



**Issue Date:**

**ISSUE DATE: 27 MAY 2015**

CASE No: 2008-CAA-00003

*In the Matter of:*

**DOUGLAS EVANS,**  
Complainant,

v.

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

### **Order Granting Partial Summary Adjudication**

The Employer, the United States Environmental Protection Agency (“EPA”), has moved for summary adjudication of this employment protection claim Douglas Evans filed after he was fired. Evans has demonstrated the existence of genuine disputes about whether retaliatory intent played a role in adverse employment actions EPA took. But EPA has shown with uncontroverted proof that it would have taken most of the adverse actions—including termination—nevertheless. For that reason, EPA’s motion for summary decision is granted in part.<sup>1</sup>

#### **A. Procedural Background**

After an investigation, the Secretary of Labor, through the Administrator of the Occupational Health and Safety Administration (“OSHA”), dismissed the complaint for several reasons. One was that Evans failed to allege violations of law that would give rise to a claim for reinstatement under the statutes 29 C.F.R. Part 24<sup>2</sup> implements, to

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<sup>1</sup> See Fed. R. Civ. P. 56(d).

<sup>2</sup> These laws covered by 29 C.F.R. § 24.1(a) include the Energy Reorganization Act of 1974, 42 U.S.C. § 5851; the Toxic Substances Control Act, 15 U.S.C. § 2622; the Safe Drinking Water Act (“SDWA”), 42 U.S.C. § 300j-9(i); the Clean Air Act (“CAA”), 42 U.S.C. § 7622; and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (“CERCLA”), 42 U.S.C. § 9610.

the extent they apply to the federal government.<sup>3</sup> An ALJ dismissed Evans's complaint, an action the Secretary's Administrative Review Board ("ARB") initially affirmed ("*Evans I*").<sup>4</sup> While Evans's appeal to the Court of Appeals for the Ninth Circuit was pending, the Secretary asked the court to remand the dismissal, so the ARB could reconsider it in light of an intervening ARB decision that clarified the standard for dismissal of a complaint.<sup>5</sup> The ARB then reversed the dismissal, and remanded so that Evans could amend his complaint ("*Evans II*").<sup>6</sup>

## **B. Undisputed Facts**

The EPA employed Evans from 1989 until he was fired in August 2007. At the time, Evans worked as an Environmental Protection Specialist at EPA's component known as the Radiation & Indoor Environments Laboratory ("Radiation Lab") in Las Vegas, Nevada. Evans alleges managers at the Lab retaliated against him because he complained about a plan to require all workers to participate in the Lab's response to a radiological emergency, when not all workers at the Lab were trained adequately to respond. He did not specify when his complaints began, but they culminated in a July 2004 letter to the head of the EPA, the Administrator, outlining his concerns about the lab's emergency preparedness training.

In late 2005, Evans believed the Lab's deputy director offered to have him lead one of the Lab's programs, which he took to be an offer of a promotion. He received no promotion, and the program was transferred out of the Radiation Lab. By early 2006, Evans had fallen several lessons behind in preparing an online emergency-response training module, and was under pressure from his supervisor to complete the work. On May 1, 2006, fellow employees allegedly overheard him say things that, given recent news stories about workplace shootings, led them to fear Evans might be contemplating workplace violence if management disciplined him for the unfinished training modules. The Director of the Radiation Lab, Jed Harrison, immediately had Evans removed from the building, placed him on paid administrative leave, and restricted his access to the facilities.

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<sup>3</sup> Neither OSHA nor the ARB, in earlier stages of this proceeding, considered Evans's claims under the Energy Reorganization Act or the Toxic Substances Control Act, for Congress did not waive the government's sovereign immunity under them. Only the claims under CERCLA, the CAA, and the SDWA are before me. *See Evans v. U.S. Evt'l Prot. Agency*, ARB No. 08-059, ALJ No. 2008-CAA-003, slip op. at 2 n.1 (ARB Jul. 31, 2012) ("*Evans I*").

<sup>4</sup> *Evans v. U.S. Evt'l Prot. Agency*, ARB No. 08-059, ALJ No. 2008-CAA-003 (ARB Apr. 30, 2010) ("*Evans I*").

<sup>5</sup> *See Evans II*, ARB No. 08-059 at 5.

<sup>6</sup> *Evans II*, ARB No. 08-059 at 15-16.

Later the same day, Harrison received third-hand allegations that Evans had told another employee that if management disciplined or fired him for the training matter, he would bring a gun to the office and shoot some people. This employee supposedly believed Evans had been under the care of a psychiatrist, was unstable, and might actually carry out such a threat.

The Radiation Lab began an internal investigation of what supervisors perceived as threats by Evans. In the meantime, Evans filed his initial complaint at OSHA, alleging whistleblower retaliation in connection with the 2004 letter to the EPA Administrator, among other activities. After the lab's internal investigation ended, Evans received a Notice of Proposed Removal. Evans was not removed; the Director of the Office of Radiation and Indoor Air (the umbrella agency for the Radiation Lab) determined instead to suspend him for seven days.

On his returned to work in September 2006, Evans was reassigned to a different center within the lab, where his work was to be directed by an employee he outranked. In November 2006, citing hostile workplace and mental health issues, Evans requested his maximum available accrued leave (which exhausted his annual and sick leave), plus another year of leave without pay.<sup>7</sup> Management granted the accrued annual and sick leave, which would be exhausted on May 20, 2007. But EPA denied Evans's request for an additional one-year period of leave without pay because it could not predict its "future work load situation."<sup>8</sup> It set his return-to-work date as May 21, 2007.<sup>9</sup>

Shortly before that return-to-work date, Evans filed a supplemental complaint at OSHA, alleging additional protected activity —*i.e.*, the act of filing the original OSHA complaint—as well as additional adverse employment actions dating from late August 2006.

On May 8, 2007, Evans' attorney renewed the request for leave without pay, citing no improvement "in the conditions that were the basis for the medical documentation" that had been the basis for his six-months of leave.<sup>10</sup>

EPA denied this request on May 15, 2007, because Evans had exhausted the leave available under the Family and Medical Leave Act. His request indicated there had been no change in the condition that led to the leave already granted. What he did submit gave no clear indication of the duration of any additional leave, nor did it give reason

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<sup>7</sup> Motion, Ex. Z.

<sup>8</sup> Motion, Ex. AA.

<sup>9</sup> Motion, Ex. AA.

<sup>10</sup> Motion, Ex. CC.

to expect that he would return to work. The workload at the Radiation Lab required him to be there.

The day Evans should have returned, his lawyer wrote that Evans had been unable to obtain an updated report on his medical condition from his therapist; he offered no further documentation of Evans' medical condition, but reiterated the therapist's last advice was that Evans not return to work.<sup>11</sup> The next day, May 22, 2007, EPA denied Evans's renewed request for the additional one-year leave without pay. What he had submitted did not meet the criteria for that sort of leave. He offered no current medical assessment that he is incapacitated and unable to work. There was no clear expectation that he would return, or an expected date of return to duty. The current workload of the lab required his contribution. EPA informed Evans that his failure to report left him in AWOL status, and warned he risked removal from federal service.<sup>12</sup> If he had a condition that prohibited him from returning to work and performing the essential duties of his position, he was told he might qualify for disability retirement instead.

For the next two months Evans neither went to work nor communicated his intention to his supervisor. On August 2, 2007, Director Harrison sent a Notice of Proposed Removal based on Evans's extended absence from work without leave.<sup>13</sup> Evans was terminated shortly thereafter. On August 7, 2007, Evans filed a second supplemental complaint with OSHA, alleging that the most recent Notice of Proposed Removal was a further act of employment retaliation. OSHA determined, on November 21, 2007, that he had not suffered retaliation. Evans requested a hearing at the Office of Administrative Law Judges.

### **C. Issues**

EPA makes two claims in its motion for dismissal without trial:

1. Evans did not engage in any protected activity; and
2. Evans has failed to produce evidence sufficient to create triable issues of fact about whether any of his activities, even if found to be protected, motivated any adverse action by the EPA.

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<sup>11</sup> Motion, Ex. DD.

<sup>12</sup> Motion, Ex. EE.

<sup>13</sup> Motion, Ex. FF.

## II. The Standards for Granting Summary Decision

This forum follows much the same practice that prevails in the Article III federal courts in addressing summary judgment.<sup>14</sup> Faced with an employer's motion for summary decision, a complaining worker must present admissible proof of facts sufficient to demonstrate that each element of the claim has been met. "A motion for summary decision after discovery focuses on the [purported] lack of evidence to support the asserted claims."<sup>15</sup> The motion tests whether the statute in question provides a remedy when the admissible evidence is considered, indulging reasonable inferences in the non-moving party's (here, Evans's) favor.<sup>16</sup> If a complainant produces insufficient evidence, then summary decision may spare the parties the time and expense of a hearing whose result would be foreordained by the evidence, or lack of it.<sup>17</sup>

The employer must first explain its contention that, at least as to one element of the claim, the worker has failed to produce sufficient proof of that element or failed to raise a genuine issue of material fact for determination at a hearing.<sup>18</sup> Having done so, the burden shifts to the nonmoving party to show that a genuine issue of material fact remains for trial.<sup>19</sup> A fact is material if it would establish or refute an essential element of an asserted claim.<sup>20</sup> When the record considered as a whole could not allow a reasonable trier of fact to find for the nonmoving party, there is no genuine issue of material fact for trial.<sup>21</sup>

## III. The Employee Protection Provisions of the Environmental Statutes

### A. Scope of the CAA's Whistleblower Protections

The Clean Air Act ("CAA")<sup>22</sup> "is a complex and comprehensive environmental statute enacted to preserve and protect the nation's air and public health."<sup>23</sup> Like the other environmental statutes at issue here, the CAA protects against invidious actions taken in retaliation

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<sup>14</sup> Fed. R. Civ. P. 56.

<sup>15</sup> *Evans II*, ARB No. 08-059 at 10 n.41.

<sup>16</sup> *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (holding that only legally permissible inferences are drawn); *see generally*, *Stauffer v. Wal Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21, slip op. at 2 (ARB Nov. 30, 1999); *Webb v. Carolina Power & Light Co.*, Case No. 93-ERA-42 slip op. at 4-6 (Sec'y July 17, 1995).

<sup>17</sup> *Orr v. Bank of America*, 285 F.3d 764, 781-83 (9th Cir. 2002).

<sup>18</sup> *See generally*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

<sup>19</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

<sup>20</sup> *Far Out Productions, Inc. v. Oskar*, 247 F.3d 986, 992 (9th Cir. 2001).

<sup>21</sup> *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076, 1079 (9th Cir. 2004).

<sup>22</sup> 42 U.S.C. § 7401 *et seq.*

<sup>23</sup> *Tomlinson v. EG&G*, ARB Nos. 11-024, 11-027, ALJ No. 2009-CAA-008, slip op. at 15 (ARB Jan. 31, 2013).

when an employee institutes “a proceeding or any other action to carry out the purposes of the act.”<sup>24</sup> “[P]rotected activity under the CAA is grounded in conditions constituting reasonably perceived violations of the [act]; such conditions can include, among others, the release of unsafe substances into the environment or the release of toxins into the ambient air.”<sup>25</sup>

### **B. Scope of CERCLA’s Whistleblower Protections**

The whistleblower provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) protect an employee against efforts to retaliate because he “has provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.”<sup>26</sup> One purpose of the statute is “to regulate hazardous substances, ‘which, when released into the environment may present substantial danger to the public health or welfare or the environment.’”<sup>27</sup> CERCLA’s definition of “environment” includes, among other things, “surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.” Virtually all conceivable parts of the physical United States are protected, except the interior space of buildings.<sup>28</sup>

### **C. Scope of the SDWA’s Whistleblower Protections**

Congress enacted the Safe Drinking Water Act (“SDWA”)<sup>29</sup> “to assure that water supply systems serving the public meet minimum national standards for protections of public health” and “to assure safe drinking water supplies, protect especially valuable aquifers, and protect drinking water from contamination by the underground injection of waste.”<sup>30</sup> Its whistleblower provision mirrors those of the CAA and CERCLA.<sup>31</sup>

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<sup>24</sup> 42 U.S.C. § 7622(a)(3).

<sup>25</sup> *Tomlinson*, ARB Nos. 11-024, 11-027 at 15 (internal citation and quotations omitted).

<sup>26</sup> 42 U.S.C. § 9610(a).

<sup>27</sup> *Williams v. Dallas Ind. School Dist.*, ARB No. 12-024, ALJ No. 2008-TSC-001, slip op. at 8 (ARB Dec. 28, 2012) (citing 42 U.S.C. § 9602(a)).

<sup>28</sup> *Williams* at 8 (citing *Devers v. Kaiser-Hill Co.*, ARB No. 03-113, ALJ No. 2001-SWD-003, slip op. at 12 (ARB Mar. 31, 2005)).

<sup>29</sup> 42 U.S.C. § 300f *et seq.*

<sup>30</sup> H.R. Rep. No. 93-1185 (1974).

<sup>31</sup> 42 U.S.C. § 300j-9(i).

#### IV. The Parties' Views of the Facts

The mission of EPA's Radiation Lab is "to protect the public and the environment by minimizing exposure to radiation and indoor air pollution through environmental measurements, applied technologies, and education."<sup>32</sup> Evans's role at the Radiation Lab was that of an Environmental Protection Specialist. His job duties, which by all accounts he performed superbly, included such environmental monitoring as air sampling, equipment calibration, and the associated recordkeeping.<sup>33</sup>

##### A. The Emergency Response Training Program

The Radiation Lab has "specific expertise in radiological contamination" and may "find itself in the middle of a local or national emergency warranting timely response to best protect the environment."<sup>34</sup> Emergency response has always been an integral part of its mission. The lab responds "once an event has occurred occasioning the potential for environmental injury . . . [and] is aimed at quantifying it, containing it, and minimizing its deleterious consequences."<sup>35</sup> Part of employees' emergency response training involves "how to fulfill their mission [quantifying and containing radiological contamination] without making the other [toxic and environmental] hazards worse."<sup>36</sup>

Sometime in either 2003 or early 2004, management at the Radiation Lab required that all lab employees be trained to participate in its emergency response programs. Before that, participation had been voluntary. The largest emergency mobilization in recent history had involved only a fraction of those employed.<sup>37</sup>

In response to the change, Evans "raised concerns about such mandatory participation in emergency response plans. [He] was concerned that he and the other employees did not have the training necessary to properly handle the types of hazards that could be involved in an emergency, including radiological and toxic chemical hazards."<sup>38</sup> Indeed, in 1999 or 2000, around ten of the lab's employees had gone to New Mexico to respond to an emergency occasioned by enormous wildfires near Los Alamos National Laboratory. Radiation Lab employees were expected to be prepared to contain a radioactive

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<sup>32</sup> EPA, RADIATION AND INDOOR ENVIRONMENTS NATIONAL LABORATORY 2 (1998), available at <http://www.epa.gov/radiation/docs/rienl/brochure.pdf>.

<sup>33</sup> Hopper Deposition at 12.

<sup>34</sup> *Evans I*, ARB No. 08-059 at 18 (dissenting opinion of Brown, J.).

<sup>35</sup> *Evans I*, ARB No. 08-059 at 18 (dissenting opinion of Brown, J.).

<sup>36</sup> Harrison Deposition at 43–44.

<sup>37</sup> Harrison Deposition at 42.

<sup>38</sup> Davis Declaration, ¶ 4.

smoke plume if the nuclear facilities caught fire. They were to do so without interfering with other agencies' attempts to contain the various types of hazards that might be released, in order not to exacerbate those problems.<sup>39</sup> Several years later, a major high-level radioactive waste facility in eastern Washington State (the Hanford Site) had a fire, and employees of the Radiation Lab were called upon to respond. The lab also had responded to the Chernobyl and Three Mile Island nuclear incidents, and to a fire involving a "highly contaminated" site in Idaho—an incident in which the lab's employees functioned as first responders.<sup>40</sup>

Given the likelihood that the lab's employees would be called upon in future large-scale disaster responses, Evans "was concerned that the training management offered was inadequate, poorly designed, and did not incorporate the precautions necessary to do the job safely."<sup>41</sup> Besides his concerns about employee safety, he felt that the new, mandatory emergency response program "would be ineffective because of the lack of training and the reliance on employees who were unwilling and unable to perform [emergency response] duties in an actual environmental emergency."<sup>42</sup>

Evans says he expressed his concerns to Emilio Braganza, his immediate supervisor, as well as to Jed Harrison, the Director of the Radiation Lab. He says he contacted Kimberly Bynum of the EPA Office of the Inspector General with his concerns on June 29, 2004, and again on July 1, 2004.<sup>43</sup> Evans faxed a letter to EPA Administrator Michael Leavitt on July 7, 2004, outlining shortcomings Evans perceived in the training program and in actions of EPA managers.<sup>44</sup> Sometime after that fax, Evans says an investigator from EPA's Office of Civil Rights contacted him about the letter, and he reiterated his concerns in that conversation.<sup>45</sup>

The letter to Administrator Leavitt detailed many concerns. He described recent events at the lab as "sickening, and just plain wrong" and implored the Administrator to make further inquiries of the employees who had "tried to speak up and were disciplined, forced out, or deliberately retaliated against when management found out."<sup>46</sup>

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<sup>39</sup> Harrison Deposition at 41–42.

<sup>40</sup> Respondent's Motion for Summary Decision ("Motion"), Ex. O at 3; Hopper Deposition at 20–22.

<sup>41</sup> Davis Declaration.

<sup>42</sup> Evans Declaration, ¶ 3.

<sup>43</sup> Complainant's Response to First Set of Interrogatories ("Complainant's Response"), ¶ 3.

<sup>44</sup> Motion, Ex. B.

<sup>45</sup> Complainant's Response, ¶ 3.

<sup>46</sup> Motion, Ex. B at 1.

Much of the letter was concerned with what Evans regarded as age discrimination in implementing the emergency response program, related invasions of privacy when managers requested employee medical records, and other shortcomings in the managerial culture at the lab that are described in section IV(B), below.

The letter also raised Evans's concerns about the mandatory nature of the new training program. According to the letter, employees were unreceptive to the new program "since [they] had no expertise in this area and the uncertainty factor was very high," and the "program was not developed or explained in any sort of rational or methodical way." The letter stated that management proposed to alter all the employees' position descriptions to reflect the "additional hazardous duties/responsibilities" resulting from participation in emergency response. Evans understood that emergency response had always been a voluntary choice, associated with specific positions only, and that employees who did not participate historically had offered emergency responders technical and administrative support.<sup>47</sup> The lab's Director, Jed Harrison, responded in a paragraph-by-paragraph rebuttal, which disputed most of Evans's characterizations.<sup>48</sup>

## **B. The Culture of "Fear and Intimidation"**

One of Evans's coworkers, Max Davis, described the culture at the RIE Lab as "one of fear and intimidation." He believed that "[m]ost employees [were] afraid to speak out against management for fear of retaliation and denial of promotions, and several [employees] have retired recently because of this situation." Furthermore, he thought that "management [did] not like it when you go over their heads, even if you are right."<sup>49</sup> While none of the situations and individuals described below are directly implicated in any environmental whistleblowing, Evans believes they reflect an oppressive culture at the Radiation Lab.

### **1. Brian Moore**

Dennis Farmer, a chemistry team leader at the lab, recalled a meeting in 2002 involving the radiochemistry staff, and two people in particular: Brian Moore and Jim Benetti. Moore was a chemistry lab employee, and Benetti was a health physicist who had also been appointed by the Lab Director as chair of the Radiation Safety Committee. An ostensibly routine meeting escalated into an aggressive confrontation when Moore refused to coordinate with Benetti to

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<sup>47</sup> Motion, Ex. B at 2.

<sup>48</sup> Motion, Ex. O.

<sup>49</sup> Davis Declaration, ¶ 3.

transfer some radioactive material to a more secure location. Moore apparently wanted to “bully” Benetti into backing off the safety issue by intimating that he had the support of the lab director and deputy lab director. It was Farmer’s experience that Moore had the ability to influence upper management to “lean on” those employees who raised safety issues.<sup>50</sup>

According to Farmer, Benetti then prepared, and Farmer hand-delivered to Human Resources Director Sheron Johnson, a letter describing the meeting’s events, along with some other incidents involving Moore. These incidents, related to Benetti by other employees, had supposedly all been brought to management’s attention when they had happened, but had been “ignored or minimized.” The letter’s only response, Farmer says, was a “blistering call” from Sheron Johnson relating that their submission of this letter was “not appropriate.” Farmer also relates that Benetti received a later letter of reprimand from Deputy Director Hopper that Farmer believed was related to the letter about Moore.<sup>51</sup> EPA disputes this characterization, insisting the letter from Hopper was a reprimand for Benetti’s allowing another employee without the proper clearance into a secure area. EPA acknowledges its letter did include a threat of termination.<sup>52</sup>

By order dated June 27, 2013, I required EPA to produce records of any communications between Benetti and Hopper. EPA had failed to show that cost or undue burden prevent it from producing this evidence.<sup>53</sup> EPA has not since produced the relevant correspondence, nor has it provide any acceptable justification for failing to do so.<sup>54</sup> In light of EPA’s inaction, Evans has asked me to make an adverse inference based on spoliation of evidence<sup>55</sup>: that EPA chose to destroy

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<sup>50</sup> Farmer Declaration ¶ 8.

<sup>51</sup> Farmer Declaration, ¶¶ 1–11.

<sup>52</sup> Hopper Deposition at 40–43.

<sup>53</sup> Order Compelling EPA to Provide Electronic Information and to Produce Correspondence, June 27, 2013.

<sup>54</sup> Proceedings before the OALJ began in 2007. Hopper retired in 2008, at a time when EPA did not routinely preserve its departing employees’ email accounts. EPA continues to insist that it turned over everything relevant to the litigation upon the initial discovery request in 2007, before it destroyed Hopper’s digital files. Now it says there is no point in going to the expense and effort of trying to reconstruct the lost data. In 2008, however, EPA was on notice that Hopper was involved in the Evans litigation, and because it could reasonably foresee that his documents might be relevant, EPA had a duty to preserve them. It may be sanctioned for the failure to preserve them.

<sup>55</sup> See *Gerlich v. U.S. Dep’t of Justice*, 711 F.3d 161, 170–71 (D.C. Cir. 2013) (collecting cases holding that a negative inference may be justified when a court finds that “future litigation was reasonably foreseeable to the party who destroyed relevant records,” and that “the destroyed records were likely relevant to the contested issue.”)

or conceal prejudicial evidence it knew might show that Hopper (or EPA management in general) had a pattern of responding to employees' safety concerns with threats of adverse action.<sup>56</sup>

I agree that the "spoliation inference" will apply here. It is reasonable to suppose that EPA's destruction of Hopper's email records was neither accidental nor merely part of a routine record-destruction practice. As to whether the destroyed records may have been relevant to proving a pattern of retaliation, Evans's burden is slight.<sup>57</sup> Farmer believed Hopper's letter reprimanded Benetti for reporting potential nuclear-safety issues.<sup>58</sup> This is material discoverable under Rule 26(b)(1), Fed.R.Civ.P., because while it does not bear specifically on the merits of Evans' individual claim, it relates to "the subject matter of the action": employee protection for whistleblowing. Evans's proffered evidence suffices to raise a reasonable inference that the destroyed correspondence may have supported his claim that supervisors at the Radiation Lab had a practice of retaliating against those who reported safety concerns. The inference would be more useful at trial than on summary judgment, where I already indulge inferences in Evan's favor.

Brian Moore appears elsewhere in this tale. According to a now-retired, long-time EPA employee named Rose Houston (who herself will be involved later), Moore assaulted her by pushing a sample cart into her. Two university students witnessed the event. Along with Houston, they reported the incident to Deputy Director Hopper and to George Dilbeck, Houston's supervisor. As far as Houston knew, management took no action in response to this violence.<sup>59</sup>

Hopper understood that Moore had pushed a cart in Houston's direction, without hitting her. He thought the choice not to discipline Moore was well within Dilbeck's discretion.<sup>60</sup> Hopper acknowledged, however, that Moore had a long history of problems with other employees. He specifically recalled an incident in which Moore had threatened to have a computer scientist named Quin Wang (or Kuen Huang) kicked off her team and/or fired because he wanted her position.<sup>61</sup>

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<sup>56</sup> Opposition at 4–7.

<sup>57</sup> *Ritchie v. U.S.*, 451 F.3d 1019, 1024–25 (9th Cir. 2006) (if document destruction has made it harder for the party seeking an adverse inference to show the documents were relevant, "the burden on [that] party . . . is lower; the trier of fact may draw such an inference based on even a very slight showing that the documents are relevant.")

<sup>58</sup> Farmer Declaration, ¶ 11.

<sup>59</sup> Houston Declaration, ¶ 8; Houston Deposition at 39.

<sup>60</sup> Hopper Deposition at 66–68.

<sup>61</sup> Hopper Deposition at 61–66.

## **2. Emilio Braganza**

Evans claims that sometime after the July 2004 letter to the EPA Administrator, and presumably before he failed to receive his anticipated promotion in December 2005, supervisor Emilio Braganza called Evans into his office. Evans says Braganza told him “Jed Harrison did not like me or the letter I sent to the Administrator. He told me my career at EPA was over and that is why I would not get the accretion of duties that would allow me to be promoted.”<sup>62</sup>

## **3. Richard Leavy**

Around March 2006, Evans was assigned to a different operational center within the Radiation Lab called the Center for Environmental Restoration, Monitoring and Emergency Response (“CERMER”). His new duty was to write a standard operating manual for the center’s handheld radios. The “IT person,” Richard Leavy, had all the necessary information for the manual. According to Evans, Leavy told him he would not share the information because he was nearing retirement and hoped to return as a contractor to run the handheld radio project after he retired. Evans informed his new supervisor, Manolo Bay, about the problem; Bay asked Evans to follow up by email. Somehow, Leavy was able to read this email and subsequently “became very offensive” toward Evans. Bay then removed Evans from the radio project. This transpired just a short time before the May 2006 threat incidents, which resulted in Evans being removed from the premises and placed on administrative leave.<sup>63</sup> As described further in section IV(C)(2), below, Leavy had a role there, too: another employee reported that Leavy pressured him to untruthfully say that Evans had made serious threats of violence in the workplace.

### **C. Major Factual Disputes**

#### **1. The 2005 Denied Promotion**

According to his 2013 declaration, Evans assisted an engineer in the lab’s Standard Reference Photometer program. Evans thought her pay grade had been GS-13, while her grade was at GS-12. No basis is offered to show how Evans had personal knowledge of the engineer’s pay grade.<sup>64</sup> After the engineer quit, Deputy Director Hopper told Evans that he wanted him to run the program in addition to his other responsibilities. Evans says he requested the description and

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<sup>62</sup> Evans Declaration, ¶ 4.

<sup>63</sup> Evans Declaration, ¶ 6.

<sup>64</sup> Factual allegations made to support or oppose summary adjudication must be based on personal knowledge, or some other basis that would make a belief admissible proof. *See* Rule 56(c)(4), Fed.R.Civ.P.

promotion potential for the position from his supervisor, but never received them. He later understood that Hopper and Director Harrison “abolished the program by transferring it to another EPA laboratory.”<sup>65</sup>

According to EPA, however, Evans was neither eligible for a promotion nor was he considered for one. EPA asserts the engineer who resigned from the Standard Reference Photometer Program was a GS-12.<sup>66</sup> Management offered Evans the opportunity to take on some of her duties, but never contemplated a concurrent promotion.<sup>67</sup> Evans was “clearly advised of such fact.”<sup>68</sup> Furthermore, based on his level of education, Evans was at the ceiling for his career ladder, and did not qualify for the engineer position being vacated.<sup>69</sup> EPA was disinclined to approve “accretion of duties” promotions, and almost certainly would not have done so when the additional duties were classified at the same grade level.<sup>70</sup> The EPA did not “abolish” the program; instead, the Radiation Lab lost the program to another unit within the EPA when Evans did not take on the additional duties.<sup>71</sup> There are some disputes of fact here, but they are immaterial. There is no admissible proof the engineer position was in fact a GS-13. The proof is that it was a GS-12; no promotion could have been involved.

## **2. The Three Threats Attributed to Evans**

EPA says that on May 1, 2006, Radiation Lab managers became concerned about Evans’s potential to commit workplace violence: they feared he might bring a firearm to work. Their concerns were based on reports of three incidents.

The first—the early-morning incident—occurred in Evans’s cubicle at about 6:45 a.m. on May 1, and involved a conversation in which Evans allegedly threatened violence against the lab administrators should they attempt to discipline him for refusal to complete mandatory emergency response training (the sort of training that was a topic of his letter to the EPA Administrator).

The second—the lunchroom incident—involved a conversation overheard in which Evans allegedly implied he might resort to violence. As a result, EPA says, the Director had Evans removed from the premises and placed on administrative leave.

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<sup>65</sup> Evans Declaration, ¶ 5.

<sup>66</sup> Johnson 2013 Declaration, ¶¶ 4–5, 7; Harrison Declaration, ¶ 3; Hopper Declaration, ¶ 3.

<sup>67</sup> Harrison Declaration, ¶¶ 3–4; Hopper Declaration, ¶¶ 3–5

<sup>68</sup> Motion at 26; Hopper Declaration, ¶ 5.

<sup>69</sup> Johnson 2013 Declaration, ¶ 2; Harrison Declaration, ¶ 4; Hopper Declaration, ¶ 6.

<sup>70</sup> Johnson 2013 Declaration, ¶¶ 5–8.

<sup>71</sup> Motion at 26.

The third incident had occurred several days earlier, but was only brought to the attention of managers at the lab on May 1—after Evans’s removal. It consisted of a conversation that supposedly took place between Evans and Rose Houston, in which Evans threatened violence at the lab. Combined with the alleged early-morning and lunchroom incidents, the story from Rose Houston led the managers to launch an investigation into Evans’s potential for workplace violence. EPA ultimately suspended Evans for one week, after which he returned to work.

**a. The Early-Morning Incident**

In a 2006 declaration, Evans’s coworker Max Davis described the first allegedly threatening conversation as a misunderstanding. “On the day all the recent trouble started, Doug and I were talking in private about whether he’d completed some mandatory [emergency response] courses. I told Doug that he risked being fired, and Doug said that if management tried to fire him, he would sue the SOB’s. Doug did not say that he would shoot anyone or anything. He said he would sue, not shoot.”<sup>72</sup> Davis said that sometime soon after Evans had been removed by security, Richard Leavy approached him and repeatedly pressured him to say that he had heard Evans “make threats that he was going to shoot up the place.” Davis denied hearing such threats and refused to say that he had.<sup>73</sup>

Evans recalled the story a bit differently. In a signed statement written later the same day, he described having had the May 1 early-morning conversation with Davis regarding a recent incident in the neighboring Building D in which an employee was fired for bringing a firearm to the parking lot. He said they also talked about Evans’s unfinished emergency training. Evans said he commented that “as long as the guy stays over at building D I didn’t care what he does.” He then stated that since there was at that time no security guard in the Radiation Lab’s building, “maybe the guy will come over here to the front office and clean house,” after which Davis told him not to say such things or risk being fired. He said that another employee, Sherry Glick, then joined them and Davis started talking about “how he was going to take the front office on.” Glick asked if Davis meant “with a gun,” and Davis replied “No the legal way.” Evans said the conversation then turned to coffee.<sup>74</sup>

In her signed statement, gathered during the course of Deputy Director Hopper’s investigation, however, Glick stated that the three of

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<sup>72</sup> Davis Declaration, ¶ 5.

<sup>73</sup> Davis Declaration, ¶ 7.

<sup>74</sup> Motion, Ex. D at 20.

them had been discussing the ex-employee at Building D when Evans said something “to the effect that ‘I can understand what that guy did, as I get so angry that I can see myself doing that sort of thing to these guys.’” She said Evans then pointed at the front office.<sup>75</sup>

#### **b. The Lunchroom Incident**

According to Evans’s signed statement, later on May 1, he was enjoying lunch with some other employees in the lunchroom and talking about his motorcycle when his supervisor approached and asked him to come to the front office. There, he was met by two Federal Protective Officers and Deputy Director Hopper, who said two witnesses had heard Evans say earlier that morning that “if management forced to [sic] me to do a certain thing, I would come in and shoot the place up!” After that, Evans handed over his keys and badge and was escorted from the building.<sup>76</sup>

In his signed statement, Brian Moore alleged that he had thought he overheard Evans, sitting at another lunch table with some employees, say “. . . glad he did it or I would have.” Because two security guards from the adjacent Building D (whose employee had just been fired for bringing a gun to work) had walked by the lunchroom just before Moore thought he heard Evans make the comment, Moore inferred he was referring to that incident.<sup>77</sup> Alejandra Baer, another employee present in the lunchroom, said in a signed statement that she heard Evans say, “I guess I won’t have to do anything anymore, it looks like this guy will instead.”<sup>78</sup>

#### **c. The Rose Houston’s Incident**

The third incident was based on at least one conversation between Evans and his coworker Rose Houston that allegedly occurred, in which he mentioned bringing a gun to the workplace and shooting somebody. This conversation was said to happen before the May 1, but was reported to management that day.<sup>79</sup> The story seems to have changed as it moved from person to person, but when traced back to its original source, Rose Houston, the conversation had involved the promotion Evans felt he was wrongfully denied in December 2005. Her signed statement of May 3, 2006, related that Evans had said “I ought to get a gun and blow them away.”<sup>80</sup>

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<sup>75</sup> Motion, Ex. D at 17.

<sup>76</sup> Motion, Ex. D at 21–23.

<sup>77</sup> Motion, Ex. D at 14.

<sup>78</sup> Motion, Ex. D at 16.

<sup>79</sup> *See* Motion, Ex. D at 9.

<sup>80</sup> Motion, Ex. D at 12.

In 2009, EPA's Las Vegas Human Resources Office received an email from Houston asking them to allow her to "retract" that statement. It read, in part:

I am writing to you regarding an event which occurred in the 2005-2006 time frame, and which is of great concern to me. The Deputy Director of R&IE, at that time, called and asked me to meet him at HRO. I waited there in the outer office with one of my colleagues until the Deputy Director came out to speak to us. He had a typewritten letter in his hand, which he then asked me to sign. I asked him if I could read the letter first, and he told me to just sign it. When the Deputy Director insisted that I sign the letter without reading it, I felt threatened by his attitude and signed the letter despite my reluctance to do so. It was my understanding that this letter contained derogatory information concerning a colleague of mine, Doug Evans.

I feel that I was coerced into signing this letter without knowing fully what its contents were, since I was not permitted to read it before signing, and was pressured into doing so. I would like to withdraw this letter since I signed it under duress.<sup>81</sup>

In a 2012 deposition, Houston said that, in addition to the email, she had phoned the HR Director regarding her retraction request and was directed to contact someone in Washington. Houston did so. EPA never replied.<sup>82</sup>

Houston said in her 2012 declaration that Evans never said anything to her "that suggested any intent to do anything violent," and she "never believed that he was unstable or about to do anything violent."<sup>83</sup> She said that the only reason she had signed the letter about Evans without looking at it was that she knew that if she refused, it would jeopardize her employment. She felt that she needed her job because, at the time, she was supporting her disabled daughter as well as two grandchildren.<sup>84</sup> She said that Dennis Farmer, the union president, was with her at the time. When Deputy Director Hopper insisted she sign the letter sight unseen, she looked at Farmer and he just shook his head. In her deposition, she expressed, "I'll go to my grave being sorry that I ever signed that letter but I had too many responsibilities to take a chance on losing my job so I caused another man to lose his."<sup>85</sup>

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<sup>81</sup> Johnson Deposition, Ex. 12.

<sup>82</sup> Houston Deposition at 34.

<sup>83</sup> Houston Declaration, ¶ 4.

<sup>84</sup> Houston Declaration, ¶ 6.

<sup>85</sup> Houston Deposition at 32.

Deputy Director Hopper recalled the story differently. According to his 2012 deposition, Houston told a chemist named Helly Diaz Marcano her story about Evans's threatening statement. Marcano then told David Musick, Houston's supervisor, and Musick was concerned enough to pass it on to Hopper. Hopper took Houston to meet with HR Director Sheron Johnson, where Houston relayed the story as described in the contemporaneous signed statement. He said no one else was present.<sup>86</sup>

HR Director Johnson requested that Houston put the story in writing, but Houston indicated she was unable to use a word processor, so Hopper offered to type it up for her. He used the secretary's computer, which was right outside Johnson's office door. Houston was present and Hopper said that he was very careful to make sure she reviewed it "sentence by sentence," both as he was drafting it and after he'd printed out a completed copy. Then he said that Johnson made sure Houston reviewed it again before signing it.<sup>87</sup>

According to Johnson's 2012 deposition, however, Houston was in the conference room while Hopper drafted the statement on the secretary's computer.<sup>88</sup> Also, Johnson stated that Max Davis was present during the meeting with Houston, and that he affirmed Houston's story.<sup>89</sup>

## **V. Elements of the Claim and Defenses**

### **A. The Proof the Environmental Statutes Require of an Employee**

Any employer subject to whistleblower protections created in the six 1970s-era environmental statutes is forbidden to retaliate against an employee because he or she "[a]ssisted or participated, or is about to assist or participate, in any manner . . . in any other action to carry out the purposes of the statute."<sup>90</sup> As an employee, Evans must prove by a preponderance of the evidence that he engaged in an activity the relevant statute(s) protect, that his employer knew of it, and that the protected activity motivated, in some part, an adverse action his employer took against him.

The non-nuclear environmental statutes listed in 29 C.F.R. Part 24 do not use the "contributing factor" causation standard, the one that applies in most other whistleblower protection cases the Secretary of

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<sup>86</sup> Hopper Deposition at 44–46.

<sup>87</sup> Hopper Deposition at 47–51.

<sup>88</sup> Johnson Deposition at 21–22.

<sup>89</sup> Johnson Deposition at 36–37.

<sup>90</sup> 29 C.F.R. § 24.102.

Labor adjudicates.<sup>91</sup> Those include whistleblower claims brought under the Environmental Reorganization Act of 1974, as amended, which is implemented by a different subset of regulations published at 29 C.F.R. Part 24.<sup>92</sup> As the Administrative Review Board has recognized, in Evans’s sort of environmental case, “the more difficult ‘motivating factor’ causation standard applies.”<sup>93</sup>

Once an employee succeeds in his burden, he is entitled to relief unless the employer demonstrates by the preponderance of the evidence that the employer (here EPA) would have taken the same action absent the protected activity.<sup>94</sup> The employer must establish its affirmative defense by a preponderance of the evidence.

### **B. What May Qualify as Protected Activity**

“[W]here the complainant’s asserted protected conduct involves providing information to one’s employer, the complainant need only show that he or she ‘reasonably believes’ that the conduct complained of constitutes a violation of the [statute].”<sup>95</sup> The “reasonable belief” standard has a subjective and an objective component. The subjective component tests whether the employee actually believed that the employer was or might be in violation of an environmental standard. The objective component tests whether that belief is objectively reasonable, that is, reasonable “based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.”<sup>96</sup> Examining the reasonableness of a complainant’s belief does not require the employee to prove he “actually communicated the reasonableness of those beliefs to management or the authorities.”<sup>97</sup>

If Evans, as the party with the burden of proof, cannot demonstrate an essential element of his claim, the opponent is entitled to summary decision. However, “[o]ften the issue of ‘objective reasonableness’ involves factual issues and cannot be decided in the absence of an adjudicatory hearing. . . . The issues of objective

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<sup>91</sup> See the discussion in *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, ALJ No. 2010-FRS-30, (ARB Apr. 21, 2015) (en banc).

<sup>92</sup> *Gupta v. Compunnel Software Group, Inc.*, ARB Case No 12-049, OALJ Case No. 2011-LCA-045, slip op. at 21 (May 29, 2014).

<sup>93</sup> *Joyner v. Georgia-Pacific Gypsum, LLC*, ARB No. 12-028, ALJ No. 2010-SWD-1, Slip op. at 21 (ARB Apr. 25, 2014) erratum (ARB June 17, 2014).

<sup>94</sup> 29 C.F.R. § 24.109(b)(2); *Joyner v. Georgia-Pacific Gypsum, LLC*, ARB No. 12-028, ALJ No. 2010-SWD-1, slip op. at (ARB Apr. 25, 2014) erratum (ARB June 17, 2014).

<sup>95</sup> *Sylvester v. Parexel Int’l, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, 2007-SOX-042, slip op. at 14 (ARB May 25, 2011).

<sup>96</sup> *Sylvester*, ARB No. 07-123 at 15.

<sup>97</sup> *Sylvester*, ARB No. 07-123 at 15.

reasonableness should be decided as a matter of law only when no reasonable person could have believed that the facts amounted to a violation.”<sup>98</sup> On this motion for summary decision, Evans’s evidence is viewed in the light most favorable to him. Contrary to EPA’s argument, Evans has adduced more than enough evidence to raise an issue of fact about whether he engaged in protected activities.

### **C. Protected Activities Shown in Proof Offered**

Evans asserts a series of protected activities, starting at some unspecified time prior to July 2004 and ending with his final supplemental complaint to OSHA in mid-2007. The story of these activities is interleaved with a string of adverse actions EPA took from late 2005 until it terminated Evans in mid-2007.

#### **1. Concerns About Supervisors’ Educational Qualifications do not Qualify**

At some unspecified time, Evans says he raised to his direct supervisor, Braganza, that he felt troubled that more senior managers lacked appropriate scientific education. Evans referred specifically to the lab’s directors, Harrison and Hopper. Evans understood Harrison to have a background in agriculture and was concerned that he lacked a degree “in the science addressed by the Laboratory.” Evans was also bothered because Hopper had only a degree from an unaccredited institution, and he had completed no coursework in “the science affecting the Laboratory’s work.”<sup>99</sup> Evans has offered nothing to show he actually knows what educational degrees either Harrison or Hopper earned. Evans alleges fellow employees Jim Benetti and Dennis Farmer shared and articulated these concerns.

According to Director Harrison, Farmer authored some articles or letters to the editor questioning whether Hopper and David Musick (another supervisor) were educationally qualified to run a radiological laboratory. Harrison also mentioned that Farmer had authored some work that was critical of the emergency response program.<sup>100</sup>

Evans claims that his association with Farmer and Benetti qualifies as protected activity, but it does not. In an answer to an interrogatory, he claimed that he raised his concerns about the qualifications of Harrison and Hopper for their jobs with his direct supervisor. I accept that he subjectively believed that Harrison and Hopper were not good fits for their jobs. That alone is not enough. There is no objective basis to believe that Harrison and Hopper didn’t

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<sup>98</sup> *Sylvester*, ARB No. 07-123 at 15 (internal citations and quotations omitted).

<sup>99</sup> Complainant’s Response, ¶ 4.

<sup>100</sup> Harrison Deposition at 25–26.

meet the qualifications for the positions they held. Evans' expression of his feelings that EPA should have selected different people for those management positions does not qualify as a protected disclosure.

Evans argues that Farmer and Benetti had engaged in protected activity by raising the education issue somewhere that found its way into print. He then says that by expressing similar views, Evans' support for them becomes another protected activity for Evans. The assumptions involved are not reasonable inferences. There is no proof in this record that Farmer and Benetti subjectively believed Harrison and Hooper were unqualified, and that they had an objectively reasonable basis for any such beliefs. Evans overreaches by claiming that lab managers thought of him as they thought of Farmer and Benetti, and that association in the minds of his managers constituted a protected activity. I must indulge reasonable inferences, but no more. The substantial claim for protection comes from the letter Evan wrote to the EPA Administrator, which is discussed next.

## **2. July 2004 Letter to the EPA Administrator**

According to his 2012 declaration, at the time he submitted his July 2004 letter to the EPA Administrator, Evans was particularly concerned about the newly mandatory nature of the Radiation Lab's emergency response training program. While the letter could be characterized as referring primarily to age-discrimination, invasion of privacy, and employee-safety issues, Evans says that forefront in his mind was a concern:

that management was requiring all employees to participate without providing the employees the training necessary to perform ER duties correctly and safely. While I was concerned that forcing employees to take on [emergency response] duties could lead to workplace injuries or illness, I was also concerned that untrained or under-trained employees would not be able to perform the [emergency response] duties in the event they were required to respond to an actual environmental emergency. . . . I was sincerely concerned that the new requirement for universal . . . participation was leading to an [emergency response] program that would be ineffective . . .<sup>101</sup>

EPA argues that the concerns raised in Evans's 2004 letter relate only to workplace health and safety issues and therefore do not "blow the whistle" on the kinds of violations the environmental statutes were enacted to prevent. EPA is wrong. An employee may raise concerns about workplace conditions covered under other

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<sup>101</sup> Evans Declaration, ¶ 3.

statutes. Doing so does not negate disclosures protected by environmental acts. “The case law makes clear that while environmental statutes ‘generally do not protect complaints restricted solely to occupational safety and health . . .,’ they do if ‘the complaints also encompass public safety and health or the environment.’”<sup>102</sup> There is no “bright line . . . between occupational and environmental” complaints, and assertion of the one certainly does not preclude application of the other.<sup>103</sup>

EPA says Evans could not reasonably have believed that an inadequate training program might lead to statutory violations because the environmental statutes “focus on actions that put the environment at risk, such as, for example, toxic waste dumping, noxious air or water emissions, or the release of radiation.”<sup>104</sup> In addition, “the Las Vegas Laboratory’s emergency response program in no way contributes to environmental degradation, rather it is aimed at quantifying it, containing it, and minimizing its deleterious consequences.”<sup>105</sup> For three reasons, this is nonsense.

The whistleblower protection statute is designed to prohibit a manager (*i.e.*, the EPA Administrator or managers at the Radiation Lab) from taking umbrage and retaliating after an employee raises something the manager doesn’t want to hear: the employee believes the organization or the manager is falling short in implementing environmental protections Congress established. In order to prevent the chilling of “employee initiatives in bringing to light perceived discrepancies in the workings of their agency,” the Administrative Review Board has stated that an employee’s “non-frivolous complaint” should not have to withstand nit-picking in order to qualify as protected under the whistleblowing provisions. Good faith allegations under the environmental statutes are protected “even though the complaining employee may have been profoundly misguided or insufficiently informed in his assessment.”<sup>106</sup> Telling a manager the agency is offering inadequate training to those tasked to respond to radiation emergencies relates to the environmental protection statutes enough to be a protected disclosure.

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<sup>102</sup> *Williams v. Dallas Ind. School Dist.*, ARB No. 12-024, ALJ No. 2008-TSC-1, slip op. at 11 (ARB Dec. 28, 2012) (quoting *Devers v. Kaiser-Hill Co.*, ARB No. 03-113, ALJ No. 2001-SWD-003, slip op. at 10 (ARB Mar. 31, 2005)).

<sup>103</sup> *Williams*, ARB No. 12-024 at 11.

<sup>104</sup> Motion at 20.

<sup>105</sup> Motion at 20.

<sup>106</sup> *Sylvester*, ARB No. 07-123 at 34 (concurring and dissenting opinion of Brown, J.) (citing *Passaic Valley Sewerage Comm’rs v. Dep’t of Labor*, 992 F.2d 474, 478, 479 (3d Cir. 1993)) (internal quotations omitted).

Next, reports of safety and health concerns an employee makes may be protected by the environmental statutes when the reports “touch on the concerns for the environment or public health and safety that are the focus of the environmental acts.”<sup>107</sup> For the EPA these concerns encompass such things as releases of toxic waste and noxious substances into the air or water, along with radiation releases. If the Radiation Lab’s emergency response program failed due to inadequate training, laboratory personnel might be unable to contain radioactive material, or their containment efforts may make other hazardous releases worse. As the Radiation Lab’s Director, Harrison, explained, in responding to a radiological emergency, part of employees’ emergency response training involves “how to fulfill their mission [quantifying and containing radiological contamination] without making the other [toxic and environmental] hazards worse.”<sup>108</sup>

In his dissent to *Evans I*, Judge Brown noted that “by EPA’s own admission the Lab’s [emergency response] program has potentially far-ranging and significant environmental health and safety implications.”<sup>109</sup> During the course of Evans’s employment, the lab responded to at least three large-scale events that carried the potential to release radioactive and other hazardous materials into the environment.<sup>110</sup> The Radiation Lab is highly likely to respond to future radiological disasters. A long-term lab employee like Evans would have a basic understanding the Lab’s emergency response practices. He could reasonably believe that a training failure could have unintended, deleterious environmental consequences. The potential that ill-trained and unwilling responders might cause environmental harm in misguided containment efforts is something an employee should be free to bring to management’s attention at the EPA. The employee has no obligation to prove that the danger brought to management’s attention is “likely to happen.”<sup>111</sup> “[A]n employee’s reasonable belief about a violation is protected even if the belief is mistaken and an actual violation never occurs.”<sup>112</sup>

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<sup>107</sup> *Williams*, ARB No. 12-024, slip op. at 9 (citing *Melendez v. Exxon Chems. Americas*, ARB No. 96-051, ALJ No. 1993-ERA-003, slip op. at 18 (ARB Mar. 31, 2005)).

<sup>108</sup> Harrison Deposition at 43–44.

<sup>109</sup> *Evans I*, ARB No. 08-059 at 18 (dissenting opinion of Brown, J.) (citing EPA Memo ISO MTD at 10–11).

<sup>110</sup> Hopper Deposition at 20–22; Harrison Deposition at 41–42.

<sup>111</sup> See *Sylvester* at 16 (“A whistleblower complaint concerning a violation about to be committed is protected as long as the employee reasonably believes that the violation is likely to happen.”).

<sup>112</sup> *Sylvester*, ARB No. 07-123 at 16 (citing *Allen v. Admin. Rev. Board*, 514 F.3d 468, 476–77 (5th Cir. 2008)).

Finally, EPA argues that, as a matter of law, the 2004 letter cannot qualify as protected activity. EPA bases this argument on the decision in *Evans I*. It upheld the ALJ's earlier dismissal of this case upon a finding that the 2004 letter was not protected.<sup>113</sup> The ARB chose not to address the question in *Evans II*. It did explicitly vacate *Evans I* in its entirety.<sup>114</sup> The question therefore remains open. I find that Evans's 2004 concerns "touched on" the environmental statutes' protections sufficiently to be a protected activity.

### **3. Communications with the Inspector General About the Letter**

Evans asserted that he contacted Kimberly Bynum of the EPA Office of the Inspector General on June 29, 2004 and again on July 1, 2004, with concerns similar to those expressed in the July 2004 letter.<sup>115</sup> That disclosure is immaterial. Evans may have been expressing his concerns to anyone at EPA who would listen. No proof gives a basis to infer Bynum had any involvement with, or contributed to, any adverse employment action. There is no basis in the evidence to infer that those managers who were involved in the adverse actions heard anything from Bynum. On this record, Evans' purported communications with the Inspector General have no causal connection to this claim. Repeating to someone in the Inspector General's office the topics framed in the letter Evans wrote to EPA's Administrator adds nothing new to the case. That letter to the Administrator, as I have already found, was protected.

### **4. May 2006 OSHA Complaint**

Evans's original OSHA complaint describes his protected activities this way:

Complainant engaged in protected activity. Evans' protected activities include, but are not limited to, raising compliance issues with management about the environmental risks of having employees participate in emergency response (ER) work without sufficient training. Evans contacted appropriate enforcement authorities to report violations. Complainant wrote a letter to the EPA administrator in 2004 that provoked a spiral of harassment and animosity. Evans continued to collect evidence of violations and retaliation. During relevant times, respondent knew of complainant's protected activity.<sup>116</sup>

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<sup>113</sup> Motion at 21; *Evans I* at 7–8.

<sup>114</sup> *Evans II*, ARB No. 08-059 at 15.

<sup>115</sup> Complainant's Responses, ¶ 3.

<sup>116</sup> Motion, Ex. A at 1–2.

OSHA dismissed Evans's claim. Upon review, the ALJ dismissed the case for failure to state a claim upon which relief can be granted, citing "the absence of Complainant's participation in any protected activity under the Environmental Acts."<sup>117</sup> However, unlike the federal district courts, "there is no pleading requirement for whistleblower complaints investigated by OSHA or litigated within the Office of Administrative Law Judges."<sup>118</sup> The ARB held in *Evans II* that "administrative whistleblower complaints that give 'fair notice' of the protected activity and adverse action can withstand a motion to dismiss for failure to state a claim."<sup>119</sup>

The ARB noted in its decision that the very act of filing the 2006 OSHA complaint constituted protected activity: "[t]he filing of a retaliation claim with OSHA constitutes commencing or instituting a 'proceeding' under the whistleblower statutes."<sup>120</sup> The ARB relied on language in the 2006 complaint alleging violations of the SDWA, the CAA, and CERCLA, as well as Evans's allegation that he "raised compliance issues with management about the environmental risks of having employees participate in emergency response (ER) work without sufficient training."<sup>121</sup>

The ARB further noted that "Evans claims most of the allegedly adverse actions EPA took occurred as a proximate [result] of his participation in Department of Labor proceedings beginning with the filing of his initial OSHA complaint on May 26, 2006."<sup>122</sup> The chain of causation between the protected 2006 complaint and allegedly related adverse actions is discussed further in section IV(D), below. Given the ARB decision in *Evans II*, this OSHA filing qualifies as a protected activity.

##### **5. First and Second Supplemental OSHA Complaints**

Filed in July 2007, the first supplemental OSHA complaint alleged an additional protected activity: the original OSHA complaint Evans had filed. The supplemental complaint also outlined a series of adverse managerial actions flowing from that event: suspending Evans in September 2006 and transferring him to a different position, limiting Evans's building access, painting him to other employees as a safety risk, requiring him to participate in counseling, refusing to grant the requested one-year leave without pay, and threatening Evans

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<sup>117</sup> Fed. R. Civ. P. 12(b)(6); D. & O. at 5.

<sup>118</sup> *Evans II*, ARB No. 08-059 at 6.

<sup>119</sup> *Evans II*, ARB No. 08-059 at 9.

<sup>120</sup> *Evans II*, ARB No. 08-059 at 14.

<sup>121</sup> *Evans II*, ARB No. 08-059 at 14.

<sup>122</sup> *Evans II*, ARB No. 08-059 at 14.

with discharge.<sup>123</sup> The second supplemental OSHA complaint, filed in August 2007, merely added his termination as a final adverse action.<sup>124</sup> Because they were not in the record before it, the ARB did not consider whether the supplemental complaints constituted protected activities. Given the ARB's holding regarding the protected status of the first OSHA complaint, and the fact that the supplemental complaints did not alter the original except to add adverse actions, there is no reason to find that they are not protected activities as well.

#### **D. What Motivated the Adverse Actions by the EPA**

EPA argues that it has either discredited Evans's evidence, or presented its own overwhelming evidence, thus proving that it would have committed the various adverse actions Evans alleges regardless of any protected activities.<sup>125</sup> Intent to retaliate is a pivotal issue, yet "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes."<sup>126</sup> Whistleblower claims often rely on inferences drawn from circumstantial evidence to prove what motivated the adverse action(s). Some evidence here is not circumstantial, while other proof is.

EPA's arguments follow two courses. First, it argues that the adverse actions occurred far too long after the 2004 letter to the EPA Administrator, or his 2006 OSHA complaint and the litigation that followed, to plausibly raise an inference of retaliation. Next, EPA asserts that most of the remaining adverse actions resulted from two intervening events:

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<sup>123</sup> Motion, Ex. E, ¶ 4.

<sup>124</sup> Motion, Ex. F, ¶ 4.

<sup>125</sup> The burdens of proof under the environmental statutes differ from those under other whistleblower statutes. Under non-environmental statutes, complainants must show that their protected activity was a "contributing factor" to in the adverse action against them. In contrast, complainants under the environmental statutes must show that their protected activity was a "motivating factor" in the adverse action against them. "Motivating" is a higher burden of proof than "contributing." Similarly, under non-environmental statutes, respondents can avoid liability by showing, by clear and convincing evidence, that they would have taken the same adverse action absent the protected activity. Respondents have a lower burden under the environmental statutes, which requires only a preponderance of the evidence to avoid liability. Evans, in his Notice of Supplemental Authority in Opposition to Summary Decision, asserts that the recent ARB decision *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB March 20, 2015) "significantly clarifies the burdens of proof on the complainant and respondent under modern whistleblower statutes, including the ERA." The Federal Railroad Safety Act imposes different burdens of proof than the environmental statutes. *Powers* does not alter the burdens faced by Evans and EPA.

<sup>126</sup> *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983).

1. the threats of violence Evans made or that EPA discovered in May 2006, and
2. Evans's refusal to return to work in May 2007.

It is true that close temporal proximity between the protected activity and the adverse action raises an inference of retaliatory intent. But there is no hard and fast rule for a maximum acceptable time interval that extinguishes an inference of causation. A sophisticated supervisor or employer might bide its time before retaliating. Perhaps the employee could not easily be replaced due to his specialized skills or professional ability, or perhaps he functioned as an integral part of an ongoing important project.<sup>127</sup> Employers, particularly government agencies, may hesitate to create a vacancy for fear that it may not be permitted to fill the position, so the position remains unstaffed or worse, is eliminated. These possibilities may merit the inference that even a protected event now remote in time motivated retaliation.<sup>128</sup> Therefore, when close "temporal proximity . . . is missing, an adjudicator may look to the intervening period for other evidence of retaliatory animus."<sup>129</sup>

The threats EPA says Evans made, and his later refusal to return to work, each would serve as evidence that EPA would have suspended and later fired him for reasons that had nothing to do with Evans' earlier protected activities. That is an affirmative defense, which is analyzed later. A motion for summary decision presents the narrow issue of whether a complainant has adduced enough evidence to make out each essential element of his claim.<sup>130</sup> As one court of appeals has said, summary judgment is "not a dress rehearsal or practice run; it is the put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of the events."<sup>131</sup>

Evans alleges the following adverse actions were retaliatory:

1. In December 2005, EPA denied him a promotion.
2. In May 2006, EPA fabricated the threat incidents.
3. In May 2006, EPA placed him on administrative leave.

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<sup>127</sup> *Kachmar v. SunGard Data Systems, Inc.*, 109 F.3d 173, 178 (3d Cir. 1997).

<sup>128</sup> *Porter v. Cal. Dep't of Corrections*, 338 F.3d 1018, 1030 (9th Cir. 2004).

<sup>129</sup> *Jensen v. Potter*, 435 F.3d 444, 450 (3d Cir. 2006) (internal citation and quotation omitted), *abrogated in part by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

<sup>130</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1985).

<sup>131</sup> *Steen v Myers*, 486 F.3d 1017, 1022 (7th Cir. 2007) (quoting *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 859 (7th Cir. 2005)).

4. EPA placed posters around the lab informing employees not to allow Evans in the building, labeled him a “security risk,” limited his building access, and deprived him of computer access.
5. In September 2006, EPA suspended him for a week.
6. Upon his return from suspension, EPA required him to attend mental health counseling.
7. In September, and again in October, 2006, EPA involuntarily transferred Evans to or within the CERMER lab, subjecting him to a hostile environment and less favorable work assignments, as well as placing him under close supervisory control and monitoring by an armed guard.
8. From May 2007 to the present, EPA refused to grant Evans’s requests for leave without pay.
9. In September 2007, EPA discharged Evans.<sup>132</sup>

#### 1. Disputes Involving the Denied Promotion

In support of his assertion that his protected activities led EPA not to promote him to the position of Environmental Engineer in late 2005, Evans has offered his declaration that Deputy Director Hopper wanted him to take over the Standard Reference Photometer Program. Sometime later, however, his supervisor, Emilio Braganza, told him that the lab’s director did not like him or his letter to the EPA Administrator. As a result, he would not receive the “accretion of duties” that would qualify him for that promotion.<sup>133</sup>

EPA agrees it gave Evans the opportunity to take on some of the duties of the departing Environmental Engineer. It disputes that it ever considered Evans for a promotion.<sup>134</sup> Promotion was technically impossible, given Evans’s educational background.<sup>135</sup> Nor was the grade of the position in the Photometer Program one that represented a promotion.

EPA has offered uncontroverted proof that not only was Evans technically ineligible for a promotion, no promotion was in the offing. While I do not weigh the parties’ proof on this motion, Evans overlooks that, as the party opposing summary judgment, he cannot merely deny factual assertions that support EPA’s motion. He must adduce contrary

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<sup>132</sup> Complaint at 3–5.

<sup>133</sup> Evans Declaration, ¶¶ 4–5.

<sup>134</sup> Motion at 25–26; Harrison Declaration, ¶¶ 4–5.

<sup>135</sup> Harrison Declaration, ¶ 6.

evidence “showing that there is a genuine issue of fact for the hearing.”<sup>136</sup> There is no proof the engineer who left held a GS-13 grade. None. Mr. Evans has provided no evidence to rebut the proof EPA offered that it would not, and in any case probably could not, have promoted him in late 2005. This un rebutted proof defeats an inferential link between the 2004 letter and any denial of a promotion in 2005.

## **2. Disputes Involving the Threat Incidents**

The threat incidents were EPA’s justification for several of its adverse actions: placing Evans on administrative leave, barring him from the facility and his computer files, suspending him for a week, and requiring him to undergo mental health counseling when he returned. If, as Evans alleges, managers directly fabricated, or induced subordinate employees to claim falsely that Evans made threats, EPA could rely upon that proof about “threats.” The “threats” would not be an intervening cause; they would defeat an inference that Evans’s protected activities motivated the adverse actions managers took.

Several factual disputes were illuminated in section III(C)(2), above, describing the conflicting evidence about the threat incidents. Some are more important than others. It matters whether Rose Houston carefully reviewed her statement several times as Hopper said, or never read it at all, as she herself insists. Also important is whether she signed it voluntarily or she was coerced or threatened into signing it by some implication that she might lose her job if she refused. Less important, but still bearing on the various witnesses’ credibility, are the questions of whether the union president Farmer was present during the meeting at HR, or whether Max Davis was in the room, or whether no one else was present. It matters whether Houston looked over Hopper’s shoulder while Hopper drafted her statement, or whether she had been left alone in a conference room while Hopper wrote it up alone.

There are three different versions of the early-morning incident story. Max Davis said the conversation involved suing the EPA, and that Richard Leavy later pressured him to say that Evans was planning to shoot up the place. Evans also said the conversation involved suing, but he admitted he made an offhand comment about how the ex-employee from building D should come to “clean house” in his building’s front office. He also said that Sherry Glick was the one who brought up guns, but Glick made no mention of her part in the conversation. Yet Glick said that the conversation proceeded

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<sup>136</sup> 29 C.F.R. § 18.40(c). See the similar provision of Rule 56(c), F.R.C.P.

differently: Evans expressed sympathy with the ex-employee and could see himself doing the same thing.

There are fact disputes on several key facets of EPA's story that go to whether the administration had a reasonable belief that Evans might commit violence. The sole justification for the 2006 adverse actions was managers' supposed belief that Evans had shown the potential for workplace violence. That belief led to his suspension and other adverse actions (such as placing him on administrative leave while it investigated the threats, barring him from the lab, and requiring him to attend counseling upon his return). However, if the managers either fabricated some portion of the threats, or pressured employees to make false statements, managers could not "believe" what they knew to be untrue. These disputes involve material facts, and preclude summary decision.

### **3. Skip Work, Lose Your Job**

After EPA denied his request for an additional one-year period of leave without pay in May 2007, Evans never returned to work at the Radiation Lab. Undisputed proof shows Evans was justifiably terminated for failure to attend work for more than two months.

Evans asserts that, upon his return from suspension in September 2006, he was placed in a hostile work environment, including being subject to monitoring by an armed guard during work hours and close supervision by a hostile supervisor and a hostile coworker who had spoken out against him during investigation of the threat incidents. He felt it was "obvious that my management wanted me to quit."<sup>137</sup>

In November 2006, Evans requested and was granted approximately six months of FMLA leave for which he received pay using his accrued annual and sick leave.<sup>138</sup> He also requested an additional one year leave without pay to begin once his annual and sick leave had been exhausted.<sup>139</sup> That request conflicted with EPA's staffing needs and was denied.<sup>140</sup> According to Evans's declaration, his counselor had "directed" him "not [to] return until this matter [the hostile work environment] was settled."<sup>141</sup> Her letter to the EPA suggested that a new work "setting" might diminish Evans's job-related anxiety, depression, and resulting physical symptoms.<sup>142</sup> When

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<sup>137</sup> Evans Declaration, ¶ 10.

<sup>138</sup> Ex. Z.

<sup>139</sup> Ex. Z.

<sup>140</sup> Ex. AA.

<sup>141</sup> Evan Declaration, ¶ 10.

<sup>142</sup> Motion, Ex. Z.

his FMLA leave expired in May 2007, Evans chose not to return to work, even though his request for additional leave had not been granted. Evans assumed the situation would not have improved during his absence. Evans never returned, so he has no facts to support his assumption about what would happen in May, 2007.

EPA argues that there were legitimate, non-retaliatory reasons for the reassignment, the new supervision regime, and the armed guard.<sup>143</sup> It disputes that Evans was in a hostile work environment.<sup>144</sup> Those disputes are immaterial, however.

EPA policy prevented the Lab's management from allowing the leave without pay without more recent justification than the statements found in the counselor's November 11, 2006 letter.<sup>145</sup> That letter had been the justification for the nearly six months of leave he completed. The EPA told him in May 2007 it had not received from him a current assessment of his medical condition.<sup>146</sup> He still had not offered any updated medical evidence almost three months later, when a proceeding to remove him began in August 2007.<sup>147</sup> He never offered proof that might have justified additional leave without pay: current medical proof that he would, in fact, become able to return to work, and an expected date of return.<sup>148</sup> When Evans did not return to work at the expiration of his FMLA leave, the agency placed him on AWOL status, as it had warned it would. EPA did not act precipitously. No party disputes that Evans remained absent with no approved leave for more than two months before EPA began the proceeding to remove him from federal service. EPA has not offered to reinstate Evans after the termination.

An employee who won't come to work gets fired. Evans has provided no evidence to support any finding that EPA could have done otherwise. Before placing him in AWOL status, management gave him an opportunity to document an ongoing disabling condition that required further leave without pay. His absence had consequences. While Evans was out on leave, the EPA Radiation Lab was short-handed. Unpaid leave is not granted indefinitely into the future. For leave without pay, Evans had to offer proof that his medical condition should improve within a discernable time; the medical evaluator would have to give a return to work date. Evans submitted no evaluation that gave a date he would return to work after his leave ran out on May 20,

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<sup>143</sup> Motion at 31–36.

<sup>144</sup> Motion at 33–34 and n.23.

<sup>145</sup> Motion at 36–39.

<sup>146</sup> Ex. CC.

<sup>147</sup> Ex. FF.

<sup>148</sup> Ex. CC; Ex. EE.

2007. For more than two months, Evans stayed away and offered nothing. The EPA had no opportunity to weigh his need for additional unpaid time off against its staffing needs. The adequacy of proof that could have led EPA to approve leave without pay after May 21, 2007 is not in issue. Evans offered none.

The EPA has shown why it did not (indeed could not) grant additional leave without pay. Evans has offered no admissible evidence to dispute that proof. The facts in this record prove EPA would have terminated Evans—when it did—for not returning to work regardless of any protected activities.

These facts are a hybrid of two groups of employment discrimination cases. In one, the employer’s liability for back pay is cut off at the time the employee unreasonably refuses an unconditional offer of reinstatement.<sup>149</sup> The refusal also “precludes a subsequent order of reinstatement.”<sup>150</sup> Only the existence of “special” or “exceptional” circumstances will allow employees to reject an unconditional offer without risking the right to recover back-pay.<sup>151</sup> “Special” and “exceptional” circumstances have sometimes been held to include fear of hostility upon return to the job.

Here, of course, what Evans refused was not an offer of reinstatement. He chose not to do the job he had. Evans was simply asked to return from leave on May 21, 2007, no strings attached. He refused. EPA terminated him for absence without leave. Lingering hostility resulting from ongoing litigation is generally not enough to refuse an offer of reinstatement.<sup>152</sup> Discomfort around working for the prior employer or supervisor is also generally insufficient.<sup>153</sup> Evans chose not to return to work—he effectively abandoned his job.

Another group of relevant cases hold that the employer’s liability normally ends when the employee voluntarily resigns.<sup>154</sup>

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<sup>149</sup> *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982).

<sup>150</sup> *E.g., Lewis Grocer Co. v. Holloway*, 874 F.2d 1008, 1012 (5th Cir. 1989), *Stanfield v. Answering Serv., Inc.*, 867 F.2d 1290, 1296 (11th Cir. 1989).

<sup>151</sup> *Lewis Grocer Co. v. Holloway*, 874 F.2d 1008, 1012 (5th Cir. 1989), *Stanfield v. Answering Serv., Inc.*, 867 F.2d 1290, 1296 (11th Cir. 1989).

<sup>152</sup> *See, e.g., Saladin v. Turner*, 936 F. Supp. 1571, 1581 (N.D. Okla. 1996) (finding a rejection of reinstatement unreasonable because some antagonism is expected between parties to litigation).

<sup>153</sup> *See, e.g., Giandonato v. Sybron Corp.*, 804 F.2d 120 (10th Cir. 1986) (finding a rejection of reinstatement unreasonable where the employee did not want to return to work under the supervisor who had previously criticized him); *Bragalone v. Kona Coast Resort Joint Venture*, 866 F. Supp. 1285, 1296 (D. Haw. 1994) (finding a rejection of reinstatement unreasonable even where the employee would be returning to “a stressful allegedly harassing work environment”).

<sup>154</sup> *See Jurgens v. EEOC*, 903 F.2d 386, 389 (5th Cir. 1990) (finding that, when an employer’s discriminatory action leads to plaintiff’s retirement, back pay liability

Evans did not submit a resignation; he failed to return from leave and, after May 21, he never communicated with EPA regarding his intention. Although this led to an involuntary termination, his choice to abandon his job might as well have been a resignation.

EPA has shown it would have terminated Evans when it did regardless of any protected activities. I do not weigh the parties' evidence on this motion. Evans has failed to provide any evidence that contradicts proof from EPA on this point.

With that ruling, EPA's potential liability for back-pay would be quite limited, if it has any. Evans has no claim for loss of pay while he was away on leave he requested and EPA granted.<sup>155</sup> No damages arise from his termination; abandoning his job for two months left EPA no choice but to find someone who would come to work and do the job. Nor, in these circumstances, could EPA be ordered to reinstate Evans.

#### ORDER

Evans has presented enough evidence to raise an inference that retaliation for his protected activities played a role in *some* of EPA's adverse actions; particularly, the paid administrative leave during its investigation and the one-week suspension. This precludes summary decision on those matters. At the same time, the evidence shows that EPA would not have promoted Evans as Evans claims, and would have separated him from federal service when it did for abandoning his job. Evans' potential remedy is limited.

EPA's motion for summary decision is granted in part.

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cuts off at the time of retirement unless plaintiff can show (1) retirement was a result of objectively intolerable working conditions, and (2) at the time of the discriminatory action, the employer reasonably could have foreseen that the action would force the employee to resign); *Muller v. U.S. Steel Corp.*, 509 F.2d 923, 929-30 (10th Cir. 1975) (holding that, as long as a discriminatory job assignment was not intended by the employer to result in resignation, liability cuts off at the time of resignation). Evans has provided no evidence that EPA intended to cause him to resign. He never resigned.

<sup>155</sup> See generally, *Zinn v. Am. Commercial Lines Inc.*, ARB No. 13-021, ALJ No. 2009-SOX-025 (December 17, 2013) (holding that where an employee asked for a reduced work load, that employee could not later claim damages for that same reduction).

Counsel parties shall determine their witnesses availability, confer and file a joint report here within twenty-eight (28) days as to the discovery that needs to be conducted prior to a hearing, the date(s) they and their witnesses would available for a hearing and whether the parties would consent to settlement judge proceeding.<sup>156</sup>

So Ordered.

William Dorsey  
Administrative Law Judge  
San Francisco, California

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<sup>156</sup> . The Office of Administrative Law Judges offers, as an optional and voluntary procedure, appointment of settlement judges pursuant to 29 C.F.R. § 18.9(e). Settlement judges are specially trained in mediation techniques and are available at any time before a formal hearing concludes to assist the parties in reaching settlements. A request for the appointment of a settlement judge must be made jointly by all parties, addressed to the presiding judge in the Washington DC office. The parties will be promptly notified whether a settlement judge will be appointed.