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Report of Investigation: Whistleblower Reprisal Investigation

September 17, 2024 | Report No. 24-N-0061

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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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 protected disclosures. After reviewing the EPA's 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 the critical element in [REDACTED] FY 2020 performance evaluation, in violation of the EPA's Scientific Integrity Policy and the Whistleblower Protection Act. We also substantiated [REDACTED] retaliation allegations with respect to [REDACTED] reassignment, in violation of the EPA's *Scientific Integrity Policy*. We did not substantiate [REDACTED] retaliation allegations with respect to [REDACTED] nonselection for the detail. We recommend that the EPA administrator take appropriate corrective action considering these findings.

On August 28, 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. In [REDACTED] response, dated September 9, 2024, [REDACTED] disagreed with our conclusions. [REDACTED] asserted that there was no retaliatory motive on [REDACTED] part with regards to [REDACTED] reassignment. [REDACTED] stated that [REDACTED] did not work directly with [REDACTED] and met with [REDACTED] once in April 2020. [REDACTED] asserted [REDACTED] was unaware of [REDACTED] protected activities and that [REDACTED] did not personally engage in resolving differences of scientific opinions, as [REDACTED] did not have the technical knowledge required. [REDACTED] stated that [REDACTED] was included in the new chemicals branch in the May 13, 2020 organizational chart because that chart reflected existing staff in the unit. As [REDACTED] was new in [REDACTED] role and had no basis to judge where [REDACTED] should be placed, [REDACTED] considered the OPPT Senior Science Advisor's feedback when revising the chart. [REDACTED] wrote that the final decision on placements of staff was made by managers above [REDACTED] in the organization.

On August 29, 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. In [REDACTED] response, dated September 6, 2024, [REDACTED] disagreed with our conclusions. [REDACTED] stated that [REDACTED] did not penalize [REDACTED] for [REDACTED] disagreements, but instead assessed [REDACTED] overall performance against various metrics, including [REDACTED] ability to meet programmatic deadlines for new-chemical assessments. [REDACTED] stated that management had the responsibility to ensure that program goals are met and that the EPA's FY2018-2022 Strategic Plan emphasized the importance of adhering to statutory deadlines. [REDACTED] pointed out that performance ratings are not static and that employees are not entitled to the same rating they received in a previous year. [REDACTED] highlighted that [REDACTED] considered [REDACTED] rebuttal of [REDACTED] rating, and that [REDACTED] adjustment of [REDACTED] rating demonstrated [REDACTED] commitment to fairness in the evaluation process. Finally, [REDACTED] noted that the agency's *Approaches for Expressing and Resolving Differing Scientific Opinions* guidance was not available to [REDACTED] at the time of [REDACTED] rating, as it was published in October 2020.

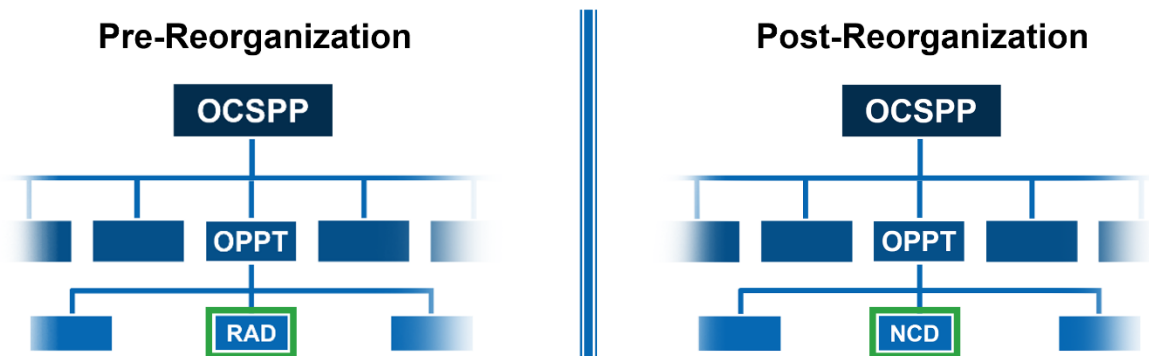
After carefully considering [REDACTED] and [REDACTED] responses, we amended some sections of the report but did not alter our original conclusions.²

Findings of Fact

[REDACTED] is [REDACTED] in the [REDACTED] within the OPPT. [REDACTED] began [REDACTED] EPA career in [REDACTED]. In [REDACTED], [REDACTED] began a detail in RAD, and [REDACTED] position later became permanent. While in RAD, [REDACTED] worked primarily on human health assessments of new chemicals³. In October 2020, during the reorganization of the OPPT, [REDACTED] was moved to [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.⁴ 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; OCSP = Office of Chemical Safety and Pollution Prevention.

Source: OIG analysis of OPPT reorganization. (EPA OIG image)

² While we included what we believe is a reasonable synopsis of both responses, we provide a copy of the full responses with this report.

³ 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.

⁴ 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 the new-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.⁵ RAD staff testified that prior to the 2016 amendment, the division conducted a full 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 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] who were responsible for [REDACTED] testified that Agency leadership was constantly contacting them.⁶ 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 disproportionately 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

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

⁶ 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]. [REDACTED] served as the [REDACTED] manager. Although the [REDACTED] manager oversaw [REDACTED] day-to-day work, [REDACTED] was not [REDACTED] supervisor of record.

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 decision 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 risk 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 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 assessment 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 regarding 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 their 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 [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. The OPPT senior science advisor testified that he and the OPPT deputy director were more likely to have scientific disagreements with [REDACTED] and the other [REDACTED] human health assessors than with other assessors.

[REDACTED] testified that from 2018 through 2020 [REDACTED] expressed differing scientific opinions regarding hazard identification in new-chemicals assessments and that [REDACTED] disagreements increased in frequency over time. [REDACTED] testified that by 2020 [REDACTED] disagreed with the scientific opinions of [REDACTED], the OPPT deputy director, and the OPPT senior science advisor a few times a month. [REDACTED] that was involved with [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 and point of departure selection in certain assessments.⁷ For example, in [REDACTED], [REDACTED] completed the first draft of a new-chemical assessment in which [REDACTED] assessed the new chemical as a reproductive toxicant based on a study of a metabolite. In the assessment, [REDACTED] noted that [REDACTED] did not assess the new chemical using an identified analogue because the analogue was an ester and the study was conducted using an ester vehicle, arachis oil. [REDACTED] testified that dosing test subjects with a vehicle of the same chemical class as the test article could create competition for the same enzymes of metabolism, resulting in an under-presentation of the full toxic effects of the chemical in the study. On January 31, 2020, the OPPT deputy director sent an email with an edited draft of the assessment, noting that [REDACTED] draft was "disappointing" because a "critical review" was not performed. Specifically, she asked why the metabolite was used to assess the new chemical instead of the analogue tested in arachis oil. She hypothesized in her email that the metabolite was chosen because it resulted in a very "extreme conservative" point of departure. In February 2020 the EPA communicated with the chemical submitter, which objected to the classification of its chemical as a reproductive toxicant and disagreed with [REDACTED] opinions regarding the test conducted in arachis oil. The official notes from a July [REDACTED], 2020 call with the chemical submitter reflect that there was a discussion of vehicle considerations and enzyme competition, in which the OPPT senior science advisor said the submitter was "raising valid points." In a second call with the submitter, held on August [REDACTED] 2020, the OPPT senior science advisor told the chemical submitter that the EPA would remove reproductive toxicity from the hazard communication due to analogue data. The OPPT senior science advisor testified that he disagreed with [REDACTED] regarding the applicability of the tests conducted in arachis oil and whether that could mask the toxicity of the test

⁷ Points of departure 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, also known as the lowest observable adverse effect level or if no effects are observed in the study, the highest tested dose at which there was no adverse effect, also known as the no observed adverse effect level.

article. The assessment was finalized on February [REDACTED], 2021, and used the analogue that was tested in arachis oil.

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 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]

[REDACTED] testified that all assessors had delays, and one noted that assessors who did not express scientific disagreements processed cases faster.

[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 the [REDACTED] manager 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] "barked" at [REDACTED], and the OPPT senior science advisor and asked why the [REDACTED] team was not completing assessments more quickly. [REDACTED] recalled the Office of Chemical Safety and Pollution Prevention [REDACTED]

[REDACTED] communicating that RAD supervisors needed to have a "firm hand" and push timelines. [REDACTED]

[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. For example, the OPPT senior science advisor flagged when the assessors disagreed with or "resist[ed]" their edits and notified RAD management. On April 30, 2020, the OPPT deputy director messaged the [REDACTED] manager and [REDACTED], calling [REDACTED] human health assessors the "worst 'conservationist[s]'" and complaining that they were "trying to indict every chemical." [REDACTED]

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] RAD supervisor, many of [REDACTED] coworkers from RAD, and at least one of [REDACTED] coworkers 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, 2021, Public Employees for Environmental Responsibility filed an additional OIG Hotline complaint 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 seven actions against [REDACTED] in retaliation for [REDACTED] differing scientific opinions, protected activities, and protected disclosures: (1) issued [REDACTED] a lower rating for one critical element in [REDACTED] performance evaluation for FY 2020 than the previous year, (2) denied [REDACTED] compensatory time in July 2020, (3) reassigned [REDACTED] to [REDACTED] in October 2020, (4) failed to select [REDACTED] for a [REDACTED] position in June and July 2022, (5) failed to select [REDACTED] for a [REDACTED] position in June 2022, (6) failed to select [REDACTED] for a [REDACTED] detail in July 2022,⁸ and (7) subjected [REDACTED] to harassment in 2019 and 2020.

1. Critical Element in FY 2020 Performance Evaluation

[REDACTED] supervisor rated [REDACTED] as “[REDACTED]” in [REDACTED] FY 2019 performance evaluation.⁹ Out of the four critical elements within [REDACTED] evaluation, [REDACTED] received one rating of “[REDACTED]” and [REDACTED]

⁸ “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.

⁹ 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.”

ratings of “██████████.” ██████ reported to the same supervisor in FY 2019 and FY 2020, who described ██████ as “██████████” and a “██████████.”

In March 2020, the RAD new chemicals assessors were split into two teams: a backlog team and an incoming-submissions team. ██████ was assigned to the ████████████████████, whereas ██████ supervisor was assigned to the ████████████████████. While on the ████████████████████, ██████ day-to-day work was managed by the ████████████████████ manager. ██████ described ██████ as “██████████.”

As noted above, scientific disagreements between assessors and OPPT management led to delays. According to the testimony of management, however, such disagreements were 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. ██████ ██████████ testified that all assessors, regardless of whether they expressed scientific disagreements, had cases that were delayed for various reasons.

The OPPT deputy director and the OPPT senior science advisor commented to the ████████████████████ manager and the RAD supervisors that the ████████████████████ human health assessors’ scientific disagreements were a performance issue. The OPPT deputy director stated in an email that the ████████████████████ human health assessors’ failure to use her approach to assessments could be considered insubordination.¹⁰ Management that attended the disposition meetings confirmed, however, that the assessors were not given direct orders to make changes in their assessments, and it is not clear that actual insubordination occurred.

In November 2020, ████████████████████ supervisor issued ██████ performance evaluation for FY 2020. Although ██████ received the same overall rating as the previous year, ██████ FY 2020 rating for critical element one, “Project Management and Technical Support to New Chemicals,” notably decreased by ██████████, from a rating of an ██████████” in FY 2019 to “██████████” in FY 2020.

██████████ testified that ██████ FY 2020 evaluation of ██████ reflected feedback that ██████ received from the OPPT deputy director, the OPPT senior science advisor, and ████████████████████. ██████ explained that the OPPT deputy director and the OPPT senior science advisor were frustrated with the ████████████████████ human health assessors’ scientific disagreements because they caused delays. Specifically, ████████████████████ supervisor received input that ██████ risk assessments were in a “never-ending rework cycle.” ██████ explained that part of the rework cycle was due to disagreements with the OPPT deputy director and the OPPT senior science advisor. When ██████ work was not moving due to rework, ████████████████████ supervisor would sometimes complete ██████ assessments. The supervisory comments accompanying ██████ rating for critical element one specifically stated that the supervisor’s intervention was due to delays caused by “differences of opinion.”

¹⁰ The OPPT deputy director declined the OIG’s request for an interview.

██████████ supervisor's comments regarding critical element one stated in part, that ██████████ was "██████████" and that ██████████ "██████████" ██████████. The supervisor testified that ██████████ expected ██████████ staff to solve disagreements, including differing scientific opinions, and that they were expected to make compromises to complete the new-chemicals assessments.

██████████ supervisor explained that, at the time of ██████████ FY 2020 performance evaluation, the division did not have "the sensitivity about having ... differing scientific opinions like we have right now," so ██████████ did not distinguish between delays caused by scientific disagreements or those caused by other aspects of the workflow. ██████████ testified, at the time, ██████████ thought ██████████ could take "scientific differences" into consideration but that if someone had explicitly told ██████████ to not consider differing scientific opinions in ██████████ performance evaluation, ██████████ rating for critical element one might have been different. In ██████████ response to our tentative conclusions, ██████████ supervisor confirmed that timeliness and ability to meet programmatic deadlines were considered in ██████████ performance evaluation.

2. Denied Compensatory Time

On Thursday, July 23, 2020, ██████████ emailed ██████████ supervisor to request to use six hours of compensatory time over the weekend. By the end of the day, the ██████████ supervisor had not responded to ██████████ email, so ██████████ called ██████████ the next day to follow up. After ██████████ called ██████████ supervisor, ██████████ approved ██████████ compensatory time for July 25 and 26, 2020.

The following week, on Thursday July 30, 2020, ██████████ emailed ██████████ supervisor requesting to work eight hours of compensatory time the next day. ██████████ believes that ██████████ went to ██████████ supervisor's office to ask whether ██████████ saw ██████████ email, and ██████████ said that ██████████ would look at it. ██████████ did not respond to ██████████ email. ██████████ did not inquire further because ██████████ did not want to annoy ██████████. ██████████ worked on July 31, 2020, but did not enter the hours into the Agency's payroll and timekeeping system.

██████████ testified that sometimes ██████████ supervisor responded promptly to requests regarding earning or using compensatory time but sometimes ██████████ would take days to respond. ██████████ gave an example in which ██████████ submitted ██████████ request to use two hours of compensatory time three days in advance and did not hear from ██████████ until the day of the requested leave.

3. Reassignment to ██████████

In April 2020, the OPPT immediate office began to consider a reorganization and staffing decisions for the new divisions.

On May 13, 2020, ██████████ sent a proposed organizational chart to the OPPT director, the OPPT senior science advisor, and the director of the OPPT Information Management Division. The chart included separate divisions to assess new and existing chemicals and noted which staff members should

be in each. The chart placed ██████ in the New Chemicals Division, not ██████. ██████ testified that ██████ placed ██████ in the New Chemicals Division because at that time ██████ was working on assessments of new chemicals. The ██████ chart also listed ██████ as a ██████ and the other staff in ██████ proposed branch as human health assessors. The ██████ explained that ██████ are higher-compensated staff who do more complex work and that such positions are offered as an advancement opportunity to help retain staff.

The next day, May 14, 2020, the OPPT senior science advisor emailed his “concern[s]” regarding the ██████ chart. Specifically, he wrote that ██████ placement gave him “concern,” adding that ██████ was not a ██████ because ██████ assessments always required extensive revisions. The OPPT senior science advisor testified that the division wanted to place a “senior person” in the ██████ position who would review others’ work and that ██████ was not right for that role because ██████ work lacked explanations and required extensive revisions. ██████ testified that ██████ believed the OPPT senior science advisor’s email was referring to ██████ “risk hunting” and engaging in “back and forth on the science.” The OPPT senior science advisor’s email added, “[t]here are ██████ people who should not be in the same branch or on the same project,” and mentioned the ██████ human health assessors by name. The OPPT senior science advisor testified that he believed those assessors needed to be separated because they were not collaborative and engaged in “group think.” ██████ testified that ██████ heard from others that the ██████ of them were “pot stirrers” and would “convene and ... talk too much,” which would lead to new-chemicals assessments taking longer to complete. Also in his May 14, 2020 email, the OPPT senior science advisor noted that he would place ██████ in one of the existing-chemicals divisions. He testified that he thought that ██████ was better suited for existing chemicals work because existing chemicals assessments are completed on a “slower” timeline.

██████████ testified that, as a direct result of the OPPT senior science advisor’s email, ██████ moved ██████ from the New Chemicals Division to the ██████ and changed ██████ from a ██████ to a human health assessor. In June 2020, the ██████ told RAD management that ██████ needed to be in the ██████. On July 16, 2020, the OPPT deputy director altered an organizational chart to move ██████ from the New Chemicals Division to the ██████, and she noted that the edited organizational chart was based upon RAD’s latest input. In October 2020, ██████ was moved to the ██████ as part of the OPPT reorganization.

4. Nonselection for a ██████ Position

On May 4, 2022, ██████ applied for a position as a ██████ in the OPPT via USAJobs, which is the federal government’s official employment website. On June 8, 2022, a certificate of eligible candidates was issued by EPA human resources. Due to the lack of candidates who qualified for the

highest qualification category, a second certificate of eligible candidates was issued on July 11, 2022. [REDACTED] was not included on either certificate.¹¹

A human resources specialist reviewed [REDACTED] application materials to ensure that [REDACTED] application was complete and that [REDACTED] met the eligibility and qualification requirements. The human resources specialist testified that she had never interacted with or heard of [REDACTED] prior to reviewing [REDACTED] application materials. Upon her review, she determined that [REDACTED] application materials did not reflect the required qualifications for the position. The USAJobs vacancy announcement for the position listed four technical qualifications that applicants needed to demonstrate to qualify.¹² The human resources specialist testified that [REDACTED] application materials addressed slightly different technical qualifications from a vacancy announcement for a different position. Specifically, the human resources specialist determined that [REDACTED] submitted materials did not address the posting's third technical qualification. While [REDACTED] narratives for the first and second technical qualifications contained information related to the third technical qualification, the human resources specialist could not consider that information when assessing the third technical qualification. This is because EPA human resources requires that applicants address and submit narratives for each technical qualification *separately*. Because [REDACTED] application materials did not separately address the third technical qualification, the human resources specialist did not put [REDACTED] name on either certificate of eligible applicants.

5. Nonselection for a [REDACTED] Position

On June 3, 2022, a position as a [REDACTED] in the Office of Research and Development, Office of Science Advisor, Policy, and Engagement, Science Policy Division was posted on USAJobs. [REDACTED] applied, and a human resources staffing specialist reviewed [REDACTED] application to determine whether it was complete and whether [REDACTED] met the eligibility and qualification requirements for the position. The human resources staffing specialist testified that she had never interacted with or heard of [REDACTED] prior to reviewing [REDACTED] application materials. She determined that [REDACTED] application was incomplete. The vacancy announcement stated that applicants must submit their most recent performance appraisal, which had to be either signed and dated within the last 18 months or accompanied by an explanation of why it was not. [REDACTED] performance appraisal was not signed within

¹¹ Initially, [REDACTED] application was marked as "not submitted" on USAJobs, due to a technical issue that caused applications marked as "incomplete" to appear to the applicant as "not submitted." This technical issue was ultimately fixed, and [REDACTED] application was marked as "incomplete."

¹² The four technical qualifications listed in the vacancy announcement were (1) "demonstrated experience managing, directing, developing and providing guidance and policy direction for human health and/or ecological risk assessment policies and initiatives related to the development and use of traditional and advanced toxicology testing techniques, including new approach methodologies, chemical exposure estimation methods, species and dose-response extrapolation, and probabilistic risk estimation;" (2) "demonstrated experience applying advanced risk assessment methodologies to current domestic and international risk assessment issues related to chemical regulation;" (3) "demonstrated experience directing and providing guidance to teams on policy development and analysis, and activities related to risk-assessment strategies;" and (4) "demonstrated experience communicating complex and politically sensitive environmental policy issues to higher management and externally."

18 months of [REDACTED] application, and [REDACTED] did not upload an explanation. Another applicant was also determined to be ineligible because their performance appraisal was not signed.

6. Nonselection for [REDACTED] Detail in July 2022

On May 24, 2022, the New Chemicals Division posted two [REDACTED] details on an internal EPA job board. [REDACTED] was one of six applicants, all of whom were interviewed by a three-person panel consisting of the two [REDACTED] supervisors and [REDACTED]. The final selection was made by the [REDACTED].

In their interview notes, all three members of the panel remarked that [REDACTED] possessed strong technical skills. However, they also discussed concerns regarding [REDACTED] interpersonal skills. The panel observed that [REDACTED] was the only interviewee who did not turn on [REDACTED] camera, despite being asked to do so. A panel member noted that [REDACTED] does not recommend selecting individuals who do not turn on their camera. Another panel member expressed that turning the camera on was an essential part of connecting with the team, a requisite for a leader such as a [REDACTED]. The panel members also discussed their concern that [REDACTED] does not always get along with [REDACTED] colleagues. One panelist noted that [REDACTED] had observed [REDACTED] talk down to other assessors, and another panelist shared that a former employee came to them crying due to an interaction with [REDACTED] and cited [REDACTED] as a primary reason for departing the division.

Based on the interviews, the [REDACTED] conducted a reference check for the three highest-scoring individuals, which included [REDACTED]. As part of this reference check, [REDACTED] expressed high confidence in the quality of [REDACTED] work, [REDACTED] dependability, and [REDACTED] technical capabilities. However, [REDACTED] noted mixed experiences with [REDACTED] ability to get along with others. [REDACTED] explained that [REDACTED] is a good team player and has had success mentoring interns, but [REDACTED] said that [REDACTED] has had some interpersonal conflicts and that [REDACTED] is careful when pairing [REDACTED] with others. [REDACTED] noted that [REDACTED] made it easy to put the “previous challenges” regarding scientific integrity behind [REDACTED] and that [REDACTED] would recommend [REDACTED] for the position of [REDACTED], as long as [REDACTED] had the right team. Based on the reference check, [REDACTED] called [REDACTED] supervisor to gather more information. [REDACTED] supervisor informed [REDACTED] that [REDACTED] would be a good addition to a “healthy, functioning team” but was working on high-priority matters in the [REDACTED] and that losing [REDACTED] would be difficult.

Ultimately, [REDACTED] selected the other two top candidates, based in large part on their stronger mentoring and leadership abilities. [REDACTED] believed these abilities were critical, as the New Chemicals Division was in a period of growth and transition. In a memorandum documenting [REDACTED] selection, [REDACTED] gave three reasons for not selecting [REDACTED]. [REDACTED] was needed by the [REDACTED], the New Chemicals Division team was not yet healthy and fully functional, and [REDACTED] was already a [REDACTED] and thus did not need the detail opportunity for promotion. On July 26, 2022, [REDACTED] informed [REDACTED] that [REDACTED] was not selected for the detail.

█ testified that starting around 2019, the OPPT senior science advisor engaged in retaliatory harassment via comments in work product and criticism in meetings, which █ found “insulting.” █ discussed multiple instances in which the OPPT senior science advisor raised his voice at █ when discussing scientific disagreements. For example, █ recalled a meeting in March 2020 in which the OPPT senior science advisor shouted at █ that a chemical submitter was angry with █ new-chemicals assessment and that █ would need to “delete these hazards.” █ noted that, although he would shout and use profanity, the OPPT senior science advisor never insulted █ personally. However, █ observed him making personal insults about other assessors and said that one time he called █ “quirky.”

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 the Whistleblower Protection Act to all EPA employees who uncover or report allegations of scientific and research misconduct or who express a differing scientific opinion.¹⁴

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.¹⁵ 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.

¹⁴ We did not assess the EPA’s authority to extend the statutory protections of 5 U.S.C. § 2302 via Agency policy.

¹⁵ 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.

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).¹⁶ 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.¹⁷

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.¹⁸ “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.¹⁹ 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).²⁰

¹⁶ *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).

¹⁷ *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999).

¹⁸ 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).

¹⁹ *Marano v. Dep’t of Justice*, 2 F.3d 1137 (Fed. Cir. 1993).

²⁰ 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.

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).²¹ 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.²²

Analysis

█████ is an EPA employee. █████ alleges that individuals with personnel authority took personnel actions against █████ in retaliation for expressing differing scientific opinions, engaging in protected activity, and making a protected disclosure. As █████ has alleged a violation of 5 U.S.C. § 2302(b)(8), § 2302 (b)(9), and a violation of the EPA's *Scientific Integrity Policy*, the OIG has jurisdiction over █████ retaliation allegations.

Did █████ Express a Differing Scientific Opinion, Engage in Protected Activities, or Make a Protected Disclosure?

█████ disagreements with █████ ██████████, the OPPT deputy director, and the OPPT senior science advisor from 2018 through 2020 regarding hazard identification in new-chemicals assessments constituted differing scientific opinions. We obtained testimony and documentary evidence confirming that █████ 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, █████ 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, █████ was widely perceived by OPPT and RAD management to have made differing scientific opinions. RAD management involved in new-chemicals assessments, including █████ ██████████, testified that █████ and the other ██████████ human health assessors were more likely than other assessors to disagree about scientific decisions made in assessments. RAD management also testified that OPPT management perceived █████ as making differing scientific opinions, in particular that the OPPT deputy director and the OPPT senior science advisor complained about █████ and the other ██████████ human health assessors' differing scientific opinions.

²¹ 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).

²² *Carr v. Social Sec. Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

█████ engaged in protected activity when █████ reported █████ and to the Labor and Employee Relations Division in 2019 and 2020. Exercising a complaint or grievance right granted by law, rule, or regulation is a protected activity under 5 U.S.C. § 2302(b)(9)(A). █████ constitutes an Agency rule. █████ further engaged in protected activity when █████ provided information to the OIG via OIG Hotline complaints filed by the Public Employees for Environmental Responsibility 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).

█████ also made at least one protected disclosure in █████ 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*. As such, it was reasonable for █████ to believe that referencing differing scientific opinions in a performance evaluation is evidence of a violation of a rule. Accordingly, █████ made at least one protected disclosure.²³

Was a Personnel Action Taken Against, Threatened, or Withheld from █████ ?

█████ alleged seven retaliatory actions in the information provided in █████ Hotline complaints to the OIG: (1) a lower rating for critical element one in █████ performance evaluation for FY 2020 than the previous year, (2) denied compensatory time in July 2020, (3) a reassignment to the █████ in October 2020, (4) a nonselection for a █████ position in June and July 2022, (5) a nonselection for a █████ position in June 2022, (6) a nonselection for a █████ detail in July 2022, and (7) harassment in 2019 and 2020.

1. Critical Element in FY 2020 Performance Evaluation

In November 2020, █████ received █████ performance evaluation for FY 2020, in which █████ received a "█████" rating for critical element one. A performance evaluation is among the personnel actions specifically enumerated in the statute. 5 U.S.C. § 2302(a)(2)(viii).

2. Denied Compensatory Time

On July 30, 2020, █████ requested to earn compensatory time. █████ supervisor did not respond to █████ email and as such, █████ worked compensatory time but did not enter it into the Agency's timekeeping system. The Whistleblower Protection Act prohibits the failure to take a personnel action. "Failure" is defined as the "nonperformance of something that is due, required or expected."²⁴ █████ testified that sometimes █████ supervisor responded promptly to requests for compensatory time but sometimes █████ would take days to respond. The previous week, █████ requested compensatory time from █████

²³ For the purposes of this analysis, we did not assess whether each allegation contained within the complaints constituted a protected disclosure.

²⁴ *Special Counsel v. Brown*, 61 M.S.P.R. 559, 568 (1994).

supervisor two days in advance, and [REDACTED] did not respond. [REDACTED] followed up on [REDACTED] request the next day, and the compensatory time was approved.

[REDACTED] submitted [REDACTED] July 30, 2020 compensatory time request the day before [REDACTED] intended to use it. After [REDACTED] supervisor told [REDACTED] that [REDACTED] would look at [REDACTED] email, [REDACTED] did not follow up because [REDACTED] did not want to annoy [REDACTED]. Given that [REDACTED] supervisor did not always respond to [REDACTED] requests for compensatory time without follow-up and that [REDACTED] did not follow up on this request, [REDACTED] cannot show by a preponderance of the evidence that the compensatory time was due, required, or expected. As such, [REDACTED] supervisor's failure to respond to [REDACTED] request does not constitute the failure to take a personnel action.

3. Reassignment to the [REDACTED]

In October 2020, [REDACTED] was reassigned to the [REDACTED] as a part of the OPPT reorganization. A reassignment is among the personnel actions specifically enumerated in the statute. 5 U.S.C. § 2302(a)(2)(iv).

4. Nonselection for a [REDACTED] Position

In May 2022, [REDACTED] applied for a [REDACTED] position in OPPT. [REDACTED] was not included on the certificate of eligible candidates and as such was not selected for or appointed to the position. An appointment is among the personnel actions specifically enumerated in the statute. 5 U.S.C. § 2302(a)(2)(A)(i). Accordingly, a nonselection for a position is the failure to take a personnel action.

5. Nonselection for a [REDACTED] Position

In June 2022, [REDACTED] applied for a [REDACTED] position. [REDACTED] was not included on the certificate of eligibles and as such was not selected for or appointed to the position. An appointment is among the personnel actions specifically enumerated in the statute. 5 U.S.C. § 2302(a)(2)(A)(i). Accordingly, a nonselection for a position is the failure to take a personnel action.

6. Nonselection for a [REDACTED] Detail

In May 2022, [REDACTED] applied for a [REDACTED] detail. In July 2022, [REDACTED] was informed that [REDACTED] was not selected for or appointed to the position. An appointment is among the personnel actions specifically enumerated in the statute. 5 U.S.C. § 2302(a)(2)(A)(i). Accordingly, a nonselection for a position is the failure to take a personnel action.

7. Harassment

[REDACTED] alleged that [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)(xi).²⁵ [REDACTED] alleges that [REDACTED] was subjected to harsh disagreements with [REDACTED] scientific opinions, criticism of [REDACTED] scientific opinions, and yelling. Verbal criticism and rudeness are not usually considered personnel actions.²⁶ 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.²⁷ 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] performance evaluation, [REDACTED] reassignment, and [REDACTED] three nonselections constitute personnel actions under 5 U.S.C. § 2302(a)(2). [REDACTED] denied compensatory time 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 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.²⁸ After assessing these two factors, knowledge and timing, we determined that [REDACTED] differing scientific opinions, protected activities, and protected disclosure were contributing factors in three personnel actions: the rating for critical element one in [REDACTED] FY 2020 performance evaluation, [REDACTED] reassignment, and [REDACTED] nonselection for the [REDACTED] detail. After assessing the same two factors, we determined that [REDACTED] differing scientific opinions, protected activities, and protected disclosure were not contributing factors in [REDACTED] nonselections for the [REDACTED] position and the [REDACTED] position.

Critical Element in FY 2020 Performance Evaluation

[REDACTED] expressed differing scientific opinions regarding hazard identification in new-chemicals assessments from 2018 through 2020, and [REDACTED] expression of [REDACTED] differing scientific opinions increased in

²⁵ *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).

²⁶ *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) (holding that an oral counseling does not constitute disciplinary or corrective action within the coverage of the Whistleblower Protection Act).

²⁷ *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. 60, 618-19 (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).

²⁸ 5 U.S.C. § 1221(e).

frequency over time. [REDACTED] supervisor, who completed [REDACTED] performance evaluation, had direct knowledge of [REDACTED] differing scientific opinions. [REDACTED] expressed many of [REDACTED] differing scientific opinions during the disposition meetings, which [REDACTED] supervisor attended. [REDACTED] supervisor testified that [REDACTED] knew about [REDACTED] differing scientific opinions, and [REDACTED] explicitly mentioned them in [REDACTED] performance evaluation, which [REDACTED] verbally communicated to [REDACTED] in September 2020 and provided to [REDACTED] in writing in November 2020. The timing between [REDACTED] differing scientific opinions and [REDACTED] FY 2020 performance evaluation was less than a year, which is a reasonable amount of time to conclude that they were a contributing factor in the personnel action.²⁹

[REDACTED] supervisor also had direct knowledge of [REDACTED] protected activities. [REDACTED] [REDACTED]. In addition, in October 2019 and February 2020, [REDACTED] received emails from [REDACTED] that detailed [REDACTED] allegations of retaliation and harassment. [REDACTED] discussed [REDACTED] October 2019 email with a labor and employee relations specialist and called [REDACTED] “unhinged.” The timing between [REDACTED] protected activities and [REDACTED] FY 2020 performance evaluation was a year, which is a reasonable amount of time to conclude that they were a contributing factor in the personnel action.

Reassignment to the [REDACTED]

[REDACTED] expressed differing scientific opinions as early as 2018 and continued to do so through [REDACTED] reassignment in October 2020. [REDACTED], who reassigned [REDACTED] had actual knowledge of [REDACTED] differing scientific opinions at the time as [REDACTED] had received and responded to a February 26, 2020 email from [REDACTED] detailing some of [REDACTED] differing scientific opinions. Additionally, [REDACTED] testified that the decision to reassign [REDACTED] to the [REDACTED] was largely influenced by the OPPT senior science advisor. The OPPT senior science advisor was also aware of [REDACTED] differing scientific opinions, as they were often expressed directly to him in meetings and work products. The OPPT senior science advisor testified that he was more likely to have scientific disagreements with [REDACTED] and the [REDACTED] [REDACTED] human health assessors than with other assessors. [REDACTED] testified that [REDACTED] reassigned [REDACTED] in response to the OPPT senior science advisor’s feedback.³⁰ The timing between [REDACTED] differing scientific opinions and [REDACTED] reassignment was less than a year, which is a reasonable amount of time to conclude that they were contributing factors in the personnel action. The OIG does not have evidence to establish that the OPPT senior science advisor or [REDACTED] was

²⁹ 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).

³⁰ In addition to actual knowledge, this demonstrates that [REDACTED] also had constructive knowledge of [REDACTED] differing scientific opinions. Constructive knowledge can be shown by demonstrating that an individual with actual knowledge of the disclosure, here the OPPT senior science advisor, influenced the official taking the retaliatory action. *Dorney v. Dep’t of the Army*, 117 M.S.P.R. 480, 485 (2012); *Aquino v. Dep’t of Homeland Sec.*, 121 M.S.P.R. 35, ¶ 19 (2014).

aware of [REDACTED] 2019 and 2020 protected activities. As such, they were not a contributing factor in the reassignment.

Nonselection for a [REDACTED] Detail

The decision to not select [REDACTED] for the [REDACTED] detail was made by [REDACTED]. Although [REDACTED] was not in RAD at the time of [REDACTED] differing scientific opinions, knowledge of the differing scientific opinions can still be imputed to [REDACTED].³¹ The nonselection was influenced by a panel of interviewers, including [REDACTED], who attended RAD disposition meetings and testified about [REDACTED] differing scientific opinions. The nonselection was also influenced by [REDACTED] supervisor, who specifically raised [REDACTED] “previous challenges” regarding scientific integrity. [REDACTED] was reassigned in October 2020 from [REDACTED] new-chemicals work in RAD, which is where [REDACTED] expressed [REDACTED] differing scientific opinions. [REDACTED] testified that [REDACTED] differing scientific opinions increased in frequency over time and that by 2020, [REDACTED] disagreed with management a few times a month.³² The timing between October 2020 and [REDACTED] July 2022 nonselection for the [REDACTED] detail was approximately 21 months, which is a reasonable amount of time to conclude that they were a contributing factor in the personnel action.³³ Further, prior to [REDACTED] nonselection, [REDACTED] engaged in protected activity and made a protected disclosure when [REDACTED] provided information to the OIG via Public Employees for Environmental Responsibility in June and August 2021. [REDACTED] as well as members of the interview panel were aware of [REDACTED] protected activity and disclosure, as the complaint with [REDACTED] name unredacted was sent to them the day after [REDACTED] activity. The timing between [REDACTED] protected activity and protected disclosure and [REDACTED] nonselection was approximately thirteen months, which is a reasonable amount of time to conclude that it was a contributing factor in the action.

Nonselections for the [REDACTED] Position and the [REDACTED] Position

[REDACTED] nonselections for the [REDACTED] position and the [REDACTED] position were due to disqualification decisions made by two human resources specialists. Both human resources specialists testified that they did not know who [REDACTED] was prior to reviewing [REDACTED] application materials, nor did they have knowledge of [REDACTED] differing scientific opinions, protected activities, or protected disclosures. Because the human resources specialists did not have knowledge of [REDACTED]

³¹ 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 the Army*, 117 M.S.P.R. 480, 485 (2012); *Aquino v. Dep’t of Homeland Sec.*, 121 M.S.P.R. 35, ¶ 19 (2014).

³² [REDACTED] may have expressed differing scientific opinions while working in the [REDACTED]. However, the scope of this investigation was limited to the allegations as outlined in Public Employees for Environmental Responsibility’s disclosures to the OIG, which encompassed retaliation for differing scientific opinions regarding hazard identification in assessments of new chemicals. As such, retaliation for differing scientific opinions expressed in the [REDACTED] is outside of the scope of this investigation.

³³ *Mastrulleo v. Dep’t of Labor*, 123 M.S.P.R. 110, ¶ 20 (2015) ((concluding that appellant’s Aug. 2010 disclosure were a contributing factor in the agency’s failure to give him a 40-hour time off award in June 2012).

differing scientific opinions, protected activities, or protected disclosures, it is not reasonable to conclude that they were contributing factors in [REDACTED] nonselections.

Conclusion

In summary, because management had knowledge of [REDACTED] differing scientific opinions, protected activities, and protected disclosures and because the personnel actions were taken within two years of that knowledge, we determined that [REDACTED] established by a preponderance of the evidence that [REDACTED] differing scientific opinions, protected activities, and protected disclosures were contributing factors in the rating for critical element one in [REDACTED] FY 2020 performance evaluation, [REDACTED] reassignment, and in [REDACTED] nonselection for the detail. Finally, because the human resources specialists did not have knowledge of [REDACTED] differing scientific opinions or protected activities, we determined that [REDACTED] could not establish by a preponderance of the evidence that [REDACTED] differing scientific opinions or protected activities were contributing factors in [REDACTED] nonselections for the [REDACTED] position and the [REDACTED] position.

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 activities, or protected disclosures. 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]” for critical element one in [REDACTED] FY 2020 performance evaluation or that it would have reassigned [REDACTED] to the [REDACTED] in the absence of [REDACTED] differing scientific opinions, protected activities, or protected disclosure in violation of the EPA’s Scientific Integrity Policy and the Whistleblower Protection Act. Analysis of the same three factors led us to determine that the EPA could establish by clear and convincing evidence that it would have not selected [REDACTED] for the [REDACTED] detail in the absence of [REDACTED] differing scientific opinions, protected activity, and protected disclosure.

FY 2020 Performance Evaluation

[REDACTED] was rated as “[REDACTED]” in [REDACTED] FY 2020 performance evaluation. Although [REDACTED] received the same overall rating as the previous year, [REDACTED] FY 2020 rating for critical element one decreased by

two levels, from a rating of “██████████” to “██████████.” The supervisory comments for critical element one directly referenced ██████████ differing scientific opinions and the timeliness of ██████████ work product. They provided no other feedback regarding other areas for improvement or no other explanations for ██████████ evaluation in this element. The supervisory comments specifically mentioned that differing scientific opinions caused case delays, and ██████████ supervisor corroborated this fact in ██████████ testimony. ██████████ also testified that if ██████████ been told to not consider differing scientific opinions in ██████████ performance evaluation, ██████████ rating for critical element one might have been different.

In writing ██████████ FY 2020 performance evaluation, ██████████ supervisor relied on feedback from management officials who expressed animus regarding ██████████ differing scientific opinions. ██████████ testified that ██████████ evaluation was based, in part, on input from the OPPT deputy director and the OPPT senior science advisor. ██████████ testified that both officials were frustrated with the differing scientific opinions expressed by ██████████ and others because they were too conservative and caused delays. This testimony was corroborated by ██████████ and ██████████, who testified that the OPPT deputy director and the OPPT senior science advisor complained about ██████████ differing scientific opinions. This testimony was also corroborated by documentary evidence. The OPPT deputy director said in an email that ██████████ failure to take ██████████ approach to assessments constituted insubordination. In a message to the OPPT deputy director, the OPPT senior science advisor used the term the “toxic ██████████” to describe ██████████ and the ██████████ human health assessors, who were viewed as more likely to express scientific disagreements than other assessors. In addition to the animus regarding ██████████ differing scientific opinions, ██████████ ██████████ may also have been influenced by ██████████ own animus regarding ██████████ protected activities. ██████████ reacted to ██████████ October 2019 email alleging harassment by calling ██████████ “unhinged” and ██████████ testified that ██████████ due to ██████████ allegations.

There are no apt comparators by which to evaluate ██████████ FY 2020 performance evaluation. The ██████████ team had ██████████ human health assessors, including ██████████ these assessors expressed differing scientific opinions. While other new-chemicals human health assessors also reported to ██████████ supervisor, they did not have the same ██████████ for their work. ██████████

We find that the Agency’s support for ██████████ lower rating in critical element one is based upon explicit references to ██████████ differing scientific opinions. After reviewing the Agency’s support for ██████████ rating, the animus evidence, and the lack of comparators, we determined that the Agency cannot establish by clear and convincing evidence that it would have issued ██████████ a “██████████” rating for critical element one in the absence of ██████████ differing scientific opinions in violation of the EPA’s *Scientific Integrity Policy*. Because the Agency’s support for ██████████ critical element one is based upon information that the Agency is not allowed to consider under Agency policy and because ██████████ supervisor expressed animus regarding ██████████ protected activity, we determined that the Agency cannot establish by clear and convincing evidence

that it would have issued [REDACTED] a “[REDACTED]” rating for critical element one in the absence of [REDACTED] 2019 and 2020 protected activities, in violation of the Whistleblower Protection Act.

Reassignment to the [REDACTED]

The Agency’s support for moving [REDACTED] to the [REDACTED] is weak. [REDACTED] worked on new-chemicals assessments until [REDACTED] was moved to the [REDACTED] in October 2020. [REDACTED] testified that [REDACTED] initially proposed placing [REDACTED] in the New Chemicals Division because at the time [REDACTED] was working on new-chemicals assessments. However, [REDACTED] testified that [REDACTED] ultimately moved [REDACTED] to [REDACTED] after the OPPT senior science advisor expressed concerns that [REDACTED] assessments required extensive revisions. [REDACTED] testified that [REDACTED] understood this to be a reference to [REDACTED] “risk hunting” and “back and forth” scientific discussions.

There was considerable evidence of animus evidence towards [REDACTED] differing scientific opinions from the OPPT senior science advisor. [REDACTED] testified that the OPPT senior science advisor was frequently frustrated with [REDACTED] differing scientific opinions. [REDACTED] testified that [REDACTED] moved [REDACTED] to the [REDACTED] because of the OPPT senior science advisor’s input that [REDACTED] and the other [REDACTED] human health assessors, who were known for making differing scientific opinions, should not be in the same branch or on the same project. [REDACTED] assumed the OPPT senior science advisor was referencing his belief that [REDACTED] and the other assessors were “pot-stirrers” and would cause assessments to take longer to complete. The OPPT senior science advisor confirmed that he was referencing that the [REDACTED] assessors engaged in “group think” and were not “collaborative.”

Although all RAD assessors were moved to newly created divisions as a result of the organization, many of [REDACTED] comparators were still assigned to the division dedicated to new-chemicals work. At the time of the OPPT senior science advisor’s May 2020 email, the proposed organization chart had [REDACTED] [REDACTED] [REDACTED]—in the New Chemicals Division. Between the May 2020 email and the October 2020 reorganization, many assessors were moved, including [REDACTED]. However, of the [REDACTED] human health assessors, only [REDACTED] [REDACTED] human health assessor were moved from the New Chemicals Division.³⁴

We find that the Agency’s support for moving [REDACTED] to the [REDACTED] is based upon references to [REDACTED] differing scientific opinions. We determined that, as a result of this explicit support, the animus evidence, and the comparator evidence, the Agency could not establish by clear and convincing evidence that it would have reassigned [REDACTED] to the [REDACTED] in the absence of [REDACTED] differing scientific opinions in violation of the EPA’s *Scientific Integrity Policy*.

³⁴ One staff member who was initially hired as [REDACTED] [REDACTED] [REDACTED] which is where that staff member was assigned.

Nonselection for a [REDACTED] Detail

In July 2022, [REDACTED] was not selected for a [REDACTED] detail in the New Chemicals Division. The agency's support for not selecting [REDACTED] is strong. Both the panel members and the selecting official testified regarding [REDACTED] interpersonal skills. While the interview panel uniformly remarked on [REDACTED] impressive technical skills, their interview notes all cited concerns regarding [REDACTED] soft skills. Multiple panel members were concerned that [REDACTED] did not turn on [REDACTED] video camera during the interview, despite being asked to do so. They discussed that interpersonal connection is an important function of leadership and that video is an important tool to connect with team members who telework. The panelists also discussed concerns that [REDACTED] does not always get along with [REDACTED] team members. Two panelists recalled specific situations in which [REDACTED] upset coworkers, including one who recalled a coworker crying due to an interaction with [REDACTED]. This concern was also reflected in the feedback that the selecting official received from [REDACTED], who said that [REDACTED] is careful who [REDACTED] pairs [REDACTED] with. [REDACTED] said that [REDACTED] would only be a good addition to a "healthy, functioning team." The selecting official ultimately did not select [REDACTED] in part because the [REDACTED] team was new and was thus not yet a healthy and fully functional team. [REDACTED] also cited the selectees' stronger mentoring and leadership abilities.

We are not aware of any statements of animus regarding [REDACTED] differing scientific opinions, 2021 protected activities, or protected disclosure made by the deciding official or interview panel members. However, during [REDACTED] reference check, [REDACTED] noted that [REDACTED] made it easy to put the "previous challenges" regarding scientific integrity behind [REDACTED]. Notably, [REDACTED] protected activities included raising allegations of *Scientific Integrity Policy* violations to the OIG.

Three comparators were also interviewed for the position and not selected. [REDACTED] was one of six applicants, all of whom were interviewed. [REDACTED] was one of the three top candidates; the other two top candidates were selected for the detail. We are unaware of any protected activity, protected disclosure, or differing scientific opinions made by the three applicants who, similar to [REDACTED] were interviewed but not selected.

We determined that the Agency's strong support for not selecting [REDACTED] outweighed the weak animus and comparator evidence. We find that the Agency could establish by clear and convincing evidence that it would have not selected [REDACTED] for the [REDACTED] detail in the absence of [REDACTED] differing scientific opinions, protected activity, 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 lower critical element in [REDACTED] FY 2020 performance evaluation than the previous year, (2) a reassignment to the [REDACTED], and (3) a nonselection for a [REDACTED] detail. We substantiated [REDACTED] allegations of retaliation with respect to the critical element in [REDACTED] FY 2020

performance evaluation in violation of the EPA's *Scientific Integrity Policy* and the Whistleblower Protection Act. We also substantiated [REDACTED] allegation of retaliation with respect to [REDACTED] reassignment to the [REDACTED] in violation of the EPA's *Scientific Integrity Policy*. We did not substantiate [REDACTED] retaliation allegations with respect to [REDACTED] nonselection for the [REDACTED] detail.

Recommendation

We recommend that the EPA administrator take appropriate corrective action considering these findings. 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).³⁵

³⁵ 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](#).

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