



**Issue Date:**

**ISSUE DATE: 14 NOVEMBER 2016**

CASE No: 2008-CAA-00003

*In the Matter of:*

**DOUGLAS EVANS,**  
Complainant,

v.

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

Appearances: Richard R. Renner, Esq.  
For Douglas Evans

Tia M. Young, Caitlin Downs, & Paul Winick, Esqs.  
For the Respondent

### **Decision and Order**

Douglas Evans worked for the United States Environmental Protection Agency (“EPA”) from 1989<sup>1</sup> until he was fired in September 2007. Mr. Evans had worked as an Environmental Protection Specialist at the component of EPA known as the Radiation & Indoor Environments National Laboratory in Las Vegas, Nevada (“Radiation Lab”). Witnesses gave contradictory and at times self-serving versions of events that led the EPA to place Mr. Evans on administrative leave for making threats of workplace violence. These variations are reminiscent of Akira Kurosawa’s *Rashomon*. Unlike Kurosawa, who gave only explanations for his four characters different accounts of a crime, my task is to find a solution.

One issue before me is whether Mr. Evan’s eventual termination for refusing to return to work after the investigation led the EPA to suspend him for a week is actionable retaliation for a protected

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<sup>1</sup> Mr. Evans explained that he first worked for the EPA through a rehabilitation program from 1987 to 1989, but became an “official” employee in 1989. C. Post-Hearing Brief at 2.

activity. It is not, for his refusal to return was the proximate cause of his firing, and constituted a valid reason to terminate him. His work could then be done by someone who actually would show up to do it. I found so earlier, in the partial summary judgment entered before trial. Mr. Evans is not entitled to reinstatement.

Aside from the termination, Mr. Evans also claims Radiation Lab managers retaliated against him in a number of other ways for the safety concerns he raised. The protected activity Mr. Evans relies on is a letter he wrote to the head of the EPA. During his employment, Mr. Evans expressed concerns about the Radiation Lab's plan to require all workers to participate in the Radiation Lab's response to environmental emergencies. His dissatisfaction culminated in his July 2004 letter to EPA's agency head, Administrator Michael Leavitt ("the Administrator"). Mr. Evans criticized many things in that letter, among them a mandate to participate in the emergency response program, and actions of the local managers he considered responsible for implementing it, including the Director of the Radiation Lab Jed Harrison, and its Deputy Director, Richard Hopper.

The central issue remaining in the case, however, is whether Radiation Lab managers invented—or induced Mr. Evans's coworkers to provide—false reports that Mr. Evans had threatened violence at the EPA workplace, and whether any such false reports affected the EPA's treatment of Mr. Evans.

Mr. Evans was disciplined for making statements that threatened violence at work—he was placed on administrative leave during an investigation, then suspended without pay, and required to attend counseling. After returning to work, Mr. Evans says he got less favorable assignments and was monitored closely by an armed security guard. Frustrated with his working conditions, Mr. Evans took an extended leave of absence on the advice of the psychologist the EPA had him see; in that process he used all his accrued annual and sick leave. The EPA denied his request for an additional year of leave without pay once his leave was exhausted. Despite that denial Mr. Evans never returned to work. His employment at the Radiation Lab was eventually terminated after being absent for months without leave.

Mr. Evans now brings a claim under the whistleblower provisions of the Clean Air Act; the Safe Drinking Water Act; and the Comprehensive Environmental Response, Compensation, and Liability Act.<sup>2</sup> I find the EPA violated the whistleblower provisions of these

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<sup>2</sup> Neither OSHA nor the Administrative Review Board, in earlier stages of this proceeding, considered Mr. Evans's claims under the Energy Reorganization Act or the Toxic Substances Control Act, for Congress did not waive the government's

various environmental statutes by retaliating against Mr. Evans for his protected activities. The evidence convinces me, however, that Mr. Evans is entitled to no more than nominal damages. Other untainted evidence was sufficient to support the decision of the EPA to suspend him.

## I. Procedural Background

After an investigation, the Secretary of Labor, through the Administrator of the Occupational Health and Safety Administration (“OSHA”), dismissed Mr. Evans’s complaint for several reasons. One was that Mr. Evans failed to allege violations of law that would give rise to a claim for reinstatement under the statutes 29 C.F.R. Part 242 implements, to the extent they may apply to the federal government. An Administrative Law Judge dismissed Mr. Evans’s complaint, an action the Secretary’s Administrative Review Board (“Board”) initially affirmed.<sup>3</sup> While Mr. 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 Board could reconsider it in light of an intervening Board decision that clarified the standard for dismissal of a complaint.<sup>4</sup> The Board then reversed the dismissal and remanded so that Mr. Evans could amend his complaint, which he did.<sup>5</sup>

The EPA later moved for summary adjudication, which I granted in part. My decision left intact Mr. Evans’s claim that he had engaged in protected activities by writing his July 2004 letter to the EPA Administrator and by filing whistleblower complaints with OSHA. Mr. Evans now claims, in his post-hearing brief, that two additional activities qualified as protected activity: (1) submitting an affidavit in support of a complaint to the Federal Labor Relations Authority (“FLRA”) in 2003, and (2) making certain comments in a 2006 performance appraisal. Those were not addressed in my order on summary adjudication and will be discussed later in this decision.

My order on summary adjudication also found the EPA had shown, with uncontroverted proof, that it would have taken most of its adverse actions regardless of Mr. Evans’s protected activities, including terminating Mr. Evans when it did. If, however, managers directly fabricated, or induced subordinate employees to falsify reports that Mr. Evans made threats of workplace violence as a way of retaliating

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sovereign immunity under them. Only the claims under CERCLA, the CAA, and the SDWA are before me. *See Evans v. U.S. Env’t Prot. Agency*, ARB No. 08-059, ALJ No. 2008-CAA-003, slip op. at 2 n.1 (ARB Jul. 31, 2012) (“*Evans I*”).

<sup>3</sup> *Evans v. U.S. Env’t Prot. Agency*, ARB No. 08-059, ALJ No. 2008-CAA-003 (ARB Apr. 30, 2010) (“*Evans I*”).

<sup>4</sup> *Evans II*, ARB No. 08-059 at 5.

<sup>5</sup> *Evans II*, ARB No. 08-059 at 15–16.

against him for protected activity, Mr. Evans could have a valid claim. The act of fabricating or inducing those reports would be discrimination. Adverse actions predicated on accusations managers knew to be wholly false would be retaliation the Secretary could remedy.

Based on the record as a whole, I find an EPA manager—Radiation Lab Deputy Director Hopper—did fabricate a witness statement in retaliation for Mr. Evans’s protected activities. Yet, ultimately, the fabrications made little difference. There were other, legitimate reports of threats by Mr. Evans. Aside from the act of fabricating the one witness statement, the EPA would have treated Mr. Evans the same (i.e., imposed a one week suspension) absent any protected activity.

## II. Stipulations

The parties each submitted the following agreed stipulations, which I adopt:

1. Mr. Evans was an employee of the EPA at its Radiation & Indoor Environments National Laboratory.<sup>6</sup>
2. Mr. Evans worked for the respondent from November 1989, and was an Environmental Protection Specialist at the time of his termination from employment on September 14, 2007.<sup>7</sup>
3. At all times relevant to the instant litigation, Jed Harrison served as the Las Vegas Laboratory Director.<sup>8</sup>
4. At all times relevant to the instant litigation, Richard Hopper served as the Las Vegas Laboratory Deputy Director.<sup>9</sup>
5. At all times relevant to the instant litigation, Elizabeth Cotsworth served as the Director of the Office of Air and Radiation, and was Mr. Harrison’s immediate supervisor.<sup>10</sup>
6. On July 7, 2004, Mr. Evans wrote a letter to the Administrator of the EPA, Michael Leavitt, entitled

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<sup>6</sup> R. Pre-Hearing Statement at 1; C. Pre-Hearing Statement at 2.

<sup>7</sup> R. Pre-Hearing Statement at 1; C. Pre-Hearing Statement at 2.

<sup>8</sup> R. Pre-Hearing Statement at 1; C. Pre-Hearing Statement at 1.

<sup>9</sup> R. Pre-Hearing Statement at 2; C. Pre-Hearing Statement at 1.

<sup>10</sup> R. Pre-Hearing Statement at 2; C. Pre-Hearing Statement at 1.

“Inequity, Injustice, Harassment, Retaliation & Intimidation R&E, Las Vegas Nevada.”<sup>11</sup>

7. Mr. Evans was placed on paid administrative leave from May 1, 2006 pending an investigation and was retained in that status until the conclusion of disciplinary proceedings against him.<sup>12</sup>
8. In June 2006, Jed Harrison issued to Mr. Evans a Notice of Proposed Removal. The proposal charged Mr. Evans with (1) inappropriate conduct, based on four specifications; (2) failure to follow supervisory instructions; and (3) disrespectful and malicious conduct towards a supervisor.<sup>13</sup>
9. In August 2006, Elizabeth Cotsworth issued to Mr. Evans a Decision on the Proposed Removal. Mrs. Cotsworth sustained Charge 1, Specifications 1, 3, and 4; Charge 2; and Charge 3.<sup>14</sup>

The parties each offered to make additional stipulations, but because both parties could not agree on them, I rely instead on the evidentiary record to make findings on those topics.

### **III. Findings of Fact**

Mr. Evans became an employee of the EPA in 1989<sup>15</sup> at the GS-5 pay grade (on the general schedule used for the majority of United States civil servants).<sup>16</sup> He was promoted consistently over the years until he reached GS-12 in 2000, where he remained until his employment was terminated in 2007.<sup>17</sup>

At the times relevant to this case, Jed Harrison, the Radiation Lab’s Director, was Mr. Evans most senior supervisor.<sup>18</sup> The Deputy

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<sup>11</sup> R. Pre-Hearing Statement at 2; C. Pre-Hearing Statement at 1.

<sup>12</sup> R. Pre-Hearing Statement at 2; C. Pre-Hearing Statement at 1.

<sup>13</sup> R. Pre-Hearing Statement at 2; C. Pre-Hearing Statement at 1.

<sup>14</sup> R. Pre-Hearing Statement at 2; C. Pre-Hearing Statement at 1–2.

<sup>15</sup> R. Pre-Hearing Statement at 1; C. Pre-Hearing Statement at 2.

<sup>16</sup> C. Ex. at 65; Tr. at 244. This Decision and Order cites to the record this way: citations to the trial transcript are abbreviated Tr. at [page number], the EPA’s exhibits are abbreviated as R. Ex.-[exhibit number] at [page number], and citations to Mr. Evans’s exhibits are abbreviated C. Ex. at [page number]. Unfortunately, Mr. Evans neglected to number his exhibits, so specific exhibits can be referenced only by their page numbers.

<sup>17</sup> C. Ex. at 65.

<sup>18</sup> Tr. at 24.

Director of the Radiation Lab, Richard Hopper, was more directly involved in the supervision of Mr. Evans than was Mr. Hopper.<sup>19</sup>

**A. Changes to the Radiation Lab's Emergency Response Program**

Emergency response has been a part of the EPA's mission since its inception.<sup>20</sup> It has also been part of the Radiation Lab's mission since Mr. Harrison joined the lab in 1992.<sup>21</sup> Nevertheless, the Radiation Lab's approach to emergency response began to change sometime around 2000 or 2001.<sup>22</sup> Mr. Harrison explained that, although all members of the Radiation Lab had already been expected to participate in emergency response in some capacity, no specific roles were assigned to employees before 2000.<sup>23</sup> After 2000, the Radiation Lab's management "decided to make relevant assignments to assure capable individuals were in each position, and to facilitate effective preparedness and training."<sup>24</sup> The Radiation Lab also began updating employee position descriptions to clarify their roles in the Lab's emergency responses.<sup>25</sup>

The changes to the Radiation Lab's emergency response program were made in conjunction with an Incident Command System implemented for the entire federal government; the system was designed to respond to a variety of emergencies from "hazardous material falling out of a truck to something along the lines of Hurricane Katrina, which would be a very large response."<sup>26</sup> As part of the Incident Command System, the EPA began training the Radiological Emergency Response Team "so that all the team members would be aware of what [the Incident Command System] was, how it worked, how they would work within it, that kind of thing."<sup>27</sup> The emergency response functions assigned to each Radiation Lab member were a mandatory part of their jobs.<sup>28</sup>

Mr. Evans and some of his coworkers responded poorly to these changes. He believed emergency response had always been, and should remain, voluntary for Radiation Lab employees.<sup>29</sup> Mr. Evans was

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<sup>19</sup> C. Ex. at 465.

<sup>20</sup> Tr. at 35.

<sup>21</sup> Tr. at 35.

<sup>22</sup> *See* C. Ex. at 67–72.

<sup>23</sup> C. Ex. at 133.

<sup>24</sup> C. Ex. at 133.

<sup>25</sup> C. Ex. at 134.

<sup>26</sup> Tr. at 32–33.

<sup>27</sup> Tr. at 33.

<sup>28</sup> C. Ex. at 135.

<sup>29</sup> *See* C. Ex. at 122, 128.

worried that imposing such responsibilities on unwilling and undertrained employees could create health and safety risks for both the employees and the environment.<sup>30</sup>

**B. The Creation of a Union and the Filing of an Unfair Labor Practice Complaint**

As the Radiation Lab's emergency response program "ramped up," the staff formed a union "pretty much parallel,"<sup>31</sup> i.e., the change in duties as part of the response program was a major impetus of the employees' decision to organize collectively. Dennis Farmer, another EPA employee at the Los Vegas facility, was the union's president.<sup>32</sup> Mr. Evans was its union steward.<sup>33</sup> The Radiation Lab's emergency response program was one of the first issues the union addressed because employees had a poor understanding of the changes being implemented.<sup>34</sup> The employees were uncertain what their new duties would entail and the risks those duties would expose them to.<sup>35</sup> Some employees were also unsure they were capable of carrying out the emergency response duties assigned to them.<sup>36</sup>

The Radiation Lab union filed an unfair labor practice charge with the FLRA about the way Radiation Lab managers handled the emergency response program.<sup>37</sup> Mr. Evans submitted an affidavit in support of that charge on November 20, 2003.<sup>38</sup> Much of his affidavit focused on whether Mr. Evans had been entitled to pay while responding to emergencies or while on stand-by status, but Mr. Evans also complained that it was inappropriate to incorporate all Radiation Lab employees into the emergency response program, and that he was assigned responsibilities for which he lacked adequate training, such as designing a "biological and chemical trailer."<sup>39</sup>

In their capacities as union leaders, Mr. Evans and Mr. Farmer also wrote two letters to Mr. Harrison in April 2004 about the emergency response program.<sup>40</sup> The focus of the union's complaints was the perceived changes to employees' duties. The letters explained that several employees had

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<sup>30</sup> Tr. at 245–46.

<sup>31</sup> Tr. at 151–52.

<sup>32</sup> Tr. at 152.

<sup>33</sup> Tr. at 173.

<sup>34</sup> Tr. at 152–53.

<sup>35</sup> Tr. at 153–54.

<sup>36</sup> Tr. at 153–54.

<sup>37</sup> Tr. at 159–60.

<sup>38</sup> C. Ex. 82–88.

<sup>39</sup> C. Ex. 83–88.

<sup>40</sup> C. Ex. at 96–101.

pointedly criticized the program, requesting to see the Federal guidance and regulations stating [Radiation Lab] management could at will and without negotiations change each and every employee[']s position description and performance agreement (PERFORMS) to reflect new duties and responsibilities in [the Radiation Lab's] Emergency Response Program as well as demanding 100% mandatory participation in potentially hazardous and still undefined field duties.<sup>41</sup>

The letters demanded clarification about whether participation in the emergency response program was mandatory or voluntary.<sup>42</sup> Environmental concerns were not directly raised in the letters. Mr. Harrison responded that participation in emergency response was mandatory.<sup>43</sup> He explained that “[f]or the majority of individuals, emergency preparedness and response is not a separate, unique learned capability, but rather an application of knowledge, skills and ability used on a routine basis in other office, field or laboratory responsibilities of the employee.”<sup>44</sup>

**C. The “Ruby Slippers Exercise” and Mr. Evans’s Letter to the EPA Administrator**

Tensions came to a head as an EPA emergency preparedness exercise scheduled for late July 2004, known as the “Ruby Slippers Exercise,” approached.<sup>45</sup> Mr. Evans and Mr. Farmer expressed their concerns that the training exercise and other developments with the emergency response program may lead to changes in employee responsibilities and the risks an employee would be exposed to.<sup>46</sup> Mr. Evans also took issue with the training material he had been assigned.<sup>47</sup> He thought the training would allow managers to assign him and other employees to do work they were unqualified for.<sup>48</sup> He explained,

This is nonsense, now management’s tactics are once everyone has had this training they can assign whom ever [sic] they want to duties in the labs? This is unacceptable, and I seek to decline this training since I know what these labs are capable of doing and that my education and training or current duties/responsibilities have nothing to do with

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<sup>41</sup> C. Ex. at 96, 99.

<sup>42</sup> C. Ex. at 98, 101.

<sup>43</sup> C. Ex. at 103.

<sup>44</sup> C. Ex. at 103.

<sup>45</sup> C. Ex. at 106.

<sup>46</sup> C. Ex. at 108–09.

<sup>47</sup> C. Ex. at 111.

<sup>48</sup> C. Ex. at 111.

sample preparation or lab analysis, I would never feel safe in performing any of these duties and would be a hazard to myself and others around me.<sup>49</sup>

Mr. Evans requested to be excused from the Ruby Slippers Exercise was denied.<sup>50</sup> He then obtained a note from his psychiatrist excusing him from participating, which he gave to his immediate supervisor at the time, Emilio Braganza.<sup>51</sup> According to Mr. Evans, Mr. Braganza told him during a later conversation, “basically this is not over.”<sup>52</sup> Mr. Evans did not attend the exercise.<sup>53</sup>

Shortly before the Ruby Slippers Exercise was scheduled to begin, Mr. Evans wrote his letter dated July 7, 2004 letter to the EPA Administrator, Michael Leavitt.<sup>54</sup> That letter is the primary protected activity Mr. Evans relies on to claim his managers retaliated against him. Mr. Evans wrote to the EPA administrator

[b]ecause I was so concerned that Dick Hopper and Jed Harrison, in their implementation of the emergency response, and their disregard for the employees, had reached a point where they refused to even listen to our concerns. They didn't care. And as a last ditch effort to have our concerns heard, I wrote [the Administrator] of these concerns.<sup>55</sup>

The letter referenced “inequity, injustice, harassment, retaliation and intimidation” by “local [Radiation Lab] Management.”<sup>56</sup> It identified by name Director Harrison, Deputy Director Hopper, Mr. Braganza, George Dilbeck, Greg Dempsey, and Shreon Johnson (the Director of Human Resources at the Los Vegas facility).<sup>57</sup> The actions of many of those individuals are discussed later in this Decision and Order.

Concerns Mr. Evans addressed in his letter have only a tangential relationship his current claim. Age discrimination at the Radiation Lab was his letter's primary focus. He also accused Radiation Lab managers of inappropriately procuring employee medical records and then harassing employees who suffered from medical conditions, which Mr. Evans claimed was done “to harass

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<sup>49</sup> C. Ex. at 111.

<sup>50</sup> C. Ex. at 111–12.

<sup>51</sup> Tr. at 248–49.

<sup>52</sup> Tr. at 249.

<sup>53</sup> Tr. at 248–49.

<sup>54</sup> C. Ex. at 121–28.

<sup>55</sup> Tr. at 250.

<sup>56</sup> C. Ex. at 121.

<sup>57</sup> C. Ex. at 121.

people out of their job, not to serve any recognizable government interest.”<sup>58</sup>

A portion of the letter did address the recent changes to the Radiation Lab’s emergency response program. Mr. Evans explained that employees of the Radiation lab were unreceptive to larger roles in the Lab’s emergency response because they “had no expertise in this area and the uncertainty factor was very high.”<sup>59</sup> He criticized the lack of information employees were given about their responsibilities.<sup>60</sup> He again accused management of changing employee position descriptions, something he thought they had no unilateral right to do.<sup>61</sup> He explained that, “although Emergency Response is and had been a relatively small voluntary program at our laboratory, it had never been part of everyone’s duties to go to the field and/or be continuously available for Emergency Response.”<sup>62</sup> He noted that, with the Ruby Slippers Exercise approaching, “harassment and discrimination from [Mr. Harrison] and his enforcers ha[d] stepped up.”<sup>63</sup> He opined that “Individuals [who] do not want to attend this exercise are being forced to participate in assignments & roles they have no idea about.”<sup>64</sup>

Mr. Evans harshly criticized several managers now implicated in his claim. He asserted Mr. Hopper—who later led the investigation into Mr. Evans’s alleged threats of workplace violence—had “singled out, badgered, and verbally abused” an older EPA employee and had “trumped up false accusations that were just plain slanderous lies against him and then used these lies to retaliate against him.”<sup>65</sup> Similarly, Mr. Evans professed that “[Mr. Harrison] and his supervisors had made “some kind of deal with someone. I think the Devil himself. They don’t care who’s career they ruin, how many they ruin or how they accomplish it just as long as they look good. These men are just plain Evil . . . .”<sup>66</sup> Finally, he alleged “Sheron Johnson [a manager in Human Resources] has overtly and covertly whitewashed every illegal decision and action [Radiation Lab management has] taken.”<sup>67</sup> Whether Mr. Evans’s criticisms had merit or not, his scathing tone impaired any relationship he had with those subjected to his ire.

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<sup>58</sup> C. Ex. at 122–23.

<sup>59</sup> C. Ex. at 122.

<sup>60</sup> C. Ex. at 122.

<sup>61</sup> C. Ex. at 122.

<sup>62</sup> C. Ex. at 122.

<sup>63</sup> C. Ex. at 127.

<sup>64</sup> C. Ex. at 127.

<sup>65</sup> C. Ex. at 125.

<sup>66</sup> C. Ex. at 127.

<sup>67</sup> C. Ex. at 127.

The EPA, as a typical government agency, keeps track of correspondence addressed to a senior agency official; it is entered into the system to ensure a response.<sup>68</sup> Mr. Evans's letter must have come to the attention of Elizabeth Cotsworth, the Director of the Office of Air and Radiation and Mr. Harrison's supervisor.<sup>69</sup> She told Mr. Harrison about Mr. Evans's letter.<sup>70</sup> Mr. Harrison wrote and sent to Ms. Cotsworth a detailed rebuttal to Evans's letter<sup>71</sup> explaining why Mr. Evans's complaints were unfounded. He accused Mr. Evans of pursuing a "vendetta-like agenda against two former managers (George Dilbeck and Gregg Dempsey), hold[ing] on to events that happened well in the past, and continu[ing] to harass [Radiation Lab] management because we have attempted to focus on mission and accountability."<sup>72</sup> Mr. Harrison heard nothing about Mr. Evans's letter to the Administrator thereafter.<sup>73</sup>

Ms. Johnson received a copy of Mr. Evans's letter, but she couldn't recall the source.<sup>74</sup> She never responded to Mr. Evans's letter.<sup>75</sup> The Administrator never responded to Mr. Evans.

#### **D. Employment After Evans Wrote to the EPA Administrator**

Some of Mr. Evans's coworkers at the EPA indicated in declarations that the Radiation Lab's managers would not have been happy with Mr. Evans's letter to the Administrator. Flo DeLuna, who retired from the EPA in January 2004, opined that, after Mr. Evans showed him the letter, "I knew that management would be unhappy with him."<sup>76</sup> Another employee at the EPA's Los Vegas facility, Max Davis, opined that following Mr. Evans's letter, "the management at Las Vegas has been against him."<sup>77</sup> Both Mr. DeLuna and Mr. Davis passed away before the hearing.<sup>78</sup>

Mr. Evans also believes the Radiation Lab's managers treated him differently after he wrote to the Administrator. He had received cash awards almost every year, and sometimes more than once a year, between 1990 and 2004.<sup>79</sup> His last award came in March 2004.<sup>80</sup> After

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<sup>68</sup> Tr. at 39–40.

<sup>69</sup> R. Pre-Hearing Statement at 2; C. Pre-Hearing Statement at 1.

<sup>70</sup> Tr. at 40.

<sup>71</sup> Tr. at 40; C. Ex. at 131–142.

<sup>72</sup> C. Ex. at 132.

<sup>73</sup> Tr. at 40.

<sup>74</sup> Tr. at 340.

<sup>75</sup> Tr. at 341.

<sup>76</sup> C. Ex. at 361.

<sup>77</sup> C. Ex. at 373.

<sup>78</sup> Tr. at 270.

<sup>79</sup> C. Ex. at 43.

<sup>80</sup> Tr. at 240.

his letter, he received no further awards.<sup>81</sup> Mr. Evans also thought he had been denied a promotion in 2005 because of the letter. According to him, Mr. Braganza told him he wasn't promoted because Mr. Harrison "does not like you, he does not like you in the union and you will never get promoted."<sup>82</sup> Mr. Evans interpreted that to mean his "career was basically over, because I wrote that letter."<sup>83</sup> That particular claim is unsupported, however. I already found, in my order on summary adjudication, that there was no admissible proof Mr. Evans was ever eligible for a promotion.<sup>84</sup>

**a. Hopper's letter to EPA Security**

Around this time, a manager at the Radiation Lab reported concerns that Mr. Evans might have violent proclivities. This report is not the one that led to Mr. Evans's suspension, but helps give context to that later investigation. The report came from Deputy Radiation Lab Director Hopper—another manager Mr. Evans had named in his letter to the Administrator—who wrote an EPA security specialist to express concerns about Mr. Evans.<sup>85</sup>

In that report, Mr. Hopper claimed that while eating lunch with Mr. Evans sometime in July 2004, Mr. Evans had casually mentioned contemplating violence in his private life.<sup>86</sup> Mr. Hopper stated that Mr. Evans had "started talking about his daughter's boyfriend that he doesn't like; he said he called him and told him if he ever comes to [Mr. Evans's] house or see's [sic] his daughter he would kill him and that he had weapons."<sup>87</sup> According to Mr. Hopper, Mr. Evans also discussed "mounting two 50 caliber machine guns; one in front and one in back of his motorcycle, so if any drivers 'pissed' him off he could machine gun them to death and ride away without the 'assholes' on the road."<sup>88</sup> Mr. Hopper believes another employee, Richard Levy, overheard the conversation. After Mr. Evans left, Mr. Levy approached Mr. Hopper to say Mr. Evans "met all the violence in the workplace training criteria to go 'postal' in the workplace."<sup>89</sup> Mr. Hopper knew Mr. Evans had brought a gun to work about ten years earlier, but when asked to remove it from EPA property, Mr. Evans had complied.<sup>90</sup>

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<sup>81</sup> Tr. at 240.

<sup>82</sup> Tr. at 253.

<sup>83</sup> Tr. at 254.

<sup>84</sup> Order Granting Partial Summary Adjudication at 12–13.

<sup>85</sup> Mr. Hopper's letter is dated September 1, 2004. C. Ex. at 144.

<sup>86</sup> C. Ex. at 144.

<sup>87</sup> C. Ex. at 144.

<sup>88</sup> C. Ex. at 144.

<sup>89</sup> C. Ex. at 144.

<sup>90</sup> C. Ex. at 144.

Mr. Hopper's letter went on to describe another instance during which Mr. Hopper "was told by fellow employees in confidence that [Mr. Evans] seemed increasingly agitated and Jed Harrison and I were vulnerable because of Mr. Evans[s] hatred of managers [Mr. Evans] wrote a letter to the administrator about [the Radiation Lab] management being evil."<sup>91</sup> Mr. Hopper claimed Radiation Lab employees told him they were afraid for their safety, but were "too afraid or intimidated [by Mr. Evans] to come forward and speak to personnel or management."<sup>92</sup>

Mr. Hopper also disclosed in his letter to the EPA security specialist that Mr. Evans had told Mr. Harrison he'd been seeing a psychiatrist.<sup>93</sup> Mr. Hopper expressed hope that Mr. Evans was "getting help for his hatred and intolerance of other people."<sup>94</sup> Mr. Hopper concluded his letter by stating, "As a human being, I do not like being a target of his hatred and letter writing campaigns to discredit managers and his use of derogatory names for managers."<sup>95</sup>

Different threats of workplace violence led to the discipline at issue here.

**b. Evans's Assignments and Actions Shortly After he Wrote to the EPA Administrator**

Mr. Evans was assigned to a project for the Center for Environmental Restoration, Monitoring, and Emergency Response ("CERMER") around March 2006.<sup>96</sup> He was tasked to write standard operating procedures for EPA radios.<sup>97</sup> Richard Levy, an "IT person" with the EPA, had the information Mr. Evans needed to complete his assignment. Mr. Levy refused to share the information with Mr. Evans because Mr. Levy planned to retire from federal service and use his knowledge of the radios to be re-hired as a contractor to write the standard operating procedures himself.<sup>98</sup> Mr. Evans discussed the issue with his supervisor at the time, Manny Bay.<sup>99</sup> Mr. Bay asked Mr. Evans to send him an e-mail about the issue, which Mr. Evans did.<sup>100</sup> Mr. Evans claimed Mr. Levy "became very hostile to me after that."<sup>101</sup>

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<sup>91</sup> C. Ex. at 144.

<sup>92</sup> C. Ex. at 144.

<sup>93</sup> C. Ex. at 144.

<sup>94</sup> C. Ex. at 144.

<sup>95</sup> C. Ex. at 144.

<sup>96</sup> Tr. at 255.

<sup>97</sup> Tr. at 255.

<sup>98</sup> Tr. at 255–56.

<sup>99</sup> Tr. at 256.

<sup>100</sup> Tr. at 256.

<sup>101</sup> Tr. at 257.

He thought Mr. Levy had used his access to the computer servers to read the e-mail he had sent Mr. Bay.<sup>102</sup> Mr. Evans claimed Mr. Levy later made comments about something Mr. Levy could not have known unless Mr. Levy had been reading the e-mail Mr. Evans sent.<sup>103</sup> These events took place a short time before management acted on reports that Mr. Evans had made threatening remarks. Mr. Levy—who had apparently grown hostile towards Mr. Evans—allegedly pressured Mr. Davis to report that Mr. Evans had threatened violence around that time.<sup>104</sup> Mr. Davis never made such a report.

In March 2006, Mr. Harrison instructed all Radiation Lab employees to complete their Incident Command System training courses by March 31, 2006.<sup>105</sup> Mr. Evans refused to complete the training.<sup>106</sup> Mr. Harrison knew “[i]t wasn’t that he was behind or asked for more time or said I’m sorry, I was busy. He refused to do the training.”<sup>107</sup> Everyone but Mr. Evans had completed the required training, according to Mr. Harrison.<sup>108</sup> This was the recent experience Radiation Lab managers had with Mr. Evans when they received reports of the specific threats of violence at issue, which are discussed next.

#### **E. Reports that on May 1, 2006 Mr. Evans Threatened Violence**

A wholly different threat of violence took place in a building adjoining the Radiation Lab in late April of 2006. It put EPA Radiation Lab employees on edge. In that incident a contractor working in a different building of the same Las Vegas facility (Building D) drove onto EPA property with a loaded gun while under the influence of drugs and alcohol, and he threatened violence.<sup>109</sup> The police escorted that contractor off the premises.<sup>110</sup> There had also been relatively recent news reports about postal workers who had shot and killed coworkers.<sup>111</sup> Workplace violence became an active subject of discussion among at the EPA’s Las Vegas employees.<sup>112</sup> The threats of workplace violence attributed to Mr. Evans shortly thereafter (on May 1, 2006) were taken especially seriously.

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<sup>102</sup> Tr. at 256.

<sup>103</sup> Tr. at 280–81.

<sup>104</sup> C. Ex. at 373.

<sup>105</sup> C. Ex. at 160, 200.

<sup>106</sup> Tr. at 78.

<sup>107</sup> Tr. at 78.

<sup>108</sup> C. Ex. at 409.

<sup>109</sup> Tr. at 45, 258–59.

<sup>110</sup> Tr. at 258–59.

<sup>111</sup> C. Ex. at 382.

<sup>112</sup> See Tr. at 259; C. Ex. at 363, 382.

**1. The Conversation Between Mr. Evans, Mr. Davis, and Ms. Glick**

Employees at the Las Vegas EPA office have widely divergent recollections of the events that culminated in the discipline of Mr. Evans. The accounts are described below, beginning with Mr. Evans's.

**a. Mr. Evans's Account of Events**

Mr. Evans says it was Ms. Glick who mentioned a gun the morning of May 1, 2006, not him. Mr. Evans says he arrived at his office sometime around 6:00 or 6:30 a.m. on May 1, 2006.<sup>113</sup> When he logged onto his computer, he read an e-mail about the contract employee from Building D who had threatened violence while possessing a gun at work.<sup>114</sup> Mr. Evans later walked passed a poster about the incident placed on a bulletin board in the office hallway. As Mr. Davis approached him,<sup>115</sup> Mr. Evans asked Mr. Davis, "What's going on, did you see this?"<sup>116</sup> Mr. Davis said he had read about it on his computer.<sup>117</sup> Shortly thereafter Sherry Glick came over and began to talk to Mr. Davis.<sup>118</sup> In Mr. Evans's version, Mr. Davis at one point said he was "going to take on the front office."<sup>119</sup> Ms. Glick responded, "Well, with a gun?"<sup>120</sup> Mr. Davis replied, "No, I'm going to legally take them on."<sup>121</sup> Ms. Glick then said, "Well, [Mr. Davis], if you decide to come in with a gun, you tell me when you're going to do it and I won't [sic] show up to work."<sup>122</sup> Then Mr. Davis said, "Well, let's go get some coffee" and Ms. Glick said "Well, I don't like your coffee, I've already got mine" and they left.<sup>123</sup>

**b. Ms. Glick's Account of Events**

Ms. Glick recalled a conversation with Mr. Evans and Mr. Davis on May 1, 2006.<sup>124</sup> She thought her friend, Janet Lane, had also been present.<sup>125</sup> Mr. Evans and Mr. Davis were discussing the incident involving the contractor in Building D when Mr. Evans "made the comment that he absolutely understood why the person would do these

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<sup>113</sup> Tr. at 258.

<sup>114</sup> Tr. at 258–59.

<sup>115</sup> Tr. at 259.

<sup>116</sup> Tr. at 259.

<sup>117</sup> Tr. at 259.

<sup>118</sup> Tr. at 259.

<sup>119</sup> Tr. at 259.

<sup>120</sup> Tr. at 259.

<sup>121</sup> Tr. at 259.

<sup>122</sup> Tr. at 259.

<sup>123</sup> Tr. at 259.

<sup>124</sup> Tr. at 430.

<sup>125</sup> Tr. at 430.

things, you know, if he had kids on [sic] college, you had a lot of things and they were pushing this gentleman, I guess, out of work . . .”<sup>126</sup> Mr. Evans “indicated that, you know, he understood where this guy was coming from, to bring guns. And he was very angry and upset, and he said: ‘I could see myself doing the same.’ And he pointed towards the management suite.”<sup>127</sup> Given the very recent situation with the EPA contractor and Postal Service shootings in the news, Ms. Glick was somewhat frightened to hear Mr. Evans could understand or see himself behaving that way.<sup>128</sup>

Ms. Glick went to the management suite that day to report what she had heard.<sup>129</sup> Someone there suggested she go speak with Ms. Johnson in human resources and give a statement, something Ms. Glick did a few days later.<sup>130</sup> Ms. Glick did sign a document titled “Voluntary Statement” a week later—on May 8, 2006.<sup>131</sup> Ms. Glick wrote it herself.<sup>132</sup> She stated Mr. Evans had said, “I can understand what [that contractor] did, as I get so angry that I can see myself doing that sort of thing to these guys,” and then pointed towards the management offices.<sup>133</sup> She claimed she had also heard prior comments from employees that she should watch out for Mr. Evans.<sup>134</sup>

Although Ms. Glick was housed at the EPA’s Los Vegas facility for a time, no one who managed her work was located there.<sup>135</sup> She would presumably have been less susceptible to pressure from Radiation Lab managers to give any statement against Mr. Evans.

### **c. Mr. Davis’s Account of Events**

A declaration Mr. Davis signed dated July 26, 2006 referred to a private conversation he’d had with Mr. Evans “[o]n the day all the recent trouble started . . .” (I infer this was May 1, 2006) about whether Mr. Evans had completed some mandatory emergency response courses.<sup>136</sup> Mr. Davis told Mr. Evans that he risked being fired.<sup>137</sup> Mr. Evans responded that, if management tried to fire him, he would “sue the SOB’s.”<sup>138</sup> Mr. Davis clarified that “[Mr. Evans] did not

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<sup>126</sup> Tr. at 430.

<sup>127</sup> Tr. at 430–31.

<sup>128</sup> Tr. at 431.

<sup>129</sup> Tr. at 431.

<sup>130</sup> Tr. at 431.

<sup>131</sup> R. Ex.-4 at 4.

<sup>132</sup> Tr. at 432.

<sup>133</sup> R. Ex.-4 at 4.

<sup>134</sup> R. Ex.-4 at 4.

<sup>135</sup> Tr. at 429.

<sup>136</sup> C. Ex. at 373.

<sup>137</sup> C. Ex. at 373.

<sup>138</sup> C. Ex. at 373.

say that he would shoot anyone or anything. He said he would sue, not shoot.”<sup>139</sup> More likely than not, Mr. Davis’s declaration concerns the same conversation described by Mr. Evans and Ms. Glick, for it took place that day.

These three versions of events don’t tell the same story. In Mr. Evans’s version, it is Ms. Glick who first brings up a gun. In Ms. Glick’s it is Mr. Evans. In Mr. Davis’s recollection no gun is never mentioned.

## **2. Comments Mr. Evans Allegedly Made to Rose Houston**

### **a. Mr. Diaz Marcano’s Account of Events**

During a lunchtime conversation sometime the week of April 24, 2006, Rose (“Kitty”) Houston mentioned to Helly Diaz Marcano that she wanted to share something, but was “afraid of it getting back to her.”<sup>140</sup> The next day she told Mr. Diaz Marcano that, during a gathering of friends, there was “some information that was mentioned about Mr. Evans, that kind of made her a little bit uneasy.”<sup>141</sup> Ms. Houston told Mr. Diaz Marcano that Mr. Evans had “made comments about bringing a gun to work and shooting some people.”<sup>142</sup> She also told him that Mr. Evans had brought a gun to work sometime in the past.<sup>143</sup> Despite her concerns, Ms. Houston did not want to report the conversation herself because she wanted to remain anonymous.<sup>144</sup>

Mr. Diaz Marcano took the information to his supervisor, David Musick, on May 1, 2006.<sup>145</sup> Mr. Diaz Marcano explained,

[P]ersonally, I was concerned. . . . [T]hat kind of statement is something not to take lightly, whether it was true or not, that’s not for me to decide. But I felt that I needed to let somebody be aware of what was shared by Ms. Houston with me.<sup>146</sup>

Mr. Diaz Marcano felt like he’d betrayed Ms. Houston by naming her as the source of the information regarding Mr. Evans, but felt he had to name her to be taken seriously.<sup>147</sup> Mr. Musick informed Mr.

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<sup>139</sup> C. Ex. at 373.

<sup>140</sup> Tr. at 418; R. Ex.-1 at 1.

<sup>141</sup> Tr. at 419.

<sup>142</sup> R. Ex.-1 at 1.

<sup>143</sup> R. Ex.-1 at 1.

<sup>144</sup> Tr. at 418–20; R. Ex.-1 at 1.

<sup>145</sup> Tr. at 420–21; R. Ex.-1 at 1.

<sup>146</sup> Tr. at 421.

<sup>147</sup> Tr. at 427.

Harrison, Mr. Hopper, and Ms. Johnson of what Mr. Diaz Marcano had reported to him.<sup>148</sup>

Mr. Marcano signed a document titled “Voluntary Statement” on May 3, 2006.<sup>149</sup> He could not recall whether he had personally drafted the statement, but he confirmed at the hearing that its contents were true and he had signed it voluntarily.<sup>150</sup> He had never personally heard Mr. Evans say anything threatening.<sup>151</sup>

Mr. Diaz Marcano gave the EPA his one month’s notice that he planned to leave the agency before he made his statement regarding Mr. Evans.<sup>152</sup> His imminent departure presumably made him less susceptible to pressure to implicate Mr. Evans in wrongdoing.

Yet, in this version, the mention of a gun ascribed to Mr. Evans took place more than a week before May 1, 2006. The person who tells Lab Director Harrison of the threat is neither Ms. Houston nor Mr. Diaz Marcano. It is Mr. Musick.

#### **b. Ms. Houston’s Account of Events**

Ms. Houston signed a document titled “Voluntary Statement” dated May 3, 2006.<sup>153</sup> That statement—which Ms. Houston repeatedly recanted—became pivotal to this matter. Ms. Houston’s statement indicated she had spoken with Mr. Evans sometime on or after December 2005, and he had expressed frustration that he had not been given a promotion and that he was “always left out of promotions and awards.”<sup>154</sup> He then told Ms. Houston, “I ought to get a gun and blow them away.”<sup>155</sup> The statement indicated Ms. Houston was bothered by Mr. Evans’s comments.<sup>156</sup> It also noted Mr. Evans had shared with Ms. Houston that he was seeing a psychiatrist and taking medication for depression.<sup>157</sup> Her “Voluntary Statement” concluded by stating,

[Mr. Evans] had also talked with others about his intentions and I believed that he would really blow people away and that he was on the brink of acting out his threats! I believe that [Mr. Evans] is a very unstable person and needs help before he does something very regretful. He is a danger to

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<sup>148</sup> C. Ex. at 166.

<sup>149</sup> R. Ex.-1 at 1.

<sup>150</sup> Tr. at 422–23.

<sup>151</sup> Tr. at 425.

<sup>152</sup> Tr. at 421.

<sup>153</sup> R. Ex.-2 at 2.

<sup>154</sup> R. Ex.-2 at 2.

<sup>155</sup> R. Ex.-2 at 2.

<sup>156</sup> R. Ex.-2 at 2.

<sup>157</sup> R. Ex.-2 at 2.

himself and those around him—He must get help immediately!<sup>158</sup>

In this version, the mention of a gun took place four to five months before May 1, 2006. What is written in her “Voluntary Statement” gilds the lily, using the gratuitous exclamation points. The statement is inconsistent with Ms. Houston’s actions, for it says Ms. Houston believed Mr. Evans was on the brink of mass murder, yet for months she said nothing to a manager at any level.

Ms. Houston testified she did not draft that statement; indeed, she testified she was not given an opportunity to review its contents.<sup>159</sup> She testified the statement was false; she had never heard Mr. Evans say anything that would suggest he was contemplating violence or bringing a gun to work.<sup>160</sup> To the contrary, she thought Mr. Evans had a reputation for being peaceable.<sup>161</sup> She could not recall ever telling Mr. Diaz Marcano that Mr. Evans had made threats.<sup>162</sup> Yet she considered Mr. Diaz Marcano a friend and an honest person,<sup>163</sup> which makes resolving the discrepancy between their stories challenging.

Ms. Houston explained that, sometime in 2006 (I infer it was May 3—the date listed at the top of her statement), Mr. Davis called her over to his building and told her Mr. Evans had a gun in his desk drawer.<sup>164</sup> Mr. Davis asked Ms. Houston to report to the human resources office.<sup>165</sup> Ms. Houston, having deduced that something significant was happening, asked Mr. Farmer to accompany her.<sup>166</sup>

In this version Ms. Houston herself has nothing to report, she is being summoned to the management suite out of the blue. But there is not merely mention of a gun, now an actual gun is said to be in Mr. Evans’s desk drawer. But the speaker is Mr. Davis, not Ms. Houston.

When Ms. Houston and Mr. Farmer got to the human resources office, Mr. Hopper approached them with an envelope and told Ms. Houston to sign the document inside.<sup>167</sup> Ms. Houston testified that she asked Mr. Hopper if she could read the document first, but Mr. Hopper told her, “No, sign it.”<sup>168</sup> Mr. Davis, who was standing beside Mr.

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<sup>158</sup> R. Ex.-2 at 2.

<sup>159</sup> Tr. at 136–37.

<sup>160</sup> Tr. at 137; C. Ex. at 363.

<sup>161</sup> C. Ex. at 379.

<sup>162</sup> Tr. at 142.

<sup>163</sup> Tr. at 142.

<sup>164</sup> Tr. at 136.

<sup>165</sup> Tr. at 136.

<sup>166</sup> Tr. at 136.

<sup>167</sup> Tr. at 136.

<sup>168</sup> Tr. at 136.

Hopper during this exchange, also told her to sign it.<sup>169</sup> Ms. Houston protested that she didn't want to sign a document she hadn't seen, but Mr. Hopper and Mr. Davis insisted she sign it.<sup>170</sup> Ms. Houston looked to Mr. Farmer, who shook his head, but Ms. Houston signed the document without reviewing it.<sup>171</sup>

Ms. Houston regrets signing the statement. She confessed, "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>172</sup> She feared losing her job because she had to support not only herself, but her developmentally disabled daughter and two grandchildren.<sup>173</sup> Ms. Houston recalled that, sometime after signing the statement Mr. Hopper put her up for a raise, which she received.<sup>174</sup>

Ms. Houston learned the contents of the statement when Mr. Davis told her.<sup>175</sup> She recalled Mr. Davis bragging about it.<sup>176</sup> At some point, she talked to Mr. Hopper about retracting her statement, and also told him Mr. Evans was a good worker and not a threat to anyone, but Mr. Hopper refused to let her redo her statement.<sup>177</sup>

Over three years after signing the statement, Ms. Houston e-mailed Ms. Johnson in human resources on August 13, 2009, indicating she would like to withdraw her statement since she had "signed it under duress."<sup>178</sup> She told Ms. Johnson she had "felt threatened by [Mr. Hopper's] attitude and signed the letter despite [her] reluctance to do so."<sup>179</sup> Ms. Johnson forwarded Ms. Houston's e-mail to Dian Wright, the human resources employee Ms. Johnson had tasked with investigating the allegations against Mr. Evans.<sup>180</sup> Ms. Wright forwarded the e-mail to Carolyn Davis, a Labor and Employee Relations Specialist in Washington, D.C., because the file on the investigation had, by that time, been sent to the D.C. office.<sup>181</sup> Ms. Houston wrote Ms. Davis, but never heard back.<sup>182</sup>

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<sup>169</sup> Tr. at 136–37.

<sup>170</sup> Tr. at 136–37.

<sup>171</sup> C. Ex. at 383.

<sup>172</sup> C. Ex. at 383.

<sup>173</sup> C. Ex. at 362–63.

<sup>174</sup> C. Ex. at 384.

<sup>175</sup> Tr. at 143–44.

<sup>176</sup> Tr. at 144.

<sup>177</sup> C. Ex. at 384.

<sup>178</sup> C. Ex. at 273.

<sup>179</sup> C. Ex. at 273.

<sup>180</sup> C. Ex. at 274; Tr. at 291–93.

<sup>181</sup> C. Ex. at 274.

<sup>182</sup> C. Ex. at 384.

Ms. Houston claimed she had waited until Mr. Hopper retired to retract her statement,<sup>183</sup> but Mr. Hopper retired on January 4, 2008.<sup>184</sup> Ms. Houston contacted Ms. Johnson a year and a half after Hopper retired.

I do not believe Ms. Houston wrote the statement, or dictated it to Mr. Hopper. It would be odd to dictate the exclamation points, as I mentioned already. Ms. Sheron Johnson testified the declaration she signed (R. Ex.-7) is not entirely accurate either. While her affidavit says it was well known that Ms. Houston was inept at drafting documents, Ms. Johnson had no experience with Ms. Houston, and no basis to make that statement.<sup>185</sup> There are also words in Ms. Johnson's declaration that Ms. Johnson testified she does not use.<sup>186</sup> I infer from this that not all the witness statements were drafted by the people who signed them. This lends some credence to Ms. Houston's claim that she never saw and did not write the statement that bears her signature. Ms. Johnson remembers it was Mr. Hopper who typed up Ms. Houston's statement.<sup>187</sup>

### **c. Mr. Hopper's Account of Events**

Mr. Hopper's statements are the rankest hearsay, for he did not testify at trial. During the first week of May 2006, Mr. Hopper said he learned from David Musick that Ms. Houston had told Mr. Diaz Marcano that Mr. Evans had made "disturbing threatening-type statements to her about management."<sup>188</sup> This convoluted sourcing makes me doubt anything Mr. Hopper was told was accurate. What Mr. Hopper said happened thereafter is likewise unlikely to be accurate. Here is Hopper's version of events:

Mr. Hopper said he brought Ms. Houston to Ms. Johnson's office because he thought Ms. Johnson needed to decide how to proceed.<sup>189</sup> No one else went with Mr. Hopper and Ms. Houston to the human resources office.<sup>190</sup> Mr. Hopper met privately with Ms. Houston and Ms. Johnson in a conference room, and Ms. Houston reported that she had personally heard Mr. Evans make threatening remarks, that she understood Mr. Evans had made threatening remarks to others, that Mr. Evans was being treated by a mental health professional, and that she considered Mr. Evans to be unstable and a danger to himself and

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<sup>183</sup> C. Ex. at 384.

<sup>184</sup> C. Ex. at 465.

<sup>185</sup> Tr. at 354–356.

<sup>186</sup> Tr. at 356.

<sup>187</sup> Tr. at

<sup>188</sup> C. Ex. at 346–47.

<sup>189</sup> C. Ex. at 347.

<sup>190</sup> C. Ex. at 475.

others.<sup>191</sup> Ms. Johnson informed Ms. Houston that she would need to make a written statement before the EPA could take action.<sup>192</sup> Ms. Houston was willing to provide one.<sup>193</sup>

Mr. Hopper explained that, because “Ms. Houston, who was in her mid-70’s at the time, was rather inept at drafting written documents,” he typed up what she had reported for her.<sup>194</sup> He claimed Ms. Houston didn’t know how to use a word processor.<sup>195</sup> The process Mr. Hopper described of preparing Ms. Houston’s statement was so detailed as to strain credulity.

Mr. Hopper explained that he agreed to type Ms. Houston’s statement, at Ms. Johnson’s request, only so long as Ms. Houston didn’t mind.<sup>196</sup> Ms. Johnson asked Ms. Houston if she minded, and Ms. Houston was said to have answered, “oh, no, no, no. No, we’ve known each other for years, you know.”<sup>197</sup> Mr. Hopper then used Ms. Johnson’s secretary’s computer to type the statement.<sup>198</sup> Mr. Hopper claimed that, while drafting the document, he told Ms. Houston:

[Y]ou know, I’m doing this to help you, this cannot be in my words, this is in your words and we are going to go over this and go over this because any word that’s not yours just take it out. And she said oh, sure, sure, sure.

So we went sentence by sentence and if she said that ain’t right today, that’s what I typed exactly word for word. When we got done, I said, [Ms. Houston], this is on the screen, I can change any word, I can delete a paragraph, I can add a paragraph. Oh, no, no, no, it’s fine. I said no, it’s not, you know.

So I had it printed out and I said now you review this statement, this is your statement, not mine. I’m your stenographer, I’m your secretary here, that’s all I’m doing.

[Ms. Johnson] asked you to do this, I did not. I did not ask you to sign it but it’s going to be your statement and so she read it and said it’s fine, okay.

Went back in and she put the statement down and [Ms. Johnson] said please review that document and she said I did. She said I want you to [read the statement] again.

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<sup>191</sup> C. Ex. at 347.

<sup>192</sup> C. Ex. at 347.

<sup>193</sup> C. Ex. at 347.

<sup>194</sup> C. Ex. at 347.

<sup>195</sup> C. Ex. at 475.

<sup>196</sup> C. Ex. at 475.

<sup>197</sup> C. Ex. at 475.

<sup>198</sup> C. Ex. at 475–76.

So she reviewed it again and she said please sign that document. I had no reason to have her sign it. [Ms. Johnson] asked her to, she did, and she handed it to her.”<sup>199</sup>

I don’t believe a word of it. The tenor of Mr. Hopper’s version of events is notably exculpatory to Mr. Hopper. Not only do I find it unlikely Mr. Hopper remembered that series of events in such detail over six years later, but the extreme precautionary steps Mr. Hopper described taking to ensure Ms. Houston’s statement was in her own words—drafting it with her line by line, repeatedly insisting he was just there to transcribe her thoughts, and making her review it multiple times—rings false. I am also persuaded by testimony from Mr. Dennis Farmer, who was familiar with Ms. Houston’s style of speaking and writing over many years of working with Ms. Houston. He found the statement Ms. Houston signed unlike the way Ms. Houston would express herself.<sup>200</sup>

#### **d. Ms. Johnson’s Account of Events**

Ms. Johnson claimed Ms. Houston was not coerced into signing her statement, and that Ms. Houston reviewed it for accuracy before signing it.<sup>201</sup> Ms. Johnson recalled Ms. Houston had come to her office with Mr. Hopper and Mr. Davis to report threatening statements Mr. Evans had made in the presence of both Ms. Houston and Mr. Davis.<sup>202</sup> Ms. Houston reported she had personally heard Mr. Evans make threatening remarks and believed he had made similar threatening remarks to other EPA employees.<sup>203</sup> After hearing Ms. Houston’s account, Ms. Johnson met privately with Ms. Houston and Mr. Hopper in a conference room.<sup>204</sup>

Ms. Johnson told Ms. Houston she would need to put her allegations against Mr. Evans in writing before the EPA could take action.<sup>205</sup> Ms. Houston agreed to do so; she felt compelled to cooperate because Mr. Evans’s comments had been so disturbing.<sup>206</sup> Ms. Johnson’s statement says that, “[b]ecause it was well known that Ms. Houston, who was in her mid-70’s at the time, was rather inept at drafting written documents,” Mr. Hopper typed up what Ms. Houston had reported.<sup>207</sup> Mr. Johnson and Ms. Houston remained in the

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<sup>199</sup> C. Ex. at 476.

<sup>200</sup> Tr. at 201–202.

<sup>201</sup> R. Ex.-7 at 56.

<sup>202</sup> R. Ex.-7 at 56; Tr. at 337.

<sup>203</sup> R. Ex.-7 at 57.

<sup>204</sup> R. Ex.-7 at 56.

<sup>205</sup> R. Ex.-7 at 56.

<sup>206</sup> R. Ex.-7 at 56.

<sup>207</sup> R. Ex.-7 at 57; Tr. at 337.

conference room while Mr. Hopper worked on the statement on a nearby computer.<sup>208</sup>

When Mr. Hopper returned, Ms. Johnson examined the statement and found it consistent with what Mr. Houston had reported.<sup>209</sup> Ms. Houston also reviewed the statement and signed it without any coercion.<sup>210</sup> Ms. Johnson could not recall anyone else being present (i.e., Mr. Farmer was not there), while she and Mr. Hopper talked with Ms. Houston, or when Ms. Houston signed the statement.<sup>211</sup>

The declarations by Ms. Johnson and Mr. Hopper were sufficiently similar in both content and language that I infer that they were drafted by the same person, or drafted by separate people who had discussed what they planned to say.

#### **e. Mr. Farmer's Account of Events**

Mr. Farmer recalled the events of May 3, 2006 slightly different from Ms. Houston, but the differences in their accounts are not so significant that I doubt their testimony. Mr. Farmer thought he and Ms. Houston had been together when they had both been called to the human resource office.<sup>212</sup> When they arrived, Ms. Houston was taken to an office.<sup>213</sup> Ms. Houston spent some time in an open alcove outside the office, but Mr. Farmer recalled she would “disappear, at times, from the open alcove. I think it took a fair amount of time. She would come out . . . she looked a little stressed out by things, and she'd go back and forth.”<sup>214</sup> Mr. Farmer was in a different room than Mr. Houston when she signed her statement.<sup>215</sup> He didn't have any contact with Ms. Houston during that process.<sup>216</sup>

After Ms. Houston left, Mr. Farmer was called back into the office and Mr. Hopper asked him questions in Ms. Johnson presence.<sup>217</sup> Mr. Hopper asked Mr. Farmer how he felt about Mr. Evans and whether Mr. Farmer knew if Mr. Evans had any violent tendencies.<sup>218</sup> Mr. Farmer said he felt fine about Mr. Evans and did not know of any violent tendencies.<sup>219</sup> Mr. Farmer was not asked to sign a statement.<sup>220</sup>

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<sup>208</sup> R. Ex.-7 at 57; Tr. at 337.

<sup>209</sup> R. Ex.-7 at 57.

<sup>210</sup> R. Ex.-7 at 57; Tr. at 338.

<sup>211</sup> R. Ex.-7 at 57.

<sup>212</sup> Tr. at 203.

<sup>213</sup> Tr. at 203.

<sup>214</sup> Tr. at 203–04.

<sup>215</sup> Tr. at 228.

<sup>216</sup> Tr. at 228.

<sup>217</sup> Tr. at 204–05.

<sup>218</sup> Tr. at 204.

<sup>219</sup> Tr. at 204.

#### **F. Mr. Evans's Removal from EPA Property**

Mr. Hopper notified the Radiation Lab Director, Mr. Harrison, of the allegations against Mr. Evans on May 1, 2006—the same day Mr. Hopper himself received the reports. Mr. Harrison then contacted the human resources office. Later, with the advice of human resources and the Federal Protective Service,<sup>221</sup> Mr. Harrison decided to place Mr. Evans on administrative leave. Removing Evans from the building would allow the EPA to investigate the allegations against Mr. Evans more easily.<sup>222</sup>

Around noon on May 1, Mr. Evans had lunch with several employees. Mr. Evans recalled Alejandra (“Alex”) Baer, Mark Ovrebo, and Mike Messer were present.<sup>223</sup> Ms. Baer recalled another employee, Brian Moore, being present as well.<sup>224</sup> Mr. Moore claimed he had been at a neighboring table, while Mr. Evans, Mr. Messer, Ms. Baer, and a contractor named Mark sat together.<sup>225</sup>

Both Mr. Evans and Ms. Baer recalled discussing how Mr. Evans was planning to sell his motorcycle, since he had purchased property in Utah and was going to quit the EPA.<sup>226</sup> Ms. Baer recalled an armed security guard walking into the break room, which she assumed was related to the recent indecent with the contractor from Building D.<sup>227</sup> According to her, Mr. Evans then made a comment along the lines of “I guess I won’t have to do anything anymore, it looks like this guy will instead.”<sup>228</sup> Ms. Baer elaborated, “I took it as ‘going postal’ and didn’t think anything of it since [Mr. Evans] had make [sic] comments to this effect in the past.”<sup>229</sup> Ms. Baer drafted the statement in her own words and had an opportunity to review it before signing.<sup>230</sup> She affirmed at hearing that the statement was accurate.<sup>231</sup> She also explained, however, that she never felt threatened by Mr. Evans, and Mr. Hopper had “bullied” her into writing the statement.<sup>232</sup> She explained,

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<sup>220</sup> Tr. at 205.

<sup>221</sup> Tr. at 24.

<sup>222</sup> Tr. at 25.

<sup>223</sup> Tr. at 261.

<sup>224</sup> R. Ex.-3 at 3.

<sup>225</sup> C. Ex. at 170.

<sup>226</sup> Tr. at 261; R. Ex.-3 at 3.

<sup>227</sup> R. Ex.-3 at 3.

<sup>228</sup> R. Ex.-3 at 3.

<sup>229</sup> R. Ex.-3 at 3.

<sup>230</sup> Tr. at 330–31.

<sup>231</sup> Tr. at 331.

<sup>232</sup> Tr. at 331.

It's, you know, I was a young staffer at the time and so I just felt like I didn't want to compromise my career, and so I felt, you know, I put pieces together, my interactions with [Mr. Evans], working with him regularly, and then you know, being a young person onboard, being new onboard, and I didn't [want] to compromise my career, so I feel like I just was bullied into doing this, kind of intimidated and more ushered to [the human resources office] to write this statement.<sup>233</sup>

Thus, although Ms. Baer acknowledged Mr. Evans had made an inappropriate allusion to violence, she did not think the incident warranted reporting until Mr. Hopper pressured her into making a statement.

Brian Moore also signed a statement regarding the lunchtime conversation.<sup>234</sup> He indicated that, on May 1, 2006, he had been sitting at a lunch table while the others sat at a neighboring table.<sup>235</sup> Two uniformed police officers and another officer in plain clothes entered the room and, minutes later, Mr. Moore heard Mr. Evans say "glad he did it or I would have."<sup>236</sup> Mr. Moore assumed Mr. Evans was referencing the contractor from Building D.<sup>237</sup> According to Mr. Moore, the body language of the others at the table confirmed he had heard correctly.<sup>238</sup>

Mr. Evans claimed he never suggested he was going to commit an act of violence against anyone at the EPA during the lunch conversation.<sup>239</sup>

Later during that lunch break, Mr. Braganza came and took Mr. Evans to the front office, where Mr. Harrison and Mr. Hopper were waiting with two Federal Protective Service officers.<sup>240</sup> Mr. Hopper said he wanted Mr. Evans's badge, access card, and office keys, and told Mr. Evans he was being fired.<sup>241</sup> According to Mr. Evans, Mr.

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<sup>233</sup> Tr. at 332.

<sup>234</sup> C. Ex. at 170. I infer it was Brian Moore. The statement itself does not specify who authored it, and the signature is illegible. Mr. Hopper's investigation notes indicated that he interviewed Brian Moore on May 4, 2006 (the date of the statement) and that Mr. Moore gave a statement. C. Ex. at 172, 175. I cannot be certain the statement was Mr. Moore's, however. Mr. Hopper's notes indicate he interviewed Mr. Moore at 12:30, while the statement itself says the author was interviewed at 8:30 a.m. C. Ex. at 170, 175. I find it more likely than not the statement was Brian Moore's.

<sup>235</sup> C. Ex. at 170.

<sup>236</sup> C. Ex. at 170.

<sup>237</sup> C. Ex. at 170.

<sup>238</sup> C. Ex. at 170.

<sup>239</sup> Tr. at 261.

<sup>240</sup> Tr. at 257.

<sup>241</sup> Tr. at 257-58.

Hopper told Mr. Evans he had two signed witness statements saying Mr. Evans was “going to come in and kill him, kill the director and the co-workers.”<sup>242</sup> Mr. Evans said he would like to know who the witnesses were, but Mr. Hopper told him that was none of his business.<sup>243</sup> Federal Protective Service officers interviewed Mr. Evans, but no charges were filed against him.<sup>244</sup>

After he was escorted out of the EPA, Mr. Evans “was shocked. I was numb. I thought where are these charges coming from? I never made them.”<sup>245</sup>

Mr. Evans was not allowed in the building during his administrative leave, but he received full pay.<sup>246</sup> Mr. Harrison made sure the building security guard was aware that Mr. Evans had been put on administrative leave and should not be given access to the building.<sup>247</sup> Mr. Harrison also made sure the office directors for the other buildings at the EPA’s Los Vegas complex knew of the steps he had taken to exclude Mr. Evans.<sup>248</sup>

Mr. Hopper told Mr. Evans to call his supervisor between 8:00 and 9:00 a.m. each morning while he was on administrative leave.<sup>249</sup>

#### **G. The Investigation into Mr. Evans’s Alleged Threats**

Mr. Harrison asked Mr. Hopper to investigate the allegations against Mr. Evans.<sup>250</sup> Mr. Harrison explained, “I trusted him as my Deputy Director and I often gave him tasks to take care of some of the more Human Resources related functions at the laboratory.”<sup>251</sup> Ms. Wright also helped conduct the investigation.<sup>252</sup>

Ms. Wright, Mr. Musick, and Mr. Hopper interviewed most of the employees that worked in the same area as Mr. Evans.<sup>253</sup> Although Ms. Wright claimed they didn’t force anyone to provide a statement, she did tell the interviewees “they were obligated to make a statement because they were EPA employees, and if they had any knowledge of any of the questions that we were asking, specific knowledge of them, that they needed to answer, you know, honestly.”<sup>254</sup>

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<sup>242</sup> Tr. at 257–58.

<sup>243</sup> Tr. at 258.

<sup>244</sup> Tr. at 262.

<sup>245</sup> Tr. at 261–62.

<sup>246</sup> Tr. at 25–26.

<sup>247</sup> Tr. at 46.

<sup>248</sup> Tr. at 26–27.

<sup>249</sup> C. Ex. at 171.

<sup>250</sup> Tr. at 27.

<sup>251</sup> Tr. at 27.

<sup>252</sup> Tr. at 292–93.

<sup>253</sup> Tr. at 293.

<sup>254</sup> Tr. at 299.

The investigation yielded statements from Ms. Houston,<sup>255</sup> Brian Moore,<sup>256</sup> Mr. Diaz Marcano,<sup>257</sup> Ms. Baer,<sup>258</sup> Ms. Glick,<sup>259</sup> and Jeff Lantz.<sup>260</sup> The contents of those statements have already been discussed, aside from the statement made by Mr. Lantz, who signed a May 22, 2006 statement indicating, “I came into the building, HR was still in building ‘C’, [Mr. Evans] was coming out of HR as I was entering the building. He was visibly agitated and made the comment what does somebody have to do to make a change around here ‘Go Postal.’?”<sup>261</sup> It’s not clear when Mr. Lantz claimed to have overheard that remark.

In addition to the written statements, Mr. Hopper’s interview notes indicate he learned that Mr. Evans owned guns, including a recently purchased rifle.<sup>262</sup> In a May 3, 2006 interview, Mr. Messer mentioned that Mr. Evans had recently purchased an AR-15 rifle and had “made references to the Glass House/Crystal Palace in derogatory terms,” which Mr. Hopper understood to be a reference to the front office.<sup>263</sup>

In a May 4 interview, Mr. Levy indicated Mr. Evans had been frustrated about not receiving a promotion and, in the same conversation, had “made references to [Mr. Harrison] and [Mr. Hopper] with strong references to guns.”<sup>264</sup> Mr. Levy claimed Mr. Davis had told him that Mr. Evans “has made threats forever and it was thought that he was just blowing off steam . . . .”<sup>265</sup> The interview notes state “[Mr. Levy] went on to say [Mr. Evans] has panic attacks and cannot handle most situations and deals with guns instead. He also said [Mr. Evans] uses intimidation to get his way at work.”<sup>266</sup> Mr. Levy thought Mr. Evans’s threats were real, and was concerned he may be on Mr. Evans’s “target list.”<sup>267</sup>

Mr. Hopper’s interview notes suggest bias. He seemed more interested in confirming the accusations against Mr. Evans than in impartially gathering facts. For instance, Mr. Hopper’s notes indicate that Mr. Farmer was interviewed on May 3, 2006, and that Mr. Farmer

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<sup>255</sup> C. Ex. at 168.

<sup>256</sup> C. Ex. at 170.

<sup>257</sup> C. Ex. at 179.

<sup>258</sup> C. Ex. at 183.

<sup>259</sup> C. Ex. at 184.

<sup>260</sup> C. Ex. at 186.

<sup>261</sup> C. Ex. at 186.

<sup>262</sup> C. Ex. at 172, 182, 185.

<sup>263</sup> C. Ex. at 172 (emphasis removed).

<sup>264</sup> C. Ex. at 172.

<sup>265</sup> C. Ex. at 172.

<sup>266</sup> C. Ex. at 172.

<sup>267</sup> C. Ex. at 172.

“wouldn’t say anything ie: played dumb.”<sup>268</sup> Similarly, Mr. Hopper interviewed Mr. Davis that same day and noted Mr. Davis had “dummied up very quickly. It is well known that [Mr. Davis] talked extensively with [Mr. Evans] and can quote most of his threats. [Mr. Davis] also said that [Mr. Evans] has a big mouth and he doubted he would kill anyone.”<sup>269</sup> It seems Mr. Hopper began these conversations with preconceived notions of what the interviewees knew, and concluded anyone who failed to confirm Mr. Hopper’s expectations were covering up the truth.

Mr. Harrison sought to interview Mr. Evans as part of the investigation, but Mr. Evans insisted on tape recording any conversation.<sup>270</sup> Mr. Harrison inquired with human resources about tape recording the meeting, and both Mr. Johnson and Ms. Wright told him the EPA had a policy against tape recording.<sup>271</sup> Mr. Evans refused the interview, since he could not record it, even after Ms. Wright said he could have a representative present or have his attorney on the phone.<sup>272</sup> I doubt any policy prohibiting tape recording existed. No one was able to produce a copy of it for this litigation, although efforts were made to find it. Ultimately, it matters little.

During Mr. Evans’s administrative leave, his wife, Janet Evans, went with Mr. Evans to his office to pick up some of his personal belongings.<sup>273</sup> Ms. Evans claimed that there was a woman at the front desk when they entered the building.<sup>274</sup> Mr. and Ms. Evans waited there until they were escorted to Mr. Evans’s office.<sup>275</sup> On the way back out of the building, Mr. Evans stopped to talk with the woman at the front desk.<sup>276</sup> While they were talking, Ms. Evans looked behind the woman’s desk and saw a picture of Mr. Evans with his motorcycle.<sup>277</sup>

[Ms. Evans] thought it was kind of strange, you know, why would she have a picture of my husband, you know, with his motorcycle at her desk. It was like taped, you know, so that if you were—it was like right above the door—if you were looking at the door coming in, then right down below would

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<sup>268</sup> C. Ex. at 171.

<sup>269</sup> C. Ex. at 172.

<sup>270</sup> Tr. at 70.

<sup>271</sup> Tr. at 70–71, 316, 348.

<sup>272</sup> Tr. at 316.

<sup>273</sup> Tr. at 87–88.

<sup>274</sup> Tr. at 88.

<sup>275</sup> Tr. at 88.

<sup>276</sup> Tr. at 88.

<sup>277</sup> Tr. at 88.

be a picture. And I looked at it closer and it said ‘Armed and Dangerous,’ on the picture that it had.<sup>278</sup>

Ms. Evans recalled she had taken that photograph of Mr. Evans.<sup>279</sup> Mr. Harrison, Mr. Diaz Marcano, and Ms. Glick could not recall seeing pictures of Mr. Evans around the office, as they worked there during Mr. Evans’s administrative leave.<sup>280</sup> Whether his photograph was posted in the EPA offices makes no difference in this claim.

Mr. Evans filed his original OSHA complaint in May 2006, alleging the EPA had retaliated against him for raising concerns about the safety of the mandatory emergency response program.<sup>281</sup>

#### **H. Mr. Evans’s Seven-Day Suspension**

After the investigation, Mr. Harrison issued a July 19, 2006 Notice of Proposed Removal (“Proposal”) to fire Mr. Evans.<sup>282</sup> The Proposal was based on three charges.

Charge I was “Inappropriate Conduct,” and was broken down into four separate specifications.<sup>283</sup>

1. Specification 1 stated that, during a December 2005 conversation with a coworker about being denied a promotion, Mr. Evans had said something along the lines of “I ought to get a gun and blow them away.” It stated Mr. Evans made a similar statement to the same coworker about “blowing them away” in May 2006.<sup>284</sup> Specification 1 was based largely on the statement given by Ms. Houston.<sup>285</sup>
2. Specification 2 stated that, during a December 2005 conversation about his reassignment to a different project, Mr. Evans had said that he held Mr. Harrison responsible and “referred to weapons, and guns and stated words to the effect the ‘people will be sorry and regret’ their actions.”<sup>286</sup>

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<sup>278</sup> Tr. at 88–89.

<sup>279</sup> Tr. at 89.

<sup>280</sup> Tr. at 27, 424, 434.

<sup>281</sup> EPA’s Motion for Summary Adjudication, Exhibit A.

<sup>282</sup> C. Ex. at 199–203.

<sup>283</sup> C. Ex. at 199–200.

<sup>284</sup> C. Ex. at 199.

<sup>285</sup> Tr. at 29–30.

<sup>286</sup> C. Ex. at 199.

3. Specification 3 stated that, during a May 1, 2006 conversation about the Building D contractor, Mr. Evans had said something like, “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” while pointing at the management offices.<sup>287</sup> Specification 3 was based largely on the statement of Ms. Glick.<sup>288</sup>
4. Specification 4 stated that, during another May 1, 2006 conversation about the Building D contractor, Mr. Evans said something like, “I guess I won’t have to do anything anymore, it looks like this guy will instead.” The person who reported the statement also said Mr. Evans had made comments about “going postal” in the past.<sup>289</sup> Mr. Harrison thought the primary basis for Specification 4 had been Ms. Baer’s statement, but he thought other witness statements had also provided support.<sup>290</sup>

Charge II was “Failure to Follow Supervisory Instructions,” and had only one specification:<sup>291</sup> Mr. Harrison had directed all Radiation Lab employees to complete specified Incident Command System training courses by March 31, 2006; Mr. Evans didn’t.<sup>292</sup>

Charge III was “Disrespectful and Malicious Conduct Toward Supervisor,” and also had only one specification:<sup>293</sup> Mr. Evans had

made disrespectful, malicious and unfounded statements about [Mr. Harrison] on [his] 2006 Performance Appraisal and Recognition System (PARS) plan when you wrote, “Due to the fact that Jed Harrison our incestuous Director has forced this program upon employees through intimidation and fear tactics, by withholding promotions and awards from employees who oppose him, and that I did not and refuse to sign any statement or paper stating that I would participate in [emergency response], I refuse to have anything to do with this program.”<sup>294</sup>

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<sup>287</sup> C. Ex. at 200.

<sup>288</sup> Tr. at 31.

<sup>289</sup> C. Ex. at 200.

<sup>290</sup> Tr. at 31–32.

<sup>291</sup> C. Ex. at 200.

<sup>292</sup> C. Ex. at 200.

<sup>293</sup> C. Ex. at 200.

<sup>294</sup> C. Ex. at 200.

Mr. Harrison indicated in the Notice of Proposed Removal that the “attack on my character was disrespectful and malicious.”<sup>295</sup> Mr. Harrison also indicated Mr. Evans’s statements were false.<sup>296</sup>

Mr. Harrison considered a number of factors in determining the appropriate punishment before settling on removal from federal employment.<sup>297</sup> He could only propose a punishment. Elizabeth Cotsworth, the Director of the Office of Air and Radiation and Mr. Harrison’s supervisor,<sup>298</sup> had the final say on what happened to Mr. Evans.

Ms. Cotsworth issued an August 29, 2006 Notice of Decision on Proposed Removal.<sup>299</sup> Ms. Cotsworth reviewed Mr. Harrison’s Notice of Proposed Removal, the case file containing the investigation into Mr. Evans’s conduct, and a written response Mr. Evans’s attorney had submitted.<sup>300</sup> She explained that she was “required to look at the record provided to me and make my decision based on the record, the documents that were provided to me.”<sup>301</sup> She did not investigate anything herself.<sup>302</sup>

Ms. Cotsworth found that all three charges against Mr. Evans were supported by the evidence.<sup>303</sup> There was insufficient evidence relating specifically to Charge 1, Specification 2, however, so Ms. Cotsworth did not consider that specification in determining an appropriate punishment.<sup>304</sup> She considered Mr. Evans’s “comments relating to potential violent behavior and veiled threats of harm towards management, in addition to the disrespectful and malicious statements about Jed Harrison, and [his] failure to follow supervisory instructions to be very serious.”<sup>305</sup>

Ms. Cotsworth considered a number of factors in determining an appropriate punishment, including the seriousness of the offenses, Mr. Evans’s 16 years of federal service with no prior discipline, the clarity of the notice given to Mr. Evans regarding the EPA’s rules on workplace violence, Mr. Evans’s potential for rehabilitation, and other mitigating circumstances, like Mr. Evans’s dissatisfaction with his

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<sup>295</sup> C. Ex. at 200.

<sup>296</sup> C. Ex. at 200.

<sup>297</sup> C. Ex. at 200–02.

<sup>298</sup> R. Pre-Hearing Statement at 2; C. Pre-Hearing Statement at 1.

<sup>299</sup> C. Ex. at 212–15.

<sup>300</sup> C. Ex. at 212–15.

<sup>301</sup> Tr. at 369.

<sup>302</sup> Tr. at 369.

<sup>303</sup> C. Ex. at 212.

<sup>304</sup> C. Ex. at 212.

<sup>305</sup> C. Ex. at 213.

duties and assignments.<sup>306</sup> Ms. Cotsworth concluded that a seven-day suspension, beginning September 4, 2006, was a more appropriate punishment than removal.<sup>307</sup> Mr. Evans was not paid during his suspension.<sup>308</sup> Ms. Cotsworth also instructed Mr. Evans to contact the Employee Assistance Program within three days of his return to work to arrange counseling services, which Mr. Evans was required to attend.<sup>309</sup> Finally, Mr. Evans was required to attend the next Violence in the Workplace Training session scheduled for the Radiation Lab.<sup>310</sup>

## **I. Mr. Evans's Return to Work Following the Suspension**

### **1. The Meeting on Mr. Evans's Return**

Mr. Farmer recalled that, before Mr. Evans returned from administrative leave, Mr. Harrison held a meeting on the topic for the employees.<sup>311</sup> Mr. Harrison told everyone Mr. Evans was “going to be working over here, you know, if you see anything, if you're troubled by anything, report that immediately to me. It sort of turned into the—here's the precautions we need to take now against Doug Evans.”<sup>312</sup>

### **2. Mr. Evans's New Work Assignment**

Mr. Evans returned to work on September 11, 2006.<sup>313</sup> He was assigned to work on a project being led by Mike Messer, though his official supervisor was Manny Bay.<sup>314</sup> Mr. Evans was unhappy with that assignment. He found it degrading in part because Mr. Messer was at a lower pay grade than Mr. Evans.<sup>315</sup> Mr. Evans explained the situation was degrading “[b]ecause a lower grade employee was now going to physically watch me do his work and I was being placed in a hostile environment.”<sup>316</sup> He also thought Mr. Messer had it out for him.<sup>317</sup> He elaborated, “Mike Messer had written a statement, which was solicited by [Mr. Harrison and Mr. Hopper]. And I actually saw his statement.”<sup>318</sup> It's true that Mr. Hopper had interviewed Mr. Messer

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<sup>306</sup> Tr. at 380–81.

<sup>307</sup> C. Ex. at 214.

<sup>308</sup> Tr. at 264.

<sup>309</sup> C. Ex. at 214.

<sup>310</sup> C. Ex. at 214.

<sup>311</sup> Tr. at 219.

<sup>312</sup> Tr. at 219.

<sup>313</sup> C. Ex. at 214, 217.

<sup>314</sup> Tr. at 264–65; C. Ex. at 59.

<sup>315</sup> Tr. at 264.

<sup>316</sup> Tr. at 264.

<sup>317</sup> Tr. at 264.

<sup>318</sup> Tr. at 264.

during the investigation, and Mr. Messer mentioned that Mr. Evans had recently purchased an AR-15 rifle and had “made references to the Glass House/Crystal Palace in derogatory terms,”<sup>319</sup> but I see no written statement from Mr. Messer in evidence. Mr. Evans also thought Mr. Bay was hostile towards him.<sup>320</sup> It’s not clear how Mr. Evans formed that opinion about Mr. Bay.

Mr. Evans found this new work less desirable than what he had done in the past because it was more physical.<sup>321</sup> He claimed he had to lift equipment and use vibrating drills.<sup>322</sup> Mr. Evans thought some of his new duties conflicted with medical restrictions his doctor had set based on an earlier work injury.<sup>323</sup> He claimed a Dr. Stark had set restrictions on lifting and using vibrating drills sometime around 1988.<sup>324</sup> No medical records from a Dr. Stark are in evidence. In 1989, someone from the Nevada Bureau of Vocational Rehabilitation recommended, seemingly based on a medical report, that Mr. Evans not lift more than 25 or 30 pounds.<sup>325</sup> Mr. Evans provided no additional information about his physical limitations at the time he returned from his suspension. I have no way of knowing whether the restrictions set in 1989 remained appropriate. Indeed, portions of the document have been redacted, so it’s not even clear whether a doctor or an employee from the Bureau of Vocational Rehabilitation recommended the restrictions. The evidence does not convince me Mr. Evans’s duties were outside his physical abilities in 2006.

Assignment to less appealing, more physically demanding work could constitute adverse action. Mr. Farmer also noted a change in the work Mr. Evans was assigned after his suspension.<sup>326</sup> He explained that Mr. Evans “was now the guy out on the airstrip washing the jeeps for three days. He was being given the business. He would do outside work and it would be physically demanding and it would be closely supervised.”<sup>327</sup> Mr. Farmer also thought Mr. Messer had been tasked with keeping a close eye on Mr. Evans, to the point that the two of

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<sup>319</sup> C. Ex. at 172 (emphasis removed).

<sup>320</sup> Tr. at 264–65.

<sup>321</sup> Tr. at 265.

<sup>322</sup> Tr. at 265.

<sup>323</sup> Tr. at 265.

<sup>324</sup> C. Ex. at 279.

<sup>325</sup> C. Ex. at 60–61. Someone made handwritten changes to the document setting the lifting restrictions. As best I can tell, the actual typed document states Mr. Evans should not lift more than “5 – 80 pounds.” I don’t know who made the handwritten changes, but 25 to 30 pounds seems to make more sense, so I infer the changes were accurate.

<sup>326</sup> Tr. at 219–220.

<sup>327</sup> Tr. at 220.

them were basically doing the job of one person.<sup>328</sup> He was far from certain on that point, however. He explained,

It was more like a feeling or a flavor of it, that two people were doing a job. And that's my feeling, that's not necessarily what is, but you know, it's like two people were doing the job, he was being closely watched. And I know that sounds a little subjective—and it is.<sup>329</sup>

I assign Mr. Farmer's testimony on that point little weight.

Mr. Hopper explained that he assigned Mr. Evans to work on Mr. Messer's project because he thought Mr. Evans was a good fit for the job and Mr. Messer had seemed overwhelmed with work.<sup>330</sup> He also had nowhere else to assign Mr. Evans at the time because the other projects Mr. Evans had worked on in the past were no longer available for various reasons.<sup>331</sup> Mr. Hopper did not consider it degrading for Mr. Evans to work under the direction of Mr. Messer. Mr. Hopper never used pay grades as criteria when assigning work.<sup>332</sup>

### **3. Supervision by a Security Guard and Restricted Building Access**

Mr. Evans testified that, while he was still suspended from work, Ms. Wright or Mr. Harrison called him to discuss his return and informed him an armed guard would escort him to and from the building each day, and would monitor him throughout the day as well.<sup>333</sup> That is precisely what Mr. Evans says happened.<sup>334</sup> He claimed,

[The guard] escorted me in the building, when I sho[w]ed up from work. He would stand either at my vehicle or he would stand on the outside of the door of the entrance to the building, and then there were times—and it was, I believe, every hour on the hour he would walk up past my cubicle and he would stand there. He would watch what I would do. And then he would move through the building, again.

Then there were times that he escorted me to the restroom. He was right behind me, watching me go to the

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<sup>328</sup> Tr. at 220, 229.

<sup>329</sup> Tr. at 229–30.

<sup>330</sup> C. Ex. at 481.

<sup>331</sup> C. Ex. at 481.

<sup>332</sup> C. Ex. at 481.

<sup>333</sup> Tr. at 265.

<sup>334</sup> Tr. at 265–66, 278.

restroom. And then, on my return at the end of the work day, he escorted me to my vehicle and watched me drive away.”<sup>335</sup>

Mr. Harrison explained that the security guard’s job was to patrol Building C of the Los Vegas facility, as well as the general campus to a more limited extent.<sup>336</sup> The security guards at the Las Vegas facility were not EPA employees.<sup>337</sup> Mr. Harrison explained:

the co-located offices that were at that Las Vegas complex kind of pooled our resources and contracted for security support services there at Las Vegas. So, the contractor selected the security guard and, basically, supervised the security guard, but we provide the main taskings, what we were interested in, in terms of the contract. And then we also could make the security guard aware of, you know, specific concerns or whatever.<sup>338</sup>

The Radiation Lab let the security guard know that Mr. Evans did not have access to the building while on administrative leave, the guard was informed Mr. Evans was allowed back to work.<sup>339</sup> He could not recall anyone instructing the guard to pay close attention to Mr. Evans.<sup>340</sup> Mr. Harrison did acknowledge, however, that he had still considered Mr. Evans dangerous after his suspension, and he had disagreed with Ms. Cotsworth’s decision to suspend, rather than fire, Mr. Evans.<sup>341</sup>

Given the evidence as a whole, however, I find it more likely than not Mr. Evans exaggerated the extent to which the security guard monitored him. It’s possible the guard may have checked in on Mr. Evans’s work area somewhat more often than other areas without being instructed to, since Mr. Evans was presumably one of few people management had specifically identified to the guard. But I believe Mr. Evans was also hyper-aware of the guard’s presence. The guard may simply have passed Mr. Evans’s work area about once an hour as part of his normal rounds through the building. And Mr. Evans’s claim that the guard personally escorted him into and out of the building, and even to the bathroom, is too extreme to be credible without any corroborating evidence.

Mr. Evans also claimed he was restricted to two buildings at the complex after he returned from his suspension.<sup>342</sup> Mr. Hopper, the only

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<sup>335</sup> Tr. at 278. *See also* Tr. at 265–66.

<sup>336</sup> Tr. at 44.

<sup>337</sup> Tr. at 45.

<sup>338</sup> Tr. at 45–46.

<sup>339</sup> Tr. at 46.

<sup>340</sup> Tr. at 46.

<sup>341</sup> Tr. at 84.

<sup>342</sup> Tr. at 265–66.

other witness to address that point, was unsure whether Mr. Evans's access to buildings had been restricted.<sup>343</sup> Mr. Hopper opined, however, that if his access had been restricted, it was likely because Ms. Houston felt unsafe.<sup>344</sup> There is insufficient evidence to determine whether the alleged restricted access was at all significant. It's not clear how Mr. Evans knew his access was restricted. He was not restricted from any area where he had to work. Nor is it clear that other EPA employees have unfettered access to buildings they don't work in.

#### **4. Counseling Through the Employee Assistance Program**

As part of his return to work, Mr. Evans received psychological counseling through the EPA Employee Assistance Program. His psychologist was Sue Daniels, Ph.D.<sup>345</sup> Although Mr. Evans considered it degrading that he was required to see Dr. Daniels, he nevertheless thought his sessions with her went well.<sup>346</sup>

#### **J. Mr. Evans's First Request for Leave**

In November 2006, Dr. Daniels wrote a letter on Ms. Evans's behalf opining that he should leave work for the time being.<sup>347</sup> She explained that:

In the weeks following [Mr. Evans's] return to work, he became stressed and began to experience sleep loss, decreasing appetite, stomach problems, irritability, difficulty concentrating and difficulty remembering. His stress and ensuing depression worsened to such a degree that he was unable to force himself to return to his job following a brief vacation.<sup>348</sup>

She went on to explain that "[t]he working environment at EPA, as perceived by [Mr. Evans], is adverse and as such, has worsened his anxiety and led to his depression."<sup>349</sup> She thought, based on what Mr. Evans had told her, that he had "taken all measures within his control to seek relief from what he now perceives to be an adverse and

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<sup>343</sup> C. Ex. at 482.

<sup>344</sup> C. Ex. at 482.

<sup>345</sup> Tr. at 267; C. Ex. at 242.

<sup>346</sup> Tr. at 267-68.

<sup>347</sup> C. Ex. at 242.

<sup>348</sup> C. Ex. at 242.

<sup>349</sup> C. Ex. at 242.

intolerable work situation.”<sup>350</sup> She saw no other alternative but for Mr. Evans to remove himself from that environment.<sup>351</sup>

According to Mr. Evans, Dr. Daniels concluded he had been “placed in a hostile environment and that I needed to remove myself until this was all taken care of.”<sup>352</sup> That differs significantly from what Dr. Daniels actually said in the letter, however, which said only that Mr. Evans *perceived* his work environment to be adverse. Mr. Evans made no showing that Dr. Daniels knew enough about the work environment to reach an informed opinion on whether Mr. Evans’s work environment was hostile. Dr. Daniels received only Mr. Evans’s side of the story, so her opinion would carry very limited weight. But, in the end, I find Dr. Daniels meant no more than she said—Mr. Evans found the conditions adverse.

Mr. Evans also claimed that Dr. Daniels “verbally told me, with the armed guard being there at EPA and monitoring everything I did, she stated that [Mr. Hopper] and [Mr. Harrison] wanted me dead and they were going to use this armed guard to do it.”<sup>353</sup> I don’t believe it. That does not sound anything like the sort of statement a trained psychologist would make to a patient. Whether Mr. Evans misinterpreted a conversation that he and Dr. Daniels had about how the security guard made him feel, or Mr. Evans fabricated Dr. Daniel’s supposed statement entirely on his own, I do not know. But without any further evidence, I reject the testimony that a psychologist with the Employee Assistance Program intimated to an emotionally troubled employee that his superiors were plotting to murder him.

Dr. Daniel’s letter served as support for Mr. Evans’s November 20, 2006 request for extended leave.<sup>354</sup> Mr. Evans sent Mr. Bay a letter (with Dr. Daniel’s letter attached) requesting leave “until at such time the work environment has changed.”<sup>355</sup> He requested that his 157 hours of annual leave be used first, followed by his 694 hours of sick leave.<sup>356</sup> Then, he requested that he be granted one year of leave without pay, “at which time I would venture my litigation would have proceeded through the courts and been taken care of.”<sup>357</sup> Mr. Bay approved Mr. Evans’s request to use his annual and sick leave based on the recommendation of Dr. Daniels, but rejected his request for an additional year of leave without pay, explaining, “I am not certain of

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<sup>350</sup> C. Ex. at 242.

<sup>351</sup> C. Ex. at 242.

<sup>352</sup> Tr. at 268.

<sup>353</sup> Tr. at 268.

<sup>354</sup> C. Ex. at 240.

<sup>355</sup> C. Ex. at 240.

<sup>356</sup> C. Ex. at 240.

<sup>357</sup> C. Ex. at 240.

the future workload situation. . . .”<sup>358</sup> Mr. Bay stated that Mr. Evans was expected to return to work on May 21, 2007.<sup>359</sup> He also mentioned that Mr. Evans may be eligible for a disability retirement.<sup>360</sup> Mr. Evans had no interest in that option. He “thought, no, I don’t need to retire, there’s nothing wrong with me.”<sup>361</sup>

In a May 8, 2007 letter, Mr. Evans, through his attorney, again requested that he be granted a year of leave without pay beginning May 21, 2007.<sup>362</sup> Mr. Evans’s attorney explained that there had been “no change in the conditions that were the basis of the medical documentation provided by Dr. Sue Daniel.”<sup>363</sup> He did not anticipate that Mr. Evans’s claim would be resolved by May 21, 2007—when Mr. Evans was expected to return to work.<sup>364</sup>

Mr. Bay rejected the new request for leave without pay in a May 15, 2007 letter.<sup>365</sup> Mr. Bay explained that Mr. Evans had already taken 851 hours of annual and sick leave, of which 480 hours had been pursuant to the Family Medical Leave Act (“FMLA”), as Mr. Evans had requested. Mr. Evans had exhausted the leave available under the FMLA.<sup>366</sup> Mr. Evans’s request for additional leave without pay could not be granted under EPA policy.<sup>367</sup> Mr. Bay explained that, “without clear indication of leave duration and expectation that he will return to work . . . our workload situation in the Center for Environmental Restoration, Monitoring and Emergency Response (CERMER), has not changed.”<sup>368</sup> Mr. Evans’s extended absence was causing a staffing shortage and forcing others to perform work that should have been his responsibility.<sup>369</sup> The Radiation Lab was falling behind on certain tasks without him there.<sup>370</sup> Furthermore, the EPA requires employees on leave for serious health conditions to provide medical recertification, and Mr. Bay could “grant sick leave only when supported by evidence administratively acceptable by the agency.”<sup>371</sup> Mr. Bay requested any

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<sup>358</sup> C. Ex. at 241.

<sup>359</sup> C. Ex. at 241.

<sup>360</sup> C. Ex. at 241.

<sup>361</sup> Tr. at 277.

<sup>362</sup> C. Ex. at 250.

<sup>363</sup> C. Ex. at 250.

<sup>364</sup> C. Ex. at 250.

<sup>365</sup> C. Ex. at 251.

<sup>366</sup> C. Ex. at 251.

<sup>367</sup> C. Ex. at 251.

<sup>368</sup> C. Ex. at 251.

<sup>369</sup> C. Ex. at 251.

<sup>370</sup> C. Ex. at 251.

<sup>371</sup> C. Ex. at 251.

additional medical information Mr. Evans had to support his request.<sup>372</sup>

Mr. Evans filed his first supplemental OSHA complaint in mid-May 2007, alleging additional protected activity—the original OSHA complaint Mr. Evans had filed—and a series of alleged adverse actions taken against him.<sup>373</sup>

Mr. Evans's attorney wrote Mr. Bay back on May 21, 2007—the day Mr. Evans was to return to work—explaining that he and Mr. Evans had been unable to contact Dr. Daniels, and Mr. Evans was aware of no doctors in Duchesne, Utah (evidently where Mr. Evans had moved and was living at the time) that could provide him with an updated assessment.<sup>374</sup> Mr. Evans's attorney asked for advice on who Mr. Evans should see for a psychological assessment and again requested that the EPA grant leave without pay, at least until Mr. Evans could see a doctor.<sup>375</sup> Mr. Evans had time during his months of paid leave to find a new doctor, treatment, and secure an updated assessment. I see no proof of any efforts to be treated or assessed.

Unsurprisingly, Mr. Bay again denied the request for leave without pay on May 22, 2007.<sup>376</sup> EPA policy would not permit it. Mr. Bay explained that:

[a]s a basic condition to approval of extended leave without pay, there must be a reasonable expectation that the employee will return to work. In addition, it should be apparent that one of the following benefits would result: an increased job availability; improvement of the employee's health; or furtherance of a program of interest to the Government. Mr. Evans[s] request for [leave without pay] does not meet the criteria for approval.<sup>377</sup>

Dr. Daniels's November 2006 letter did not project any date on which Mr. Evans could return to work. Mr. Evans had not provided more recent medical records to show either that he was still unable to work, or that he was expected to return to work by a certain date.<sup>378</sup> Mr. Bay warned that Mr. Evans had become absent without leave, and his continued absence could result in his removal from federal service.<sup>379</sup>

Mr. Evans continued to dawdle. A May 23, 2007 letter from Mr. Evans's attorney indicated Mr. Evans "would like to work with you to

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<sup>372</sup> C. Ex. at 251.

<sup>373</sup> EPA's Motion for Summary Adjudication, Exhibit E.

<sup>374</sup> C. Ex. at 252.

<sup>375</sup> C. Ex. at 252.

<sup>376</sup> C. Ex. at 253.

<sup>377</sup> C. Ex. at 253.

<sup>378</sup> C. Ex. at 253.

<sup>379</sup> C. Ex. at 253.

get the evaluations necessary to document the issues you identified in your letter yesterday.”<sup>380</sup> Mr. Evans’s attorney had asked Mr. Evans to make an appointment with the nearest community mental health agency, but Mr. Evans was unable to get an appointment until May 31.<sup>381</sup> He asked if Mr. Bay could wait until the evaluation was done and, if not, whether Mr. Bay had any advice on another way to obtain the evaluation.<sup>382</sup> Again, Mr. Evans sought advice on a matter in which the EPA had no reason to get involved. If Mr. Evans sought further leave, he had to provide the necessary documentation.

Mr. Bay wrote back on May 25, explaining that Mr. Evans continued to be absent without leave.<sup>383</sup> He suggested that, if Mr. Evans provided medical documentation by June 4, 2007, he may be able to apply ten hours of annual leave Mr. Evans had accrued to his absence without leave, but no leave without pay would be approved.<sup>384</sup>

Mr. Bay sent another letter on June 19, 2007 warning that Mr. Evans continued to be absent without leave.<sup>385</sup> He explained that absence without leave in excess of five consecutive days could result in removal from federal service.<sup>386</sup>

Unsurprisingly, on August 2, 2007, Mr. Harrison again proposed to remove Mr. Evans from federal service—this time for remaining absent without leave for 51 workdays from May 21, 2007 to August 1, 2007.<sup>387</sup> This time, Mr. Cotsworth approved Mr. Harrison’s proposal, and Mr. Evans was removed from federal service effective September 14, 2007.<sup>388</sup>

Mr. Evans filed a second supplemental OSHA complaint in August 2007 adding his termination from the EPA as an adverse action.<sup>389</sup>

The evidence convinces me Mr. Evans never intended to return to work. Mr. Evans moved to Utah. He made no effort to supply the EPA with medical evidence that would support his request for additional leave. Furthermore, he admitted at the hearing that he had walked away from federal service.<sup>390</sup> He explained, “I walked out when I handed that letter to [Mr. Bay]. I left. I walked. And I loaded up my

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<sup>380</sup> C. Ex. at 258.

<sup>381</sup> C. Ex. at 258.

<sup>382</sup> C. Ex. at 258.

<sup>383</sup> C. Ex. at 259.

<sup>384</sup> C. Ex. at 259.

<sup>385</sup> C. Ex. at 260.

<sup>386</sup> C. Ex. at 260.

<sup>387</sup> C. Ex. at 266–69.

<sup>388</sup> C. Ex. at 270–72.

<sup>389</sup> EPA’s Motion for Summary Adjudication, Exhibit F.

<sup>390</sup> Tr. at 274.

personal belongings, at that time, and I did not come back. I was not even in Nevada when I received the removal letter, the final removal letter, I was nowhere there.”<sup>391</sup> When asked to clarify whether he did not intend to ever return to work, Mr. Evans responded “It was my intention that walking away, that this lawsuit would not take 10 years.”<sup>392</sup>

#### **IV. The Employee Protection Provisions of the Environmental Statutes**

##### **A. Scope of the CAA’s Whistleblower Protections**

The Clean Air Act (“CAA”)<sup>393</sup> “is a complex and comprehensive environmental statute enacted to preserve and protect the nation’s air and public health.”<sup>394</sup> Like the other environmental statutes at issue here, the CAA protects against invidious actions taken in retaliation when an employee commences or assists with a proceeding or any other action to carry out the purposes of the act.<sup>395</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>396</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 Act, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act.”<sup>397</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>398</sup> CERCLA’s definition of “environment” includes, among other things, “surface water, ground water, drinking water

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<sup>391</sup> Tr. at 274.

<sup>392</sup> Tr. at 274.

<sup>393</sup> 42 U.S.C. § 7401 *et seq.*

<sup>394</sup> *Tomlinson v. EG&G*, ARB Nos. 11-024, 11-027, ALJ No. 2009-CAA-008, slip op. at 15 (ARB Jan. 31, 2013).

<sup>395</sup> 42 U.S.C. § 7622(a).

<sup>396</sup> *Tomlinson*, ARB Nos. 11-024, 11-027 at 16 (internal citation and quotations omitted).

<sup>397</sup> 42 U.S.C. § 9610(a).

<sup>398</sup> *Williams v. Dallas Ind. School Dist.*, ARB No. 12-024, ALJ No. 2008-TSC-001, slip op. at 8 (ARB Dec. 28, 2012) (quoting 42 U.S.C. § 9602(a)).

supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.”<sup>399</sup> Virtually all the outdoors of the United States are protected, but not the interior space of buildings.

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

Congress enacted the Safe Drinking Water Act (“SDWA”)<sup>400</sup> “to assure that water supply systems serving the public meet minimum national standards for protections of public health”<sup>401</sup> and “to assure safe drinking water supplies, protect especially valuable aquifers, and protect drinking water from contamination by the underground injection of waste.”<sup>402</sup> Its whistleblower provision mirrors those of the CAA and CERCLA.<sup>403</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>404</sup> As an employee, Mr. 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 Labor adjudicates.<sup>405</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>406</sup> As the Administrative Review Board has

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<sup>399</sup> *Williams*, ARB No. 12-024 at 8 (quoting *Devers v. Kaiser-Hill Co.*, ARB No. 03-113, ALJ No. 2001-SWD-003, slip op. at 15 (ARB Mar. 31, 2005)).

<sup>400</sup> 42 U.S.C. § 300f *et seq.*

<sup>401</sup> H.R. Rep. No. 93-1185, at 6454 (1974).

<sup>402</sup> *Nat. Res. Def. Council, Inc. v. EPA*, 824 F.2d 1258, 1268 (1st Cir. 1987).

<sup>403</sup> 42 U.S.C. § 300j-9(i).

<sup>404</sup> 29 C.F.R. § 24.102(b).

<sup>405</sup> *See generally Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB Apr. 21, 2015) (en banc).

<sup>406</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).

recognized, in Mr. Evans's sort of environmental case, "the more difficult 'motivating factor' causation standard applies . . . ." <sup>407</sup>

Once an employee succeeds in his burden, he is entitled to relief unless the employer demonstrates by a preponderance of the evidence that the employer (here the EPA) would have taken the same action absent the protected activity. <sup>408</sup>

**B. Mr. Evans Engaged in Protected Activities**

"[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>409</sup> The "reasonable belief" standard has a subjective component and an objective component. <sup>410</sup> The subjective component tests whether the employee actually believed that the employer was or might be in violation of an environmental standard. <sup>411</sup> 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>412</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>413</sup>

Mr. Evans now claims he engaged in four principal protected activities:

1. sending the July 2004 letter to the EPA Administrator,
2. submitting the November 2003 affidavit in support of the union's complaint to the FLRA,
3. making certain comments in his 2006 performance appraisal, and
4. filing each of his three OSHA complaints.

The 2004 letter to the EPA Administrator is the primary protected activity alleged in the case, and the principal reason Mr.

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<sup>407</sup> *Gupta*, ARB Case No 12-049 at 21.

<sup>408</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 11 (ARB Apr. 25, 2014) erratum (ARB June 17, 2014).

<sup>409</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>410</sup> *Sylvester*, ARB No. 07-123 at 14.

<sup>411</sup> *Sylvester*, ARB No. 07-123 at 14-15.

<sup>412</sup> *Sylvester*, ARB No. 07-123 at 15.

<sup>413</sup> *Sylvester*, ARB No. 07-123 at 15.

Evans believes managers at the EPA retaliated against him. I begin my analysis there.

**1. Sending the July 2004 Letter to the EPA Administrator Was a Protected Activity**

While Mr. Evans's letter to the Administrator could be characterized as referring primarily to age-discrimination, invasion of privacy, and employee-safety issues, some of the letter touched on his concerns regarding the emergency response program. He explained that employees of the Radiation Lab were not receptive of increased emergency response duties because they "had no expertise in this area and the uncertainty factor was very high."<sup>414</sup> He criticized the lack of information conveyed to employees about their responsibilities.<sup>415</sup>

He also opined that "[i]ndividuals [who] do not want to attend [the Ruby Slippers] exercise are being forced to participate in assignments & roles they have no idea about."<sup>416</sup>

Mr. Evans explained, in a later declaration, that he had written the letter to the Administrator in part because he was worried about the impact improperly trained emergency responders could have on the environment. He was concerned

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 [emergency response] participation was leading to an [emergency response] program that 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 emergency.<sup>417</sup>

Mr. Evans confirmed at trial that he was concerned about the environmental impact the changes made to Radiation Lab's emergency response program would have. He explained, "I knew that by forcing these individuals and changing their position description, the

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<sup>414</sup> C. Ex. at 122.

<sup>415</sup> C. Ex. at 122.

<sup>416</sup> C. Ex. at 127.

<sup>417</sup> Evans Declaration in support of Mr. Evans's Memorandum in Opposition to Summary Decision at ¶ 3.

environment was going to suffer, people that would be involved in the emergency—not the responders, but the people in the community would be harmed, as well.”<sup>418</sup>

Although environmental concerns were not the primary focus of the Mr. Evans’s letter to the Administrator, “[t]he 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>419</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>420</sup> So long as reports of safety and health concerns “touch[] on the concerns for the environment or public health and safety that are the focus of the environmental acts,” they may still be protected by the environmental statutes.<sup>421</sup>

Furthermore, 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.<sup>422</sup> 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>423</sup>

The possibility that Radiation Lab employees might be called upon to respond to an environmental emergency was more than theoretical. It has already happened more than once. Staff under Mr. Harrison’s supervision responded to the Hanford, Washington nuclear waste site and to Hurricane Katrina. Mr. Harrison acknowledged those were situations that could involve radiation, toxic chemicals, and potential risks to drinking water sources.<sup>424</sup> Radiation Lab employees also responded to the Cerro Grande fires near Los Alamos, New Mexico

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<sup>418</sup> Tr. at 245–46.

<sup>419</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>420</sup> *Williams*, ARB No. 12-024 at 11.

<sup>421</sup> *Williams*, ARB No. 12-024, slip op. at 9 (quoting *Melendez v. Exxon Chems. Americas*, ARB No. 96-051, ALJ No. 1993-ERA-003, slip op. at 18 (ARB Mar. 31, 2005)).

<sup>422</sup> *Sylvester*, ARB No. 07-123 at 34 (Brown, J., concurring in part and dissenting in part) (citing *Passaic Valley Sewerage Comm’rs v. Dep’t of Labor*, 992 F.2d 474, 478, 479 (3d Cir. 1993)).

<sup>423</sup> *Sylvester*, ARB No. 07-123 at 34 (Brown, J., concurring in part and dissenting in part) (citing *Passaic Valley Sewerage Comm’rs v. Dep’t of Labor*, 992 F.2d 474, 478, 479 (3d Cir. 1993)) (internal quotations omitted).

<sup>424</sup> Tr. at 55–56. *See also* C. Ex. at 468.

around 1999 or 2000.<sup>425</sup> The fires were near the Los Alamos National Laboratory, and there were concerns that radioactive contamination may spread through the fire's smoke plume.<sup>426</sup> The team's primary responsibility was to monitor the area around the fire for potential radiation.<sup>427</sup> Mr. Hopper thought Radiation Lab employees may also have responded to a fire in Idaho at some point.<sup>428</sup> Furthermore, the whole reason Radiation Lab managers began updating employees' emergency response roles and requiring additional training was so that Radiation Lab employees could better respond to emergencies.

The risk to the environment was also more than theoretical. Ms. Houston explained that inadequately trained emergency responders could cause the environmental contamination of an entire neighborhood, and could even cause deaths.<sup>429</sup> Similarly, Mr. Farmer explained that improperly responding to an emergency situation could escalate a relatively minor problem into one that has long-term consequences for the surrounding ground, air, and water.<sup>430</sup> He opined,

Once it's in the air, it's on the ground. Once it's on the ground, it's in the water. Once it's in the water, the EPA is going to be there for 30 years monitoring those sites. To tie it up, I believe they call those Superfund Sites. . . . [T]he impact could be huge, including safety aspects to the people doing that work.<sup>431</sup>

Mr. Evans told the Administrator that the Radiation Lab was forcing employees to respond to environmental emergencies without sufficient training or expertise. That concern was reasonable, both objectively and subjectively, and relates to the environmental protection statutes enough to be a protected disclosure.

## **2. The November 2003 Affidavit in Support of the Union's Complaint to the FLRA**

Much of the same analysis that applied to Mr. Evans's letter to the Administrator applies to his affidavit as well. Again, like the letter to the Administrator, the affidavit focused on issues other than environmental concerns—most prominently, whether Mr. Evans had been entitled to pay while responding to emergencies or while on stand-by status. But Mr. Evans also complained it was inappropriate for the Radiation Lab to incorporate all employees into the emergency

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<sup>425</sup> C. Ex. at 407–08.

<sup>426</sup> C. Ex. at 408.

<sup>427</sup> C. Ex. at 408.

<sup>428</sup> C. Ex. at 469.

<sup>429</sup> Tr. at 133; C. Ex. at 382.

<sup>430</sup> Tr. at 156.

<sup>431</sup> Tr. at 156.

response program, and that he had been assigned responsibilities for which he lacked adequate training, such as designing a “biological and chemical trailer.”<sup>432</sup> As with the letter to the Administrator, these concerns “touched on” the environmental statutes’ protections sufficiently to be a protected activity.

### **3. The 2006 Performance Appraisal Comments**

In his 2006 performance appraisal Mr. Evans said:

Due to the fact that Jed Harrison our incestuous Director has forced this program upon employees through intimidation and fear tactics, by withholding promotions and awards from employees who oppose him, and that I did not and refuse to sign any statement or paper stating that I would participate in [emergency response] I refuse to have anything to do with this program.<sup>433</sup>

This entire ER program is dangerous to the employees of the R&IE and their health, as was shown in last year[']s Ruby Slippers exercise. Yet Management doesn't care about its employees and continues their incestuous goal. ER duties have never been defined.<sup>434</sup>

Environmental concerns were not the focus of Mr. Evans's remarks. He was primarily concerned about employee safety. Yet he generally objected to the emergency response program because the Radiation Lab's employees were ill prepared to handle the duties associated with it—a problem that could have environmental implications. The portions of the performance appraisal objecting to the emergency response program are protected activity.

### **4. Filing the Three OSHA Complaints**

The Board noted in *Evans v. U.S. Environmental Protection Agency* 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>435</sup> The ARB relied on language in the 2006 complaint alleging violations of the SDWA, the CAA, and CERCLA, as well as Mr. 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

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<sup>432</sup> C. Ex. 86–88.

<sup>433</sup> C. Ex. at 200.

<sup>434</sup> R. Ex.-5 at 50.

<sup>435</sup> *Evans II*, ARB No. 08-059 at 14.

training.”<sup>436</sup> Given the ARB decision, the initial 2006 OSHA filing qualifies as a protected activity.

Mr. Evans filed two supplemental OSHA complaints. The first, filed in May 2007, alleged an additional protected activity: the original OSHA complaint Mr. Evans had filed. The supplemental complaint also outlined a series of adverse managerial actions flowing from that event, including: suspending Mr. Evans in September 2006 and transferring him to a different position, limiting his 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 Mr. Evans with discharge.<sup>437</sup> The second, filed in August 2007, merely added his termination as a final adverse action.<sup>438</sup> Because they were not in the record before it, the Board did not consider whether the supplemental complaints constituted protected activities. Given the Board’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.

### **C. The EPA Took Numerous Adverse Actions Against Mr. Evans**

The EPA took specific adverse actions against Mr. Evans—some disputed and some undisputed. But the focus of this case is not whether the EPA punished Mr. Evans; it’s whether the EPA had adequate grounds to do so, unrelated to his protected activities.

The alleged adverse actions taken against Mr. Evans include fabricating allegations against him, placing him on administrative leave, suspending him in September 2006, transferring him to a different position, limiting his building access, portraying him as a safety risk to other employees, requiring him to participate in counseling, refusing to grant the requested one-year leave without pay, and ultimately terminating him. The section below discussing the EPA’s motive will eliminate the need to discuss all of these claimed adverse actions, save one: fabricating allegations against Mr. Evans.

The environmental statutes’ anti-retaliation provisions cover only employment actions that are “materially adverse” to a reasonable employee.<sup>439</sup> The action must be sufficiently harmful to dissuade a

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<sup>436</sup> *Evans II*, ARB No. 08-059 at 14.

<sup>437</sup> EPA’s Motion for Summary Adjudication, Exhibit E at 2.

<sup>438</sup> EPA’s Motion for Summary Adjudication, Exhibit F at 2.

<sup>439</sup> *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2, slip op. at 16 (ARB Sept. 30, 2008); *Burlington N. & Santa Fe Ry Co. v. White*, 548 U.S. 53, 57 (2006) (defining “materially adverse” as action sufficiently harmful to

reasonable employee from making or supporting a charge of discrimination.<sup>440</sup> As I will discuss in more detail later, I find that Mr. Hopper fabricated Mr. Houston's witness statement. That statement made its way into the EPA's investigation files, and was referenced in Mr. Harrison's Notice of Proposed Removal. Although Ms. Houston's statement was far from the sole basis for punishing Mr. Evans, I find that a reasonable employee would be dissuaded from reporting environmental concerns knowing that it may subject him to false accusations that he had threatened workplace violence, particularly when that accusation was well documented, reported to numerous managers, and cited as justification for imposing punishment.

#### **D. Radiation Lab Managers Knew of Mr. Evans's Protected Activities**

##### **1. The Letter to the Administrator**

There is no dispute that the EPA managers relevant to this case knew of Mr. Evans's letter to the Administrator. Ms. Cotsworth—who made the final decisions to first suspend, and then later to terminate, Mr. Evans—learned that Mr. Evans had sent the letter and informed Mr. Harrison.<sup>441</sup> She acknowledged she learned of the letter before she decided to suspend Mr. Evans, but denied it played any role in that decision.<sup>442</sup> Mr. Harrison was aware of the letter, which he responded to on August 17, 2004.<sup>443</sup> Mr. Hopper also learned of Mr. Evans's letter. He referenced Mr. Evans's letter to the Administrator in a September 1, 2004 letter to an EPA security specialist.<sup>444</sup> During his deposition, however, Mr. Hopper claimed he did not remember Mr. Evans's letter to the Administrator.<sup>445</sup> He thought he had not actually read Mr. Evans's letter, but may have heard about it from Mr. Harrison.<sup>446</sup> Ms. Cotsworth, Mr. Harrison, and Mr. Hopper were all aware of the protected activity.

##### **2. The 2003 Affidavit**

There is no direct evidence that either Mr. Harrison or Mr. Hopper were aware of Mr. Evans's affidavit in support of the FLRA

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dissuade a reasonable employee from making or supporting a charge of discrimination).

<sup>440</sup> *Burlington*, 548 U.S. at 57.

<sup>441</sup> Tr. at 40.

<sup>442</sup> Tr. at 384, 395.

<sup>443</sup> Tr. at 40; C. Ex. at 131–142.

<sup>444</sup> C. Ex. at 144.

<sup>445</sup> C. Ex. at 470.

<sup>446</sup> C. Ex. at 472.

complaint. I find it more likely than not both of them were generally aware of the complaint, and of Mr. Evans's participation in the process, since both Mr. Harrison and Mr. Hopper were involved at some level in discussions with the union. There is insufficient evidence, however, to prove that either was aware of the specific contents of Mr. Evans's affidavit filed there. Neither of them were asked in a deposition or at the hearing about the affidavit. Without knowledge of the contents, they could take no adverse action in retaliation for what Mr. Evans said in that proceeding.

Ms. Cotsworth could not even recall whether Mr. Evans had served at the Radiation Lab's union steward, whether the Radiation Lab's union had bargained with management regarding the emergency response program, whether the union had filed a complaint with the FLRA about management's refusal to bargain over the emergency response program, or whether the FLRA had prepared a Memorandum of Agreement between the EPA and the union regarding bargaining over the emergency response program.<sup>447</sup> The EPA's interactions with the union were matters she did not manage. Mr. Evans offered no counter evidence to show Ms. Cotsworth was aware of his affidavit.

None of the relevant managers were aware of this affidavit as protected activity.

### **3. The Performance Appraisal Comments**

Mr. Harrison was obviously aware of the comments Mr. Evans had made in his performance appraisal when Mr. Harrison proposed to remove Mr. Evans, since language from the performance appraisal formed the basis of Charge III: Disrespectful and Malicious Conduct Towards Supervisor.<sup>448</sup> Ms. Cotsworth likewise knew of the comments before she decided to suspend, rather than terminate, Mr. Evans.<sup>449</sup>

There is no direct evidence Mr. Hopper knew of the comments Mr. Evans made in his performance appraisal—he was not asked about the matter during his deposition. Given Mr. Hopper's frequent communication with Mr. Harrison, however, I find it more likely than not Mr. Hopper knew of the comments.

### **4. The OSHA Complaints**

Mr. Harrison received a copy of Mr. Evans's initial OSHA complaint.<sup>450</sup> It's not clear exactly when, however. Mr. Evans made his first complaint in May 2006, and the EPA claims OSHA served the

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<sup>447</sup> Tr. at 391–92.

<sup>448</sup> C. Ex. at 200.

<sup>449</sup> C. Ex. at 213.

<sup>450</sup> C. Ex. at 411.

complaint around June 29, 2006.<sup>451</sup> I do not know, specifically, to whom OSHA gave the complaint. Mr. Harrison drafted the Notice of Proposed Removal on July 19, 2006.<sup>452</sup> I find it more likely than not Mr. Harrison had learned of the OSHA complaint before submitting his Notice of Proposed Removal. Presumably, Mr. Harrison learned of the supplemental complaints as well. But Mr. Evans had ceased working at the EPA by the time either supplemental complaint was made, even though he had not been formally terminated by the time of the first supplemental complaint. Thus, knowledge of those supplemental complaints matters little. At most, the first supplemental complaint could have motivated his termination, but, as will be discussed later, I do not believe that was the case.

Again, there is no direct evidence Mr. Hopper knew of the OSHA complaints. Given his relationship with Mr. Harrison, I find it more likely he eventually learned of them. But Mr. Hopper had already played his most significant role in this tale before any of the OSHA complaints were made—procuring Ms. Houston’s witness statement and conducting the remainder of the investigation into Mr. Evans’s threats.

Ms. Cotsworth became aware that Mr. Evans had filed a whistleblower complaint while she was in the process of deciding the appropriate punishment based on Mr. Harrison’s first Notice of Proposed Removal.<sup>453</sup>

#### **E. The EPA Retaliated Against Mr. Evans**

To prevail, Mr. Evans must show that his protected activities were a “motivating factor” in the EPA’s decision to take adverse action against him.<sup>454</sup> Mr. Evans can satisfy the causation element even if his protected activity was just one of several factors that motivated the respondent to take the adverse action.<sup>455</sup> The standard is not whether the EPA had good, or legitimate, reasons to discriminate against Mr. Evans, but whether the discrimination was also motivated in any way by the protected activity.<sup>456</sup>

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<sup>451</sup> EPA’s Motion for Summary Judgment at 1.

<sup>452</sup> C. Ex at 199.

<sup>453</sup> Tr. at 405; Tr. at 69–70.

<sup>454</sup> *Joyner v. Georgia-Pacific Gypsum, LLC*, ARB No. 12-028, ALJ No. 2010-SWD-1, Slip op. at 11 (ARB Apr. 25, 2014) erratum (ARB June 17, 2014).

<sup>455</sup> *Kanji v. Viejas Band of Kumeyaay Indians*, ARB No. 12-002, ALJ No. 2006 WPC 001, slip op at 6, fn. 4 (ARB Aug. 29, 2012).

<sup>456</sup> *Kanji*, ARB No. 12-002 slip op at 6 n.4.

Linking the protected activity to the adverse action often requires inferences about the “motivating factor[s]”<sup>457</sup> for the adverse action. An employer rarely admits to retaliation. A complainant may link them by showing a close temporal proximity between the protected activity and the employer’s adverse action.<sup>458</sup> An employer can rebut this inference if it demonstrates by a preponderance of the evidence “that it would have taken the same adverse action in the absence of the protected activity.”<sup>459</sup> The ultimate burden of proof, however, remains with Mr. Evans to show, by a preponderance of the evidence, that the “protected activity caused or was a motivating factor in the adverse action alleged in the complaint . . . .”<sup>460</sup>

The Supreme Court has found that a “cat’s paw” theory of causation can apply in whistleblower cases.<sup>461</sup> That theory of liability applies when the protected activity has no bearing on the decision-maker, but does bear on the actions of a lower-level supervisor, who in turns acts to bring the adverse action about. For example, in *Staub v. Proctor Hospital*, a case brought under the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”), the Court held that, “if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA.”<sup>462</sup>

As will be discussed next, Mr. Evans’s case relies primarily on a cat’s paw theory of liability—in this instance the theory that Mr. Hopper fabricated allegations against Mr. Evans to induce Mr. Harrison and Ms. Cotsworth to punish Mr. Evans.

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<sup>457</sup> “A complainant must prove more when showing that protected activity was a ‘motivating’ factor than when showing that such activity was a ‘contributing’ factor.” *Lopez v. Serbaco*, ARB No. 04-158, ALJ No. 04-CAA-5, slip op. at 4 n.6 (ARB Nov. 29, 2006) (citing *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31, slip op. at 5–7 (ARB Sept. 30, 2003); *Vander Meer v. Western Ky. Univ.*, ARB No.97-078, ALJ No. 1995-ERA-38, slip op. at 3 (ARB Apr. 20, 1998)). A motivating factor need not be the only factor or the primary factor; it may be one of several motives. *Cf.*, *Cosa v. Desert Palace, Inc.*, 299 F.3d 838, 848 (9th Cir. 2002) (discussing the definition of “motivating factor” as used in discrimination cases under Title VII, and codified at 42 U.S.C. § 2000e-2(m)).

<sup>458</sup> 29 C.F.R. § 24.104(e)(3).

<sup>459</sup> 29 C.F.R. § 24.109(b)(2).

<sup>460</sup> 29 C.F.R. § 24.109(b)(2).

<sup>461</sup> *Staub v. Proctor Hosp.*, 562 U.S. 411, 419–422 (2011).

<sup>462</sup> *Staub*, 562 U.S. at 422. Like the statutes at issue in Mr. Evans’s case, USERRA requires retaliation be a motivating factor in the adverse action. *Staub*, 562 U.S. at 417–19.

## 1. General Evidence of Retaliation

There is some general evidence that the Radiation Lab managers utilized retaliation as a means of control, which tends to show they may have retaliated against Mr. Evans.

### a. Employee Declarations

In a declaration, Mr. Davis opined that Radiation Lab employees feared retaliation from management. He opined,

The work atmosphere of the US EPA in Las Vegas is one of fear and intimidation. Most employees are afraid to speak out against management for fear of retaliation and denial of promotions, and several of my co-workers have retired recently because of this situation. It is well known that management does not like it when you go over their heads, even if you are right.<sup>463</sup>

Similarly, Mr. DeLuna explained in his declaration that he suspected Radiation Lab managers had framed Mr. Evans for making the threats so they could punish him. He opined,

[Mr. Evans] was a good worker. I believe that management finally gave up trying to catch [Mr. Evans] in misconduct, and had to resort to making up statements of misconduct that [Mr. Evans] never committed. It bothers me that EPA management would do something so dishonest and retaliatory in trying to get [Mr. Evans] fired.<sup>464</sup>

### b. Management's Response to Complaints About Brian Moore

Brian Moore, an employee at the EPA's Los Vegas facility, was the subject of several complaints before he passed away. Mr. Evans considers Mr. Moore a comparator for his case. He believes the Radiation Lab's comparatively mild response to Mr. Moore's inappropriate behavior shows the punishment for Mr. Evans was disproportionately severe, which he considers evidence that the managers sought to retaliate against him.

Some background is needed regarding the complaints about Mr. Moore. First, Ms. Houston at one time complained to management that Mr. Moore had pushed a cart full of samples into her.<sup>465</sup> She explained that she had taken the cart of samples to Mr. Moore's office, but his door was locked, so she knocked and said "Your samples are here."<sup>466</sup> She then turned to leave, but Mr. Moore came out of his office and

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<sup>463</sup> C. Ex at 372.

<sup>464</sup> C. Ex at 361.

<sup>465</sup> Tr. at 128–29.

<sup>466</sup> Tr. at 128.

pushed the cart into her.<sup>467</sup> She explained, “[I]t almost knocked me down. If I hadn’t had something to hang onto, I would have fallen.”<sup>468</sup> She recalled two “stay-in-schools” (by which I assume she meant interns) had witnessed the incident.<sup>469</sup>

George Dilbeck investigated the incident<sup>470</sup> and spoke with Ms. Houston.<sup>471</sup> Mr. Harrison never interviewed her about it.<sup>472</sup> According to Ms. Houston, nothing was done about Mr. Moore.<sup>473</sup> She claimed that after she submitted a letter about him, Mr. Moore was “just plain ugly to me. He would use cuss words when he talked to me. He was just plain ugly.”<sup>474</sup> Mr. Hopper thought the investigation had shown Mr. Moore had pushed the cart towards Ms. Houston, but had not actually hit her.<sup>475</sup> Mr. Harrison thought the investigation had been inconclusive, and there had been no way of determining whose account of events was accurate.<sup>476</sup> Nevertheless, Mr. Harrison required Mr. Moore to attend anger management counseling.<sup>477</sup>

Mr. Harrison later received a complaint that Mr. Moore was stalking and harassing a female EPA employee, who had obtained a restraining order against Mr. Moore.<sup>478</sup> When Mr. Harrison learned about the situation, he contacted Mr. Moore to let him know they needed to talk as soon as Mr. Moore returned to the office, but Mr. Moore died that weekend, before Mr. Harrison could meet with him.<sup>479</sup>

Mr. Farmer had also complained about Mr. Moore. According to Mr. Farmer, Mr. Moore had one time asked to borrow equipment, and when Mr. Farmer was reluctant to loan it out, Mr. Moore told him, “When you say that, it makes me want to kick your ass.”<sup>480</sup>

As discussed in my order on summary adjudication, Mr. Moore was also involved in an altercation with Jim Benetti, a health physicist who had been appointed chair of the Radiation Safety Committee.<sup>481</sup> In

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<sup>467</sup> Tr. at 128–29.

<sup>468</sup> Tr. at 129.

<sup>469</sup> Tr. at 129.

<sup>470</sup> C. Ex. at 480.

<sup>471</sup> C. Ex. at 385.

<sup>472</sup> Tr. at 129.

<sup>473</sup> Tr. at 130–31.

<sup>474</sup> Tr. at 131.

<sup>475</sup> C. Ex. at 480.

<sup>476</sup> C. Ex. at 404.

<sup>477</sup> Tr. at 58.

<sup>478</sup> Tr. at 59.

<sup>479</sup> Tr. at 60; C. Ex. at 405.

<sup>480</sup> Tr. at 211.

<sup>481</sup> Order Granting Partial Summary Adjudication at 9–10; Declaration of Dennis Farmer in support of Mr. Evans’s February 20, 2013 Motion to Compel Discovery at ¶ 2–7 [hereinafter Farmer Dec.].

a declaration, Mr. Farmer described a routine meeting with Mr. Moore, Mr. Benetti, Mr. Dilbeck, and other members of the radiochemistry staff in September 2002.<sup>482</sup> A confrontation arose when Mr. Moore refused to coordinate with Mr. Benetti to transfer some radioactive material to a more secure location.<sup>483</sup> Mr. Farmer thought Mr. Moore intended to “bully” Mr. Benetti into backing off the safety issue by intimating that he had the support of Mr. Harrison and Mr. Hopper.<sup>484</sup> According to Mr. Farmer, Mr. Benetti then prepared, and Mr. Farmer hand-delivered to Ms. Johnson, a letter describing the meeting’s events, along with some other incidents involving Mr. Moore.<sup>485</sup> The letter’s only response, Mr. Farmer says, was a “blistering call” from Ms. Johnson relating that their submission of this letter was “not appropriate.”<sup>486</sup> Mr. Farmer recalled that Mr. Benetti later received a letter of reprimand from Mr. Hopper that Mr. Farmer believed had been issued because Mr. Benetti had expressed concerns about safety and workplace violence.<sup>487</sup> Mr. Hopper claimed he had actually reprimand Mr. Benetti’s for allowing another employee without the proper clearance into a secure area.<sup>488</sup>

By order dated June 27, 2013, I required the EPA to produce records of any communications between Mr. Benetti and Mr. Hopper, which the EPA failed to do. In my order granting summary adjudication, I found that a “spoliation inference” applies. Mr. 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.<sup>489</sup>

While the inference provides Mr. Evans with some evidence of retaliation, Mr. Moore has little value as a comparator. The allegations against Mr. Moore (allegedly pushing a cart into Ms. Houston, stalking another employee, and generally being aggressive and confrontational) were significant. But the allegations that Mr. Evans had threatened to shoot the Radiation Lab’s managers were more concerning by an order of magnitude. Mr. Harrison took more drastic action in response to the allegations against Mr. Evans because he was concerned about an imminent and lethal threat. Comparing the allegations against Mr.

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<sup>482</sup> Farmer Dec. at ¶ 3.

<sup>483</sup> Farmer Dec. at ¶ 5–6.

<sup>484</sup> Farmer Dec. at ¶ 6.

<sup>485</sup> Farmer Dec. at ¶ 9.

<sup>486</sup> Farmer Dec. at ¶ 9.

<sup>487</sup> Farmer Dec. at ¶ 11.

<sup>488</sup> C. Ex. at 473–74.

<sup>489</sup> Order Granting Partial Summary Adjudication at 11.

Evans to those against Mr. Moore, they involve acts that are not of equal severity.

## **2. Ms. Cotsworth's Actions Were Justified by Non-Retaliatory Motives**

Ms. Cotsworth was Mr. Evans's third-level supervisor.<sup>490</sup> She did not interact with him on a day to day basis. Her role in this case was limited to making final decisions on the punishments proposed by Mr. Harrison. Ms. Cotsworth explained that, as the deciding official, she was "required to look at the record provided to me and make my decision based on the record, the documents that were provided to me."<sup>491</sup> She did not conduct an independent investigation into whether Mr. Evans was guilty of the infractions charged.<sup>492</sup>

Thus, Ms. Cotsworth made the decision to suspend Mr. Evans based on all of the witness statements, including the statement Ms. Houston later recanted. She had evidence that Mr. Evans was frustrated with management and had made comments like, "I ought to get a gun and blow them away."<sup>493</sup> Based on that information, she was justified in suspending Mr. Evans. Threats of workplace violence are a very serious matter. Comments like those described in Ms. Houston's statement and the other witness statements are inappropriate.

Ms. Cotsworth also considered Mr. Evans's 2006 performance appraisal comments when deciding on an appropriate punishment. She found the language Mr. Evans used to be disrespectful.<sup>494</sup> She explained, "The references were personal and inflammatory, belligerent and also stated, clearly, that he refused to take on certain responsibilities. But inflammatory against the laboratory director."<sup>495</sup> She elaborated,

The terms, themselves, are inappropriate. The employees are certainly allowed to use the [performance appraisal] forum to highlight, for their supervisors, the particular actions and activities they've undertaken, that might help to be the basis for a determination of their rating. But these were personal and I considered malicious statements about the director.<sup>496</sup>

Ms. Cotsworth took issue with Mr. Evans's language, not his environmental concerns. Her consideration of his statements was not

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<sup>490</sup> Tr. at 366.

<sup>491</sup> Tr. at 369.

<sup>492</sup> Tr. at 369.

<sup>493</sup> R. Ex.-2 at 2.

<sup>494</sup> Tr. at 375-76.

<sup>495</sup> Tr. at 376.

<sup>496</sup> Tr. at 376.

retaliation for protected activities. But even if it were, Ms. Cotsworth's decision to suspend Mr. Evans and to require him to attend counseling was justified by the threats of workplace violence alone.

Similarly, Ms. Cotsworth was justified in terminating Mr. Evans after receiving Mr. Harrison's second Notice of Proposed Removal. By the time Ms. Cotsworth issued her final decision on September 5, 2007, Mr. Evans had been absent without leave for 107 days—since May 21, 2007. Mr. Bay had warned Mr. Evans that absence without leave in excess of five consecutive days could result in removal from federal service.<sup>497</sup> With the evidence before her, Ms. Cotsworth was fully justified in terminating Mr. Evans's employment.

Ms. Cotsworth would have taken all of the same actions regardless of any protected activities.

### **3. Mr. Harrison's Actions Were Justified by Non-Retaliatory Motives**

There is some limited evidence that Mr. Harrison was frustrated with Mr. Evans, particularly his participation in the employees' union, and had a motive to retaliate against him. For instance, Mr. Harrison explained that he was "kind of disappointed in a way" with the union.<sup>498</sup> He elaborated, "I'm not an antiunion person. I would have liked to have seen the union be a true agent for change, but I didn't see that happen for positive change, I guess, that would benefit the bargaining unit."<sup>499</sup> He clarified at the hearing that he "wasn't disappointed to work with the union," but he was "disappointed in what came out of the interactions with the union."<sup>500</sup> He didn't "feel like it really worked for positive change."<sup>501</sup> Mr. Harrison also indicated in his deposition that, he would "be happy if the headaches left the agency."<sup>502</sup> He clarified at the hearing that, "I guess what I am referring to as headaches is that as a manager sometimes you spent 80 percent of your time dealing with 20 percent of the people kind of thing."<sup>503</sup> Nevertheless, Mr. Harrison opined that he "had no reason to be worried about [Mr. Evans] prior to May 2006 . . . . I didn't have a problem with [Mr. Evans] up to that time."<sup>504</sup>

Regardless of whether Mr. Harrison felt any animus towards Mr. Evans, Mr. Harrison had sufficient non-retaliatory justification for the

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<sup>497</sup> C. Ex. at 260.

<sup>498</sup> C. Ex. at 410.

<sup>499</sup> C. Ex. at 410.

<sup>500</sup> Tr. at 49.

<sup>501</sup> Tr. at 49.

<sup>502</sup> C. Ex. at 421.

<sup>503</sup> Tr. at 76.

<sup>504</sup> Tr. at 83.

adverse actions he imposed. I am convinced he would have taken the same actions absent any protected activities.

Mr. Harrison almost immediately placed Mr. Evans on administrative leave after learning what Mr. Diaz Marcano and Ms. Glick had reported on May 1, 2006. At the time, Mr. Harrison had credible proof that Mr. Evans had threatened workplace violence. He acted to minimize the risk of harm to the Radiation Lab's employees while the report was investigated.

Mr. Harrison did not investigate Mr. Evans's alleged threats himself. He gave Mr. Hopper that task, for he "trusted [Hopper] as my Deputy Director and I often gave him tasks to take care of some of the more Human Resources related functions at the laboratory."<sup>505</sup> Like Ms. Cotsworth, Mr. Harrison acted on the evidence provided to him—primarily by Mr. Hopper. That included the Ms. Houston's statement.

Mr. Harrison considered the threats that had been reported to be very serious, and he did "my best to make sure I was doing everything in my power to protect the co-workers as well as myself."<sup>506</sup> He explained,

[B]ased upon my understanding of the evidence, basically the nature of the threats, I took it very serious that there was a real chance of there being an incident. EPA and the laboratory had a prevention of violence in the workplace policy, which very clearly states that every single incident will be investigated and appropriate action will be taken. [Removal] is what I deemed to be the appropriate action.<sup>507</sup>

Mr. Harrison also considered Mr. Evans's 2006 performance appraisal comments when deciding to propose removal from federal service. Mr. Harrison thought Mr. Evans's statements were disrespectful towards him, personally, because "it's all untrue, it's all lies, in my eyes. And this isn't something that's just between [Mr. Evans] and me, this is something that other people see, higher than me in the supervisory chain."<sup>508</sup> As with Ms. Cotsworth, Mr. Harrison took issue with the personal attacks and specific language used, not with Mr. Evans's concerns about the emergency response program.

Mr. Harrison also testified that Mr. Evans's letter to the Administrator played no role in his proposal to remove Mr. Evans.<sup>509</sup>

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<sup>505</sup> Tr. at 27.

<sup>506</sup> Tr. at 26.

<sup>507</sup> Tr. at 28–29.

<sup>508</sup> Tr. at 37, 80.

<sup>509</sup> Tr. at 41.

Even if retaliation had motivated Mr. Harrison, which I do not believe, Mr. Harrison's actions were justified by the reports of threats that were brought to him. Mr. Harrison explained he "was focused entirely on the incidents that began with the threats that I became aware of in May."<sup>510</sup> He clarified, "the main thing in my mind was were these threats real? Was there a possibility he was going to follow-through on the violent threats? Clearly, we had lots of witness statements . . ."<sup>511</sup> Mr. Evans's failure to complete his emergency response training and the comments he made in his performance assessment were relevant to the Notice of Proposed Removal primarily because they showed Mr. Evans was frustrated, and provided a motive for why he might be prone to violence.<sup>512</sup> Mr. Harrison had enough evidence to be genuinely concerned that Mr. Evans might pose a threat. He was justified in proposing his removal.

The evidence also justified Mr. Harrison's decision to alert other Radiation Lab employees to the situation involving Mr. Evans. Mr. Harrison took the matter seriously, as would be expected. He acted to minimize the risk to his fellow employees based on the information he had been provided. Mr. Evans did not prove his access to buildings at the EPA facility was restricted after he returned from his suspension, or whether any restriction was justified by the evidence Mr. Harrison had about threats Mr. Evans had made. Mr. Harrison still considered Mr. Evans dangerous after the return from his suspension.<sup>513</sup>

I am unconvinced Mr. Harrison played a direct role in assigning Mr. Evans work after he returned from his suspension. Mr. Hopper seems to have made that decision. He is discussed next.

Mr. Harrison also had sufficient non-retaliatory justification for denying Mr. Evans request for leave without pay and for issuing a second notice of proposed removal. As Mr. Bay explained to Mr. Evans in several letters, EPA policy did not permit the EPA to grant Mr. Evans's request for leave without pay. To grant Mr. Evans's request would tie up a full time position that could not be filled with another employee. The loss of a worker would hurt the lab's productivity.<sup>514</sup> Mr. Harrison also thought Mr. Evans had requested the leave without pay to pursue his litigation against the EPA, which Mr. Harrison did not consider an appropriate basis to grant the leave request.<sup>515</sup> Mr. Evans failed to provide the medical documentation that would have permitted

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<sup>510</sup> Tr. at 41.

<sup>511</sup> Tr. at 41.

<sup>512</sup> Tr. at 41-42.

<sup>513</sup> Tr. at 84.

<sup>514</sup> C. Ex. at 417.

<sup>515</sup> C. Ex. at 417.

Mr. Harrison or Mr. Bay to even consider his request for leave without pay.

I find it more likely than not Mr. Harrison would have taken the same actions regardless of any protected activities.

**1. Mr. Hopper Retaliated Against Mr. Evans, but His Actions Were Not the Proximate Cause of any Adverse Actions**

**a. Mr. Hopper Fabricated Ms. Houston's Statement**

I must decide now, from the multiple irreconcilable accounts offered, what happened when Ms. Houston signed her witness statement. No one's memory of the events was perfect. Ms. Houston was deposed on June 28, 2012<sup>516</sup>—over five years after she signed the statement. Mr. Hopper and Ms. Johnson were both deposed even later, in later November 2012.<sup>517</sup> The hearing took place in October 2015—over nine years after the events at issue took place. Discrepancies in the minor details are unsurprising. But the events were significant enough that I would expect the major participants (Ms. Houston, Mr. Hopper, and Ms. Johnson) to recall the basics with relative clarity.

Ultimately, I find Ms. Houston's testimony—and particularly her trial testimony, when I had the opportunity to observe her in person—the most credible account of events. Ms. Houston gave compelling testimony that she did not participate in drafting the statement, and that she was pressured into signing it without reading it.<sup>518</sup> I found particularly persuasive the remorse Ms. Houston expressed at having capitulated to Mr. Hopper's demand to sign the statement.<sup>519</sup> She confessed, "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>520</sup> She explained that she had feared losing her job because she had to support herself and her family.<sup>521</sup>

Ms. Houston's efforts to retract her statement in 2009<sup>522</sup> were consistent with her contention that she was pressured into signing the document by Mr. Hopper. I find little significance in the fact that Ms.

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<sup>516</sup> C. Ex. at 375.

<sup>517</sup> C. Ex. at 442, 463.

<sup>518</sup> Tr. at 136–37.

<sup>519</sup> Tr. at 137; C. Ex. at 383.

<sup>520</sup> C. Ex. at 383.

<sup>521</sup> C. Ex. at 362–64.

<sup>522</sup> C. Ex. at 273.

Houston did not contact Ms. Johnson to retract the statement until over a year and a half after Mr. Hopper retired. While the events of May 2006 might have remained fresh in Mr. Evans's mind, Ms. Houston had likely moved on. She sought to retract the statement when she realized she could do so without repercussions.

I also place little significance in the fact Ms. Houston testified that Mr. Farmer was present beside her when she signed the statement, and that Mr. Farmer shook his head when Ms. Houston looked to him for advice<sup>523</sup>—something Mr. Farmer denied.<sup>524</sup> That is the kind of mistaken detail I can understand would occur years after the fact. Mr. Farmer accompanied Ms. Evans to the human resources office.<sup>525</sup> Her account of events was close enough to reality to remain credible.

I was not given an opportunity to observe Mr. Hopper testify in person, but I found his deposition testimony suspect. He described the process of drafting Ms. Houston's statement in much more detail than I would expect more than six years after the fact, which leads me to infer he was inventing some of the details. He also described taking extraordinary steps to ensure Ms. Houston's statement was in her own words—steps so thorough they sounded more like an attempt to protect himself than a description of what he actually remembered. There is also evidence that Mr. Hopper pressured Ms. Baer into making a statement.<sup>526</sup> Ms. Baer's statement may have been true, but her testimony still suggests Mr. Hopper had an agenda.

I also find Ms. Johnson's testimony less persuasive than that of Ms. Houston. Ms. Johnson claimed she was present when Ms. Houston signed the statement, and that Ms. Houston reviewed the statement before signing it.<sup>527</sup> Her account of events did not match Mr. Hopper's. She claimed Mr. Hopper typed the statement just outside the conference room while Ms. Houston waited inside, not with Ms. Houston right there with him.<sup>528</sup> That discrepancy is far from conclusive, but worth noting, considering how adamant Mr. Hopper was that Ms. Houston had been present throughout the drafting process.

Ms. Johnson had reason to dislike Mr. Evans. He had accused her of inappropriate, and even illegal, conduct in the past. His letter to the Administrator, for example, alleged "Sheron Johnson has overtly

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<sup>523</sup> C. Ex. at 383.

<sup>524</sup> Tr. at 228.

<sup>525</sup> Tr. at 203.

<sup>526</sup> Tr. at 332.

<sup>527</sup> Tr. at 337.

<sup>528</sup> Tr. at 337–38.

and covertly whitewashed every illegal decision and action [Radiation Lab management has] taken.”<sup>529</sup> And that was not his only reference to her in that letter.

Ultimately, I find Ms. Houston’s account of events most persuasive. There is no way to know with absolute certainty what actually happened. But I find it is more likely Mr. Hopper and Ms. Johnson twisted the facts than it is Ms. Houston lied about signing a statement without reviewing it. She had little to gain from a false confession, and I give her live testimony great weight.

It is perhaps most difficult to reconcile Mr. Diaz Marcano’s testimony with Ms. Houston’s account of events. There seemed to be no hostility between the two. Indeed, Ms. Houston considered Mr. Diaz Marcano a friend and an honest person.<sup>530</sup> Mr. Diaz Marcano claimed Ms. Houston had told him that Mr. Evans had “made comments about bringing a gun to work and shooting some people.”<sup>531</sup> He claimed Ms. Houston did not want to report the conversation because she wanted to remain anonymous.<sup>532</sup> Ms. Houston claimed she had never heard Mr. Evans say anything that would suggest he was contemplating violence or bringing a gun to work.<sup>533</sup> I find the most likely explanation to be that Mr. Diaz Marcano misinterpreted his conversations with Ms. Houston. Ms. Houston may very well have heard Mr. Evans say something inappropriate. The other witness statements suggest Mr. Evans has a history of making inappropriate comments that allude to violence without actually threatening any direct action. Though inappropriate in a work setting, such comments are generally interpreted in context as jokes, or as intentional exaggeration for effect. Ms. Houston may have overheard such a comment, but not taken it seriously. When she repeated it to Mr. Diaz Marcano, he misinterpreted what she told him as a genuine threat. Ms. Houston, knowing Mr. Evans’s comments were in poor taste, may well have warned Mr. Diaz Marcano that she didn’t want him telling others she had shared Mr. Evans’s comments.

I do not fault Mr. Diaz Marcano for reporting his conversation with Ms. Houston to management. Workplace violence is a serious issue. But it seems Mr. Hopper seized on the report as an opportunity to take retribution on Mr. Evans. The information Mr. Diaz Marcano shared warranted an investigation, but once Mr. Hopper was placed in charge of that investigation, he did not conduct a neutral search for

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<sup>529</sup> C. Ex. at 127.

<sup>530</sup> Tr. at 142.

<sup>531</sup> R. Ex.-1 at 1; Tr. at 419.

<sup>532</sup> R. Ex.-1 at 1; Tr. at 419.

<sup>533</sup> Tr. at 137; C. Ex. at 363.

facts. After speaking with Mr. Diaz Marcano again on May 3,<sup>534</sup> Mr. Hopper next crafted a witness statement that would confirm the accusations against Mr. Evans and ensure he was punished. The later interviews yielded further proof that Mr. Evans had made inappropriate comments, but the damage had already been done. Mr. Hopper had all but guaranteed Mr. Evans would be punished.

**b. Mr. Hopper Was Motivated to Retaliate by Mr. Evans's Protected Activity**

Why Mr. Hopper fabricated the statement is not clear. I infer, however, that Mr. Evans's complaints about management, which at times referenced Mr. Hopper by name, were a motivating factor for Mr. Hopper's actions. Mr. Evans's criticism of the emergency response program, something important to both Mr. Harrison and Mr. Hopper, was persistent and, at times, scathing. Although Mr. Evans's letter to the Administrator preceded the allegations of threats by nearly two years, I find it more likely than not Mr. Hopper remembered the comments Mr. Evans had made and retaliated against Mr. Evans in part because of his protected activity. Mr. Hopper bided his time until this opportunity to harm Mr. Evans presented itself. Mr. Hopper's September 1, 2004 letter to the EPA security specialist regarding Mr. Evans<sup>535</sup> may have been an early, unsuccessful attempt at getting Mr. Evans punished that failed. Mr. Hopper wrote it fewer than two months after Mr. Evans wrote the Administrator.

**c. Fabricating Ms. Houston's Statement Was Not a Proximate Cause of Any Adverse Action**

Mr. Hopper fabricated Ms. Houston's statement motivated by retaliatory animus. It was retribution for Mr. Evans's protected activities. It was intended to cause an adverse employment action. If fabricating Ms. Houston's statement was a proximate cause of the punishment subsequently imposed, the EPA would be liable.<sup>536</sup> It was not. Mr. Harrison and Ms. Cotsworth, who Mr. Hopper used as cat's paws, would have taken the same steps even if Ms. Houston had not signed a witness statement.

The statement Mr. Hopper fabricated did not trigger the investigation—what Mr. Diaz Marcano<sup>537</sup> and Ms. Glick<sup>538</sup> reported did that. Nor did it provide the only basis for concluding Mr. Evans had

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<sup>534</sup> C. Ex. at 171.

<sup>535</sup> C. Ex. at 144.

<sup>536</sup> *Staub v. Proctor Hosp.*, 562 U.S. 411, 422 (2011); *Koziara v. BNSF Railway Co.*, No. 16-1577 (7th Cir. Oct. 31, 2016).

<sup>537</sup> R. Ex.-1 at 1.

<sup>538</sup> Tr. at 431.

threatened workplace violence—information later provided by Ms. Glick,<sup>539</sup> Mr. Lantz,<sup>540</sup> Mr. Levy,<sup>541</sup> Ms. Baer,<sup>542</sup> and Mr. Moore<sup>543</sup> were sufficient reason to conclude Mr. Evans had threatened violence, even if indirectly. Mr. Hopper’s actions ensured what was already destined—that Mr. Evans would be punished for making inappropriate comments that alluded to workplace violence.

Mr. Harrison acknowledged that Charge I, Specification 1 of the first Notice of Proposed Removal had been based on Mr. Houston’s witness statement.<sup>544</sup> But there were other specifications relying on different evidence. Mr. Harrison relied primarily on Ms. Glick’s statement for Specification 3,<sup>545</sup> and primarily on Ms. Baer’s statement for Specification 4.<sup>546</sup> Mr. Harrison thought another witness statement had supported Specification 4 as well, but could not remember which statement during the hearing. I infer it was Mr. Moore’s statement, which concerned the same conversation as Ms. Baer’s.<sup>547</sup>

Similarly, Ms. Cotsworth based her decision to suspend Mr. Evans only in part on Ms. Houston’s statement.<sup>548</sup> Ms. Cotsworth upheld Charge 1, Specification 1 based on both Ms. Houston’s statement and Mr. Hopper’s interview with Mr. Levy.<sup>549</sup> Specifications 3 and 4 did not rely on Ms. Houston’s statement at all. Specification 3 was based on Ms. Glick’s statement,<sup>550</sup> and Specification 4 was based the statements of Ms. Baer and Mr. Moore.<sup>551</sup>

Thus, the interview with Mr. Levy provided some support for Specification 1 independent of Ms. Houston’s statement, but even ignoring Specification 1 (and Specification 2, which Ms. Cotsworth found insufficient evidence to uphold), there was still substantial evidence that Mr. Evans had made threats based on the well-supported Specifications 3 and 4.

Ms. Cotsworth acknowledged that, if Ms. Houston’s statement had been fabricated by management, she “would certainly want to ask more questions and think about it more seriously.”<sup>552</sup> But she was

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<sup>539</sup> Tr. at 430–31; R. Ex.-4 at 4.

<sup>540</sup> C. Ex. at 186.

<sup>541</sup> C. Ex. at 172.

<sup>542</sup> R. Ex.-3 at 3; Tr. at 331.

<sup>543</sup> C. Ex. at 170.

<sup>544</sup> Tr. at 29–30.

<sup>545</sup> Tr. at 31.

<sup>546</sup> Tr. at 31–32.

<sup>547</sup> C. Ex. at 170.

<sup>548</sup> Tr. at 383.

<sup>549</sup> Tr. at 371–72; R. Ex.-5 at 11.

<sup>550</sup> Tr. at 372–73; R. Ex.-5 at 21.

<sup>551</sup> Tr. at 373; R. Ex.-5 at 18, 20.

<sup>552</sup> Tr. at 412.

quick to note that another statement had been reported regarding the same incident.<sup>553</sup> She opined that knowing one statement was fabricated would cause her “[d]oubt sufficient for me to ask some questions, to understand better.”<sup>554</sup> She never suggested it would have changed the ultimate outcome, so long as the remaining statements were accurate.

I can’t know whether Mr. Harrison and Ms. Cotsworth would have taken the same actions knowing Ms. Houston’s statement was inaccurate. I can say, however, that there was sufficient justification for their actions, even absent Ms. Houston’s statements. I find it more likely than not the outcome would have been the same.

There is also one alleged adverse action over which Mr. Hopper seemingly had direct control: assigning Mr. Evans less favorable work after he returned from his suspension. Mr. Evans claims he was given more physically demanding assignments under the close supervision of an employee with a lower pay grade in retaliation for his protected activities.<sup>555</sup> Mr. Hopper explained, however, that he had assigned Mr. Evans to work on Mr. Messer’s project because he thought Mr. Evans was a good fit for the job, Mr. Messer had seemed overwhelmed with the work, and, most importantly, there was no other work to assign him.<sup>556</sup> The other projects Mr. Evans had worked on were no longer available for various reasons, such as being shut down due to lack of funding or being transferred to a different unit within the EPA.<sup>557</sup> Furthermore, Mr. Hopper explained that he never used paygrades as criteria when assigning work, so he didn’t consider it degrading for Mr. Evans to work under Mr. Messer.<sup>558</sup> Mr. Evans offered no proof that Mr. Hopper could have assigned him more favorable work, or that work under an employee with a lower paygrade was unusual. I do not attribute Mr. Evans’s post-suspension work assignments to retaliation.

## **2. Ms. Johnson Did Not Retaliate Against Mr. Evans**

Ms. Johnson did not, herself, take any adverse action towards Mr. Evans. As a member of the human resources office, however, she may have had some influence over Mr. Harrison’s and Ms. Cotsworth’s decisions. I find insufficient evidence to support that theory.

When Mr. Harrison first learned of the allegations against Mr. Evans, he contacted human resources.<sup>559</sup> With the advice of human

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<sup>553</sup> Tr. at 412.

<sup>554</sup> Tr. at 412.

<sup>555</sup> Tr. at 264–65.

<sup>556</sup> C. Ex. at 481.

<sup>557</sup> C. Ex. at 481.

<sup>558</sup> C. Ex. at 481.

<sup>559</sup> Tr. at 24.

resources, he then contacted the Federal Protective Services.<sup>560</sup> Mr. Harrison opined that he generally spoke with Ms. Johnson when he contacted human resources.<sup>561</sup> Similarly, Ms. Cotsworth worked with human resources to draft her final decisions on the proposed removals, particularly with regard to the format of the documents.<sup>562</sup> Yet there is no convincing proof that Ms. Johnson's input had any impact on Mr. Harrison's or Ms. Cotsworth's decisions. I find that, at most, Ms. Johnson is guilty of knowingly standing by while Mr. Hopper pressured Ms. Houston to sign the fabricated statement. She took no affirmative steps to punish, or to induce others to punish, Mr. Evans. Nothing she did was a proximate cause of any adverse action.

### 3. Conclusion

The EPA would have taken all of the same adverse actions against Mr. Evans regardless of any protected activity, save one: fabricating Ms. Houston's witness statement. As will be discussed later, however, only nominal damages are awarded based on that sole act of retaliation.

## VI. Mr. Evans Was Not Constructively Discharged

In my order granting partial summary adjudication, I found that Mr. Evans's entitlement to back pay was severely limited by two groups of employment discrimination cases—the first holding that an employer's liability for back pay is cut off at the time the employee unreasonably refuses an unconditional offer of reinstatement,<sup>563</sup> and the other holding that an employer's liability normally ends when the employee voluntarily resigns.<sup>564</sup> The order found that Mr. Evans's refusal to return to work after his extended leave was equivalent to a resignation. I concluded, "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."<sup>565</sup>

Mr. Evans now claims he was constructively discharged, which would allow him to recover back pay despite abandoning his position. He raised this new theory for the first time in his post-hearing brief; he

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<sup>560</sup> Tr. at 24.

<sup>561</sup> Tr. at 24–25.

<sup>562</sup> Tr. at 367.

<sup>563</sup> *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231–32 (1982). The refusal also "precludes a subsequent order of reinstatement." *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>564</sup> *See Jurgens v. EEOC*, 903 F.2d 386, 389 (5th Cir. 1990).

<sup>565</sup> Order Granting Partial Summary Adjudication at 32.

made no mention of it in response to the EPA's motion for summary adjudication. Having already found that the only adverse action attributable to retaliation was Mr. Hopper's fabrication of Ms. Houston's witness statement, there is no real need to discuss whether Mr. Evans was constructively discharged. The "intolerable" conditions Mr. Evans claims forced him to leave the EPA were mostly the consequences of his own inappropriate behavior. Nevertheless, I take some time to address the issue, and I conclude the conditions were not so bad that Mr. Evans was constructively discharged.

Mr. Evans first argues that I failed to address the initial question of whether the EPA made an unconditional offer of employment in the order on summary adjudication. Absent special circumstances, an employer's unconditional offer of employment cuts off the employer's liability for back pay.<sup>566</sup> An offer of reinstatement is unconditional when it guarantees a substantially comparable position.<sup>567</sup> Mr. Evans asserts the EPA made no unconditional offer because "the EPA did not assure Evans that he would not be subjected to discrimination, harassment, retaliated against, or be required to work with or in close proximity to the people who made false accusations against Evans."<sup>568</sup>

The EPA did not offer Mr. Evans a comparable position; it offered him the same position. Indeed, the EPA insisted Mr. Evans return to his usual work. There was no need for the EPA to expressly assure Mr. Evans that he would not be harassed at work. Mr. Evans was subjected to only one act of retaliation—the accusations Mr. Hopper fabricated—and that act of retaliation ultimately made no material difference to how Mr. Evans was treated. Mr. Evans left his job because he was unhappy, but that was not due to discrimination, harassment, or retaliation. He was unhappy because he had been punished for his inappropriate comments and because he had been assigned work he disliked. Furthermore, neither Mr. Harrison nor Ms. Cotsworth could be expected to assure Mr. Evans that his mistreatment would end because neither of them was aware that Mr. Hopper had fabricated Ms. Houston's letter.

Next, Mr. Evans argues that, even if the EPA unconditionally offered continued employment,

it would have been totally unreasonable for Evans to return to work after being suspended on account of fabricated threats of violence, branded as unstable and extremely violent, referred for criminal prosecution, subjected to

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<sup>566</sup> *Ford Motor Co. v. EEOC*, 458 U.S. 219, 238–39 (1982).

<sup>567</sup> *See Boehm v. Am. Broad. Co.*, 929 F.2d 482, 485–87 (9th Cir. 1991).

<sup>568</sup> C. Post-Hearing Brief at 39.

monitoring by an armed guard, being forced to take a mental health evaluation, and having that evaluator conclude that going to the workplace was dangerous for Mr. Evans and his health.<sup>569</sup>

The legal standard ordinarily used to determine what constitutes a constructive discharge is whether the employer has created “working conditions so intolerable that a reasonable person in the employee's position would feel forced to resign.”<sup>570</sup> Constructive discharge is a question of fact, and the standard is objective: the question is whether a “reasonable person” would find the conditions intolerable, and the subjective beliefs of the employee (and employer) are irrelevant.<sup>571</sup>

As already discussed, most of what Mr. Evans complains of was not retaliation, but rather the EPA's response to his inappropriate behavior. For instance, Mr. Harrison discussed his concerns about Mr. Evans with Radiation Lab employees because Mr. Evans's inappropriate comments caused Mr. Harrison to believe Mr. Evans posed a genuine threat. The damage done to Mr. Evans's reputation may well have been a factor in why he abandoned his job, but that reputational damage was self-inflicted. The same is true of being forced to see a counselor through the Employee Assistance Program. Mr. Evans may not have liked it, but it was warranted by things he said at work.

As for being monitored by an armed security guard, I have already found that Mr. Evans exaggerated the facts. The guard may have sometimes checked in on the areas where Mr. Evans worked, but I reject the idea that he was constantly watched, escorted in and out of the building, or accompanied to the bathroom. Any heightened scrutiny from the guard did not warrant abandoning his job.

It's unclear what Mr. Evans means by being “referred for criminal prosecution.”<sup>572</sup> Mr. Harrison contacted federal protective services, but Mr. Evans acknowledged no charges were filed against him.<sup>573</sup> Given the nature of Mr. Evans's comments, contacting Federal

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<sup>569</sup> C. Post-Hearing Brief at 41.

<sup>570</sup> *Strickland v. United Parcel Svc.*, 555 F.3d 1224, 1228 (10th Cir. 2009) (quoting *Fischer v. Forestwood Co.*, 525 F.3d 972, 980 (10th Cir. 2008)). The model jury instructions used in the Ninth Circuit state that “[a] constructive discharge occurs when the working conditions are so intolerable that a reasonable person in the plaintiff's position would feel compelled to resign.” NINTH CIRCUIT JURY INSTRUCTIONS COMMITTEE, MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT 213 (2007).

<sup>571</sup> *Strickland*, 555 F.3d at 1228.

<sup>572</sup> C. Post-Hearing Brief at 41.

<sup>573</sup> Tr. at 262.

Protective Services was a reasonable precaution and cannot support a claim of constructive discharge.

The opinions of Dr. Daniels (who Mr. Evans saw through the Employee Assistance Program) have little bearing on whether Mr. Evans was constructively discharged. Her letter discussed only how Mr. Evans perceived his work environment.<sup>574</sup> Based on that perception, she determined Mr. Evans should leave work for the time being, but she offered no opinion on whether she, herself, believed his working conditions were objectively intolerable.<sup>575</sup> As already discussed, I find Mr. Evans's claim that Dr. Daniels told him Mr. Hopper and Mr. Harrison sought to have him killed implausible.

Mr. Evans also complained that he was assigned less favorable, more physical work after his suspension. First, Mr. Evans presented no evidence that the EPA could have assigned him other work. The other projects he had worked on were apparently no longer available. Second, based on the limited evidence offered on the subject, I find the work he was assigned far from being so intolerable that a reasonable person would be compelled to quit. I am also unconvinced that any medical restrictions made the work unbearable. The only work restrictions Mr. Evans offered were from nearly two decades earlier.<sup>576</sup> I have no way of knowing if those restrictions were still relevant. Nor do I have enough information about Mr. Evans's post-suspension assignments to know whether much of the work conflicted with those restrictions.

Mr. Evans was not constructively discharged.<sup>577</sup> His working conditions were not so bad that a reasonable employee would have felt compelled to leave, and most of what he considered intolerable was the natural consequences of his own inappropriate comments. Although Mr. Hopper did fabricate a witness statement making allegations against Mr. Evans, that statement had no significant impact on how Mr. Evans was treated because many other witnesses confirmed that he had made allusions to workplace violence. The EPA offered Mr.

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<sup>574</sup> C. Ex. at 242.

<sup>575</sup> C. Ex. at 242.

<sup>576</sup> C. Ex. at 60–61.

<sup>577</sup> Mr. Evans was also not subjected to a hostile work environment. The EPA spent several pages of its post-hearing brief describing why Mr. Evans was not subjected to a hostile work environment. R. Post-Hearing Brief at 12–17. Mr. Evans spent no time discussing that issue in his post-hearing brief, so it warrants little discussion. For the same reasons Mr. Evans was not constructively discharged, he was not subjected to a hostile work environment—the only act of retaliation was the witness statement Mr. Hopper fabricated. That is not enough to create a hostile work environment.

Evans continued employment, and Mr. Evans unreasonably rejected that offer.

### **VII. Mr. Evan's Is Entitled to Only Nominal Damages**

Mr. Evans seeks reinstatement, back pay compensatory damages for emotional distress, abatement to correct the EPA's adverse employment actions, punitive damages, interest, and attorney's fees.<sup>578</sup>

Neither reinstatement nor back pay is appropriate. Mr. Evans is not entitled to back pay for his seven-day suspension without pay because the EPA would have suspended Mr. Evans based on his inappropriate comments regardless of any protected activity. He is also not entitled to back pay after his extended period of leave because he abandoned his job, leaving the EPA no choice but to fire him. He was not constructively discharged.

Mr. Evans is entitled to only nominal damages for emotion distress. There is evidence that the events described in this decision caused Mr. Evans to feel stress and depression. Mr. Evans testified that, after learning of the allegations, he was shocked. I was numb."<sup>579</sup> His wife testified that Mr. Evans was very depressed and had a hard time sleeping because of the allegations.<sup>580</sup> There were periods Mr. Evans lost his appetite and didn't participate in the same activities he used to.<sup>581</sup> She claimed Mr. Evans still suffered from anxiety at the time of the hearing.<sup>582</sup> Similarly, Mr. Evans's neighbor testified that Mr. Evans "got physically ill that these people were just riding him so hard and accusing him—of things that, according to [Mr. Evans]—and I believe him—that he did not do. And he went just kind of down, physically."<sup>583</sup> He explained that Mr. Evans "just seemed to get real depressed and he lost weight, you know, he just wasn't the same man."<sup>584</sup>

There is also evidence, however, that Mr. Evans suffered from many psychological symptoms well before any of the events at issue in this case took place. Medical records show Mr. Evans had experienced trouble sleeping since at least August 2003,<sup>585</sup> and Mr. Evans acknowledged that he had struggled with both depression and anxiety

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<sup>578</sup> C. Post-Hearing Brief at 42–46.

<sup>579</sup> Tr. at 261.

<sup>580</sup> Tr. at 89.

<sup>581</sup> Tr. at 90.

<sup>582</sup> Tr. at 90.

<sup>583</sup> Tr. at 94.

<sup>584</sup> Tr. at 95.

<sup>585</sup> C. Ex. at 499–500.

in the past—both conditions run in his family.<sup>586</sup> He has taken medication for anxiety since at least 2002.<sup>587</sup>

I have no doubt the events of this case were emotionally trying for Mr. Evans. Unfortunately, he put himself in that position. The EPA's actions were the result of Mr. Evans's inappropriate comments. It's true Mr. Hopper falsified Mr. Houston's allegations against Mr. Evans, but I have no way of determining the extent to which Ms. Houston's witness statement, specifically, caused Mr. Evans emotional distress. Her witness statement was one of several that accused Mr. Evans of inappropriate conduct. Mr. Evans would have been subjected to the same treatment even absent her statement. Yet it seems reasonable to assume that a false accusation from someone Mr. Evans knew well would have contributed in some way to his emotional distress. It was his burden to prove the extent of that emotional distress, and he failed to do so beyond what common sense suggests. I grant only a nominal award. The EPA must pay Mr. Evans one dollar in compensatory damages for a marginal increase in his emotional distress.

The SDWA permits an award of exemplary (*i.e.*, punitive) damages,<sup>588</sup> which serve as punishment for wanton or reckless conduct, and deter future misconduct.<sup>589</sup> The Administrative Review Board applies the standard found in the Restatement 2<sup>nd</sup> of Torts § 908: exemplary damages are appropriate when an employer acted with reckless disregard for the worker's rights and took conscious action in deliberate disregard of those rights.<sup>590</sup>

Mr. Hopper consciously violated Mr. Evans's rights. I am not convinced that Mr. Hopper's actions were representative of the EPA's actions as a whole, however. Ms. Johnson may have been aware of Mr. Hopper's wrongdoing, but both Mr. Harrison and Ms. Cotsworth had a valid, non-discriminatory justification for their actions. Mr. Hopper retired from the EPA in 2008<sup>591</sup> and Ms. Johnson retired in 2014.<sup>592</sup> Even Mr. Harrison and Ms. Cotsworth, who did nothing wrong, have retired.<sup>593</sup> This decision cannot deter those employees from future wrongdoing. The EPA does not seem likely to repeat its illegal behavior

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<sup>586</sup> Tr. at 246–47.

<sup>587</sup> C. Ex. at 497–502.

<sup>588</sup> 42 U.S.C.A. § 300j-9(i)(2)(B)(ii).

<sup>589</sup> *Johnson v. Old Dominion Sec.*, 1986-CAA-003, -004, and -005, slip op. at 16–17 (Sec'y May 29, 1991).

<sup>590</sup> *Johnson*, 1986-CAA-3, 4 and 5, slip op. at 16–17; Restatement (Second) of Torts § 908 & Comment b (1976).

<sup>591</sup> C. Ex. at 341.

<sup>592</sup> Tr. at 334.

<sup>593</sup> Tr. at 21, 365.

in the future. Exemplary damages are inappropriate in this instance. In any event, it seems the ARB has held that punitive damages are not awardable against the federal government.<sup>594</sup>

The SDWA,<sup>595</sup> CERCLA,<sup>596</sup> and CAA<sup>597</sup> all provide that the relief the Secretary may order includes a requirement that the employer pay all costs and expenses, including attorney's fees, reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued. The Supreme Court has found, however, that, in claims for attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, a plaintiff's attorney is not entitled to fees if the claimant receives only nominal damages.<sup>598</sup> In that case (*Farrar v. Hobby*), the Court found the "litigation accomplished little beyond giving petitioners 'the moral satisfaction of knowing that a federal court concluded that [their] rights had been violated' in some unspecified way."<sup>599</sup> It explained, "When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all."<sup>600</sup> The Court affirmed the denial of an attorney's fee award.<sup>601</sup>

Mr. Evans proved he was retaliated against for a protected activity, but he is entitled to only nominal damages. Mr. Evans's counsel is not entitled to an award for fees and costs incurred in pursuing Mr. Evans's claim.

### VIII. Order

The EPA must pay to Mr. Evans \$1 in nominal damages for emotional distress caused by fabricating the allegations against him in Ms. Houston's witness statement.

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<sup>594</sup> *Dixon v. United States Dept. of Interior, Bureau of Land Management*, ARB Nos. 06-147, -160, ALJ No. 2005-SDW-8, slip op. at 17 (ARB Aug. 28, 2008).

<sup>595</sup> 42 U.S.C.A. § 300j-9(i)(2)(B)(ii); 29 C.F.R. § 24.109(d)(1).

<sup>596</sup> 42 U.S.C. § 9610(c); 29 C.F.R. § 24.109(d)(1).

<sup>597</sup> 42 U.S.C. § 7622(b)(2)(B); 29 C.F.R. § 24.109(d)(1).

<sup>598</sup> *Farrar v. Hobby*, 506 U.S. 103, 115 (1992).

<sup>599</sup> *Farrar*, 506 U.S. at 114 (quoting *Hewitt v. Helms*, 482 U.S. 755, 762 (1987)).

<sup>600</sup> *Farrar*, 506 U.S. at 115 (internal citation omitted).

<sup>601</sup> *Farrar*, 506 U.S. at 116.

So Ordered.

William Dorsey  
ADMINISTRATIVE LAW JUDGE  
San Francisco, California

**NOTICE OF APPEAL RIGHTS:** This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board (“the Board”) within 10 business days of the date of this decision. The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

The date of the postmark, facsimile transmittal, or e-filing will be considered to be the date of filing. If the petition is filed in person,

by hand-delivery or other means, the petition is considered filed upon receipt. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties.

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

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

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

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