



Issue Date: 15 April 2015

IN THE MATTER OF:

CATE JENKINS,
Complainant,

v.

U.S. ENVIRONMENTAL
PROTECTION AGENCY,
Respondent.

CASE NO.: 2011-CAA-3

RECOMMENDED DECISION AND ORDER

This matter is before the Court on the Complainant's Motion for Sanctions in connection with the Respondent's discovery conduct in the course of this claim. On January 14, 2014, I issued an Order setting out a schedule for the parties to submit pleadings in connection with the Complainant's request for discovery sanctions. After a brief hiatus for the parties to participate in the settlement judge procedure, and multiple extensions of these deadlines, the Complainant submitted her Motion for Sanctions Pursuant to 29 C.F.R. § 18.6(d) on October 1, 2014. On February 2, 2015, the Respondent submitted its Opposition to the Complainant's Motion, and on February 26, 2015, the Complainant submitted her Reply.¹

Background

The Complainant was employed by the Respondent, the EPA, from 1979 until her removal on December 30, 2010. The Complainant's second level supervisor, Robert Dellinger, initiated the removal process in a memorandum dated July 9, 2010, in which he charged the Complainant with (1) threatening or attempting to inflict bodily harm; and (2) abusive or offensive language, gestures, or other conduct. The Director of EPA's Office of Resource Conservation and Recovery, Suzanne Rudzinski, issued a Final Decision on December 30, 2010, finding the Complainant guilty of the charged conduct and upholding Mr. Dellinger's proposal. The Complainant's removal was made effective that same day.

On January 31, 2011, the Complainant simultaneously filed (1) a complaint with the U.S. Department of Labor (DOL), Occupational Safety and Health Administration (OSHA) alleging that she was unlawfully terminated in retaliation for disclosures, complaints, and

¹ Citations to Exhibits in connection with the hearing are CX (Complainant's Exhibits), RX (Respondent's Exhibits), and Tr. (Hearing transcript). In addition, the Complainant provided Exhibits with her Motion, which are designated as "EX."

communications protected under numerous Environmental Whistleblower Statutes;² and (2) an appeal challenging EPA's basis for her removal before the MSPB, in which she raised an affirmative defense of whistleblower retaliation under the Whistleblower Protection Act.³ By letter dated February 25, 2011, OSHA dismissed the Complainant's complaint based on the Secretary's determination that it had not been timely filed. The Complainant appealed OSHA's dismissal of her complaint and requested a hearing on the merits before DOL's Office of Administrative Law Judges (OALJ).

The Complainant's complaint was assigned to me, and a hearing was scheduled for the week of April 30, 2012, in Washington, D.C. After four days of testimony, and during the testimony of Ms. Rudzinski, the Respondent's final witness, the hearing was abruptly suspended when it became clear that despite months of discovery disputes, and specific Orders from the Court, the Respondent had not produced a draft of Ms. Rudzinski's removal decision, which was clearly responsive to the Complainant's discovery requests, as well as my specific Orders. The hearing was adjourned to provide the Complainant the opportunity to take the deposition of Respondent's counsel, Paul Winick, as to his efforts to comply with discovery and my Orders compelling production of documents. Although the Court anticipated that the hearing could conclude the following week, after Mr. Winick's deposition, the proceeding devolved into a massive discovery expedition, after it was discovered that, not only had Mr. Winick withhold the one document whose existence was discovered at the hearing, he withheld literally hundreds of documents that were clearly responsive to the Complainant's repeated discovery requests, and clearly required to be produced pursuant to my repeated Orders.⁴

I advised the parties that, once the discovery process had been completed, I would provide the Complainant the opportunity to submit a motion for sanctions based on the Respondent's discovery conduct.

STATEMENT OF UNCONTESTED FACTS⁵

The Complainant was hired by the EPA through a competitive service appointment as a chemist on December 2, 1979. She served continuously as an Environmental Scientist at the EPA's Office of Solid Waste and Emergency Response (OSWER), until her removal, effective December 30, 2010, for approximately 31 years. At the time of her removal, the Complainant

² The Complainant's OSHA complaint alleges violations of the Clean Air Act (CAA), 42 U.S.C. §7622; the Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971; the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9610; the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622; and the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1367 (hereinafter referred to collectively as the "Environmental Statutes").

³ On May 19, 2011, AJ Bogle issued an Initial Decision affirming EPA's removal of the Complainant. On May 5, 2012, the MSPB vacated that determination and ordered the Complainant reinstated, on the grounds that the Respondent had violated her due process rights by denying her notice of specific information considered by Ms. Rudzinski (*i.e.*, the enhanced penalties for generally criminal, infamous, dishonest, immoral or notoriously disgraceful conduct); and that AJ Bogle had denied her a full opportunity to present evidence regarding her affirmative defenses, including her claims of whistleblower retaliation, and had abused her discretion in limiting the Complainant's attempts at discovery and requests for witnesses. 2012 MSPB 70.

⁴ Mr. Winick retired from the Environmental Protection Agency in 2013.

⁵ This factual summary is taken from my April 2, 2012 Order denying the Respondent's request for summary judgment, supplemented, where necessary, by testimony or evidence introduced in the May 2012 hearing.

was a GS-13 Environmental Scientist with the Waste Characterization Branch (WCB) in the Material Recovery and Waste Management Division (MRWMD) in the Office of Resource Conservation and Recovery (ORCR) in OSWER. Her first level supervisor at that time was James Michael, Chief of the WCB; her second level supervisor was Robert Dellinger, Director of MRWMD.

In 1988, the Complainant made disclosures to Congress alleging EPA contractor abuses. At the time, her first line supervisor and branch chief was Mr. Dellinger, who had knowledge of these disclosures.

In 1990, the Complainant made disclosures regarding the EPA's alleged misrepresentation of cancer studies on Alar, the apple pesticide, and the apparently intentional manipulation by Monsanto Corporation of its studies on the effects of dioxins on its own workers so as to achieve a study result showing no adverse effects. The Complainant subsequently prevailed in a whistleblower claim at the Department of Labor with regard to these disclosures.

Beginning in 2001, the Complainant made numerous disclosures and complaints concerning allegations of improper testing and cover-up of the toxic properties of the dust emanating from the World Trade Center (WTC) disaster and the impact of that toxic dust on First Responders and other citizens. The Claimant disseminated these disclosures and complaints to her chain of command and others at EPA, as well as to outside parties including state officials, state elected representatives, law firms representing First Responders, citizens, and the press. She also made complaints and disclosures regarding these issues to the EPA Inspector General's Office, members of Congress, and the Federal Bureau of Investigation. Her disclosures were posted on web sites and repeatedly quoted in the press and television broadcasts, and by members of Congress.

In August 2006, the Complainant made disclosures concerning the alleged falsification of pH standards (a measure of corrosivity) by her division in the promulgation and subsequent re-evaluation of the EPA's Corrosivity Characteristics regulation. The Complainant also alleged that the EPA had used improper laboratory methods in the testing of WTC dust for its pH. She alleged that these laboratory methods were developed, maintained, and legally mandated by her division at the EPA. The Complainant's disclosures and complaints alleged that the claimed falsification of the Corrosivity Characteristics regulation and improper use of laboratory methods contributed to allowing excessive and harmful exposures of First Responders and others at the WTC. The Complainant claimed that the EPA knew, but covered up the fact, that the WTC dust was highly caustic (corrosive) and that the EPA's falsified Corrosivity Characteristics regulation made it appear that the dust at the WTC was safe, when in fact it was corrosive enough to cause First Responders and others in Lower Manhattan to later suffer respiratory disease and aggravated exposure to other toxic substances in WTC emissions.

In her complaints to the FBI, the Complainant alleged that, before his tenure, Mr. Dellinger's EPA branch, division, and office had falsified the nonhazardous pH levels established by the United Nations World Health Organization, and that the falsified standard was republished every year of Mr. Dellinger's tenure. She claimed that these falsifications began in 1980, were repeated in 1993 and 1996, and are still part of the current EPA regulations

republished every year, and that these falsified standards were in place and used at the time of the WTC disaster for First Responders through their incorporation into the List of Hazardous Substances.

The Complainant's disclosures about the corrosivity of WTC dust and the EPA's cover up were reported by the New York Times and other media; the Complainant also appeared on the CBS Early Show in September 2006 about these disclosures.

On August 22, 2006, and October 25, 2006, the Complainant made complaints to the EPA Inspector General and Congress about the alleged (1) cover-up by the EPA of the corrosive alkalinity of WTC dust, (2) falsification concerning the health effects of the corrosive dust, and (3) fraudulent testing of pH levels of the WTC dust particles. The August 22, 2006 disclosure were sent to Congress and the Inspector General as two separate documents with separate addresses; the October 25, 2006 disclosure went to the Inspector General, with a copy to Congress.

In May 2007, the Complainant made complaints and requested investigations of the falsification of the corrosivity standard to the FBI and to members of Congress. In October 2008, she supplemented her FBI complaint concerning fraud in pH tests of the WTC dust and falsified Corrosivity Characteristic regulation, including documentation that the EPA laboratories had diluted WTC dust almost 600 times with water before testing it for corrosivity. She copied her communication to the FBI to her chain of command at the EPA, including the Administrator, the Assistant Administrator for OSWER, Mr. Dellinger, and James Michael, the Chief of the WCB and her immediate supervisor.

Mr. Dellinger, who was the Complainant's second tier supervisor throughout the entire period of her WTC whistleblowing, was familiar with her whistleblowing accusations with respect to the WTC incident.

On March 8, 2009, the Complainant sent an e-mail to all EPA Headquarters staff, the EPA Administrator, her superiors, and the EPA Health and Safety Unit entitled "Op-Ed: Should EPA Institute a Workplace Fragrance Ban as Part of its Endocrine Disruptor Initiative?" ("Workplace fragrance e-mail.") On June 3, 2009, Mr. Michael issued the Complainant a proposed five day suspension, based on charges of alleged failure to follow supervisory directives, discourteous conduct, and "misuse of Position," claiming that the Complainant had violated the Standards of Ethical Conduct by disseminating the workplace fragrance e-mail.

On July 20, 2009, Mr. Dellinger issued the Complainant a Notice of Decision on the proposed five day suspension (Suspension Decision), upholding the charges of failure to follow supervisory directives, and discourteous conduct. The Complainant challenged the Suspension Decision through the EPA's grievance process, and it was upheld. The Complainant claimed that Mr. Dellinger gave her a disciplinary "warning" with respect to the charge of misuse of position, but that warning cannot be challenged in the EPA grievance process.

On August 19, 2009, the Complainant made a whistleblower retaliation complaint to the Office of Special Counsel (OSC), challenging the "warning" about the workplace fragrance e-

mail in the Suspension Decision. On January 27, 2010, the OSC declined the Complainant's complaint, and issued a notice of right to pursue an individual right of action (IRA) before the Merit Systems Protection Board (MSPB). On April 1, 2010, the Complainant filed her IRA before the MSPB regarding the warning about the workplace fragrance e-mail. On April 23, 2010, the Complainant responded to a MSPB show cause order, accusing Mr. Dellinger of violating the Ethics Standards for his false accusations against her in his July 2009 Suspension Decision, and reprising against her for raising the fragrance issue.

In March and April 2010, the Complainant sent e-mails to several members of her division, her immediate superiors, outside parties, and EPA Headquarters and Regional Unions about a pending lawsuit involving First Responders at the WTC, in which her complaints and disclosures were being used as documentary evidence. The e-mails referred to and provided links to her earlier FBI, congressional, and Inspector General complaints over the falsification of the Corrosivity Regulation, and the use of improper laboratory test methods for WTC dust by the EPA and outside parties. It also provided links to published medical studies attributing the high corrosivity of WTC dust to medical symptoms in First Responders.

Mr. Dellinger signed a Memorandum to the Complainant dated April 30, 2010, entitled "Clarification on July 20, 2009 Suspension Decision" (Clarification Memo), stating that it was his intent that this "clarification" would persuade the Complainant that she had not suffered an adverse action incident to the workplace fragrance e-mail and that she would withdraw her IRA appeal. On July 1, 2010, an MSPB Administrative Judge (AJ) dismissed the Complainant's IRA, which was upheld by the full Board on December 23, 2010.

On Monday, May 3, 2010, at about 9:15 a.m., the Complainant found Mr. Dellinger's Clarification Memo in her office in the EPA central mail station. Before speaking with Mr. Dellinger, the Complainant distributed her April 23, 2010 response to the MSPB show cause Order to a large group of EPA staff and outside parties interested in the workplace fragrance issue, and a large list of EPA union officials. The Complainant then took the Clarification Memo to Mr. Dellinger, told him that it was an inappropriate *ex parte* communication, and left the Memo with him.

Some time later, Mr. Dellinger came to the Complainant's cubicle and returned the Clarification Memo to her, stating that he had checked with an EPA lawyer (specifically, Mr. Winick) and was told that he could give the Memo to her.

The Complainant returned to Mr. Dellinger's office two more times on May 3, 2010. One of these times, she advised Mr. Dellinger that if he failed to retract the Clarification Memo, she would have to revisit her July 2009 suspension in the MSPB IRA litigation, and involve other co-workers in that process. The other time, she advised Mr. Dellinger that he had violated the Privacy Act in the manner of delivery, because the memo was placed in an unsealed envelope in the central mail station.

The morning of May 10, 2010, Mr. Dellinger informed Roy Prince, Chief of Resources Management in the Office of Resource Conservation and Recovery, that the Complainant had made a profane death threat to him on May 3, 2010, while he was speaking to her in her cubicle

after returning the Clarification Memo. Shortly thereafter, Mr. Dellinger and Mr. Prince met with Acting Office Director Maria Vickers and informed her of Mr. Dellinger's claim regarding the death threat. On May 11, 2010, Mr. Dellinger provided a written statement to Oris Dearborn, a Federal Protective Service Officer employed by the Department of Homeland Security, regarding the death threat that the Complainant allegedly made to him on May 3. Based on Mr. Dellinger's report, Mr. Michael placed the Complainant on paid administrative leave effective May 12, 2010, and prohibited her from accessing EPA's work premises. The Complainant remained in a paid administrative leave status until the effective date of her removal, December 30, 2010.

On June 2, 2010, the Complainant submitted a supplemental complaint to the OSC and MSPB alleging additional retaliation by Mr. Dellinger in the Clarification Memo, complaining that while it dropped the ethics charge, it imposed a new censorship of her rights to raise health and safety concerns by requiring that she obtain pre-approval from the EPA Ethics Office to distribute such concerns.

In an affidavit dated June 15, 2010, the Complainant denied Mr. Dellinger's allegation that she uttered a profane death threat to him on May 3, 2010.

On July 9, 2010, Mr. Dellinger issued a Notice of Proposed Removal (NPR) to the Complainant, claiming that on May 3, 2010, she made a profane death threat to kill him, specifically that she said, "I'll kill you, you fucking asshole." Suzanne Rudzinski was identified as the Deciding Official. Ms. Rudzinski was never in the Complainant's chain of command before her appointment as the Acting Office Director of Resource Conservation and Recovery (ORCR).

On August 6, 2010, the Complainant submitted a written response and provided an oral reply to Ms. Rudzinski. She was accompanied at the oral reply meeting by two NTEU officials. After the oral reply, Ms. Rudzinski provided the declarations of Mr. Dellinger and Paul Winick to the Complainant, who responded in writing. Ms. Rudzinski also provided the Complainant with a written summary of the meeting, to which the Complainant responded in writing.

After the Complainant was placed on administrative leave, but before her removal, there were additional press stories citing her disclosures about the toxicity of WTC dust and resulting injuries to First Responders and others.

On December 30, 2010, Ms. Rudzinski issued her final removal decision, with the Complainant's removal effective on that date.

Authority to Impose Sanctions

Title 29 C.F.R. § 18.6(d)(2) unambiguously permits an administrative law judge to impose discovery sanctions. *Roadway Express, Inc. v. U.S. Department of Labor*, 495 F.3d 477 (7th Cir. 2007). It provides that:

If a party or an officer or agent of a party fails to comply with a subpoena or with an

order, including, but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories, or requests for admissions, or any other order of the administrative law judge, the administrative law judge, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following:

- (i) Infer that the admission, testimony, documents or other evidence would have been adverse to the non-complying party;
- (ii) Rule that for the purposes of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the non-complying party;
- (iii) Rule that the non-complying party may not introduce into evidence or otherwise rely upon testimony by such party, officer or agent, or the documents or other evidence, in support of or in opposition to any claim or defense;
- (iv) Rule that the non-complying party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence should have shown.
- (v) Rule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the non-complying party, or both.

These regulations give an Administrative Law Judge some flexibility in how she administers the sanctions regime, under which, “*for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, [she] may take such action in regard thereto as is just....*” 29 C.F.R. § 18.6(d)(2) (emphasis added).

In addition to the authority explicitly granted to this Court under Part 18, this Court has the inherent power to impose sanctions for discovery abuses. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-67 (1980). *See also, Halaco Engineering Co. v. Costle*, 843 F.2d 376 (9th Cir. 1988). As the Court noted in *Halaco*, such dismissals are subject to much the same considerations as under the Federal Rules of Civil Procedure, and there are five factors that must be considered. These include the existence of certain extraordinary circumstances, willfulness, bad faith, or fault by the offending party, the efficacy of lesser sanctions, the relationship between the misconduct at issue and the matters in controversy in the case, the prejudice to the party who is the victim of the misconduct, and the government interests at stake.

Dismissal under a court’s inherent powers is justified in extreme circumstances, in response to abusive litigation practices, and to insure the orderly administration of justice and the integrity of the court’s orders. *Id.* As the Court in *Halaco* noted, in cases where the drastic sanctions of dismissal or default are ordered, the range of discretion is narrowed, and the losing party’s non-compliance must be due to willfulness, fault, or bad faith. A finding of any of these circumstances can justify the sanction of dismissal. *Id.*

An agency's choice of a sanction is reviewed for abuse of discretion, so long as the sanction is within the statutory limits imposed on the agency. *Chapman v. U.S. Commodity Futures Trading Comm'n*, 788 F.2d 408, 411 (7th Cir.1986). To determine whether a judge has abused her discretion by sanctioning a party, the courts look at the proportionality of the sanction to the discovery violation, but only to ask whether the judge's decision was a reasonable one - not to decide whether the reviewing court might have done the same in the judge's place. *See Roadway, supra, citing Marrocco v. Gen. Motors Corp.*, 966 F.2d 220, 223 (7th Cir.1992); *Halaco, supra* (Sanctions imposed by a district court are reviewed for abuse of discretion, and will not be reversed absent a definite and firm conviction that the district court made a clear error of judgment). As the Court noted in *Halaco*,

[a] determination that an order was disobeyed is entitled to considerable weight because a district judge is best equipped to assess the circumstances of the non-compliance. *National Medical*, 792 F.2d at 911; *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 947 (9th Cir. 1976). The question is not whether this court would have, as an original matter, imposed the sanctions chosen by the trial court, but whether the trial court exceeded the limits of its discretion. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642, 96 S.Ct. 2778, 2780, 49 L.Ed.2d 747 (1976 (per curiam)); *In re Rubin*, 769 F.2d 611, 615 (9th Cir. 1985).

Id. at 379. *See, National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976), finding no abuse of discretion in the imposition of the extreme sanction of dismissal under Rule 37(b)(2)(C) for a discovery violation.

Although the Respondent acknowledges the applicability of Rule 18, the Respondent argues that the sanctions requested by the Complainant are unavailable, because the Complainant is "essentially" requesting the imposition of Sanctions under Rule 11 of the Federal Rules of Civil Procedure. Respondent's Opposition at 10. Claiming that the Complainant's request is narrowly based on alleged misrepresentations and misconduct by Mr. Winick, the Respondent then argues that I cannot impose sanctions even if I determine that Mr. Winick signed pleadings in bad faith or after failing to make a reasonable inquiry, as provided by Rule 11.

This is a "straw man" argument – the Complainant has not requested sanctions under Rule 11. While the conduct at issue might also fall under Rule 11 if this were a matter before a Federal District Court, that does not convert *this* matter into an inquiry under Rule 11. I fully agree with the Respondent, that I am not authorized to impose sanctions and penalties under Rule 11 of the Federal Rules of Civil Procedure. But that is entirely irrelevant.

Nor am I limited to the narrow remedy of excluding Mr. Winick, the Agency's representative, under Section 18.36(b), as the Respondent claims. The Respondent has attempted to place the blame for its extended course of discovery intransigence on Mr. Winick, who was lead counsel in this matter until he was replaced in July 2013. Thus, the Respondent reasons, the only applicable remedy for any alleged bad faith on Mr. Winick's part has been pre-empted, and is now moot, because Mr. Winick is gone.⁶ According to the Respondent, it cannot be

⁶ The Respondent's suggestion that once it became "apparent" in my May 20, 2013 Order Regarding Discovery that Mr. Winick could no longer effectively represent the agency in this matter, it took prompt action to replace him as

sanctioned for Mr. Winick's misconduct unless it was "somehow implicated." Respondent's Brief at 11. I find this claim to be reprehensible. Mr. Winick did not work in a vacuum, nor was he the only attorney who participated in the prehearing activity surrounding this claim. For example, Mr. Starrs, Mr. Winick's supervisor, assisted in depositions and at the hearing. Mr. Winick was assisted by co-counsel, Ms. Lais Washington at the hearing.

But more importantly, Mr. Winick was an employee of the Respondent, an Agency of the United States, not a privately retained attorney over whom the Respondent could exercise little supervision or control. The Respondent was most assuredly "implicated" in Mr. Winick's activities on its behalf. The Respondent cannot absolve itself of responsibility by throwing Mr. Winick under the bus. As Judge Lamberth stated, courts should seldom penalize a party so severely as by default for the conduct of his attorney in which he took no part and of which he was unaware. But he also noted that:

The situation of government or in-house counsel, however, is decidedly different from that of appointed or even retained counsel. [*Citations omitted.*] A government lawyer and her client maintain an exclusive and ongoing relationship, in which the client has an unusually broad influence because of the power to control litigation policies and the entirety of the lawyer's resources.

Webb at 11. While much of the blame for the ongoing failure of the Respondent to comply with its discovery obligations and the Court's Orders rightfully falls on Mr. Winick, the Respondent cannot escape sanctions for that misconduct by washing its hands of Mr. Winick.

Clearly this Court has the authority and power to impose a broad range of sanctions for a party's discovery misconduct. As discussed further below, I find that the Respondent's conduct over a more than two year period reflects a deliberate, willful disregard of its discovery obligations in this matter, as well as continued willful disobedience of the Court's specific Orders regarding discovery. The gravity of the Respondent's discovery misconduct, as well as the extended period over which it took place, the prejudice to the Complainant, and the prejudice to the Court and the orderly system of litigation, more than justify the imposition of the most severe sanctions available.

Nature of Sanctionable Conduct

Failure to Cooperate in Discovery

There can be no question that the Respondent failed, and failed miserably, over an extended course of time, in complying with its discovery obligations and in complying with the Court's discovery orders. While the Respondent concedes that its compliance with its discovery obligations was "deficient," it has downplayed the breadth and seriousness of its intransigence.

counsel, is disingenuous. Respondent's Opposition at 11. It was clear long before my May 20, 2013 Order that there were serious issues with regard to the Respondent's compliance with discovery obligations. I note that Mr. Winick signed the Respondent's June 23, 2013 Motion for an Extension of Time to Comply with my May 20, 2013 Order. The Respondent replaced Mr. Winick, not in May 2013, but on July 15, 2013; he has since retired.

For example, the Respondent has attempted to pigeonhole its conduct into a few narrow categories, which it then argues do not apply.

The Respondent focuses on the Complainant's arguments as allegations that Mr. Winick violated the "duty of candor," and engaged in a fraud on the Court, then argues that there is no legal authority for sanctions against the Respondent on these bases. Respondent's Opposition at 4. This is not a narrow inquiry into whether Mr. Winick should be punished, which, as discussed above, this Court does not have the power to do. The focus of the inquiry is the *Respondent's* repeated, extensive, and abject failure to fulfill its obligations in discovery, and to comply with my Orders regarding discovery. Thus, it is not necessary, although it may be relevant, for the Complainant to establish that Mr. Winick deliberately lied to the Court or committed a fraud on the Court.

The Respondent attempts to downplay the extent of its discovery lapses by its claim that for about two years, "its lead counsel did not sufficiently or satisfactory [*sic*] fulfill the Agency's discovery obligations, leading to an unnecessarily protracted process." Respondent's Opposition at 17. This is an understatement of immense proportions. Nor does the fact that the Respondent "eventually" corrected the "deficiencies" noted in my "numerous Orders," and replaced the lead counsel whose discovery production was found "wanting," as the Respondent seems to suggest, mean that the parties and the Court can simply resume the hearing that was interrupted almost three years ago, and proceed as if nothing had happened.

The Respondent has also carved out the issue of destruction of Ms. Vickers' emails, arguing that this does not justify the imposition of sanctions because the Respondent violated no law. Whether the Respondent's destruction of these emails violated a law is not dispositive. And again, this issue cannot be considered in isolation, but must be viewed as part of the larger picture of the Respondent's discovery incalcitrance.

The Respondent has also focused on the Complainant's claim that Mr. Winick demonstrated "retaliatory animus" toward her, arguing that the evidence does not support such a claim. Mr. Winick's contempt for the Complainant is crystal clear from the evidence in this proceeding, as well as the pleadings Mr. Winick submitted to the Court, and his demeanor during the hearing. Regardless of whether it rises to the level of "retaliatory animus" under the whistleblower statutes, Mr. Winick's attitude and demeanor toward the Complainant in these proceedings, as well as his attitude and demeanor toward the Court and these proceedings, is a factor I consider in ruling on her current motion.

The Respondent's discovery misconduct is not limited to the narrow question of whether Mr. Winick or anyone else made misrepresentations on a few occasions, or whether the Respondent violated the FRA or NARA when it destroyed Ms. Vickers' records. Rather, the Respondent's conduct, from beginning to end, reflected a wholesale, deliberate, and willful disregard of the Respondent's discovery obligations in this proceeding, as well as the Court's authority to govern the conduct of the proceedings. To give context to the gravity of the Respondent's failure to produce literally thousands of documents before the hearing, it is

necessary to set out a relatively brief recounting of the Respondent's repeated failures to produce documents before the hearing.⁷

First Motion to Compel

From the outset, the Respondent has resisted providing the Complainant with anything more than what Mr. Winick thought she was entitled to in connection with her MSPB proceeding.⁸ In defending itself against the Complainant's motions to compel discovery, the Respondent repeatedly argued that it had produced "arguably relevant" documents in the course of the MSPB discovery process, and thus was under no further production obligation.

In my September 29, 2011 Order granting the Complainant's first motion to compel, I dismissed the Respondent's claim that there were only two persons working for the Respondent who had any involvement in the matters at issue – Mr. Dellinger and Ms. Rudzinski – and thus it was "obvious" that the Complainant's discovery requests, which sought documents from a number of other EPA personnel, were not reasonably calculated to lead to the discovery of admissible evidence.

I noted that, just a month earlier, on August 10, 2011, in my Order denying the Respondent's request for a protective order in connection with depositions proposed by the Complainant, I found that the Complainant was entitled to question those persons who sat near her at the time she uttered the alleged death threat to Mr. Dellinger, which was the basis for her termination, anyone with whom Mr. Dellinger spoke about this incident, and each person who had a role in the process that led to her removal, whether or not they had any firsthand knowledge of the alleged death threat. I also noted that the Complainant was entitled to production of documents and answers to interrogatories that bore on the issue of retaliatory animus and its contribution to her termination. I stated that, despite my previous Order that made it clear that the Complainant was entitled to take testimony from each person who might have played some role in her removal process, the Respondent persisted in limiting its discovery responses to Mr. Dellinger and Ms. Rudzinski.

I also noted that it was clear that the Respondent did not understand its discovery obligations with respect to documents withheld on the grounds of privilege. It was not sufficient for the Respondent to claim that there were "some," or "a considerable amount" of documents covered by a privilege – it was not up to the Respondent to make that determination. That was a finding to be made by the Court, based on the review of a privilege log that described the

⁷ I note that the time spent by the Court and parties in dealing with the Respondent's repeated failure to fulfill its obligations in discovery and to respond to my Orders has far outstripped the amount of time that would be required to review the evidence and write a decision on the merits of this claim.

⁸ The Respondent twice filed a motion to stay this proceeding pending what it anticipated to be a determination by the MSPB affirming the "righteousness" of its removal of the Complainant, stating that at that time, the Respondent would move for summary decision based on the theories of *res judicata* and collateral estoppel. The Respondent also suggested that I should defer to the MSPB on the issue of whether AJ Bogle abused her discretion in her discovery rulings. The Respondent's optimism was not justified – the MSPB vacated the removal decision on the grounds that the Complainant was denied due process during her termination proceeding, and that AJ Bogle *had* abused her discretion in limiting the Complainant's attempts at discovery, and denied her a full opportunity to present her affirmative defenses.

withheld documents with enough specificity for such a determination. I directed the Respondent, if it wished to withhold responsive documents on a claim of privilege, to list each document by date, author, and recipient (if any), provide a general description of the nature of the document and the applicable privilege, and the request to which it responded.⁹ I noted that in the case of emails, the subject line was not necessarily a sufficient description of the nature of the communication.

In that first Order regarding discovery, I addressed 37 separate document requests and 3 separate interrogatories.

Second Motion to Compel

On February 9, 2012, I issued my second Order compelling the Respondent to cooperate in discovery, after the Respondent withheld requested documents on the grounds of privilege. For most of the requested documents, I found that there was insufficient information on the Respondent's privilege log, or in its response to the Complainant's motion, to determine if the requested documents, or any part of them, were protected by a privilege.¹⁰ I directed the Respondent to provide the documents for which it claimed a privilege to the Court for *in camera* inspection. I also directed the Respondent to provide to the Complainant those documents for which it did not claim a privilege, which were or reflected communications between the EPA and the Office of Special Counsel (OSC) about the Complainant and/or her disclosures. The Respondent was directed to provide documents in this category for which it claimed a privilege to the Court for *in camera* inspection.

On February 29, 2012, I issued my Order finding that the Respondent did not meet its threshold burden to establish any of the necessary requirements for the applicability of the deliberative disclosure privilege, and that **none** of the documents provided for *in camera* inspection were protected from disclosure by the attorney client or work product privilege.

With respect to the documents that the Respondent produced to the OSC, which the Respondent was directed to provide the Court, the Respondent produced 14 documents. Despite my explicit instructions to indicate the nature and basis for its claim of privilege for each document, the Respondent merely stated that these documents were "referenced" in its previously provided privilege log. But the Respondent's privilege log did not identify the nature or basis for the Respondent's claim of privilege for **any** of these documents. I rejected the Respondent's generalized and non-specific claim of "privilege" for these documents, noting that not only did the Respondent fail to affirmatively establish the essential elements of a claimed privilege, it failed to even identify the privilege that it thought attached to each particular document.

I found that, in any event, the Respondent had waived any applicable privilege by disclosing the documents and communications to the OSC. With one exception, in which I directed the Respondent to provide the Court with a complete copy of the June 24, 2010 draft

⁹ It should not have been necessary for the Court to instruct a senior trial attorney for a government agency on the necessity of, and how to prepare a privilege log. Yet the Court was forced to do so, not once, but repeatedly.

¹⁰ See footnote 9.

NPR from Mr. Winick to Mr. Dellinger for *in camera* review, I found that the documents were not properly withheld, and ordered the Respondent to produce them to the Complainant. Subsequently, on March 8, 2012, I found that the draft NPR was not protected by the attorney client or work product privilege, and ordered that the Respondent produce a copy to the Complainant.

April 30, 2012 Hearing

The Court having resolved all outstanding discovery disputes, the hearing commenced on Monday, April 30, 2012. On Thursday, May 3, 2012, during the testimony of the Respondent's last witness, Ms. Rudzinski, it became painfully apparent that, despite my previous Orders to compel production of such documents, at least one, specifically a draft of a final decision that Mr. Winick exchanged with Ms. Rudzinski, which was clearly responsive to the Complainant's discovery requests as well as my previous Orders, had not been produced by the Respondent. Mr. Winick acknowledged that he had not produced this document, but could provide no explanation for his failure to do so. Nor did he know where the document was. Particularly troubling was Mr. Winick's apparent belief that, since he had made no changes to this document, it was not relevant, and his failure to produce it was of little consequence.¹¹ I advised Mr. Winick that this was not his call to make, and if there was a previous draft of this document, the Complainant was entitled to it, even if he was "confident" that he made no changes to it.

The hearing was adjourned to provide the Complainant the opportunity to take the deposition of Mr. Winick as to his efforts to comply with discovery, and my Orders compelling production of documents. At that time, the Court anticipated that the hearing could conclude the following week, after Mr. Winick's deposition, and reserved the courtroom for that purpose.

Unfortunately, the Court's dismay with the interruption of the hearing by the Respondent's failure to provide a document it was clearly directed to provide, paled in comparison to the Court's reaction to the submission by Mr. Winick, the following Monday, of the "Agency's Amendment to November 1, 2011 Privilege Log." Over the weekend, Mr. Winick had "re-examined" his electronic records, and had asked Mr. Guerrero and Ms. Rudzinski to search theirs as well. During this search, Mr. Winick "discovered" a number (to be precise, **twenty seven**) of *never-previously identified* documents related to Ms. Rudzinski's role in the Complainant's removal process. Mr. Winick claimed that all of these documents qualified for protection under one or all of the following privileges: attorney-client, deliberative process, and attorney work product. He did not bother to submit a privilege log.

After a telephone conference with the parties, I issued an Order dated May 9, 2012, noting that I had previously made it clear that the Respondent was required to indicate the nature and basis for its claim of privilege for each document for which it claimed a privilege. Once again, the Respondent did not articulate the basis for its claim of privilege with respect to each document, but relied on a conclusory claim that the documents were protected under "one or all" of three possible privileges. With one exception, I found that the Respondent did not meet its burden to articulate a basis for the applicability of either the work product or the attorney client privilege to **any** of the documents, nor did the Respondent meet (or even attempt to meet) its

¹¹ As discussed further below, this representation was false – Mr. Winick made edits to this document.

threshold burden to establish the necessary requirements for applicability of the deliberative process privilege to any of the documents.

I directed the Respondent to provide a copy of the documents to the Complainant forthwith, for her use in conducting the deposition of Mr. Winick, which had been scheduled for May 10, 2012. I noted that the parties were hopeful that the hearing could resume shortly afterward. Alas, that was not meant to be.

After Mr. Winick's deposition, the Complainant requested documents identified during the deposition that were responsive to her discovery requests, but that had not been produced. Specifically, the Complainant requested a copy of Ms. Rudzinski's hard file regarding her removal, to which Ms. Rudzinski had referred several times during the hearing, as well as an attachment identified on an email previously provided by the Respondent. In addition, the Complainant requested documents reflecting communications between Mr. Winick or persons acting on his behalf, and current and former EPA employees regarding responses to her discovery requests.

By letter dated May 21, 2012, the Respondent produced a list of documents in Ms. Rudzinski's hard file, stating that the Complainant already had all of the documents, with the exception of "e-mail traffic related to the issue of Complainant's access to her government computer files" after she was placed on administrative leave. The Respondent did not consider this e-mail traffic as "germane" to the litigation. The Respondent claimed that the missing e-mail attachment was previously "identified" on its November 1, 2011 privilege log, and either the Complainant already had it, or it was never produced because the Complainant did not request it and my Orders did not address it.

The Respondent refused to produce any documents reflecting communications between Mr. Winick and others about its response to the Complainant's discovery requests, invoking the attorney client and work product privileges. Again, Mr. Winick did not provide a privilege log.

Third Motion to Compel

On July 11, 2012, I issued yet another Order granting the Complainant's request to compel the Respondent to respond to discovery requests. In my Order, I noted that the discovery process in this claim had been marked by the persistent failure of Respondent's counsel to abide by even the most basic requirements for responding to discovery requests in the course of litigation.

In its response to the Complainant's request, the Respondent argued that "There has never been any suggestion that EPA has failed to produce actual records ordered to be produced, as opposed to having failed to generate a complete privilege log that identified the universe of responsive privileged documents." I found this claim to be disingenuous, stating that obviously, if the Respondent did not identify all of the responsive documents in the "universe," privileged or otherwise, neither the Complainant nor the Court would be aware that there were "actual records" that must be ordered to be produced. In other words, the Respondent's compliance with my Orders to produce specific, "actual" documents did not absolve it of its failure to produce or

identify the “universe” of specific, “actual” documents responsive to discovery requests or Orders in the first instance.

In my Order, I noted that Mr. Winick’s deposition did not provide any further assurance that the Respondent adequately complied with its obligations during discovery. I noted that Mr. Winick could not recall if he asked persons to search their email archives for documents responsive to the Complainant’s discovery requests. Even though the EPA requires employees to preserve their email records in a central archive accessible for electronic discovery in litigation, Mr. Winick testified that at the time the original searches for responsive documents were undertaken, he did not know how these archives could be searched. He did not take any steps to find out how to undertake such a search. Nor did Mr. Winick adequately search the records of persons who were no longer employed at EPA, if at all. Despite my repeated and explicit instructions that the Respondent’s discovery obligations were not limited to what was produced in connection with the MSPB proceeding, having gathered those documents, and documents in connection with the Complainant’s complaint to the OSC, Mr. Winick did not feel obligated to conduct any further searches in response to the Complainant’s Department of Labor complaint. Indeed, despite my explicit instructions to the contrary, Mr. Winick continued to refer to the discovery process in this claim as a “do-over,” with issues identical to those raised in the MSPB proceeding.

The Complainant pointed to numerous examples of Mr. Winick’s limited or nonexistent search for responsive records, which I agreed left open the possibility that there were records in connection with this proceeding that had not been gathered in connection with the MSPB proceeding. My conclusion about the inadequacy of the Respondent’s discovery responses was bolstered by Mr. Winick’s convoluted explanation of how he conducted the search that led to the discovery of the 27 additional documents. Mr. Winick’s instructions when the hearing was suspended were to try to obtain the missing draft, and any transmittal memoranda, and “anything else that you can identify that you made the judgment call not to produce” before his deposition. The purpose was to facilitate Mr. Winick’s deposition; it was not a comprehensive “order” regarding the production of additional documents, something that was anticipated after Mr. Winick’s deposition, when the scope of any failure to produce discovery would be clearer.

Because he was confident that he had already collected and produced the “universe” of *non-privileged* records responsive to the Complainant’s discovery requests, Mr. Winick decided that only those records that would be considered to be *privileged* needed to be searched again. He further circumscribed his search to documents created after the issuance of the Notice of Proposed Removal, relying on the self-described “comprehensive” document search done in response to an August 31, 2010 information request from the OSC. Mr. Winick further limited his search to communications between Ms. Rudzinski and her legal advisors, himself and Mr. Guerrero, and himself and Mr. Guerrero, because “almost no one with operational, as opposed to legal advisory responsibilities, played any role in the removal process after the issuance of the NPR.”

But even after whittling down the scope of this search, Mr. Winick discovered **27** additional documents that had not been produced or identified in response to discovery requests or the Court’s Orders. In addition to the fact that Mr. Winick’s search was far from

“comprehensive,” the discovery of these additional 27 documents seriously eroded the confidence the Court had in Mr. Winick’s previous search of the records outside the narrow scope of this search.

In my Order, I stated that:

What has become painfully obvious is that Mr. Winick has taken minimal, if any, steps to ensure that documents responsive to the Complainant’s discovery requests in this matter were identified, preserved, and in fact provided to the Complainant. Indeed, as noted above, Mr. Winick has taken it on himself to narrow the scope of his most recent search to communications between persons involved in the Complainant’s removal process, when in fact, the scope of the issues involved in this proceeding, not to mention the scope of the Complainant’s discovery requests, is much broader.

Again, I noted that it was apparent that Mr. Winick believed the records he produced to the OSC in response to its information request, as well as whatever records he produced to the Complainant in connection with the MSPB proceeding, were synonymous with the Complainant’s requests in this proceeding, and he was not required to produce or search for anything further.

Noting that I had absolutely no confidence in the integrity of the Respondent’s response to the Complainant’s discovery requests, or its compliance with my Orders directing the production of documents, and that I would not require the Complainant to keep returning to the Court to try to enforce the Respondent’s compliance with discovery requirements, I directed the Respondent to conduct a thorough search for all email communications responsive to the Complainant’s discovery requests for a list of 23 persons, and to provide the responses to the Court for in *camera inspection*.¹² I specifically advised the Respondent that communications between Agency counsel and Agency employees regarding the production of documents or information in response to the Complainant’s discovery requests were not protected from disclosure by any privilege, including the work product and the attorney client privilege. Nor had the Respondent produced a privilege log identifying any of these specific documents, or articulating how a privilege applied to any of them. More importantly, the Respondent, by its failure to comply with the rules of discovery, as well as the Court’s orders, had placed the issue of its compliance squarely before the Court.

I also directed the Respondent to produce a copy of the complete and intact file maintained by Ms. Rudzinski regarding the Complainant, including the email traffic related to the issue of her access to her government computer files after she was placed on administrative leave. In this regard, I noted that the Complainant was entitled to review the intact file on which Ms. Rudzinski relied; she was not required to take Mr. Winick’s word that certain documents already provided to her were in Ms. Rudzinski’s file.

Finally, I addressed the Respondent’s ridiculous refusal to produce the attachment to a December 14, 2010 email from Ms. Rudzinski to Mr. Guerrero. The Respondent alternatively argued that it had already produced it in response to my Order; alternatively, they did not

¹² The list was later reduced to 20 persons.

produce it because the Complainant did not specifically ask for it in her challenges to its discovery responses, and my Order did not specifically address it. I found that the Respondent was obligated to produce this document. There could be no serious challenge to its relevance, as it was an attachment to an email that clearly fell within the scope of the Complainant's discovery requests, as well as the Court's order to compel. I had already determined that the email itself was not protected by a privilege, and the Respondent did not even attempt to argue that the attachment was protected from disclosure by any privilege. The Respondent's argument was that, because I did not explicitly order it to produce the attachment as well as the email itself, the attachment did not need to be produced, and the Respondent had fulfilled its discovery obligations with respect to this document.

As I noted, the Respondent's stubborn refusal to produce this document boiled down to a childish claim that "no one told us to give it to you." The Respondent apparently felt that because I did not explicitly direct it to produce the attachments to the emails that I ordered to be produced, it was absolved of its obligation to produce documents that were responsive to the Complainant's discovery requests. This document was clearly relevant and within the scope of the Complainant's discovery requests, and should have been produced to her at the outset, regardless of whether the Court ordered its production, and regardless of whether it was identified by virtue of its status as an attachment to an email.

I noted that the Court should not have to order the Respondent to comply with its obligation to provide relevant documents clearly responsive to the Complainant's discovery requests and my Orders. And in case it was not perfectly clear that my previous Orders directing production by the Respondent included attachments to emails, I ordered the Respondent to produce the attachment to the December 14, 2010 email.

In my Order, I stated that it was unfortunate that it had been necessary for the Court to become so deeply involved in the discovery process. But I found it necessary to ensure that, regardless of the ultimate outcome, the Complainant was able to pursue her claim with all of the relevant information and documents to which she was entitled, which was the purpose of discovery. It was not sufficient, as claimed by Mr. Winick, that the "Complainant has been given, for all intents and purposes, the entire universe of documents on which the respondent has raised a claim of privilege."

The Respondent was directed to provide the information and documents within thirty days, at which point I would determine which were covered by a privilege, and confer with the parties about the resumption of the hearing and a schedule for the submission of any motions.

Fourth Motion to Compel

Unfortunately, the Court's optimism about the prospects of resuming and concluding the hearing was misplaced. At the Respondent's request, I allowed the production of documents pursuant to my Order to proceed piecemeal, in a rolling fashion. When this process was completed, the Complainant filed her Fourth Motion to Compel EPA's Responses to

Complainant's Discovery Requests, objecting to numerous deficiencies in the Respondent's search methodology.¹³

In my December 19, 2012 Order, I noted that, despite what I regarded as straightforward instructions about the Respondent's responsibilities in connection with the search of specific individuals' email archives, the Respondent's response clearly reflected that the required email searches were not uniformly and consistently conducted, the search terms and time periods were unjustifiably narrowed, and the documents obtained even under those proscribed searches were further culled, without an adequate description of how that was done. I found most troubling the suggestion that, in addition to the email accounts that the Complainant and the Court were aware of, there were one or more "shadow" email accounts that were not the subject of any search. I noted that the Respondent's claim that the "principal point of the search exercise" was to identify documents germane to the issue of retaliatory animus was incorrect: the "principal point" of my July 11, 2012 Order was to attempt to remedy the Respondent's failure to meet its obligation to conduct a thorough search for **all** documents, including email documents, that were responsive to the Complainant's discovery requests, a failure that brought the hearing to an abrupt halt when it became apparent that the Respondent had persistently failed to abide by even the most basic requirements for responding to discovery requests.

But rather than responding to straightforward discovery requests, the Respondent had again unilaterally narrowed its search and production to those documents it deemed as "meaningful" or that reflected retaliatory animus. I concluded that the methods used by Mr. Winick to obtain documents were inconsistent and flawed, and Mr. Winick's further review and culling of those documents was not transparent or consistent. Thus, the Respondent, unilaterally and without sufficient justification, restricted its search of the emails to those containing the term "Cate Jenkins" or "Cate" as opposed to those terms, plus all versions and combinations of her name. Moreover, the Respondent used inconsistent search terms.

The search produced an email from "Richard Windsor," which turned out to be an email account used by Administrator Lisa Jackson to conduct Agency business. I directed the Respondent to search Administrator Jackson's emails pursuant to the criteria in my Order, as well as the email accounts of all of the other individuals in this search for emails to or from the "Richard Windsor" account and which referred to the Complainant by any version of her name.

To my consternation, although I thought that I had made it clear that attachments to emails were encompassed in the required search, the Respondent unilaterally decided not to extend the search to email attachments. The Respondent reasoned that its "expectation" was that only emails connected to the Complainant could be responsive and relevant, and if there was nothing in the email itself to suggest a connection to the Complainant, there could be no reason to believe that an attachment could be relevant to the issue of retaliatory animus. I disagreed, noting that I had made it clear repeatedly that the search was not limited to documents relevant to the issue of retaliatory animus. The Respondent was explicitly instructed, in conducting the

¹³ I rejected the Respondent's argument that, because the Complainant's objections were not raised earlier, *i.e.*, in a piecemeal fashion to correspond with its piecemeal production, she should be estopped from raising any challenges to its compliance with my Order.

searches for the second time, to search in the “to,” “from,” subject line, and all attachments to emails.

The subject of Ms. Vickers’ emails was also addressed. The Respondent argued that her emails were “routinely destroyed” under the then existing protocol, but produced no evidence to establish that this was in fact the protocol, or that a litigation hold would not have applied to her emails. I noted that the Respondent’s argument that it was not until the Complainant’s discovery requests in this claim that it would have had any reason to consider preserving Ms. Vickers’ emails reflected a disregard for the Respondent’s obligations to preserve these documents in the face of the initiation of litigation. The Respondent was clearly on notice that Ms. Vickers played an important role in the Complainant’s disciplinary process, and that there were not one, but two actions initiated by her in connection with that process. The Respondent was under an obligation to preserve those documents, regardless of when the Complainant served her discovery requests in this claim. Nor was it relevant that the Complainant decided not to take Ms. Vickers’ deposition, or that the Respondent’s assessment was that she had no relevant information to offer.

Noting that it was unclear whether Ms. Vickers’ emails were actually destroyed, or if so, the authority under which they were destroyed, I directed the Respondent to produce a sworn declaration stating what was done with Ms. Vickers’ emails on her retirement, and if they were destroyed, under what statutory or regulatory authority.

I found that the certifications provided by Mr. Winick, as required by my July 11, 2012 Order, were deficient in many respects, and set out specific instructions for the certifications required for the second email search. I noted that my instruction that the Respondent produce a signed declaration from each person who conducted a search stating that, *inter alia*, the documents produced represented all documents that would comply with the Complainant’s requests for discovery in my July 11, 2012 Order clearly included Mr. Winick. But Mr. Winick did not produce a certification, stating that if the Complainant objected, he could easily execute such a certification.

My instructions were not contingent on the Complainant objecting. So that there would be no further “misunderstanding,” I again set out specific instructions for Mr. Winick to certify the results of the second search to the Court, including, again, the requirement that he sign a declaration attesting that the documents produced to the Complainant represented all documents that would comply with her request for discovery.

Again, I directed that the Respondent could produce the documents in sequential fashion, ending no later than February 8, 2013.

Complainant’s Motion for Clarification

On May 12, 2013, more than one year after the suspension of the hearing, I issued an Order addressing the Complainant’s Motion for Clarification of my December 19, 2012 Order. I noted that my December 19, 2012 Order specifically directed the Respondent to produce new certifications from the persons on the list, stating if they had used alternate email accounts to

conduct EPA business, and if they had, to identify and search those alternate accounts. The Respondent did not do so, based on its speculation that if any employees used private accounts to conduct agency business, it was only to access their official accounts, which would be in the official email inventory and captured in a search. The Respondent unilaterally determined that a search of any private accounts would not be a “productive endeavor.” The Respondent also claimed that agency employees did not know the email addresses of other EPA employees’ private email accounts, and thus could only send emails to a colleague’s EPA email account.

I found that this was total speculation, and that once again the Respondent disregarded the Court’s explicit instructions and relied on its unfounded conclusion that any search would not be “productive.” I instructed the Respondent to provide new certifications as necessary to correct this deficiency.

The Complainant noted that Mr. Gregory Helms attested that he conducted agency business on a private email account, but he had changed providers and no longer had access to the account. The Respondent speculated that Mr. Helms used his private email account only to access his official email account, and that any search of the private account would not be “fruitful,” because his involvement was “of no moment.” I noted that my December 19, 2012 Order clearly required the Respondent to search private email accounts used by persons on the list to conduct official business, and directed the Respondent to provide declarations as to whether such accounts were still active, and to produce certifications as to whether materials were retained in hard copy or electronic form accessible to the agency, and if so, whether they were searched in accordance with my Order.

The Complainant also requested clarification regarding the search of alternate, “shadow” email accounts, or private email accounts, of persons no longer employed at EPA. With respect to Ms. Vickers, the Respondent had advised the Complainant that they could not obtain an affidavit from her, and that they found her focus on Ms. Vickers to be “tiresome.”

I noted that obtaining a declaration from departed EPA employees was problematic, as neither the Respondent nor the Court had the authority to compel former employees to conduct a search or produce a declaration. I provided explicit directions for obtaining declarations from former employees, or if that was not feasible, Respondent’s counsel, and for preparing certifications about the search of the identified accounts.

I did not agree with the Complainant’s argument that the Respondent used inappropriate methods of filtering the emails that were produced, or that the certifications as to how the culling was accomplished were insufficient. I noted that as a general rule, it was appropriate to leave some discretion to the individual employees required to search their emails, especially here, where the documents retrieved using the initial search criteria were voluminous. As a practical matter, I found that the criteria used by Mr. Helms and Mr. Michael were sufficient to identify the emails responsive to her discovery request, and that Ms. Washington sufficiently described the criteria she used to further narrow the documents. I did not require the Respondent to conduct any further searches with versions of the Complainant’s name.

Finally, the Complainant again raised objections about the Respondent's claim that Ms. Vickers' emails were no longer available. In response to my July 19, 2012 Order, the Respondent produced a declaration from Mr. Paul Frazier, with the Office of Environmental Information. Mr. Frazier stated that his office processed a request from Ms. Carolyn Dunston, in the Office of Resource Conservation and Recovery, to delete Ms. Vickers' email inventory on June 30, 2010, which was done by a contract employee on August 3, 2010. A duplicate delete request from the program office noted that June 23, 2010 was Ms. Vickers' retirement date. Mr. Frazier stated that as of June 2010, standard Agency procedure was for a person in the departing employee's program office, such as Ms. Dunston, to determine if there was an outstanding litigation hold on the departing employee's email inventory, and if not, to complete a form instructing OEI to delete the inventory. Regular practice on the receipt of such a request would be to direct the delete request to a contractor. The OEI did not rely on any regulatory or statutory authority, and Mr. Frazier knew of no requirement for the Agency to preserve a departing employee's email inventory.

I noted that the Respondent's claim that it had fully complied with my Order was technically correct. But it did not address the question of why there was no litigation hold on this email inventory, or who would have been responsible for placing such a hold. The search contemplated in my July 11, 2012 Order was not meant to answer this question, and I stated that there would be no further discovery in this regard.

Mr. Frazier's affidavit did not answer the question of whether the "substantial volume" of Ms. Vickers' email inventory that would qualify as documents that must be preserved by the FRA had in fact been preserved in hard copy or other electronic versions. The Respondent speculated that emails Ms. Vickers elected to preserve in hard copy would "almost assuredly" have been sent to the Federal Records Center, but that it would be unduly burdensome to search those records as required by my order. There was no indication that the Respondent made any attempt to verify this speculation, or to determine if Ms. Vickers in fact elected to preserve any such emails in hard copy. I directed the Respondent to provide a certification by counsel stating whether any of Ms. Vickers' emails were preserved in hard copy or other electronic versions, and if so, to search them in compliance with my December 19, 2012 Order. I also directed the Respondent to identify the second person who ordered the deletion of Ms. Vickers' emails, and to provide a sworn declaration indicating the applicable statutory or regulatory authority under which that order was made.

Once again, I noted the Respondent's continued insistence, despite my repeated instructions to the contrary, that the universe of relevant evidence came solely from Mr. Dellinger and Ms. Rudzinski. The Respondent claimed that Mr. Dellinger did not make up a "vicious lie," and that the death threat actually happened. Thus, reasoned the Respondent, Mr. Dellinger was not motivated by a retaliatory animus, and since there was only one other decision-making actor in this "soap opera," Ms. Rudzinski, it was really only her communications that could shed light on what motivated her. She had no substantive communications about the Complainant until she was appointed as the deciding official.

I again reminded the Respondent that it was for the factfinder to determine if the death threat "actually happened." More importantly, a determination that it "actually happened" would

not be dispositive, and did not address the broader issue of whether the Complainant's protected activity was a factor in the decision to fire her, and whether the allegation of her making such a threat was a pretext. I noted that I had repeatedly advised the Respondent, and the Respondent had repeatedly ignored, that the universe of relevant evidence was not limited to information in the hands of Mr. Dellinger and Ms. Rudzinski.

I provided the Respondent 21 days to comply with my directives, at which time I anticipated providing the parties with a schedule for the submission of dispositive motions.

Finally, after various requests for extension were granted, the Respondent's final production was completed by January 7, 2014. By that time, the Respondent had produced, after Mr. Winick's repeated representations that discovery was complete, and after the suspension of the hearing, an additional **900-plus** documents responsive to the Complainant's discovery requests. Or, as the Respondent characterizes it, "some additional discovery." Respondent's Opposition at 2.

The Respondent's casual dismissal of the significance and impact of its concededly belated disclosure of these documents is stupefying. Thus, the Respondent argues that **only** 85 of the emails were related to the Complainant's "disclosures," with **only** 16 sent from or copied to Mr. Dellinger, **only** 6 sent from or copied to Ms. Vickers, and **only** 1 sent from or copied to Ms. Rudzinski. I find that, on its face, the Respondent's failure to produce these emails from key witnesses is anything but trivial. Moreover, it does not take into account the Respondent's failure to produce emails related to other aspects of the Complainant's claim. Nor does it take into account the Respondent's failure to produce all five versions of Ms. Rudzinski's draft decision, which triggered the subsequent investigation into the Respondent's failure to provide discovery.

Nor do I agree with the Respondent's claim that its "extensive post-hearing discovery collection resulted in hardly anything that was actually material to this case." Respondent's Opposition at 18. I note that, although I have made it clear that anyone in the Complainant's chain of command could have played some role in her removal, and specifically directed a search with respect to twenty individuals, the Respondent continues to rely on its claim that only documents from Mr. Dellinger, Ms. Rudzinski, and Ms. Vickers are relevant in this claim.¹⁴

It is not at all relevant, as the Respondent seems to believe, that the Complainant was reinstated, at the direction of the MSPB, with full back pay and benefits.¹⁵ The fact that the MSPB ordered the Complainant reinstated, after finding that she had been denied due process in the removal proceedings, may bear on the issue of any appropriate damages. But it does not change the fact that the Complainant suffered an adverse action when she was fired in December

¹⁴ See the Complainant's Motion for Sanctions at 80-91, setting out in detail the documents produced after the hearing that bear on issues relevant to this claim.

¹⁵ When the Complainant was reinstated, the Respondent deducted the entirety of the annual leave that had been paid at the time of her separation in a lump sum, contrary to its customary practice of deducting this sum over a period of several paychecks in order to avoid hardship, with the result that the Complainant received no salary for a number of weeks. According to the Respondent, this mistake was inadvertent.

2010. Nor does it have any bearing on the extreme prejudice that has accrued to the Complainant as a result of the Respondent's discovery recalcitrance.

Destruction of Ms. Vickers' Documents

I find that the Respondent willfully failed to preserve Ms. Vickers' emails when she retired, despite the fact that there was pending litigation in which her testimony could play a key role. There is no indication that the Respondent made any effort whatsoever to assure the preservation of Ms. Vickers' emails (or of any emails from any other potential witnesses either).

As the Complainant has correctly stated, the Respondent's responses to her discovery requests, as well as the Court's Orders compelling discovery, were shifting, contradictory, and often inaccurate. Ms. Vickers directed that a proposed removal of the Complainant be drafted on May 10, 2010, and a draft removal document was completed in early June 2010. Ms. Vickers retired on June 23, 2010. On June 30, and July 1, 2010, there were three separate orders from the Office of Resource Conservation and Recovery (ORCR) for the destruction of Ms. Vickers' email inventory.

The Respondent issued its notice of proposed removal of the Complainant on July 9, 2010; on July 14, 2010, the Complainant filed a request for a stay of this action with the Office of Special Counsel (OSC), and the Merit Systems Protection Board (MSPB), arguing that it was illegal retaliation for her protected whistleblowing.¹⁶ The Respondent filed its response opposing the Complainant's request for a stay with the MSPB and OSC on July 21, 2010. On August 31, 2010, the OSC made a request to the Respondent for the records related to the Complainant's removal proposal. In his September 28, 2010 response to the OSC, Mr. Winick listed Ms. Vickers as a person who was involved in the decision to propose the Complainant's removal; she was also listed as a person who was involved in proposing discipline of the Complainant in 2009.

The destruction of Ms. Vickers' email inventory was carried out on August 3, 2010; backup files were retained for 90 days. These backup tapes were destroyed on or about November 1, 2010. At the time that these actions were taken, the Respondent was actually participating in litigation regarding the Complainant's proposed removal.

When the Complainant served her discovery requests, asking for documents reflecting communications to or from Ms. Vickers and employees of the Respondent about her before May 3, 2010, the Respondent answered that Ms. Vickers did not receive or generate any communications about the Complainant's whistleblowing, a claim that has turned out to be false. It became apparent at Mr. Winick's deposition that he made no real attempt to search for documents responsive to the Complainant's document requests relating to Ms. Vickers.

Thus, Mr. Winick testified that he asked Ms. Vickers what her role was in the removal proceeding, and whether she had any documents. Based on her response, he concluded that her role was limited, and that she had no relevant documents. Because Ms. Vickers had been retired

¹⁶ The Complainant had submitted a Joint Filing to the OSC and MSPB on June 2, 2010, about her claims of whistleblower retaliation in connection with the fragrance issue before her proposed removal.

since June 2010, she could not have searched her work email to verify that she had generated no responsive documents. Mr. Winick did not himself search, or ask anyone else to search for records Ms. Vickers might have had regarding the Complainant's removal, related issues, and whistleblowing.

After I issued my July 11, 2012 Order requiring the Respondent to search emails, which included Ms. Vickers, Mr. Winick responded that the Respondent was unable to conduct this search because it did not have any of her email inventory. He speculated as to the possible reasons for this, but did not provide any facts as to how or why Ms. Vickers' emails were destroyed.

Nor did Mr. Winick offer anything to support his claim that the Respondent began "routinely" maintaining email records of departed employees within the last few years, and either Ms. Vickers' retirement predated that "routine," or the process was not perfect, and her email traffic was "inadvertently lost." As it turned out, Ms. Vickers' emails were not "inadvertently lost;" there were three separate requests to destroy her emails.

As the Complainant has pointed out, putting aside the impact of a litigation hold, the Federal Records Act (FRA) required the preservation of many of Ms. Vickers' records, long before her retirement from the Respondent. The Respondent has not provided any explanation as to why none of her records were preserved pursuant to this statute.

As I noted in my December 19, 2012 Order on the Complainant's Fourth Motion to Compel, the Respondent's reliance on Mr. Winick's discussion with Ms. Vickers, where he learned that except for the memorandum addressing the Complainant's immediate placement on administrative leave, she did not generate any written materials about "that matter" was insufficient. This unsworn report of a discussion with Ms. Vickers concerned only the narrow question of whether she had any written communications about the removal proceeding. It did not concern the question of whether Ms. Vickers had any communications about the Complainant that could have suggested a retaliatory motive.

The evidence already adduced shows that Ms. Vickers was aware of the Complainant's protected disclosures, and was involved in responding to them. Other employees produced email communications with Ms. Vickers about the Complainant's protected activities. In addition, as the Complainant has pointed out, Ms. Vickers was previously involved, on more than one occasion, in proposed disciplinary activity in connection with the Complainant's protected disclosures.

Yet the Respondent continues to claim that Ms. Vickers had no "relevant" evidence to offer, and argues that the Complainant must think so too, because she did not "bother" to take Ms. Vickers' deposition. Respondent's Opposition at 15-16. As I noted previously in response to this claim, whether the Complainant took Ms. Vickers' deposition is irrelevant to the Respondent's discovery obligations, and its duty to comply with the Court's Orders. In addition, as the Complainant has noted, at the time she made the decision not to take Ms. Vickers' deposition, she was not aware that the Respondent had ordered that Ms. Vickers' emails be

destroyed, or that emails produced after the hearing would show that Ms. Vickers was aware of the Complainant's protected activities.¹⁷

Once again, the Respondent's arguments reflect its narrow perception of what was potentially relevant and discoverable in this claim, and its continued disregard for the Court's explicit instructions otherwise. Ms. Vickers was the first official to prepare a draft of a removal decision. The Complainant was not limited to those documents that reflect Ms. Vickers' involvement in the dismissal process. She was entitled to all documents that might bear on the issue of whether her protected activities were a contributing factor in her dismissal. This would include documents that bear on Ms. Vickers' knowledge of those protected activities.

As I noted in my December 19, 2012 Order, the Respondent's claim that it was not until the Complainant made her discovery requests in this claim that it would have had any reason to consider preserving Ms. Vickers' emails reflected a disregard for its obligation to preserve these documents in the face of the institution of litigation. The Respondent was clearly aware that Ms. Vickers played an important role in the Complainant's disciplinary process, and that there were not one, but two actions initiated by the Complainant in connection with that process. Regardless of when the Complainant served her discovery requests in this claim, the Respondent was under an obligation to preserve these documents, as of at least July 14, 2010, when the Complainant requested a stay pending resolution of her whistleblower claims.

I directed the Respondent to provide a sworn statement or declaration from an appropriate authority stating what was done with Ms. Vickers' emails on her retirement in June 2010, and if they were destroyed, the identity of the person who destroyed them, the date on which they were destroyed, and the statutory or regulatory authority under which they were destroyed.

The Respondent provided a declaration from Mr. Paul Frazier, the Chief of the Infrastructure Operations Branch, OEI, on February 14, 2013, stating that if a program office, such as OSWER, requested the deletion of email records, there was no policy or regulation that would have prohibited it at the time Ms. Vickers retired. Mr. Frazier stated that OEI did not rely on any regulatory or statutory authority when it directed the contractor to delete Ms. Vickers' email inventory, and that generally, if particular records were not expressly required to be preserved, the Agency could delete them. He was not aware of any statutory or regulatory authority requiring an Agency to preserve a departing employee's emails.

Subsequently, Ms. Lais Washington, counsel for the Respondent, advised the Complainant that Mr. Frazier's declaration did not address the legal or policy requirements to preserve Ms. Vickers' emails in another electronic or paper form under the FRA, and it would be expected that a substantial volume of her emails would qualify as documents that were required to be preserved under the FRA. Ms. Washington claimed that Ms. Vickers chose not to save any records in the Respondent's Enterprise Content Management System archive system.

¹⁷ I note that the Court does not have the authority to subpoena a retired federal employee to provide deposition testimony.

In her March 27, 2013 Motion to Clarify, the Complainant pointed out that there were policies in place before June 2010 directing the preservation of records of departing officials, specifically the FRA and NARA. In response, Mr. Winick claimed that Ms. Vickers preserved hard copies of her email inventory and other documents required to be preserved under the FRA.¹⁸ On May 13, 2013, I issued an Order directing the Respondent to produce a certification from counsel as to whether any of Ms. Vickers' emails were preserved in hard copy or other electronic versions, and if so, to search them in compliance with my December 29, 2012 Order.

Ms. Washington submitted three declarations on August 8, 2013, addressing the disposition of Mrs. Vickers' emails. She stated that Ms. Vickers advised her that she used no email accounts to conduct Agency business other than her official account. Mr. Prince told Ms. Washington that he had learned from OSWER records management staff that none of Ms. Vickers' hard copy records were sent to the Federal Records Center, and that she did not leave any hard copies of emails. Ms. Washington also stated that she was informed that after the initial destruction of Ms. Vickers' emails on August 3, 2010, the backups were retained for 90 days. In an Amended Declaration submitted on September 12, 2013, Ms. Washington advised that Mr. Prince told her that there were no backups of the emails.

The Respondent has admitted that the Federal Records Act would have required that a substantial volume of Ms. Vickers' emails be preserved (Letter from Ms. Washington to Complainant dated March 4, 2013). But whether the FRA was actually violated or not is not necessary for the resolution of the Complainant's motion. The Complainant is not seeking a remedy under the FRA. The existence and applicability of laws regarding the preservation of Ms. Vickers' emails, and the failure of the Respondent to take any steps to abide by these laws, certainly leads to the rational inference that the wholesale destruction of Mr. Vickers' emails was not in the "ordinary course of business."

There can be no dispute that Ms. Vickers' documents and emails would have been relevant and helpful to the Complainant's claim. Ms. Vickers was the first official to determine that the Complainant should be removed, and to direct the drafting of a proposed removal. She did so before any investigation of the alleged death threat, before hearing the Complainant's side of the story, before the appointment of a proposing official, and before any analysis of the appropriate penalty. Ms. Vickers was also involved in earlier discipline and attempts to discipline the Complainant, and she was aware of the Complainant's protected activity. All of this is circumstantial evidence that could support the Complainant's claims of retaliation and pretext.

There is nothing to support the Respondent's speculation that all of the "relevant" emails in the destroyed files have already been produced in connection with the twenty other persons whose emails were searched pursuant to the Court's orders. Nor has the Respondent claimed that discovery from the other email accounts would provide the totality of what it destroyed. It is simply not possible to say what might have been in the destroyed emails. Given the circumstances, it is appropriate to draw the inference that they were destroyed because they would have hurt the Respondent's case.

¹⁸ In fact, Ms. Vickers preserved no hard copies of her email inventory.

The duty to preserve material evidence arises not only during litigation, but also extends to the period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation. *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001). One would not have to be clairvoyant to foresee that the dismissal of a senior employee (one who had previously brought retaliation claims against the Respondent) could result in litigation in some form, and thus it would be important to preserve documents generated by key players in that process. Indeed, the Respondent was aware that the Complainant had requested a stay of the proposed removal from the MSPB and OSC on July 14, 2010. Yet the Respondent deleted Ms. Vickers' emails on August 3, 2010.

The OSC requested that the Respondent produce records regarding the Complainant's proposed removal on August 31, 2010, clearly putting the Respondent on notice of the relevance of Ms. Vickers' records. But the Respondent then destroyed the backup files of Ms. Vickers' emails.

From the moment that the Complainant indicated that she intended to dispute her dismissal, the Respondent was under a duty to assure that any documents that could be relevant to a resolution of her claim were preserved. There is no indication that any instructions were ever given to Respondent's employees to preserve documents, paper or electronic, or to its computer staff to stop routine erasure of backup tapes or to preserve email backup tapes. Indeed, the only instructions that were given were to destroy Ms. Vickers' emails and the backup tapes of those emails.

Title 29 C.F.R. § 18.1(a) provides that the Rules of Civil Procedure for the District Court of the United States shall be applied in any situation not provided for or controlled by the rules, or by any statute, executive order, or regulation. As the Administrative Review Board has observed, the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges governing discovery are substantially the same as those of the Federal Rules of Civil Procedure. *Hasan v. Burns & Roe Enterprises, Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-6 (ARB 2001).

Courts have routinely found that it is appropriate to impose sanctions for spoliation of evidence. The Court in *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (D.N.Y. 2003) held that the parties to an action involving an EEOC charge of discrimination had a duty to preserve backup tapes containing email correspondence of key employees potentially relevant to the suit. The authority to sanction litigants for destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence, arises jointly under the Federal Rules of Civil Procedure and the court's own inherent powers.

The Court in *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776 (2nd Cir. 1999), held that a federal district court may impose sanctions under Fed.R.Civ. P. 37(b) when a party spoliates evidence in violation of a court order, or even without a discovery order, in the exercise of its inherent power to control litigation.

Courts have held that the duty to preserve evidence commences when a party receives a complaint. *Fujitsu Ltd. v. Federal Express Corp.*, at 436; *Kronisch v. United States*, 150 F.3d

112, 126 (2nd Cir. 1998); *Zubulake v. UBS Warburg LLC*, *supra*. The Court in *Hudson Transit Lines v. Zozichowski*, 142 F.R.D. 68 (S.D.N.Y. 1991) set out the rule on when a litigant's obligation to preserve evidence arises:

Sanctions may be imposed on a litigant who is on notice that documents and information in its possession are relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence, and destroys such documents and information. While a litigant is under no duty to keep or retain every document in its possession once a complaint is filed, it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.

Hudson Transit Lines v. Zozichowski, *supra*, at 72.

In *Zubulake v. UBS Warburg LLC*, *supra*, Judge Scheindlin stated that "Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents. *Id.* at 218.

Here, the Respondent's duty to preserve potentially relevant documents began at the latest when the Complainant filed her request for a stay on July 14, 2010, clearly putting the Respondent on notice that she intended to dispute her dismissal on the grounds that she had been retaliated against for her whistleblowing activities.¹⁹ This obligation encompassed all documents relevant to the central issues in this claim, including the Complainant's involvement in protected activity, as well as the events leading up to her termination. This obligation was an affirmative one. As the Court stated in *Hudson Transit Lines*, a party and its managers have an affirmative duty to communicate to employees the type of information that is relevant and the necessity of its preservation.

This obligation ran first to counsel, who had a duty to advise his client of the type of information potentially relevant to the lawsuit and of the necessity of preventing its destruction. *See Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co.*, 109 F.R.D. 12, 18 & n* (D.Neb. 1983). Similarly, the defendants' corporate managers were responsible for conveying this information to the relevant employees. *Id.* It is no defense to suggest, as the defendant attempts, that particular employees were not on notice. To hold otherwise would permit an agency, corporate officer, or legal department to shield itself from discovery obligations by keeping its employees ignorant. The obligation to retain discoverable materials is an affirmative one; it requires that the agency or corporate officers having notice of discovery obligations communicate those obligations to

¹⁹ On the same date, the Complainant filed an appeal challenging the Respondent's basis for her removal before the MSPB, in which she raised an affirmative defense of whistleblower retaliation under the Whistleblower Protection Act.

employees in possession of discoverable materials. *National Ass'n of Radiation Survivors*, 115 F.R.D. at 557-58 (footnote omitted).

Hudson Transit Lines, supra, at 73.

The Respondent's argument is essentially that Ms. Vickers' emails were destroyed in the normal course of business.²⁰ As discussed above, once the Complainant put the Respondent on notice that she intended to dispute her dismissal, the Respondent was not entitled to rely on its "normal course of business," but was under an *affirmative* duty to take steps to preserve evidence of persons who could be anticipated to be key witnesses in that claim. Clearly Ms. Vickers, who drafted the original notice of dismissal, was such a "key witness." But no attempt whatsoever was made to assure the preservation of her emails, let alone the emails of any other employee who could reasonably be anticipated to be a key witness.

Indeed, there is nothing to suggest that the Respondent made *any* effort to even identify those employees whose emails might be discoverable, and to instruct them to retain appropriate documents and preserve backup tapes. As repeatedly demonstrated during the course of these proceedings, the Respondent did not take its discovery responsibilities seriously, and ignored and failed to comply with my explicit discovery instructions. While Mr. Winick, as lead counsel, may have been responsible for seeing that this was done, he was not the only person in the Respondent's legal office, and the Respondent cannot escape liability for its lapses by placing the blame on him.

Compounding the failure to preserve Ms. Vickers' documents, it now appears that Mr. Winick misled both the Complainant and the Court when he stated that Ms. Vickers told him that her sole role in the Complainant's removal was the placement of the Complainant on administrative leave. See, Respondent's Response to Complainant's Third Motion to Compel. Ms. Vickers herself, in her declaration (as confirmed by Mr. Prince and Mr. Dellinger), confirmed that she determined that the Complainant should be removed from federal service, and ordered that a proposed removal notice be drafted immediately. She was also copied on an email chain regarding the preparation of a proposed removal notice, and the acquisition of the Complainant's statement. And contrary to Mr. Winick's claim, Ms. Vickers also exchanged communications about the Complainant's whistleblowing activities.

Nor can the Respondent divest itself of culpability for the destruction of Ms. Vickers' emails by shifting the blame to the Office of General Counsel. The Respondent argues that the OGC would ordinarily direct a litigation hold, but that this office had no knowledge of Ms. Vickers' involvement in the removal process at the time the documents were destroyed. Respondent's Opposition at 13. This is manifestly false – the OGC was aware of Ms. Vickers' involvement no later than Mr. Winick's September 28, 2010 response to its document request, in which he listed Ms. Vickers as a person involved in the decision to propose the Complainant's removal.

²⁰ Although the Respondent provided affidavits describing the process by which Ms. Vickers' emails were destroyed, there is nothing to establish that this was in fact the "normal course of business." Moreover, the Respondent has acknowledged that at least some of Ms. Vickers' records were required to be retained under the Federal Records Act.

But whether the OGC was aware of Ms. Vickers' involvement or not is not relevant. The Respondent, through its managers and counsel, clearly were aware of Ms. Vickers' role, as early as May 10, 2010, when she met with Mr. Dellinger and Mr. Prince and directed that a proposed removal decision be drafted.

Nor is it dispositive that Ms. Vickers' records were destroyed by persons not directly involved in the Complainant's removal. As the Complainant has pointed out, she did not have the opportunity to pursue discovery on the issue of who directed the persons who ordered and carried out the destruction; it is an open question as to who exactly was involved in this process. But the Respondent had control over this evidence, and the persons who carried out the document destruction were its employees or contractors. The Respondent is responsible for their destruction. *See, K-Con Bldg. Sys. V. U.S.*, 106 Fed.Cl. 654, 664 (Fed. Cl. 2012 (If a party with control over evidence allows it to be discarded, the disposal of the evidence is attributable to that party, regardless of who actually discarded the evidence)).

Duty of Candor

The Court has the inherent power to sanction a party for conduct that involves deceit, and erodes the integrity of the court process.

At the hearing, Mr. Winick explicitly stated that he did not make any changes to the draft decision document Ms. Rudzinski provided to him, and argued that because this was the only document that had not been produced, it was not significant. I advised Mr. Winick that, whether or not he made any changes on this document, he was required to produce it in discovery. As it turned out, Mr. Winick's statements to the Court were demonstrably false. On December 10, 2010, Ms. Rudzinski sent a draft decision document dated December 8, 2010 to Mr. Winick for review (EX 1). Mr. Winick sent the draft back to Ms. Rudzinski with his edits, clearly reflecting that Mr. Winick, contrary to his representations to the Court, made changes to Ms. Rudzinski's draft (EX 2).

Nor was Mr. Winick's representation that only the one draft of this document had not been produced truthful. On December 14, 2010, Ms. Rudzinski emailed Mr. Guerrero, Mr. Winick, Ms. Lawrence, and Mr. White with another version of the removal decision, incorporating Mr. Winick's comments (EX 3). On December 14, 2010, Mr. Guerrero also provided his edits and comments on the removal decision to Mr. Winick (EX 3). And Mr. Winick sent Ms. Rudzinski yet another draft of the removal decision on December 15, 2010, which he and Mr. Guerrero had reviewed and approved (EX 4).²¹

It is now abundantly clear that Mr. Winick was very closely involved in the process that led up to the Complainant's dismissal, including the preparation of the documentation to support

²¹ Mr. Winick noted that the deadline for the Complainant's response to the Oral Reply was close of business on December 20, 2010, and he recommended that Ms. Rudzinski issue the removal decision on December 21, 2010 (EX 4).

that dismissal.²² Under those circumstances, it is unacceptable that Mr. Winick did not identify these drafts or produce them, and worse, made misrepresentations to the Court about their existence.²³

In this regard, the Complainant does not argue that Mr. Winick was not allowed to advise Ms. Rudzinski or to assist her in drafting documents. The problem is that Mr. Winick withheld documents and emails that reflected his involvement, concealed their existence by not identifying them on a privilege log, and misrepresented to the Court and the Complainant that the Respondent had complied with its discovery obligations.²⁴ The ultimate disclosure of these documents reflects that, *inter alia*, Mr. Winick drafted a removal decision document before any potential witnesses had been identified and interviewed, contrary to his advice to Ms. Rudzinski, and which Ms. Rudzinski herself described as “too vitriolic.” (EX 11). He also pressed Ms. Rudzinski to issue the removal decision before she was ready to do so, and advised her in a manner that she characterized as abusive (EX 12).²⁵ All of this bears directly on the issue of retaliatory animus and irregular procedure, and whether the Complainant’s protected activity was a contributing factor in her termination, and is highly relevant to the issues presented in this claim.

Indeed, many of the wrongly withheld emails reflect Mr. Winick’s own hostile attitude to the Complainant, as well as the use of arguably irregular procedures in her termination.²⁶ Even if Mr. Winick believed that his communications were privileged, he was specifically and repeatedly ordered to list any such documents on a privilege log so that the Court could make a determination on whether they were protected from disclosure. By not doing so, Mr. Winick concealed the existence of these documents.

²² For example, in his 16 page August 20, 2010 Draft of the “Deciding Official’s Decision on Proposed Removal Action of Cate Jenkins,” which he forwarded to Ms. Rudzinski, Mr. Winick discussed at length his assessment of the credibility of Mr. Dellinger, as opposed to the Complainant. His draft also included an acknowledgement that Mr. Dellinger’s late reporting of the threat bore on his credibility, but he then set out “testimony” by Mr. Dellinger explaining why he delayed reporting the threat. When he was later challenged on this by Ms. Rudzinski, Mr. Winick was forced to acknowledge that Mr. Dellinger did not so testify; Mr. Dellinger acknowledged that these were not the reasons for his delay in reporting the threat. CX 154. In addition, Mr. Winick’s Draft is the first appearance of the language sanctioning the Complainant for “conduct generally criminal, infamous, dishonest, immoral, or notoriously disgraceful,” justifying her removal.

²³ Mr. Winick also lied to the Court at the hearing when he claimed that he had provided all documents from Mr. Dellinger in response to discovery requests and the Court’s Orders. As the Complainant has noted, the post-hearing search produced 35 additional responsive documents that had been previously withheld.

²⁴ The Complainant has cited to a number of emails produced after the hearing was suspended, reflecting Mr. Winick’s input into Ms. Rudzinski’s determination and his animus toward the Complainant. See Complainant’s Motion at 15.

²⁵ The withheld documents reflect that Mr. Winick was “disgusted beyond measure” at Ms. Rudzinski’s delay in issuing the removal decisions. EX 11. He characterized the Complainant’s response to her proposed removal, and her retaliation argument and whistleblowing activities, as a “diatribe,” “surreal,” “absurd,” and her retaliation arguments and whistleblowing as “absurd,” “obscene,” and the Agency’s collective reaction to the Complainant’s filings with the OSC and MSPB as “who gives a sh__.” EX 9, 10, 12.

²⁶ Although Ms. Rudzinski testified that in drafting her removal decision, she received no input on the question of the Complainant’s credibility from anyone but the Complainant, the August 20, 2010 draft prepared by Mr. Winick provides an extensive discussion of the credibility of Mr. Dellinger and Dr. Jenkins. See also, EX 6, 10, 11, and 17. Thus, in addition to credibility issues involving Mr. Dellinger and Dr. Jenkins, the only known witnesses to the alleged threat, the credibility or lack thereof of the disciplinary actors, who are supposed to be independent decision makers providing due process, has been called into question.

The Complainant has also pointed out that the Respondent's claim, in its September 21, 2011 response to her motion to compel, that there were no other documents related to the Complainant's World Trade Center disclosures was false, as shown by the disclosures the Respondent was forced to make after the hearing was suspended. In that response, Mr. Winick stated that

With respect to Complainant's skepticism of the Agency's claim that there exist no other responsive documents, what her attitude reflects is her unwillingness to accept how insignificant her Corrosivity Characteristic regulation allegations were to Mr. Dellinger's office and the Agency, generally.

It is clear that Mr. Winick wished to convey the impression that the Complainant's activities were of little or no concern to the Respondent, which in turn would help to establish that her dismissal was completely unrelated to her disclosures. The voluminous documents produced after the hearing was suspended suggest that, while the Complainant's activities may not have been a matter of dire concern for the Respondent, neither were they the petty annoyances that Mr. Winick wished them to seem to be.

The Respondent's Opposition to the Complainant's motion for sanctions suggests that the Respondent continues to attempt to convey the impression that the Complainant's protected activities were but a trifle. Thus, the Respondent argues that the documents it failed to disclose showing the reactions of various officials to the Complainant's reports to the FBI and Congress could be seen by the factfinder, not as reflecting retaliatory motive or animus, but as simply showing that the officials were "vexed" and "annoyed" at the amount of time being devoted to managing the press and other inquiries regarding the Complainant's "personal agenda." Respondent's Opposition at 8. As the Complainant has pointed out, her "personal agenda" (*i.e.*, her protected activity) was reporting public health dangers and EPA fraud regarding environmental contaminants to the FBI and Congress. Complainant's Reply at 18. But whether the Complainant's disclosures were trivial or not – a question to be decided by the Court, not the Respondent – the Complainant was entitled to these documents, which could bear on the issue of animus and retaliatory motive. The Court was certainly entitled to their production in response to its orders.

As the Respondent points out, it is entirely proper for an attorney to prepare his witnesses for their testimony in a hearing. But witness preparation should not cross the line to witness coaching, or suggestions on how a witness should testify to benefit the client. Yet before Mr. Dellinger's deposition, Mr. Winick told him not to feel "compelled" to review the "wealth of material" about the Complainant's whistleblowing before the deposition, and the more nonchalant he could be about her protected activity ("i.e., the 'I could not really be bothered too much to focus on it, it was not relevant to me' approach"), the better.²⁷ However, the emails previously withheld, and produced after the hearing, show that Mr. Dellinger was involved in responding to his superiors, and directing his subordinates in response to the Complainant's reports to Congress and the FBI, in exploring the possibility of disciplining the Complainant, and in preparing a rebuttal to her allegations.

²⁷ EX 26, 4-14-11 email from Mr. Winick to Mr. Dellinger.

In the Respondent's January 5, 2012 Motion for Summary Judgment, Mr. Winick argued that because the Complainant did not provide any "credible evidence" that Mr. Dellinger fabricated the alleged threat, there was no "genuine dispute" that she did in fact make the threat. But Mr. Winick knew that he had talked with Mr. Dellinger by telephone on May 3, 2010, after the Complainant allegedly made the threat, and that Mr. Dellinger did not mention it. Mr. Winick also knew that he and Mr. Dellinger had exchanged emails on May 3 and 4, 2010, in which they discussed Mr. Dellinger's interactions with the Complainant on the day the threat allegedly occurred; again, Mr. Dellinger did not mention any threat. CX 143, 144.

The documents previously withheld, and not produced until after the hearing, strongly suggest that Mr. Winick may have crossed the line in his advice and assistance to Mr. Dellinger. Mr. Winick drafted Mr. Dellinger's declaration for Ms. Rudzinski, including factual statements that were not within Mr. Dellinger's knowledge concerning the Complainant's disclosures to the FBI (stating that they were logically and factually flawed, and had no meaning whatsoever) and a statement that it was his understanding that other EPA employees had been removed for violent threats, when in fact Mr. Dellinger did not know of any such incident, or confirm that it was true. CX 116 (Mr. Dellinger's deposition).

The Respondent's attempt to characterize Mr. Winick's failure to disclose the existence of relevant documents, and whether they had been turned over to the Complainant, as a mere "error," based on his "extremely narrow view" of what would be considered relevant, and not fraud or material misrepresentation, is misplaced, to say the least. As an example, the Complainant has pointed to Mr. Winick's representation to her and the Court that all emails responsive to her discovery requests had been produced, including those of Mr. Breen and Mr. Elliott. But not only did Mr. Winick fail to produce those emails in response to the Complainant's discovery requests, he failed to produce them after the Court explicitly ordered that the Respondent search and produce responsive records from the emails of Mr. Breen and Mr. Elliott, among others. Indeed, only in response to my *third* and *fourth* Orders to compel did the Respondent produce documents, 75 to be exact, relating to Mr. Elliott. The Respondent did not produce any documents relating to Mr. Breen, although post-hearing discovery proceedings resulted in the production of numerous communications between Mr. Breen and OSWER officials about the Complainant's disclosures. Not only were these documents responsive to the Complainant's discovery requests, they were explicitly directed to be produced by the Court. There was no room for any judgment calls by the Respondent.²⁸ By not searching these records as directed by the Court, and producing the responsive documents, Mr. Winick was violating the Court's orders.

Mr. Winick also claimed to the Court that Ms. Rudzinski was a neutral and unbiased witness, because she did not consult with anyone about the Complainant's proposed removal. Mr. Winick was fully aware that he drafted the first removal decision in August 2010, in which he added a charge that the Complainant had engaged in conduct that was "generally criminal,

²⁸ The Complainant is correct, that once the Court ordered the Respondent to search Mr. Breen's and Mr. Elliott's emails and produce documents responsive to her discovery requests, it no longer mattered how narrow Mr. Winick's view of relevance was. The Respondent's obligation was to comply with the Court's orders. Complainant's Reply at 3.

infamous, dishonest, immoral, or notoriously disgraceful.”²⁹ Indeed, Ms. Rudzinski testified that she did not make the decision to remove the Complainant, or start drafting her removal decision, until November 2010; her draft removal decisions were prepared in early December 2010. (Tr. 793, 795).³⁰ Mr. Winick also lobbied Ms. Rudzinski to reject the Complainant’s side of the story. (EX 2, 15, 16, 17). It was not Ms. Rudzinski, acting alone and in a vacuum, who made the removal decision; Mr. Winick also had a big hand in that process. As the Complainant notes, Mr. Winick’s draft removal decision, charging that the Complainant was guilty of “generally criminal, infamous, dishonest, immoral, or notoriously disgraceful” conduct and should be removed, was sent to Ms. Rudzinski before she had even determined whether removal was appropriate. Complainant’s Reply at 7.³¹

A rational inference is that Mr. Winick, having already concluded that the Complainant should be removed, did everything he could to see that the official responsible for carrying out that process, Ms. Rudzinski, conformed to his wishes.³²

The Respondent argues that it is “preposterous” to suggest that Mr. Winick was perpetrating a fraud when he made claims that Ms. Rudzinski was solely responsible for the Complainant’s removal, because she was the only “deciding official.” As the Complainant points out, such a claim is highly misleading – the Respondent’s own documents reflect that Ms. Vickers was the first person to direct the Complainant’s removal; that Mr. Michaels and Mr. Dellinger acted as proposing officials; and that Mr. Winick had considerable influence on Ms. Rudzinski’s final decision, including a totally new charge that was not included in the proposed removal decision, which the MSPB determined violated the Complainant’s due process rights. While it may be true that Ms. Rudzinski was the only “deciding” official of record, she was not “solely responsible” for the removal decision.

In determining whether a fraud was perpetrated on the Court, it is not dispositive that the Court was not “deceived” about the underlying evidence in the claim.³³ But the Court was repeatedly deceived by the Respondent about its compliance with its discovery obligations, as well as the Court’s orders. Had the Court contemporaneously known the extent and breadth of

²⁹ This charge was not included in the July 9, 2010 Notice of Proposed Removal. Because the Complainant did not have the opportunity to respond to this charge before a final decision was made, the MSPB concluded that she had been denied due process, and vacated the removal decision.

³⁰ The Complainant notes that Mr. Winick allowed Ms. Rudzinski to testify in her deposition that she was the author of this language. Complainant’s Motion at 7.

³¹ In an email forwarding Ms. Rudzinski’s draft removal decision to a colleague, Mr. Winick noted that it essentially tracked the one he provided to her in August. EX 2.

³² It seems that the relationship between Mr. Winick and Ms. Rudzinski was strained on December 6, 2010, when Mr. Winick demanded that Ms. Rudzinski meet with him that day, and told her that he wanted the removal decision issued that day. Ms. Rudzinski cancelled the meeting, telling Mr. Winick that he had made it clear that she could not rely on her attorney (Mr. Winick) for assistance, but only abuse, and informed him that she would finish her removal decision by that Friday. After Ms. Rudzinski cancelled the meeting, Mr. Winick emailed Mr. Prince, Mr. White, and Ms. Lawrence that he was “disgusted beyond measure” by Ms. Rudzinski’s delay, and suggested intervention by the General Counsel or Deputy General Counsel. EX 11.

³³ As the Complainant has pointed out, the Court’s determination on its motion does not depend on any credibility findings. There is no dispute that the Respondent failed to produce hundreds of documents in response to discovery and the Court’s orders. The testimony of Mr. Dellinger and Ms. Rudzinski, and Mr. Winick’s representations to the Court, are a matter of record. See Complainant’s Reply at 12.

the Respondent's discovery failures, the hearing certainly would not have been scheduled until this matter was resolved.³⁴

Remedy

I recognize that dismissal or default is not an appropriate sanction for a single instance of misconduct or for conduct that does not evidence any bad faith, willful misconduct, or tactical delay. In this case, however, the Respondent's discovery shortcomings were ongoing, blatant, knowing, and willful. Indeed, a major factor in my consideration of the Complainant's motion is the breadth and depth of the of the Respondent's ongoing disregard of its discovery obligations, and failure to abide by my orders.

Courts have recognized that a court must have a range of sanctions available, including the most severe, to penalize the offender as well as deter such future conduct. As Judge Lamberth noted,

There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

Webb at 185, quoting *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 642-43 (1976).

Here, the Court is not dealing with a single failure to comply with a discovery order. The Respondent's discovery misconduct was ongoing, starting from the moment discovery began in this claim (and with respect to Ms. Vickers' emails and the failure to put a litigation hold in place, even earlier), and continuing through, and after the suspension of the hearing. The Respondent's intransigence in carrying out its discovery responsibilities, and in repeatedly violating my specific directions, has resulted in the issuance of numerous lengthy Orders, directing the Respondent to do what it should have done in the first place, and then to do what the Court had ordered it to do. A claim that should have been resolved several years ago remains in limbo.

The Respondent is not helped by its citation of three cases where default judgment was imposed, and its claim that its conduct did not come anywhere close to the conduct in those cases. Respondent's Opposition at 20. I find that the Respondent's conduct was at least as

³⁴ The Respondent argues that the Court must not have been too concerned about Mr. Winick's discovery failures, because I declined to grant the Complainant's Motion to disqualify him on the eve of the hearing, on the grounds that the Complainant wished to call him as a witness. Had the Court been aware of the Respondent's massive discovery violations, and Mr. Winick's role in them, as well as the removal process, I would have granted this Motion.

egregious, if not more so, than the conduct considered by the Courts in those cases. *See, Henry v. Onsa*, 2008 U.S. Dist. LEXIS 13127 (D.D.C. 2008); *Webb v. District of Columbia*, *supra*; *Nat'l Hockey League v. Metropolitan Hockey Club*, *supra*. As did the Court in *National Hockey League v. Metropolitan Hockey Club*, *supra*, I conclude that the conduct of the Respondent in this claim demonstrates its callous disregard of the responsibilities the Respondent and its counsel owe to the Court and their opponent.

Courts have recognized three factors that could support the sanction of default judgment for misconduct. The first would be a conclusion that the other party's ability to present its case has been "so prejudiced by the misconduct that it would be unfair to require him to proceed further in the case." *Webb* at 187, quoting *Shea*, 795 F.2d at 1074. However, prejudice to a party is not a required element in a finding of fraud on the court, because dishonest conduct victimizes the court and judicial process, as well as the innocent party. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944); *Dixon v. Comm'n of Internal Revenue*, 316 F.3d 1041 (9th Cir. 2003).

I find that the prejudice that would accrue to the Complainant by essentially ignoring the Respondent's discovery misconduct, and proceeding with the hearing as if nothing had happened, is both extreme and manifest. The sheer volume of the Respondent's untimely document production would require and entitle the Complainant to additional, extensive, and costly discovery in the form of depositions and interrogatories.

Further prejudicing the Complainant is the fact that most of the major witnesses in this claim are no longer available to the Complainant. Thus, Ms. Vickers, Mr. Dellinger, and Mr. Winick are no longer employed by the Respondent, and cannot be compelled to participate in discovery, or to testify at a hearing.³⁵

The second factor involves potential prejudice to the judicial system, by placing an intolerable burden on the court to modify its docket and operations to accommodate the delay. Although the Court's resources have been significantly diverted by the need to oversee the discovery process in this claim, it cannot fairly be characterized as an "intolerable burden" that required the Court to modify its docket and operations.

The third factor involves the need to sanction conduct disrespectful to the Court, and to deter similar misconduct in the future. This factor clearly applies to this claim. Despite his status as a senior litigation counsel for the Respondent, it might, at an earlier point, have been possible to attribute Mr. Winick's earlier shortcomings to inexperience or incompetence, or both. But Mr. Winick continued to operate under the arrogant belief that he was entitled to ignore the Court's explicit instructions, and do whatever he wanted. Thus, as the Complainant has correctly pointed out, while the Respondent's "narrow view" of its obligations to respond to discovery requests may explain its initial deficient responses, it does not explain or justify its subsequent and continued non-compliance with my specific orders.

³⁵ Respondent is fully aware that this Court does not have the power to compel the testimony of witnesses who are not employed by the Respondent, as evidenced by my August 31, 2011 Order granting the Respondent's request to quash the Complainant's subpoena to Mr. Oris Dearborn on these grounds.

The Respondent argues that its conduct, and that of Mr. Winick, is not sanctionable because with respect to Mr. Dellinger, Mr. Winick did not specifically ask him to search his records in connection with this claim, but directed him to perform a comprehensive search of his records related to the Complainant's removal in connection with the MSPB proceeding. The Respondent argues that this was not a discovery violation or sanctionable conduct, but only a less than "robust" search. Again, while this may not have been sanctionable when the Respondent argued in response to the Complainant's first motion to compel that its discovery efforts in the MSPB matter excused it from further discovery responses in this claim, once this Court issued Orders specifically requiring that Mr. Dellinger's emails be searched and relevant records produced, the Respondent could no longer rely on this argument. I agree with the Complainant, that the Respondent's stubborn reliance on this claim indicates that the Respondent believes that it is free to disregard the Court's discovery orders if, in its opinion, it should not have to conduct the discovery ordered. I also agree that this indicates that there was nothing inadvertent about the Respondent's repeated discovery failures.

It should not have been necessary for the Court to instruct Mr. Winick on the necessity of preparing a privilege log, or how one should be prepared, for those documents he unilaterally withheld, and did not identify, on claims of privilege. But despite the fact that I did so, and instructed him to provide such a privilege log henceforth, Mr. Winick continued to disregard my instructions, necessitating further motions and orders.³⁶

Even today, after the departure of Mr. Winick, on whom the Respondent would like to lay blame for all of its shortcomings, the Respondent's pleadings reflect its continued view that it, and not the Court, is the arbiter of what is relevant or subject to disclosure.

I note, for example, the Respondent's acknowledgement that while Mr. Winick's search for relevant documents may have not exactly been "robust,"

it is quite a stretch to say that he made knowingly false or fraudulent statements when he asserted his belief that no [all?] relevant documents had been produced and no other relevant documents existed. The fact that additional relevant documents were subsequently discovered to exist does not mean that Mr. Winick did not believe, at the time he made the assertions in question, that he had provided all documents that he considered to be relevant.

Respondent's Opposition at 6. Again, once the Court directed the Respondent to produce specific documents, Mr. Winick's "beliefs" about their relevance are of no moment. Moreover, many of the documents withheld by the Respondent reflect that Mr. Winick was more involved in the Complainant's termination process than was previously apparent. That Mr. Winick withheld documents and email traffic reflecting his own involvement in the process, despite the Court's explicit Orders to produce them, strongly supports a finding that he acted in bad faith.

³⁶ Indeed, after the hearing was suspended, and I directed that as part of the disclosure process, all persons who conducted searches submit an affidavit, Mr. Winick did not do so, stating that he would if the Complainant requested one. Apparently it did not matter that the Court had already required him to submit a declaration.

Nor is it an excuse for withholding documents reflecting Mr. Winick's communications with Ms. Rudzinski and Mr. Dellinger that he believed, "rightly or wrongly" that such documents were privileged. Respondent's Opposition at 7. Once again, Mr. Winick either ignored the Court's explicit instructions to provide privilege logs, or provided privilege logs that were insufficient; almost without exception, I found the documents so withheld not to be protected by a privilege.

I also find it fair to consider that the extensive and blatant flouting of the rules of discovery, and repeated violation of my Orders, was done, not by a private litigant, but by an agency of the United States. Incompetence or ignorance, while not acceptable, would be more tolerable than the Respondent's lengthy course of willful misconduct during the protracted prosecution of this claim. One should be able to expect better of public servants, who should be held to higher standards. Indeed, as Judge Tureck observed,

A party's deliberate failure to withhold material evidence that was properly requested through discovery is an unconscionable perversion of the judicial process. It is reprehensible when it is engaged in by a private party; but I am not sure there is an adjective pejorative enough to describe this conduct when it is engaged in by attorneys representing the United States government.

Beliveau v. Naval Undersea Warfare Center, 1997 SDW 1, 29-30 (June 29, 2000).

The scope of the Respondent's failure to provide the Complainant with the discovery to which she was entitled is breathtaking, to put it mildly. The process that began as a concern over the Respondent's failure to turn over Ms. Rudzinski's draft decision document that she had provided to Mr. Winick has ultimately turned out to involve the Respondent's failure to provide not one, but four iterations of this draft decision, as well as more than 900 additional documents, mostly in the form of emails, that were not provided to the Complainant because the Respondent utterly failed in its responsibility to search for documents responsive to her discovery requests. And this is in addition to the Respondent's repeated discovery intransigence in the months leading up to the hearing.

The issue which then arises is the appropriate sanction for Respondent's withholding of this highly probative evidence. In this case, I find that there is no effective alternate sanction to the entry of a default judgment against the Respondent. Although the Respondent has not directly addressed this issue, apparently the Respondent believes that it would be sufficient for the hearing to resume, now that it has finally completed its discovery production, and now that Mr. Winick, on whom it places the blame for its misconduct, is gone.

I find that reopening the record, and continuing the hearing, is not a viable option. The documents withheld by the Respondent raise far more questions than they answer, and it would be insufficient simply to reopen the record to admit the documents produced by Respondent since the suspension of the hearing. The Complainant, and perhaps the Respondent, would need to conduct additional discovery in the form of depositions and interrogatories, and to recall many

of the witnesses who testified at the hearing, as well as additional witnesses.³⁷ Not only would this entail substantial delay, it would be inherently unfair to expect the Complainant to bear the additional expense that essentially retrying this claim would engender. As noted above, essential witnesses may now be beyond the authority of this tribunal to compel to testify, further prejudicing the Complainant.

Moreover, in light of the nature of the Respondent's conduct, reopening the record, even if accompanied by an award of costs to the Complainant, would be a mere slap on the wrist. I have no doubt that Respondent's repeated failures to fully respond to the Complainant's discovery requests, and to comply with my discovery orders, were deliberate and willful.

Accordingly, I will enter judgment for the Complainant, supported by specific findings that are based, where appropriate, on inferences adverse to the Respondent. I agree with the Respondent that these adverse inferences are prejudicial, if not "outrageously" prejudicial, to the Respondent, as would be any adverse findings, whether after a full blown hearing or otherwise. But they do not require either speculation or the use of unreliable evidence, given the four days of hearing and the mountains of documents produced by the Respondent after the hearing.

It is simply not enough that the Respondent has now, after more than two years of withholding documents and disobeying the Court's orders, finally produced the documents it was required and ordered to produce in the first place (and second, third, and fourth place). Nor would it be sufficient, as the Respondent apparently believes, to just resume the hearing as if nothing had happened.

There is no dispute that the Respondent and the Complainant are covered by the whistleblower protection provisions of the Clean Air Act, the Solid Waste Disposal Act, the Comprehensive Environmental Response, Compensation and Liability Act, the Toxic Substances Control Act, and the Federal Water Pollution Control Act. Nor is there any dispute that the Complainant engaged in protected activities when she made her reports to Congress and the FBI, and to the public through the media, about her allegations of violation of environmental laws and regulations by the EPA in connection with the rescue and cleanup operations at the WTC. The evidence in the record clearly establishes that the Respondent was aware of the Complainant's protected activity.³⁸ There is no dispute that the Complainant suffered an adverse action, as she was dismissed on December 30, 2010.

The issues in dispute are whether the Complainant's protected activity was a contributing factor in her dismissal, and if so, whether the Respondent had a legitimate, non-pretextual reason to dismiss her. These determinations hinge on whether the Court concludes that Mr. Dellinger's claim that the Complainant made a profane death threat to him on May 3, 2010 is credible. If the Court concludes that the Complainant did not make such a threat, there is no basis for her dismissal, and thus no basis for the Respondent's decision to fire her.

³⁷ I also agree with the Complainant that the destruction of Ms. Vickers' emails has tainted the evidentiary resolution of this case.

³⁸ Indeed, this matter was not the first time the Complainant brought an action alleging retaliation by the Respondent for her whistleblowing activities.

As a sanction for the Respondent's extensive and blatant failure to fulfill its discovery obligations, and its repeated violations of my Orders, I draw the inference that the Complainant's protected activity was a contributing factor in her dismissal.³⁹

In addition, also as a sanction for the Respondent's misconduct, I draw the inference that the Respondent did not have a legitimate, non-pretextual reason for dismissing the Complainant. The Complainant has adamantly maintained that she did not make a threat of any kind to Mr. Dellinger on May 3, 2010, or at any other time. As a sanction for the Respondent's abuse of the discovery process, I find that the Complainant did not utter a profane death threat to her supervisor, Mr. Dellinger, on May 3, 2010.

Although this adverse inference is sufficient to support this finding, independently of this inference, I find that the facts and testimony already in the record also support my finding that the Complainant did not make this threat. As the Respondent did not conduct any investigation into the circumstances surrounding this allegation, resolution of this issue relies on an assessment of the credibility of the Complainant and Mr. Dellinger, the two parties to any exchange that occurred.

I had the opportunity to observe the demeanor of both of these witnesses at the hearing. I found the Complainant to be fully credible on this issue, and her testimony consistent and forthright. In contrast, I found Mr. Dellinger to be evasive and equivocal in his testimony in general, and on this issue in particular. In addition, the circumstances surrounding Mr. Dellinger's report of this threat cast significant doubt on whether it actually occurred. Thus, although he spoke with Mr. Winick by telephone on the day of this alleged incident, Mr. Dellinger did not mention the alleged death threat to him. He did not report such a threat to any of his supervisors or managers, in person, by phone, or by email. Although he testified that shortly after the alleged threat the Complainant came to his office, and was "nice as pie," he did not ask her to clarify or confirm what she had just allegedly said to him.

Nor did Mr. Dellinger mention any threat in his email exchanges with Mr. Winick throughout that day, in which he specifically discussed the events of that morning (CX 142, 143). Mr. Dellinger said nothing about any threat until May 10, 2010, when he reported it to Mr. Prince, stating that he was afraid for himself and the people in the office, and that he thought it was the best thing to do.

Mr. Dellinger's reason for waiting so long to report the alleged threat was not convincing. He stated that he was "Still trying to figure out exactly what my – what my role as a manager was in dealing with the incident. It had took me a while to determine what the right action was." CX 116 (Dellinger Deposition) at 125. He was not ready – he was "struggling with the whole threat issue. And it took me awhile to determine that I – you know, that I had to take some kind of an action." *Id.*

³⁹ It is not necessary for the Complainant to prove that anyone employed by the Respondent had a retaliatory "animus" towards her, and thus it is not relevant that Mr. Dellinger testified that he did not have any "animus" toward the Complainant.

The possible significance of Mr. Dellinger's untimely reporting of a threat was not lost on Ms. Rudzinski. Mr. Winick told her that Mr. Dellinger did not timely report the threat because he was too busy dealing with EPA business, and other managers were out of the office (EX 23). When Ms. Rudzinski asked Mr. Winick to point her to Mr. Dellinger's testimony on this issue, he had to admit that it was not there. Mr. Dellinger himself stated that these were not the reasons for his delay in reporting a threat (EX 24, CX 116 at 124-126).⁴⁰

I also note that the evidence and testimony at the hearing supports an inference that Mr. Dellinger was being coached by Mr. Winick. Mr. Winick prepared Mr. Dellinger's sworn affidavit, which included several claims about the Complainant's protected activities that Mr. Dellinger admitted were simply not within his knowledge. As discussed above, Mr. Winick encouraged Mr. Dellinger to downplay the significance of the Complainant's protected activities in his testimony.

Accordingly, I find that the Complainant engaged in protected activities under the whistleblower provisions of the above cited environmental statutes; that the Respondent was aware of the Complainant's protected activities; that the Complainant suffered an adverse action when she was fired; that the Complainant's protected activities were a contributing factor to her dismissal; and that the Respondent did not have a legitimate, non-pretextual reason for its decision to fire her.

CONCLUSION

Based on the foregoing, I find that Dr. Jenkins, the Complainant, has established that the U.S. Environmental Protection Agency, the Respondent, retaliated against her for her reports to Congress and the FBI, and to the public through the media, about her allegations of violation of environmental laws and regulations by the EPA in connection with the rescue and cleanup operations at the WTC, in violation of the whistleblower provisions of the Clean Air Act, the Solid Waste Disposal Act, the Comprehensive Environmental Response, Compensation and Liability Act, the Toxic Substances Control Act, and the Federal Water Pollution Control Act.

Pursuant to the MSPB's May 4, 2012 Order, the Complainant has been reinstated, with full back pay and benefits.⁴¹ Thus, there is no need to address the issue of reinstatement, or back or front pay. The Complainant did not present evidence of any specific damages she suffered, other than her loss of pay and benefits. While some of the statutes under which the Complainant brought her claim provide for the assessment of punitive damages, such damages may not be assessed against an agency of the federal government.

However, the Complainant has requested that she be awarded attorney's fees. As a successful party, the Complainant is entitled to recovery of attorney's fees and costs.

⁴⁰ Mr. Dellinger also acknowledged that although the removal proposal drafted for him by Mr. Winick reflects his understanding that other EPA employees had been removed for violent threats, he did not in fact know of any such incidents. CX 116 (Dellinger Deposition) at 136-137.

⁴¹ The Complainant is entitled to reimbursement of any costs associated with the payment of her back pay, specifically any tax implications that she suffered. To the extent that the Complainant incurred any such costs, she may present documentary evidence in support.

Accordingly, the Complainant will have thirty days to submit a fully supported application for attorney's fees and costs, as well as any other documentary evidence supporting costs incurred in connection with her dismissal. The Respondent will have fifteen (15) days following the receipt of such application within which to file any objections.

ORDER

Based on the foregoing, IT IS HEREBY RECOMMENDED that the complaint of Cate Jenkins for relief under the Clean Air Act, the Solid Waste Disposal Act, the Comprehensive Environmental Response, Compensation and Liability Act, the Toxic Substances Control Act, and the Federal Water Pollution Control Act be GRANTED. IT IS FURTHER ORDERED that the Respondent shall pay to Dr. Jenkins the reasonable costs and attorney's fees incurred in prosecuting her claim, and any other damages as appropriate, to be determined in a Supplemental Order.

SO ORDERED.

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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If 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.