



Issue Date: 18 May 2010

Case No.: 2010 CAA 2

In the Matter of

**William T. Knox,
Complainant
v.**

**National Park Service,
Respondent**

**RECOMMENDED DECISION AND ORDER
DENYING COMPLAINT**

This case arises under the employee protection provisions of the Clean Air Act (“CAA”), 42 U.S.C. § 7622. The Complainant filed a complaint on April 8, 2009, alleging complaints against the Respondent under the whistleblower protection provisions of the Act. After investigating the allegations in the complaint and its amendments, the Regional Administrator for the Occupational Safety & Health Administration (“Administrator”) dismissed the complaint in a determination dated September 29, 2009. The Complainant filed a timely request for a hearing before the Office of Administrative Law Judges, which took place on February 1 and 2, 2010.¹ The Complainant and Respondent filed written briefs on April 27, 2010. I have based my analysis on the entire record, including the exhibits and representations of the parties, and have given consideration to the applicable statutory provisions, regulations, and case law, and made the following findings of fact and conclusions of law.

Statement of the Case

Mr. Knox, the Complainant, has been employed as an engineering equipment operator with the National Park Service, U.S. Department of the Interior, at Greenbelt Park since 2002. He began his career with the Jobs Corps as a forest technician, and subsequently worked as a firefighter with the Los Angeles Fire Department, and as a hot shots crew firefighter with the U.S. Forest Service. Mr. Knox has also worked as a firefighter for the U.S. Fish and Wildlife Agency, and at the Fort Walton U.S. Army Task Force. He has worked as a maintenance worker at National Biological Services, an engineer equipment operator at Ft. Meade, and a training instructor supervisor/safety officer at Harpers Ferry Job

¹ At the hearing, I admitted Complainant’s Exhibits (CX) 1 to 64, and 66 to 76, and Respondent’s Exhibits (RX) 1 to 5. References to the transcript of the hearing are noted as “Tr.”

Corps.

Mr. Knox's Previous Whistleblower Litigation

Before coming to Greenbelt Park, Mr. Knox was employed with the Park Service at Harpers Ferry Job Corps Center, as a Training Instructor, Vocational Training Specialist. While in this position, Mr. Knox raised concerns about asbestos at the Job Corps with the Interior Department. Mr. Knox was fired in March 2000, and subsequently rehired, although he remained on administrative leave while DOI personnel tried to find a position for him at a different location.² Mr. Knox filed complaints with the Merit System Protection Board (MSPB), and eventually, a settlement agreement was reached that included his transfer to Greenbelt Park. The settlement agreement states that Mr. Knox was appointed to the position of Engineering Equipment Operator in the National Capital Parks East, with his duty location at Greenbelt Park, effective on the date of the settlement, which was September 29, 2000 (CX 73).

On March 7, 2000, Mr. Knox wrote to the Secretary of the Interior with his concerns about asbestos at Harpers Ferry, and his claims of retaliation. This was considered to be a whistleblower complaint against the U.S. Department of the Interior (DOI) under the employee protection provisions of the Clean Air Act. After an investigation, OSHA found merit in Mr. Knox's complaint, and ordered relief. The Respondent appealed, and after a hearing, Administrative Law Judge David DiNardi found that the DOI had violated the Act. However, on appeal, the Administrative Review Board (ARB) dismissed the complaint, finding that Mr. Knox did not engage in protected activity, because he did not bring to management's attention that asbestos was being emitted into the outside ambient air.

Mr. Knox appealed to the Fourth Circuit of Appeals, which reversed and remanded to the ARB for further consideration. On April 28, 2006, the ARB issued its Decision and Order dismissing Mr. Knox's complaint, finding that although Mr. Knox reasonably believed that asbestos was being emitted into the ambient air, the Respondent was not aware of his protected activity, and thus could not have retaliated against him.

Mr. Knox appealed to the Fourth Circuit Court of Appeals, which reversed and remanded the case to the ARB for further consideration of whether Mr. Knox conveyed to Respondent a reasonable belief that the Respondent violated EPA work practice standards. On August 30, 2007, the ARB issued its Decision and Order again dismissing Mr. Knox's complaint, finding that he did not demonstrate a reasonable belief that the DOI violated work practice standards. Mr. Knox appealed, but on November 20, 2008 the Fourth Circuit dismissed his appeal as untimely.

I have set out below the incidents that Mr. Knox claims establish that he was subjected to a hostile work environment upon his transfer to Greenbelt Park, in retaliation for prosecuting his whistleblower claim under the CAA with the Department of Labor.

² The opinions from the ARB and the Fourth Circuit reflect that Mr. Knox's supervisor thought he was a probationary employee who could be fired at will. When DOI discovered that Mr. Knox was a permanent employee, he was reinstated.

Knowledge of Mr. Knox's Whistleblower Status

Mr. Knox believed that the confidentiality clause in his settlement agreement meant that no one would know who he was when he got to Greenbelt, and that it would be a clean start.³ But he testified that when he got to Greenbelt, everybody there knew he was a whistleblower, and numerous people told him they knew he was a whistleblower. According to Mr. Knox, he did not tell anyone at Greenbelt that he was a whistleblower; they knew ahead of time. After people told him that they could not trust him, because he was a whistleblower, he told people at the Park about his status. He stated that people stayed away from him for six years, and that the people responsible for taking away his job duties, and not giving him accommodations, were definitely aware of his whistleblower activity.

Mr. Keith Sears has been a maintenance worker and motor vehicle operator at Greenbelt for two years. He testified that he has heard talk in the work area that Mr. Knox is a whistleblower, and thought that this was generally known in Greenbelt, but he did not know much about the situation.

Mr. Romero has been the Acting official for National Park East, including Greenbelt, since 2004. He testified that he has met Mr. Knox, but does not know him from working with him. Mr. Romero served on the Park Service accident review board, and knows Mr. Knox through the number of accidents and safety lost time injuries he has had over the years. Mr. Romero has known Mr. Knox was a whistleblower for three to five years. He thought he heard this from Mr. Cunningham, although it was hard for him to recall. According to Mr. Romero, Mr. Cunningham told him that there were instances of destructive behavior in the workplace, with Mr. Knox acting out and telling others that he was a whistleblower, and untouchable.

Mr. Fred Cunningham has been the Park manager at Greenbelt Park since 2003, and is Mr. Knox's second in line supervisor. When Mr. Knox came to Greenbelt, Mr. Cunningham was working at headquarters, and did not know anything about him. All of Mr. Knox's issues were handled by the regional office. According to Mr. Cunningham, he did not know about Mr. Knox's whistleblower activity until after an incident at Greenbelt Park, which involved Mr. Knox's supervisor complaining that Mr. Knox was telling all of the other employees that he was a whistleblower, and that when the supervisor gave them assignments, they did not have to do them. Mr. Knox was disruptive. According to Mr. Cunningham, Mr. Young, the chief of maintenance, talked with Mr. Knox, and told him to stop telling everyone about his whistleblower activities. Mr. Knox asked Mr. Young to put this in writing, which he did. Mr. Knox then "took him to court," and Mr. Young had to go to U.S. District Court in connection with a complaint Mr. Knox had with the Park Service.

Mr. Cunningham testified that he told Mr. Romero that Mr. Knox was a whistleblower, after Mr. Knox was involved in several safety incidents. According to Mr.

³ The settlement agreement states that "Both parties agree that this agreement and its terms will be kept confidential. The terms of the agreement will be revealed only to those whose actions are necessary to implement this settlement." (CX 73).

Cunningham, when Mr. Knox is told that he is at fault, he brings up the fact that he is a whistleblower, and you have to be careful what you say to him because you will wind up in court. Mr. Cunningham knew that Mr. Knox came to Greenbelt Park as a result of the settlement of his whistleblower litigation. But he did not tell anyone about that, Mr. Knox did.

Mr. Tony Migliaccio is the maintenance worker supervisor at Greenbelt Park, and Mr. Knox's direct supervisor. He has been with the Park Service since 1977. Mr. Migliaccio became aware of Mr. Knox's whistleblower activity not long after he came to Greenbelt Park in July 2004. Mr. Migliaccio testified that Mr. Knox was talking to him in the lunch room about going to court with the Park Service, and when Mr. Migliaccio asked him about it, Mr. Knox told him about it. Mr. Migliaccio stated that he commended Mr. Knox for his guts, and told him several times that it had no bearing on their relationship or Mr. Knox's employment.

Mr. Ralph Hill is a maintenance worker at Greenbelt, where he has worked for about twenty years. He was aware that Mr. Knox was coming to work at the Park, and that he was a whistleblower. He was not sure how he got this information, which was "talk," to the effect that Mr. Knox was a whistleblower, and could not be touched because he was under a court order.⁴ There were no warnings to keep away from Mr. Knox. According to Mr. Hill, Mr. Knox spoke with him about his displeasure that people were taking things out on him because he was a whistleblower. Mr. Knox constantly talked about being frustrated, and mistreated because he was a whistleblower.

Alleged "Gag Order" on Raising Safety Complaints

Mr. Knox identified a December 21, 2000 memorandum to Mr. Knox from Mr. Young, dated December 21, 2000, documenting a meeting that was held to address Mr. Knox's safety concerns. (CX 71). Mr. Knox characterizes this memorandum as a "gag order," which prevented him from raising safety complaints, and was evidence of a hostile work environment and animus. Mr. Knox also identified the written response to his safety complaints at Complainant's Exhibit 72, and testified that he understood it to instruct him not to raise any fire safety concerns except with the persons named in the memorandum.

Complainant's Exhibit 71 documents a meeting on December 21, 2000 with Mr. Knox, Bobby Johnson, a Safety and Occupational Health Specialist, National Capital Parks-East, Matthew Shifflett, Employee Relations Specialist, National Capital Parks-East, and Mr. Young, the Chief, Division of Maintenance, National Capital Parks-East. It reflects that Mr. Knox expressed concerns about a number of issues, including unsafe operation of park vehicles, the return of a grader with a broken window, contamination of the creek near the Greenbelt Maintenance Yard, and an odor coming from behind the maintenance area. Mr. Knox also advised Mr. Young that three weeks earlier, he had an accident with a Park vehicle; he was concerned that it took so long for the U.S. Park Police to respond, and that he was not able to contact any employees at the Greenbelt Maintenance Yard. Mr. Knox asked for a cellular telephone, but Mr. Young told him that, since a cell phone did not have a higher

⁴ Although he was guessing, Mr. Hill stated that he would have to say most people at the Park knew about Mr. Knox's whistleblower status.

capacity for transmission or reception, and there was a cost factor, he would not receive one.

Mr. Knox raised a concern about traffic safety and control, stating that the Park was mandated by Maryland State Law to have a Certified Traffic Safety Control Manager. When Mr. Young asked him to provide the mandate, Mr. Knox was unable to provide him with a satisfactory answer. Mr. Knox also expressed concern about the speed of vehicles on park roadways, and was informed that this was a Park Police law enforcement issue, over which the Park Service had no control. Mr. Young indicated that "although you stated that the park was not complying with safety standards, you did not specifically indicate what those standards are."

Mr. Young told Mr. Knox that safety was the responsibility of every employee in the Park, but he needed to be concerned with the position he occupied, Engineering Equipment Operator. According to Mr. Young,

You were directed to report safety-related concerns through the chain of supervision or directly to the Safety Officer, if you [sic] initial efforts through your supervisors were unsuccessful. You then apologized and thanked us for taking the time to hear your concerns.

Mr. Knox also expressed concern that contractors assigned to a snow emergency were working a full 24 hours, while Park employees were sent home and directed to report for duty the next day. Mr. Young was not aware of this working condition, but advised Mr. Knox that contract employees were subject to the same working conditions as federal employees, and should not be required to work a continuous 24 hour shift. He advised Mr. Knox that he had an upcoming meeting with Park staff to discuss the issue of contractors and their working relationship with park employees.

Mr. Knox was concerned that contractors would threaten the jobs of park employees, and was informed that no such threat existed. Mr. Knox also requested hazardous duty pay for employees required to work on park roadways, due to the constant danger of vehicular accidents. He was advised that, once his safety concerns were addressed, the need for a pay differential would be eliminated.

Mr. Knox also asked about the Disabled Veteran's Affirmative Action Program. Mr. Young stated that he was not able to respond to this request, but referred him to the Personnel Officer at National Capital Parks-East, who was working with the Washington Office to obtain an updated copy of the DOI Program.

Mr. Young informed Mr. Knox that he would be provided with a written response to his concerns by January 26, 2001. He stated that

Until that time, Mr. Shifflett and I informed you that you were not to again raise these issues with other employees or supervisors at NCP-East, nor were you to contact individuals outside the organization, including the National Capital Regional Office. You then stated that you would comply with our direction and wait for our written

response.

Finally, Mr. Young addressed a concern raised by Mr. Knox's supervisor, Tony King, that Mr. Knox was performing duties not assigned to him, such as duties normally performed by the Park automotive workers and mechanics. Mr. Knox was instructed that he was not to perform such duties without authorization from Mr. King or his supervisors.

As promised, Mr. Young provided Mr. Knox with a written response, dated January 25, 2001 (CX 72). He advised Mr. Knox that the straps used to move equipment more than met the safety standards. He also stated that while he was aware of a limited number of motor vehicle accidents involving park vehicles, he found no evidence of a widespread problem. Mr. Young advised that the area near the creek had been investigated, and there was no evidence of a foul odor, or any contamination of the creek.

Mr. Young expressed his conclusion that safety precautions had reduced the element of hazard on the park roadways to a less than significant level of risk, and there was no justification for hazardous differential pay.

Mr. Young advised Mr. Knox that Mr. Mel Reid, the Regional DVAAP Coordinator in the Washington Office, had forwarded an "advanced copy" of the DOI DVAAP Program to Ms. Katrina Roberts, the Personnel Officer at National Capital Parks East, and that when she received this document she would discuss with Mr. Knox how the program applied to disabled veterans.

Mr. Young again addressed Mr. Knox's request for a cellular telephone, noting that Mr. Knox's supervisor, Mr. King, had explained to him that each employee had a two-way radio, and that no additional maintenance employees would be assigned cellular telephones, which would not enhance his ability to contact other personnel. Mr. Young also discussed Mr. Knox's concern about the F-600 Ford Crew Cab, stating that it would only be used with the energy absorption unit, not for snow removal.

With respect to Mr. Knox's concern about PPE, Mr. Young related that Mr. King had purchased and assigned to all maintenance personnel safety shoes, safety glasses, hearing muffs, safety vest, gloves, hard hats, and ear plugs. He stated that it was the employee's responsibility to maintain the items in the assigned locker when not in use.

Mr. Knox had expressed written concern that the work standards at Greenbelt Park needed to be brought up and maintained in accordance with the Williams-Steiger Occupational Safety and Health Act of 1970, which provides that no work "will be performed or engaged in under working conditions which are unsanitary or hazardous or dangerous to the health and safety of the employees engaged" in such work. Mr. Young stated that since the Park employees worked under conditions that did not compromise their health or safety, it would appear that the working standards were in compliance with the Act.

In closing, Mr. Young stated:

As I communicated to you in our meeting, however, you are to direct any future safety-

related concerns through Mr. King or DeWayne Perry, Maintenance Mechanic Supervisor. If a satisfactory resolution is not reached at their level, then you contact either their supervisor(s) or the Safety Officer, Robert Johnson.

Mr. Knox agreed that these documents did not reflect that Mr. Young told him he could not complain about any issues not listed in the document. Mr. Knox claimed that Mr. Young told him after the meeting that he could not complain about any issues not listed in the document, and that he did not want Mr. Knox to go to OSHA. Mr. Knox read Mr. Young's January 25, 2001 memorandum as applying to his future safety concerns, not just his current safety complaints.

Attempt to Place Mr. Knox on a Performance Improvement Plan (PIP)

Mr. Cunningham testified that when Mr. Knox first came to Greenbelt, he was in the middle of a court case, and his supervisor at the time felt he was not proficient; he had several accidents with the equipment. Someone suggested putting him on a Performance Improvement Plan (PIP). Instead, Mr. Knox was sent to Kentucky to attend an equipment operating class.

Mr. Knox claimed that Ms. Michelle Stewart attempted to get Mr. Cunningham to put him on a PIP, but he was unable to do so, because he did not have the necessary paperwork.

Alleged Statement by Mr. Gentry Davis

According to Mr. Knox, he spoke to Mr. Davis, who was the Park Service assistant regional director and top safety officer, about his concerns regarding asbestos at Harpers Ferry, and the retaliation he was experiencing. Mr. Davis testified on behalf of the DOI in Mr. Knox's whistleblower litigation. At some time after Mr. Knox was transferred to Greenbelt Park, Mr. Davis told him that he would never make management again, that he could complain, but it would do no good.

Removal from Department of Interior Building

As evidence of his claim that he was subjected to a hostile work environment, Mr. Knox brought up an incident involving his ejection from Department of the Interior headquarters. Mr. Knox testified that he went to the Department of Interior headquarters building in 2001 or 2002, to ask about the open door policy, and to see if he could make an appointment with the Director of the Park Service.

Mr. Knox testified that he made some phone calls to see if he could put his name down for an appointment with the Director, and was told that he should come down and give his name. Apparently, unknown to Mr. Knox, there was an order that he was not to be given an appointment with the Director, and to call security if he showed up.⁵ When Mr. Knox went to the building, he saw a secretary to try to schedule an appointment, and he talked with an assistant

⁵ Claimant's Exhibit 70 is a copy of an email from Deb Smith to various National Park Services personnel, dated November 6, 2001, instructing that if Mr. Knox showed up in the office wanting to see the Director, he should by no means be given an appointment, and if he became upset, security should be called.

park director. Mr. Knox thought his name was put on an appointment list. On his way out, he was told to sit down and wait. Then, a park ranger with a gun came and escorted him out of the building.

Mr. Knox acknowledged that he has since been to the main DOI building, this year for a urine test, and in connection with a training issue. He also went to the building in January for his deposition in connection with this case.

Mr. Cunningham testified that Mr. Knox often talked about wanting to speak with the Director of the Park Service about settling his lawsuit.⁶ The first time, he went to the main Interior building to try to see the Director without an appointment, and when he was told that he could not see the Director, there was a scene. Mr. Knox took everyone's name, and they all ended up in court in Baltimore for not giving him an audience with the Director.⁷ When a new Director was appointed, Mr. Knox again went to the Interior building to try to settle his case. He did not have an appointment, and security was called to escort Mr. Knox out. Mr. Knox's identification card was confiscated, and as Mr. Knox's supervisor, Mr. Cunningham was called to pick it up.⁸ A few weeks later, it was ruled that Mr. Knox could not be barred from the building; however, he was banned from the Director's floor.

Request for Gate Opener

According to Mr. Knox, he has knee and stomach problems, which slow him down, and cause him to "struggle." He has problems walking fast for any distance, and soreness in his hands and back. He claims that particular tasks are especially difficult, such as pounding stakes and shoveling. At some point, Mr. Knox asked Mr. Migliaccio for an electronic opener for the gate to the maintenance yard.⁹ He stated that without the opener, he has to come down off his truck and enter a code to open the gate. According to Mr. Knox, "everybody" has a gate opener. Mr. Knox stated that he told Mr. Migliaccio he would pay for the opener, but Mr. Migliaccio told him no.

Mr. Migliaccio testified that, at one time, Mr. Knox asked him for an electronic gate opener. When Mr. Migliaccio first came to Greenbelt, the supervisor and auto mechanic had a gate opener. Mr. Migliaccio told Mr. Knox that if he gave him a gate opener, he would have to give one to everyone, and there was no need to change the previously established rules. Mr. Migliaccio just let it go. Mr. Knox did not tell him that he needed it to perform his job, or because of any disability. He offered no particular reason for his request. Mr. Migliaccio thought Mr. Knox offered to pay for an opener, but Mr. Migliaccio could not sell him one, or authorize him to go out and buy one.

Mr. Migliaccio testified that Mr. Knox told him he had a percent disability from the

⁶ This would be Mr. Knox's whistleblower claim that was originally heard by Judge DiNardi.

⁷ The evidentiary hearing by Judge DiNardi was held in Baltimore.

⁸ According to Mr. Knox, his identification card was not confiscated. It had expired, and Mr. Cunningham went to the DOI building and got him a new identification card.

⁹ Mr. Knox could not remember when he made this request, although he stated that "each year" he asked for a gate opener.

military, but Mr. Migliaccio did not know what that meant. Mr. Knox never told him that he had trouble bending, walking, or climbing, although he has noticed that Mr. Knox walks with a limp. He did not think that Mr. Knox's request for a gate opener had anything to do with his limp, or with difficulty walking and climbing. Mr. Migliaccio probably would not give Mr. Knox a gate opener if he asked again, because then he would have to give one to everyone else.

Mr. Cunningham testified that Mr. Knox has never asked him for special equipment, including a gate opener. All supervisors and auto mechanics have a gate opener, and others enter a code into a combination pad at the gate. Mr. Knox never told him that he was unable to open the gate this way. Mr. Cunningham was aware that Mr. Knox was told he was not going to be given a gate opener. He is not a supervisor, and does not need one; no other employees have them. Mr. Knox has the code to get into the facility when required. The supervisor made the decision to give the auto mechanic a gate opener, because he has to bring equipment in and out of the yard at all times. The warehouse and supply people do not have gate openers.

Mr. Cunningham testified that even if he knew that Mr. Knox had a service related injury (which he did not), and a lot of trouble climbing up and down from equipment (which Mr. Knox never told him), he would not have asked that he be provided with a gate opener. According to Mr. Cunningham, when Mr. Knox returned from knee surgery, he said that he was fully capable of performing all aspects of his duties, which call for climbing up and down on equipment.

Mr. Knox's Entitlement to Accommodations

Mr. Knox underwent knee surgery after a work-related accident, and was off work for about a year. He claims that when he recovered, he was told that there was no light duty, and he had to return at full duty. He acknowledged that his doctor told the Park Service that he could return at full duty, without restrictions or limitations, but that, because Mr. Knox was told ahead of time that he had to return at full duty, his doctor did not recommend that he return to light duty.

Mr. Knox stated that he has requested to be considered for the Disabled Veterans Affirmative Action program at the National Park Service. He submitted an undated letter, addressed to Green Belt Park, National Capital East, National Capital Region, Director of Park Service, stating that he would like to be, or should have been considered for this program. He indicated that he was stationed at Greenbelt Park, and requested that the Human Resources Program and the Equal Opportunity Program manager intervene in his "case," and provide guidance to ensure equal access to disabled veterans in hiring, promotion, details, and training opportunities.¹⁰ (CX 67).

¹⁰ Mr. Knox referred several times to a meeting that took place at headquarters, in which he asked for accommodations under the Disabled Veterans Affirmative Action Program. It appears from the context that Mr. Knox was referring to the attempts to find him a position in connection with the settlement of his previous claim. According to Mr. Knox, "they" yelled at him, and told him that if they let him apply for this program, he would have a lower grade. He claimed that the meeting included Mr. Cunningham (who would have been working at

Mr. Cunningham testified that Mr. Knox complained that the Park Service did not have an affirmative action program for disabled veterans. Mr. Cunningham told him he needed to go to human resources at the regional office. Mr. Knox asked him for permission to pursue this, and Mr. Cunningham told him to go ahead. Mr. Cunningham called the superintendent, Gail, who told him that Mr. Knox could go directly to the "source." Mr. Cunningham thought that Mr. Knox met with Mr. Reid at the main Interior building; Mr. Reid has since retired.¹¹ Mr. Knox did not discuss this issue with him further until recently, when he brought up the fact that the Park still did not have an affirmative action program.

According to Mr. Knox, he did not tell his supervisor that he was physically unable to do his job, and would not do so, because if he did he would be threatened with demotion or firing. Mr. Knox stated that he hurts, but he is still doing his job.¹² Mr. Knox claimed that he asked for accommodations one other time, in addition to his request for a gate opener, through a Department of Defense equipment program for things such as gloves. Mr. Cunningham applied, and got some "stuff," but Michelle Stewart turned him down.¹³

Mr. Migliaccio did not recall Mr. Knox ever telling him that he could not perform his job because of a disability. As far as he was aware, Mr. Knox was able to perform every aspect of his duties. The only medical documentation Mr. Migliaccio had came from the physician who certified him to return to work on full duty after his knee injury. He was not aware of any latent problems as a result of this injury. Nor was he aware that Mr. Knox had any disabilities as a result of service related injuries.

Mr. Romero testified that he did not know that Mr. Knox was disabled, or what his disability was. This was the first time that he heard that Mr. Knox wanted to be considered for the Disabled Veterans Affirmative Action Program, and moved into a position that was not as hard on his body.

According to Mr. Deutsch, the Disabled Veterans Affirmative Action plan is administered by the EEO office, and its purpose is to encourage federal agencies to hire thirty percent compensable disabled veterans. The program is designed for hiring employees from outside the government. If an applicant is qualified for a position, and has documentation of the thirty percent compensation, he or she can be hired noncompetitively.

Mr. Deutsch stated that generally, veterans preference of any kind applies in terms of bringing people in from the outside. It does not apply to merit promotions. He identified the National Park Service affirmative action plan at Complainant's Exhibit 67, and

headquarters at the time), Mel Reid, Matt Shifflett, Michelle Stewart, and John Hill, and took place "maybe" a couple of years ago.

¹¹ According to Mr. Young's January 2001 memorandum addressing Mr. Knox's safety concerns, Mr. Mel Reid was the Regional DVAAP Coordinator in the Washington Office, and was forwarding material in response to Mr. Knox's request.

¹² Mr. Knox's testimony was somewhat contradictory: he stated that he remembered saying once at a meeting that he could not do his job. He also stated that he told his supervisors that he could do his job, but had to work at his own pace.

¹³ Mr. Knox did not specify what type of equipment he requested.

acknowledged that the Policy Statement, which reflects the Park Service's commitment to the recruitment, retention, and advancement of the compensable disabled veterans, applied to training and development. Mr. Deutsch felt that this was relatively noncontroversial, and was not aware of a specific program related to training and development. To his knowledge, the program is mainly geared to bringing people in from the outside.

Assignment of Duties to Others

According to Mr. Knox, when he got to Greenbelt, he was not allowed to operate all of the equipment in his position description. Instead, lower grade maintenance workers, whose position description did not include operating this equipment, operated the heavy equipment. Mr. Knox claimed that the equipment that is supposed to be assigned to him, the "new stuff," is assigned to Keith Sears, while he operates the "old stuff."

Mr. Knox testified that he asked Mr. Migliaccio why the duties in his position description were taken away and given to laborers, and Mr. Migliaccio told him it was a training issue, and he was not sure Mr. Knox could really operate the equipment. Mr. Knox was upset, and told Mr. Migliaccio this was not right. He thought Mr. Migliaccio told him that if he did not like it, he should have the judge tell him; he would treat Mr. Knox that way until someone told him differently. According to Mr. Knox, he paints, and puts snow stakes down, when there are laborers who should be doing that work. Another guy is doing his job.

Mr. Sears testified that he operates heavy equipment, which is outside his position description. Mr. Knox told him that he used to perform those duties. Mr. Sears has operated heavy equipment most of his life, and he has a Class A driver's license. He has received training to operate heavy equipment. Day to day, he might be operating one piece of equipment, while Mr. Knox operates another.

Mr. Migliaccio testified that Mr. Knox has not had his duties taken away, and he still operates heavy equipment. From time to time, Mr. Migliaccio has someone else operate this equipment on an as-needed basis. If a piece of heavy equipment needs to be operated, he generally goes to Mr. Knox first, but if Mr. Knox is tied up with another piece of heavy equipment, he goes to another employee. In fact, Mr. Knox operated heavy equipment the previous Saturday night into the next morning. Mr. Migliaccio stated that there are days when no one is operating heavy equipment, and he finds other things for Mr. Knox to do, such as driving the truck or painting snow stakes. According to Mr. Migliaccio, Mr. Knox did not object to this task; other employees also do this job, and Mr. Migliaccio has painted stakes many times.

Mr. Migliaccio stated that it was not true that a lot of the heavy equipment operation has been given to Mr. Sears; Mr. Knox is probably spending as much of his time with heavy equipment as he was before Mr. Sears came. He stated that the need for heavy equipment is greater in certain weeks and years, and he makes the decision as to how often it is used. If Mr. Knox is complaining that he is not using the heavy equipment as much, it could be because there was not as much need.

Mr. Cunningham testified that none of Mr. Knox's duties have been taken away, and in fact, he asked for, and was assigned trail maintenance duties, which are not in his position description. Mr. Knox has been sent to trail maintenance class; he goes on trails and marks downed trees in hazardous conditions.

Lack of Promotions or Cash Bonuses

Mr. Knox believes that he has not received cash awards, although other people have, because of his whistleblower status. He asked his supervisor about this, but was told to mind his own business, and not worry about other people. Mr. Knox's performance appraisal shows that he achieved all of his goals from 2000 to 2001, and 2001 to 2002; from 2007 to 2008, he was rated as successful. Mr. Knox stated that other people advanced, such as Kevin Barry, who received a 120 day detail and temporary promotion, and is now a park ranger. When Mr. Knox asked for a detail a few months earlier, he was denied, and was told he was needed at the park. Mr. Knox believes that if not for discrimination against him, he would now be a facilities manager. He feels that he has the education, and is on target. But his career has stalled, and he is being punished.

Mr. Migliaccio thought that Mr. Knox had asked to be put on a detail, but he did not recall when or what detail.

Mr. Cunningham testified that Eric Harris and Kevin Barry were sent to a summer detail at Central Park, a decision made by the supervising office, because of their previous work with youth programs. To Mr. Cunningham's knowledge, Mr. Knox had not previously worked on youth programs; he said he was an instructor when he came from the Harpers Ferry Job Corps, and he did work one summer with a student conservation course in the Park. In contrast, both Mr. Harris and Mr. Barry had significant work with youth programs.

Mr. Deutsch testified that under the DOI performance award program, an employee is eligible for consideration if the overall performance rating is four or five, but not three, which is "fully successful."

Mr. Migliaccio testified that, as previously, Mr. Knox's most recent performance rating was fully successful; he was not eligible for a performance award. Mr. Migliaccio supervises 15 to 18 people, and he stated that generally, four or five of them receive ratings of superior, and performance awards each year. He has written an award for an employee who performed the Heimlich maneuver, who had a fully successful rating; the award was based on his action. Mr. Migliaccio testified that if he had it to do over, he would think "long and hard" about rating Mr. Knox as "fully successful." He felt that it was hard to put the entire blame on Mr. Knox for some of his accidents, but some things were judgment issues. He did not feel that he could rate Mr. Knox as "superior," because of his accidents.

Mr. Knox claims that he was unfairly treated when he was not hired to fill the position vacated when his previous supervisor, Tony King, left; Mr. Migliaccio was hired for that position. Mr. Cunningham testified that he did the hiring for that position, but he did not remember seeing Mr. Knox's name on the certificate of qualified individuals that was

provided to him. Mr. Cunningham stated that Mr. Migliaccio was the number one applicant for the position.

Mr. Cunningham stated that Mr. Knox is at Wage Grade 10, which is the highest he can go as an equipment operator. He was never denied a promotion, and in fact there is no promotion potential for him at the Park.¹⁴

According to Mr. Knox, when Kevin Barry left Greenbelt on a temporary 120 day promotion, there was a safety officer position available. Mr. Knox wanted it, and so did Eric Harris. Mr. Knox claimed that he told Mr. Migliaccio they could have two safety officers, but Mr. Cunningham told Mr. Knox that he could not have the spot, only Eric could do it.

Mr. Knox claimed that Dwayne Perry went from Greenbelt Park to the U.S. Park Police to do maintenance, and was at Fort Dupont as the chief of maintenance; he has been promoted two times. He stated that other people took advancement training in areas outside their job duties, and everyone at Greenbelt was allowed to have supervisory duties except for him.¹⁵ Mr. Knox claimed that he was the highest grade worker, and had more experience. He had experience as a supervisor when he was a noncommissioned officer, and in his position at U.S. Fish and Wildlife, where he ran a fire crew and was the incident commander. He was also a supervisor training instructor at Harpers Ferry for persons aged 16 to 25.

Mr. Migliaccio testified that Mr. Knox did not want the safety officer position after Mr. Barry left. He stated that a year or so earlier, Mr. Barry had decided he did not want to do the job any more, and Mr. Migliaccio opened it up for anyone else who wanted it. Mr. Knox was in the lunchroom when Mr. Barry announced that he did not want to do the job, and he said that he was not interested. Mr. Harris, who was hired as a maintenance worker was already a member of the safety unit assisting Mr. Barry with the safety duties. When Mr. Barry left, Mr. Migliaccio moved Mr. Harris into the spot; he did not think to ask anyone else if they wanted the position.

Mr. Migliaccio testified that Mr. Knox asked him why Mr. Harris was the safety officer, and Mr. Migliaccio told him that Mr. Harris was already doing those duties. He told Mr. Knox that he could work with Mr. Harris, because they could always use two safety officers. But nothing happened, and Mr. Knox never asked to be in the second position. Mr. Migliaccio was not going to take Mr. Harris, who was already in the position, and put Mr. Knox in the position. Although Mr. Knox claimed that Mr. Cunningham would not let Mr. Migliaccio remove Mr. Harris and put Mr. Knox in the position, Mr. Migliaccio stated that Mr. Cunningham never told him that Mr. Knox should not be put in the safety officer position. Mr. Migliaccio stated that Mr. Knox could still be a safety officer if he wanted to.

¹⁴ Mr. Knox acknowledged that at Step 5, he is at the highest step for a Wage Grade, and there is no higher Wage Grade position at Greenbelt Park. But he felt there was room for promotion, because there were GS positions, although he would have to apply for them.

¹⁵ Mr. Knox complained that if Mr. Migliaccio was not at the Park, he assigned a mechanic or lower grade worker to supervise him. Indeed, he did not feel that Mr. Migliaccio was capable of supervising him. Mr. Migliaccio testified that if he is out of the Park, he assigns a work leader; there are already work leaders who know the Park operation very well.

According to Mr. Romero, when opportunities for temporary promotion or lateral placement arise, they can be filled in a number of ways. There might be a working relationship already, or the assignment could be based on qualifications or experience level. Mr. Romero testified that there is one safety officer at Greenbelt, Bobby Johnson, and possibly a collateral duty safety officer. Collateral duty safety officer is not a promotion, it is a collateral duty appointed by the site manager; Mr. Romero has no role in that decision.

Incident at Training Session

Mr. Knox testified that last year he attended a facilitator safety training session, which was described as an “employee based” concept. During one of the sessions, he told the instructor that he could not turn down dangerous assignments, and that he worked in a hurricane cutting down trees on the Baltimore Washington Parkway; he sometimes could not say no to an assignment. According to Mr. Knox, Mr. Romero, the Assistant Deputy Director, stood up and started yelling at him, saying that he did not know what he was saying, and embarrassing him. The class took a break, and Mr. Romero took him aside and chewed him out, reading him the riot act for 45 minutes to an hour. Mr. Knox missed several blocks of the instruction as a result. Mr. Romero demanded a meeting with Mr. Knox’s supervisors, which took place the next day, but Mr. Knox was not included.

Mr. Romero testified that he organized this training, which was attended by people from the whole region, including employees who worked with Mr. Knox. Mr. Romero sent Mr. Knox to this training so that he could learn how to train other employees, and also because of his past history of a large number of safety incidents.

According to Mr. Romero, Mr. Knox was disrupting the objective of the class, which was to certify the participants to train other employees. Three or four times, Mr. Knox described unsafe scenarios that he was placed in, and went back and forth with the facilitator. He was not satisfied with the responses, and created a stir. Mr. Romero did not think Mr. Knox was displaying respectful professional courtesy. He would have pulled the facilitator aside at a break to discuss his questions; there were plenty of opportunities to do so. Mr. Knox also could have talked about safety issues with him. Instead, he asked his questions over and over again.

At one of the sessions, Mr. Knox stated that he could not always turn down dangerous assignments. Mr. Romero raised his hand, and told Mr. Knox that he wanted to get to the bottom of this, and that it was unacceptable for Mr. Knox to be placed in this kind of work environment. Mr. Romero stated that he was going to meet with Mr. Knox’s supervisor.¹⁶ Mr. Knox wanted to find out if any employees faced an unsafe working environment, or felt uncomfortable saying no to unsafe assignments. He did not yell at Mr. Knox, or embarrass him. Mr. Romero stated that he spoke with Mr. Knox in the break room afterward, and that Mr. Knox missed maybe fifteen minutes of training, not a few blocks of the three day course. According to Mr. Romero, Mr. Knox was very quiet and cordial during their conversation. Mr. Knox acknowledged that Mr. Romero said nothing about his whistleblower activity during this conversation.

¹⁶ According to Mr. Romero, afterwards, a number of participants, as well as the facilitator, thanked him, and told him they needed this, because Mr. Knox’s behavior disrupted the learning opportunity for everyone.

Mr. Romero called Mr. Knox's supervisor to set up a meeting, and to find out why Mr. Knox felt this way. Mr. Knox was not invited to the meeting; he had already made his allegation very clear to Mr. Romero and the group. Mr. Romero met with Mr. Migliaccio and Mr. Cunningham, and they discussed Mr. Knox's allegations about unsafe working conditions, including personal protective equipment, heavy equipment, and the environment. According to Mr. Romero, he did not think that Mr. Knox's status as a whistleblower came up; the meeting did not involve Mr. Knox's whistleblower status. Mr. Romero stated that, as confrontational as such a decision might be, he would rather close down the Baltimore Washington Parkway than have someone die on his watch; if the risk is too high, he would rather close it down. Both Mr. Migliaccio and Mr. Cunningham told Mr. Romero that Mr. Knox's statement, that he was not allowed to turn down dangerous assignments, was not true, and that employees are allowed to refuse unsafe assignments.

Mr. Cunningham recalled meeting with Mr. Romero and Mr. Migliaccio to discuss the incident at the training session. His recollection was that Mr. Knox made some statements that were contrary to what was being discussed at the session, and then got into a little "tiff" with Mr. Romero about his allegations that things were not done safely at the park, and he had to keep the Parkway open and throw safety to the wind. Mr. Romero was upset, and called Mr. Migliaccio to ask if this was true, and Mr. Migliaccio told him it was not. Mr. Knox's status as a whistleblower did not come up at the meeting. Mr. Knox was not given any sort of discipline in connection with the incident.

Mr. Romero stated that after the training, Mr. Knox did not choose to take additional training, and when he was asked if he wanted to teach the class to his colleagues, he declined. Mr. Romero described this as a development opportunity. Mr. Knox claimed that he missed three to four blocks of instruction, and when he asked if he could make them up, the instructor told him he could not do it. He stated that he did not really complete the class, and after Mr. Romero yelled at him, it was hard to continue. He acknowledged that he did not take the opportunity to train others after his training, but this was because he missed some blocks of instruction, and he felt that if he did not say the right thing to the people he was training, Mr. Romero would chew him out. He could not speak the truth.

Although he did not offer specifics, Mr. Knox testified that his managers give him dangerous assignments, and he cannot turn them down. He does not think that he can refuse dangerous jobs, because Mr. Romero has said to do the job first and complain later, and that no matter what, the Parkway has to stay open.¹⁷ Mr. Knox claimed that he has had to keep the Parkway open during hurricanes and snowstorms, and put up traffic blocks, which is not safe.

Application for Facility Management Training Program

On two occasions, Mr. Knox applied to participate in a year long facility management training program. The first time, he was told that the Park was short of people, and everyone was needed to work. A few months later, however, two employees were sent for a 120 day detail. The second time, he was told he was not qualified, and was not permitted to apply.

¹⁷ According to Mr. Knox, there is a contingency plan calling for the use of the National Guard to keep the Parkway open if necessary.

Mr. Knox identified a memorandum from Mr. Cunningham, stating that he and Mr. Migliaccio did not support training for Mr. Knox, whose position was heavy equipment operator, and whose duties did not include any facility management (RX 2). The targeted audience of the training was new facility managers.

Mr. Knox claimed that neither Mr. Cunningham nor Mr. Migliaccio told him that the training was not related to his job. According to Mr. Knox, the Park Service has an upward mobility plan in the union guidelines,¹⁸ and under the Disabled Veterans program, he is allowed to take this training. He claimed that it would not cost the agency or Greenbelt Park any money, and that he would be gone for about a month.¹⁹ He agreed that this was a competency based training opportunity, not an intake program for managers. He also agreed that the current job is not a facilities manager, and that the training had nothing to do with his current job. Mr. Knox acknowledged that he did not have any evidence that Mr. Cunningham denied him training because of his whistleblower activity.

Mr. Knox claimed that others at the Park received training not related to their current job positions, including Kevin Barry. It was not clear from Mr. Knox's testimony what type of training or promotion Mr. Barry received that was not related to his current job position.

According to Mr. Migliaccio, Mr. Knox told him that he applied for the facility management training. Mr. Migliaccio spoke about it with Mr. Cunningham, who did not think that Mr. Knox was at a level for this type of training. Mr. Migliaccio also knew there would be a few people out on detail later in the year, and he told Mr. Knox that he needed him, and did not want to lose him without any reimbursement. He told Mr. Knox that he did not think the training was a good idea, and that Mr. Cunningham concurred. Mr. Knox told Mr. Migliaccio that he needed to rethink it, but Mr. Migliaccio told Mr. Knox that he had already talked to Mr. Cunningham about it. Mr. Knox was not happy.

Mr. Migliaccio testified that this training was not approved for anyone else, and Mr. Knox's whistleblower status did not play any part in the decision. He has approved other training requests for Mr. Knox, including trail maintenance training. If anyone else in the park brought him the same application, he would have responded the same way. He felt that Mr. Knox probably received more training than anyone else at the Park.

Mr. Migliaccio stated that it was a difficult decision to say no to Mr. Knox's request for training. Both times he denied it because the positions were not entry level positions, or intake programs. The program was written for people who were already in management, or supervisors in facility management. Mr. Knox did not fit that description.²⁰ Mr. Migliaccio testified that he

¹⁸ Mr. Knox did not identify any such "union guidelines," and Mr. Deutsch testified that he was not aware of anything specific in the current contract about upward mobility.

¹⁹ It is not clear whether Mr. Knox was confusing this training, which was for one year, with some other training opportunity.

²⁰ Mr. Migliaccio did not know of any facility management duties that Mr. Knox had; he did not know anything about Mr. Knox's previous employment other than what Mr. Knox told him. He did not recall ever approving training outside of a job description to help an employee advance in his career. He had no way of knowing that Mr. Knox was qualified for the GS 11 level, the facility manager position, and could not say if it would change his mind

did not know what Mr. Knox's motivations were, but as a judgment call, he would say Mr. Knox is not ready for facility manager training; he is not a supervisor, manager, or facility manager. Mr. Cunningham concurred with this assessment.

Mr. Cunningham testified that Mr. Knox did not ask him about the facilities management training program when he put in the paperwork. In the normal process, Mr. Cunningham was notified that Mr. Knox had applied. Mr. Cunningham looked at the prerequisites, which reflected that it was not intake job training, but was for people already involved in facility management who wanted to be chiefs of maintenance. It was not for people who were not currently working in the field. Mr. Cunningham testified that he talked with Mr. Knox several times about that, and he appeared to understand. Mr. Cunningham did not approve this training for any other non-manager, and no one else from the park attended.

According to Mr. Cunningham, Mr. Knox's status as a whistleblower played no part in the denial of training. Mr. Knox has made many requests for training, and the majority have been approved. Mr. Knox takes training online during the day, and has been to equipment operators and trail maintenance training. In fact, he has had more training than anyone. He has had several sessions of incident training with FEMA. But Mr. Knox's various training experiences were not qualifications to attend the facility management training course. He had no experience as a facilities manager, and the training would have cost the Park, because he would have to find someone to do Mr. Knox's job for a year. In addition, when he returned, he would have to be doing facility manager work, which Mr. Knox was not involved in.

Mr. Romero stated that either he or Gail, his acting deputy, was asked to recommend Mr. Knox for the facility manager training program, but he did not recall the response. He then identified Complainant's Exhibit 3, in which he denied the request for training. Mr. Romero testified that he thought that there were prerequisites for the training. His acting deputy looked into it, and based on her investigation, he concurred with her conclusion. Mr. Romero was asked to review the description of the program at Claimant's Exhibit 51, and he agreed that it did not list any prerequisites.

Mr. Romero was shown that Mr. Knox's 2001/2002 employee development plan, which shows "facility manager" as Mr. Knox's development target. But this was never conveyed to Mr. Romero, and this was the first time he was aware that Mr. Knox wanted to be a facility manager; he understood that Mr. Knox wanted to be a safety specialist. Mr. Knox is not currently a facility manager or any other type of manager; he does not supervise anyone. Facility manager training is not related to his current job.

Mr. Knox's Unsuccessful Job Applications

In Complainant's Exhibit 1, Mr. Knox listed the various jobs he has applied for over the past several years. According to Mr. Knox, he was qualified for these jobs, but was not selected for any of the 37 positions. Mr. Knox believes that Mr. Don Harris, an attorney who

on approving the training request.

represented the agency in his previous case, has been talking to a lot of the people in human resources about him.

The first position on Mr. Knox's list was for a facility manager. Mr. Knox acknowledged that he was not a facility manager, and he did not know who was selected for the position. But he had "evidence" to believe that the person who made the selection (whose identity he did not know) knew about his whistleblower activity. He felt that it went back to Mr. Don Harris, who told him that he talked to "personnel people." "In other words, with all these applications, somebody makes some phone calls." (Tr. 146). But he did not know who processed this position, or that he was not selected because he was a whistleblower, or whether he was more qualified than the person who was hired.

Mr. Knox was asked about the second position on his list, program specialist, and stated that he did not know who was selected for the position, or the identity of the human resource officer who made the selection. No one indicated that they knew he engaged in protected activity, and he had no evidence that he did not get the job because he was a whistleblower. He acknowledged that he had no experience as a program specialist.²¹ Nor does he have any experience as an equipment specialist.²²

The fourth position on Mr. Knox's list was a Maintenance Mechanic Supervisor (Roads and Trails), in Rock Creek Park. Mr. Knox did not know the identity of the selecting official, nor did he have any evidence that they knew about his protected activity. He did not know whether the reason he was not selected was because of his protected activity. He stated that he has not worked as a mechanic supervisor, but he has worked on roads and trails.

The fifth position on Mr. Knox's list was Park Ranger (Education), in Newbury Park, California. Mr. Knox testified that he has never worked as a park ranger. He did not know the identity of the selecting official, and he had no reason to believe anyone at that Park knew about his protected activity. He had no reason to believe he was not selected because of his protected activity.

The next position on Mr. Knox's list is Regional Structural Fire Management Officer in Lakewood, Colorado. Mr. Knox testified that he has experience in this position. He did not know the identity of the selecting official, or the human resources officer. He had no reason to believe that they knew about his protected activity, and did not know whether the reason for his non-selection was his protected activity.

Position number seven on Mr. Knox's list is Facility Manager at Antietam and Monocacy Battlefields. Mr. Knox did not know the identity of the selecting official or the human resources person. Nor did he have any reason to believe that they knew about his protected activity, or that he was not selected because of his whistle blower activity.

The eighth position on this list is Supervisory Facility Operations Specialist at

²¹ Respondent's Exhibit 5 reflects that the Park Service has no record of Mr. Knox applying for this job.

²² This appears to be a reference to the third job on Mr. Knox's list, Supervisor Exhibit Specialist in Frederick County, Maryland.

Gettysburg National Military Park. Mr. Knox did not know the identity of the selecting official or the human resources officer. He did not know if they were aware of his protected activity, or if he was not selected because of his protected activity.

The next position is for a Safety and Occupational Health Manager in Glen Canyon Arizona. Mr. Knox did not know the identity of the selected official or the human resources officer who processed the vacancy. He had no reason to believe that they knew about his protected activity, or that they did not select him because of his protected activity.

According to Mr. Knox, human resources in Imperial County, California, knows about his protected activity. While he did not know if everyone in the Park Service, or human resources, knew about his protected activity, he claimed that Michelle Stewart, the human resources specialist who was in court during his previous case, went back to human resources and passed on what happened in court.

With respect to the remaining positions on his list, Mr. Knox testified that the persons involved with filling these vacancies for the positions of Park Ranger, Youth Programs Coordinator, in Philadelphia, Pennsylvania (#14), Maintenance Mechanic Supervisor, National Capital Parks-East, Kenilworth Maintenance Yard (# 24), and Facility Management Specialist (# 28) “probably” knew about him. Otherwise, he testified that he had no reason to believe that any selected officials, or anyone involved in any way with the vacancies knew about his protected activity. He specifically acknowledged that, with the exception of these three positions, he did not have any reason to believe that the reason he was not selected was because of his whistleblower activity.

With respect to those three positions, Mr. Knox acknowledged that he never had a job as a Park Ranger (# 14), although he felt that he had the education and/or experience and/or qualifying time, by virtue of his work from 1999 to 2000 with the Job Corps. He did not know who the selecting official was; he had never worked at this park, and did not know the qualities the selecting officials were looking for. He did not think he got any information back on this particular application.

With respect to the Maintenance Mechanic Supervisor position (# 24), Mr. Knox testified that he had supervision experience as a noncommissioned officer leading his troops into battle. He also ran a fire crew. Mr. Knox felt that he was well-qualified for this job. The person who was hired was Frank Elum, the chief of maintenance.

The facility management specialist position was at National Capital East (# 28).

Mr. Knox claimed that he scored high on the “cert list,” and when he applied for the position of Structural Fire Prevention Specialist in the Philadelphia Support Office (# 25), “she” told him that “she knocked me off because she would take away my benefits. And she would have had to hire me.” (Tr. 163).

Mr. Knox testified that he applied for Mr. Migliaccio’s spot when Mr. King left, but Mr. Cunningham told him that he did not give him an interview because the regional director

put Mr. Migliaccio into the spot.²³

Mr. Knox stated that the only reason he is claiming that he is not getting these positions is because “Don Harris started talking to people.” (Tr. 155-6). In addition, Ms. Stewart was at the national capital region, and any job he applied for would have to go through them. According to Mr. Knox, “HR talks to HR,” and whatever job he applied for, it went across HR’s desk. (Tr. 182). He stated that “people” were talking about him throughout the agency, and to other park service employees.

Mr. Knox has concluded that there are too many rules for him not to be successful, and even the Veterans Administration is wondering what is happening to him. It does not make sense to Mr. Knox, because if the rules are followed, hiring him is the only option. He pointed to one of the positions he interviewed for, which was cancelled. He noted that it costs a lot of money to set up a job and advertise it. But instead of hiring the person with the high score (presumably Mr. Knox), the position was cancelled.²⁴

Mr. Migliaccio testified that he had no knowledge of any of the positions for which Mr. Knox applied; the only hiring decisions he is involved in are the decisions on hiring for his Park. He did receive a telephone call from a supervisor in another park, who wanted to know if Mr. Knox worked for him, and who asked if Mr. Knox had any experience with supervision. Mr. Migliaccio told him that Mr. Knox had none with him.

Mr. Deutsch testified that when he became the Chief of human resources, no one ever told him about a whistleblower named William Knox. He heard Mr. Knox’s name the previous summer, after receiving a request to maintain the file on a position Mr. Knox applied for in connection with litigation. He never heard of Mr. Knox before that, and does not really know anything about him.

Mr. Deutsch has never seen or heard of any instructions to a human resources specialist not to select Mr. Knox for any positions. He stated that hiring at the National Park Service is very decentralized, with each office responsible for hiring its own employees, other than the seasonal employees, who are centrally hired. The human resources office for a particular park is completely involved in the hiring process, and the regional officer is not aware of a position unless an issue comes up.

Central to Mr. Knox’s claim is his allegation that Mr. Harris and Ms. Stewart are behind the scenes, pulling the strings and preventing him from receiving any of the number of positions he has applied for across the country. Mr. Harris represented the Solicitor’s Office of the Department of the Interior in connection with Mr. Knox’s environmental whistleblower litigation, and Ms. Stewart, a human resources officer, assisted Mr. Harris in connection with the litigation.²⁵ Mr. Knox believes that he was not selected for any of the positions on his list because he was a whistleblower.

²³ This position is not listed on Complainant’s Exhibit 1.

²⁴ Apparently Mr. Knox has concluded that the position was cancelled to avoid hiring him.

²⁵ Mr. Knox thinks that Mr. Harris moved out west with the Solicitor’s office.

According to Mr. Knox, the Department of Interior is a small organization, where everybody knows everybody. When job leads come out, the “supervisor leads the pack to personnel,” (Tr. 176), and nothing can be done without their approval. At his previous trial, Mr. Stewart had all of the personnel people with her, so “H-R wise,” he was sunk, because they all knew about his whistleblowing (Tr. 176). He felt that this was the case not only at the Park level, but at the Director of the Park Service Level, and the Main Interior level, and even higher, where people were against him and were “doing cover-ups.” (Tr. 178). Mr. Knox believes that he has been discriminated against in his job applications, because it comes back to management and human resources people.

Mr. Cunningham testified that Ms. Stewart was involved with Mr. Knox’s lawsuit, gathering information, and working with the attorneys at the Interior Department. He described it as a “love-hate” relationship, with Mr. Knox talking about Ms. Stewart all the time, and Ms. Stewart talking about Mr. Knox all of the time. The nature of Ms. Stewart’s talk was about Mr. Knox’s court case: Ms. Knox would call Mr. Cunningham to let him know they needed to attend the trial in Baltimore, and to get information and documents about Mr. Knox. It was all in connection with the litigation. Mr. Cunningham also thought that he talked with Mr. Harris in connection with the litigation. According to Mr. Cunningham, two weeks earlier, Mr. Knox told him that although Ms. Stewart had left the Park Service, he still thought she was pulling some kind of string to get him denied jobs.

Mr. Deutsch testified that he has heard of Ms. Stewart, who was a former GS 12 human resources specialist in the national capital regional office. She left more than a year ago. He thought that she handled employee relations; she was not in a high level position. There are 240 human resources specialists in the National Parks Service.

Mr. Knox’s History of Safety Incidents

Mr. Romero believes that Mr. Knox is a high risk for injury to himself and others; he has lost time due to injury every year. His injury rate is high compared to other employees. He discussed a number of safety incidents involving Mr. Knox since 2004. They included an incident where Mr. Knox was driving a sweeper, and sideswiped a private vehicle on the Baltimore Washington Parkway. Mr. Knox claimed the accident was due to faulty equipment.

Mr. Knox had an accident with an elevator recently, where he brought the machine down and injured another employee, who had not made it to the safety perimeter.

According to Mr. Romero, Mr. Migliaccio advised him that other employees stated that Mr. Knox did not like other vehicles to be too close to him, and he warned them by shifting to the side, which was not a safe practice.

Mr. Migliaccio testified that Mr. Knox had been involved in a couple of accidents since Mr. Migliaccio came to the Park. The most recent one was the previous fall, when Mr. Knox was operating a small compact excavator, and put the bucket down on a piece of composite lumber, made of plastic and wood. It bounced, and hit another employee in the

knee. According to Mr. Migliaccio, the employee was trying to bend or break the piece of lumber, and Mr. Migliaccio told him to come over outside the safety perimeter, and they would hit it with the bucket. Mr. Knox did not have the go-ahead to drop the bucket, but before the employee had the chance to walk two feet away, the bucket came down. Afterward, Mr. Knox told him that he never thought the piece of lumber would bounce as much as it did.

Mr. Knox also described this accident, stating that the cleanup job was basically finished, except for a piece of board that was about fourteen feet long. Shawn, another employee, was trying to bend it, but Mr. Migliaccio, who was over by the truck, stopped him, and told Shawn to bring the board over to him. Shawn put the board down, and began walking away. When Shawn got about five feet away, Mr. Knox heard Mr. Migliaccio say to cut it. He went down with the backhoe, and hit the board, which shot out, and “barely” hit Shawn on the knee. He was off work for a couple of days.

Mr. Knox also told Mr. Migliaccio the previous Sunday that when he was cleaning a parking lot, he had an accident at the handicap ramp.

Although he did not provide the date, Mr. Knox testified about an incident where Mr. Migliaccio asked him to take paint off a spreader. When Mr. Knox told him he was not a maintenance worker, Mr. Migliaccio told him to do it anyway. One of the wires came off and hit Mr. Knox in his knee, which subsequently became infected, and he underwent surgery.²⁶

Mr. Knox stated that he needed stitches when he slid on hydraulic fluid. He has had accidents with the rain, and slipping getting in and out of a vehicle. Mr. Knox stated that he blocked off a bridge with a dump truck to save people in a blizzard. He thought that three of his accidents went before the accident review board.

According to Mr. Knox, he had an accident while transporting an old sweeper, when a valve malfunctioned, and caused the sweeper to swing out. People were going around him to get on the Parkway, and he tried to move it to the curb, but when the sweeper went out, the broom sliced the side of a car.

Mr. Knox also testified about an accident while operating a crash truck, which is designed to stop traffic and protect workers in a work zone. If a car hits it, it crunches, and no one is too badly hurt. According to Mr. Knox, a driver was speeding, and it looked as if he was going to go around the truck to the right, where he would have hit the workers. Mr. Knox pulled the truck in sideways, and the driver just barely missed him. Otherwise, he would have killed the workers.

Mr. Knox's Requests for Training

Mr. Knox claimed that he was denied training on a computer course that he already did through another website. He was also denied NFTC training, because it was not in his

²⁶ This appears to be the injury which required Mr. Knox to be off work for approximately a year.

career field.

Mr. Knox testified that he has taken courses online through FEMA, and has a “grade card” for FEMA emergencies; he is a squad loss team leader, and heavy equipment boss.

Mr. Knox submitted an e-mail from Mr. Cunningham dated October 27, 2009, denying his request for online training in the DOI system for MMS Self-Certification. The request was denied because Mr. Knox was not in a current job that required him to have this type of training. (CX 62). Mr. Cunningham testified that NPS was also giving the same training, and Mr. Cunningham was not aware that by the time he denied the request, Mr. Knox had already taken the training, which he paid for.

Mr. Cunningham prepared a memo stating that incident commander training was not in Mr. Knox’s job description, but Mr. Knox had already taken that training on his own.

Mr. Cunningham stated that Mr. Knox has taken a great deal of training pertaining to his position as an equipment operator. He has been provided time during the work day to take training online; he has been sent to equipment operators training and trail maintenance training. He has also taken college courses on his own, which he discussed with Mr. Cunningham. He stated that Mr. Knox had more training than anyone at Greenbelt Park.

Mr. Cunningham recalled that Mr. Knox applied for and took several FEMA incident training courses, which are free online with the Park Service. According to Mr. Cunningham, Mr. Knox applied for ICS (Incident Commander) training with another service, which would have cost money, but it was also offered for free through another system. He denied Mr. Knox’s request (CX 62). Mr. Cunningham thought was going to take the free training; in any event, Mr. Knox has taken the ICS training, although Mr. Cunningham was not aware that by the time he denied Mr. Knox’s request, he had already taken the training, which he paid for.

At Mr. Knox’s request, he was also sent to trail maintenance class, which is not in his position description.

Miscellaneous Complaints

Mr. Knox complained that he had never been provided with an Individual Development Plan (IDP). However, he later acknowledged that his Performance Plan for the rating period October 1, 2001 to September 30, 2002 includes an IDP, which was signed by Mr. Knox and Mr. King (CX 69). This IDP identifies Mr. Knox’s Career Path Target Job Title as Engineering Equipment Supervisor, and his Knowledge/Skills Path/Development Target as Facility Manager. He indicated that he had forgotten about this IDP; his new supervisor (Mr. Migliaccio) had not done one, or helped him reach that goal.

Mr. Migliaccio testified that when he does performance appraisals, he asks the employee where they want to go with his or her career, and tells them that if they want an IDP, they should let him know. Mr. Knox never indicated to him until the training issue

came up that he wanted an IDP; he would have been glad to do one for him. Mr. Migliaccio testified that he had been remiss with everyone up to that point, and when Mr. Knox mentioned it, Mr. Migliaccio thought it would be a good idea to start doing the IDPs.²⁷ This was the first year in a long, long time that he has actually started asking employees about their goals.²⁸

Mr. Knox claimed that after he went to Greenbelt Park, Mr. Davis told him that he would never make management again, and that he could complain, but it would not do any good. He also claimed that his co-workers told him that he could not be trusted because he was a whistleblower, and the first few years he worked at Greenbelt, no one would work with him. He claimed that people call him a troublemaker, laugh at him, and tell him to just quit.

DISCUSSION

Mr. Knox alleges that he was denied the opportunity to participate in the facilities management training course to which he applied in March 2009, in retaliation for his past whistleblower activity. He also alleges that in retaliation for his past whistleblower activity, he has been subjected to a hostile work environment in his position at Greenbelt Park. With the exception of the denial of Mr. Knox's most recent training request in March 2009, all of the specific incidents identified by Mr. Knox took place outside the thirty day period for reporting violations to the Department of Labor, and thus if Mr. Knox cannot establish that he was the victim of a hostile work environment, any claim based on those alleged adverse actions is time barred.

To establish a prima facie case of retaliation under the whistleblower provisions of the Act, a complainant must show that: (1) the complainant was a covered employee; (2) the complainant was engaged in protected activity; (3) the employer was aware of that protected activity; and (4) the employer took some adverse action against the complainant because of such activity. The complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action.

In this case, there is no dispute that Mr. Knox was a covered employee, and that he engaged in protected activity, by virtue of his lengthy whistleblower litigation against the Respondent. It is also clear that the Respondent was aware of Mr. Knox's protected activity. The issue in this claim is whether Mr. Knox has established that the Respondent took adverse action against him because of that protected activity. I find that Mr. Knox has failed to meet his burden of proof to show by a preponderance of the evidence that the Respondent denied his request for the facilities management training in retaliation for his protected activity, or that he was subjected to a hostile work environment in retaliation for litigating his whistleblower claim.

Hostile Work Environment

²⁷ The IDP in Mr. Knox's file was prepared before Mr. Migliaccio came to Greenbelt Park.

²⁸ Mr. Romero testified that it is the responsibility of the employee to write his IDP, which can be researched and done online. "Your career goals are your career goals, not my career goals." (Tr. 235). Mr. Deutsch stated that an IDP is a plan between the employee and supervisor on training and aspirations for the year; it is not a guarantee an employee will be able to attend a particular course. (Tr. 257).

The concept of a hostile work environment, which was first developed in cases alleging race-based and sex-based employment discrimination, applies to allegations of whistleblower discrimination. *Varnadore v. Oak Ridge Nat'l Lab.* (*Varnadore II*), Nos. 1992-CAA-002, et al., slip op. at 71 (ARB June 14, 1996), *aff'd*, *Varnadore v. Sec'y of Labor*, 141 F.3d at 625 (6th Cir. 1998). Such claims involve conditions or repeated conduct that occurs "over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. at 101 (2002). A hostile work environment claim requires a complainant to prove that the workplace is "permeated with discriminatory intimidation, ridicule, and insult, which is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Morgan*, 536 U.S. at 116 (internal quotations omitted). To succeed on a hostile work environment claim, a complainant must prove by a preponderance of the evidence that 1) he engaged in protected activity, 2) he suffered intentional harassment related to that activity, 3) the harassment was sufficiently severe or pervasive so as to alter the conditions of his employment and to create an abusive working environment, and 4) the harassment would have detrimentally affected a reasonable person and detrimentally affected him. See *Lewis v. United States Environmental Protection Agency*, ARB No. 04-117, ALJ Nos. 2003-CAA-5 and 6, amended slip op. at 5 (ARB June 30, 2008); *Erickson v. United States Environmental Protection Agency*, ARB Nos. 03-002 -004, 03-064; ALJ Nos. 1999-CAA-002, 2001-CAA-008, -013, 2002-CAA-003, - 018, slip op. at 19 (ARB May 31, 2006).

To succeed on a hostile work environment claim, the complainant must prove by a preponderance of the evidence that the objectionable conduct is so severe or pervasive that it altered the conditions of employment and created an abusive working environment. *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8 (ARB Jan. 31, 2006). Objective hostility is determined by examining the totality of the circumstances, and whether a reasonable person with the same characteristics as the complainant would perceive the workplace as hostile. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

Whether the work environment is hostile is determined by looking at the totality of the circumstances: the frequency of the harassing conduct, its severity, whether the conduct was genuinely humiliating or merely an offensive utterance, and whether harassing conduct unreasonably interfered with an employee's work performance. See, *Harris v. Forklift Sys., Inc.*, *supra*, 510 U.S. at 23 (involving a Title VII claim where a manager repeatedly denigrated a female employee and made inappropriate sexual comments), quoted in *Morgan* at 116. Careful analysis is required "to ensure that Title VII [or any employment discrimination statute] does not become a 'general civility code.'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, (1998). Proper application of the standard distinguishes complaints based on invidious discrimination from those rooted in the ordinary trials and tribulations of the workplace. *Id.* Circumstances germane to gauging whether a work environment is hostile include "the frequency of the discriminatory conduct; its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance." *Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ Nos. 1997 ERA 14 et al. (ARB Feb. 29, 2000).

As noted above, Mr. Knox clearly engaged in protected activity when he prosecuted his whistleblower claim through successive levels of appeal, despite the unsuccessful outcome. However, he has not established that he suffered intentional harassment of any type, related to that activity or otherwise. Nor has he shown that, even if the actions of which he complains were found to be related to his prosecution of his lawsuit, they constituted harassment that was sufficiently severe or pervasive so as to alter the conditions of his employment and to create an abusive working environment; or that these actions amounted to harassment that would have detrimentally affected a reasonable person and detrimentally affected him. *See Lewis supra*, amended slip op. at 5.

I find that Mr. Knox has not established that he was the subject of any intentional harassment over the seven to eight years that he has worked at Greenbelt Park. More importantly, Mr. Knox has offered not a shred of evidence to support his speculation that the conduct that is the subject of his complaints was motivated by his status as a whistleblower. Indeed, the evidence strongly suggests that Mr. Knox was treated with kid gloves by his fellow employees, who feared being drawn into a lawsuit by Mr. Knox if they crossed him.

Nor do the incidents alleged by Mr. Knox demonstrate a regular activity that pervaded the workplace, and unreasonably interfered with his work performance. I find that Mr. Knox has not presented evidence that he was harassed, threatened, humiliated, or treated differently than other employees at Greenbelt for any reason, much less his status as a whistleblower, and he was not subjected to an abusive working environment that unreasonably interfered with his work performance.

To be sure, Mr. Knox's fellow employees were well aware of the fact that he was a "whistleblower." Indeed, it appears that many of them heard this from Mr. Knox himself. In this regard, Mr. Knox is upset at what he considers a violation of the confidentiality clause in his settlement agreement in connection with his MSPB claims. But there is no evidence that the terms of Mr. Knox's settlement agreement were broadcast to the employees at Greenbelt Park in an attempt to poison the atmosphere for Mr. Knox.²⁹ Nor did this confidentiality provision apply to Mr. Knox's ongoing litigation against the Park Service under the Clean Air Act.

I have reviewed the incidents complained of by Mr. Knox, and I find that he has not established that any of the actions constituted harassment, much less that they were undertaken in retaliation for his status as a whistleblower.

"Gag Order"

Mr. Knox points to the December 20, 2000 and January 25, 2001 memoranda by Mr. Young, documenting a meeting with Mr. Knox to discuss his safety concerns, and Mr. Young's findings, claiming that this was an attempt to prevent him from making disclosures about safety concerns to higher authorities at the Park Service, or outside the agency. Mr. Knox pointed to testimony by Mr. Young and Mr. Shifflett at his hearing before Judge DiNardi in support of his claim that

²⁹ The only Park Service employee to testify on this issue was Mr. Knox's co-worker Ralph Hill, who stated that he knew of no warnings to keep away from Mr. Knox. Tr. 185.

“Clearly these orders were directed only at Knox because the officials who issued it were aware that Knox was a whistleblower and they wanted to quash his ability to raise safety concerns in his new position and prevent him from making any further protected disclosures to higher or outside authorities.”

Complainant’s Brief at 22. I note that neither Mr. Young nor Mr. Shifflett testified at the hearing in this claim. Not only is their previous testimony hearsay, it was not subject to cross examination at the hearing before me. For these reasons, I find that this testimony, from a proceeding that took place almost ten years ago, is not particularly trustworthy.³⁰

Nevertheless, these excerpts do not support Mr. Knox’s claim. I note that, in the first memorandum, Mr. Young documented Mr. Knox’s concerns in detail, and instructed him that, until he was provided with a written response, he was not to raise these issues with other employees or supervisors, or persons outside the Park Service. In the written response, Mr. Young again addressed Mr. Knox’s concerns in detail, and described his findings on investigation. He directed that in the future, Mr. Knox should address his safety concerns to his supervisor, Mr. King, or Mr. Perry the Maintenance Mechanic Supervisor, and if he was not satisfied, he should contact their supervisors or the Safety Officer, Mr. Johnson. This memorandum does not prohibit Mr. Knox from raising safety concerns, or from going outside the Park Service with his concerns; it directs Mr. Knox to follow the chain of command for reporting such concerns.

In this regard, the Board has stated that “an employer may not, with impunity, discipline an employee for failing to follow the chain-of-command, failing to conform to established channels or circumventing a superior.” *Talbert v. Washington Pub. Power Supply Sys.*, ARB No. 96-023, ALJ No. 1993-ERA-35 (ARB Set. 27, 1996). But the Board has also found that this should not be understood to mean that employers have no right to require employees to tell them immediately about hazardous conditions. An employer may not rely on its chain of command policy as a pretext for disciplining an employee who reports safety concerns outside the chain of command. *Hall v. United States Army Dugway Proving Ground*, ARB Nos. 02-108 and 03-313, ALJ No. 1997-SDW-5 (ARB Dec. 30, 2004).

While Mr. Knox interpreted the January 25, 2001 memorandum as prohibiting him from complaining about safety concerns, or going to OSHA, I find that this interpretation is not objectively reasonable.³¹ Nor is there any evidence in the record that Mr. Knox was subsequently disciplined in any manner for reporting safety concerns.

Removal from Department of Interior Building

According to Mr. Knox, sometime in 2001 or 2002, in retaliation for his whistleblower activities, he was ejected from the main Department of Interior Building. Mr. Knox described an

³⁰ Nor am I bound by Judge DiNardi’s assessment of these memoranda. See Complainant’s Brief at 23.

³¹ Mr. Knox claimed that Mr. Young told him after the meeting that he could not complain about any issues not listed in the document, and he did not want Mr. Knox to go to OSHA. There is nothing in the record to support this claim.

incident where he was escorted out of the Director's office by an armed security guard after he tried to make an appointment to meet with the Director. However, I find that the more credible evidence regarding this incident comes from Mr. Cunningham, who testified that Mr. Knox visited the main Department of Interior Building twice. On his first visit, Mr. Knox created a disturbance, and was barred from entering the building unescorted. Mr. Knox was apparently unaware of this directive, and when he visited the building the second time, unescorted, and without an appointment to see the Director, he was removed. According to Mr. Cunningham, this directive has been modified to ban Mr. Knox from the floor where the Director's office is located, and indeed, although he claimed that the restriction was still in force, Mr. Knox acknowledged that he has been in the building on several occasions since.

The only documentary evidence on this incident appears at Complainant's Exhibit 70, the November 6, 2001 e-mail from Deb Smith to various Park Service Personnel, instructing that if Mr. Knox showed up at the office, he was not to be given an appointment to see the Director, and if he got upset, security should be called.

But there is not any evidence whatsoever to support a conclusion that a directive banning Mr. Knox from visiting the main Department of Interior building unescorted, if indeed such a directive existed, rises to the level of harassment, much less that it was undertaken in retaliation for his whistleblower status. While Mr. Knox speculated that he was removed from the building because he is a whistleblower, Mr. Cunningham testified that the reason for the directive set out in CX 70 was Mr. Knox's disruptive behavior on a previous attempt to see the Director.³²

Attempt to Place Mr. Knox on a PIP

It is not at all clear how Mr. Knox learned that, shortly after he began working at Greenbelt Park, his placement on a Performance Improvement Plan (PIP) was contemplated. Mr. Knox claimed that Ms. Stewart tried to get Mr. Cunningham, who was not Mr. Knox's supervisor at the time, but was working at headquarters, to place him on a PIP, but Mr. Cunningham was not able to do so, because there was no backup paperwork. Ms. Stewart did not testify at the hearing, and Mr. Knox did not indicate how he learned of her alleged attempt.

Mr. Cunningham, who did testify, stated that to his knowledge, Mr. Knox's supervisor at the time (Mr. King) considered putting him on a PIP because of his poor performance and accidents with the equipment; instead, he was sent for further training. He specifically stated that Ms. Stewart had nothing to do with it.³³

There is nothing in the record to support Mr. Knox's speculation that Ms. Stewart had a hand in any attempt to place Mr. Knox on a PIP, or, if a PIP was considered, it was motivated in any part by Mr. Knox's status as a whistleblower, as opposed to his poor work performance and accidents with equipment. In any event, Mr. Knox was not placed on a PIP; he was sent for additional training.

³² Again, I am not bound by Judge DiNardi's conclusions regarding this incident.

³³ Contrary to Mr. Knox's claim, Mr. Cunningham's testimony on the non-involvement of Ms. Stewart in this matter was not inconsistent. See Complainant's Brief at 27.

Statements by Supervisor and Co-Workers

Mr. Knox alleges that Mr. Gentry Davis told him that he would never make management again, and he could complain, but it would not do any good. I find this claim to be vague, and lacking in any supporting detail, such as time or context, that would give it any credibility. Nor was it corroborated by any other evidence.

Similarly, Mr. Knox's claim that his coworkers, whom he did not specifically identify, told him that he could not be trusted because he was a whistleblower, and that unidentified persons have called him a troublemaker, laughed at him, and told him to quit, are vague and unsupported by any corroborating evidence, as is his claim that "no one" would work with him for the first few years at Greenbelt.

Requests for Automatic Gate Opener

According to Mr. Knox, the denials of his requests for an automatic gate opener are evidence that he was the subject of a hostile work environment.³⁴ Mr. Knox was vague as to when he made these requests, stating that he asked for one each year. Mr. Knox claims that he has difficulty getting off and on the equipment to operate the keypad that opens the gate.

As Mr. Migliaccio testified, only the supervisor and the auto mechanic, who move equipment in and out of the yard all day, have automatic gate openers; this was the policy when Mr. Migliaccio became the supervisor, and he kept it in force. If Mr. Migliaccio gave an automatic opener to Mr. Knox, he would have to give one to everyone. While Mr. Cunningham and Mr. Migliaccio testified that Mr. Knox never told them that he had difficulty climbing up and down out of the truck, nevertheless they would not have given him an opener even if he told them that.³⁵ In this regard, Mr. Knox was treated the same as the other Park employees.

Nor were Mr. Migliaccio or Mr. Cunningham aware that Mr. Knox has any physical difficulties in performing his work duties. Indeed, when Mr. Knox returned from a year on leave after injuring his knees, his physician certified that he was capable of performing his full duties.³⁶ Other than his testimony that at some point he requested some "stuff" through a Department of Defense program, Mr. Knox has not identified any other accommodations he sought. More importantly, he has not established that the denial of his request for a gate opener was based, even in part, on a desire to punish him in return for his whistleblower activities. Mr. Knox's claim that he was denied accommodations for his physical problems is vague; other than the gate opener, he has not identified any accommodations that he was requested or denied. As far as his supervisors are aware, he is capable of performing all aspects of his job.³⁷

Veterans Preference Program

³⁴ Indeed, Mr. Knox stated that "The pettiness and inhumanity of this refusal is another reflection of the hostile work environment in which Knox must function every day." Complainant's Brief at 41.

³⁵ Nor could Mr. Migliaccio allow Mr. Knox to purchase one of the gate openers, or use an outside opener.

³⁶ Mr. Knox apparently believes that his physician acted in collusion with his employer, and certified him as able to return to full duty because he knew that there was no light duty available.

³⁷ Mr. Knox acknowledged that he has not informed his supervisors of any disabilities.

Mr. Knox's claims about his entitlement to consideration under the Park Service Veterans Benefits Affirmative Action Program are equally amorphous. There is some evidence in the record that at some point, Mr. Knox talked to Mr. Cunningham about this program, and was referred by Mr. Cunningham to another department; Mr. Cunningham made a telephone call to find out who Mr. Knox should speak to, but never heard anything more about it. Mr. Knox's undated letter at Complainant's Exhibit 67 reflects his request to be considered for such a program. Mr. Young's January 25, 2001 memorandum reflects that Mr. Mel Reid, the Regional DVAAP Coordinator in the Washington Office, had forwarded information on the Program to Ms. Katrina Roberts, the Personnel Officer at National Capital Parks, who would be discussing with Mr. Knox how the program applied to disabled veterans. The record in this claim contains no information on how this issue was resolved. More importantly, it is entirely unclear just what Mr. Knox thought his status as a disabled veteran entitled him to, or what he feels was unfairly denied to him. Mr. Deutsch testified that the Park Service has a program to hire disabled veterans, but it is designed to hire such veterans from the outside. It has no application to promotions within the Park Service.

Mr. Knox testified about a meeting with Mr. Cunningham, Ms. Stewart, the Regional Director of the Park Service, and an EEOC representative, in which he asked for such accommodations. According to Mr. Knox, these persons yelled at him, told him they could not believe he was asking for accommodations, and threatened to give him a lower grade. It is not at all clear from Mr. Knox when this alleged meeting took place. Given the context, it appears that it most likely was in connection with negotiations over the settlement of Mr. Knox's MSPB suits, and the effort to find another position for Mr. Knox in the Park Service.

Mr. Knox argues that he was not given "priority consideration" in his job applications, in retaliation for his whistleblower activity. He has offered no details to support this speculation, and the record includes not a shred of evidence that but for a denial of such "priority consideration," he would have gotten any of these positions.

Assignment of Duties to Others

Over the course of the hearing, Mr. Knox's initial claim that his duties had been taken away from him changed to a claim that he is forced to operate the older heavy equipment, while Mr. Sears, a maintenance worker who is junior in grade and whose job description does not include operating heavy equipment, gets to operate the new equipment. Additionally, Mr. Knox claims that he is assigned menial chores that should be done by laborers, such as painting snow stakes. Mr. Sears agreed that he operates heavy equipment, which is not part of his job description; he has the experience and training to do so.

Mr. Knox's claim that Mr. Sears testified that Mr. Knox is only doing the heavy equipment operation duties as a small percentage of his time is misleading. (Complainant's Brief at 30). Mr. Sears testified that Mr. Knox told him that he operated heavy equipment before Mr. Sears came, and that he was still performing those duties. Although Mr. Sears stated that it was probably a smaller than large percentage of time that Mr. Knox spent operating heavy equipment, he also stated that he did not know what Mr. Knox was doing now.

Mr. Migliaccio, Mr. Knox's direct supervisor, testified that none of Mr. Knox's duties have been taken away, and that he assigns Mr. Knox and Mr. Sears to operate heavy equipment as the need arises. He indicated that just the previous weekend Mr. Knox was operating heavy equipment. Mr. Knox is apparently upset that he has to do what he considers to be menial labor, such as painting stakes, but as Mr. Migliaccio testified, there are times when there is no need for heavy equipment, and at those times, he assigns Mr. Knox to other chores, including painting stakes, a task that he himself has done many times. I find that Mr. Knox has not established that his job duties have been taken away, as retaliation or otherwise.

Lack of Promotions or Bonuses

Mr. Knox alleges that he has suffered retaliation in the form of a lack of promotion. However, Mr. Knox is at the top of his Wage Grade, and has received regular step increases to this point. Mr. Knox offered no evidence otherwise. Although Mr. Knox argues in his brief that there are higher positions on the GS and WS scale at Greenbelt to which he could move, he has presented no evidence that he sought any such positions.

Mr. Knox claims that although other employees have been assigned to details that lead to more advanced positions, he has not been approved for any such details.³⁸ The only specific detail that Mr. Knox referred to was the assignment of Eric Harris and Kevin Barry to a summer detail at Central Park. Mr. Knox apparently believes that he should have been picked for this detail, based on his experience at Harpers Ferry.

However, Mr. Cunningham testified that the supervising office decided to give Mr. Harris and Mr. Barry this detail because of their significant work with youth programs. To his knowledge, Mr. Knox had not previously worked on youth programs. Mr. Knox told him that he was in instructor when he came from the Harpers Ferry Job Corps, and he worked one summer with a student conservation course.

Not only is there any evidence to indicate that Mr. Knox requested consideration for this detail, there is no evidence to indicate that he was unjustly passed over in favor of Mr. Harris and Mr. Barry.

Mr. Knox points to Mr. Romero's testimony, that he could only recommend Mr. Knox for a detail for advancement purposes if he had an Individual Development Plan (IDP); Mr. Knox has not had an IDP since his 2001-2002 evaluation. Of course, this would only have any significance if Mr. Knox identified any specific details that he asked for, and that Mr. Romero denied because he did not have an IDP. Nor is it significant that Mr. Migliaccio has been "remiss" about suggesting IDP's to his employees for several years.³⁹

³⁸ Mr. Knox claimed that he asked for a detail a few months earlier; he did not indicate what this detail was, and Mr. Migliaccio could not recall it either.

³⁹ Mr. Migliaccio testified that when Mr. Knox asked about an IDP, he realized that he should make them part of his employee evaluation, and has since initiated that process for everyone.

Mr. Knox also alleges that he has suffered retaliation because he has not received any performance bonuses during his time at Greenbelt, while other employees have. As Mr. Deutsch testified, an employee is not eligible for a performance bonus unless he or she receives a performance rating of four or five, but not three, which is “fully successful.” Mr. Knox, whose most recent performance rating was “fully successful, is not eligible for a performance bonus. Nor has Mr. Knox presented any evidence to support a conclusion that his “fully successful” rating was not appropriate. Indeed, as Mr. Migliaccio testified, Mr. Knox’s frequent work accidents were a factor in that rating.⁴⁰ According to Mr. Migliaccio, while it was not appropriate to lessen a person’s evaluation for involvement in accidents, at the same time, he could not justify a superior performance rating. Nor is there any evidence that Mr. Knox performed any individual action that would justify a performance bonus.

Mr. Knox claims that he was unfairly treated when he was not selected to fill the position vacated by his previous supervisor, Tony King. Mr. Cunningham was in charge of hiring for this position, and he testified that he did not recall seeing Mr. Knox’s name on the certificate of qualified applicants. Mr. Migliaccio was the number one applicant. Mr. Knox has presented no evidence to establish that he qualified for this position, or that he was as qualified as Mr. Migliaccio, but was passed over because of his whistleblower activities.

Mr. Knox also complained that he was not selected as a safety officer, and that Mr. Cunningham told him he could not have the spot, which he gave to Eric Harris. However, Mr. Migliaccio testified that Mr. Knox did not want this position after Mr. Barry left. According to Mr. Migliaccio, about a year earlier, Mr. Barry decided he did not want the job any more, and Mr. Migliaccio opened it up for anyone else who was interested. Mr. Knox was present when Mr. Barry made his announcement, and stated that he was not interested. At the time, Mr. Harris, who was a maintenance worker, was already a member of the safety unit assisting Mr. Barry with the safety duties. When Mr. Barry left, Mr. Migliaccio moved Mr. Harris into the safety officer spot; he did not think to ask anyone else if they wanted the position.

When Mr. Knox asked Mr. Migliaccio why Mr. Harris was assigned as the safety officer, Mr. Migliaccio told him that Mr. Harris was already doing those duties, but that they could always use two safety officers and that Mr. Knox could work with Mr. Harris. But nothing happened, and Mr. Knox never asked to be in the second position. Mr. Migliaccio would not remove Mr. Harris, who was already in the position, and put Mr. Knox in.⁴¹

⁴⁰ Curiously, Mr. Knox argues that, because he has not been disciplined other than as reflected in his performance rating for his work accidents, Mr. Romero’s “shocking” claim that Mr. Knox is a high risk employee for potential fatalities is not credible. Complainant’s Brief at 32. Mr. Romero testified that Mr. Knox has lost time every year due to injury, and compared with the other 190 Park Service employees, he is a high risk for injury to himself and other employees, and potentially, fatalities. Indeed, the number of safety incidents in which Mr. Knox was involved was one reason he was sent to the training at Wolf Trap. There is no evidence in the record that Mr. Knox has ever been disciplined in connection with his work related accidents, much less that the Respondent has “trumped up” claims that Mr. Knox posed a safety hazard to justify its failure to give him appropriate duties, awards, and opportunities for advancement. Nor does Mr. Romero’s assessment of Mr. Knox as a safety risk, in light of his high incidence of work related injuries, reflect “retaliatory animus.”

⁴¹ Although Mr. Knox claimed that Mr. Cunningham decreed that there could not be two safety officers, and only Mr. Harris could have the position, Mr. Migliaccio stated that Mr. Cunningham never told him that, and in fact, Mr. Knox could still be a safety officer if he wanted to.

Mr. Knox also claims that everyone but him gets to supervise when Mr. Migliaccio is gone, and that a lower grade employee is assigned to supervise him. Mr. Migliaccio testified that if he is out of the Park, he assigns a work leader to supervise in his place; there are already work leaders who know the Park operation very well. There is no evidence in the record that “everyone else” gets to supervise, or that he has unfairly been passed over to take over for Mr. Migliaccio in his absence, much less that any such action was the result of any retaliatory animus.

Denial of Training Opportunities

Mr. Knox alleges generally that he has been thwarted in his attempts at advancement as retaliation for his whistleblower activities. He argues that so intent was the Respondent on denying him training, it denied his request to take a free online course that he had already taken. Complainant’s Brief at 35. However, this is a mischaracterization of the record.

According to Mr. Cunningham, Mr. Knox has taken more training than anyone else at Greenbelt Park, in the form of training online during the work day, and equipment operators and trail maintenance training, which Mr. Knox requested, and is not in his duty description. Mr. Knox has acknowledged that he has taken courses online through FEMA.

It appears that the “free online course” that Mr. Knox referred to was for self-certification as an incident commander. Mr. Knox applied to take this course through a service that charged a fee; Mr. Cunningham denied that request, because this training was not required for Mr. Knox’s job duties. (CX 62). Mr. Cunningham testified that this training was offered for free online through another service, and he thought that Mr. Knox planned to take the free online version; he was not aware at the time he denied the request that Mr. Knox had in fact already completed the free version of the course.

In short, Mr. Knox’s claim that he has been denied opportunities for training at Greenbelt Park are not substantiated by, and are in fact contradicted by, the evidence of record.⁴²

Incident at Training Session

As evidence of his claim that he has been the subject of a hostile work environment, Mr. Knox points to the incident that occurred at a facilitator safety training program in 2009, at which he alleges that Mr. Romero yelled at him in front of the rest of the class, and dressed him down afterward, to the point where he was unable to concentrate on the remainder of the training. Mr. Knox and Mr. Romero both agree that Mr. Knox claimed that employees at Greenbelt Park were not allowed to refuse dangerous assignments. But each characterized the incident differently.

Mr. Knox claims that after this incident, he lost several blocks of instruction, and was so distraught that he could not concentrate for the remainder of the course. Setting aside the fact

⁴² Moreover, Mr. Knox acknowledged that he does not have any evidence that Mr. Cunningham denied him training because of his whistleblower activity. (Tr. 145).

that I find Mr. Knox's account to be somewhat exaggerated, nevertheless Mr. Knox has not established that Mr. Romero's outburst, even if it can be so characterized, was an intentional act of harassment motivated by Mr. Knox's whistleblower status. In the presence of other Park Service employees, Mr. Knox claimed that he was forced to work in dangerous situations, and could not say no to dangerous assignments. Mr. Romero, who was understandably upset by this claim, challenged Mr. Knox, and questioned him further about it during a break in the instruction. He also followed up with Mr. Knox's supervisors, who told him in no uncertain terms that Mr. Knox's claim was not true.

Indeed, Mr. Knox has offered nothing to suggest that his claim was based in fact. He has not pointed to any incident where he or any other employee was forced to work under dangerous conditions, or were unable to refuse a dangerous assignment. The only evidence on this issue comes from Mr. Romero, who testified that he would rather take the heat from closing down the Baltimore Washington Parkway than risk having one of his employees killed on the job.

I do not accept Mr. Knox's characterization of Mr. Romero's actions as an effort to shut him down from continuing to speak about his safety concerns. Complainant's Brief at 39. Indeed, Mr. Romero's desire to get to the bottom of Mr. Knox's claims is corroborated by his meeting with Mr. Migliaccio and Mr. Cunningham the following day. Nor do I credit Mr. Knox's claim that Mr. Romero "demonstrated his propensity to harshly attack" Mr. Knox without factual basis by his claim that Mr. Knox was a high safety risk for fatalities, based on accidents not found to be Mr. Knox's fault. Complainant's Brief at 39. I find Mr. Romero's version of this incident to be inherently more credible.

But even if I were to accept Mr. Knox's characterizations, Mr. Knox has presented nothing to support his speculation that Mr. Romero's actions were motivated in any part by Mr. Knox's status as a whistleblower, or by a desire to silence Mr. Knox in expressing safety concerns. Nor has Mr. Knox presented any evidence that he suffered any consequences as a result of this incident.

Unsuccessful Job Applications

Over the last several years, Mr. Knox sent applications for positions with the Park Service all across the country. For most of the applications, he received no response; he was not hired for any of the positions. But Mr. Knox has not even come close to establishing that his failure to be selected for the myriad of positions for which he applied in the Park Service had any connection to his whistleblower activities. Mr. Knox believes that he was qualified for all of these positions, and the fact that he was not hired compels the conclusion that he was being blackballed because of his whistleblower status.

Mr. Knox believes that Mr. Don Harris, the attorney who represented the Park Service in connection with his whistleblower litigation, and Ms. Michele Stewart, the human resources specialist who assisted him, have been working behind the scenes, pulling strings to make sure none of the offices in the Park Service across the country hire Mr. Knox. Indeed, even though Ms. Stewart left her employment at least a year ago, Mr. Knox believes she is still acting to

prevent him from being hired. Unfortunately for Mr. Knox, he offered not a shred of evidence to support this speculation, which is belied by the evidence that is actually in the record.

Mr. Knox acknowledged that he did not know who the hiring official was for the positions he applied for, or who actually got the positions and their qualifications. He has not come close to showing that he was the most qualified applicant for any of these positions, much less that he was not hired because of any efforts by either Mr. Harris or Ms. Stewart.

Mr. Knox seems to believe that because Ms. Stewart was in court during his whistleblower litigation, her knowledge of Mr. Knox's whistleblower activities has been transmitted to all of the human resources employees throughout the Park Service, who are actively thwarting his applications for other positions in the Park Service. Again, Mr. Knox has offered no evidence to support this speculation, which is also belied by the testimony of Mr. Deutsch, the Director of human resources for the Park Service. Mr. Deutsch testified that the hiring process at the Park Service is decentralized, with the exception of seasonal employees. There are about 240 human resources specialists across the country, who hire independently for their respective offices.

Mr. Knox is incorrect when he states his documentary evidence establishes a *prima facie* case for many of the positions for which he applied. Complainant's Brief at 42. The documentary evidence reflects that Mr. Knox was put on a certificate of eligible candidates for nine of these positions; for six of them, the Park Service specifically found him not to be qualified. Mr. Knox testified that he did not have the experience for several of these positions, including facility manager, program specialist, equipment specialist, and mechanics supervisor.

For those positions for which Mr. Knox was placed on the certificate of eligible candidates, Mr. Knox has not produced any evidence that the position remained open while the Park Service sought applicants with qualifications similar to his after he was rejected, or that a candidate was ultimately hired who was less qualified than him. Indeed, while the evidence submitted by Mr. Knox reflects that, for some of these positions another applicant was selected (CX 13, 31, 37, 42), Mr. Knox has presented no evidence that he was more or as well qualified as the person selected. Thus, Mr. Knox has not established a *prima facie* case of non-selection under the environmental whistleblower laws.

As Mr. Harris represented the Respondent in Mr. Knox's various lawsuits, it is certainly plausible that he spoke with persons from human resources about Mr. Knox, including Ms. Stewart, especially during the attempt to find Mr. Knox a position at another location in the Park Service. It is equally plausible that Mr. Harris advised Mr. Knox that he was doing so. But it is a herculean leap to claim, as Mr. Knox appears to do, that this establishes that "the selecting officials were likely influenced by NPS officials who knew about Knox's whistleblower litigation." Complainant's Brief at 43, fn. 181. Again, there is nothing, other than Mr. Knox's rank speculation, to support a conclusion that Mr. Harris, Ms. Stewart, or any other NPS official has said or done anything to adversely affect Mr. Knox's chances of obtaining a job at any of the more than 240 Park Service offices across the country. There is no evidence, direct or circumstantial, to support Mr. Knox's claim that he is being held back from advancement

because he is a whistleblower. The fact that he was not hired for any of these positions is simply not sufficient to support that conclusion.

Denial of Requests to Attend Facilities Management Training

Mr. Knox points to the denial of his requests to attend a facilities management training course in support of his belief that his career goals are being thwarted, and he is being unfairly targeted because he is a whistleblower. Mr. Knox applied for this course, a one year training course, twice, and his supervisors denied the request both times. As is abundantly clear from the course description, Mr. Knox did not meet the requirements to take this course. As it states in the course description, the course is for employees who are already working as facilities managers, and wish to advance to maintenance chief. While Mr. Knox claims that he has some past experience that can be characterized as facilities management experience, nevertheless he was not employed as a facilities manager. Moreover, as Mr. Cunningham testified, upon completion of the training, the employee was expected to return to facilities management work, something Mr. Knox clearly was not in a position to do.

Both Mr. Cunningham and Mr. Migliaccio, who reviewed Mr. Knox's requests and denied them, did so because he did not meet the requirements to take the course. It is simply not relevant that neither Mr. Migliaccio nor Mr. Cunningham read Mr. Knox's application, or did any further research into his supposed qualifications. Thus, the claim that Mr. Knox was found qualified at the GS 11 level for a facility manager position, or that he scored the highest on an application for a facility operations specialist, ignores the fact that Mr. Knox did not meet the requirements for the course, which was open only to employees who were already working as a facilities manager, and who had a facilities manager position to return to on completion of the training.

Nor is it relevant that Mr. Romero did not personally verify the requirements for the training, or that he did not know if Mr. Knox had an IDP, or was not aware that Mr. Knox had a certificate for college courses in occupational health and safety, had been found eligible at the GS 11 level for facility manager positions, and received the highest score in his application for a facility operations specialist.

None of these arguments can obscure the fact that, regardless of his training or "actual qualifications," Mr. Knox **was not eligible to take this training**. Mr. Knox has not argued otherwise, but claims that the managers "reflexively denied Knox the opportunity to apply for the training out of an ingrained retaliatory animus." While Mr. Knox may believe that to be the case, he has offered no evidence to support his speculation, and in fact, the evidence reflects that both Mr. Cunningham and Mr. Migliaccio considered Mr. Knox's requests, and denied them because he did not meet the requirements for the training. Nor did Mr. Romero "reflexively" deny this request; he had his assistant review the request, and based on her recommendation, he did not approve it.⁴³ There is simply nothing to even suggest that Mr. Knox's status as a whistleblower played any part in those decisions, or that his request was denied as punishment for his previous whistleblowing activities. Indeed, both Mr. Cunningham and Mr. Migliaccio

⁴³ Regardless of whether Mr. Romero referred to the requirements for taking the training as "prerequisites," the fact remains that Mr. Knox did not qualify to take the training.

testified that Mr. Knox has taken numerous training courses while at Greenbelt Park, more than any other employee.

CONCLUSION

Viewing the evidence as a whole, I find that Mr. Knox has failed to establish that he was harassed, or treated differently than other employees at Greenbelt Park, over the almost ten years that he has worked there. Moreover, I find that Mr. Knox has failed to establish that any of the actions of which he complains were motivated in any part by his whistleblower activity.

In this regard, I note that Judge DiNardi's assessment of Mr. Knox's credibility has absolutely no bearing on my assessment of the credibility of Mr. Knox, as well as the other witnesses who testified at the hearing. I found Mr. Knox's descriptions of the incidents he claims as harassment to be often vague, and lacking in detail. Moreover, they were consistently refuted by his two supervisors, Mr. Migliaccio and Mr. Cunningham, as well as Mr. Romero and Mr. Sears, whose testimony I found to be credible and persuasive.⁴⁴ I have no doubt that Mr. Knox believes he has been treated unfairly, but this belief was not borne out by the evidence. Nor do I find that the conduct, even if it could be fairly characterized as harassment, can be considered so severe or pervasive that it altered the conditions of Mr. Knox's employment.

Mr. Knox points to Judge DiNardi's conclusion that the January 2001 memorandum written by Mr. Young was "the most blatant example of direct evidence of discrimination and retaliation that I have seen in my many years as an Administrative Law Judge," and that the denial of access to the DOI main building was "an outrageous way to treat a dedicated, conscientious and highly-motivated public servant." Complainant's Brief at 24-25. Again, I am not bound by Judge DiNardi's findings in Mr. Knox's previous litigation. I have made my determinations based on the record before me.⁴⁵

But even if I were to agree with Judge DiNardi's characterization of these two incidents, I find that Mr. Knox has not come close to establishing that, in the ensuing eight or nine years, he was the victim of harassment or unfair treatment, much less a pervasive and severely hostile work environment, or that his status as a whistleblower played any part in his treatment at Greenbelt Park. Objective hostility is determined by examining the totality of the circumstances and whether a reasonable person with the same characteristics as him would perceive the workplace as hostile. *Harris v. Forklift Sys., Inc.*, *supra*, 510 U.S. at 20-21. I find that, taken as a whole, the conditions for Mr. Knox at Greenbelt Park were not "permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive [i.e., a hostile] working environment." *Morgan*, *supra*, 536 U.S. at 116.

CONCLUSION

⁴⁴ I agree with Mr. Knox that the testimony of Respondent's employees contradicts his testimony. But this does not mean that Mr. Knox's testimony should be given great weight because he was "completely honest."

⁴⁵ Curiously, although Mr. Knox argues that I should rely on Judge DiNardi's findings, he also argues that the incidents he has raised occurred after he commenced his previous case, and the issue of whether they were part of a hostile work environment in retaliation for bringing that proceeding was not previously litigated.

Accordingly, for all of the reasons discussed above, IT IS HEREBY ORDERED that the claim of William T. Knox under the employee protection provisions of the Clean Air Act be DISMISSED.

SO ORDERED.

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LINDA S. CHAPMAN
Administrative Law Judge

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 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. The date of the postmark, facsimile transmittal, or e-mail communication 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 Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW., Washington, DC 20210. 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 the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. 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, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).