~~CUI//PRIIG/PRVCY~~

Report of Investigation: Whistleblower Reprisal Investigation

September 17, 2024 | Report No. 24-N-0064

REDACTED VERSION FOR PUBLIC RELEASE

The full version of this report contained controlled unclassified information. This is a redacted version of that report, which means the controlled unclassified information has been removed. The redactions are clearly identified in the report.

Abbreviations

C.F.R.	Code of Federal Regulations
EPA	U.S. Environmental Protection Agency
FY	Fiscal Year
OIG	Office of Inspector General
OPPT	Office of Pollution Prevention and Toxics
RAD	Risk Assessment Division
U.S.C.	United States Code

Table of Contents

Report of Investigation

Introduction and Summary **1**

Findings of Fact **2**

Analytic and Legal Framework **10**

Analysis **13**

Conclusions **17**

Recommendation **17**

Report of Investigation

Introduction and Summary

On June 28, 2021, and August 3, 2021, the U.S. Environmental Protection Agency Office of Inspector General received OIG Hotline complaints filed by the nonprofit organization Public Employees for Environmental Responsibility on behalf of four scientists who worked in the former Risk Assessment Division, or RAD, of the Office of Pollution Prevention and Toxics, or OPPT, in the EPA Office of Chemical Safety and Pollution Prevention. [redacted] The complaint and subsequent interviews of [redacted] raised multiple allegations of misconduct, including that the Agency took three personnel actions against [redacted]: two in 2020 and 2021 after [redacted] expressed differing scientific opinions and one personnel action that occurred from 2021 through 2022, after the Public Employees for Environmental Responsibility filed the OIG Hotline complaint on [redacted] behalf. We opened an investigation to determine whether the alleged actions in 2020 and 2021 were in retaliation for [redacted] differing scientific opinions, in violation of the EPA's *Scientific Integrity Policy* (2012). We also investigated whether the alleged action from 2021 through 2022 was in retaliation for [redacted] OIG Hotline complaint, in violation of the Whistleblower Protection Act.

Our investigation first sought to determine whether [redacted] expressed differing scientific opinions or made disclosures or engaged in other activities that were protected under the Whistleblower Protection Act and whether any of these were a contributing factor in any personnel actions taken against [redacted]. We determined that [redacted] expressed differing scientific opinions starting in 2020 and that [redacted] engaged in protected activities and made a protected disclosure in 2021. We found that EPA management had knowledge of [redacted] differing scientific opinions when it took one personnel action against [redacted] withholding [redacted] career-ladder promotion. Our investigation identified [redacted] as the [redacted] who withheld [redacted] career-ladder promotion. We determined that the other two alleged retaliatory actions did not constitute personnel actions. The withholding of the career ladder promotion occurred within a period of time such that a reasonable person could conclude that [redacted] differing scientific opinions were a contributing factor. We found that [redacted] protected activities and protected disclosure postdated that personnel action and thus were not contributing factors in that action.

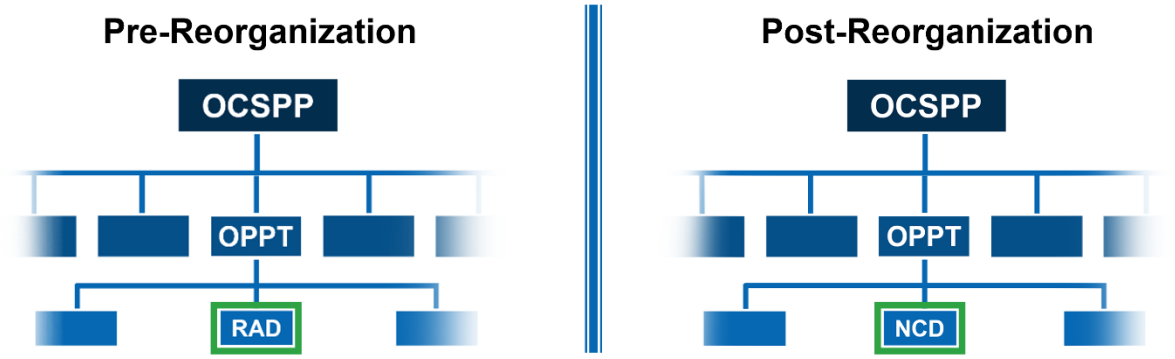
Next, we assessed whether the EPA could establish that it would have withheld [redacted] promotion even if [redacted] had not expressed differing scientific opinions. After reviewing the evidentiary support for the personnel action, evidence of any retaliatory motive on the part of officials involved in the decision, and any evidence that the Agency has taken similar actions against similarly situated employees who are not whistleblowers, we did not substantiate [redacted] retaliation allegation under the EPA's *Scientific Integrity Policy*. We make no recommendations regarding corrective action considering this finding.

Findings of Fact

[redacted] is a [redacted] within the OPPT. [redacted] started at the EPA in [redacted] in RAD, where [redacted] worked on human health assessments of new chemicals[1]. In October 2020, during the reorganization of the OPPT, [redacted] was moved to the New Chemicals Division.

Background

Prior to the OPPT reorganization in October 2020, RAD was responsible for assessing the hazards of new chemicals before they entered U.S. commerce to determine whether they posed an unreasonable risk to human health and the environment. RAD's hazard assessments were sent to the Chemical Control Division in the OPPT, which conducted risk management assessments. These assessments were made under the Toxic Substances Control Act, which requires a final regulatory determination within 90 days of submission.[2] After the two divisions completed their assessments, the OPPT deputy director would review their work and approve a final regulatory determination regarding the risks posed by each new chemical. As a result of the OPPT reorganization in October 2020, the full assessments and regulatory determinations were assigned to the New Chemicals Division and were subject to the same statutory 90-day deadline.



Notes: NCD = New Chemicals Division; OCSPP = Office of Chemical Safety and Pollution Prevention.
Source: OIG analysis of OPPT reorganization. (EPA OIG image)

The EPA's assessments of new chemicals constitute scientific products. The hazards in new-chemicals assessments are identified by assessing and interpreting scientific data, such as testing on the new-chemical substance or on analogue chemicals. These hazards, as well as data from the other disciplines, such as exposure and engineering data, are used to inform the EPA's final regulatory decisions.

[1] As a human health assessor, [redacted] worked on assessments of how new chemicals would impact the human health of consumers, workers, and the genal population. In addition to human health assessors, RAD had assessors from four other disciplines: engineering, exposure science, fate, and ecological toxicity.

[2] Toxic Substances Control Act § 5(a)(3)(A)-(C), 15 U.S.C. § 2604(a)(3)(A)-(C).

In 2016, the Toxic Substances Control Act was amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act.[3] RAD staff testified that prior to the 2016 amendment, the division conducted a full assessment of about 20 percent of the new chemical submissions. As a result of the 2016 amendment, the EPA was required to conduct a full assessment for *every* chemical within the same statutory 90-day deadline.[4] Despite the increased workload, the division did not receive an increase in staffing or contractor resources.

Agency staff testified that the division was not prepared or equipped to satisfy the new requirements. Management consistently testified that 90 days was not enough time to complete the new-chemicals assessment process and that the division lacked the resources to meet this deadline. [redacted] described the statutory deadline as "ridiculous" and stated that everyone knew it could not be met. A human health assessor described completing the new requirements within 90 days as "somewhat impossible." If new-chemicals evaluations are not completed within the statutory 90-day deadline, they become a part of the "backlog." The backlog existed before the 2016 amendment, but it grew as a result of the increased workload. While management testified that there had always been pressure to clear the backlog, as the backlog grew, so did the political pressure to eliminate it.

Management called the pressure from Office of Chemical Safety and Pollution Prevention leadership to eliminate the backlog "intense." [redacted] who were responsible for [redacted] testified that Office of Chemical Safety and Pollution Prevention leadership was constantly contacting them.[5] One of [redacted] described the pressure as "pushing us like animals in a farm." [redacted] testified that [redacted] was afraid that if it was not reduced, there would be repercussions in [redacted] performance evaluation. Witnesses from RAD and the New Chemicals Division explained that because the human health assessment took the most time and had the most potential for disagreement, pressure to reduce the backlog was disproportionally applied to the human health assessors. [redacted] called the human health assessment "the hardest part of the risk assessment." [redacted] testified that a political appointee complained about specific human health assessors as being "slow" and asked their management to be more involved in their work. Office of Chemical Safety and Pollution Prevention leadership also characterized these assessors as too "conservative" in their approach.

However, witness testimony indicated that the assessment completion timeline and the backlog size were not entirely in the assessors' control. Companies that submit new chemicals for assessment play a large role in the new-chemicals assessment process. RAD and New Chemicals Division management testified that since 2016, the EPA regulates new chemicals via consent orders. Before a final regulatory determination is made, chemical submitters are told the EPA's tentative conclusion and have an

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

[4] Toxic Substances Control Act § 5(a)(1)-(4), 15 U.S.C. § 2604(a)(1)-(4).

[5] In March 2020, the assessors who worked on new chemicals were split into two groups: a backlog team and an incoming-submissions team. [redacted] was assigned [redacted].

opportunity to dispute the EPA's assessment or provide additional information. According to [redacted], the division is required to consider anything the chemical submitter supplies, no matter when it is received. As a result, assessors often must review and respond to new information submitted in rebuttal to the initial assessment, a process referred to as "re-work." If chemical submitters do not agree with the initial regulatory determination, then they can continue to submit more information for the EPA to consider until an agreement between the chemical submitter and the EPA is reached, extending the timeline beyond the statutory 90-day deadline. [redacted] testified that chemical submitters' desire for a regulatory decision that their chemicals are not likely to present risk to human health or the environment causes "heavy" rework and emphasized that an average case goes through two or three back-and-forth cycles. [redacted] and one of the [redacted] explained that assessments that chemical submitters disagree with end up more delayed than assessments that they agree with. [redacted] also testified that identifying fewer hazards or determining that a chemical was less hazardous led to quicker case completion.

Delays are also caused by internal scientific disagreements that are inherent to the new-chemicals review and approval process. Staff from RAD and the New Chemicals Division testified that human health assessors often have little-to-no test data regarding the new chemicals when writing their reports. Instead, hazards in new-chemicals assessments are identified by finding existing chemicals that are structurally similar to the new chemicals to use as analogues. A [redacted] testified that the division did not have written guidance regarding how to select the best analogue chemical, but that the decision is still based in part on professional judgment and a review of the scientific data. According to [redacted], the New Chemicals Division is working on creating objective measures for analogue selection. The data gap and resulting need for extrapolation leave room for scientific disagreements.

[redacted] *Scientific Disagreements*

Once a human health assessor completed their initial assessment, the OPPT deputy director and the OPPT senior science advisor would conduct an extensive technical review and provide edits back to the assessor. According to [redacted], certain human health assessors routinely disagreed with the scientific decisions made in the edits. These assessors expressed disagreements with both the OPPT deputy director and the OPPT senior science advisor regarding hazard identification in the assessments. As noted above, hazards in new chemical assessments are identified by assessing and interpreting scientific data. OPPT managers' disagreements regarding hazard identification would be included in their edits back to the human health assessors. These disagreements were also raised at weekly disposition meetings, where management and the human health assessors would discuss scientific issues that arose in the new-chemicals assessments.

At the time, there was no process in place for addressing and documenting these scientific disagreements. Neither the OPPT deputy director nor the OPPT senior science advisor was officially in the assessors' chain of command. Although they would edit the assessors' work and express any

disagreements, neither they nor the assessors' supervisors directed the assessors to make the changes. Some assessors would provide further rounds of edits back to OPPT management because they disagreed with the edits. There was no mechanism to end the back-and-forth edits and responses. Thus, when the human health assessors expressed their scientific disagreements with the OPPT deputy director and OPPT senior science advisor's edits, the review process for the given chemical would be delayed, as the two sides would go through multiple rounds of discussions and edits to arrive at a final assessment. [redacted] testified that all assessors had delays, and one noted that assessors who did not express scientific disagreements processed cases faster.

In March 2020, when the new-chemicals assessors were divided to create an incoming-submissions team and a backlog team, [redacted] was placed [redacted]. As part of that work, [redacted]. In March 2020, [redacted] was assigned a new-chemical assessment. The chemical submitter had sent a rebuttal letter to the EPA regarding the initial assessment of the new chemical, disputing the inclusion of reproductive and developmental toxicity hazards and proposing the use of a different chemical as an analogue. Because the studies of the proposed analogue chemical administered it to test subjects in an oil that was the same class as the new chemical, the original assessor disagreed with the rebuttal.[6] When the case was reassigned to [redacted] agreed with this determination. From March to June 2020, [redacted] worked with [redacted] to develop a memorandum to the chemical submitter that stated [redacted] scientific opinion that the proposed analogue chemical was not appropriate to assess the new chemical. [redacted] completed the memorandum on June [redacted], 2020.

On July [redacted], 2020, the chemical submitter responded to [redacted] memorandum, continuing to dispute the classification of the new chemical as a developmental and reproductive toxicant and advocating for the use of the proposed analogue chemical. A call was held on July [redacted], 2020, between the submitter's representative and EPA staff. Included in this call were [redacted], the original assessor, and the OPPT senior science advisor. During the call, the OPPT senior science advisor noted that the chemical submitter was raising "valid points." In August 2020, a meeting was held to prepare for another call with the chemical submitter. [redacted] did not attend this meeting. [redacted] testified that in this meeting, management decided to use the chemical submitter's proposed analogue chemical, reversing the decision in [redacted] June 2020 memorandum.

The assessment for this new chemical was finalized in February 2021. In the final assessment, management removed the reproductive and developmental toxicity hazards from the assessment and used the chemical submitter's proposed analogue chemical. In a meeting before the assessment was

[6] Some assessors were concerned that administering a new chemical to test subjects in an oil that is the same class as the new chemical could create competition for the enzymes that cause metabolism. Those enzymes might break down the oil, leaving fewer enzymes to break down the new chemical. As a result, the full new chemical might not be broken down, thus the full toxic effects of any metabolite of the new chemical would not be seen in the study.

finalized, [redacted] continued to voice [redacted] disagreement with the choice of the analogue chemical, despite testifying that [redacted] felt pressured to agree to the changes.

[redacted] alleges that throughout [redacted] time in RAD and the New Chemicals Division, [redacted] wrote additional memorandums in response to and disagreeing with other chemical submitters' rebuttals and disagreed with other scientific opinions expressed by [redacted] management and colleagues. [redacted] testified that in 2020, [redacted] and other human health assessors represented by Public Employees for Environmental Responsibility often selected analogue chemicals with low points of departure, which [redacted] saw as the "crux" of the majority of the scientific disagreements raised in the division.[7] [redacted] testified that, as time progressed, [redacted] began "questioning" things more often. [redacted] hypothesized that [redacted] "developed a relationship with" one of the other assessors and "lost track of the facts," by which [redacted] meant that [redacted] began accusing the [redacted] of reducing hazards in new-chemicals assessments.

[redacted] *Disclosure to the OIG and Equal Employment Opportunity Complaint*

On August 31, 2021, [redacted] filed an OIG Hotline complaint with the help of Public Employees for Environmental Responsibility. The complaint was also sent to the Office of Chemical Safety and Pollution Prevention's assistant administrator. [redacted] OIG Hotline complaint was filed in collaboration with [redacted]. The complaint included a disclosure that the EPA changed the way that it historically assessed a class of chemicals and that a manager allegedly yelled at the assessors for expressing differing scientific opinions. [redacted] also filed [redacted], as well as [redacted].

[redacted] *Allegations of Retaliation*

[redacted] alleged that EPA management took three actions against [redacted] in retaliation for [redacted] alleged differing scientific opinions, protected activities, and protected disclosures: (1) withheld [redacted] promotion in November 2020, (2) increased [redacted] duties in June 2021, and (3) subjected [redacted] to harassment in late 2021 through February 2022.

[7] Points of departure are values taken from scientific studies that reflect the lowest dose at which test subjects experienced observable adverse effects from exposure to the analogue chemical, also known as the lowest observable adverse effect level, or if no effects are observed in the study, the highest tested dose at which there was no adverse effect, also known as the no observed adverse effect level.

1. Withheld Promotion

[redacted] was hired in [redacted] as a [redacted] employee[8]. The full promotion potential of [redacted] career-ladder position was to the [redacted] level. After 52 weeks of performance at the [redacted] level, [redacted] was eligible for a promotion to the [redacted] level.

As described previously, [redacted] was asked in March 2020 to write a memorandum to a chemical submitter that explained [redacted] position regarding the reproductive and developmental toxicity of a new chemical. [redacted] and [redacted] supervisor engaged in multiple rounds of edits before sending the memorandum to the chemical submitter. In emailed comments to [redacted] the [redacted] supervisor said that there were "issues" with [redacted] writing style. [redacted] noted that [redacted] should take a writing course and told [redacted] "Don't take offense. I took many courses in the past to help my writing [redacted]." [redacted] responded that [redacted] was happy to do so. [redacted] supervisor also identified grammatical errors in the memorandum and emailed [redacted] that the errors needed to be fixed, since the document might become part of the public record.

[redacted] supervisor did not ask [redacted] to change [redacted] determination. [redacted] requested that [redacted] add references and clarify sentences that [redacted] thought were confusing. [redacted] also included comments that provided additional information to help strengthen [redacted] argument. For example, one of the [redacted] supervisor's comments noted that [redacted] memorandum provided support for [redacted] analogue chemical but did not address why the chemical submitter's proposed analogue chemical was inadequate. Another of [redacted] comments suggested that [redacted] emphasize a metabolic process that would lead to the release of [redacted] preferred analogue chemical. [redacted] memorandum that was sent to the chemical submitter, which had undergone editing by the [redacted] supervisor, defended [redacted] decision to retain the developmental and reproductive toxicity hazards.

Also as described previously, the final assessment for that new chemical was issued in February 2021 and altered [redacted] analogue chemical. [redacted] testified that the decision to change the analogue chemical was made in an August 2020 meeting by the OPPT senior science advisor. [redacted] supervisor could not recall whether [redacted] agreed or disagreed with the change.

On September 22, 2020, [redacted] met with [redacted] supervisor to discuss [redacted] performance rating for fiscal year 2020. For FY 2020, [redacted] received an overall rating of "[redacted]."[9] In [redacted] narrative comments, the [redacted] supervisor wrote that [redacted] "[redacted]" In the section of the narrative titled "Training and Development Needs," the [redacted] supervisor wrote that [redacted] "[redacted]." [redacted] testified that [redacted] first noticed concerns regarding [redacted] writing in the

[8] "GS" refers to the classification and pay level on the General Schedule system, which is used for civilian federal employees in professional, technical, administrative, and clerical positions.

[9] [redacted] does not allege that [redacted] rating of "[redacted]" constitutes retaliation.

summer of 2020, when [redacted] sent [redacted] the draft of the June 2020 memorandum to the chemical submitter. The [redacted] supervisor said that [redacted] did not understand [redacted] reasoning in the memorandum and that [redacted] work included technical and grammatical mistakes. [redacted] explained that [redacted] work frequently contained grammatical mistakes, which [redacted] attributed to [redacted].

As part of the October 2020 reorganization of the OPPT, [redacted] was placed in the newly formed New Chemicals Division. [redacted] temporarily became [redacted] acting supervisor until a permanent branch chief was selected. [redacted] informed the [redacted] that [redacted] was eligible for promotion to the [redacted] level[10]. [redacted] was not a [redacted], nor was [redacted] familiar with [redacted] work. As such, [redacted] met with [redacted] supervisor and the [redacted], who explained that [redacted] was not ready for a promotion because of [redacted][11]. [redacted] had evaluated "many" employees who were eligible for career ladder promotions but had never withheld a career-ladder promotion before. [redacted] testified that [redacted] were one of the "key skills" that [redacted] would evaluate when deciding whether to promote an employee. The [redacted] testified that [redacted] was surprised by the feedback [redacted] received about [redacted] but [redacted] noted that during subsequent weeks [redacted] noticed "minor editorial errors" in [redacted] work. [redacted] testified that these errors would not have caused [redacted] to delay a promotion, as they were not in [redacted] work. Because [redacted] was not a [redacted], [redacted] did not review [redacted] work. Instead, [redacted] trusted feedback from [redacted] and [redacted] regarding that work. [redacted] decided that [redacted] would take training and then, after demonstrating that [redacted] writing had improved, [redacted] would be eligible for a promotion.

On January 8, 2021, [redacted] met with [redacted] and asked [redacted] to send a list of writing courses that [redacted] intended to take. [redacted] provided a list to the associate director and took the courses in January 2021. [redacted] informed [redacted] that [redacted] and other managers would review [redacted] progress in [redacted] written work products and, once it was determined that [redacted] had enhanced [redacted] writing skills, [redacted] would recommend [redacted] for promotion to the [redacted] level. However, [redacted] new-chemicals assessments themselves did not require much writing. Instead, management assessed [redacted] more in-depth [redacted] writing assignments, which [redacted] only wrote when chemical submitters disagreed with the Agency's initial assessments of their chemicals.

[10] Per EPA policy, career ladder promotions are not automatic. They are at the discretion of management.

[11] [redacted] testified that [redacted] did not review [redacted] writing until the [redacted] and [redacted] met with [redacted] to discuss [redacted] promotion. [redacted] explained that [redacted] was provided samples of [redacted] writing and agreed that [redacted] could benefit from a writing course. [redacted] reviewed [redacted] responses to comments in risk assessments and documenting differing opinions. [redacted] agreed that had [redacted] not written the differing opinion, issues with [redacted] writing might not have been noticed.

In January 2021, a permanent [redacted] was hired and became [redacted] supervisor. [redacted] New Chemicals Division supervisor was informed that [redacted] was taking courses to improve [redacted] writing skills before [redacted] could be promoted. [redacted] [redacted] was asked by [redacted] to conduct an independent review of [redacted] writing. [redacted] New Chemicals Division supervisor identified an assessment that required a data review and assigned [redacted] to write a memorandum, which [redacted] completed on August 4, 2021. Based on this writing exercise, [redacted] New Chemicals Division supervisor determined that, while there was room for improvement, there were no major concerns with [redacted] writing and initiated the promotion process. On August 29, 2021, [redacted] was promoted to the [redacted] level[12].

2. Increased Duties

In the summer of 2021, the New Chemicals Division human health assessors were assigned new-chemicals assessments on a rotational basis. Specifically, each human health assessor was assigned a week during which all chemicals that came into the division would be assigned to them. While on average there were approximately five cases per week, there was fluctuation; one week could have as many as ten cases. As a result, case assignments were not uniform. Additionally, an assessor's preexisting workload was not taken into account when assigning rotations, and individual assessors could have very different workloads. This uneven workload was further compounded when assessors were on leave or when staffing was low. Managers testified that a common complaint by staff in the division was that the rotation schedule led to an uneven distribution of assignments.

In June 2021, [redacted] workload was larger than usual, and [redacted] felt as though [redacted] was "set up to fail." The division was assessing a large number of bio-fuel chemicals. This large workload was compounded by summer schedules; at least two individuals in the five-person rotation took leave during June 2021. As a result, [redacted] was assigned a large number of new-chemicals assessments. On June 15, 2021, [redacted] met with [redacted] New Chemicals Division supervisor to discuss the issue. While the discussion resulted in a small decrease in assignments, [redacted] ultimately retained a heavy caseload in June 2021.

In October 2021, the assignment process for human health assessors was changed in an attempt to have a more evenly distributed workload.

[12] [redacted] Our investigation did not encompass [redacted] allegations of discrimination.

3. Harassment

[redacted] alleged that [redacted] was harassed in 2021 and 2022 by [redacted] former [redacted] in retaliation for expressing differing scientific opinions.[13] [redacted] alleged that when [redacted] disagreed with [redacted] would raise [redacted] voice, ask repeated questions, and assign writing tasks. [redacted] described telling [redacted] in a meeting in October 2021 that [redacted] wanted to ask a chemical submitter for additional information regarding a new chemical. [redacted] testified that [redacted] rejected [redacted] request and asked [redacted] to write a document regarding [redacted] proposal. According to [redacted] "raised [redacted] voice" and asked [redacted] repeatedly why [redacted] needed the information. However, according to [redacted] when another employee agreed with [redacted] that employee did not receive the same pushback. [redacted] also described a meeting in March 2022 in which [redacted] and a colleague raised the same differing scientific opinion, specifically that they had insufficient information with which to assess a new chemical. As a result of their alleged differing scientific opinion, they were asked to write a statement, which the [redacted] had them rewrite. [redacted] called the task "tedious." [redacted] testified that when the [redacted] would disagree with [redacted] would get "tense" and "heated." [redacted] sensed that the [redacted] was "ready to burst," which made [redacted] "really afraid."[14]

Analytic and Legal Framework

The Whistleblower Protection Act prohibits retaliation against most executive branch employees for making protected disclosures or engaging in protected activity. 5 U.S.C. § 2302(b)(8)-(9). To allege a reprisal violation under section 2302(b), complainants must allege that they made a protected disclosure or engaged in protected activity and that the protected disclosure or activity was a contributing factor in a covered action taken, threatened, or withheld from them. The EPA's *Scientific Integrity Policy* extends the protections of Whistleblower Protection Act to all EPA employees who uncover or report allegations of scientific and research misconduct or who express a differing scientific opinion.[15]

[13] [redacted] also alleged that two coworkers harassed [redacted] in meetings in retaliation for [redacted] differing scientific opinions, such as by disagreeing with [redacted] work and not listening to [redacted] The Whistleblower Protection Act prohibits employees with personnel authority from taking a retaliatory personnel action. As [redacted] coworkers did not have personnel authority, we determined that [redacted] could not show by a preponderance of the evidence that [redacted] coworkers' actions constituted retaliation under the statute; thus, we did not include those actions within the scope of our investigation.

[14] [redacted].

[15] We did not assess the EPA's authority to extend the statutory protections of 5 U.S.C. § 2302 via Agency policy.

The first step in assessing these retaliation allegations is to determine whether the complainant expressed a differing scientific opinion, engaged in protected activity, or made a protected disclosure.[16] The EPA's *Scientific Integrity Policy* does not define the term differing scientific opinion. However, in October 2020, the EPA's Scientific Integrity Program issued a guidance document, *Approaches for Expressing and Resolving Differing Scientific Opinions*. This guidance document defines "differing scientific opinion" as:

> [A] differing opinion of an EPA employee who is substantively engaged in the science that may inform an EPA decision. It generally contrasts with a prevailing staff opinion included in a scientific product under development. The differing opinion must concern scientific data, interpretations, or conclusions, not policy options or decisions. These approaches do not address personal opinions about scientific issues that are not accompanied by scientific arguments, are not part of a scientific product, and are not made in the context of an EPA decision.

Protected activities are defined as the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation; testifying for or otherwise lawfully assisting any individual in the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation; cooperating with or disclosing information to the inspector general or the special counsel; or refusing to obey an order that would require the individual to violate a law, rule, or regulation. 5 U.S.C. § 2302(b)(9).

A protected disclosure is defined as a communication about actual or suspected wrongful conduct that the employee reasonably believes is evidence of a violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8). Vague, conclusory, or facially insufficient allegations of government wrongdoing are insufficient to state a claim under section 2302(b)(8).[17] A reasonable belief exists if a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the government evidence one of the categories of wrongdoing listed in the statute.[18]

Once it has been established that the complainant expressed a differing scientific opinion, engaged in protected activity, or made a protected disclosure, the next step is to analyze whether a preponderance of the evidence supports that one or more differing scientific opinions, protected activities, or protected disclosures were a contributing factor in the decision to take, threaten, or withhold a personnel action

[16] An individual who has not made a protected disclosure may still be entitled to protection under section 2302 if the individual is perceived to be a whistleblower. *See King v. Dep't of the Army*, 116 M.S.P.B. 689, 694 (Sept. 14, 2011). In such cases, the analysis focuses on the perceptions of the officials involved in the personnel actions at issue and whether those officials believed that the complainant made or intended to make disclosures that evidenced the type of wrongdoing listed in the statute. *Id.* at 694-95.

[17] *Johnston v. Merit Sys. Prot. Bd.*, 518 F.3d 905, 909 (Fed. Cir. 2008) (outlining the jurisdictional threshold for claims under the Whistleblower Protection Act).

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

from the complainant.[19] "Contributing factor" is defined as any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.[20] The whistleblower can establish that a disclosure or activity was a contributing factor through circumstantial evidence showing that (1) "the official taking the personnel action knew of the disclosure or protected activity" and (2) "the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action." 5 U.S.C. § 1221(e)(1)(A)-(B).[21]

Once a preponderance of the evidence establishes that one or more protected activities or disclosures was a contributing factor in the personnel action, the retaliation allegation is substantiated unless clear and convincing evidence establishes that the personnel action would have been taken in the absence of the protected activity or disclosure. 5 U.S.C. § 1221(e)(2).[22] In other words, if the evidence shows that it is highly probable that the employer would have taken the personnel action against the employee regardless of the protected activity or disclosure, the retaliation allegation is not supported. The relevant factors to consider in this determination are (1) the strength of the evidence in support of the Agency's decision, (2) the existence and strength of any retaliatory motive by the officials involved in the decision, and (3) any evidence that the employer has taken similar actions against employees who are not whistleblowers but are otherwise similarly situated.[23]

[19] A preponderance of the evidence is defined as the "degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." 5 C.F.R. § 1201.4(q). A personnel action is defined as "(i) an appointment; (ii) a promotion; (iii) an action under chapter 75 of this title or other disciplinary or corrective action; (iv) a detail, transfer, or reassignment; (v) a reinstatement; (vi) a restoration; (vii) a reemployment; (viii) a performance evaluation under chapter 43 of this title or under title 38; (ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; (x) a decision to order psychiatric testing or examination; (xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; and (xii) any other significant change in duties, responsibilities, or working conditions." 5 U.S.C. § 2302(a)(2).

[20] *Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993).

[21] Although the EPA's *Scientific Integrity Policy* notes that employees who uncover or report allegations of scientific and research misconduct or express a differing scientific opinion are protected "from retaliation or other punitive actions," because it is unclear what "other punitive actions" entails, we did not incorporate this into our analysis.

[22] Clear and convincing evidence is defined as "that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established." It is a higher standard than preponderance of the evidence. 5 C.F.R. § 1209.4(e).

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

Analysis

[redacted] is an EPA employee. [redacted] alleges that individuals with personnel authority took personnel actions against [redacted] in retaliation for [redacted] expressing differing scientific opinions and providing information to the OIG. As [redacted] alleged a violation of 5 U.S.C. § 2302(b)(9)(C) and a violation of the EPA's *Scientific Integrity Policy*, the OIG has jurisdiction over [redacted] retaliation allegations.

Did [redacted] Express a Differing Scientific Opinion, Engage in Protected Activities, or Make a Protected Disclosure?

[redacted] disagreements with [redacted], OPPT management, and colleagues, which started in mid-2020 and continued through 2022, constituted differing scientific opinions. [redacted] disagreements were regarding hazard identification and analysis in new-chemicals assessments. The EPA's assessments of new chemicals constitute scientific products. Thus, [redacted] scientific disagreements meet both the plain language meaning of a differing scientific opinion and the formal definition of a differing scientific opinion that was issued by the Scientific Integrity Program in October 2020.

In addition, [redacted] was perceived by OPPT and RAD management to have expressed differing scientific opinions, and [redacted] was closely associated with other the four other assessors represented by Public Employees for Environmental Responsibility who both expressed differing scientific opinions and engaged in protected activity. [redacted] testified that in 2020 [redacted] and the four other assessors raised scientific disagreements more often than other assessors. The four other assessors were widely known to express differing scientific opinions and to have engaged in protected activity. [redacted] testified about the association [redacted] made between [redacted] and one of the other assessors. Specifically, [redacted] believed that after [redacted] developed a relationship with that assessor, [redacted] "lost track of the facts," began accusing [redacted] of reducing hazards in chemical assessments and began "questioning" things.

[redacted] engaged in protected activity when [redacted] provided information to the OIG via an OIG Hotline complaint filed by the Public Employees for Environmental Responsibility in August 2021. Providing information to the OIG is a protected activity under 5 U.S.C. § 2302(b)(9)(C). [redacted] also [redacted] and a [redacted] in October and November 2021, respectively. Exercising a complaint or grievance right granted by law, rule, or regulation is a protected activity under 5 U.S.C. § 2302(b)(9)(A). [redacted] and a [redacted] constitute exercising a complaint or grievance right granted by law or agency rule.

[redacted] made at least one protected disclosure in [redacted] OIG Hotline complaint, which included an allegation that a manager yelled at assessors in retaliation for expressing differing scientific opinions. Retaliation for differing scientific opinions violates the EPA's *Scientific Integrity Policy*. As such, it was reasonable for

[redacted] to believe that yelling at assessors for expressing a differing scientific opinion is evidence of a violation of a rule. Accordingly, [redacted] made at least one protected disclosure.[24]

Was a Personnel Action Taken Against, Threatened, or Withheld from [redacted]?

[redacted] alleged three retaliatory actions in the information provided in [redacted] hotline compliant to the OIG: (1) a withheld promotion to the [redacted] level, (2) an increase in duties in June 2021, and (3) harassment in 2021 and 2022. We determined that one of these three actions constitutes taking, withholding, or threatening to take or withhold a personnel action.

1. Withheld Promotion

In November 2020, [redacted] was eligible for a promotion. [redacted] was not promoted until August 2021. A promotion is a personnel action under 5 U.S.C. § 2302(a)(2)(ii). As such, the initial failure to promote [redacted] is the failure to take a personnel action.

2. Increase in Duties in June 2021

In June 2021, [redacted] experienced an increase in assigned work. However, fluctuation in assignments was, at that time, a normal part of the working conditions in the New Chemicals Division, and the increase only lasted approximately a month[25]. Because the workload for all human health assessors regularly fluctuated, [redacted] June 2021 increase in assignments does not constitute a significant change in duties or working conditions and, as such, is not a personnel action.[26]

3. Harassment

[redacted] alleged that in 2021 and 2022 [redacted] was harassed by [redacted] in retaliation for expressing differing scientific opinions. While harassment is not a personnel action enumerated in the statute, it can be considered a personnel action when it constitutes a significant change in duties, responsibilities, or working conditions.[27] 5 U.S.C. § 2302(a)(2)(A)(xii). [redacted] alleges that [redacted] was subjected to harsh disagreements and criticism of [redacted] scientific opinions in the form of repeated questions that were asked in a raised voice and additional work assignments. Verbal criticism and rudeness are not usually

[24] For the purposes of this analysis, we did not assess whether each allegation contained within the complaint constituted a protected disclosure.

[25] [redacted] provided documentation to the OIG to corroborate an increase in [redacted] workload in June 2021. Some of that documentation could be read to allege that the increase continued into July 2021. Even if the increase in duties lasted two months, a two-month increase would not constitute a significant change in duties or working conditions due to the fluctuating nature of case assignments in the unit.

[26] See *Shivaee v. Dep't of the Navy*, 74 M.S.P.R. 383, 388 (1977) (determining whether an action is "significant" by examining how common the action was and whether other employees received similar treatment).

[27] *Covarrubias v. Social Sec. Admin*., 113 M.S.P.R. 583, ¶ 15 n.4 (2010) (finding harassment constituted a significant change in working conditions when a supervisor monitored the employee's phone calls and whereabouts, including following her to the restroom), *overruled on other grounds, Colbert v. Dep't of Veterans Affairs*, 121 M.S.P.R 677, ¶ 12 n.5 (2014).

considered personnel actions.[28] Whistleblower Protection Act case law discussing alleged constructive discharge is also instructive here. The Merit Systems Protection Board has consistently held that a feeling of being unfairly criticized or difficult or unpleasant working conditions are generally not so intolerable as to compel a reasonable person to resign and thus not personnel actions.[29] These cases contemplate that criticism and unpleasantness in the workplace alone are not actionable under the Whistleblower Protection Act. Accordingly, the criticism and disagreements that [redacted] experienced do not constitute a personnel action.

In summary, [redacted] withheld promotion constitutes the failure to take a personnel action under 5 U.S.C. § 2302(a)(2). [redacted] increase in duties and the alleged harassment do not constitute personnel actions under 5 U.S.C. § 2302(a)(2).

Were [redacted] Differing Scientific Opinions, Protected Activities, or Protected Disclosure a Contributing Factor in the Personnel Action Taken Against [redacted]?

A differing scientific opinion, protected activity, or protected disclosure is a contributing factor in a decision to take a personnel action if the official taking the personnel action knew of the differing scientific opinion, protected activity, or protected disclosure and if the action occurred within a period of time such that a reasonable person could conclude that it was a contributing factor in the personnel action.[30] After assessing the two factors, knowledge and timing, we determined that [redacted] differing scientific opinions were a contributing factor in the decision to withhold [redacted] promotion but that [redacted] protected activities and protected disclosure were not.

The decision to withhold [redacted] promotion was made by [redacted], who relied upon feedback from [redacted] and [redacted]. [redacted] had direct knowledge of [redacted] differing scientific opinions, as [redacted] edited [redacted] response to a chemical submitter and attended a meeting where one of [redacted] differing scientific opinions was discussed by OPPT management. [redacted] expressed differing scientific opinions starting in early 2020 and was denied a promotion in November 2020. The timing between [redacted] differing scientific opinions and [redacted] denied promotion was less than a year, which is a reasonable amount of time to conclude that the differing scientific opinions were a contributing factor in that personnel action.[31] [redacted] protected

[28] *Greenspan v. Dep't of Veterans Affairs*, 94 M.S.P.R. 247, ¶ 22 (2003) *rev'd and remanded on other grounds*, 464 F.3d 1297 (Fed. Cir. 2006); *Special Counsel v. Spears*, 75 M.S.P.R. 639, 670 (1997) (oral counseling does not constitute disciplinary or corrective action within the coverage of the WPA).

[29] *Miller v. Dep't of Def.*, 85 M.S.P.R. 310 ¶ 32 (2000); *Brown v. U.S. Postal Service*, 115 M.S.P.R. 60, 618-19 (2011), *aff'd*, 469 F. App'x 852 (Fed. Cir. 2011) (holding that a pattern of poor treatment, including groundless criticism and allegedly throwing and destroying a desk, did not compel the complainant's retirement and thus did not constitute a personnel action).

[30] 5 U.S.C. § 1221(e).

[31] The U.S. Merit Systems Protection Board has found time periods longer than a year between the protected disclosure and adverse action to be reasonable in establishing that a disclosure was a contributing factor. See e.g., *Redschlag v. Dep't of the Army*, 89 M.S.P.R. 589, ¶ 87 (2001) (holding that a suspension proposed 18 months after an employee's protected disclosure was a sufficient time period where a reasonable person could conclude that the disclosure was a contributing factor in the suspension).

activities occurred in August, October, and November 2021, and [redacted] protected disclosure occurred in August 2021. Because [redacted] promotion decision was made in 2020 before [redacted] protected activities and protected disclosure, those activities and that disclosure were not a contributing factor in the personnel action.

In summary, because EPA management had knowledge of [redacted] differing scientific opinions and because [redacted] promotion was withheld within a year of [redacted] expressing those differing scientific opinions, we determined that [redacted] can establish by a preponderance of the evidence that [redacted] differing scientific opinions were a contributing factor in the Agency's decision to withhold [redacted] promotion. Because [redacted] protected activities and protected disclosure occurred after the decision regarding [redacted] promotion was made, we determined that [redacted] could not establish by a preponderance of the evidence that [redacted] protected activities and protected disclosure were a contributing factor in the Agency's decision to withhold [redacted] promotion.

Would the Agency Have Taken the Personnel Action Against [redacted] in the Absence of [redacted] Differing Scientific Opinions?

Once a preponderance of the evidence establishes that one or more differing scientific opinions contributed to the personnel action taken against the complainant, the retaliation allegation is substantiated unless clear and convincing evidence establishes that the action would have been taken in the absence of the differing scientific opinion. To make this determination, our analysis weighs the following factors: (1) the strength of the evidence in support of each action; (2) the existence and strength of any motive to retaliate on the part of the officials who were involved in the decision, referred to as *animus evidence*; and (3) any evidence that the employer has taken similar actions against employees who are not whistleblowers but are otherwise similarly situated, referred to as *comparators*.

After analyzing the three factors, we determined that the EPA can establish by clear and convincing evidence that it would have withheld [redacted] promotion in the absence of [redacted] differing scientific opinions.

The support for withholding [redacted] promotion is mixed. [redacted] was eligible for a promotion to the [redacted] level in November 2020. Because the division had recently undergone a reorganization, [redacted] new acting supervisor was not familiar with [redacted] work. As such, the acting supervisor contacted [redacted] and [redacted], who told [redacted] that [redacted] should not be promoted yet[32]. [redacted] based this feedback on [redacted] written work, including [redacted] June 2020 memorandum documenting a differing scientific opinion, which [redacted] said contained

[32] [redacted] testified that had [redacted] not expressed a differing scientific opinion in written form, concerns about [redacted] writing might not have been noticed, but [redacted] also testified that [redacted] did not review [redacted] work during the FY 2020 performance period. [redacted] noted that [redacted] only reviewed the examples of [redacted] writing that were provided to [redacted] by [redacted]. As the [redacted] did not review a representative sample of [redacted] work during the performance period, we did not find [redacted] testimony regarding the remainder of [redacted] work product during the FY 2020 performance period to be credible.

grammatical mistakes and was hard to understand. While [redacted] identified mistakes, they were not enough to negatively impact [redacted] performance review. In [redacted] FY 2020 performance evaluation, the [redacted] rated [redacted] as "[redacted]" and wrote that [redacted] "[redacted]" The [redacted] did, however, also note in [redacted] supervisory comments that [redacted]. [redacted] also reviewed [redacted] written work product and noted errors. Meaningfully, one of these reviews was conducted after [redacted] took multiple training courses. However, that manager determined that, while there was room for improvement, there were no major concerns with [redacted] writing and initiated the promotion process. Based on this review, [redacted] was promoted in August 2021.

Although [redacted] was aware of [redacted] differing scientific opinions, [redacted] did not express animus regarding them. In fact, [redacted] supported [redacted] scientific opinion expressed in the June 2020 memorandum and provided edits to the drafts of that memorandum to strengthen [redacted] argument. Although the final assessment altered [redacted] selected analogue chemical, that decision was made by the OPPT senior science advisor, not [redacted]

There are no apt comparators. The decision-maker, [redacted], testified that [redacted] had never withheld a career-ladder promotion before.

Although [redacted] grammatical mistakes may not have been enough to negatively impact [redacted] performance evaluation, two other managers identified errors in [redacted] work. At least one of these managers identified grammatical errors even after [redacted] took writing trainings. Given the discretionary nature of the career ladder promotion, this confirmation of errors by other managers, paired with the lack of animus evidence, leads us to determine that the agency can establish by clear and convincing evidence that it would have withheld [redacted] promotion in the absence of [redacted] differing scientific opinions.

Conclusions

We determined that [redacted] expressed differing scientific opinions, which were a contributing factor in one personnel action taken against [redacted] a withheld promotion to the [redacted] level. We did not substantiate [redacted] allegation of retaliation with respect to [redacted] withheld promotion.

Recommendation

Given the conclusions discussed above, we make no recommendation regarding corrective action.

Whistleblower Protection

U.S. Environmental Protection Agency

The whistleblower protection coordinator's role is to educate Agency employees about prohibitions against retaliation for protected disclosures and the rights and remedies against retaliation. For more information, please visit the OIG's whistleblower protection webpage.

Contact us:

Congressional Inquiries: OIG.CongressionalAffairs@epa.gov

Media Inquiries: OIG.PublicAffairs@epa.gov

EPA OIG Hotline: OIG.Hotline@epa.gov

Web: epaoig.gov

Follow us:

X (formerly Twitter): @epaoig

LinkedIn: linkedin.com/company/epa-oig

YouTube: youtube.com/epaoig

Instagram: @epa.ig.on.ig

www.epaoig.gov