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## USDOL/OALJ Reporter

[Lewis v. U.S. Environmental Protection Agency](#), ARB No. 04-117, ALJ Nos. 2003-CAA-5 and 6 (ARB Mar. 30, 2007)

**U.S. Department of Labor**

Administrative Review Board  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210



ARB CASE NO. 04-117  
ALJ CASE NOS. 03-CAA-6  
03-CAA-5  
DATE: March 30, 2007

In the Matter of:

DAVID L. LEWIS,  
COMPLAINANT,

v.

U.S. ENVIRONMENTAL  
PROTECTION AGENCY,  
RESPONDENT.

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

**For the Complainant:**

Stephen M. Kohn, Esq., *Kohn, Kohn & Colapinto, LLP*, and Sara Michaelchuck, Esq., *National Whistleblower Legal Defense and Education Fund*, Washington, D.C.

**For the Respondent:**

David P. Guerrero, Esq., *Office of General Counsel, U. S. Environmental Protection Agency*, Washington, D.C.

### FINAL DECISION AND ORDER

Dr. David L. Lewis filed two whistleblower complaints with the U. S. Department of Labor alleging that his employer, the U. S. Environmental Protection Agency (EPA), violated the employee protection provisions of six federal statutes.<sup>1</sup> Lewis claims that

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EPA took various adverse actions against him because he engaged in activity that the federal statutes protect. A Department of Labor Administrative Law Judge (ALJ) consolidated the complaints and, after a hearing, recommended that Lewis's complaints be dismissed. Lewis appealed. We agree with the ALJ's recommendation and dismiss Lewis's complaints.

#### Background

Lewis was a highly respected microbiologist at EPA's Office of Research and Development (ORD).<sup>2</sup> RX 1.<sup>3</sup> His work exposing certain viruses and pathogens in dental equipment earned national recognition. CX 75, 77-78, 128, 136, 138. During the relevant time frame, Lewis worked at the marine sciences department at the University of Georgia (UGA) pursuant to the Intergovernmental Personnel Act (IPA). The scope of his work there involved research and experiments on dental device contaminants that "pose a risk of infection from human pathogens, and the relationship of this work to environmental issues of concern to the EPA." CX 8 at 6.

In addition to his dental interests, Lewis researched human exposure to pathogens contained in water and soil dust affected by sewage sludge (bio-solids) used to fertilize farm land. CX 61. Since 1996 he had voiced concerns about EPA's Rule 503, which regulates the application of bio-solid wastes to land. CX 49, 67-68. In written articles, speaking engagements, and congressional testimony, he attacked what he claimed was a

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lack of research into the harmful effects of pathogens released during sludge fertilization. CX 59-60, 120-21.

In 1998, Lewis served as an expert witness in a wrongful death case, *Marshall v. Synagro*, in which a young man's death due to breathing difficulties was blamed on sludge fertilization near his home. CX 82, RX 145. Lewis produced two reports. One concluded that the dust and gaseous emissions from the sludge-fertilized land likely caused the young man's death, and the other pointed out flaws in implementing Rule 503, noting that using bio-solids as fertilizer could result in harm to the public's health. CX 82, TR at 134-35.

These reports and Lewis's subsequent testimony prompted Synagro Technologies, Inc., a national sludge fertilization company, to publish a "White Paper," *Analysis of David Lewis's Theories Regarding Bio-solids*, that was highly critical of Lewis and his theories and research on Rule 503. RX 68. The paper asserted that EPA did not sponsor Lewis's bio-solids theories, and that sound science did not support his opinions. *Id.* Synagro e-mailed the paper to numerous people in the bio-solids industry and to EPA employees, including John Walker, a pay grade GS-14 physical scientist in EPA's Office of Waste Water Management (OWWM), who was also a spokesman for Rule 503 implementation. TR at 796-806.

In September 2001, Walker spoke to attorney Carol Geiger about land application of bio-solids. TR at 779. Geiger represented Southern Waste, Inc., another sludge fertilizer company, and was preparing for a Dawson County, Georgia public hearing on banning bio-solid sludge fertilization. CX 94. Geiger told Walker that Lewis was scheduled to speak at the hearing. TR at 779. Walker forwarded the White Paper to Geiger and also sent her a letter on EPA letterhead stating that EPA had no evidence that applying sludge fertilizer in accordance with Rule 503 was unsafe and that a majority of the scientific community believed that Rule 503 was based on sound science. CX 94, TR at 776. He also forwarded the White Paper to others inside and outside EPA. CX 96, TR at 1196-97. Lewis spoke at the hearing. So did Geiger who had also given the White Paper and Walker's letter to the Dawson County Board of Commissioners on the day of the hearing. RX 8 at 8, TR at 206. Franklin County, Georgia, held a similar meeting in October at which Southern Waste presented the same information. CX 29 at 8-15.

### EPA Policy About Disclaimers and Clearance

EPA has specific ethical guidelines for employees who engage in activities that are "along the lines" of their scientific work but not part of their official duties. JX 1 at 60-64. Employees who take on outside speaking, writing, or teaching engagements may refer to their EPA employment, but they must also provide other biographical data and state in disclaimers that they are acting as private citizens, not as EPA employees. *Id.*

The disclaimers that EPA employees use vary according to the type of document and public appearance – project report, journal article, book chapter, technical

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conferences, hearings – and generally cover the extent of EPA involvement and endorsement. RX 132 at 12-15. Most disclaimers point out whether EPA funded or approved the document or appearance and note that EPA does not endorse or recommend any commercial applications. *Id.*

EPA also has detailed procedures governing the publications its scientists write. RX 132. Scientific articles and papers undergo one or more types of review. For an article prepared for a journal that provides its own peer review, NERL managers would approve publication (though not necessarily agree with the views expressed) after that review. However, if the author is part of ERD, like Lewis, NERL would approve publication prior to the journal's peer review. JX 1.

EPA sometimes conducts an internal peer review of an article rather than, or in addition to, a journal's peer review. CX 145. The guidelines for the coordinator of an internal peer review are specific. The reviewers should not have a vested financial interest in the article under review or other conflicts of interest, should not aggressively criticize the author, should be technically competent in at least one of the subjects of the article, should maintain a formal record of reviewing materials, should not consult outside sources without the author's permission, and should not release critical comments to a third party. CX 145 at 55-59, TR at 325. Internal peer reviewers do not decide if an article is publishable, but the article's author must either rebut critical comments or incorporate them in his or her work. JX 1 at 47-49. And sometimes scientific or technical articles are subject to an informal review rather than, or in addition to, a peer review. TR at 525-26. These reviewers can have conflicts of interest and usually have valid objections. *Id.* Lewis's practice was to obtain informal reviews from such persons to build his own credibility. TR at 528-30.

### Lewis's Publications

Along with his expert witness activities, Lewis wrote a research article, *Adverse Interactions of Irritant Chemicals and Pathogens with Land Applied Sewage Sludge*. This article documented illnesses stemming from sludge fertilization and concluded that the link between it and public health risks "should be thoroughly investigated with epidemiological studies." RX 43. Lewis wanted *Lancet*, a prestigious medical journal, to publish the article. TR at 317.

In May 2001, following EPA policy, Lewis submitted the article to his supervisor, Frank Stancil, and requested an expedited clearance review. RX 73, TR at 318. He also sent the paper to several others for review, including Dr. Harvey Holm, an ORD research director, and Dr. James Smith, chair of the EPA's Pathogens Equivalency Committee, which evaluated new sewage sludge treatment processes. CX 84, TR at 167-68, 621-22, 630-31. Smith's supervisor ordered a peer review of Lewis's article, which Holm then coordinated. RX 47, TR at 648-51, 1229-34.

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Smith involved Walker in the peer review. TR at 1234-35. Walker skimmed the *Adverse Interactions* article and passed it on to Dr. Patricia Millner, a microbiologist at the U.S. Department of Agriculture for her comments. RX 52, TR at 759-60, 814. He then used her comments without attribution and added his own conclusion that "the methodology including the evidence and analysis as presented are significantly flawed and do not support the conclusions." RX 55, TR at 1139, 1154-55. Walker disseminated his review to his managers and the other reviewers, noting in a cover letter that the article was "poor quality" and "alarmist." RX 55, TR at 1180-81.

Meanwhile, *Lancet* rejected the article, noting the need for an epidemiological study with a control group and suggesting that Lewis submit it to a specialty journal instead. RX 190 at 2, TR at 352. Following the rejection, Lewis revised the article, which EPA cleared for publication, and submitted it to the on-line journal *Environmental Health*. RX 83-84, TR at 890-92.

In February 2002, Lewis wrote a second article, *Risk from Pathogens in Land Applied Sewage Sludge*, which he intended to submit to *Environmental, Science & Technology Journal*. RX 88, TR at 389, 894. At ERD, where Lewis worked, his second-line supervisor was Rosemarie Russo, the deputy ethics official with whom employees must consult before engaging in outside activities. JX 1 at 60. Because of the policy implications in the article, Russo sent a copy to Jewel Morris of ORD's National Exposure Research Laboratory for review. RX 90.

Morris wanted Lewis to change the disclaimer on the *Risk from Pathogens* article to emphasize that although EPA had approved the article for publication, it did not reflect the views of EPA and "no official endorsement of the opinions expressed . . . should be inferred." RX 93, TR at 902-05. Initially, Lewis did not agree with this disclaimer, and Morris suggested an alternative that stated, "the views expressed in this paper are those of the authors and do not necessarily reflect the views or policies of the EPA." RX 103. In the end, Morris and Lewis compromised on a disclaimer for both the revised *Adverse Interactions* and the *Risk from Pathogens* articles. TR at 418.

### Lewis's Other Activities

In addition to writing articles and acting as an expert witness on Rule 503, Lewis made several public appearances starting in February 1998 when he presented his bio-solids research at the annual meeting of the American Academy for the Advancement of Science. CX 121-22. He discussed his theory that pathogens survive

longer in the oils and greases of bio-solids and, when these bio-solids are applied to land in sludge fertilization, they pose a risk to human health. TR at 118-20. Lewis's abstract of his presentation led to an article in *Science News* which discussed his criticism that Rule 503 did not address this risk. CX 120. And from December 1998 until December 2000, Lewis, with EPA's permission, contracted with the Steris Corporation to speak at conferences on germ sterilization issues in the dental industry, for which he was paid \$78,150.00. RX 32-33; TR at 495-97.

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Following discussions with staff members of the U. S. House Science Committee, Lewis also testified at a hearing on March 22, 2000, which addressed whether the EPA, in managing Rule 503, failed to foster sound science with an open exchange of ideas and whether EPA harassed scientists and intimidated private citizens who criticized the sludge rule and the science supporting it. CX 59, TR at 150-57. Subsequently, EPA commissioned the National Academy of Sciences to study the legitimacy of the scientific bases of Rule 503. CX 46, 140 at 29. And in April 2000, Lewis presented his bio-solids research at the National Science Conference and called for further research on the gaseous emissions from sludge fertilizer and their potential for harmful health effects. CX 140 at 24-25, TR at 1103-06.

Then, in November 2001, after speaking at the Dawson and Franklin County public hearings, Lewis presented "scientific data that were not supportive" of Rule 503 at a conference at Boston University. RX 106. Lewis orally disclaimed that he was not speaking on behalf of EPA. TR at 404-05. Subsequently, the University asked Lewis to prepare an abstract of his presentation. TR at 406. The abstract was posted on the University's web site without a disclaimer or ERD review. RX 106.

### Case History

Lewis filed whistleblower complaints with the Department of Labor's Occupational Safety and Health Administration (OSHA) on October 15, 2001, and September 23, 2002. CX 81, 83. He contends that EPA violated the employee protection provisions of the six aforementioned statutes when it retaliated against him because he criticized Rule 503 in his articles and public appearances. *Id.* After investigating, OSHA concluded that Lewis's complaints lacked merit. RX 15. Lewis objected to OSHA's findings and requested a hearing before an ALJ. The hearing took place on March 4-7 and April 8-11, 2003. R. D. & O. at 2. As noted earlier, the ALJ concluded that EPA did not violate the employee protections and recommended that Lewis's complaint be dismissed. R. D. & O. at 65-66. Lewis appealed to this Board.

### Jurisdiction and Standard of Review

The Administrative Review Board (ARB or the Board) has jurisdiction to review the ALJ's recommended decision.<sup>4</sup> Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in

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rendering a decision.<sup>5</sup> The ARB engages in de novo review of an ALJ's recommended decision in cases pertaining to the environmental acts.<sup>6</sup>

### Discussion

#### The Legal Standard

To prevail on his CAA whistleblower complaint, Lewis must prove by a preponderance of the evidence that he engaged in protected activity, that EPA knew about his protected activity, and that EPA took adverse employment action because of his protected activity.<sup>7</sup>

#### A. Protected Activity and Employer Knowledge

The CAA protects employees from discharge or other discrimination who commence a proceeding, or who testify in such a proceeding, or who assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of the statute.<sup>8</sup> The purpose of the CAA is to protect and enhance the quality of the nation's air resources so as to promote public health and welfare. The term "proceeding" encompasses all phases of a proceeding that relates to public health or the environment, including an internal or external complaint that may precipitate a proceeding.<sup>9</sup> An employee who makes a complaint to the employer that is "grounded in conditions constituting reasonably perceived violations" of the environmental acts engages in protected activity.<sup>10</sup> Similarly, expressing concerns to the employer that constitute reasonably perceived threats to environmental safety is protected activity.<sup>11</sup>

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The ALJ assumed that Lewis engaged in protected activity and that EPA was aware of his activities. R. D. & O. at 54. The record supports a finding that Lewis reasonably believed that the scientific basis for declaring sewage sludge fertilization safe was flawed and that further investigation of the possible risks to human health was necessary. R. D. & O. at 3-46. Thus, Lewis engaged in CAA-protected activity when he expressed his concerns about sludge fertilization and Rule 503 in his various writings, speeches, and testimony. In doing so, he was furthering the purposes of the CAA. And since Lewis communicated those beliefs to EPA, EPA knew about his protected activity. Thus, we find that Lewis proved by a preponderance of the evidence that he engaged in CAA-protected activity and that EPA knew about this activity.

#### B. Adverse Actions

The CAA prohibits employers from discharging or otherwise discriminating "with respect to compensation, terms, conditions, or privileges of employment" because an employee has engaged in protected activity.<sup>12</sup> Nor may an employer intimidate, threaten, restrain, coerce, blacklist, or in any other manner discriminate because of protected activity.<sup>13</sup> Not every employer act that renders an employee unhappy constitutes an adverse action.<sup>14</sup> A whistleblower like Lewis must prove by a preponderance of the evidence that an employer's actions were materially adverse, that is, "harmful to the point that they could well dissuade a reasonable worker" from engaging in protected activity.<sup>15</sup> Furthermore, discrete adverse employment actions, that is, those that occur at a specific time rather than those involving repeated conduct, are actionable only if they occur within the prescribed limitations period.<sup>16</sup> This means that a whistleblower will be barred from asserting discrete adverse action claims that occurred outside of the

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applicable limitations period. The limitations period for CAA claims is thirty days.<sup>17</sup> The thirty-day limitations period begins to run on the date that a complainant receives final, definitive, and unequivocal notice of the adverse action.<sup>18</sup> The date that an employer communicates its decision to implement such an action, rather than the date the consequences are felt, marks the occurrence of the violation.<sup>19</sup>

The ALJ applied the "continuing violations doctrine." Under that doctrine, discrete acts that would ordinarily be time barred because they occurred outside of the statutory limitations period are actionable as long as they are "related" to an act that did occur within the limitations period. R. D. & O. 52-53. This was error because *Morgan* specifically reversed the Ninth Circuit Court of Appeals's application of the continuing violations doctrine.<sup>20</sup>

### Lewis's Claims

According to the ALJ, Lewis claimed that EPA took 11 adverse actions. R. D. & O. at 55. The parties do not dispute the ALJ's catalogue and description of Lewis's claims. Nevertheless, for greater ease of analysis, we have condensed the 11 claims into five categories.

#### 1. Peer Review of Adverse Interactions

Lewis completed his research article, "*Adverse Interactions of Irritant Chemical and Pathogens with Land Applied Sewage Sludge*," on May 1, 2001, and sent it to his supervisor for an expedited clearance, noting that the article might attract media attention. RX 73. Copies also went to other individuals at EPA and elsewhere for informal review. RX 76. After ERD clearance, Lewis submitted the article to *Lancet* for formal peer review. Such a review would comply with EPA's procedures for scientific articles that are peer reviewed outside EPA. JX 1 at 40-42, RX 77; TR at 168-71, 624-25.

Lewis also sent the article to Dr. James Smith, who chaired EPA's Pathogens Equivalency Committee. RX 43. Lewis noted that the article was confidential and not for public disclosure and should be distributed only to "appropriate individuals." *Id.* Smith, however, recalled the previous controversy over Lewis's views and told his supervisor, Lynnann Paris, about the article. She instructed Smith to conduct a technical peer review of the article. RX 46-47; TR at 1229-30. Smith asked two other members of

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his committee to participate, and one of them suggested that Walker also review the article. TR at 1231-35.

On July 11, 2001, Walker submitted his comments to Smith. RX 55. Walker concluded that the evidence and analysis presented in *Adverse Interactions* were "significantly flawed and do not support the conclusions." *Id.* At the hearing, Walker admitted that, except for his conclusion, what he had written were not his findings and opinions but were Dr. Patricia Millner's, a microbiologist at the U.S. Department of Agriculture, to whom he had given Lewis's article. RX 53, 65, TR at 1142-51. Walker also sent his plagiarized comments to other reviewers, along with a cover letter labeling the article "poor quality" and "alarmist." RX 55, TR at 1153-55, 1180-81. That same day, Lewis received the reviewers' comments, including Walker's, and agreed to send Smith a revised manuscript. RX 56, 80; TR at 352-53. Meanwhile, *Lancet* rejected the article on the grounds that epidemiological studies and a control group were needed to support the conclusions. RX 190, TR at 552-53.

Also in July 2001, Synagro's vice president O'Dette submitted affidavits in the *Marshall* case describing two meetings with Walker at which they discussed Lewis's anti-sludge activities and Walker's comments on *Adverse Interactions*. CX 106-07. Lewis received copies of these affidavits and asked EPA's Office of Inspector General (OIG) to investigate Walker's selection as a peer reviewer, alleging that he was not qualified to be a technical reviewer and had a conflict of interest because of his pro-sludge stance. TR at 228-44, *see* CX 109.

Given these facts, Lewis claims that EPA violated its policy and procedures when, despite the *Lancet* review, it conducted an internal peer review and permitted Walker, a pro-sludge advocate and aggressive critic of Lewis's research, to participate in the internal process. Lewis claims that EPA's disregard of its own policy forced him to seek quick publication of the revised *Adverse Interactions* article in a less prestigious, on-line journal. Also, Lewis claims that in retaliation for his activities against Rule 503, EPA permitted Walker's conclusion that Lewis's research was "significantly flawed" to become known in the academic and pro-sludge communities to the detriment of Lewis's reputation.

The ALJ found that Walker "blatantly violated" EPA's peer review policy and that Smith should not have included Walker in the review. Nonetheless, the ALJ found that Lewis offered no evidence of any tangible job consequence resulting from these violations. He found that *Lancet*'s decision not to publish was based on its own review, and that other reviewers were also critical of Lewis's article. RX 50-51. The ALJ concluded that EPA's actions regarding the peer review process were not adverse because they did not result in any consequence to Lewis. R. D. & O. at 57.

Lewis argues on appeal that the ALJ ignored the fact that the public and other scientists have access to peer reviews of scientific articles. Thus, the ALJ failed to consider the harm that EPA's disregard of its procedures inflicted on Lewis's professional credibility. Lewis contends that EPA refused to refute the tainted peer

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review and, by allowing it to remain in the public record, permitted Synagro, the World Environment Federation, and other pro-sludge activists to use it to destroy Lewis's ability to function as an internationally renowned scientist. According to Lewis, the tainted peer review is equivalent to a negative job performance evaluation from EPA. Complainant's Brief at 16-24.

EPA argues that the tainted peer review was not adverse action for several reasons. First, Lewis's supervisors had nothing to do with the technical peer review that Smith initiated and therefore did not take adverse action against Lewis. Second, Lewis cannot claim adverse action because he himself asked Smith to let other "appropriate individuals" at EPA review the article and stated in a June 19, 2001 e-mail that he would incorporate any suggestions that Walker, among others, might have regarding the paper. Third, EPA did not disseminate the tainted peer review to the public. EPA asserts that Lewis himself attached Walker's comments to his first whistleblower complaint, which OSHA forwarded to Synagro, at its request, during discovery proceedings. Therefore, EPA contends, it took no adverse action that was detrimental to Lewis's employment or reputation. Respondent's Brief at 9-22.

The ALJ concluded that Lewis's claim regarding the peer review was actionable under the continuing violation doctrine. R. D. & O. at 52-53. As we have discussed, that theory is no longer viable. Rather, an employee must file a complaint within thirty days of the date of a discrete adverse action or of the date that the employee became aware of such action.

Lewis's claim that EPA's tainted peer review was adverse action is not actionable because the discrete acts

comprising this claim occurred more than thirty days prior to his filing of the October 15, 2001 complaint. Lewis knew in July 2001 that Walker, a well-known pro-sludge advocate, had inappropriately participated in the peer review of *Adverse Interactions* because Lewis had received the reviewers' comments, including Walker's, and had responded to Smith in an e-mail. Further, Lewis asked the OIG in July 2001 to investigate Walker's role in the peer review process. RX 196. Also, Lewis knew in August 2001 that Walker had shared his views about Lewis's article and activities with Synagro's O'Dette because Lewis had copies of O'Dette's July 2001 affidavits submitted in the *Marshall* case. RX 61. Therefore, because Lewis filed his complaint containing this claim in October 2001, which was more than two months after learning of Walker's participation and actions, the tainted peer review claim is not actionable.

## 2. Distributing the Synagro White Paper

Synagro responded to Lewis's participation as an expert witness in the *Marshall* wrongful death lawsuit with a 26-page attack on his theories and reputation as a bio-solids researcher. RX 68. The Synagro White Paper stated that Lewis did not have the fundamental bio-solids training and experience needed to establish valid links between sewage fertilization and human health effects. It alleged that he used faulty and insufficient data to develop his theories, failed to identify specific pathogens, relied on

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biased anecdotal reports to support his conclusions, and misrepresented the work of other bio-solids researchers and regulators. The White Paper also stated that EPA did not sponsor Lewis's bio-solids activities, that no court of law had accepted him as an expert, and that no peer review of his work and writings on bio-solids had been done.

On September 21, 2001, Robert O'Dette, Synagro's vice president of government relations, e-mailed a copy of the White Paper to people who worked in the bio-solids industry and at EPA, including Walker, who had played a significant role in developing EPA's Rule 503, which regulates application of bio-solids to land. RX 67. Walker was also the quality assurance and control manager for the Office of Waste Water Management (OWWM). As such, he evaluated some EPA documents prior to public dissemination and responded to public inquiries about Rule 503. And, as noted previously, on September 24, 2001, Walker e-mailed the White Paper to several other people inside and outside EPA, including Geiger, the attorney representing Southern Waste, another bio-solids company. CX 96. Geiger then circulated copies of the White Paper at the Dawson County, Georgia public meeting concerning sludge fertilization and indicated that the White Paper had come from EPA. TR at 213-15. In his private capacity, Lewis spoke at the meeting, defending his theories to an audience of industry representatives, faculty from the UGA, and the public. TR 572-74.

Lewis reported to EPA's OIG that Walker had distributed the White Paper. OIG investigated. RX 172-73. Subsequently, OWWM's deputy director, Alfred W. Lindsey, counseled Walker about his "poor judgment" in forwarding the White Paper to those outside EPA because his action could be interpreted as an EPA endorsement of Synagro's obviously biased views about Lewis. RX 174. On December 11, 2001, Lindsey instructed Walker to (1) have his supervisors clear beforehand any written or electronic correspondence concerning Lewis that he provides to outsiders, and (2) clarify to the attorneys representing Southern Waste that EPA does not approve or endorse Synagro's White Paper. RX 175.

Lewis claims that by disseminating the White Paper to the pro-sludge forces, Walker and EPA officials collaborated against him because of his views about the health risks of sludge fertilization. Post-Hearing Brief at 148. According to Lewis, the fact that sludge companies like Southern Waste got the White Paper from EPA gave its conclusions credibility and harmed his reputation among those attending the public hearings. Furthermore, Lewis asserts that EPA should have consulted him about the discipline Walker received and should have informed the public at large that it did not endorse the White Paper. *Id.* at 149-151.

The ALJ concluded that Walker's distribution of the paper was not an adverse action that EPA took because Walker was not Lewis's supervisor, but only a fellow scientist who did not even work in the same program office. He found that since Lewis's supervisors were not aware that Walker had distributed Synagro's White Paper to others inside and outside EPA until Lewis reported his action to the OIG and since EPA took

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prompt, disciplinary action against Walker, EPA was not liable for Walker's actions.<sup>21</sup> Furthermore, since Lewis did not adduce evidence that EPA had a policy which permitted Lewis to be consulted about Walker's discipline, EPA's failure to consult him was not an adverse action. R. D. & O. at 58-59.

Lewis argues on appeal, as he did below, that Walker acted in his official capacity as one of EPA's leading bio-solids authorities. He contends that Walker, Synagro, Southern Waste, and trade organizations that promote sludge fertilization "badmouthed" him when they publicized the highly critical White Paper. According to Lewis, this denigrated his scientific reputation and harmed his future employment prospects. Complainant's Brief at 11-16. EPA counters that Walker's distributing the White Paper was not an adverse action because: (1) Walker did not inform his supervisors of his intent to distribute the White Paper, (2) Walker had no supervisory power over Lewis, (3) Walker did not establish EPA policy on bio-solids, and (4) EPA took prompt disciplinary action when informed of Walker's actions. Respondent's Brief at 22-27.

Since Walker distributed the White Paper on September 24, 2001, which was less than thirty days before Lewis filed his October 15, 2001 whistleblower complaint alleging this adverse action, this discrete act of "badmouthing" is actionable. But even if we were to assume that Walker had some supervisory authority over Lewis or that EPA did not promptly remedy the situation, distributing the White Paper did not constitute adverse action.

First, Lewis provided no evidence that distributing the White Paper had any adverse effect on the compensation, terms, conditions, or privileges of his employment with EPA. Lewis continued with his IPA assignment at the University of Georgia until it ended in December 2002. Yes, Lewis was unhappy about the distribution and the denigrating contents of the paper, but, as Walker testified, the White Paper was "common knowledge." TR at 1196. Distributing the paper was not materially adverse to the point that it "could well dissuade a reasonable worker" from engaging in protected activity.<sup>22</sup> Lewis certainly was not dissuaded because he continued to promulgate his views about sludge fertilization in articles and public hearings and was eventually vindicated about the need for more research. RX 189, TR at 283-300.

Second, we reject Lewis's argument that distributing the White Paper constituted "badmouthing." We view this argument as an allegation of "blacklisting." Blacklisting occurs when an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding

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employment.<sup>23</sup> The whistleblower must produce evidence that a specific act of blacklisting occurred; his subjective feelings toward an employer's action are insufficient to establish blacklisting.<sup>24</sup>

Though Lewis claims that the White Paper harmed his reputation and thus his future employment prospects, he provided no evidence that Walker or other EPA managers intentionally disseminated damaging information that prevented him from finding employment.

Lewis also claims that EPA's failure to respond to Synagro's White Paper allegations indicated public endorsement of them and thus constituted a bad reference, i.e., blacklisting. Lewis has not convinced us that EPA had an affirmative obligation to respond to the White Paper. And even if EPA did have a duty to respond, again, to succeed on a blacklisting claim, Lewis must present evidence that EPA disseminated damaging information. Failing to respond is hardly equivalent to disseminating damaging information. But if EPA's failure to respond could be seen as disseminating damaging information, Lewis has not adduced evidence that such failure prevented him from finding employment. Therefore, Lewis's blacklisting argument fails.

### 3. Inquiries About the Scope of Lewis's IPA Assignment to UGA

Lewis claims that EPA failed to respond and defend him when Synagro, the UGA, and the Water Environment Federation (WEF) sent letters to EPA questioning the scope of Lewis's IPA at UGA. EPA's policy regarding outside inquiries about its employees states that such inquiries will be referred to the employee's program office for review and response unless the employee is involved in litigation. JS 14, 21. Lewis also claims that, in its response to an OSHA inquiry, EPA misstated the scope of his IPA and then provided this false and misleading information to Synagro.

#### *Synagro's Inquiries*

During Lewis's IPA tenure at UGA, Synagro, as the defendant in the *Marshall* case, wrote several letters to EPA inquiring about Lewis, who served as an expert witness for the plaintiff. The first letter, on July 10, 2001, asked EPA to clarify Lewis's duties on his IPA assignment and to clarify its response to Lewis's public criticism of Rule 503 as an expert witness. RX 150. In a July 16, 2001 letter, Synagro repeated its questions and accused Lewis of using EPA resources for his private work in the *Marshall* case. RX 197 at 5.

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Synagro wrote another letter to EPA on February 6, 2002, that again asked about the scope of Lewis's IPA and referred to peer reviews that termed Lewis's bio-solids research "significantly flawed." CX 12. Synagro followed up with a March 27, 2002 letter requesting a meeting with EPA to discuss its concerns about Lewis. RX 154.

EPA did not answer Synagro's July 2001 letters or the February 2002 letter, but Lewis had seen a copy of the first letter and sent a memorandum to Russo, his supervisor, responding to Synagro's allegations. RX 151. He stated that he had complied with the EPA ethics requirements and had permission from UGA to serve as an unpaid expert witness in the *Marshall* case. *Id.*

EPA did respond to Synagro's March 27, 2002 inquiry. In an April 8, 2002 letter, copied to Lewis, EPA informed Synagro that it would not meet with that company's attorneys or respond to the issues and questions raised in the letter because Lewis had filed whistleblower claims against both EPA and Synagro.<sup>25</sup> RX 155, *see* JS 12. The EPA letter added that the Privacy Act and the Freedom of Information Act prohibited EPA from disclosing information about an employee's conduct. RX 155.

Lewis claims that EPA discriminated against him by failing to defend him against Synagro's allegations that he misused his IPA position in promulgating the health risks resulting from sewage sludge fertilization. According to Lewis, EPA's failure to respond to Synagro's letters assisted Synagro's campaign to discredit his theories and ruin his reputation, thus harming his future job prospects at UGA. Complainant's Post-Hearing Brief at 158-83.

The ALJ assumed that EPA was obligated to respond to outside inquiries about Lewis despite ongoing litigation. Nevertheless, he concluded that EPA's inaction was not adverse because Lewis did not prove that any tangible job consequences resulted. R. D. & O. at 60.

On appeal, Lewis argues that EPA's failure to respond to Synagro's February 6, 2002 letter violated its standard policy on answering outside inquiries and that, therefore, EPA did not protect his scientific reputation. He argues that EPA's lack of response undermined his ability to do his work at UGA, "souring" his standing at UGA, and "ended" his hope of obtaining a professorship at UGA. Complainant's Brief at 29-35.<sup>26</sup> EPA argues that its lack of response to the February 6, 2002 letter was due to in part to the litigious environment between it and Lewis. Respondent's Brief at 28-29. Thus,

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EPA contends, it had a legitimate, non-discriminatory reason for not responding in writing to Synagro. *Id.* at 29-31.

The record contains no evidence that EPA's action adversely affected Lewis's work or standing at UGA. Nor does the record support Lewis's assertion that when EPA did not respond, he lost the opportunity to become a professor at UGA. Lewis presented no evidence that UGA had offered him a position or, by the time of the hearing, that he had ever applied for employment there (or anywhere else), although several UGA officials testified that they would support him if funds could be raised. R. D. & O. at 61. Moreover, as the ALJ also pointed out, during the course of the *Marshall* case, Lewis testified that he "no longer planned to pursue employment" at UGA. *Id.* Therefore, like the ALJ, we conclude that EPA's failure to respond to Synagro's February inquiry does not constitute an adverse action.

#### *UGA's Inquiries*

In 2000, after Synagro subpoenaed Lewis and two UGA employees working with him to appear for depositions in the *Marshall* case, UGA's legal affairs director, Arthur Leed, asked Lewis to explain his role as an expert witness in the case. RX 147. Leed also asked EPA's Deputy Administrator in Washington, D.C., in letters dated October 9 and November 29, 2001, to clarify the scope of Lewis's IPA work. RX 162.

Meanwhile, Rosemary Russo, Lewis's supervisor, had already clarified the scope of Lewis's IPA in a September 4, 2001 letter to the Director of UGA's marine sciences department. CX 9. She stated that Lewis would apply his dental pathogens research "to the Agency's mission, including pathogens in sewage sludge," thus continuing his official EPA research in this area that began in 1996. Russo added that Lewis had EPA's permission to serve as an expert witness in the *Marshall* case and that there were no restrictions on his testimony as long as he stated he was not speaking for EPA. *Id.*

In a January 30, 2002 letter, EPA did respond to Leed's October and November 2001 letters. CX 11. A copy of

this letter was sent to Lewis's attorney. EPA informed Leeds that it had told Synagro's counsel that current federal privacy statutes and regulations precluded EPA from responding to Synagro's inquiries. The letter added that the scope of Lewis's IPA concerned his work on pathogen contamination of medical and dental devices and "the relationship of this work to environmental issues of concern" to EPA, as detailed in the two-year extension of Lewis's IPA that was scheduled to end in December 2002.<sup>27</sup> *Id.*

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Lewis claims that EPA's response to Leed about the scope of his IPA assignment at UGA was inadequate because EPA never informed Leed that Synagro's allegations of misuse of the IPA were without merit. Complainant's Post-Hearing Brief at 162-67. According to Lewis, this inadequate response created hostility among his UGA colleagues and interfered with his prospective future employment at UGA. *Id.* at 158-62.

The ALJ found that Russo's September 4, 2001 letter prompted the subsequent inquiries from Leed and that EPA responded to Leed. R. D. & O. at 61. He concluded that EPA's response was not adverse because it resulted in no tangible job consequence for Lewis. *Id.*

On appeal, Lewis argues that EPA's failure to respond appropriately to UGA's inquiries regarding the scope of his IPA constitutes blacklisting because EPA "chose not to inform UGA that Synagro's allegations were false, or at least completely unfounded." Complainant's Brief at 29, 32. Therefore, Lewis contends, the ALJ erred in finding no adverse action because the record demonstrated that EPA's violation of its policy to respond to outside inquiries harmed his professional standing at UGA and undermined both his ability to do his job and his potential employment there. *Id.* at 33-35.<sup>28</sup>

EPA responds that Lewis's assertions of adverse employment consequences are highly speculative and without merit. EPA points out, as we noted earlier, that Lewis did not apply for employment with UGA, and that any adverse effects on his work relationship or future job prospects with UGA were due to Synagro's actions, not EPA's. Respondent's Brief at 33-35.

Despite the ALJ's conclusions and the parties' arguments, we conclude that Lewis's claim regarding EPA's responses to UGA is not actionable. First, Lewis does not claim that Russo's September 4, 2001 letter to UGA was adverse. Second, Lewis's attorney received a copy of EPA's January 30, 2002 letter to UGA explaining the scope of Lewis's IPA. CX 11. Therefore, Lewis knew about EPA's allegedly inadequate response more than seven months before he filed the September 23, 2002 complaint. Since Lewis did not file a complaint alleging this discrete adverse action within 30 days of when it occurred, it is not actionable. Furthermore, even if this claim were actionable, we, like the ALJ, find that the record does not support Lewis's speculative allegations that EPA's inadequate responses interfered with his work on his IPA and harmed his future job prospects.

#### *WEF's Inquiries*

WEF promotes the safety of sewage sludge. CX 49 at 138, CX 129 at 5-18, 65. On February 13, 2002, a WEF director wrote to EPA questioning Lewis's distribution of

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the revised *Lancet* article that documented the risk of infection from staphylococcus aureus among residents living near sludge fertilization sites. The letter accused Lewis of attempting to "cloak his unvalidated and unpublished theories on bio-solids with the credibility of the EPA," asked EPA to clarify that the article was not authorized, and mentioned a peer review that found Lewis's research to be "significantly flawed." CX 102.

Jewel Morris, then acting director of EPA's National Exposure Research Laboratory, responded in writing to the WEF on June 27, 2002, with a copy to Lewis. RX 111. The letter explained that employment law restrictions prevented EPA from discussing WEF's allegations of wrongdoing against Lewis, but that EPA's inability to respond "in no way should be interpreted as corroboration" of any allegations WEF was making against Lewis. *Id.*

Lewis claims that Morris inadequately responded to WEF because she did not inform WEF that the peer review was improperly conducted and because she should have asked him to waive his rights under the employment privacy laws so that Morris could defend his reputation. Complainant's Post-Hearing Brief at 187-189.

The ALJ found that Morris's response was not inappropriate and that if Lewis was not satisfied with the response, he should have initiated a waiver. R. D. & O. at 61. The ALJ again concluded that EPA's response was not an adverse action because Lewis provided no evidence of a tangible job consequence. *Id.* On appeal, Lewis makes no argument regarding this claim. Therefore, he waived any argument and we will not consider this claim further.<sup>29</sup>

#### *EPA's Response to OSHA*

OSHA investigated Lewis's October 15, 2001 whistleblower complaint and asked EPA to respond to the allegations therein. RX 15. On December 18, 2001, EPA's Office of General Counsel (OGC) responded. Among other things, the OGC attorney wrote that Lewis's IPA assignment was limited to work on pathogen contamination of dental or medical devices. The letter also referred to the settlement agreement concerning Lewis's previous whistleblower complaints against EPA.<sup>30</sup> The letter said that Lewis would be "incorrect" if he represented that the settlement agreement allowed him, while on the IPA assignment to UGA, to conduct research "primarily or significantly devoted" to bio-solids. CX 14.

Lewis testified that he found out about this letter on August 29, 2002, when he was reviewing documents that EPA provided to his attorneys during discovery. TR at

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262. Shortly thereafter, on September 23, 2002, Lewis filed his second whistleblower complaint. He alleged that EPA had discriminated against him when it misstated the scope of his IPA to OSHA. He also alleged that EPA communicated this misinformation to Synagro, which used the false information in a national campaign to discredit his reputation. Additionally, Lewis claimed that EPA discriminated when it failed to correct Synagro's numerous false statements about the scope of his IPA. CX 83.<sup>31</sup>

Strangely, other than finding that these claims were actionable, the ALJ did not otherwise discuss them despite the fact that they were sole basis for Lewis's September 23, 2002 whistleblower complaint. R. D. & O. at 53. Equally strange is the fact that, on appeal, Lewis does not even mention the December 18, 2001 letter or present any argument regarding these claims, including the ALJ's failure to address them. Therefore, we will not decide whether these claim have merit since, again, Lewis has waived any argument on these matters.<sup>32</sup>

#### **4. EPA Did Not Credit Lewis's Work or Fund His Research**

In early 2000, following a congressional hearing before the House Science Committee, EPA commissioned the National Academy of Sciences (NAS) to study the scientific basis of Rule 503.<sup>33</sup> CX 46, CX 140 at 30. NAS issued its preliminary conclusion in July 2001: while no documented scientific evidence showed that Rule 503 had failed to protect public health, NAS advocated additional epidemiological studies on whether a link existed between sludge fertilization and the human health problems that Lewis had documented. CX 90 at 12. At the public hearings that followed NAS's preliminary findings, NAS officials indicated that Lewis's research first identified the "whole controversy over sludge." TR at 161-62. On December 4, 2001, EPA managers circulated NAS's final report for comment and review prior to publishing a response in the *Federal Register*. That report also recommended further studies. CX 156. Despite other scientists' suggestions that Lewis be asked to review the NAS report, he was not asked to do so. TR at 688, 1305, 1326-27. EPA submitted its response for publication in the *Register* on April 2, 2003. In essence, EPA agreed to conduct further research, evaluate studies made inside and outside EPA, and continue ongoing activities for

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enhancing communications with outside associations and the public. Lewis was not mentioned in EPA's response. CX 157.

Earlier, on June 4, 2002, Lewis wrote to Russo, his supervisor, complaining that Synagro, other industry organizations, and EPA collaborated to stop him from researching and publicizing his views about the health risks due to pathogens emissions from sludge fertilization. RX 105. Lewis referred to his June 3, 2002 memorandum explaining the need for further research into dealing with mixtures of chemicals and microbes that terrorists might use. He requested that EPA's Ecosystems Research Division (ERD) take the lead in funding pathogens research at an annual cost of \$250,000.00 for three years. CX 17. Lewis noted the implications for homeland security in this kind of research. He stated that for him to develop this area, EPA would have to modify the settlement agreement that required him to retire in May 2003. RX 105. Lewis added that he would like a response by June 14 as to whether EPA would allow him to stay on and work on this homeland security project. *Id.*

Russo forwarded this letter to her supervisor, Morris, who answered her by e-mail on June 24, 2002. Morris stated that EPA would "not agree to any deviation from or modification of" the settlement agreement. RX 109. The e-mail added that once Lewis's IPA assignment with the university ended in December 2002, he would return to work at ERD until May 28, 2003, when he would resign or retire, according to the terms of the settlement agreement. *Id.*

After his IPA ended in December 2002, Lewis requested an additional \$150,000.00 from EPA to fund hospital research in Egypt. CX 155. Lewis stated that this first-of-its kind study of hospital-acquired infections where hepatitis C was prevalent required that another 300 patients be processed for a statistically sound conclusion. He added that he had raised \$500,000.00 in private funding and contributed \$80,000.00 of his own to this research. *Id.* While one EPA manager approved Lewis's request, Russo testified in a January 30, 2003 deposition that ERD had no further funding for the Egypt project because of budget cuts. JS 1 at 133-40; TR at 692-93, 728-29.

Lewis claims that EPA's failure to acknowledge his work in its response in the *Federal Register* to the NAS study and to credit him with being the first to highlight publicly the problems with Rule 503 is adverse action because these failures negatively impacted his scientific reputation among his peers who knew about his campaign for more research on sludge fertilization. He also claims that EPA's failure to fund his research projects further harmed his reputation and future job prospects. Complainant's Post-Hearing Brief at 176-83.

The ALJ found that, even if Lewis's work did precipitate a turn-around in EPA's thinking about Rule 503, EPA had no obligation to mention Lewis's name in the *Federal Register*. The ALJ therefore concluded that the omission was not adverse action. R. D. & O. at 62. He also concluded that EPA did not take adverse action when it refused to extend his retirement and fund his homeland security proposal because Lewis had agreed to retire on May 28, 2003, as part of the settlement agreement. R. D. & O. at 61-62. In

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addition, the ALJ concluded that EPA did not discriminate because he found that EPA reasonably refused further funding for the Egypt research because of office budget cuts, not his protected criticisms of Rule 503. R. D. & O. at 64.

On appeal, Lewis argues that EPA's failure to fund his research projects and to credit his work were adverse action because these failures harmed his reputation and led to his professional isolation. Complainant's Brief at 35-37. EPA responds that its failure to fund the two research projects was not retaliatory because major budget cuts had reduced the funding pool for projects. Further, EPA argues that Lewis presented no evidence showing that EPA's actions resulted in his professional isolation. Respondent's Brief at 35-38.

We note that Lewis's claims pertaining to EPA's failure to credit his research in the *Federal Register* and failure to fund the Egypt project arose after he filed his last whistleblower complaint in September 2002. His claim about the homeland security project funding did occur before he filed the September 2002 complaint, but he did not allege it. Nor did he list it as an issue in his Prehearing Statement. Nevertheless, the ALJ made findings and conclusions about these three claims. Since EPA did not object to Lewis raising these claims below, we find that the parties consented to amend Lewis's complaints to include these claims.<sup>34</sup>

These three claims fail because Lewis did not produce sufficient evidence to support them. To prevail, Lewis must prove by a preponderance of the evidence that EPA took materially adverse action against him and did so because of his protected activity.<sup>35</sup> Like the ALJ, we find scant, if any, evidence in this record demonstrating that EPA failed to include Lewis in the *Federal Register* or refused to fund his projects because of his Rule 503 criticism. And other than offering his opinion that these actions harmed his reputation among his peers, Lewis did not sufficiently demonstrate that these actions were actually, or potentially, materially adverse. Therefore, we conclude that when EPA took these actions, it did not discriminate against Lewis.

## 5. EPA's Disclaimer and Clearance Policies; Collaboration with the Bio-Solid Industry

As discussed earlier, EPA employees who speak or write about their scientific work outside of their official duties must generally disclaim that they are acting on behalf of EPA. Lewis claims that Morris, his second line supervisor, applied the disclaimer

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requirements more stringently on his articles and speeches than on other EPA scientists because of his protected activity. The ALJ, however, concluded that Lewis had not proven that the disclaimers Morris required resulted in any tangible employment consequence and, therefore, were not adverse actions. R. D. & O. at 55-56.



EPA also requires that all papers and articles that its scientists write undergo an internal clearance process prior to publication. Scientists must coordinate with another program office when their writings might affect that office. JX 1 at 7-8, 64; TR at 994-95, 1242-43. When Morris requested that he coordinate with the Office of Water (OW) regarding his *Adverse Interactions* article, Lewis claims that she discriminated because that office had a conflict of interest and would not treat his article fairly. But the ALJ found that prior to Morris's request, Lewis had voluntarily forwarded the article to OW for review. Furthermore, he found that Lewis had suffered no job consequences as a result of OW's review. Therefore, the ALJ concluded that Morris's request was not an adverse action. R. D. & O. at 56-57.

Lewis also claims that Morris, Walker, and other EPA officials worked with bio-solid proponents like Synagro to denigrate his views, hinder his efforts to prompt more investigation of the effects of fertilization on the public health, and harm his scientific reputation. The ALJ, however, found that Lewis had not produced any "reliable evidence that EPA collaborated with any person or organization" against Lewis. R. D. & O. at 64.

On appeal, Lewis did not address the ALJ's conclusions pertaining to the disclaimers, the clearance and coordination process, and the collaboration. Therefore, Lewis has waived any argument that the ALJ erred in concluding that these claims do not constitute adverse actions.<sup>36</sup>

### **Lewis's Argument that EPA Subjected Him to a Hostile Work Environment**

Lewis argues on appeal that "EPA's continuing pattern of conduct created a hostile work environment for Dr. Lewis." Complainant's Brief at 37. He asserts that he provided "an extensive HWE discussion" in his Post-Hearing Brief that the ALJ "simply ignored." *Id.* at n.38. But the Post-Hearing Brief contains no discussion or argument pertaining to a hostile work environment claim.

We have carefully examined not only Lewis's Post-Hearing Brief, but also his two complaints, his Pre-Hearing Statement, and the entire transcript. Other than a vague reference to the "atmosphere at EPA,"<sup>37</sup> we have found no allegation, statement, or testimony asserting a hostile work environment claim. Rather, his complaints allege a "continuing pattern" of discrimination. And in his opening statement to the ALJ, Lewis characterized his case as a "classic continuing

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violation case" that involves a "continuing pattern." He stated that the release of the White Paper was "the key predicate act for a continuing violation." TR at 8, 18, 21.

But the "continuing violation doctrine" is not the same as the hostile work environment theory of liability. Until the U.S. Supreme Court held otherwise in *Morgan*, the "continuing violation doctrine" allowed a plaintiff to recover for discrete adverse actions that occurred outside of the limitations period if he could prove that these claims were "sufficiently related" to an adverse act that did occur within the limitations period.<sup>38</sup> Hostile work environment claims, however, differ from claims involving discrete acts. Hostile work claims involve repeated harassment occurring over a period of time rather than adverse action that occurs on a particular day.

To succeed on a hostile work environment claim, Lewis must prove by a preponderance of the evidence that 1) he engaged in protected activity, 2) he suffered intentional harassment related to that activity, 3) the harassment was sufficiently severe or pervasive so as to alter the conditions of his employment and to create an abusive working environment, and 4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect him.<sup>39</sup> Lewis did not allege, attempt to prove, or argue below that EPA intentionally harassed him because of protected activity and that the harassment was severe or pervasive enough to alter the conditions of his employment so as to detrimentally affect him.

Therefore, since Lewis presented his case as one involving discrete adverse actions and never alleged or presented facts, law, or argument to the ALJ that EPA subjected him to a hostile work environment, we will not consider the hostile work environment argument he argues on appeal.<sup>40</sup>

### **Conclusion**

Lewis's various claims fail either because they are not actionable, or because Lewis waived argument about them, or because Lewis did not prove by a preponderance

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•of the evidence that they were materially adverse or that EPA took them because of his protected criticism of Rule 503. Therefore, we **DISMISS** the complaints.

**SO ORDERED.**

**OLIVER M. TRANSUE**  
Administrative Appeals Judge

**M. CYNTHIA DOUGLASS**  
Chief Administrative Appeals Judge

### **[ENDNOTES]**

<sup>1</sup> The Clean Air Act, 42 U.S.C.A. § 7622(a) (CAA) (West 2003); the Safe Drinking Water Act, 42 U.S.C.A. § 300j-9(i)(1)(A) (SDWA) (West 2003); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. § 9610(a) (CERCLA) (West 2005); the Toxic Substances Control Act, 15 U.S.C.A. § 622(a) (TSCA) (West 1998); the Federal Water Pollution Prevention and Control Act, 33 U.S.C.A. § 1367(a) (FWPPCA) (West 2001); and the Solid Waste Disposal Act, 42 U.S.C.A. § 6971(a) (SWDA) (West 2001). Regulations implementing these statutes are found at 29 C.F.R. Part 24 (2006). The Administrative Law Judge (ALJ) assumed that all of the statutes applied. Recommended Decision and Order (R. D. & O.) at 52. Though neither the parties nor the ALJ addressed the issue, federal agencies such as the EPA are immune from suit unless Congress unequivocally waives that immunity. We have recently decided that among these six environmental whistleblower statutes, Congress waived federal sovereign immunity only with respect to the employee protections of the SWDA and CAA. See *Erickson v. U.S. Env'tl. Prot. Agency*, ARB Nos. 03-002 – 004, 03-064; ALJ Nos. 99-CAA-2, 01-CAA-8, 13, 02-CAA-3, 18, slip op. at 10-12 (ARB May 31, 2006). EPA has not argued against coverage under either of these statutes, nor has Lewis specifically argued for such coverage. Our decision would be the same regardless of which of the two statutes is assumed to apply. Therefore, for purposes of this decision we will assume coverage under the CAA.

<sup>2</sup> EPA is divided into 12 program offices, each headed by an assistant administrator. One of the 12 is the Office of Research and Development (ORD), which has five divisions. Lewis's tenure at EPA was with the Ecosystems

Research Division (ERD) within the National Exposure Research Laboratory (NERL), which is one of ORD's five divisions. R. D. & O. at 4.

<sup>3</sup> The following abbreviations will be used: Complainant's Exhibit, CX; Respondent's Exhibit, RX; Joint Stipulation, JS; Joint Exhibit, JX; Hearing Transcript, TR.

<sup>4</sup> Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 24.8.

<sup>5</sup> See 5 U.S.C.A. § 557(b) (West 2004).

<sup>6</sup> *Berkman v. U.S. Coast Guard Acad.*, ARB No. 98-056, ALJ No. 97-CAA-2, slip op. at 15 (ARB Feb. 29, 2000).

<sup>7</sup> *Sayre v. Veco Alaska, Inc.*, ARB No. 03-069, ALJ No. 00-CAA-7, slip op. at 5 (ARB May 31, 2005); 29 C.F.R. § 24.2(a).

<sup>8</sup> 42 U.S.C.A. § 7622(a).

<sup>9</sup> *Jenkins v. U.S. Env'tl. Prot. Agency*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 18 (ARB Feb. 28, 2003).

<sup>10</sup> See, e.g., *Devers v. Kaiser-Hill Co.*, ARB No. 03-113, ALJ No. 01-SWD-3, slip op. at 11 (ARB Mar. 31, 2005); *Kesterson v. Y-12 Nuclear Weapons Plant*, ARB No. 96-173, ALJ No. 95-CAA-12, slip op. at 2 (ARB Apr. 8, 1997). Cf. *Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 931-932 (11th Cir. 1995) (applying "reasonably perceived" test to analogous Energy Reorganization Act, 42 U.S.C.A. § 5851).

<sup>11</sup> See, e.g., *Knox v. U.S. Dep't of Interior*, ARB No. 06-089, ALJ No. 01-CAA-3, slip op. at 3 (ARB Apr. 28, 2006).

<sup>12</sup> 42 U.S.C.A. § 7622(a).

<sup>13</sup> 29 C.F.R. § 24.2(b).

<sup>14</sup> *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996); *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 97-ERA-52, slip op. at 12 (ARB Feb. 29, 2000) ("personnel actions that cause the employee only temporary unhappiness do not have an adverse effect on compensation, terms, conditions or privileges of employment").

<sup>15</sup> See *Hirst v. Se. Airlines, Inc.*, ARB Nos. 04-116,160, ALJ No. 03-AIR-47, slip op. at 9-11 (ARB Jan. 31, 2007).

<sup>16</sup> *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110, 114-115 (2002). The *Morgan* holding applies to whistleblower complaints. *Erickson*, slip op. at 21 n.60.

<sup>17</sup> 42 U.S.C.A. § 7622 (b)(1).

<sup>18</sup> *Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 2001-CER-1, slip op. at 8 (ARB Apr. 30, 2004).

<sup>19</sup> *Id.*

<sup>20</sup> *Morgan*, 536 U. S. at 114.

<sup>21</sup> Here the ALJ relied upon *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ No. 97-ERA-14, slip op. at 47-48 (ARB Nov. 13, 2002) where, inter alia, the Board held that when a whistleblower asserts a hostile work environment claim, the employer will be liable for co-worker harassment when it knew or should have known about the harassment and failed to take prompt remedial action.

<sup>22</sup> *Hirst*, slip op. at 8-10.

<sup>23</sup> *Pickett v. Tenn. Valley Auth.*, ARB No. 00-076, ALJ No. 00-CAA-9, slip op. at 8-9 (ARB Apr. 23, 2003).

<sup>24</sup> *Id.*

<sup>25</sup> *Lewis v. Synagro Techs., Inc.*, 2002-CAA-8, 12, 14 (ALJ Apr. 26, 2002).

<sup>26</sup> Lewis focuses his argument only on EPA's lack of response to Synagro's February 6, 2002 letter. Though he claims that EPA's lack of response to Synagro's other inquiries constitutes discrimination, he does not present argument about these other letters. Complainant's Brief at 29-32. Therefore, he waives that argument. See *Hall v. U.S. Army Dugway Proving Ground*, ARB Nos. 02-108, 03-013, ALJ No. 97-SDW-5, slip op. at 6 (ARB Dec. 30, 2004) (failure to present argument or pertinent authority waives argument).

<sup>27</sup> The position description for Lewis's IPA extension states clearly that Lewis's research on the environmental survival of pathogens on dental and medical devices directly applies to EPA's environmental goals, including clean and safe water and better waste management. CX 10.

<sup>28</sup> Dr. Robert Hodson, chairman of the marine sciences department at UGA, testified in deposition that prior to the IPA controversy, Lewis was being considered for a tenured professorship, but that after EPA's failure to clarify the scope of his IPA, his standing within the university soured. CX 24 at 29-31, 37-40.

<sup>29</sup> See *Hall*, slip op. at 6 (failure to present argument or pertinent authority waives argument).

<sup>30</sup> *Lewis v. Env't'l Prot. Agency*, 99-CAA-12, 00-CAA-10, 11 (ALJ Jan. 17, 2001).

<sup>31</sup> Eventually, EPA stipulated that Lewis had not violated the terms of his IPA. JS 10. EPA also stipulated that Lewis had not used his IPA to support his expert witness work. JS 17. And, according to EPA, Lewis's work on bio-solids research "did not violate any applicable [EPA] policies." JS 32.

<sup>32</sup> See *Hall*, slip op. at 6 (failure to present argument or pertinent authority waives argument).

<sup>33</sup> The March 2000 hearing addressed whether EPA failed to "foster sound science" in managing Rule 503 and whether EPA was harassing scientists who expressed concerns about the science supporting the rule. CX 59.

<sup>34</sup> "When issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings . . . ." 29 C.F.R. § 18.5(e). See *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071 and 03-095,

ALJ No. 02-STA-35, slip op. at 8-9 (ARB Aug. 6, 2004).

[35](#) See *Sayre*, slip op. at 9-11.

[36](#) See *Hall*, slip op. at 6 (failure to present argument or pertinent authority waives argument).

[37](#) Complainant's Post-Hearing Brief at 68.

[38](#) *Morgan*, 536 U.S. at 114.

[39](#) *Erickson*, slip op. at 13.

[40](#) See *Schlage*, slip op. at 9.

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