which "would not be protective of the developmental effects." The assessment was subsequently discussed at a disposition meeting, where the attendees agreed with [redacted] approach. Although the group decided to follow [redacted] approach, the [redacted] emailed the [redacted], the OPPT deputy director, and the OPPT senior science advisor, noting that [redacted] June 2, 2020 email "missed [[redacted]] point" and that it was "very difficult to steer the ship." The OPPT senior science advisor responded that they should "let [redacted] write [the assessment] up and build the record of [redacted] performance."

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 any disagreements, neither they nor the assessors' supervisors directed the assessors to make the changes.

[redacted] and the [redacted] human health assessors would frequently respond to OPPT management's edits because they disagreed with them and thought that the edits were not protective of human health. 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] and the [redacted] human health assessors were perceived by management as more likely to express scientific disagreements than other assessors. [redacted] testified that all assessors had delays, and one noted that assessors who did not express scientific disagreements processed cases faster.

[5] Point of departures are values taken from scientific studies that reflect the lowest dose at which test subjects experienced observable adverse effects from exposure to the analogue chemical.

[redacted] and the [redacted] human health assessors received negative attention from political appointees, OPPT management, and RAD management for expressing scientific disagreements. [redacted] described how political appointees pressured OPPT and RAD management to move new-chemicals assessments more quickly. For example, the Office of Chemical Safety and Pollution Prevention [redacted] would require [redacted] to "defend the outputs from our data systems every week" in weekly meetings about delayed assessments, which became a "never-ending status update." [redacted] recalled a meeting in which the Office of Chemical Safety and Pollution Prevention [redacted] for new chemicals "barked" at [redacted], and the OPPT senior science advisor and asked why [redacted] was not completing assessments more quickly. [redacted] recalled the Office of Chemical Safety and Pollution Prevention [redacted] communicating that RAD supervisors needed to have a "firm hand" and push timelines. [redacted] testified that the Office of Chemical Safety and Pollution Prevention [redacted] constantly contacted [redacted] pressured [redacted] and focused on the division completing assessments.

OPPT management complained to RAD management about [redacted] and [redacted] human health assessors. On April 30, 2020, the OPPT deputy director messaged [redacted] and [redacted], calling [redacted] human health assessors the "worst 'conservativist[s]'" and complaining that they were "trying to indict every chemical." [redacted] described how the OPPT deputy director and the OPPT senior science advisor began to characterize [redacted] human health assessors' scientific disagreements as insubordination in 2019 and 2020. In early 2020, the OPPT deputy director stated in an email that the [redacted] human health assessors' failure to use her approaches to assessments "could be considered insubordination." On May 29, 2020, in a message to [redacted], the OPPT senior science advisor called the [redacted] human health assessors the "tox[ic] [redacted]."

[redacted] perceived [redacted] and the [redacted] human health assessors as closely aligned with one another. [redacted] emailed [redacted] when [redacted] witnessed the [redacted] human health assessors talking together and mentioned more than once that [redacted] assumed they would "join forces" to file a complaint. [redacted] called the [redacted] human health assessors passive-aggressive and described them as "piranhas" because [redacted] feared that they would make scientific integrity allegations about [redacted]. Other assessors noticed how those who disagreed with management were perceived. [redacted] testified that disagreeing or delaying the resolution of backlogged cases could get an employee labeled as "problematic" by management. [redacted] testified that, once management labeled an employee as problematic, they were "done."

[redacted] *Union and OIG Complaints*

In November 2020, [redacted] filed a grievance through [redacted] union appealing [redacted] performance evaluation for FY2020. 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, the organization 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 many of [redacted] former coworkers and at least one coworker who worked with [redacted] in [redacted]. 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, she 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. The OIG Hotline complaint included 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.

[redacted] *Allegations of Retaliation*

[redacted] alleged that EPA management took six actions against [redacted] in retaliation for [redacted] differing scientific opinions, protected activities, and protected disclosure: (1) assigned [redacted] to work on assessments of existing chemicals in July 2020; (2) gave [redacted] a lower performance evaluation for FY 2020 than the previous year; (3) withheld a cash or time-off award in FY 2020; (4) decreased [redacted],[6] projects in June 2020; (5) did not select [redacted] for a [redacted] position in April 2022; and (6) subjected [redacted] to harassment in 2019 and 2020.[7]

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[6] [redacted].

[7] In addition to the allegations discussed later in this report, [redacted] raised concerns regarding actions that on their face do not fall within the OIG's jurisdiction under 5 U.S.C. § 2302(b). [redacted] alleged that, on August 6, 2021, [redacted] found a dead cockroach on [redacted] recently cleaned desk. It is unclear whether the cockroach was deliberately placed on [redacted] desk in an act of intimidation; however, because this allegation does not rise to the level of an allegation of a personnel action, it did not fall within the scope of our investigation. [redacted] also alleged that the EPA's Labor and Employee Relations Division did not follow its policies in handling a [redacted] when it forwarded the complaint to a fact finder in late 2022. [redacted] alleged that perhaps the coworker's allegation would not have been addressed as quickly or as thoroughly if it was not against a whistleblower. Because an investigation or fact-finding is not a personnel action, this allegation was not within the scope of our investigation. *See Sistek v. Dep't of Veterans Affairs*, 955 F.3d 948, 954 (Fed. Cir. 2020) (affirming that a retaliatory investigation, in and of itself, does not qualify as a personnel action within the meaning of the Whistleblower Protection Act).

1. Assignment to Existing-Chemicals Assessments

Prior to the October 2020 reorganization of the OPPT, RAD included both new-chemicals and existing-chemicals assessors who were combined into mixed branches. Each branch contained assessors from multiple disciplines, including human health assessors, some of whom worked on new-chemicals assessments and others who worked on existing-chemicals assessments. [redacted] was a human health assessor who [redacted].

On February 20, 2020, [redacted] emailed the [redacted] manager regarding an interaction with a fellow team member that [redacted] perceived as hostile. [redacted] followed [redacted] email with a request to be reassigned from [redacted] team. Management discussed [redacted] request and the possibility of assigning [redacted] to work on either existing chemicals or [redacted]. In discussing the possibility of assigning [redacted] to work on the [redacted], [redacted] raised concerns about whether [redacted] would have a conflict with [redacted].

Over the following two weeks, [redacted] continued to tell [redacted] supervisor that [redacted] was having difficulties, some of which centered on [redacted] communications with a newer team member and some of which involved [redacted] communications with managment. While discussing the difficulties, [redacted] noted that [redacted] was considering whether to request a shift from [redacted] current duties to an existing-chemicals project. By the end of April 2020, [redacted] asked [redacted] supervisor for a change in duties and mentioned that [redacted] was thinking about leaving the Agency. [redacted] testified that, due to the resource needs of RAD, [redacted] was unable to reassign [redacted] at that time but began to look for opportunities to do so. In early June 2020, the [redacted], began preparing to leave the EPA. By the end of June 2020, [redacted] was informed that [redacted] would be assigned as the [redacted] and began to transition into the role in July 2020. By the end of July 2020, [redacted] was no longer assigned to new-chemicals work.

2. FY 2020 Performance Evaluation

On November 1, 2019, [redacted] received [redacted] first performance evaluation in RAD and was rated as "[redacted]"[8]. Although the majority of [redacted] work during the performance year was in the [redacted], which is also within the Office of Chemical Safety and Pollution Prevention, [redacted] supervisor testified that [redacted] performance while on [redacted] detail to RAD was "[redacted]."

[redacted] supervisor's background is in [redacted]. [redacted] supervised a team comprising assessors across multiple disciplines, [redacted]. Although [redacted] supervisor assigned work to the team members who worked on new chemicals and held biweekly meetings with them to keep

[8] For the FY 2019 and FY 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."

apprised of their accomplishments, [redacted] did not manage or oversee their work. [redacted] relied heavily on feedback from the new-chemicals team managers when [redacted] evaluated [redacted] performance.

In March 2020, the RAD new-chemicals assessors were split into two teams: a backlog team and an incoming-submissions team. [redacted] and [redacted] human health assessors were assigned to the [redacted] and their day-to-day work was managed by [redacted], who served as [redacted] manager.

As noted above, scientific disagreements between assessors and OPPT management led to delays. According to the testimony of management, however, such disagreements were just one of several reasons that new-chemicals assessments frequently missed the statutory 90-day deadline. Assessments were often delayed even in the absence of scientific disagreements. [redacted] testified that all assessors, regardless of whether they expressed differing scientific opinions, had cases that were delayed for various reasons.

In 2019 and 2020, the OPPT deputy director, the OPPT senior science advisor, and [redacted] began to complain about scientific disagreements in general and [redacted] specifically. For example, in an email to [redacted] manager, [redacted] noted that [redacted] was raising legitimate questions but needed to move forward on assessments that were about to go past their statutory deadline and could not "hold late cases hostage." The OPPT deputy director, the OPPT senior science advisor, and [redacted] also began to characterize the scientific disagreements as a reflection of the [redacted] human health assessors' performance. In an email to [redacted], the OPPT deputy director noted that [redacted] was not performing at the [redacted] level because [redacted] resisted the OPPT senior science advisor's guidance and was overly cautious.[9] The OPPT deputy director complained that [redacted] scientific conclusions were not well substantiated and hurt the credibility of the division, noting that she received a complaint from a chemical submitter about [redacted] work. Another time, she complained to managers that chemical submitters would be "irate" if the division took [redacted] approach to human health assessments. In early 2020, the OPPT deputy director stated in an email that the [redacted] human health assessors' failure to use her approaches to assessments "could be considered insubordination."

On October 30, 2020, [redacted] received [redacted] FY 2020 performance evaluation, in which [redacted] overall rating was lower than the rating from the previous year. [redacted] was rated "[redacted]" overall and in [redacted] of [redacted] four critical elements, including critical element one: "project management and technical support to new chemicals The supervisory comments regarding critical element one, [redacted] work on assessments of new chemicals, noted that [redacted] produced work of "[redacted]" but that [redacted] work was [redacted]."

[redacted] supervisor testified that prior to approximately March 2020, [redacted] had only heard positive feedback regarding [redacted] performance. [redacted] during this time, [redacted] work on new

[9] "GS" refers to the classification and pay level on the General Schedule system, which is used for civilian federal employees in professional, technical, administrative, and clerical positions.

chemicals was “in the [redacted]’ range.” [redacted] described that once the pressure to clear the backlog grew, [redacted] stopped hearing positive feedback regarding [redacted] and instead began to receive feedback regarding performance issues. [redacted] heard from the [redacted] that the OPPT deputy director and the OPPT senior science advisor were having to go back and forth with [redacted] on the same issues and that it might be a performance issue. [redacted] explained that the “back and forth” referred to exchanges with management about scientific disagreements. [redacted] testified that during the previous performance period, when [redacted] had a scientific disagreement, [redacted] would write it down and then move the case forward in the work process. In FY 2020, however, [redacted] engaged in “constant back and forth” about [redacted] scientific disagreements. This created delays, according to the [redacted], and there was pressure in the division to meet deadlines. [redacted] tried to coach [redacted] on how to resolve to [redacted] disagreements with the OPPT deputy director and the OPPT senior science advisor. [redacted] explained that in giving [redacted] a rating of [redacted]” [redacted] considered the fact that [redacted] had to be more direct with [redacted] to help [redacted] resolve these disagreements. [redacted] believed that finding resolutions was part of the performance criteria for a [redacted] assessor.

Prior to issuing [redacted] FY 2020 performance evaluation, [redacted] discussed [redacted] performance with [redacted] and the OPPT deputy director. In summarizing their meeting, the [redacted] that [redacted] issues began to arise when [redacted] insisted on “digging into cases in search of risks which affected timeliness of reviews.” [redacted] continued that [redacted] was unwilling to take advice from more senior [redacted]. [redacted] explained that [redacted] boss, the [redacted], as well as the OPPT deputy director, told [redacted] that [redacted] was not performing at the [redacted] level and asked [redacted] to look into whether [redacted] could be demoted. [redacted] supervisor said that those requests put [redacted] “in a bad position.”

[redacted] supervisor testified that [redacted] was on the cusp between a “[redacted]” and the higher “[redacted]” rating. [redacted] testified that [redacted] did not think that [redacted] had the support of [redacted] chain of command to give [redacted] an “[redacted]” rating. [redacted] explained that [redacted] did not rate [redacted] as “[redacted]” because of the [redacted]. While [redacted] was not involved in [redacted] new-chemicals work and did not have a human health background, [redacted] assumed that higher quality work would have fewer back-and-forth exchanges. [redacted] supervisor testified that [redacted] also had late assignments that were separate from [redacted] scientific disagreements. However, when asked, [redacted] did not provide any documentation of [redacted] late assignments that were not connected to the expression of a scientific disagreement.

In November 2020, the National Treasury Employees Union filed a grievance appealing [redacted] FY 2020 performance evaluation. The initial grievance noted that [redacted] was told that [redacted] was not performing at an “[redacted]” level because of [redacted] r. The management response to the initial grievance noted that [redacted] was expected to [redacted]. In January and March 2021, the union appealed management’s response to the grievance through secondand third-step grievances. Neither of management's responses to the second- and third-step grievances addressed the impact of [redacted] scientific disagreements on [redacted] performance evaluation or provided further explanation for [redacted] rating.

3. Withheld Award for FY 2020

The OPPT distributed two types of monetary awards in FY 2020: superior accomplishment awards, known as "s-awards," and on-the-spot awards, known as "spot awards." S-awards are valued up to $5,000 and are issued for high-quality performance of assigned duties or for special acts, services, or achievements. Spot awards are valued up to $250 and are intended to recognize employees for accomplishments that are "generally modest and limited in scope."

The OPPT determined these monetary awards by asking RAD management to rank their employees as high, medium, or low. S-awards were then distributed based on each employee's rank. According to the testimony of RAD management, s-awards were not explicitly tied to performance ratings, but the amounts were still based upon performance. [redacted] explained that employees who received higher performance ratings received higher monetary awards, and those with lower performance ratings received lower monetary awards. In FY 2020, the OPPT did not issue s-awards to individuals who received a quality step increase.

In addition to monetary awards, the Agency can offer time-off awards. [redacted] explained that management asked employees eligible for awards if they would prefer a monetary award or a time-off award. Depending on whether employees were ranked as high, medium, or low, they would receive a time-off award in lieu of or in addition to a monetary s-award. For FY 2020, out of 101 employees in the OPPT, [redacted] was one of five who were eligible for but did not receive an s-award or a time-off award. Four of these employees were rated as "[redacted]" and one was rated as "[redacted]." S-awards or time-off awards were issued to all of [redacted] direct reports who received above a "[redacted]" rating. The only other employee who [redacted] did not issue an s-award or time off award received the same rating as [redacted] rating of "[redacted]." Multiple RAD employees received both an s-award and a time-off award. Although [redacted] did not receive an s-award, [redacted] received a $250 spot award for [redacted] work on [redacted] projects.

4. Decrease in [redacted] Assignments

The Toxic Substances Control Act, as amended in 2016, requires the EPA to develop a list of [redacted]. In 2018, the EPA developed a strategic plan to promote the development and implementation of [redacted]. The strategic plan included many different [redacted] projects. [redacted] explained that opportunities to work on [redacted] projects were not advertised or subject to competition; rather, volunteers were accepted to complete [redacted] work as an ancillary duty.

In 2019, 13 staff members from RAD worked on [redacted] projects, which included participating in a monthly [redacted] meeting. [redacted] was one RAD staff member who volunteered to work on [redacted] projects, and [redacted] participated in these meetings. As part of the EPA's requirements under the Toxic Substances Control Act, one of the [redacted] projects was to identify and maintain [redacted]. [redacted]. In October 2019, the OPPT lead for [redacted] sent [redacted] the 2018 [redacted], the 2019 [redacted] which [redacted] had already circulated, and the comments [redacted] received on the draft. [redacted] asked [redacted] to incorporate the comments into the draft. The finalized 2019 [redacted] was posted to the EPA website on December 5, 2019. [redacted] testified that in the fall of 2019, [redacted] work was approximately 10 percent of [redacted] job duties.

Around this same time, the [redacted] leaders from the OPPT, the Office of Pesticide Programs, the Office of Chemical Safety and Pollution Prevention, and the Office of Research and Development began planning for a [redacted] conference that was held on December 17, 2019. The [redacted] leaders corresponded frequently regarding planning. Some conference planning also occurred during a weekly meeting, in which [redacted] was a participant. [redacted] testified that EPA employees who were "big names" were assigned as subgroup leaders to lead various breakout sessions of the conference. While [redacted] was in a subgroup, [redacted] was not a subgroup leader. After the [redacted] conference, the members of the weekly meeting began working on a [redacted] workplan. The workplan built upon the conference and comprised the work of the subgroups. Some participants of the weekly meeting were designated to lead subgroups for the workplan.

The weekly meeting continued after the conference, though as the year progressed, the meeting was often canceled. Despite many meetings being canceled, a smaller subgroup of meeting participants continued to work on a draft [redacted] workplan that was ultimately presented to the OCSPP assistant administrator in April 2020. While [redacted] was a member of the often-canceled weekly meeting, [redacted] was not in the smaller subgroup that continued to meet. The smaller subgroup comprised just the [redacted] leaders, the workplan subgroup leaders, and one senior executive service employee who was involved in [redacted]. In May 2020, [redacted] estimated that [redacted] data science efforts, which included support to [redacted] projects, was approximately 5 percent of [redacted] duties.

Approximately a month after the [redacted] workplan was submitted to the EPA administrator, the original calendar invite for the often-canceled weekly meeting was discontinued. On June 1, 2020, the individuals in the smaller subgroup began a new weekly meeting. This new weekly meeting did not include [redacted] or the other invitees to the original meeting who were not on the subgroup email chains. On July 27, 2020, [redacted] emailed the OPPT [redacted] lead, who was a [redacted], asking why [redacted] was no longer in the weekly meeting. The OPPT [redacted] lead replied that once the [redacted] workplan was released, a smaller subgroup continued meeting on Mondays to plan for the next [redacted] conference. The OPPT [redacted] lead noted that [redacted] was the only OPPT invitee and assured [redacted] that there would be future opportunities to work on [redacted] projects.

In October 2020, the OPPT [redacted] lead met with [redacted] and asked [redacted] to work on developing an update to the 2019 [redacted]. This [redacted] was published on the EPA's website in February 2021. In early 2021, the duties of the OPPT [redacted] lead were transferred from the [redacted] to the OPPT senior science advisor. The OPPT senior science advisor planned to reinstate the [redacted], which had not met for months. In February 2021, [redacted] sent an email to all former members of the [redacted] to gauge interest, including [redacted] The OPPT senior science advisor planned to have the first T[redacted]meeting in May 2021, but [redacted] separated from the EPA before the meeting could be held. The EPA did not publish an update to the [redacted] in 2022. However, in June 2022, [redacted] work was reinvigorated as part of a new Office of Chemical Safety and Pollution Prevention fellowship program. The fellowship program, which was announced on an internal EPA digital job board on June 29, 2022, included nine different projects, one of which was related to [redacted]. [redacted] did not apply to the fellowship and thus was not selected.

5. Nonselection for a [redacted] Position

On November 22, 2021, a [redacted] in the ECRAD was posted on USAJobs, the federal government's official employment website. There were 11 applicants, six of whom were determined to be eligible by human resources and were interviewed for the position, including [redacted] The position was initially advertised for two selectees; however, a [redacted] decided to hire only one.

[redacted] testified that [redacted] position is a strategic role, and its occupant should take a broad approach to the work of the ECRAD. [redacted] noted that [redacted] was seeking an applicant who could do more than quality control of risk assessments and could help set up, implement, and sustain the existing-chemicals program. In [redacted] interview, [redacted] spoke about [redacted] strength as a one-on-one mentor. However, the selecting official testified that [redacted] wanted the [redacted] to focus on the broad needs of the divison rather than individualized needs of team members. In April 2022, the new ECRAD [redacted] was announced. [redacted] was not selected. According to [redacted], the selectee had experience taking the desired broader approach. For example, [redacted] led the team that developed the division's new workplan. [redacted] also noted that the selectee had served in management and had experience with strategic thinking.

6. Harassment

[redacted] alleged that [redacted] was harassed in late 2019 and 2020 by the OPPT deputy director, the OPPT senior science advisor, and [redacted] in retaliation for expressing differing scientific opinions.[10]

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[10] [redacted].

[redacted] testified that the OPPT deputy director harassed those with whom she disagreed via "disrespectful" comments in meetings and in writing. According to [redacted] the OPPT deputy director questioned assessors' skills and capabilities based on their scientific opinions. [redacted] examples included the OPPT deputy director asking such questions as "Why would you think you could use this?" or "Why would you think this is a thing?" [redacted] also recalled a meeting during which, according to a colleague of [redacted], the OPPT deputy director rolled her eyes the entire time that [redacted] spoke. [redacted] recalled watching the OPPT deputy director have similar reactions when others spoke too. [redacted] also testified that the OPPT deputy director would sneer or have an angry look on her face if she did not agree with an assessor. In addition, [redacted] testified that in written communications, it was the OPPT deputy director's practice to use all capital letters, bold font, underlined font, and excessive punctuation marks. For example, when [redacted] identified a new study with a more protective point of departure that was applicable to one of [redacted] assessments, the OPPT deputy director wrote to [redacted] in all capital letters, directing that [redacted] not use the new study and instead "keep moving with what you have."

[redacted] testified that the OPPT senior science advisor was rude to [redacted] because he disagreed with [redacted] scientific opinions. According to [redacted] the way that the OPPT senior science advisor would ask questions in meetings implied that he believed [redacted] was "an idiot" or that he was in "complete disbelief" that [redacted] could arrive at a particular conclusion. [redacted] recalled a meeting in which he asked [redacted] to do something [redacted] disagreed with. When [redacted] explained that [redacted] did not have support to write what he wanted, he told [redacted] that "a GS[redacted] could do what I'm asking." [redacted] contrasted this behavior with his behavior toward those who "didn't give him any problems," whom he helped and spoke to "like a professor." [redacted] said that [redacted] believes the OPPT senior science advisor spoke to [redacted] this way to embarrass [redacted] into changing [redacted] scientific determinations. [redacted] also described comments that he made about [redacted] work and the work of others he disagreed with, such as "we're not going to defend you" from industry. [redacted] said that while making these comments, the OPPT senior science advisor was audibly agitated and raised his voice. [redacted] said that he made similar comments in writing. On one occasion, [redacted] provided him with what [redacted] described as a well-documented reason why [redacted] would not accept his edits to [redacted] assessment; he wrote back that [redacted] case was "a mess." [redacted] also testified that the OPPT senior science advisor would ignore [redacted] or not engage with [redacted] For example, in a meeting in which [redacted] work product was discussed, he stated, "I disagreed with what the reviewer did," as though [redacted] was not in the room. [redacted] felt as though he was indicating that [redacted] was not worth talking to. [redacted] also detailed an instance in which he refused [redacted] request for help, despite offering to help others.

[redacted] testified that, although [redacted] was not in [redacted] chain of command, the [redacted] still held power over [redacted] because [redacted] supervisor was not involved in [redacted] work, as noted previously in this report. [redacted] reported that, although [redacted] saw the OPPT deputy director and OPPT senior science advisor more often than [redacted] saw the [redacted], [redacted] harassed [redacted] in the same manner as the OPPT deputy director and the OPPT senior science advisor. [redacted] testified that [redacted] scolded [redacted] in a meeting in front of others and would similarly chastise and criticize other staff. [redacted] described interactions with [redacted] as being curt, such as in one meeting that occurred right before [redacted] transfer to existing-chemicals work when [redacted] shouted, "This case is going to have to be reassigned." As another example, [redacted] described how [redacted] would tell human health assessors, "You have to do this" instead of "I'd like you to do this." [redacted] testified that [redacted] would get impatient with [redacted] when [redacted] attempted to explain [redacted] scientific disagreements. When [redacted] started to perceive [redacted] as "a problem," [redacted] began copying [redacted] on emails. [redacted] viewed this as an attempt to "get [[redacted] in trouble."

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.[11]

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.[12] The EPA's *Scientific Integrity Policy* does not define the term differing scientific opinion. However, in October 2020, the EPA's Scientific 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

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

[12] 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.

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).[13] 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.[14]

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.[15] "Contributing factor" is defined as any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.[16] 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).[17]

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

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[13] *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).

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

[15] 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." 5 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).

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

[17] 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.

the protected activity or disclosure. 5 U.S.C. § 1221(e)(2).[18] 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.[19]

Analysis

[redacted] is an EPA employee. [redacted] alleges that individuals with personnel authority took personnel actions against [redacted] in retaliation for expressing differing scientific opinions, filing a union grievance, and providing information to the OIG. As [redacted] alleged a prima facie violation of 5 U.S.C. § 2302(b)(8), (9)(A), and (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 Activities, or Make a Protected Disclosure?

[redacted] disagreements with [redacted], the OPPT deputy director, and the OPPT senior science advisor between July 2019 and July 2020 constitute differing scientific opinions. [redacted] expression of differing scientific opinions was corroborated by [redacted] [redacted] as well as by [redacted] and [redacted]. We obtained testimony and documentary evidence confirming that [redacted] disagreements concerned interpretations of scientific data, such as the selection of analogue chemicals that were to be used in the assessments The EPA's assessments of new chemicals constitute scientific products. Thus, [redacted] scientific disagreements meet both the plain language meaning of a differing scientific opinion and the formal definition of a differing scientific opinion that was issued by the Scientific Integrity Program in October 2020.

In addition, [redacted] was widely perceived by OPPT and RAD management to have made differing scientific opinions. [redacted] testified that [redacted] and the other [redacted] human health assessors were more likely than other assessors to disagree about scientific decisions made in assessments. The OPPT deputy director and the OPPT senior science advisor complained about [redacted] and the other [redacted] human health assessors' differing scientific opinions.

[redacted] engaged in protected activities when [redacted] filed with the union regarding [redacted] FY 2020 performance evaluation from November 2020 through March 2021 and when [redacted] provided information to the OIG via Hotline complaints filed by the Public Employees for Environmental Responsibility in June

[18] 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).

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

and August 2021. Filing a complaint through a union is the exercise of an appeal, complaint, or grievance right granted by law, rule, or regulation under 5 U.S.C. § 2302(b)(9)(A). Providing information to the OIG is a protected activity under 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, which is a rule. 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.[20]

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

[redacted] alleged six retaliatory actions in the information provided in [redacted] Hotline complaint to the OIG: (1) an assignment to work on existing-chemical assessments in July 2020, (2) a FY 2020 performance rating, (3) a withheld cash or time-off award in FY 2020, (4) a decrease in [redacted] work in June 2020, (5) a nonselection for a [redacted] position in April 2022, and (6) harassment in 2019 and 2020. We determined that three of these actions constitute personnel actions.

1. Assignment to Existing-Chemicals Assessments

In summer 2020, [redacted] was assigned to work on existing-chemicals projects instead of new-chemicals assignments. This change in work assignment came at [redacted] request, due to [redacted] dissatisfaction with [redacted]. A voluntary action does not constitute a personnel action.[21] An employee-initiated action is considered voluntary unless the employee can show that the action was obtained through duress or coercion or that a reasonable person would have been misled by the agency.[22] A stressful work environment is not enough to find that an action was coerced.[23] Dissatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions do not constitute coercion.[24] Accordingly, [redacted] requested change from new-chemicals assignments to existing-chemicals assignments does not constitute a personnel action.

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

[21] *Jay v. Dep't of the Navy*, 51 Fed. Appx. 4 (Fed. Cir. 2002); *Comito v. Dep't of the Army*, 90 M.S.P.R. 58, ¶ 13 (2001).

[22] *Staats v. U.S. Postal Serv.*, 99 F.3d 1120, 1124 (Fed. Cir. 1996) (declining to find an involuntary resignation in cases in which "an employee decides to resign or retire because he does not want to accept a new assignment, a transfer, or other measures that the agency is authorized to adopt, even if those measures make continuation in the job so unpleasant for the employee that he feels that he has no realistic option but to leave").

[23] *Brown v. U.S. Postal Serv.*, 115 M.S.P.R. 609, ¶ 15 (2011).

[24] *Miller v. Dep't of Def.*, 85 M.S.P.R. 310, ¶ 32 (2000).

2. FY 2020 Performance Evaluation

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

3. Withheld Award for FY 2020

In FY 2020, [redacted] was one of five employees who was not given a cash or time-off award. A decision regarding a cash or time-off award is a personnel action. 5 U.S.C. § 2302(a)(2)(A)(ix). Accordingly, the denial of a cash or time-off award for [redacted] constitutes a personnel action.

4. Decrease in [redacted] Assignments

[redacted] started working on [redacted] projects in October 2019 as an ancillary duty. [redacted] projects only constituted 5 to 10 percent of [redacted] job duties in FYs 2019 and 2020. As 2020 progressed, [redacted] was phased out of one of the multiple [redacted] projects [redacted] was working on but continued to be involved in other [redacted] projects. [redacted] work comprised only a small amount of [redacted] duties and, although [redacted] was removed from one [redacted] project, [redacted] was assigned other [redacted] tasks. The decrease in [redacted] assignments does not constitute a significant change in duties and as such is not a personnel action.[25]

5. Nonselection for a [redacted] Position

[redacted] applied for the [redacted] position around November 2021. In April 2022, a different applicant was selected for the position. An appointment is among the personnel actions specifically enumerated in the statute. 5 U.S.C. § 2302(a)(2)(A)(i). Accordingly, the failure to select [redacted] for the position constitutes the failure to take a personnel action.

6. Harassment

[redacted] alleged that in 2019 and 2020 [redacted] was harassed in retaliation for expressing differing scientific opinions. 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. 5 U.S.C. § 2302(a)(2)(A)(xii).[26] [redacted] alleges that [redacted] was subjected to harsh disagreements with [redacted] scientific opinions and comments in meetings, emails, and [redacted] written work

[25] *White v. Social Sec. Admin.*, 76 M.S.P.R. 447, 462 (1997) (finding that removal of certain cases from an administrative law judge's docket did not amount to a significant change in duties because he was assigned other similar cases); *Martin v. Dep't of Veterans Affairs*, 2014 WL 7045133 (Dec. 11, 2014) (finding that the assignment of seven additional cases to an attorney's docket was not a significant change in duties or working conditions).

[26] *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 the employee 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).

product, which [redacted] characterized as rude and disrespectful. Verbal criticism and rudeness are not usually considered personnel actions.[27] 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 are generally not so intolerable as to compel a reasonable person to resign and thus are not personnel actions.[28] These cases contemplate that criticism and unpleasantness in the workplace alone are not actionable under the Whistleblower Protection Act. Accordingly, the criticism and disagreements that [redacted] experienced do not constitute a personnel action.

In summary, [redacted] FY 2020 performance evaluation, the Agency's failure to provide [redacted] with a cash or time-off award for FY 2020, and [redacted] nonselection for a [redacted] position constitute personnel actions under 5 U.S.C. § 2302(a)(2). [redacted] reassignment to existing-chemicals assessments, [redacted] decrease in [redacted] projects, and the alleged harassment do not constitute personnel actions under 5 U.S.C. § 2302(a)(2).

Were [redacted] Differing Scientific Opinions, Protected Activities, or Protected Disclosure Contributing Factors in 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 covered 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.[29] After assessing these two factors, knowledge and timing, we determined that [redacted] differing scientific opinions were a contributing factor in three personnel actions: [redacted] FY 2020 performance evaluation and [redacted] withheld cash or time-off award for FY 2020, and [redacted] nonselection for a [redacted] position. [redacted] protected activities and protected disclosure were also a contributing factor in [redacted] non selection.

FY 2020 Performance Evaluation and Withheld Award

[redacted] expressed differing scientific opinions regarding new chemicals from approximately July 2019 through July 2020. [redacted] supervisor, who completed [redacted] performance evaluation and provided input for [redacted] withheld cash or time-off award, had knowledge of [redacted] differing scientific opinions. In approximately March 2020, the [redacted] supervisor began to receive feedback about [redacted] differing scientific opinions. [redacted] was also included on multiple emails discussing [redacted] differing scientific opinions. The OPPT distributed cash awards in July 2020, and [redacted] FY 2020 performance

[27] *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) (oral counseling does not constitute disciplinary or corrective action within the coverage of the Whistleblower Protection Act).
[28] *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).
[29] 5 U.S.C. § 1221(e).

evaluation was issued to [redacted] in October 2020. The timing between [redacted] differing scientific opinions and [redacted] FY 2020 performance evaluation and withheld cash or time-off award was less than 18 months, which is a reasonable amount of time to conclude that they were contributing factors in the actions.[30]

Nonselection for a [redacted] Position

[redacted] was the selecting official for the ECRAD [redacted] position. As discussed above, [redacted] had knowledge of [redacted] differing scientific opinions regarding new-chemicals assessments. By the end of July 2020, [redacted] was no longer assigned to new-chemicals work.[31] [redacted] nonselection for the ECRAD [redacted] position was in April 2022. The timing between [redacted] differing scientific opinions and [redacted] nonselection for the position was less than two years, which is a reasonable amount of time to conclude that they were contributing factors in the actions.[32] Further, [redacted] engaged in protected activities when [redacted] filed a grievance regarding [redacted] FY 2020 performance evaluation from November 2020 through March 2021 and when [redacted] provided information to the OIG in June and August 2021. [redacted] also made a protected disclosure in [redacted] OIG complaint. [redacted] had knowledge of [redacted] protected activities and disclosure, as [redacted] testified that [redacted] read news articles about the disclosures to OIG and read the grievance. The timing between [redacted] protected activities and disclosure and the nonselection was less than two years, which is a reasonable amount of time to conclude that they were a contributing factor in [redacted] nonselection for a [redacted] position.

In summary, because EPA management had knowledge of [redacted] differing scientific opinions, protected activities, and protected disclosure and because the personnel actions at issue were taken less than two years after [redacted] expressed differing scientific opinions, engaged in protected activities, and make a protected disclosure, we determined that [redacted] established by a preponderance of the evidence that [redacted] differing scientific opinions were contributing factors in [redacted] FY 2020 performance evaluation, [redacted] withheld awards in FY 2020, and [redacted] nonselection for a [redacted] position. We also found that [redacted] protected activities and protected disclosure were contributing factors in [redacted] nonselection.

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[30] 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).

[31] [redacted] may have expressed differing scientific opinions while working in the existing-chemicals program and in the ECRAD. However, the scope of this investigation was limited to the retaliation allegations as outlined in Public Employees for Environmental Responsibility's disclosures to the OIG, which was retaliation for expressing differing scientific opinions regarding new-chemicals assessments. As such, retaliation for differing scientific opinions regarding existing-chemicals assessments is outside of the scope of this investigation.

[32] *Mastrulleo v. Dep't of Labor*, 123 MSPR 110, ¶ 20 (2015) (concluding that appellant's August 2010 disclosure was a contributing factor in the agency's failure to give him a 40 hour time off award in June 2012).

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

Once a preponderance of the evidence establishes that one or more differing scientific opinions, protected activity, 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 three 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 could not establish by clear and convincing evidence that it would have rated [redacted] as "[redacted]" in critical element one, which addressed [redacted] work on new-chemicals assessments, and that it would not have provided [redacted] an award in the absence of [redacted] differing scientific opinions. Analysis of the same three factors led us to determine that the EPA could establish by clear and convincing evidence that it would have failed to select [redacted] for the [redacted] position in the absence of [redacted] differing scientific opinions, protected activities, and protected disclosure.

FY 2020 Performance Evaluation

[redacted] was rated as "[redacted]" in [redacted] FY 2019 performance evaluation. Although the majority of [redacted] work during FY 2019 was in the [redacted], [redacted] supervisor testified that [redacted] performance in RAD during FY 2019 was "[redacted]." In FY 2020, [redacted] was rated as "[redacted]." [redacted] supervisor testified that [redacted] relied heavily on the feedback of the other managers when rating [redacted] [redacted] explained that [redacted] considered [redacted] new-chemicals work to be in the "[redacted]" range, until [redacted] heard from [redacted] about the back-and-forth disagreements with [redacted] which [redacted] testified was a reference to [redacted] differing scientific opinions. The [redacted] explained that [redacted] did not rate [redacted] as "[redacted]" because of [redacted]. Although [redacted] supervisory comments noted that [redacted] produced work of good quality, [redacted] testified that [redacted] assumed that higher quality work may have fewer back-and-forth exchanges with managment. And while [redacted] explained that [redacted] differing scientific opinions created delays, [redacted] also testified that [redacted] also had late assignments that were separate from [redacted] differing scientific opinions. However, when asked, the [redacted] did not provide any documentation of [redacted] late assignments that were not connected to the expression of a differing scientific opinion.

[redacted] supervisor relied heavily on feedback from management officials who expressed animus regarding [redacted] differing scientific opinions. The OPPT deputy director and the OPPT senior science advisor complained about [redacted] differing scientific opinions, and the [redacted] believed that they viewed the differing scientific opinions as insubordination. The OPPT deputy director even noted in an email that chemical companies complained about [redacted] assessments and that those companies would be angry if the division took her approach to assessments. [redacted] also received feedback about [redacted] differing scientific opinions from [redacted]. The [redacted] noted that issues began to arise when [redacted] dug into cases, affecting the timeliness of reviews, and [redacted] characterized this as [redacted] "hold[ing] late cases hostage." [redacted] and the OPPT deputy director asked [redacted] to look into whether [redacted] could be demoted, which [redacted] testified put [redacted] in a difficult position. The [redacted] explained that [redacted] was on the cusp between a "[redacted]" and the higher "[redacted]" rating but that [redacted] did not believe that [redacted] had the support of [redacted] chain of command to give [redacted] the higher rating.

There are no apt comparators by which to evaluate [redacted] FY 2020 performance evaluation. The [redacted] had [redacted] human health assessors, including [redacted]. Other human health assessors who may have reported to [redacted] would not have had the same [redacted] deadline for their work because [redacted].

We find that the Agency's support for [redacted] rating in critical element one was mostly based upon explicit references to [redacted] differing scientific opinions. After reviewing the Agency's support for [redacted] rating, the animus evidence, and the lack of comparators, we have determined that the Agency cannot establish by clear and convincing evidence that it would have rated [redacted] as [redacted]" in critical element one in the absence of [redacted] differing scientific opinions. Accordingly, [redacted] FY2020 performance rating violated the EPA's *Scientific Integrity Policy*.

Withheld Award for FY 2020

In FY 2020, OPPT employees received one or more of the following three types of awards: s-awards, time-off awards, and spot awards. According to the testimony of management, s-award amounts were based upon performance, even if they were not tied directly to performance ratings. In other words, employees with higher performance ratings received higher monetary awards and time-off awards, and those with lower performance ratings received lower award amounts. [redacted] received a spot award for [redacted] work on [redacted] projects but did not receive an s-award or a time-off award.

As discussed above, [redacted] rating for critical element one was largely influenced by officials who expressed animus regarding [redacted] differing scientific opinions. Performance awards were closely tied to performance evaluations. As such, the animus that influenced [redacted] performance rating also had an effect on [redacted] ability to receive monetary and time-off awards.

Comparator evidence shows that [redacted] lack of an s-award or time-off award was closely tied to [redacted] "[redacted]" performance rating. In FY 2020, [redacted] was one of five OPPT employees who were eligible for but did not receive an s-award or a time-off award. Four of these employees were rated as "[redacted]." S-awards or time-off awards were issued to all of [redacted] supervisor's direct reports who received above a "[redacted]" rating. The only other employee who [redacted] did not issue an s-award or time off award received a "[redacted]" rating.

We find that the Agency's support for [redacted] withheld s-award or time-off award is the same as the support for [redacted] performance rating, which, as discussed above, referenced [redacted] differing scientific opinions. After reviewing the Agency's support for [redacted] rating, the animus evidence, and the neutral comparator evidence, we determined that the Agency cannot establish by clear and convincing evidence that it would have withheld an s-award or time-off award in the absence of [redacted] differing scientific opinions. Accordingly, the Agency's withholding of an s-award or time-off award violated the EPA's *Scientific Integrity Policy*.

Nonselection for a [redacted] Position

[redacted] was not selected for the [redacted] position in the ECRAD. [redacted], testified that [redacted] was seeking a candidate who could focus on the broad, strategic needs of the office, rather than the individualized needs of team members. [redacted] wanted a [redacted] who could help set up, implement, and sustain the existing-chemicals program. The candidate who was ultimately selected for the position had previous management experience and had led the team that developed the ECRAD's new workplan. [redacted] had not served in a management position, and while [redacted] had served as [redacted], [redacted] did not have the broad strategic experience of the selectee.

While earlier personnel actions taken against [redacted] were influenced by the animus of higher-level officials, those officials were not involved in the ECRAD [redacted] selection process. We are not aware of any evidence of animus expressed by [redacted] [redacted].

[redacted] was one of 11 applicants for the position. Six of the applicants were determined to be qualified by human resources, including [redacted] In addition to [redacted] four other qualified applicants were not selected for the position.

Because the selectee had previous management experience and led the team that developed the ECRAD's new workplan, we find that the Agency's support for choosing its selectee is strong. We determined that the strong supporting evidence, paired with the lack of animus evidence and the neutral comparator evidence, supports the finding that the Agency could show by clear and convincing evidence that it would have not selected [redacted] for the ECRAD [redacted] position in the absence of [redacted] differing scientific opinions, protected activities, and protected disclosure.

Conclusions

We determined that [redacted] expressed differing scientific opinions, engaged in protected activities, and made a protected disclosure, which were contributing factors in three personnel actions taken against [redacted] (1) a FY 2020 performance rating, (2) a withheld cash or time-off award, and (3) the nonselection for a [redacted] position. We substantiated [redacted] retaliation allegations with respect to [redacted] FY 2020 performance evaluation and [redacted] withheld award, in violation of the EPA's *Scientific Integrity Policy*. We did not substantiate [redacted] retaliation allegations with respect to [redacted] nonselection for a [redacted] position.

Recommendations

We recommend that the EPA administrator consider appropriate corrective action considering our findings.[33]

[33] If the inspector general of an agency determines that a supervisor committed a prohibited personnel practice under the Whistleblower Protection Act, the head of the agency in which the supervisor is employed shall propose suspending the supervisor for a period that is not less than three days. 5 U.S.C. § 7515(b)(1)(A)(i). While the EPA's Scientific Integrity Policy extends whistleblower protections to employees who express a differing scientific opinion, it does not state whether the Whistleblower Protection Act's mandatory suspension provision applies when these protections are violated.

Whistleblower Protection

U.S. Environmental Protection Agency

The whistleblower protection coordinator's role is to educate Agency employees about prohibitions against retaliation for protected disclosures and the rights and remedies against retaliation. For more information, please visit the OIG's whistleblower protection webpage.

Contact us:

Congressional Inquiries: OIG.CongressionalAffairs@epa.gov

Media Inquiries: OIG.PublicAffairs@epa.gov

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