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Issue Date: 30 December 2002

CASE NO.: 2001-CAA-00003

FILE NO.: 3-0480-00-007

In the Matter Of:

WILLIAM T. KNOX
Complainant

v.

UNITED STATES DEPARTMENT OF INTERIOR
Respondent

APPEARANCES:

Glen M. Fallin, Esq.
Donald J. May, Esq.
For the Complainant

Donald S. Harris, Esq.
For the Respondent

Before: **DAVID W. DI NARDI**
District Chief Judge

RECOMMENDED DECISION AND ORDER

The above-referenced matter is a complaint of discrimination under Section 322(a) of the Clean Air Act, 42 U.S.C. 7622 and Section 23(a) of the Toxic Substance Control Act, 15 U.S.C. 2622. The formal hearing was held pursuant to the implementing regulations found at 29 C.F.R. Part 24 and Part 18. The following abbreviations shall be used herein: ALJX for an exhibit offered by this Administrative Law Judge, CX for a Complainant's Exhibit, JX for a Joint Exhibit and RX for an Exhibit offered by Respondent.

I. BACKGROUND

On April 7, 2000, William T. Knox (Complainant) filed a

complaint of retaliation against the U.S. Department of Interior ("DOI" or "Respondent"). (ALJX 1) Complainant, a DOI employee, alleges that he has been subjected to a hostile work environment in the form of a pattern of retaliatory treatment at work, and has been otherwise discriminated against as a result of his having engaged in activity protected under the employee protection provisions of the whistleblower statutes involved herein. This complaint was investigated by OSHA and referred to the Office of Administrative Law Judges under cover letter dated October 18, 2000. (ALJX 3) DOI timely filed an appeal and the matter was assigned to this Administrative Law Judge. After the usual pre-trial proceedings, a twenty-nine (29) day hearing was held before the undersigned commencing on March 21, 2001 in Baltimore, Maryland. All parties were present, had the opportunity to present evidence, and to be heard on the merits. The last day of hearing was on March 1, 2002 and the parties were given additional time to file their post-hearing evidence, as well as a number of extensions to discuss, in good faith and realistically, the future course of this matter. Those discussions did not result in mutual satisfaction and the record was finally closed on December 20, 2002, at which time the Respondent's reply brief was filed. Post-hearing briefs have been filed and the matter is now ready for resolution. All documents filed at the hearing and post-hearing, not yet in evidence, are hereby admitted as they are relevant, material and not unduly cumulative herein, the sole standard of admissibility in these proceedings.

II. CONCLUSION

While there have been twenty-nine (29) days of hearings and while the record consists of a plethora of documents, this whistleblowing case boils down to the following simple conclusion:

William T. Knox is a dedicated, conscientious, diligent and highly-motivated public citizen who has manifested these qualities throughout his many years in the military and as a public servant, no matter the task assigned.

Many administrations, beginning at the highest levels of the federal government and continuing with the current President, have consistently encouraged federal employees to report examples of waste, fraud or abuse, or to engage in so-called whistleblowing, and such employees have been told they may do so with impunity and without fear of reprisals, retaliation, harassment and/or disparate treatment. This "no fear" attitude is especially important today, given the events on "9/11".

While employees are encouraged to use the chain-of-command, they are also told they may make their complaints to third-parties,

should their internal complaints not bring about the anticipated results and/or necessary correction. Mr. Knox numerous times attempted to utilize the chain-of-command but each attempt not only produced a lack of results but also brought about instances of reprisals, harassment, retaliation and disparate treatment.

Mr. Knox, frustrated with the futility of his internal complaints, then went outside his chain-of-command and reported his public safety and public interest concerns to third-parties. These reports similarly resulted in blatant instances of reprisals, harassment, retaliation, disparate treatment, as well as shunning by his co-workers.

The record reflects that one of his supervisors actually placed him under a "gag" order whereby he was told in writing that he could not go outside his agency with his complaints. In my many years of presiding over these cases, I have seen such restriction reduced to writing only once before. The etiology, motivation and source for that written restriction should certainly be examined. Furthermore, Mr. Knox was the subject of a memorandum to the effect that he was not allowed to see the Director of NPS, presumably the decision-maker and ultimate authority in Mr. Knox's chain-of-command. Noteworthy is the unrebutted fact that the prohibition was never communicated to Mr. Knox. Moreover, the Security Department, on the flimsiest of second-and-third-class hearsay, issued a memorandum on November 16, 2001 that Mr. Knox was not to be in the main building, without an escort. This restriction, also not communicated to Mr. Knox, also applied if he wished to go to the cafeteria or the rest rooms. What an outrageous way to treat a dedicated, conscientious and highly-motivated public servant.

Whistleblowers, a vital part of American society, have just been acknowledged by **TIME** which recognized as **PERSONS OF THE YEAR FOR 2002 Sherron Watkins** (a vice-president at Enron Corp.), **Cynthia Cooper** (an executive at World Com) and **Coleen Rowley** (a special agent for the Federal Bureau of Investigation) for exposing malfeasance and nonfeasance that eroded public confidence in their institutions. At this point I would note that while Knox's travails might not rise to the level of intrigue experienced by **Ms. Erin V. Brockovich**. at least as glamorized by Holywood, Knox, in my judgment, is following in the footsteps of **A. Ernest Fitzgerald** (who blew the whistle on the B-1 bomber overruns), **Karen Silkwood, Erin Brockovich, Casey Rudd** (who blew the whistle about the Hanford Nuclear Plant), **Jeffrey Wigand** (the scourge of the tobacco industry), **Frank Serpico** (who needs no further identification) and those other brave, dedicated and conscientious public-spirited citizens who are not reluctant to put the public interest ahead of their own careers and who, in the last thirty (30)years or so have

elevated the term “whistleblower” to the level of having a secondary meaning. To that pantheon will now be added the name **William T. Knox**. Moreover, the, concept of “a team player,” as the term was used by Respondent’s agents and employees, will soon be raised to that level. While in sports the appellation of being a team player is a compliment, the term as used to described a whistleblower is highly pejorative.

The totality of this closed record ineluctably lends to the conclusion that Mr. Knox had engaged in protected activities, that the Respondent, through its agents and employees, knew of such activities and that Mr. Knox experienced adverse personnel actions solely because of such activities.

That is this case in a “nutshell.” I shall now further explicate my reasons for the above **CONCLUSION**.

III. SUMMARY OF THE EVIDENCE

Knox was selected for the position of Training Instructor, Vocational Training Specialist, GS-1712-09, at the Harpers Ferry Job Corps Center (“Job Center”), National Park Service (“NPS”), U.S. Department of the Interior (“DOI”) on November 21, 1999 (Exh. 46). At the time of his hire, Complainant was placed on a one-year initial probationary period by the Park Service personnel staff. (**Id.**; Testimony of Jay Weisz, January 30, 2001, p. 175 of the transcript). As part of his duties as Training Instructor, Complainant was tasked with collateral duties as a safety officer for the Center. (RX-45; typed entry dated 11-22-99) As a result of his discussions with Ray Sooy, a Safety and Health Officer for the Department of Labor in December 1999 who was present to conduct a regularly-scheduled inspection of the Center, Complainant learned that friable or hazardous asbestos was present at the facility and that such presence was noted as contained in the previous inspection done in 1997 (RX-2; Testimony of Raymond Sooy, April 10, 2001, p.3717 of the transcript).

Upon Complainant’s further examination of the Center, Complainant concluded that because there had been some recent renovations and maintenance work done in the interior of the Job Center, employees may have been exposed to asbestos within the building. (Testimony of William Knox, transcript, p.2158)

Complainant thereupon began discussing his suspicions with other employees and expressed the view to those employees that the Center should be shut down, that there should be an investigation, that the health of the employees at the Center should be monitored and that they should file a lawsuit based on that asbestos threat.

(Testimony of Jay Weisz, transcript, pp. 181, 192; Testimony of Valerie Flemming, Monday, January 29, 2001, p.98)

As a result of Complainant's faxing a document entitled "Notice of Unsafe and Unhealthful Working Conditions" to his supervisor while she was at a meeting on January 4, 2000, his supervisor and others met with Complainant on January 6, 2000 to discuss the matter. (CX-118, pp. 81-88, 91, 96) At that meeting Complainant's supervisor determined that the Center would be visited by several management officials to verify the presence of that asbestos. (RX-45, typewritten notation dated 01-06-00; handwritten notation entitled "Brief Out")

In addition, the officials decided to conduct another inventory of the Center and inform the staff at the Center of the situation and to have an industrial hygienist visit the Region the following March (**Id.**). The issue of asbestos was discussed, and it was determined that Gentry Davis and Gloria Brown would visit the Center and review the asbestos situation there.

On January 11, 2000, the management officials visited the Center to review the asbestos situation, as they had discussed. (Testimony of Gentry Davis, February 2, 2000, p.994)

Complainant testified that he was threatened with a reduction in his duties and a corresponding reduction in grade during a meeting at the Center with those officials on January 11, 2000. (Testimony of William Knox, p.2133)

According to Complainant's supervisor, in December 1999 and January 2000, Complainant was disruptive and recalcitrant in participating in staff training and in performing his duties at the Center. (RX-45, p.2 of type-written notes; typed notes, and handwritten notes dated 2-3-00; Testimony of Ms. Valerie Flemming, pps. 635, 842) It is obvious that there was a personality conflict between Mr. Knox and Ms. Flemming and this will be further discussed below.

The difficulties with Complainant were discussed with the Human Resources personnel who mistakenly believed that Complainant's probationary period extended to his federal employment and who also advised Complainant's supervisors that Complainant could be removed from employment without notice. (Testimony of Michelle Stewart-Piercy, April 13, 2002, p.4564-4574 of the transcript; Testimony of Jay Weisz, p.189 of the transcript; testimony of Ken Brodie, April 11, 2002, 3872-3879)

Accordingly, Complainant's supervisor prepared a draft memorandum to the Center director requesting that complainant be

removed from the Center during his probationary period, a memorandum which Complainant found at the copy machine on February 8, 2000. (Testimony of Valerie Flemming, pp.107-111 of the transcript; testimony of Jay Weisz, pp.186-188)

That draft memorandum was never given to Complainant, nor was the subsequent memorandum from Valerie Flemming to Jay Weisz, which was dated February 10, 2000. Thus, no adverse personnel action had yet taken place, although Complainant could see the handwriting on the wall.

Complainant was terminated from his purported probationary period pursuant to 5 C.F.R. §315.804 effective March 16, 2000. The stated reasons for the termination were 1) failure to perform duties as assigned; 2) failure to follow instructions and; 3) disruptive and inappropriate behavior.

On March 18, 2000, agency counsel discovered the error regarding the termination, had the action corrected, and Complainant was reinstated to his GS-09 position. (RX-48; Testimony of Michelle Stewart-Piercy, pp. 4574-75 of transcript) All references to a removal were removed from Complainant's records.

Complainant filed three whistleblower appeals with the Merit Systems Protection Board ("Board"), dated January 30, 2000; March 27, 2000 and on April 14, 2000, Docket Nos. PH-1221-00-0173, PH-1221-00-260, PH-315H-00-236, which appealed the so-called "threat" of his removal and the removal on the basis of his whistleblowing. (RX-50) Both the March 27, 2000 and April 24, 2000 appeals to the MSPB raised the issue of Complainant's termination and whistleblowing. (**Id.**) On May 23, 2000, the MSPB dismissed the appeals without prejudice due to the fact that settlement discussions were ongoing and had been delayed.

On July 7, 2000, however, Complainant refiled his appeals with the MSPB, apparently because of the Respondent's lack of good faith in these discussions, a lack of good faith which continues to this very day.

On September 29, 2000, Complainant and the Department of Interior reached mutual agreement in settlement of the MSPB matters. As part of the settlement agreement, the removal action was rescinded and Complainant was appointed to a position of Engineering Equipment Operator, WG-5716-10, Step 5 at another Park within the Park Service. In addition, the Department of Interior paid Complainant's attorney's fees. (RX-49)

On October 4, 2000, the Administrative Judge ("AJ") noted that

the Board had jurisdiction over the appeals and dismissed the appeals because the parties had entered into a settlement agreement and entered the settlement agreement into the record. **Knox v. Interior**, Initial Decision of AJ Garety, dated October 4, 2000 (RX-50). The decision of the AJ became final on November 8, 2000 and Complainant filed a complaint with the Occupational Health and Safety Administration (OSHA) alleging that the draft removal letter which he found February 8, 2000 in the copy machine was drafted (1) because he had requested a desk audit within 45 days of being hired, (2) because he was accused of stirring up employees concerning safety issues regarding asbestos problems, (3) because he was in a hostile work environment due to not being trained properly, (4) because he was being exposed to asbestos and (5) because he was about to be terminated from employment.

On October 18, 2000, the Department of Labor notified the Department of Interior that as a result of a fact finding investigation, the DOL found that the Complainant had engaged in protected activity by, **inter alia**, "voicing his concerns to management regarding exposure to workplace asbestos" and that "discrimination as defined and prohibited by the statute was a factor in the actions which comprise the complaint." That letter stated that the remedy required was to reinstate the Complainant to the "former or substantially equivalent position with no loss of seniority and other benefits accruing to the employment relationship." Letter dated October 18, 2000 from William D. Seguin, Regional Supervisory Investigator to the U.S. Department Interior. (ALJ EX 3)

On October 20, 2000, three weeks after settling his MSPB whistleblowing complaints and two weeks after receiving the dismissal from the AJ dismissing his whistleblowing complaints due to reaching settlement with the Agency, Complainant cross-appealed the DOL decision, challenging certain aspects of the remedy ordered.

Mr. Knox sent the following undated letter to DOI Secretary Bruce Babbitt and this letter summarizes the allegations raised by Mr. Knox, which allegations have been corroborated by his credible and persuasive testimony and which have not been contradicted by the vague and numerous-could-not-recall testimony of the Respondent's witnesses. (I note that this document contains the "faxed" date of March 7, 2000.)

"I am asking you for your help in stopping the discrimination against me at my job site at Harpers Ferry Job Corp NPS. If possible may I have an appointment with you? I know that your calendar is a busy one, but I feel that it is really important for

you and I can discuss this matter of harassment. I feel that the only reason that I am being harassed against is because I am a whistle blower. The memorandum states that there is Zero Tolerance of Discrimination, no matter what...

"I, William T. Knox, a Disabled American Veteran, applied for the position of Training Instructor GS-1727 step 7, at Harpers Ferry Job Corp Center, Harpers Ferry, West Virginia, for the Department of Interior Announcement Number NSP-NCR-99-33 and was hired with a starting date of November 22, 1999. Upon reporting to work my immediate supervisor, Valerie Flemming, stated that I would be responsible for the following duties: Training Instructor, Maintenance Supervisor and to work with the Safety Officer. (See attached Form E)

"On December 17, 1999, I received from Mr. Raymond Sooy, L 1-2029 Department of Labor an Unsafe and Unhealthful Condition a report (see attached form H). On December 23, 1999, I contacted Mr. Dave Johnson, from AAS Environmental who came to Harpers Ferry, looked at the site and stated that there were asbestos problems (See attached form A). I told my supervisor Valerie Flemming that there was an asbestos problem. Ms. Flemming stated that I should not get people in an uproar over this situation. On 4 , or 5, Jan. 00, I contacted Gloria Brown, the Regional Safety Officer and asked for some help. She requested that I fax information to her (See attached forms A, G, B, H, and F), which I did. At this time, Gentry Davis, Regional Director, contacted me and requested more information about the matter. On 6 Jan. 00, I was asked to attend a meeting with Gloria Brown, Bill Jones and Valerie Flemming. I explained to them what the asbestos problem was, who was exposed and that no one was ever told about the asbestos problem at the Center. On or about the week of January 11, 2000, Gentry Davis and Gloria Brown came to the Harpers Ferry Center to inspect and interview some of the people that had been exposed.

"In talking with Gentry Davis I explained to him the problems I have experienced since being employed at the Center. I was hired primarily as a Training Instructor and that the other duties as Safety Officer were taking over 50% of my time, Maintenance Supervisor or Facility Manager was taking about 40% and that the initial position I was hired for was only about 10% of the duties they expected. In addition, I showed Mr. Davis a copy of my position description. The OPF copy that was given to me from my personnel file states that I was to work with the Safety Officer, but I am the Safety Officer (See attached form D), and that I supervise one FTE WG-10 and five contractors in various trades. Mr. Davis said that he would look into what I had said. There was a meeting with Mr. Davis, Ms. Flemming, Ms. Brown, Mr. Jay Weiz and myself. At that time I was told that my extra duties would be

worded or changed so that there would be no promotional value for the extra duties or that they would change my job description and lower by GS Grade. At this time, I told them I would look for another job. I was then given the employee copy of my position description from which a page had been excluded. I then contacted Mr. Lewis Anderson about wanting a Desk Audit to determine whether or not with the extra duties should my GS rating be higher. Mr. Anderson stated that the policy on how to perform a desk audit has been changed.

"Since then, I have been harassed by Supervisor Ms. Flemming stating that "you have time to ask for a desk audit but you do not have time to perform the duties asked of you."

"On January 16, 2000, Mr. Jay Weiz and Ms. Flemming had a meeting with me asking what I discussed with the Regional Director and was questioned about my remarks. I stated that I was looking for another job and I felt we were in a dangerous working environment. They had been without a Safety Officer for six months and they were telling me what to do and how to do it. I explained to them that my name is on the paperwork and that I would do the Safety Officer job honestly, to the best of my knowledge and skill, no matter how much they would try to hamper me and make me redo paperwork for the same safety issues over and over again. I stated that, unlike Mr. Carles (who also had a problem with this management) "I would not quit". Mr. Carles asked for training (see attached form F). If Mr. Carles would have had the training, this problem with the asbestos would have been taking care of years ago. However, management was more concerned with travel money.

"My supervisor, Ms. Flemming, made me sign a paper as to my arrival and departure time on the property. In addition, there was to be no unannounced inspections on common areas which included the dining facility, living quarters and dorms. I have been questioned about my work habits and was told that management is going to BETTER TIME MANAGE MY ACTIVITIES. My work conditions are primitive and hostile. I have had to share an office with Ms. Flemming who listens to my phone conversations from across the room, tells me what to say and do. I have asked for a computer to make my work easier and was denied. I am now forced to use and wait for access to another computer, which delays processing my work. It also denies security for my files. At my desk, in this office, anyone can take paperwork form my area.

"I feel that I am being harassed and I am paying the price for exposing the asbestos problem, which management knew all about and chose to ignore. The employees that I supervise know that I am doing my job and have witnessed this harassment. I feel that unfair labor practices have been used against me.

"On January 18, 2000; I was subjected to verbal abuse such as ("Your Stupid") for they feel that I cannot comprehend what they are trying to imply.

"January 19, 2000; Management listening in on all my phone conversations and making comments on what I should or should not say. Also, putting notes on my desk telling me to get off the phone.

"On January 24, 2000, I was told that if the students from Center Support, did not pick up the trash, that I would have to and that if the maintenance worker did not show up to work, that I was to be a maintenance worker for that time. I was also ... expected to complete a maintenance workers assignment log. At this time, I explained that I have other responsibilities such as safety inspection, maintenance inspection, working with students at Center Support, ordering parts, snow removal, working with students with CA-1, filling in for an instructor, working with contractors on center items, taking bids for work that needs to be done and being required to go to student meetings. I explained that there were not enough hours in a day and that I still did not have a computer to help organize work schedules, supplies, inventory, write reports, etc.

"I feel, under Executive Order 11222, I have been discriminated by prohibited personnel practice. On February 7, 2000, the problem got worse. Statements were made that I could not comprehend what was going on and was requested to sign a maintenance work assignment tracking log. At this time Ms. Flemming handed me a DI-2002 form. I stated to her that I was not supervisory training instructor and that I would need sometime to look over the paperwork. I stated, "I need training" and feel that under the Disabled Veterans Affirmative Action Program Section 4214, Title 38, US Code and Part 720 Title 5 of the code of Federal Regulation had been violated. I have asked for training, only to be denied.

"On December 12, 1999 Ms. Flemming stated that there was no money to send me to training, and I stated that laws were being broken by not having a trained person at the work site under 29 CFR 1960.46.

"I feel as a whistle blower I have been discriminated against under Executive Order 11222, violation of the law, rules and regulations, mismanagement, gross waste of funds, abuse of authority and danger to public health and safety. On February 08, 2000 I found memorandum in the copy machine requesting my immediate removal from the program for the following reason: A request for a desk audit within 45 days. I was given tasks outside my job

description as far as Maintenance Supervisor and Safety Officer. As far as following the chain-of-command, I have followed it. When talking to Mr. Gentry Davis I stated I should have went to IG. Mr. Davis stated that it would not do any good to go there due to the fact it would only come back to him. At that point I went to Ms. Flemming and asked to utilize the chain-of-command numerous times only to be turned down. This is why I went to the U.S. Office of Special Counsel and the MSPB and to Senator Mikulski for help.

"As far as the abandonment of the snow team, me and Jimmy Kircher are the only ones that have performed snow removal. On January 19, 2000, I was requested to sign a paper stating when I can come and go. During the blizzard I was told to go home at 4:00 PM. from the Center Director. I am the only one out of the center to sign these memorandums.

"I feel I have been discriminated under the American with Disabilities Act. See 504 of the Rehabilitation Act Amendments of 1992 P.I.102-569. On February 08, 2000, memorandum it states that I should be removed immediately from the program and that the matter should be expedited. The statement says, constant reminders to Ms. Flemming and other staff, that I am a disabled veteran, a fact known when I was hired for this job. I have a letter from the Department of Veteran Affairs stating that I have a service connected disability rated at 30% or more. For the record, I have a 50% service connected rating as a Disabled American Veteran. On February 10, 2000, I received a memorandum asking if I want reasonable accommodation for my Disability substantiating my claim. When I filled out SF Form 56 I stated that I did not want to identify my handicap and did not ask for any accommodations. The only thing that I did ask for, was not to be harassed. Ms. Flemming stated, she wanted confirmation of my disabilities and what medication I was taking.

"Under Title 29 CR. 1960 46 violations have been made against me. I am being punished as a whistle blower. Valerie Flemming states that I am stirring up employees concerning safety issues regarding asbestos problems found at the Center that she states has not been confirmed. On September 08, 1993 asbestos was found at the center where students, contractors and federal workers had been exposed. Over the years, AHED Public Law, EPA Laws, and OSHA Laws had been violated. Reports that item code and estimated cost $313,000.00, was funded for asbestos removal. In addition, there was not an OEM plan.

"Dated back June 5, 1998, I have reports that Ms. Flemming and William Jones knew about this problem and did nothing about it. I have reports from John Carls, who held the same position, also asking for training in asbestos and was denied. I have paperwork

where Ms. Flemming has falsified documents to Ray Sooy, Department of Labor, Regional Safety and Health Manager. Ms. Flemming is making statements that there is no problem of asbestos to the workers. On February 18, 2000 the Center Director, Jay Wiez and Ms. Flemming, called me into the office stating the new report came back positive for asbestos."

IV. THE ISSUES

The issues as framed by the Complainant are as follows (ALJ EX 8):

1. Whether Complainant engaged in protected activity, within the meaning of the controlling statutes, prior to the Agency's attempt to remove him from federal employment.

2. Whether the Agency's decision-makers who attempted to terminate Complainant's federal employment were aware that Complainant had engaged in protected activity.

3. Whether the Agency attempted to remove Complainant from federal employment because Complainant had engaged in protected activity.

4. Whether the Agency intentionally and substantially delayed the restoration of Complainant to active employment - even after the Agency learned that its attempted removal of Complainant from federal employment was unlawful - because Complainant had engaged in protected activity.

5. Whether the Agency's bargaining for dismissal of Complainant's appeals to the MSPB - which Complainant had instituted to challenge the Agency's admittedly unlawful attempt to terminate his federal employment - in partial exchange for its restoration of Complainant to active employment constituted an unlawful reprisal for Complainant's protected activity.

On the other hand, the issues as framed by the Respondent are as follows (ALJ EX 7):

1. Does the Department of Labor have subject matter jurisdiction over Federal employees who allege retaliation due to whistleblowing activities?

2. If yes, did Complainant engage in protected activities as defined by the employee protection provisions of the Clean Air Act and the Toxic Substances Control Act?

A) Would a reasonable person have believed that the Respondent's activities constituted violations of the Toxic Substances Control Act and the Clean Air Act?

B) Did the Respondent engage in activities that violated either of these two Acts?

3. Did the Respondent discriminate against the Complainant because of any alleged protected activities under the Clean Air Act or the Toxic Substances Control Act?

4. Would the Respondent have taken the personnel actions against the Complainant if the Complainant had not engaged in the alleged protected activity?

On the basis of the totality of this closed record and my observation of the demeanor of the witnesses I find and conclude that the answers to all of those issues, except for number 4. immediately above, are in the affirmative, as shall now be further discussed.

V. FINDINGS OF FACT

Complainant's case is credibly buttressed by his May 13, 2001 AFFIDAVIT (CX 100):

WILLIAM T. KNOX, Complainant, affirms as follows under penalties of perjury and, unless or except otherwise noted, on personal knowledge:

1. I am William T. Knox, the Complainant herein.

2. From November 22, 1999, through March 16, 2000, I was assigned to the Harper's Ferry Job Corps Center ("the Center") as an employee of the Respondent - the National Park Service, U.S. Department of the Interior ("Agency").[1] During this time, I was appointed and served as a GS-9 "training instructor", but with the "collateral duty" of Safety Officer. On March 16, 2000, the Agency attempted to terminate my federal employment, but eventually reinstated me to the position of GW-10.

3. Prior to February 7, 2000, I complained widely that the Agency had failed to take adequate and appropriate steps to abate

[1]It is undisputed that I received on March 13, 2000, written notice that my subject employment would be terminated as of March 16, 2000.

and/or mitigate the effects of asbestos that was contained in materials (**i.e.**, asbestos containing materials, or ACM) that were widely used at the Center, **viz**, floor tile; "mastic", which is the glue-like material used to secure the floor tile to the surfaces that it was used to cover; and the "joint compound" that was used to join panels of drywall.[2] It was my belief at the time I communicated the complaints - and it remains my belief today - that these materials had been disturbed, so as to cause asbestos fibers to be emitted into both interior and outside air, on many occasions in the past and, absent implementation of adequate controls, asbestos fibers would continue to be emitted into the air inside and outside the various buildings at the Center. I complained also that the Agency had failed to apprize its current and former employees who were assigned or had previously been assigned to the Center of the presence of ACM and of prior instances in which asbestos fibers were emitted from disturbed ACM. I complained also about the Agency's failure to make and maintain records to account for ACM and possibly other hazardous and/or toxic materials that were removed from various cites at the Center. My primary concern in complaining about the Agency's failure to maintain records concerning its disposal of ACM and possibly other hazardous materials was for the general public. Furthermore, it is my belief that, during the course of my complaints, I articulated concern about the general public being endangered by emissions of asbestos fibers.

4. At the time of my above-referenced complaints, I was fully aware that several sites of ACM were served by exhaust fans, and that the emission of asbestos fibers into the interior air at the sites would lead to transmission of the asbestos fibers by the exhaust fans into the outside or ambient air. I was aware further that, once emitted into the outside, asbestos fibers could be encountered by members of the general public and also by students enrolled and resident at the Job Corps. In fact, my belief at the time of my complaints was that the students enjoyed the status of members of the general public, since I believed that they were obviously not federal employees. I was further aware that asbestos fibers were likely to be emitted, both inside and outside of the buildings where the ACM sites were located, when the ACM was disturbed by vibrations caused by heavy trucks that regularly transported foods and supplied to the Center. These trucks regularly traveled within a few feet of at least one of the ACM sites.

5. In complaining about the Agency's failures to deal properly with the ACM, I believed that the danger posed to the

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[2]**See** testimony of Valerie Flemming, Hearing Transcript at 69-70.

general public, including the Job Corps students, would be abated at the same time, and at least to the same extent, as the danger posed to the Center's workforce as abated.

6. As noted above, after the attempted termination of my federal employment at the Harper's Ferry Job corps Center, I was reinstated to the position of WG-10 Heavy Equipment Operator. At the time of my termination, I was step 7 of GS 9. Upon reinstatement, I was placed at the final step of WG-10, Step 5. At GS-9, Step 7, I would have advanced to Step 8 one year after my appointment to the GS-9 position, to Step 9 two years after my GS-9 appointment, and to Step 10 three years after my GS-9 appointment. In the WG-10 position, I was at the fifth and final step. Assuming that I would remain employed by the federal government until age 70, and assuming further that COLAs would be the same for GS-9 and WG-10, I therefore will lose three step increases, and then the difference between GS-9, Step 10, and WG-10, Step 5, for 26 years, since I now am 41 years old. The present difference between GS-9, Step 7, and WG-10, Step 5, is $1240 per year. The difference between GS-9, Step 8, and WG-10, Step 5, is $4942. The difference between GS-9, Step 9, and WG-10, Step 5, is $6164. The difference between GS-9, Step 10, and WG-10, Step 5, is $7385, which is the amount that I will lose for each of 27 years. Therefore, my total loss in compensation will be $211,741.

7. My intention in agreeing to the settlement of my appeals to the Merit Systems Protection Board ("MSPB") was in no way to compromise my claims that are before this tribunal.

8. During my employment at the Harper's Ferry Job Corps Center I remained fully willing to work cooperatively with my superiors for so long as they were discharging their responsibilities or attempting to do so in good faith. There came a time, however, when I believed that my superiors were engaging in a coverup of the asbestos problems and were seeking to discredit and oust me from my employment because I was attempting to discharge my responsibilities, particularly my responsibilities as Safety Officer, regarding the asbestos problems. During much of the hearing before this tribunal, I was outraged by what I regarded as the false and dissembling testimony of the Agency's employees and, unfortunately, was unable to comport myself in a less emotional manner."

Moreover, Complainant credibly testified concerning his hiring by and employment at the DOI from November 21, 1999 through March 16, 2000 as a Vocational Training Instructor at the Harper's Ferry Job Corps Center ("HFJCC") in West Virginia, with additional, collateral duties as Safety Officer; various instances of his reporting of the presence of asbestos in various buildings at his

worksite and the Agency's failure to take any meaningful steps to abate or even mitigate these hazardous conditions, as well as its failure to inform employees and Job Corps students of their exposure to the asbestos or to make available to these personnel appropriate medical testing; his conflicts with his superiors that Complainant believes were the result of his reporting of these conditions; the Agency's attempt to terminate his federal employment as if he were a probationary employee, although he was not a probationary employee and so advised Agency counsel; the substantial delay that occurred after the Agency had admitted, in effect, that it had attempted to discharge Complainant unlawfully; and the Agency's offer of active employment in partial exchange for dismissal of Complainant's three remaining appeals to the MSPB.

2. **John Carls** testified that he preceded Complainant as Safety Officer at the HFJCC, that he was unaware for at least five years of a 1993 report that identified various buildings at the HFJCC where asbestos containing materials ("ACM") were located that he never received the training that was necessary for him to perform his duties as Safety Officer with respect to the ACM; that nothing whatever was ever done to abate the ACM during his tenure as Safety Officer, although his superiors were aware of the presence of the ACM; that the individual who was later Complainant's immediate supervisor, Valerie Flemming, consistently demonstrated a lack of competence to perform her assigned duties, particularly her duty to supervise the Safety Officer. Mr. Carls, who resigned from his employment with the Agency in June, 1999, also testified concerning the nature, quantity, and difficulty of the duties that were assigned to him during his employment at HFJCC in the same position as that subsequently held by Complainant.

3. **Ben Hutzler**, who is currently employed as an electrician at HFJCC, testified that he reported to Complainant as his direct supervisor; that Complainant performed his duties satisfactorily in light of the duties assigned to Complainant; that he, Mr. Hutzler, has worked for years in an area where ACM is located and where the ACM was reported to be located in the above-mentioned 1993 report; that he was not advised of the presence of ACM in his work area for at least five years after the 1993 report; that nothing whatever has been done to abate the ACM that is present in his work area; that there is friable ACM in his work area and that he was allowed to disturb the friable ACM without knowing that he was doing so, after the Agency's receipt of the 1993 report; that he has been exposed to friable ACM; and that he has never been offered any medical testing to determine whether his health has been affected by his exposure to the ACM.

VI. CONCLUSIONS OF LAW

1. JURISDICTION

Respondent submits that this Court has no jurisdiction over any of the complaints filed by Mr. Knox (1) because the personnel actions of the DOI cannot be reviewed or second-guessed by this tribunal, (2) because the Respondent is not subject to these two (2) statutes as Congress has not waived sovereign immunity for the employee protection provisions of these statutes and (3) because these alleged violations are foreclosed by Complainant's prior settlement thereof with the MSPB.

I disagree and this Court's discussions relating to these issues are reflected at the beginning of the hearing in the official hearing transcripts, and those portions are incorporated herein by reference. The Motion to Dismiss was taken under advisement and it is hereby **DENIED** and each of the statutes will now be further discussed.

2. CLEAN AIR ACT JURISDICTION

Mr. Knox's protected activities involved concerns that asbestos was present in various forms at the Harper's Ferry Job Center ("Center") and that such asbestos posed a hazard to the general public.

On the basis of the totality of this closed record, I find and conclude that Complainant had a good faith and reasonable belief that releases to the air of such asbestos posed at least a potential violation of the Clean Air Act, and I so find and conclude.

The issue of whether the Complainant was an "employee" within the meaning of the environmental whistleblower provisions of the CAA and TSCA is jurisdictional. **Reid v. Methodist Medical Center of Oak Ridge**, 93-CAA-4 (Sec'y April 3, 1995). Under the CAA and the TSCA "any employee" is protected. **See**, **e.g.**, 42 U.S.C. §5851(a). Moreover, such an employee need not be charged with enforcement authority under the Acts. As those Acts do not include a definition of the term "employee", we must look to the U.S. Supreme Court for guidance and in **Nationwide Mutual Insurance Co. v. Darden**, 112 S.Ct. 1344 (1992), that Court held that "the conventional master-servant relationship as understood by common-law agency doctrine" should be applied and the Court summarized the test as follows:

> In determining whether a hired party is an employee under

> the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

The Court also quoted **NLRB v. United Ins. Co. of America**, 390 U.S. 254, 258; 88 S.Ct. 988, 991 (1986), as follows:

> Since the common-law test contains 'no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.'

Thus, as **Darden** articulates a common-law test for "employee" based on the general common law of agency, I find and conclude that Complainant is an "employee" within the intent and meaning of the whistleblower provisions of the CAA and TSCA, except as noted below pertaining to TSCA coverage.

As noted above, Respondent submits that it, as a federal executive agency, is not subject to the CAA and TSCA and that the Civil Service Reform Act is the exclusive remedy for federal employee whistleblowers, that the United States and its federal agencies are not covered employers and that federal employees, like the Complainant, are not covered employees.

Respondent's position is **DENIED** for the following reasons:

1. The Secretary rejected the argument that the Civil Service Reform Act of 1978 provides a preemptive and exclusive remedy for federal employee whistleblowers in **Conley v. McClellan Air Force Base**, 84-WPC-1 (Sec'y Sept. 7, 1993), **slip op.** at 9-17, and **Pogue v. United States Dept. of Navy**, 87-ERA-21 (Sec'y May 10, 1990), **rev'd on other grounds, Pogue v. United States Dept. of Labor**, 940 F.2d 1287 (9th Cir. 1987);

2. Complainant was an employee, and nothing in the statutes or the legislative history of the statutes adjudicated under Part 24 suggests exclusion of government employees;

3. EPA was a "person" subject to the employee protection provisions of all the statutes invoked except the Clean Water Act (the United States is expressly included as a person under the ERA, CAA, CERCLA, SDWA and SWDA, and by reference to the citizen's suit sections of the TSC);

4. CAA, CERCLA, SWA, SDWA, SWDA all have virtually identical federal facilities provisions. The federal facilities provision of the CWA was found by the Secretary in **Conley** to subject the federal government to all requirements of the CWA; CERCLA's federal facilities provision was interpreted much the same way in **Pogue**.

In this regard, **see Stephenson v. NASA**, 94-TSC-5 (Sec'y Sept. 28, 1995). **See also Community for Creative Non-Violence v. Reid**, 490 U.S. 730 (1989); **Baker v. McNeil Island Corrections Center** 859 F.2d 124 (9th Cir. 1988)(prison inmate was an "employee" for purposes of Title VII); **Coupar v. Federal Prison Industries/Unicor**, 92-TSC-6 and 8 (ALJ June 11, 1992)(Respondent's workers are employees within the meaning of the employee protection provisions of the CAA and TSCA).

With reference to Respondent's thesis that it is not a "person" as defined by the Acts, in **Conley v. McClellan Air Force Base**, 84-WPC-1 (Sec'y Sept. 7, 1993), the Secretary has determined that the Air Force was not a "person" within the meaning of the Act. The "omission of the United States from the CWA definition of the term person has to be seen as a pointed one when so many other government entities are specified." Nonetheless, the Secretary held that the CWA can apply to the Federal government under the Federal Facilities provision of the FWPCA which states:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, an each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges.

33 U.S.C. 1323(a). The phrase "any requirement" indicates that the Federal Government is subject to all requirements, even those which are not central to eliminate pollution. The Secretary determined

that the employee protection prohibition is a requirement under the Act because it is a means of enforcing the law.

In **Varnadore v. Oak Ridge National Laboratory**, 92-CAA-2 and 5, 93-CAA-1 and 94-CAA-2 and 3 (ARB June 14, 1996), the Complainant named both the Department of Energy and DOE's Oak Ridge Operations Office. The Oak Ridge Operations Office, being merely a subdivision of DOE, is subsumed within DOE and cannot be held independently liable. **Slip op.** at 55 n.37.

With the exception of whistleblower complaints involving lead-based paint, sovereign immunity has not been waived for purposes of the TSCA employee protection provision. Thus, in **Stephenson v. NASA**, 94-TSC-5 (Sec'y July 1, 1995), NASA was properly dismissed as a Respondent where the complaint did not concern a lead-based paint hazard. A CAA complaint against NASA, however, was cognizable. **See Jenkins v. U.S. Environmental Protection Agency**, 92-CAA-6 (Sec'y May 18, 1994).

As this proceeding does not involve lead-based paint, I find and conclude that Complainant's complain under TSCA cannot succeed and Respondent's motion to discharge this statute is hereby **GRANTED**.

The Secretary Noted that the United States Supreme Court had held in **Department of Energy v. Ohio**, 503 U.S. 607, 112 S.Ct. 1627, 1633-1635 (1992), that neither the Clean Water Act nor the Solid Waste Disposal Act contains a clear enough waiver of sovereign immunity to subject the United States to civil penalties for past violations.

In **Jenkins v. U.S. Environmental Protection Agency**, 92-CAA-6 (Sec'y May 18, 1994), the Secretary found that CERCLA, 42 U.S.C. §§ 9610, 9620(a)(1), expressly subjects an agency of the United States to the employee protection provisions. Specifically, the Secretary found EPA to be a "person" within the meaning of 42 U.S.C. §9610.

The Secretary found that the SDWA, 42 U.S.C. §§ 300(f)(11) and (12), 300j-9(i), similarly subjected the EPA to the SDWA employee protection provision. Although "employer" is not defined, "person" includes a Federal agency, which is "any department, agency, or instrumentality of the United States." In addition, as noted above, the Federal Facilities provision of the SDWA indicates that Congress intended to waive governmental immunity. 42 U.S.C. §300j-6(a).

Similar provisions govern CAA employee protection cases. **See** 42 U.S.C. §§ 7418(a), 7602(e), 7622(a) and (b).

The SWA and SWDA definitions of the term "person" do not expressly include the United States Government. Nonetheless, the Secretary held that the Federal facilities provision of those statutes made the employee protection provisions applicable to federal agencies.

In sum, the Secretary held:

> [I]mmunity is waived under the CERCLA, SDWA, and CAA by expressly including the United States within the definition of the term "person." Moreover, the CERCLA subjects each agency of the United States to its terms by means of its Federal facilities provision. The Federal Facilities provisions of the SDWA, CAA, CWA and SWDA, while describing Federal agencies reasonably expected to be affected, can be construed to waive immunity generally, thereby providing Federal employees as well as non Federal employees with statutory whistleblower protection. Even if this were not the case, the instant record establishes that EPA exercises jurisdiction over affected properties and facilities and engages in activities affecting regulated substances and processes, thus constituting an agency described in the provisions. I previously have held that the CWA whistleblower provision is a "Federal requirement" within the meaning of the CWA Federal facilities provision, and I incorporate that analysis as applying equally to the above statutes. **Conley v. McClellan Air Force Base (Conley)**, Case no., 84-WPC-1, Sec. Dec., Sept. 7, 1993, **slip op.** at 2-9.

As noted above, in **Conley v. McClellan Air Force Base**, 84-WPC-1 (Sec'y Sept. 7, 1993), the Air Force contended that the employee protection provision of the Federal Water Pollution Control Act or Clean Water Act (CWA), 33 U.S.C. §1367 (1988), does not apply to the Federal Government, and that Complainant's exclusive remedy arises under the Civil Service Reform Act (CSRA), 5 U.S.C. §2302(b)(8)(Supp. IV 1992). However, the Secretary rejected that position and found coverage for the following reasons.

The United States Government is not a "person" for purposes of section 1367 of the CWA. **See** 33 U.S.C. §1362(5); **United States Dept. of Energy v. Ohio**, 503 U.S. 607, 112 S.Ct. 1627, 1633-1635, 118 L.E.d 255, 267-268 (1992). In some instances, however, the CWA can apply to the Federal Government just as it applies to any nongovernmental entity, such as the CWA "federal facilities" provision, 33 U.S.C. §1323(a). The Secretary, employing statutory construction and a look to the legislative history, reasoned that

the employee protection provision of the CWA "would appear to be a Federal requirement respecting control and abatement of water pollution" and therefore fits within the "federal facilities" provision.

The Secretary viewed the Air Force's contention in regard to the CSRA as one of implied repeal of the CWA, and found that there was no evidence that the CSRA repealed a broad range of earlier enacted laws that explicitly provide substantive protections to whistleblowers, and instead found case law indicating that the CSRA was to provide additional protection for federal whistleblowers. **See Borrell v. United States Intern. Communications Agency**, 682 F.2d 981, 990 (D.C. Cir. 1982), and that CSRA does not foreclose other avenues of relief for federal employees where Congress otherwise has provided. **See Veit v. Heckler**, 746 F.2d 508, 51 (9th Cir. 1984). The Secretary distinguished cases in which Federal employees were foreclosed other statutory avenues on the ground that the CSRA provides a comprehensive scheme for administrative and judicial review of Federal personnel actions and practices. The distinction is that, for the most part, those cases dealt with situations in which the employee was trying to bypass the CSRA and go directly to the courts, and thus involves the employee's personal interest vis-a-vis the Federal government's interest in the sound and efficient administration of its operations. The Secretary also noted that when the Whistleblower Protection Act of 1989 was enacted (which amended section 2303(b)(8) of the CSRA), Congress indicated that it was not to be the exclusive remedy for whistleblowers. **See** 5 U.S.C. §1222; Joint Explanatory Statement, 135 Cong. Rec. 4,514 5,035 (1989).

As already noted above, in **Stephenson v. NASA**, 94-TSC-5 (ALJ June 27, 1994), the ALJ concluded that in the absence of a ruling by the Secretary upholding DOL jurisdiction under TSCA when that jurisdiction has been challenged on the basis of sovereign immunity, a proceeding under 15 U.S.C. §2622 cannot be maintained. The ALJ concluded that NASA, as an agency of the United States government, has not waived its sovereign immunity from suit under that TSCA. He therefore recommended that complainant's complaint against NASA under 15 U.S.C. §2622 be dismissed. The ALJ did not make a similar recommendation in regard to the CAA complaint, in which a "person" is expressly defined to include the United States thereby waiving sovereign immunity in clear terms. In contrast, no such expressed waiver is contained in 15 U.S.C. §2622.

Moreover, the employee protection provision of the CERCLA, SDWA, CWA, and the CAA covers employees of the Federal government "to the same extent, both procedurally and substantively, as [employees of] any nongovernmental entity..." 42 U.S.C.

§9620(a)(1). The CERCLA provisions expressly include the United States Government in its definition of "person." Similarly, federal facilities are expressly subject to the SDWA, CWA, and the CAA. Thus, the EPA cannot claim governmental immunity from the statutes.

The Secretary also rejected the EPA's argument that the CSRA impliedly repeals the environmental whistleblower statutes as applied to federal employees. **See Pogue v. U.S. Department of the Navy Mare Island Shipyard**, **supra**, **rev'd on other grounds**, 940 F.2d 1287 (9th Cir. 1990); **Conley v. McClellan Air Force Base**, **supra**.

Finally, the Secretary found that that complainant engaged in a protected activity and sufficiently established that the protected activity motivated not only the complainant's discharge but also the Inspector General's report which was used as a pretext to discharge him.

The Secretary ordered the EPA to reinstate that complainant to his former or comparable position together with the compensation, terms, conditions, and privileges of his former employment.

Consequently, the Complainant's motion for a temporary restraining order and an injunction preventing termination of his employee health insurance plan was moot and the motion was denied.

In **Jenkins v. U.S. Environmental Protection Agency** 92-CAA-6 (Sec'y May 18, 1994), Respondent contended that complainant's exclusive remedy arises under the Civil Service Reform Act. The Secretary characterized this contention of one of implied repeal: that the CSRA, with its comprehensive scheme of remedies to enforce personnel prohibitions, effectively has repealed the environmental whistleblower statutes as they apply to Federal government employees. The Secretary adopted the reasoning of **Marcus v. U.S. Environmental Protection Agency**, 92-TSC-5 (Sec'y Feb. 7, 1994), **Pogue v. U.S. Department of the Navy Mare Island Shipyard**, **supra**; and **Conley v. McClellan Air Force Base**, **supra**.

As also noted above, in **Pogue v. United States Dept of the Navy**, 87-ERA-21 (Sec'y May 10, 1990), **rev'd on other grounds, Pogue v. United States Dept. of Labor**, 940 F.2d 1287 (9th Cir. 1987), the Navy asserted that the Secretary of Labor lacked jurisdiction to entertain Complainant's employee protection complaint under CERCLA because (1) there is no express language in CERCLA, nor any express statement in its legislative history, indicating coverage of Federal employees; (2) that there has been no waiver of sovereign immunity of the Federal Government; and (3) that CERCLA does not cover Federal employees because the CSRA established for Federal

employees a comprehensive scheme to address all claims concerning adverse personnel actions.

The Secretary held

> (1) **Statutory language**. The CERCLA whistleblower provision provides that no "person" shall discriminate against "any employee." 42 U.S.C. §9610(a). The definition of "person" for purposes of this subchapter specifically includes "United States Government." 42 U.S.C. §9601(21). There is no ambiguity in this language that would support exclusion of Federal employees as complainants. This is confirmed by the Federal facilities section, which requires Federal agencies to comply with the CERCLA requirements to the same extent as nongovernment persons. 42 U.S.C. §9620(a). Moreover, a Federal employee may file a reading of "any employee" to exclude Federal employees would frustrate the statutes's goals, **see Dedham Water Co. v. Cumberland Farms Dairy Inc.**, 805 F.2d 1074, 1081 (1st Cir. 1986) (CERCLA a remedial statute that should be construed liberally), by diminishing the sources through which information could be obtained regarding compliance with the environmental requirements of the statute.
>
> (2) **Sovereign Immunity.** Congress waived sovereign immunity by including the Federal government in the definition of "person", by the Federal facilities provision (which although revised in 1986 was included in the original act), and by including federal employees in the citizen's suit provision.

The Secretary also rejected an argument that the Secretary lack authority to issue an order directed at another Federal agency because only the President has such power. The Secretary found no discretion not to require the abatement of the violation and order appropriate relief where a violation is found. The Secretary likewise rejected an argument that CERCLA did not apply because the Navy was not allocated funds for relief for environmental whistleblowers. Failure to allocate funds does not defeat a Government obligation created by statute. **See New York Airways, Inc. v. United States**, 369 F.2d 743, 748 (Ct. Cl. 966).

> (3) **Preemptive effect of the Civil Service Reform Act of 1978.** CERCLA was enacted more than two years after the CSRA, and yet made clear through CERCLA's definition of "person" and inclusion of the Federal facilities provision that CERCLA whistleblower provisions apply to the Federal government. Moreover, in the Joint Explanatory Statement to the Whistleblower Protection Act of 1989, which amended section 2302(b)(8) of the CSRA to strengthen the protection afforded

whistleblowers, Congress made it clear that the WPA was not meant to limit any right or remedy that might be available under "a large number of environmental ... statutes which provide specific protection to employees who cooperate with federal agencies." Although the WPA was enacted after the activity of Complainant in the instant proceeding, the Secretary found the legislative history to be entitled to consideration.

3. RES JUDICATA, COLLATERAL ESTOPPEL, FULL FAITH AND CREDIT, AND ELECTION OF REMEDIES

Respondent also submits, as an alternate defense herein, that Complainant's whistleblower complaint filed with the Department of Labor on April 14, 2000 is barred by **Res Judicata** and **Collateral Estoppel** and cites numerous cases in support of those defenses. However, those cases are clearly distinguishable and do not deal with the plethora of Secretary decisions cited above that lead to the conclusion that the CAA and TSCA, as well as the other whistleblower statutes, are another source of relief for aggrieved whistleblowers and that the CSRA is not the exclusive remedy for whistleblowers.

It is well settled that mere acceptance of payments under a state act does not constitute an election of remedies barring a subsequent claim under the federal statute where there is concurrent jurisdiction. **Calbeck v. Travelers Insurance Co.**, 370 U.S. 114, 82 S.Ct. 1196 (1962); **Holland v. Harrison Brothers Dry Dock and Repair Yard**, 306 F.2d 369 (5th Cir. 1962). However, the employer must be given credit for sums paid under the state act to avoid a double recovery. **Calbeck**, **supra**.

When an employee files claims in more than one forum, the employer may raise defenses such as **Res Judicata**, Full Faith and Credit and Election of Remedies. Full Faith and Credit is mandated by Article IV, Section I, of the United States Constitution. **Director, OWCP v. National Van Lines**, 613 F.2d 972, 981, 11 BRBS 298, 308-309 (D.C. Cir. 1979).

The doctrine of **Res Judicata** requires that the determination made in an earlier proceeding occur after a full and fair adjudication of its legal and evidentiary factors in order to be binding. **United States v. Utah Construction and Mining Co.**, 384 U.S. 394 (1966) (review of the record had made it clear to the court that proceedings afforded claimant in Virginia and the proof adduced before the state agency abundantly met this criterion, **i.e.**, whether or not the plaintiff had full and ample opportunity

to present his case before the state agency).

The doctrine of Election of Remedies relates to the liberty or the act of choosing one out of several means afforded by law for the redress of an injury, or one out of several available forms of action. An "**Election of Remedies**" arises when one having two coexistent but inconsistent remedies chooses to exercise one, in which event he loses the right to thereafter exercise the other. **Melby v. Hawkins Pontiac**, 13 Wash. App. 745, 537 P.2d 807, 810 (1975).

The general rule of Collateral Estoppel is that when an issue of **ultimate fact** has been determined by a valid judgment, that issue cannot be again litigated between the same parties in future litigation. **City of St. Joseph v. Johnson**, 539 S.W.2d 784, 785 (Mo. App. 1976). In **Kendall v. Bethlehem Steel Corp.**, 16 BRBS 3 (1983), the Board applied collateral estoppel to vacate an administrative law judge's findings regarding the same claimant and covering the same period of time which the Board had affirmed.

Res Judicata and Collateral Estoppel apply only after entry of a final order that terminates the litigation between the parties on the merits of the case. **St. Louis Iron Mountain & Southern Railway v. Southern Express Co.**, 108 U.S. 24, 28-29, 2 S.Ct. 6, 8 (1883); **Firestone Tire and Rubber Co. v. Risjord**, 449 U.S. 368, 373, 101 S.Ct. 669, 673 (1981).

Moreover, **Res Judicata** and Collateral Estoppel apply to administrative agencies acting in a judicial capacity resolving disputed issues of fact properly before it which issues the parties have had an adequate opportunity to litigate. **United States v. Utah Mining and Construction Co.**, 384 U.S. 394 (1966).

Although a state court opinion could collaterally estop the litigant from debating the scope of state court jurisdiction in a subsequent claim, **Shea v. Texas Employers Insurance Assoc.**, 383 F.2d 16 (5th Cir. 1967), the question of state court jurisdiction is simply not relevant in a subsequent claim pursued under the federal statute. **Simpson v. Director, OWCP**, 681 F.2d 81, 14 BRBS 900 (1st Cir. 1982), **vac'g and remanding** 13 BRBS 970 (1986), **cert. denied**, 459 U.S. 1127, 103 S.Ct. 762 (1983). **See also Simpson v. Bath Iron Works Corp.**, 22 BRBS 25 (1989) (**Decision and Order After Remand**).

In **Thomas v. Washington Gas Light Co.**, 448 U.S. 261, 12 BRBS 828 (1980), a four member plurality of the Supreme Court held that the Full Faith and Credit Clause does not preclude successive compensation awards. The Court considered the different interests

affected by the potential conflicts between the two jurisdictions from which claimant sought benefits and concluded that Virginia had no legitimate interest in preventing the District of Columbia from granting a supplemental award to a claimant who had been granted a Virginia award, where the District would have had the power to apply its workers' compensation law in the first instance.

Three justices concurred in the result of the plurality, but relied on the rationale of **Industrial Commission of Wisconsin v. McCartin**, 330 U.S. 622, 67 S.Ct. 886 (1947). The rule of **McCartin** permitted a state, by drafting its statute in "unmistakable language", to preclude an award in another state. The concurrence found that the Virginia statute lacked the "unmistakable language" required to preclude a subsequent award in the District of Columbia.

In **Sun Ship, Inc. v. Commonwealth of Pennsylvania**, 477 U.S. 715, 100 S.C. 2432 (1980), the Supreme Court held that state and federal jurisdiction may run concurrently in areas where state law constitutionally may apply.

Following **Thomas**, the Board held that an award of compensation under the Virginia Workers' Compensation Act did not operate as a bar to a supplemental award based on the same injury under the District of Columbia Act. **Murphy v. Honeywell, Inc.**, 12 BRBS 856 (1980). **See also Dixon v. McMullen and Associates, Inc.**, 13 BRBS 707 (1981) (Miller, concurring in result only) (Smith, concurring in part and dissenting in part) (three opinion decision holding that neither the Full Faith and Credit Clause nor the doctrines of collateral estoppel and election of remedies barred a longshore claim brought subsequent to a settlement agreement under a state workers' compensation statute).

In **Landry v. Carlson Mooring Service**, 643 F.2d 1080, 13 BRBS 301 (5th Cir. 1982), **rev'g** 9 BRBS 518 (1978), **cert. denied**, 454 U.S. 1123 (1981), the court, citing **Thomas** and **McCartin**, held that the Full Faith and Credit Clause did not prevent claimant, who had a judicially approved settlement under the Texas workers' compensation statute, from asserting a claim under the Longshore Act. Claimant, however, would have to credit his state benefits against any recovery under the federal statute. Election of remedies was held inapplicable in the absence of an indisputable state declaration precluding pursuit of a subsequent longshore claim.

Similarly, in **Simpson v. Director, OWCP**, 681 F.2d 81, 14 BRBS 900 (1st Cir. 1982), **rev'g on other grounds** 13 BRBS 970 (1981), **cert. denied**, 459 U.S. 1127 (1983), the court held that a state

court award did not collaterally estop claimant from bringing a claim under the federal statute. The court held that although a state court opinion could collaterally estop a litigant from debating the scope of state court jurisdiction, the question of state court jurisdiction was not relevant under the federal Act. That Congress authorized federal compensation for all injuries to employees on navigable waters was to be accepted regardless of what a particular claimant recovered under state law. The court held further that **Res Judicata** was inapplicable since claims under the federal statute may not be pressed in state court.

In **Jenkins v. McDermott, Inc.**, 734 F.2d 229, 16 BRBS 102 (CRT) (5th Cir. 1984), a tort suit, the court held that where the federal statute and the state workers' compensation law were concurrently applicable, but nothing in the record indicated that claimant had elected his state benefits over the federal remedy, the district court could not grant summary judgment to a third party defendant on the basis of a provision of the state statute barring claims against third parties. The court held that application of the state bar to recovery could not survive an election of the federal remedy in view of the Longshore Act's purpose to provide uniformity of treatment to all maritime workers and the fact that Louisiana, the situs state, was the only jurisdiction whose workers' compensation law barred recovery against employer's principals. On rehearing, the court vacated its earlier opinion insofar as it reversed the district court's summary dismissal of claimant's negligence and strict liability claims against employer's principal. The court noted that the Supreme Court's decision in **W.M.A.T.A. v. Johnson**, 467 U.S. 925, 104 S.Ct. 2827 (1984), cast doubt on its previous holding that under the Longshore Act the principal had no immunity from a tort suit by an employee of its contractor. **Jenkins v. McDermott, Inc.**, 742 F.2d 191, 16 BRBS 140 (CRT) (5th Cir. 1984) (**On Petitions for Rehearing and Suggestions for Rehearing En Banc**).

4. THE ISSUES RAISED IN COMPLAINANT'S FILING BEFORE THE DEPARTMENT OF LABOR ARE THE SAME ISSUES RAISED IN THE MSPB LITIGATION FILED IN JANUARY, MARCH AND APRIL 2000, AND ARE BARRED BY THE EQUITABLE DOCTRINE OF COLLATERAL ESTOPPEL.

The equitable doctrine of collateral estoppel exists when issues that are litigated in a previous proceeding are litigated in a second suit by the same parties surface in subsequent litigation between the same parties. **Paynes v. Gulf States Utilities Company**, ARB Case No. 98-045, August 31, 1999. **See also, Astoria Federal Savings and Loan Ass'n v. Solimino**, 111 S. Ct. 2166, 2170 (1991). Four elements must be met for collateral estoppel to apply: 1) The

issue of both proceedings must be identical; 2) The relevant issues must have been actually litigated and decided in the prior proceeding; 3) there must have been "full and fair opportunity" for the litigation of the issues in the prior proceeding; and 4) the issues must have been necessary to support a valid and final judgment on the merits. **Agosto v. Consolidated Edison Company of New York**, ARB Case Nos. 96-ERA-2 and 97-ERA-54 (July 27, 1999) The issues in the present complaint meet these elements vis-a-vis those issues that were resolved through the settlement agreement. Therefore, the doctrine of collateral estoppel would apply to the issues raised by the complainant here.

I disagree because the issues before the MSPB and the Department of Labor are not the same. Complainant has raised and proven a continuing pattern of discrimination and retaliation, as well as the creation of a hostile work environment, that continued until at least the last day of the hearings held herein. I cite particularly the fact that Complainant's access to the main building at DOI was **RESTRICTED** and he was escorted about the public areas of that building just like a common criminal. This restriction will be further discussed below.

5. COMPLAINANT HAS FAILED TO RAISE CERTAIN ALLEGATIONS IN A TIMELY MANNER, AND THESE ALLEGATIONS MUST BE DISMISSED.

Under the Clean Air Act and the Department of Labor's regulations, an allegation of retaliation for whistleblower activities must be filed with OSHA within 30-days of the alleged retaliation. 42 U.S.C §7622(b)(1); 29 C.F.R. §24.3(b) Since Complainant did not file with OSHA until April 5, 2000, Complainant's claims that both the draft and the final memorandum from Valerie Flemming to Jay Weisz, which occurred in early February, must be dismissed because they occurred more than 30 days before Complainant filed his complaint with OSHA. In addition, the 30-day time limit should not be equitably tolled since Complainant presented these claims at the MSPB in January and March, 2000. Presumably, therefore, Complainant was aware of the actionable nature of those claims and could have filed with OSHA had he so chosen.

The complaint filed by Mr. Knox is timely because he was led to believe that the MSPB proceeding would toll the 30-day statute of limitations and he filed his complaint with OSHA during the pendency of the MSPB proceeding.

6. COMPLAINANT'S WHISTLEBLOWER COMPLAINT FILED WITH THE DEPARTMENT OF LABOR ON APRIL 14, 2000 IS BARRED BY THE DOCTRINE OF MOOTNESS.

The U.S. Supreme Court held in **County of Los Angeles v. Davis, et al**., 44 U.S. 625; 99 S. Ct. 1379 (1979) that "jurisdiction, properly acquired, may abate if the case becomes moot because (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." (Citations omitted) 440 U.S. at 631.

The employee protection provision of the Clean Air Act states: "No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions or privileges of employment..." 42 U.S.C. 7622(a) Complainant has not been affected by any action of the agency as to compensation, terms, conditions or privileges, nor was complainant removed from employment. Therefore, this complaint is moot.

Furthermore, the draft letter that complainant found on the Xerox machine had absolutely no effect on the conditions or privileges of employment. Regarding the February 10, 2000 memorandum recommending Complainant's removal, again, that document did not affect the conditions and privileges of Complainant's employment, as Complainant did not see it, and Weisz did not act upon it.

Respondent further submits that Complainant was not, in fact, removed. While Complainant's performance was an issue, the agency mistakenly believed that complainant was a probationary employee (RX 46) and therefore did not accord him with the appropriate procedural rights as accorded non-probationary employees regarding disciplinary actions. Complainant was removed due to a mistake by Human Resources. Within two days of the mistake being discovered, Complainant was immediately restored to his position, retroactive to the date of the removal, and the action was treated as if it had never occurred. Complainant's Official Personnel File contains no reference to any removal of complainant.

Respondent further submits that both conditions of County of Los Angeles apply here. The removal was corrected once the agency realized Complainant was a non-probationary employee. Since Complainant has available to him all the procedural rights accorded a nonprobationary employee if Complainant is ever disciplined, he will be accorded his procedural rights and this action will not recur.

Further, management has not taken any action against Complainant in the two years that he has been in his current position. Second, any alleged effects of his "removal" have

completely been eradicated through the agency's action. In addition, Complainant did not seek compensatory damages when he appealed the decision of OSHA to the Office of Administrative Law Judges. (**See** complainant's letter of appeal dated October 20, 2000). In addition, he was reinstated immediately upon discovery of the error. Accordingly, compensatory damages have not been raised and are not a viable remedy in this case. Therefore, since "neither party has a legally cognizable interest in the final determination of the underlying questions of facts and law" (**Id**.), this case should be dismissed as moot.

I disagree. The Respondent has subjected Knox to a continuing pattern of discrimination, retaliation and disparate treatment throughout his employment with the Respondent, and such treatment continued with his employment at the Greenbelt facility (1) where he has been denied overtime work made available to the "team players" there and (2) where he was subjected to that written "gag" order **after the hearings began in this case.** Thus, Knox has established the need for corrective action here by the issuance of an **ORDER** herein.

7. A SETTLEMENT AGREEMENT BINDS THE PARTIES WHO VOLUNTARILY ENTER INTO IT.

The parties entered into a settlement agreement where there is an agreement between the parties by which one accepts an agreed performance by the other in discharge of a contested obligation of that party. Proposed Debarment for Labor Standards Violations by: U.S. Floors, Inc., ALJ Case No. 90-DBA-15 (August 29, 1991). Each party entered in to it voluntarily, and with the advise of counsel. Therefore, the parties are bound by their agreement.

I disagree because the Respondent has not lived up to the terms of the agreement, most notably because Complainant's assignment to Greenbelt resulted in a loss of seniority, pay grade and wages, an amount Knox once estimated at approximately $200,000.00. However, that amount has not been clearly delineated and should be submitted to the ARB for their consideration.

8. COMPLAINT'S CLAIMS HAVE BEEN EXTINGUISHED BY THE DOCTRINE OF ACCORD AND SATISFACTION.

The Doctrine of Accord and Satisfaction applies when there is a binding agreement between the parties. **Proposed Debarment for Labor Standards Violations by: U.S. Floors, Inc.**, ALJ Case No. 90-DBA-15 (August 29, 1991). We have such an agreement here. There was consideration given by each party, each was represented by competent counsel, and each entered into the agreement by their own

free will in an arms-length transaction. In addition, all of Complainant's claims under the present suit were resolved through the settlement agreement of Complainant's MSPB claims, and through this doctrine the issues raised in the present complaint have already been contractually resolved. I disagree as no such Accord and Satisfaction has taken place.

9. COMPLAINANT FAILED TO STATE A CLAIM OF WHISTLEBLOWER RETALIATION UNDER THE CLEAN AIR ACT (CAA).

As argued above by Respondent, Complainant has not suffered an action that affected a term or condition of employment as required under the CAA. Complainant's removal was completely eviscerated and does not exist in either Complainant's official personnel file or the agency's record. Since Complainant has not been removed, his terms and conditions of employment have not been affected. Accordingly, he has not made a **prima facie** case of whistleblower retaliation, and has failed to state a claim upon which relief can be granted.

I strongly disagree as Complainant has established by credible, probative and persuasive evidence that he has been subjected to a continuing pattern of discriminatory and retaliatory treatment, that he has been forced to work in a hostile environment, that he has been shunned by his co-workers as an outcast and pariah and subjected to a written "gag" order after his whistleblowing activities caused problems at Greenbelt. This Administrative Law Judge, in so concluding, accepts and credits the testimony provided by Complainant and his witnesses, as opposed to the witnesses provided by the Respondent. The tension between Complainant and Respondent's witnesses, especially Ms. Flemming, was readily apparent to this Administrative Law Judge.

10. THE UNITED STATES HAS NOT WAIVED SOVEREIGN IMMUNITY UNDER TSCA, THEREFORE LABOR HAS NO JURISDICTION TO ENTERTAIN COMPLAINANT'S TSCA ACTION.

The ARB has clearly held that the United States has not waived its sovereign community under TSCA. **Berkman v. United States Coast Guard Academy**, Case Nos. 97-CAA-2 and 97-CAA-9 (ARB Decision, January 2, 1998). Therefore, complainant cannot bring this action under TSCA. I agree and only the complaint under CAA is actionable.

11. COMPLAINANT HAS FAILED TO DEMONSTRATE THAT HIS ALLEGED DISCLOSURES CONCERNED FOULING THE AMBIENT AIR AS REQUIRED BY THE CLEAN AIR ACT.

In order for an employee to come under the protections of the whistleblower provisions of the Clean Air Act, the employee's complaints "must be grounded in conditions constituting reasonably perceived violations of the environmental acts." **Kemp v. Volunteers of America of Pennsylvania, Inc.**, ARB Case No. 00-069 (December 18, 2000) at p. 4, quoting **Minard v. Nerco Delamar Co**, Case No. 92-SWD-1. The purpose of the Clean Air Act is to protect the public health by preventing pollutants from fouling the ambient air (defined as the statute's term for the outdoor air used by the general public). **Kemp** at p. 4. "Employee complaints about purely **occupational hazards** are not protected under the CAA's employee protection provision." **Id**. The ARB held that "the substance of the complaint determines whether activity is protected under the particular statute at issue." In **Kemp**, the ARB held that the evidence showed that the asbestos in the basement was a threat to himself, his son, his co-workers, and any member of the public who went into the basement of his workplace. **Id**. The ARB found that there was nothing in the record to suggest that Kemp alleged the asbestos in the basement posed any threat to the air outside the building. **Id**. Therefore, the ARB dismissed the complaint. **Id**. At p. 6.

The Respondent submits that the **Kemp** case is directly on point here. The record reveals and it is clear that Complainant had in mind only the asbestos contained in the buildings when he made his alleged protected disclosures. Indeed, the FAX sent to WASO on January 4, 2000 was entitled, "Notice of Unsafe or Unhealthful Conditions," which is OSHA-related language. (CX-119) In addition, the regulations cited by Complainant in the facsimile are OSHA regulations. No Clean Air Act regulations are cited. Finally, the concern expressed in the language of the facsimile all relate to worker exposure due to the recent work done at the Center. (CX-119) There are also many written statements in the record (especially the writing of Complainant contained in RX-55) that contain only purported alleged disclosures related to worker safety, safety of the students, and safety of people inside the buildings. There are no statements regarding the release of asbestos into ambient or outside air and no mention of the Clean Air Act. Phrases like "dangerous working environment" "Notice of Unsafe and Unhealthful Working Conditions" are predominant throughout the writings in this exhibit, as well as in Complainant's filings to the MSPB and to DOL. In addition, those employees who testified as to complainant's oral communications testified unanimously that worker and student safety was the watchword. [Testimony of Gloria Brown, March 22, 2001, pp. 2750-2757; testimony of Gentry Davis, pp. 4199-4210] Therefore, the record is clear that Complainant's only alleged concern was the safety of the students and workers in the buildings that contained

asbestos, not that there was any release of asbestos into the ambient air.

Respondent also submits that Complainant, for the first time at the hearing, expressed concern about the alleged release of asbestos into the ambient air that his testimony should not be given any credence, that he never made any disclosures to NPS officials, or anyone else before the hearing, regarding ambient air, which could have raised Clean Air Act implications. In any event, the ARB has held that the nature of the protected disclosure is determined as of the time of the disclosure. Therefore, anything Complainant said regarding his alleged disclosure at the hearing should not be given any weight as what is legally required is what was disclosed at the time of the disclosure. What he says about his alleged disclosures after the fact must be discounted where it does not agree with the disclosure itself.

I disagree. **Kemp** is clearly distinguishable because Knox had a reasonable and good faith belief that the asbestos at the Job Center was a hazard not only to the staff and workers there but also to visitors and others who had reason to go there for various reasons. **Kemp** is also distinguishable because the Federal Facilities Compliance Act subjects the Respondent to coverage herein and I so find and conclude.

12. THE AGENCY HAS PROVIDED A LEGITIMATE, NONDISCRIMINATORY REASON FOR ANY ALLEGED ACTION IT HAS TAKEN AGAINST COMPLAINANT.

Once the employee establishes a **prima facie** case of reprisal through indirect means, the burden shifts to the employer to "produce evidence that the plaintiff was [denied a promotion] . . . for a legitimate, nondiscriminatory reason." **Carroll v. Bechtel Power Corp.**, 91-ERA–46 (Sec'y Dec. February 15, 1995). The employee then has "the opportunity to prove by a preponderance of the evidence that the alleged legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." **Id**. At 253; **Leveille v. New York Air Nat'l. Guard**, 1994-TSC-3/4 (Sec'y Dec., December 1, 1995); **Hoffman v. Bossert**, 1994-CAA-4 (Sec'y Dec., May 19, 1995). In addition, the complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. **Dartley v. Zack Co.**, Case No. 80-ERA-2, Sec. Dec., April 25, 1983. The complainant bears the ultimate burden of proving by a preponderance of the evidence that he was retaliated against in violation of the law. **Id.**; **Carroll v. Bechtel Power Corp.**, 91-ERA-46 (Sec'y Dec. February 15, 1995); **Agbe v. Texas Southern**

University, ARB No. 98-072 (July 27, 1999).

Respondent also submits that the agency has articulated nonretaliatory reasons for any alleged actions taken against complainant. Complainant's supervisor stated that she wanted complainant removed during his probationary period because of his abandonment of the snow team, his demonstrated lack of professionalism while working with an off-site contractor, his refusal to follow the chain-of-command when dealing with personnel matters, as well as giving incorrect directions to vocational staff. Mr. Weisz also testified that the reasons for the removal, which was effectuated on March 13, 2000 [exhibit RX-31] were clearly stated in the removal letter. In that letter, Weisz cited instances of complainant's failure to perform assigned duties, his failure to follow instructions, and his disruptive and inappropriate behavior. Furthermore, Ms. Flemming testified at length before this tribunal that Complainant was increasingly combative, argumentative and uncooperative towards her, and these concerns were discussed with Weisz, according to Respondent, who also posits that these reasons were not refuted during cross-examination.

In fact, throughout the course of the hearing, Complainant by his behavior and conduct in the courtroom confirmed on numerous occasions that he is indeed extremely combative, disruptive and uncooperative. On a number of occasions, Complainant disrupted the proceedings by commenting about witnesses and their statements from his seat at the table, and on occasion storming out of the courtroom when he disagreed with a witnesses' testimony. While being cross-examined, Complainant became very combative and argumentative, and on several occasions burst out of the courtroom in the middle of cross-examination. When he returned, Complainant was very uncooperative, refusing to respond to questions other than with a terse "yes," or "no," according to the Respondent. [**See**, for examples, transcript, pps. 2223, 312-14, 2330, 2352-53, 2361-62, 2415, 2561] In his testimony, Complainant confirmed on the record the legitimacy of Ms. Flemming's complaints about his behavior in the workplace, and which established that there were legitimate reasons for removing Complainant regardless of his probationary status. Based on the above discussion, the record is clear that the reasons given for complainant's removal were based on legitimate, nondiscriminatory reasons for taking disciplinary action against complainant.

I strongly disagree because the various reasons cited by the Respondent are clearly specious, have no basis in reality and were merely a pretext to get rid of Knox because he was not a team player, and I so find and conclude.

13. THERE IS NO DIRECT EVIDENCE OF DISCRIMINATION IN THIS CASE.

Respondent also posits that Complainant has not shown any direct evidence of discrimination. While Complainant makes much of certain entries into Ms. Flemming's notes regarding the Complainant in RX-45, each of those entries have been explained by Ms. Flemming during her direct and cross examinations. For example, the entry regarding Complainant's facsimile to the Regional Office, CX-119, relates only to the form in which the document was sent (handwritten without any cover or explanation), rather than its content. The notes do not reference the content of the facsimile at all. Regarding the February 10, 2002 memorandum from Flemming to the Center Director recommending Complainant's removal (RX-14), the portions dealing with Complainant's not following the chain-of-command have to do with his personnel requests to the Deputy Director of NPS. They have nothing to do with his alleged safety concerns. Accordingly, there is no direct evidence of any discriminatory action being taken against complainant.

I strongly disagree. The "gag" order placed on him at Greenbelt is the most blatant example of direct evidence of discrimination and retaliation that I have seen in my years as an Administrative Law Judge, and I so find and conclude. Other instances of discrimination have been delineated above.

14. EVEN IF EVIDENCE OF DIRECT DISCRIMINATION WAS FOUND, THE AGENCY HAS SHOWN THAT IT WOULD HAVE TAKEN THE SAME ACTIONS NOTWITHSTANDING ANY PROTECTED DISCLOSURES.

In cases alleging direct evidence of discrimination, a dual-motive analysis applies. The employer must prove, by a preponderance of the evidence, that it would have taken the same action even if the employee had not engaged in protected conduct. **Passaic Valley**, 992 F.2d at 481.

In this case, Respondent posits that the record is clear that the agency would have taken the same disciplinary action against Complainant during this time, whether or not he was a probationary employee. As shown above, Complainant's performance and behavior were egregious, and he was a disruption to the Center. Furthermore, the record is clear that the management officials and human resource personnel were under the misapprehension that Complainant was a probationary employee. Therefore, the decision would have clearly been the same regardless of his alleged disclosures.

I disagree. The reasons put forth by Respondent to justify its disparate treatment of Knox are specious and merely an excuse by the Respondent to justify its actions and I do not accept those reasons because those actions took place only because Knox was engaged in protected activities and because he need not go through the chain-of-command as his prior complaints brought no results and just resulted in further discrimination, retaliation and disparate treatment.

15. THE COMPLAINANT HAS FAILED TO SHOW THAT THE AGENCY'S REASONS FOR ITS ACTIONS WERE PRETEXT FOR REPRISAL.

According to the Respondent, there is no evidence in the record to show that the legitimate reasons discussed above constitute pretext for reprisal. As discussed above, there were a number of articulated reasons for Complainant's removal that were not rebutted even after many hours of cross-examination. The record is clear that Complainant's behavior and performance were lacking and that disciplinary action would have been taken regardless of Complainant's alleged protected disclosures. Accordingly, neither the record nor the allegations raised by Complainant demonstrate that the agency's actions in taking disciplinary action against Complainant were pretextual and taken in reprisal for any alleged disclosures.

I disagree. The reasons put forth by Respondent to justify its disparate treatment of Knox are specious and merely an excuse by the Respondent to justify its actions, and I do not accept those reasons because those actions took place only because Knox was engaged in protected activities and because he need not go through the chain-of-command as his prior complaints brought no results and just resulted in further discrimination, retaliation and disparate treatment.

16. COMPLAINANT HAS FAILED TO SHOW THAT ACTIONS HE ALLEGED HAVE OCCURRED AT HIS CURRENT PLACE OF EMPLOYMENT ARE RELATED TO THE HARPER'S FERRY JOB CORPS CENTER.

Respondent submits that the record is clear that the events alleged to have occurred at Complainant's current place of employment (Greenbelt) were unrelated to the alleged events at the Center some months before Complainant began his tenure at Greenbelt in October 2000. There is no evidence that management at Greenbelt knew of Complainant's allegations at the Center. Indeed, they testified that they had no such knowledge. While Complainant may have talked to other employees about his litigation against the National Park Service regarding his alleged disclosures at the Center, there is no evidence in the record that management knew

about Complainant's case. While it may be true that Complainant was instructed to follow the chain-of-command in disclosing health and safety issues in Greenbelt, clearly, this memorandum was directed at Complainant's activities at Greenbelt, and not at the Center, and was an ongoing policy at Greenbelt, put into place well before Complainant's tenure began in October 2000.

In addition, management had valid concerns about Complainant's performance at Greenbelt. First, there is ample evidence that Complainant was careless with the equipment under his care as Complainant "had wrecked all the equipment in the yard, " according to management at Greenbelt. Complainant also had failed to follow instructions of his supervisors. This behavior is what precipitated a discussion about the possibility of Complainant being placed on a PIP. This discussion was clearly a discrete event unrelated to complainant's prior activities at the Center, and related wholly to his performance issues at Greenbelt. Nothing in the record demonstrates that any actions taken or contemplated by management related to Complainant's prior activities at the Center. Therefore, there is no evidence of continuing reprisal, and Complainant should be required to raise allegations of whistleblower reprisal at Greenbelt in a new complaint.

I strongly disagree as Knox, virtually from the start of his employment at the Job Center, was subjected to a persistent and continuing pattern of discrimination, retaliation and disparate treatment, that his protected activities have been a source of tension between Knox, his supervisors and his co-workers, that his reputation as a whistleblower "preceded" him to Greenbelt, that he was, within a short time, subjected to that "gag" order and that he was finally subjected to the ultimate act of discrimination, **i.e.**, his access to the main DOI building under restrictions not applicable to any other DOI employee at that time, and I so find and conclude.

17. COMPLAINANT'S RESTRICTED ACCESS AT THE MAIN INTERIOR BUILDING WAS CLEARLY NOT IN REPRISAL FOR COMPLAINANT'S ALLEGED PROTECTED DISCLOSURES.

With regard to Complainant's allegation that his access to the Main Interior building was restricited, the testimony elicited at the hearing shows clearly that his placement on restricted access at the Main Interior Building had nothing whatever to do with any of his alleged protected activities at the Center.

According to the Respondent, the testimony clearly established that Complainant's access was restricted because of his disturbing contact with Ms. Margelos, a clerical employee, who had no

knowledge of Complainant before that meeting, or of any protected activity in which he may have engaged. Furthermore, the record shows that the staff in the National Park Service Headquarters who were interviewed by Mr. Henson, the Department's Chief of Security, did not know about Complainant's alleged protected activities at either the Center or Greenbelt. All these employees knew was that Complainant was acting erratically in their presence. Accordingly, no connection was established at hearing or in the record regarding Complainant's placement on restricted access to the Main Interior Building. Even assuming, **arguendo**, that Complainant should not have been placed on restricted access, once he was placed on restricted access, it was appropriate for the agency to insist that Complainant be escorted while in the building. Since the allegations relating to restricted access are not reprisal for any of Complainant's alleged whistleblowing activities, the allegations should not be considered in the present complaint, according to the Respondent.

As noted above, the restricted access to the main building is a direct result of his protected activities as the reasons given for such restrictions were the most specious reasons I have ever encountered in presiding over these complaints, and I so find and conclude.

VII. ARGUMENT AND DISCUSSION

An important threshold issue in these cases is the credibility of the Complainant and that of his witnesses. Respondent's essential thesis on this issue is that Mr. Knox simply is not credible, that he has changed his version of events over the years, and that his witnesses had motives to give biased testimony against the Respondent. Respondent submits that Complainant has lied, exaggerated, played word games and changed his story to prevail in this action, that he is an employee who overreacted to the risks posed by asbestos at the Center and that he simply is not credible.

As the hearing proceeded, according to Respondent, it became clear that Complainant had a problem with telling the truth, exaggerating and distorting events, experienced memory loss and lied about the facts, according to Respondent, who has also accused Complainant's counsel of changing his arguments several times during the course of the hearing. Respondent also posits that Knox has exaggerated the importance and the alleged hazards at the Center.

Respondent also suggests that some employees understandably tried to avoid Complainant due to his personality and behavior, but such avoidance or shunning was not due to his whistleblowing.

I disagree very strongly.

This Administrative Law Judge, allowing for the usual hyperbole found in an attorney's brief, simply cannot believe that counsel truly believes those statements. This is akin to saying, "everyone else is correct, only the whistleblower is wrong."

Respondent also submits that Complainant is arrogant and abrasive and cannot get along with his co-workers - -

I disagree as he is very intelligent, dedicated and conscientious individual. However, such arrogance can be attributed to Ms. Valerie Flemming, and her arrogance was manifested in her testimony before me, as even a cursory reading of her testimony will reflect that aspect of her personality - - it's quite obvious that she took pleasure in criticizing and humiliating and deprecating the work of Knox. That Ms. Flemming may have treated others in that fashion is no defense herein, as it is apparent that she also was out to get rid of Mr. Knox.

Complainant's co-workers went out of their way to make his life at the Center and at Greenbelt as miserable as possible simply because he was not a "team player." While the term "team player" has a positive connotation in sports, it is a pejorative team in referring to one who has engaged in protected activities, and I so find and conclude.

While Respondent's counsel refers to Complainant as being less-than-truthful, I strongly disagree. I observed Complainant's demeanor during twenty-nine (29) days of trial and I have credited his testimony, and any confusion as to dates or events can simply be attributed to the passage of time. Fortunately, Mr. Knox kept some notes as to who said what and when.

A. BURDEN OF PROOF

The burden of proof in whistleblower cases has been well described in prior decisions of the OALJ and ARB. As I wrote in one of my more recent decisions:

> In order to establish a **prima facie** case of unlawful discrimination, a complainant must show that he engaged in protected activity, that he was subjected to adverse action, and that the respondent was aware of the protected activity when it took the adverse action. A complainant also must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. **Dartey v. Zack**

Co., Case No. 80-ERA-2, Sec. Dec., Apr. 25, 1983. Viewing all of the evidence as a whole, the Complainant has shown, by a preponderance of the evidence, that she was discriminated against for engaging in protected activity. **See Boudrie v. Commonwealth Edison Co.**, 1995-ERA-15 (ARB Apr. 22, 1997); **Boytin v. Pennsylvania Power & Light Co.**, 1994-ERA-32 (Sec'y Oct. 20, 1995); **Marien v. Northeast Nuclear Energy Co.**, 1993-ERA-49/50 (Sec'y Sept. 18, 1995). To carry that burden Complainant must prove that Respondent's stated reasons for reprimanding Complainant are pretext, **i.e.**, that they are not the true reasons for the adverse action and that the protected activity was. **Leveille v. New York Air Nat'l Guard**, 1994-TSC-3/4 (Sec'y Dec. 1, 1995); **Hoffman v. Bossert**, 1994-CAA-4 (Sec'y 19, 1995).

Migliore v. Rhode Island Department of Environmental Management, 1998-SWD-3, 1999-SWD-1, 1999-SWD-2 (ALJ RDO August 13, 1999).

As I also wrote in another decision:

In order for [Complainant] Anderson to prevail, she must establish the following:
...
B. That she was engaged in a protected activity.

C. That she was discriminated against or received disparate treatment by Metro.

D. That Metro knew of the protected activity when it took the adverse action.

E. The protected activity was the reason for the adverse action.

See Trimmer v. U.S. Dept. of Labor, 174 F.3d 1098, 1101 (10th Cir. 1999); **Carrol v. U.S. Dept. of Labor**, 78 F.3d 352, 356 (8th Cir. 1996); **Simon v. Simmons Foods, Inc.**, 49 F.3d 386, 388 (8th Cir. 1995).

The traditional preponderance of evidence standard is to be used in complaints under environmental whistleblower statutes. **See Martin v. Dept. of the Army**, ARB No. 96-131 at 6 (July 30, 1999) and **Ewald v. Commonwealth of Virginia**, Case No. 89-SDW-1 at 11 (April 20, 1995).

Once a complainant has proved all the elements of

the **prima facie** case by a preponderance, the respondent may rebut the **prima facie** case by presenting evidence that it had a legitimate non-discriminatory motive for the action taken. **See Carroll v. Bechtel Power Corp.**, 91-ERA-46 (Sec'y February 15, 1995)(setting out the general legal framework) "In any event, the complainant bears the ultimate burden of proving by a preponderance of the evidence that he was retaliated against in violation of the law. (**Id.**) and **Agbe v. Texas Southern University**, ARB No. 98-072 (July 27, 1999)(respondent does not carry the burden of proving a negative proposition, that it was not motivated by complainant's protected activities when it took the adverse action. Throughout, complainant has the burden of proving that the employer was motivated, at least in part, by complainant's protected activities). Once the respondent produces evidence that the complainant was subjected to the adverse action for legitimate non-discriminatory reasons, the rebuttable presumption created by complainant's **prima facie** showing drops from the case. **Carroll** at 6.

There is one variant to this format. Where an employee establishes by a preponderance that illegitimate reasons played a part in the employer's adverse action, the employer has the burden of proving by a preponderance that it would have taken the adverse action against the person for the legitimate reason alone. (**Id.**) This is known as a dual motive case. If there is rebuttal, the complainant, to prevail, must demonstrate that the proffered reason for the adverse action is not the real reason by showing that discriminatory reasons more likely motivated the action or that the proffered explanation is unworthy of credence. **Texas Dept. of Comm. Affairs v. Burdine**, 450 U.S. 248, 256 (1981); If the trier of fact decides there are dual motives, the respondent cannot prevail unless it shows it would have reached the same decision in the absence of protected conduct. **Young v. CBI Services, Inc.,** 88-ERA-8 (Sec'y Dec. 8, 1992), slip op. at 6.

Anderson v. Metro Wastewater Reclamation District, ARB No.: 98-087, Case No.: 1997-SDW-7 (ALJ RDO Sept. 18, 2001).

B. MR. KNOX IS AN EMPLOYEE COVERED UNDER, AND RESPONDENT IS AN EMPLOYER COVERED UNDER, THE FEDERAL ENVIRONMENTAL STATUTES' EMPLOYEE PROTECTION PROVISIONS, THAT IS, THE

DEPARTMENT OF LABOR HAS JURISDICTION OVER ONE OF THE COMPLAINTS FILED BY MR. KNOX, AND MR KNOX ENGAGED IN PROTECTED ACTIVITIES UNDER THIS STATUTE

1. SOVEREIGN IMMUNITY HAS BEEN WAIVED UNDER ONE OF THE FEDERAL STATUTES CITED BY COMPLAINANT

As I found above, I find and conclude that the Clean Air Act (CAA) applies here and that the Respondent is not immune from actions under that act, including under the employee protection provisions. The case law and the Federal Facilities Compliance Act at 42 U.S.C. 6961 make this clear. The case law, including decisions by the ARB, one of which is quoted below, also makes clear that there is no explicit waiver of sovereign immunity under TSCA.

On the basis of our review of pertinent law, I find and conclude that this forum does have jurisdiction over a federal government agency and that Respondent is covered by and subject to the CAA. As I wrote in one of my decisions:

> As an entity of the United States government, the Academy cannot be held liable unless the United States has waived its sovereign immunity under the statutory provisions at issue. Any waiver of the government's sovereign immunity must be "unequivocal." **United States Dep't of Energy v. State of Ohio**, 503 U.S. 607, 615 (1992). We examine whether the United States has waived its sovereign immunity concerning the five whistleblower provisions under which Berkman brought his complaints. This examination is important because the remedies available under the different environmental statutes are not uniform. **Berkman v. USCGA**, ARB Nos. 97-CAA-2, 97-CAA-9 (January 2, 1998)(a matter over which this Administrative Law Judge presided).

(2) CLEAN AIR ACT (CAA)

The whistleblower provision of the CAA apply to the Federal government if the respondent Federal agency falls within the "federal facilities" provision of that Act, which provides:

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof

in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges.

33 U.S.C. §1323 (1994). Thus, the United States unequivocally has waived sovereign immunity under the CAA.

In this regard, see 42 U.S.C. §7418(a) (1994). The legislative history clearly indicates that the CAA whistleblower provision applies to facilities of the United States: "This section is applicable, of course, to Federal . . . employees to the same extent as any employee of a private employer." H.R. Rep. No. 294, 95th Cong., 1st Sess. 326, **reprinted in** 1977 U.S. Code Cong. & Admin. News 1405. **See Jenkins v. U.S. Environmental Protection Agency**, Case No. 92-CAA-6, Sec. Dec. and Ord., May 18, 1994, slip op. at 5.

(3) TOXIC SUBSTANCES CONTROL ACT (TSCA)

As already noted above, in contrast, the United States has not waived its sovereign immunity under the TSCA's employee protection provision, except for certain whistleblower complaints involving lead-based paint. **Stephenson v. NASA**, Case No. 94-TSC-5, **Sec. Dec. and Ord. Of Rem.**, July 3, 1995, slip op. at 6-8; **accord Johnson v. Oak Ridge Operations Office, United States Dep't of Energy**, ARB Case No. 97-057, ALJ Case Nos. 95-CAA-20, -21, -22, Final Dec. and Ord., Sept. 30, 1999, slip op. at 9. **Berkman v. U.S. Coast Guard Academy**, Case Nos.: 97-CAA-2 and 97-CAA-9 (ARB Dec. January 2, 1998)(a matter over which this Administrative Law Judge presided).

C. COMPLAINANT ENGAGED IN PROTECTED ACTIVITIES, AND DID SO WITH A REASONABLE GOOD FAITH BELIEF THAT ENVIRONMENTAL LAWS WERE VIOLATED

This case proceeded to a full hearing on the merits. Accordingly, examining whether or not Complainant has established a **prima facie** case is no longer particularly useful and this Administrative Law Judge will consider whether, viewing all of the evidence as a whole, the Complainant has shown, by a preponderance of the evidence that he was discriminated against for engaging in protected activity. **See Boudrie v. Commonwealth Edison Co.**, 1995-ERA-15 (ARB Apr. 22, 1997); **Boytin v. Pennsylvania Power & Light Co.**, 1994-ERA-32 (Sec'y, Oct. 20, 1995); **Marien v. Northeast Nuclear Energy Co.**, 1993-ERA-49/50 (Sec'y, Sept. 18, 1995). To

carry that burden Complainant must prove that Respondent's stated reasons for reprimanding Complainant are pretext, **i.e.**, that they are not the true reasons for the adverse action and that the protected activity was. **Leveille v. New York Air Nat'l Guard**, 1994-TSC-3/4 (Sec'y Dec. 1, 1995); **Hoffman v. Bossert**, 1994-CAA-4 (Sec'y 19, 1995). It is not sufficient that Complainant establish that the proffered reason was unbelievable; he must establish intentional discrimination in order to prevail. **Leveille, supra**.

On the basis of the totality of this closed record, I find and conclude that Complainant's engagement in protected activity has been overwhelmingly established in this case. He raised complaints both internally within his chain-of-command, and externally to third parties.[3] I found Complainant's testimony most credible and convincing on this issue. Specifically, I find that, virtually from the start of his employment with DOI, Complainant has repeatedly raised his concerns both internally and to the third parties. Complainant's concerns related to an asbestos problem at the Center. I find and conclude that these actions constitute protected activity under the several Acts before me, with the exception of TSCA.

Similarly, the evidence clearly establishes that Respondent knew of Complainant's engaging in these protected activities, as his complaints were always logged with his first line supervisor and then to others in his chain-of-command, when the supervisor was not responsive to his concerns.

Even though Respondent disagreed with Complainant's insistence about his concerns, Respondent has not shown that Complainant's position was unreasonable. **See generally Yellow Freight Sys. v. Reich**, 38 F.3d 76 (2d Cir. 1994) (wherein the Court held an employee need not prove the existence of an actual safety defect to have engaged in protected activity under an analogous whistleblower statute, the Surface Transportation Act); **Crow v. Noble Roman's, Inc.**, 1995-CAA-8 (Sec'y Feb. 26, 1996) (the CAA protects employee's work refusal that is based on a good faith, reasonable belief that doing the work would be unsafe or unhealthy); **Minard v. Nerco Delamar Co.**, 1992- SWD-1 (Sec'y Jan. 25, 1994) (concluding that whistleblower protection applies to where a complainant is mistaken, so long as complainant's belief is reasonable); **Scerbo v. Consolidated Edison Co. of N.Y., Inc.**, 1989-CAA-2 (Sec'y Nov. 13, 1992) (protection is not dependent upon actually proving a

[3]The law is clear that both internal and external complaints are protected by the whistleblower statutes. **See Dodd v. Polysar Latex**, 1988-SWD-4 (Sec'y Sept. 22, 1994).

violation). In fact, it is well established that Complainant arrived at his recommendations that the Respondent was violating the Acts based on his extensive training and experience. Further, the evidence establishes that many of the issues in controversy were anything but clear cut.

The nature of Complainant's protected activities has been detailed above in the findings of fact and these are incorporated herein at this point. Moreover, the law defining what is protected activity, as described below, clearly encompasses his actions described above in raising his environmental concerns internally and externally. Mr. Knox's actions in raising RCRA and CAA concerns regarding the Job Center are classic protected activities, and I again so find and conclude.

> The Secretary of Labor has repeatedly held that the reporting of safety or quality concerns internally to one's employer is protected activity under the Solid Waste Disposal Act. **See Dodd v. Polysar Latex**, 1988-SWD-4 (Sec'y Sept. 22, 1994); **Conaway v. Instant Oil Change, Inc.**, 1991-SWD-4 (Sec'y Jan. 5, 1993). The Secretary has noted that, "An employee's internal complaints are the first step in achieving the statutory goal of promoting safety." **Dodd v. Polysar Latex**, 1988-SWD-4 (Sec'y Sept. 22, 1994).

Migliore v. Rhode Island Department of Environmental Management, 1998-SWD-3, 1999-SWD-1, 1999-SWD-2 (ALJ RDO August 13, 1999).

> Courts and the Secretary of Labor have broadly construed the range of employee conduct which is protected by the employee protection provisions contained in environmental and nuclear acts. **See** S. Kohn, **The Whistleblower Handbook** 35-47 (1990). Examples of the types of employee conduct which the Secretary of Labor has held to be protected include: making internal complaints to management,[3] reporting alleged violations to governmental authorities such as the Nuclear Regulatory Commission ("NRC") and the Environmental Protection Agency, threatening or stating an intention to report alleged violations to such governmental authorities, and contacting the media, trade unions, and citizen intervenor groups about alleged violations. **Id.**

> As I also wrote in another decision:

> > This claim deals with internal complaints to Respondent's management because on April 20, 1992,

> Complainant advised Lionel Banda that there were serious and widespread violations in Respondent's "Access Screening Program" for technicians granted unescorted access to nuclear power plants and other public utilities. The totality of this closed record leads to the conclusion that Complainant reported these violations to the Employer and that he forced the Employer to report these violations to the appropriate governmental authority, such as the NRC, as well as the affected public utilities.

Creekmore v. ABB Power Systems Energy Services, Inc., 93-ERA-24 (ALJ Sept. 1, 1994) (a matter over which this Administrative Law Judge presided).

As I also wrote in another decision:

> The employee protection provisions have been construed broadly to afford protection for participation in activities in furtherance of the statutory objectives. **Marcus v. U.S. Environmental Protection Agency**, 1996-CAA-3 (ALJ Dec. 15, 1998), slip op. at p. 25, **citing Tyndall v. U.S. Environmental Protection Agency**, 93-CAA-6, 95-CAA-5, ARB June 14, 1996). Protected activities include employee complaints which "are grounded in conditions constituting reasonably perceived violations of environmental acts." **Jones v. ED&G Defense Materials., Inc.**,95-CAA-3 (ARB Sept. 29, 1998), slip op. at p. 8, **citing Crosby v. Hughes Aircraft Co.**, Case No. 85-TSC-2, Sec. Final Dec. and Ord., Aug. 17, 1993, slip op. at 26, **aff'd, Crosby v. United States Dep't of Labor,** 1995 U.S. LEXIS 9164(9th Cir.); **Johnson v. Old Dominion Security**, Case Nos. 86-CAA-3, et seq., Sec. Final Dec. and Ord., May 29, 1991, slip op. at 15. Raising internal concerns to an employer, as well as the filing of formal complaints with external entities, constitute protected activities under §24.1(a). **Melendez v. Exxon Chemicals Americas**, ARB No. 96-051, ALJ No. 1993-ERA-6 (ARB July 14, 2000), slip op. at p. 10.
>
> Raising complaints about worker health and safety "constitutes activity protected by the environmental acts when such complaints touch on the concerns for the environment and public health and safety that are addressed by those statutes." **Melendez v. Exxon Chemicals Americas, supra** at p. 10. **See also Jones v. ED&G Defense Materials, Inc.**, **supra** at p. 8, **citing Scerbo v. Consolidated Edison Co.**, Case No. 86-ERA-2, Sec. Dec. and

Ord., Nov. 13, 1992, slip op. at 4-5. Further, the gathering of evidence in support of a whistleblower complaint, including the gathering of evidence by means of tape recording, is a type of activity that has been held to be covered by the employee protection provisions referenced at 29 C.F.R. §24.1(a). **Melendez v. Chemicals Americas, supra** at p. 10.

Anderson v. Metro Wastewater Reclamation District, ARB No.: 98-087, Case No.: 1997-SDW-7 (ALJ RDO Sept. 18, 2001) (a matter over which I presided).

As I also wrote more recently:

> Complainant's engagement in protected activity has been overwhelmingly established in this case. She raised complaints both internally within her chain-of-command, and externally to the EPA. I found Complainant's testimony most credible and convincing on this issue. Specifically, I find that from the 1996 proposed reorganization to the present, Complainant has repeatedly raised her concerns that RIDEM was taking action that compromised the RCRA enforcement program. Complainant's concerns were that the procedures, methods, and policies of RIDEM were causing direct violations of the RCRA. I find and conclude that these actions constitute protected activity under.
>
> Even though Respondent disagreed with Complainant's insistence about the proper RCRA procedures, Respondent has not shown that Complainant's position was unreasonable. **See generally Yellow Freight Sys. v. Reich**, 38 F.3d 76 (2d Cir. 1994) (wherein the Court held an employee need not prove the existence of an actual safety defect to have engaged in protected activity under an analogous whistleblower statute, the Surface Transportation Act); **Crow v. Noble Roman's, Inc.**, 1995-CAA-8 (Sec'y Feb. 26, 1996) (the CAA protects employee's work refusal that is based on a good faith, reasonable belief that doing the work would be unsafe or unhealthy); **Minard v. Nerco Delamar Co.**, 1992- SWD-1 (Sec'y Jan. 25, 1994) (concluding that whistleblower protection applies to a case where a complainant is mistaken, so long as complainant's belief is reasonable); **Scerbo v. Consolidated Edison Co. of N.Y., Inc.**, 1989-CAA-2 (Sec'y Nov. 13, 1992) (protection is not dependent upon actually proving a violation). In fact, it is well established that Complainant arrived at her

> recommendations that the Respondent was violating the RCRA based on her extensive training and experience in the environmental enforcement area. Further, the evidence establishes that many of the enforcement actions in controversy were anything but clear cut.

Migliore v. Rhode Island Department of Environmental Management, 1998-SWD-3, 1999-SWD-1, 1999-SWD-2 (ALJ RDO August 13, 1999).

The **Kemp** case requirement, **see Kemp v. Volunteers of America of Pennsylvania, Inc.**, ARB No. 00-069, ALJ No. 2000-CAA-6 (ARB Dec. 18, 2000), that Complainant have a reasonable good faith belief that environmental laws were violated is well satisfied here. The asbestos in the basement circumstances in **Kemp** are facts that do not resemble the facts here which involve, **inter alia**, asbestos in various parts of the buildings at the Job Center, which presence constituted a hazardous condition to the employees, visitors and the public at large, and I so find and conclude.

D. THE RESPONDENT HAD KNOWLEDGE OF MR. KNOX'S PROTECTED ACTIVITIES

The record is replete with evidence that Respondent knew of Mr. Knox's protected activities and numerous examples of such evidence have already been detailed above. Respondent knew because Mr. Knox made many of his protected reports directly to his managers and higher level supervisors, as in **Berkman**.

As I wrote in **Berkman**:

> Similarly, the evidence clearly establishes that Respondent knew of Complainant's engaging in these protected activities, as his complaints were always logged with his first line supervisor and elsewhere in his chain-of-command.

Berkman v. U.S. Coast Guard Academy, Case Nos.: 97-CAA-2 and 97-CAA-9 (ARB Dec. January 2, 1998). As the findings of fact, **supra**, make clear, there was virtually no example of Mr. Knox's protected activities of which the Respondent was unaware.

I strongly disagree with Respondent that the Respondent was not aware of Complainant's protected activities as this record is replete with many instances thereof, almost from the start of his employment at the Center, simply because the word quickly spread that he was not a "team player" and could not be trusted.

E. ADVERSE ACTIONS WERE TAKEN BY RESPONDENT AGAINST MR. KNOX

It is clear from the applicable law discussed herein defining what constitutes adverse actions by an employer against an employee that are actionable under the environmental statutes if performed with discriminatory intent, that the numerous actions by Respondent against Mr. Knox documented in the record and delineated above are the type of actions that are within the scope of the employee protection provisions of the CAA.

> An "adverse action" has been defined as simply something unpleasant, detrimental, even unfortunate, but not necessarily (and not usually) discriminatory." **Marcus v. U.S. Environmental Protection Agency**, 1996-CAA-3 (ALJ Dec. 15, 1998), slip op. at p. 28, **citing Stone & Webster Engineering Corp. v. Herman**, 115 F.3d 1568, 1573 (11th Cir. 1997). Under 29 C.F.R. §24.2(b), as amended, an employer is deemed to have violated the particular statutes and regulations "if such employer intimidates, threatens, restrains, coerces, blacklists, discharges or in any other manner discriminates against any employee" because of protected activities. Consistent with this regulation, a wide range of unfavorable actions has been held to constitute adverse action within the context of employment discrimination complaints. **Melendez v. Exxon Chemicals Americas, supra** at 24.

Anderson v. Metro Wastewater Reclamation District, ARB No.: 98-087, Case No.: 1997-SDW-7 (ALJ RDO Sept. 18, 2001).

> Discrimination means disparate treatment. It means treating one employee less favorably than another for a forbidden reason. **See Teamsters v. United States**, 431 U.S. 324, 335 n. 15 (1977). An employer may treat one employee less favorably than another in many different ways. Any such less favorable treatment is adverse action. Termination, suspension and discipline are obvious forms of adverse action, but they are not exclusive. Indeed, the seminal case establishing the model for proving discrimination, **McDonnell Douglas v. Green**, involved none of those.

Creekmore v. ABB Power Systems Energy Services, Inc., 93-ERA-24 (ALJ Sept. 1, 1994).

> An adverse employment action can be in the form of tangible job detriment or a hostile work environment. **Smith v. Esicorp, Inc.**, 93-ERA-16, at p. 3 (Sec'y 3/13/96). ... Complainant also alleges he has been subjected to retaliatory harassment, which is a violation

of the applicable whistleblower statutes. **Smith**, **supra**, at p. 11; **Marien**, **supra**, at p. 4. Hostile work environment cases involve issues of the environment in which the employee works and not tangible job detriment. **Smith**, **supra**, at p. 11. For harassment to be actionable, it must be sufficiently severe or persuasive as to alter the conditions of employment and create an abusive working environment. **Id.** at pp. 4-5 (**Citing Meritor Savings Bank v. Vinson**, 477 U.S. 57, 67 (1986). **See also English v. General Elec. Co.**, 85-ERA-2 (Sec'y 2/13/92) (in which the Secretary applied the **Meritor** decision for guidance in the case of an alleged hostile work environment in violation of an analogous whistleblower statute, the ERA). In **Harris v. Forklift Sys., Inc.**, 114 S. Ct. 367 (1993), the Supreme Court discussed some of the factors that may be weighed but emphasized that whether an environment is hostile or abusive can be determined only by looking at all the circumstances.

Berkman v. U.S. Coast Guard Academy, Case Nos.: 97-CAA-2 and 97-CAA-9 (ARB Dec. January 2, 1998).

A finding of constructive discharge requires proving that the employer, rather than acting directly, deliberately makes an employee's working conditions so difficult, unpleasant, unattractive, or unsafe that an objective reasonable person would have felt compelled to resign, **i.e.**, that the resignation was involuntary. **See generally Mosley v. Carolina Power & Light Co.**, 94-ERA-23 (ARB 8/23/96)(**citing Nathaniel, supra; Johnson v. Old Dominion Security**, 86-CAA-3 (Secy' 5/29/91). **See also Guice-Mills v. Derwinski**, 772 F.Supp. 188 (S.D.N.Y. 1991), **aff'd**, 967 F.2d 794 (2d Cir. 1992); **Lopez v. S.B. Thomas, Inc.**, 831 F.2d 1184 (2d Cir. 1987); **Talbert, supra**. Thus, the adverse consequences flowing from an adverse employment action generally are insufficient to substantiate a finding of constructive discharge. Rather, the presence of "aggravating factors" is required. **Nathaniel, supra (citing Clark v. Marsh**, 665 F.2d 1168, 1174 (D.C. Cir. 1981). **See also Stetson v. Nynex Serv. Co.**, 995 F.2d 355 (2d Cir. 1993). Conceivably, a constructive discharge could occur through medical or physical inability. **Spence v. Maryland Casualty Co.**, 803 F.Supp. 659, 667 (W.D.N.Y. 1992)(reasoning that **Lopez v. S.B. Thomas, Inc., Supra**, does not require that a constructive discharge be demonstrated only by an affirmative resignation).

> On the one hand, the Secretary has noted that circumstances sufficient to render a resignation involuntary include a pattern of discriminatory treatment and "locking" an employee into a position from which no relief seemingly can be obtained. **Johnson, supra**, at n. 11 (**citing Clark**, 665 F.2d at 1175); **Satterwhite v. Smith**, 744 F.2d at 1382-1383). On the other hand, it is insufficient that the employee simply feels that the quality of his work has been unfairly criticized. **Mosley, supra** (**citing Stetson**, 995 F.2d at 360). Furthermore, when an employee's performance is poor, "an employer's communication of the risks [of discipline for that poor performance] does not spoil the employee's decision to avoid those risks by quitting." **Id.** at p. 4 (**quoting Henn v. National Geographic Society**, 819 F.2d 824, 829-30 (7th Cir. 1987), **cert. denied**, 484 U.S. 964 (1987). ...
>
> The Secretary has adopted the majority position for determining whether or not there has been a constructive discharge. As was succinctly stated in the matter of **Hollis v. Double DD Truck Lines, Inc.**, 84-STA-13, at p. 4 (Sec'y March 18, 1995) it is not necessary to show that the employer intended to force a resignation, only that he intended the employee to work in the intolerable conditions.

Berkman v. U.S. Coast Guard Academy, Case Nos.: 97-CAA-2 and 97-CAA-9 (ARB Dec. January 2, 1998).

There can be no doubt on this record that Respondent took a number of adverse actions against Complainant. These actions have been delineated above and they are incorporated herein by reference.

Respondent submits that its actions of requiring Complainant to go through the chain-of-command with his concerns or complaints were not adverse actions under the CAA. However, I strongly disagree - - that is the very essence of his case as the chain-of-command requirement was being used to prevent Mr. Knox from voicing his concerns or complaints outside the Center and at Greenbelt.

F. RESPONDENT ACTED WITH RETALIATORY MOTIVE, TAKING ACTIONS AGAINST MR. KNOX BECAUSE HE ENGAGED IN PROTECTED ACTIVITIES

The trial record reflects evidence of retaliatory motive that is both abundant and blatant, and these have been detailed above.

This evidence falls into a number of categories of direct and circumstantial evidence that are recognized in the case law as indicia of retaliatory motive and discriminatory intent. Some of the applicable case law which lays out the law on evidence of retaliatory motive, including the burden shifting procedure which is to be used in an appropriate case, is quoted at some length below. However, the findings above make it clear that Complainant's case is a direct evidence case, as in **Moder** quoted below, and thus burden shifting is not required. In any case, the motive evidence documented in the findings above makes clear that even if a burden shifting analysis were applied here, at best for Respondent this is a dual motive case and with the direct evidence identified in the findings above, there is no way Respondent can separate out the illegal from the legal motives for its actions against Mr. Knox and show that it would have taken the same actions absent the illegal motive, and I so find and conclude.

> A plaintiff may prove a case of unlawful whistleblower retaliation in the same way as a case under Title VII of the Civil Rights Act of 1964. He may do so in one of two ways: either directly with direct evidence of retaliation or indirectly through circumstantial evidence establishing a **prima facie** case of retaliation.

Moder v. Village of Jackson, Wisconsin, 2000-WPC-0005 (ALJ Aug. 10, 2001) (a matter over which this Administrative Law Judge presided).

It is now well-settled that the Complainant, applying the traditional "burden-shifting" approach established in **McDonnell Douglas v. Green**, 411 U.S. 492 (1973), may establish a **prima facie** case of retaliation indirectly by showing that

> (1) the plaintiff was an employee of the party charged with discrimination; (2) the plaintiff was engaged in a protected activity under the Clean Water Act; (3) the employer took an adverse action against the plaintiff; and (4) the evidence creates a reasonable inference that the adverse action was taken because of the plaintiff's participation in the statutorily protected activity.
>
> **Passaic Valley**, 992 F.2d at 480-81; **see also Simon v. Simmons Foods, Inc.**, 49 F.3d 386, 389 (8th Cir. 1995).

Moreover, once the employee establishes a **prima facie** case of discrimination through such indirect means, the burden shifts to the employer to "produce evidence that the plaintiff was [denied a promotion] . . . for a legitimate, nondiscriminatory reason." **See Texas Dept. of Community Affairs v. Burdine**, 450 U.S. 248, 254

(1981). The employee then has "the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." **Id.** at 253; **see also St. Mary's Honor Center v. Hicks**, 509 U.S. 502, 507-08 (1993). This Administrative Law Judge, in determining whether the plaintiff has met this burden, "may still consider the evidence establishing the plaintiff's **prima facie** case 'and inferences properly drawn therefrom ... on the issue of whether the defendant's explanation is pretextual.'" **Reeves v. Sanderson Plumbing Products, Inc.**, 120 S.Ct. 2097, 2106 (2000) (**quoting Burdine**, 450 U.S. at 255, n. 10).

Furthermore, the plaintiff need not proffer direct evidence that unlawful discrimination was the real motivation. Instead, "it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." **Reeves**, 120 S.Ct. at 2108. As the Court stated in **St. Mary's** and reiterated in **Reeves**:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the **prima facie** case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination.

St. Mary's, 509 U.S. at 511, **quoted in Reeves**, 120 S.Ct. at 2108. **Id.**

If the employee presents direct evidence of discrimination, there is no need to resort to "burden-shifting" analysis under **McDonnell Douglas v. Green, supra**; **TWA v. Thurston**, 469 U.S. 111, 121 (1985). Direct evidence of discrimination is:

> evidence which, if believed by the trier of fact, will prove the particular fact in question without reliance on inference or presumption... This evidence must not only speak directly to the issue of discriminatory intent, it must also relate to the specific employment decision in question.

Pitasi v. Gartner Group, Inc., 184 F.3d 709, 714 (7th Cir. 1999) (internal quotations and citations omitted).

Of course, the employee must still prove by a preponderance of the evidence that unlawful discrimination was a **substantial factor**

in the employer's decision. See Price Waterhouse v. Hopkins, 490 U.S. 228, 259 (1989) (White, J., concurring); **Id.** at 274 (O'Connor, J., concurring); **Texas Dept. of Community Affairs v. Burdine**, 450 U.S. 248, 253 (1981). So long as the direct evidence of discrimination is substantial, the employee is entitled to have it weighed and decided by the trier of fact. ...

This is a direct-evidence case, with substantial evidence that both "speak[s] directly to the issue of discriminatory intent" and "relate[s] to the specific employment decision in question." No inference or presumption is needed. **See Pitasi**, 184 F.3d at 714. Beaver's and Murphy's statements and actions leading up to the decision to promote Deitsch rather than Moder leave no room for doubt that Moder's involvement in the DNR investigation more than ten years before was the deciding factor, and I so find and conclude. ...

As I wrote in **Moder**:

> The Village has asserted what it calls "legitimate, nondiscriminatory reasons" for selecting Deitsch rather than Moder. In this regard, **see McDonnell Douglas v. Green**, **supra,** and its progeny. However, to the extent that those purported reasons are asserted in contravention of the direct evidence of discrimination, it is not enough for the employer simply to articulate them. If an employee proves unlawful discriminatory or retaliation, but the employer contends that its adverse action against the employee was motivated instead by a legitimate, non-discriminatory reason, dual-motive analysis applies. The employer must prove, by a preponderance of the evidence, that it would have reached the same decision even if the employee had not engaged in protected conduct. **See Mt. Healthy City Bd. of Ed. v. Doyle**, 429 U.S. 274, 287 (1977); **Passaic Valley, 992 F.2d at 481 (Sec. 507(a) case); see also Price Waterhouse, 490 U.S.** at 252-53 (Brennan, J., for 4 justices); **Id.** at 259-60 (White, J., concurring); **Id.** at 261 (O'Connor, J., concurring).
>
> In such a "dual-motive" situation, it is not enough that the employer simply articulate a lawful reason for the employee then to disprove. **See Martin v. Department of the Army**, 93-SDW-1 (Sec'y July 13, 1995). Rather, "the employer's burden is most appropriately deemed an affirmative defense: the plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on another." **Price**

Waterhouse, 490 U.S. at 245 (Brennan, J.). The employer bears the risk that the influence of legal and illegal motives cannot be separated. **Mandreger v. Detroit Edison Co.,** 88-ERA-17 (Sec'y March 30, 1994).

In short, Moder has proven by direct evidence that unlawful discrimination in violation of Section 507(a) was a substantial motivating factor in the decision not to promote him to supervisor/foreman, and I so find and conclude. The Village bears the burden of proving, by a preponderance of the evidence, that it would have selected Deitsch anyway for legitimate, nondiscriminatory reasons even if it had not also been motivated by Moder's role in the DNR investigation. For the reasons discussed more fully below, all such asserted reasons are mere pretexts. ...

The defendant, of course, is entitled to proffer a "legitimate, nondiscriminatory reason," returning to the plaintiff "the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." **Burdine**, 450 U.S. at 253. Pretext is "a lie, specifically a phony reason for some action." **Russell v. Acme-Evans Co.**, 51 F.3d 64, 68 (7th Cir. 1995).

A plaintiff can establish pretext either directly, with evidence suggesting that retaliation or discrimination was the most likely motive for the termination, or indirectly, by showing that the employer's proffered reason was not worthy of belief. The indirect method requires some showing that (1) the defendant's explanation has no basis in fact, or (2) the explanation was not the "real reason", or (3) ... the reason stated was insufficient to warrant the termination.

Sanchez v. Henderson, 188 F.3d 740, 746 (7th Cir. 1999) (internal citations and quotations omitted).

Furthermore, the Supreme Court has emphasized:

The fact finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the **prima facie** case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of

> fact to infer the ultimate fact of intentional discrimination.
>
> **Reeves**, 120 S.Ct. at 2108; **St. Mary's v. Hicks**, 509 U.S. at 511.

Id.

In Knox's case, just like Moder's, there was retaliatory motive on the part of the Respondent in taking the adverse actions against Knox, **i.e.**, the actions taken were caused by the protected activity. There are a number of pieces of the puzzle, key circumstantial evidence, that point clearly to the presence of retaliatory motive in this case. In addition, unlike many whistle blower cases but like **Moder**, there are also more direct expressions of hostility and retaliatory motive in this case which are at Greenbelt unambiguous, such as the "gag" order and his restricted access to the main building of the Respondent, and I so find and conclude.

1. DIRECT EVIDENCE: RESPONDENT'S HOSTILE ATTITUDE TOWARD COMPLAINANT'S PROTECTED ACTIVITIES SPECIFICALLY:

As this Administrative Law Judge found in **Moder**, this case involves direct evidence of retaliatory motive and discriminatory intent.

> This is a direct evidence case. Beaver told Deitsch at Deitsch's interview about "perceived baggage" and the possibility that one or both would be rejected because of the Schultz affair ten years earlier. Murphy told Goetsch, a week before the Board met to make the selection, that Moder was not seen as a "team player" because he had gone to DNR about Schultz. Beaver and Murphy collaborated in placing the report of the anonymous tip to the DNR before the Board members when they made their decision. This is all direct evidence that the two key players in the selection decision, Beaver and Murphy, did not want Moder to get the job because of his role in the DNR investigation.

(**Id.**) In the case at bar, Complainant was subjected to a "gag" order at Greenbelt and his access to the main building was restricted SOLELY for reporting environmental violations; these are examples of direct evidence of retaliatory motive.

On the basis of the totality of this closed record, this Judge

finds and concludes that Respondent's adverse actions were motivated by its disapproval of Complainant's repeated insistence on environmental compliance and his efforts to obtain that compliance. While this Judge does not fault the chain-of-command for its disagreement with Complainant's assessment on the asbestos hazards at the Center and its declination to adopt his recommendations, I do find fault in the chain-of-command's active efforts to dissuade and/or prohibit Complainant from making a report to external regulatory authorities. Respondent was not entitled to insist that Complainant adhere to their position or keep silent about his disagreement with it. **See Generally Dutkiewicz v. Clean Harbors Environmental Services, Inc.**, 95-STA-34 (ARB August 8, 1997)(a matter over which I presided).

As I wrote in an earlier decision:

> Respondent is, in effect, faulting Complainant for going outside the chain-of-command and making a complaint to a government agency. For example, Captain Florin commented and gesticulated that Complainant had stabbed him in the back when he reported to the CT DEP despite the command's determination that the North Site need not be reported. He also testified and attested to the fact that he took issue with Complainant circumventing the chain-of-command. (TR 1003; CX 109) It is not permissible, however, to find fault with an employee for failing to observe established channels when making safety complaints. **Odom v. Anchor Lithkemko**, 96-WPC-1 (ARB 10/10/97). **See also West v. Systems Applications Int'l**, 94-CAA-15 (Sec'y 4/19/95). Such restrictions on communication, the Secretary has held, would seriously undermine the purpose of the environmental whistleblower laws to protect public health and safety.

Berkman v. U.S. Coast Guard Academy, Case Nos.: 97-CAA-2 and 97-CAA-9 (ARB Dec. January 2, 1998).

> The Board has held that evidence that an employer routinely encouraged employees to make written reports of safety defects is "highly relevant" evidence that militates against a finding of retaliatory motive. **See Andreae v. Dry Ice, Inc**. 95-STA-24 (ARB 7/17/97). Vice versa, this Judge views evidence that an employer discourages reporting compliance issues as highly relevant to a finding of retaliatory motive. In this regard, I find the credible and uncontroverted evidence that Attorney Frey was told not to contact the DEP indicative of Respondent's animus towards the

environmental compliance officer resorting to external authorities in an effort to obtain compliance....

2. PROXIMITY IN TIME OF RESPONDENT'S ACTIONS TO COMPLAINANT'S PROTECTED ACTIVITIES

As I wrote in one of my earlier decisions:

One factor that courts deem important in determining whether the employee has made a **prima facie** case of unlawful retaliation or discrimination is whether the employer discharged or otherwise disciplined the employee for engaging in protected activity "so closely in time as to justify an inference of retaliatory motive." **Couty v. Dole**, 886 F.2d 147, 148 (8th Cir. 1989) (termination occurred thirty days after protected activity), **citing Womack v. Munson** 619 F.2d 1292. 1296 (8th Cir. 1980) (twenty-three days), **cert. denied**, 450 U.S. 979 (1981); **Keys v. Lutheran Family and Children Services of Missouri**, 668 F.2d 356, 358 (8th Cir. 1981) (less than two months). These cases provide examples of when the duration of time between protected conduct and adverse employment action is sufficiently short to give rise to at least an inference of retaliation, thereby allowing the employee to satisfy the requirement of a **prima facie** case. ...

It is well-settled that temporal proximity is sufficient as a matter of law to establish the final required element of a **prima facie** case - that of causation of retaliatory discharge. **Keys v. Lutheran Family and Children's Services of Missouri**, 668 F.2d 356, 358 (8th Cir. 1981); **Womack v. Musen**, 618 F.2d 1292, 1286 & N. 6 (8th Cir. 1980); **cert. denied**, 450 U.S. 979, 101 S.Ct 1513, 67 L.Ed 2nd 814 (1981); **Davis v. State University of New York**, 802 F.2d 638, 642 (2d Cir. 1986); **Mitchell v. Baldrich**, 759 F.2d 80, 86 (D.C. Cir. 1985); **Dominic v. Consolidated Edison Co. of New York**, 822 F.2d 1249 (2d Cir. 1987) (considering retaliatory action claim for firing that occurred three months after filing complaint); **Burrows v. Chemed Corp**., 567 F. Supp. 978, 986 (E.D. Mo. 1983) (holding inference of retaliatory motive justified, where transfer followed protected activity); **Kellin v. ACF Industries**, 671 F.2d 279 (8th Cir. 1982) (holding lower court's finding that **prima facie** case for retaliatory action was established, where EEOC charge was filed in late 1971 and disciplinary

> measures occurred throughout 1972). 8. The close proximity of time of the discharge to the protected activity will justify the inference of a retaliatory motive in the employer. **Couty v. Dole**, **supra** (8th Cir. 1989). The above cases include temporal spacing between the protected activity and the retaliatory discharge of up to five months. **Thermidor, supra.**

Creekmore v. ABB Power Systems Energy Services, Inc., 93-ERA-24 (ALJ Sept. 1, 1994).

The close proximity in time between Mr. Knox's protected activities and Respondent's actions strongly supports an inference of retaliatory motive, and these instances, delineated above, are incorporated herein by reference.

3. PRETEXTUAL REASONS OFFERED BY RESPONDENT FOR ITS ACTIONS AGAINST COMPLAINANT

As Complainant has proved the elements of his case, Respondents have the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, nondiscriminatory reasons. **See Morris v. The American Inspection Co.**, 1992-ERA-5 (Sec'y Dec. 15, 1992). Significantly, Respondent bears only a burden of production, as the ultimate burden of persuasion of the existence of intentional discrimination rests with the Complainant. **Texas Dep't of Community Affairs v. Burdine**, 450 U.S. 248, 254-55 (1981); **Dartey v. Zack Co. of Chicago**, 1982-ERA-2 (Sec'y Apr. 25, 1983). An employer's discharge decision is not unlawful even if based on mistaken conclusions about the facts, however, a decision will only violate the Acts if it was motivated by retaliation. **Dysert v. Westinghouse Electric Corp.**, 1986- ERA-39 (Sec'y Oct. 30, 1991).

Respondent contends that any alleged, adverse action taken against Complainant was for a legitimate, non-discriminatory reason. I disagree. Rather, I find and conclude that all of Respondent's purported legitimate, non-discriminatory reasons for its actions were actually based upon, and closely interwoven with, Complainant's protected activities, and those actions and reasons therefore have been delineated at length above. While Respondent cites to Mr. Knox's alleged poor performance and his attitude, the delays and conflicts upon which Respondent relies actually involved the same projects and situations where Mr. Knox was engaging in protected activity. Moreover, the cited delays were actually the result of the conspiracy against Mr. Knox to get rid of him because he was not a "team player" and because of his protected activity,

and I so find and conclude.

I find this situation closely analogous to **Passaic Valley Sewerage Commissioners v. United States Dep't of Labor**, 992 F.2d 474 (3d Cir.), **cert. denied**, 50 U.S. 964 (1993), where the Third Circuit held, where there was "no evidence that the Complainant's alleged personality or professional deficiencies [in interpersonal relations] arose in any other context outside his complaint activity," the Respondent's conclusion that the Complainant had a personality problem or deficiency of interpersonal skills was reducible in essence to the problems of the inconvenience the Complainant caused by his pattern of complaints. **Id.** at 481; **see also Dodd v. Polysar Latex**, 1988-SWD-4 (Sec'y Sept. 22, 1994) (concluding that what respondent viewed as poor attitude was nothing more than the result and manifestation of the Complainant's protected activity). I agree that this case presents a situation where all of Respondent's alleged "legitimate" reasons are essentially complaints about the inconvenience and difficulties caused by Complainant raising safety concerns. Therefore, I find and conclude that Respondent has failed to produce a legitimate, non-discriminatory reason for subjecting the Complainant to adverse action, and as a result, Complainant has met his claim for intentional discrimination and is entitled to damages. If, however, a reviewing authority concludes that Respondent has provided legitimate, non-discriminatory reasons for its actions, then I find and conclude that Complainant has proven that any such reasons are pretext, as shall now be discussed.

I find and conclude that Complainant has presented adequate evidence to prove not only that the Respondent's proffered reasons for any adverse action pretext, but also that the Complainant was harassed and subject to disciplinary action in retaliation for engaging in protected activity. **Leveille v. New York Air Nat'l Guard**, 1994-TSC-3/4 (Sec'y Dec. 11, 1995). Respondent alleges that Complainant was subject to discipline based upon his professional failures, and repeated instances of refusing to follow supervisors' orders. I find and conclude, however, that Complainant has proven that those reasons are specious, and that the real motivation concerned retaliation against him because of his protected activity. I conclude that Mr. Knox has proven that Respondents intentionally discriminated against him for engaging in protected activity.

I find that Respondent's reasons are pretext and that Respondent's adverse actions were discriminatory and in retaliation for Complainant engaging in protected activity.

First, however, I, very briefly, wish to touch upon the issue

of dual motive analysis. Under dual motive analysis, a respondent must establish, by a preponderance of the evidence, the existence of a legitimate reason for the taking of adverse employment action against a complainant, and that the respondent would have taken the same action even if the employee had not engaged in protected conduct. **See Simon v. Simmons Foods, Inc.**, 49 F.3d 386, 389 (8th Cir. 1995); **Martin v. The Dept. of the Army**, 1993-SDW-1 (Sec'y July 13, 1995).

This Judge only reaches the dual motive analysis if I determine there is a legitimacy to the Respondent's stated reason for the adverse employment action, a conclusion which I have specifically rejected for the aforementioned reasons. Even so, I find and conclude the Respondent has failed to present sufficient evidence that they would have taken the same action if Complainant had not engaged in protected activity, because the evidence establishes that Respondent's actions and positions were motivated primarily in response to Complainant raising quality concerns.

In view of the clear and direct evidence of Respondent's retaliatory motive in the record, there is no need to analyze asserted reasons offered by Respondent to show they are pretextual. On the record that exists, I find and conclude that it is impossible for Respondent to assert a legitimate non-discriminatory reason for its actions. However, if reviewing authorities should rule otherwise, I further find and conclude that this record makes clear that the reasons asserted by Respondent are in fact pretextual. Pretext is shown from Respondent's false and **post-hoc** evaluations of Complainant's performance over the years, evaluations that are inconsistent with the official performance appraisals at the time, and in the reasons given for his lowered performance evaluations.

The evidence of retaliatory motive in The Center's actions against Mr. Knox discussed under the categories above is abundant in the record – both direct and circumstantial evidence. The case law recognizes each category above as evidence of retaliatory motive.

In terms of direct evidence, the "gag" order and the restricted access are clear and direct signs of retaliatory motive and intent to discriminate. This situation is analogous to the **Migliore** case where this Administrative Law Judge wrote:

> Complainant had previously, and repeatedly, provided information to the EPA critical of Mr. Albro and the RIDEM program. Such information was used by the EPA in conducting an audit of the RCRA program, RIDEM's use of

> federal funds, and served as a basis for PEER's withdrawal petition. Suffice to say, RIDEM failures, highlighted by complaints to the EPA and others, created a great deal of external pressure and embarrassment for Mr. Albro and other RIDEM supervisors. I find that because of Complainant's repeated protected disclosures to the EPA, Mr. Albro and Mr. Szymanski sought to prevent Complainant's contact with the EPA. Despite the contradictory testimony on the extent of contact to be allowed, RIDEM sought to curtail Complainant's access to the EPA, and such motivation was an intent to discriminate.

Migliore v. Rhode Island Department of Environmental Management, 1998-SWD-3, 1999-SWD-1, 1999-SWD-2 (ALJ RDO August 13, 1999).

4. RESPONDENT HAS NOT ARTICULATED LEGITIMATE REASONS FOR ITS ACTIONS

As in **Migliore** quoted below, Respondent here has failed to articulate any legitimate non-discriminatory business reason for its actions against Mr. Knox, as a result of the existence of both substantial direct evidence of retaliatory motive and because Respondent's actions against him have been based upon and closely interwoven with his protected activities. As I ruled in **Migliore**:

> All of Respondent's purported legitimate, non-discriminatory business reasons were actually based upon, and closely interwoven with, Complainant's protected activity. For example, I find that the Respondent's allegation concerning Complainant's insubordination in regard to her memoranda responses to Mr. Albro, and regarding the charges in CX 41 and CX 42, were actually based upon, or in response to Complainant's actions where she implicated her protected activity. Further, Director McLeod's memoranda directing Complainant to respond to his questions and threatening "corrective action" were the direct result of her engaging in protective activity by voicing her concerns about American Shipyard to both the EPA and PEER. I also find that Mr. Albro and Mr. Szymanski's statements regarding Complainant's communications with the EPA are actually in response to several EPA investigations of RIDEM, based on Complainant's protected disclosures. While Respondent cites to Complainant's alleged poor performance, the delays and conflicts RIDEM relies upon, actually involved the same cases and circumstances where Complainant was engaging in protected activity. Moreover, the cited

> delays were actually the result of micro-managing and obstruction by the Complainant's supervisors. Accordingly, I conclude that the Respondent's propounded "legitimate, non-discriminatory reasons" for subjecting Complainant to a one-day suspension, and instances of discrimination and harassment, are actually tainted, as the basis for these "legitimate" reasons was really in retaliation for her engaging in protected activity. I find this situation closely analogous to **Passaic Valley Sewerage Commissioners v. United States Dep't of Labor**, 992 F.2d 474 (3d Cir.), **cert. denied**, 50 U.S. 964 (1993), where the Third Circuit held, where there was "no evidence that the Complainant's alleged personality or professional deficiencies [in interpersonal relations] arose in any other context outside his complaint activity," the Respondent's conclusion that the Complainant had a personality problem or deficiency of interpersonal skills was reducible in essence to the problems of the inconvenience the Complainant caused by his pattern of complaints. **Id.** at 481; **see also Dodd v. Polysar Latex**, 1988-SWD-4 (Sec'y Sept. 22, 1994) (concluding that what respondent viewed as poor attitude was nothing more than the result and manifestation of the Complainant's protected activity). I agree that this case presents a situation where all of Respondent's alleged "legitimate" reasons are essentially complaints about the inconvenience and difficulties caused by Complainant raising safety concerns. Therefore, I find and conclude that Respondent has failed to produce a legitimate, non-discriminatory reason for subjecting the Complainant to adverse action, and as a result, Complainant has met her claim for intentional discrimination and is entitled to damages.

Migliore v. Rhode Island Department of Environmental Management, 1998-SWD-3, 1999-SWD-1, 1999-SWD-2 (ALJ RDO August 13, 1999).

In the case at bar, Respondent also suggests that Respondent did not create or allow a hostile work environment, although due to Complainant's personality, Complainant may have actually believed he was the victim of a hostile work environment. Respondent also points out that Mr. Knox's medical problems existed before he became employed at the Center therefore were not caused by Respondent.

I agree to a certain extent but I also disagree. While Complainant's psychological problems may have been aggravated by his own self-induced stress typically found in a so-called Type A

individual, especially one who is a perfectionist, and while non-employment stressors were present in his life, there is absolutely no doubt that Complainant's psychological problems were aggravated, exacerbated and accelerated by the discriminatory, adverse and disparate treatment he received from his supervisors and from his co-workers, and I so find and conclude.

Thus, I firmly believe that this matter should have been voluntarily resolved years ago - - However, such did not happen, apparently not to make a peace treaty with a known whistleblower and one who is not a "team player."

Yes, Complainant challenged his supervisors and co-workers at the Center - I see nothing wrong with this. Respondent views that as a personality problem, apparently looking only for so-called "yes men and women" at that facility.

On the basis of the totality of this closed record and resolving all doubts in favor of Mr. Knox to effectuate the spirit and purposes of the whistleblower statutes, I find and conclude that Mr. Knox was subjected to hostile work environment at Respondent as part of the conspiracy against him, a conspiracy engendered because of his protected activities that began at the Center within a few months of his employment. Mr. Knox was frustrated at every opportunity and he finally was forced to go outside his chain-of-command with his concerns.

While I understand that Respondent's counsel must try to put all events in proper light for his client, I simply cannot agree that this proceeding is simply about an honest disagreement with management over environmental issues. This case involves the creation of a hostile work environment and a pattern of retaliation over the years because of Mr. Knox's protected activities.

Yes. Complainant did have pre-existing personal, family and medical problems before going to work for the Respondent. However, Respondent hired him with full knowledge of these problems and it is obvious that Complainant's problems were aggravated and exacerbated by the harassment, discrimination and disparate treatment by the Respondent, almost from day one. It is well to keep in mind that an employer takes each employee "as is" and with all of our human frailties and the employer will be responsible for the aggravation and exacerbation of such pre-existing problems, and it is no defense for the employer to say that he/she had those problems prior to employment with it and, thus, it is not responsible therefor. In this regard, **see Wheatley v. Adler**, 407 F.2d 307 (D.C. Cir. 1968).

Respondent, in my judgment, should have taken steps to provide

Mr. Knox with the time, help and resources that he needed; instead, Respondent discriminated against him, most particularly through Ms. Flemming, and these instances have been thoroughly delineated and discussed above. It is apparent, even to the cursory reader of these transcripts, that Complainant was a whistleblower, that the Respondent knew about this status, that the Respondent used a number of means to make it difficult for him to do his job to such an extent that finally, as a result of the inaction by his supervisors, doctor's advice, he was forced to take his concerns outside the chain-of-command.

This case really boils down to the simple fact that there existed at the Job Center and at Greenbelt a conspiracy among virtually all of those who came into contact with the Complainant to get him because he was a whistleblower and one who would not stay within the chain-of-command because his internal complaints to his superiors were producing no results.

In summary, I find and conclude that Complainant raised a great deal of concerns over the procedures and policies at the Center and Greenbelt. His actions were the source of a great deal of pressure for DOI management. Further, Respondent has been criticized and embarrassed by Complainant's protected activity. As a result, I find and conclude that Respondent has clearly, continuously and illegally discriminated against Complainant through harassment, disciplinary procedures and outright threats. Accordingly, I find and conclude that all of Respondent's purported, legitimate reasons for taking adverse actions against Complainant are, in fact, pretext. Complainant has met his burden of proving that Respondent has intentionally discriminated against him for engaging in protected activity concerning the proper enforcement of the Acts involved herein. As such, Complainant is entitled to an award of damages.

This Judge, having found the Respondent in violation of the aforementioned CAA, will issue a recommendation on damages to be awarded to Complainant. Complainant requests back pay, compensatory damages, equitable relief, and attorney fees and costs.

VIII. DAMAGES AND RELIEF SOUGHT

A. GENERAL DISCUSSION

As I have already held in other decisions, the environmental statutes provide liberally for an award of damages sufficient to place the employee in the position they would have been absent the retaliation. Thus, it is well to keep in mind certain well-settled principles.

Section 507(b) of the Clean Water Act (CWA), 33 U.S.C. Sec. 1367(b), provides in pertinent part: "If [the Secretary] finds that ... a violation did occur, he shall issue a decision, incorporating an order therein and his findings, requiring the party committing such violation to take such affirmative action to abate the violation as the Secretary of Labor deems appropriate[.]" "Affirmative action to abate [a] violation" of an environmental whistleblower statute, such as Sec. 507(a), includes retroactive promotion into a position the discriminatee would occupy but for the discrimination. **See Thomas v. Arizona Public Svs. Co.**, No. 89-ERA-19, slip op. at 13 (Sec'y Sept. 17, 1993). "Making a victim whole ... include[s] his reinstatement to the position he would have held but for the discrimination." **Lander**, 888 F.2d at 156; **see also Malarkey v. Texaco, Inc.**, 983 F.2d 1204, 1214 (2d Cir. 1993).

Cases under Title VII of the Civil Rights Act of 1964, **as amended**, 42 U.S.C. Sec. 2000e-5, have guided the Secretary and the Administrative Review Board (ARB) in fashioning remedies appropriate to abate violations. **Hobby v. Georgia Power Co.**, No. 90-ERA-30, slip op. at 15 (ARB Feb. 9, 2001). Like the remedies under Title VII, those available under the environmental whistleblower laws serve a twofold purpose. First, they are intended to make the complainant whole by placing him, "as near as may be, in the situation he would have occupied if the wrong had not been committed." **Albemarle Paper Co. v. Moody**, 422 U.S. 405, 418-19 (1975). Second, they must "so far as possible eliminate the discriminatory effects of the past **as well as bar like discrimination in the future." Id.** at 418, **quoted in Hobby** at 7 (ARB's emphasis). This goes beyond the interest of employees in protection from discrimination. It also serves the public interest in assuring exposure of threats to public health and safety, such as the discharge of sewage into streams, rivers and lakes. **See Beliveau v. DOL**, 170 F.3d 83, 88 (1st Cir. 1999).

Moder v. Village of Jackson, Wisconsin, 2000-WPC-0005 (ALJ Aug. 10, 2001).

Back pay is clearly provided for:

The "goal of back pay is to make the victim of discrimination whole and restore him [or her] to the position that he [or she] would have occupied in the

absence of the unlawful discrimination." **Blackburn v. Martin**, 982 F.2d 125, 128 (4th Cir. 1992). **Also See Creekmore v. ABB Power Sys. Energy Servs., Inc.**, 1993-ERA-24 (Dep. Sec'y Feb. 14, 1996) .

Complainant is correct to note that any uncertainties with regard to the amount of back pay are to be resolved against the discriminating party. **McCafferty v. Centerior Energy**, 1996-ERA-6 (ARB Sept. 24, 1997).

The award of back pay effectuates the remedial statutory purpose of making whole the victims of discrimination, and "unrealistic exactitude is not required" in calculating back pay and "uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating [party]." **EEOC v. Enterprise Ass'n Steamfitters Local No. 6348**, 542 F.2d 579, 587 (2d Cir. 1976), **Steamfitters Local No. 6348**, 542 F.2d 579, 587 (2d Cir. 1976), **cert. denied**, 430 U.S. 911 (1977), **quoting Hairston v. McLean Trucking Co.**, 520 F.2d 226, 233 (4th Cir. 1975). Initially, the Complainant bears the burden of establishing the amount of back pay that a respondent owes. **Adams v. Coastal Production Operation, Inc.**, 89-ERA-3 (Sec'y Aug. 5, 1992). Once the Complainant establishes the gross amount of back pay due, the burden shifts to the Respondent to prove facts which would mitigate that liability. **Lederhaus v. Donald Paschen & Midwest Inspection Service Ltd.,** 92-ERA-13 (Sec'y Oct. 26, 1992), slip. op. at 9-10; **Moody v. T.V.A.**, Dept of Labor Decisions, Vol. 7, No. 3, p. 68 (1993).

Creekmore v. ABB Power Systems Energy Services, Inc., 93-ERA-24 (ALJ Sept. 1, 1994).

It is appropriate to review other types of wrongful termination cases, as well as awards in other whistleblower decisions involving emotional distress, to assist in the analysis of the appropriate measure of compensatory damages in a whistleblower case. Accordingly, this is precisely what this Judge has done. **See Crow v. Noble Roman's, Inc.**, 1995-CAA-8 (Sec'y Feb. 26, 1996)(approving an award of $10,000.00 in compensatory damages);[4] **Creekmore v. ABB Power Sys. Energy Servs., Inc.**, 1993-

[4]The evidence proved that the complaint was terminated without any warning, and could not afford insurance. The complainant also had to receive food stamps for a period of time.

ERA-24 (Dep. Sec'y Feb. 14, 1996) (wherein the Deputy Secretary upheld this ALJ's recommendation of $40,000.00 in compensatory damages);[5] **Gaballa v. Atlantic Group, Inc.**, 1994- ERA-9 (Sec'y Jan. 18, 1996)(wherein the Secretary reduced the ALJ's recommended compensatory damage award from $75,000.00 to $25,000.00);[6] **Smith v. Littenberg**, 992-ERA-52 (Sec'y Sept. 6, 1995) (wherein the Secretary affirmed the ALJ's award of $10,000.00);[7] **Blackburn v. Metric Constructors, Inc.**, 86-ERA-4 (Sec'y Aug. 16, 1993) (wherein the Secretary reduced the ALJ's recommended award of compensatory damages to $5,000.00);[8] **Lederhaus v. Paschen**, 1991-ERA-13 (Sec'y

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[5]The ALJ found that the evidence established that the discriminatory conduct caused Complainant severe stress, leading to a heart attack. While questioning the sufficiency of the causative evidence in regard to the heart attack, the Deputy Secretary concluded that the record of the stress claim and pain attacks was sufficient to justify the award of compensatory damage. Specifically, the Deputy Secretary noted that the complainant suffered a great deal of embarrassment over a lay off after twenty-seven years with the employer, and that complainant suffered family disruption by his need to travel for consulting work.

[6]The ALJ recommended a $75,000 compensatory damage award based on the treating psychologist's finding that complainant suffered from chronic stress, paranoid thinking, a general distrust of others, a lack of confidence in his engineering judgment, a fear of continuing repercussions, and a general feeling of apathy. The psychologist further testified complainant will forever suffer from a full-blown personality disorder and a permanent strain on his marital relationship. The Secretary reduced the award based on the fact that the same psychologist indicated this psychological state was caused in part by a co-respondent who had previously settled out of the case and that part of that settlement compensated for part of complainant's compensatory damages.

[7]The evidence established that the complainant suffered from severe mental and emotional stress, including psychiatric evidence that the complainant was "depressed, obsessing, ruminating and ha[d] post-traumatic problems," following the discriminatory discharge.

[8]The testimony of complainant, his wife, and his father established complainant was of the opinion that firing someone was like saying that person is no good. The evidence also established complainant felt really low and that he relied on is father to come out of depression. The termination affected complainant's self-image and impacted his behavior, which became short with his wife. The wife testified to the stress and emotional strain on the marital relationship and the father testified to complainant's pride and work ethic and the fact that complainant felt sorry for himself after the termination.

Oct. 26, 1992) (wherein the Secretary reduced the compensatory award from a recommended amount of $20,000.00 to $10,000.00);[9] **McCuistion v. Tennessee Valley Auth.**, 1989-ERA-6 (Sec'y Nov. 13, 1991) (wherein the Secretary increased compensatory damages from the ALJ's recommended award of $0.00 to $10,000.00);[10] **Martin v. The Department of Army**, 1993-SDW-1 (ARB July 30, 1999) (wherein the ARB awarded $75,000.00 in compensatory damages for emotional distress);[11] **Jones v. EG&G Defense Materials, Inc.**, 1995-CAA-3 (ARB Sept. 29, 1998) (wherein Board adopted ALJ's award of $50,000.00);[12] **Smith v. Esicorp, Inc.**, 1993-ERA-16 (ARB Aug. 27, 1998) (wherein the Board reduced the ALJ's recommendation of $100,000.00 in

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[9]In **Lederhaus**, the evidence established complainant remained unemployed for 5 ½ months after his termination, he was harassed by bill collectors, foreclosure was begun on his home and he was forced to borrow $25,000 to save the house. In addition, complainant's wife received calls at work from bill collectors and her employer threatened to lay her off. Complainant had to borrow gas money to get to an unemployment hearing and experienced feelings of depression and anger. Complainant fought with his wife and would not attend her birthday party because he was ashamed he could not buy her a fit, the family did not have their usual Christmas dinner, and complainant would not go to visit his grandson. In fact, complainant cut off almost all contact with his grandson. The evidence revealed complainant became difficult to deal with and this was corroborated by testimony from complainant's wife and a neighbor. Complainant contemplated suicide twice.

[10]The evidence revealed the complainant was harassed, blacklisted, and fired. In addition, complainant lost his livelihood, he could not find another job, and he forfeited his life, dental and health insurance. The blacklisting and termination exacerbated complainant's pre-existing hypertension and caused frequent stomach problems necessitating treatment, medication, and emergency room admission on at least on occasion. Complainant experienced problems sleeping at night, exhaustion, depression, and anxiety. Complainant introduced into evidence medical documentation of symptoms, including blood pressure, stomach problems, and anxiety. Complainant's wife corroborated his complaints of sleeplessness and testified he became easily upset, withdrawn, and obsessive about his blood pressure.

[11]The evidence revealed severe emotion distress based upon psychological records of major depression and suicidal thoughts.

[12]The evidence Complainant suffered embarrassment from having to look for work, and having his car and home repossessed. Evidence also reflected stress due to loss of medical insurance and familial stress.

compensatory damages to $20,000.00);[13] **Michaud v. BSP Transport, Inc.**, 1995-STA-29 (ARB Oct. 9, 1997) (wherein the Board approved an award of $75,000.00 in compensatory damages);[14] **Doyle v. Hydro Nuclear Services**, 1989-ERA-22 (ARB Sept. 6, 1996) (wherein the Board affirmed the ALJ's recommendation of $40,000 compensatory damages);[15] **Bigham v. Guaranteed Overnight Delivery**, 1995-STA-37 (ALJ May, 8, 1996) (adopted by ARB Sept. 5, 1996) (wherein the Board increased the ALJ's award of compensatory damages from $2,500 to $20,000 after reviewing the observations and accounts of complainant's emotional distress);[16] **Sayre v. Alyeska Pipeline**, 1997-TSC-6 (ALJ May 8, 1999)(wherein ALJ awarded $10,000.00 in compensatory damages);[17] **Leveille v. New York Air Nat'l Guard**, 1994-TSC-3/4 (ALJ Feb. 9, 1998)(wherein ALJ awarded over $80,000.00 in

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[13]The evidence that the discriminatory conduct was limited to several cartoons lampooning complainant, and that the complainant did not suffer loss of a job or blacklisting and did not incur financial losses, and evidence of mental and emotional injury was limited to his own testimony and that of his wife.

[14]The evidence established that complainant from major depression caused by a discriminatory discharge, as supported by reports of a licensed clinical social worker and psychiatrist. Further, evidence showed increased stress and humiliation at having a bank foreclose on Complainant's home and the loss of savings.

[15]The evidence which supported an award in this amount consisted of complainant's consulting physicians who prescribed anxiety and depression medications, as well as other medications for chest pain; a treating psychologist testified that respondent's discriminatory acts caused complainant's anxiety disorder and post-traumatic stress disorder and respondent failed to offer any countervailing evidence on causation; and that same psychologist testified complainant's wife and children noticed a radical change in complainant's behavior, a serious strain in the marital relationship, and that divorce proceedings were begun, although the couple did eventually reconcile.

[16]At the hearing, the complainant testified to his lowered self-esteem and uncommunicativeness, to his change in sleep and eating habits, and to the adverse effect on his marriage. He also testified that he was not interested in socializing, felt 'less than a man' because he could not support his family, and that the family experienced a sparse Christmas. Finally, complainant testified the family had to cancel their annual summer vacation and charge the credit cards to the limit. Complainant's wife testified she noticed complainant's withdrawal in the weeks after Christmas.

[17]The complainant testified to severe stress caused by work-place discrimination.

compensatory damages based upon past and future emotional stress, past and future medical expenses, and damage to professional reputation);[18] **Berkman v. United States Coast Guard Academy**, 1997-CAA-2/9 (ALJ Jan. 2, 1998)(wherein the ALJ awarded $70,000.00 in compensatory damages).[19]

In **Van Der Meer v. Western Kentucky Univ.**, 1995-ERA-38 (ARB Apr. 20, 1998), the complainant suffered little out-of-pocket loss: he lost no salary as a result of the leave of absence and there was no evidence of uncompensated medical costs. Other losses were non-quantifiable. The complainant, however, was awarded $40,000 in compensatory damages because the respondent took extraordinary and very public action against the complainant which surely had a negative impact on complainant's reputation among the students, faculty and staff at the school, and more generally in the local community; complainant was subjected to additional stress by the respondent's failure to follow the conciliatory procedures contained in its handbook and complainant testified that he felt humiliated.

In **Smith v. Esicorp, Inc.**, 1993-ERA-16 (ARB Aug. 27, 1998), the ARB noted that, "The severity of the retaliation suffered by [a complainant] is also relevant to our determination of appropriate compensatory damages. The courts have held that the more inherently humiliating and degrading the defendant's action, the more reasonable it is to infer that a person would suffer emotional distress, and the more conclusory the evidence of emotional distress may be." **Id.** (**citing United States v. Balistrieri**, 981 F.2d 916, 932 (7th Cir. 1993)).

With these principles in mind, I will now consider the awards sought by Mr. Knox.

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[18]The evidence established severe emotional pain and suffering. Further the complainant suffered from anxiety attacks, shortness of breath and dizziness caused on the work-related stress. The complainant also submitted evidence of marital friction, and psychological evidence of depressive disorder dysthmia. The complainant requested $130,000 in compensatory damages, but the ALJ only awarded $45,000 for past and future emotional pain; $25,000 in a loss of professional reputation and $10,529.28 for past and future medical costs.

[19]The evidence established that complainant suffered from clinical, major depression require medication and therapy, in addition to suffering from frequent anxiety attacks.

B. BACK PAY

With reference to the general issue of damages that may be awarded herein, Complainant at the hearing testified that his reassignment to Greenbelt has resulted in a loss of wages he estimated at approximately $100,000.00. However, the specific amount is not delineated in Complainant's brief. That amount should be submitted to the ARB for their consideration.

The "goal of back pay is to make the victim of discrimination whole and restore him [or her] to the position that he [or she] would have occupied in the absence of the unlawful discrimination." **Blackburn v. Martin**, 982 F.2d 125, 128 (4th Cir. 1992).

C. OTHER DAMAGES

1. COMPENSATORY DAMAGES

As already noted above, compensatory damages sufficient to make the employee whole are provided for as well:

> The environmental statues, by authorizing an award of compensatory damages, have created a "species of tort liability" in favor of persons who are the objects of unlawful retaliation. Compensatory damages are designed to compensate complainants not only for direct pecuniary loss, but also for such harm as impairment of reputation, personal humiliation, and mental anguish and suffering. **Martin v. Dep't of the Army**, ARB Case No. 96-131, ALJ Case No. 96-131, ARB Dec. and Ord. (July 30, 1999) WL 702416 at *13, **citing Memphis Community Sch. Dist, v. Stachura**, 477 U.S. 299, 305-307 (1986). ...
>
> It is well-settled that expert medical evidence is not necessary to award compensatory damages for emotional distress. A complainant's credible testimony by itself is sufficient for this judge to find and conclude that emotional distress has resulted from a persistent pattern of retaliatory action and to award damages. **Jones v. EG&G Def. Materials Inc.**, ARB Case No. 97-129, ALJ Case No. 95-CAA-3 (ARB Sept. 29, 1998). In **Jones**, the testimony of the complainant alone was sufficient to sustain a $50,000 award for emotional distress. Similarly, complainant's testimony was sufficient to sustain a $20,000 emotional distress award in **Assist. Secretary of Labor for Occup. Safety & Healthy, Guaranteed Overnight Delivery**, ARB Case No. 96-108, ALJ

Case No. 95-STA-37 (Sept. 5, 1996).

Anderson v. Metro Wastewater Reclamation District, ARB No.: 98-087, Case No.: 1997-SDW-7 (ALJ RDO Sept. 18, 2001).

As I held in another decision:

> The general rule is that a wrongdoer is liable to the person injured in compensatory damages for all of the natural and direct or proximate consequences of his wrongful act or omission but he is not responsible for the remote consequences of his wrongful act or omission. Natural consequences are such as might reasonably have been foreseen, such as occur in an ordinary state of things. Thus, it is often said, if according to the usual experience of mankind the result was to be expected, it is not too remote.
>
> An act or omission is the proximate cause of a loss where there is no intervening, independent, culpable and controlling cause severing the connection between the wrongful act or omission and the claimed loss. Thus, an intermediate cause which, disconnected from the primary act or omission, produces the injury or loss will be regarded as the proximate cause. It is sufficient if it is established that the defendant's act produced or set in motion other agencies, which in turn produced or contributed to the final result. Moreover, although an act of the plaintiff has intervened between defendant's wrong and the injury suffered, the defendant is not thereby excused if the intervening act was the result of or was naturally and reasonably induced by his earlier wrong. While the plaintiff is not entitled to recover damages for conditions which are due entirely to a previous disease, the defendant may be liable for damages if his wrongful act aggravated or exacerbated such disease or impairment of health. Thus, the wrongdoer is not exonerated from liability if, by reason of some pre-existing condition, his victim is more susceptible to injury and the plaintiff may recover such damages as proximately result from the activation or aggravation of a dormant disease or condition. Heart disease was recognized as a pre-existing condition in **Firkol v. A.R. Glen Corp.**, 223 F. Supp. 163 (D.C.N.J. 1963). As between an innocent and a wrongful cause, the law uniformly regards the latter as the proximate and legally responsible cause. It is also well-settled that damages which are uncertain, contingent or speculative in their

> nature cannot be recovered as compensatory damages. Where a cause of action is complete and no subsequent action may be maintained, a recovery may be had for prospective and anticipated damages reasonably certain to accrue. Thus, damages are not restricted to the period ending with the institution of the suit and where it is established that there will be future effects sustained by the plaintiff as a result of the wrongful act or injury, damages for such effects may be awarded.

Creekmore v. ABB Power Systems Energy Services, Inc., 93-ERA-24 (ALJ Sept. 1, 1994).

> Compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment and humiliation. **See generally DeFord v. Secretary of Labor**, 700 F.2d 281, 283 (6th Cir. 1983)(decided pursuant to the ERA); **Nolan v. AC Express**, 1992-STA-37 (Sec'y Jan. 17, 1995)(decided pursuant to an analogous provision of the STA). Where appropriate, a complainant may recover an award for emotional distress when his or her mental anguish is the proximate result of respondent's unlawful discriminatory conduct. **See Bigham v. Guaranteed Overnight Delivery**, 1995-STA-37 (ALJ May, 8, 1996) (adopted by ARB Sept. 5, 1996); **Crow v. Noble Roman's Inc.**, 1995-CAA-8 (Sec'y Feb. 26, 1996). **See also Blackburn v. Metric Constructors, Inc.**, 1986-ERA-4 (Sec'y Oct. 30, 1991).
>
> Complainant bears the burden of proving the existence and magnitude of any such injuries; although, as a caveat, it should be noted that medical or psychiatric expert testimony on this point is not required. **Crow v. Noble Roman's, Inc.**, 1995-CAA-8 (Sec'y Feb. 26, 1996); **Lederhaus v. Paschen**, 1991-ERA-13 (Sec'y Oct. 26, 1992); **Jones v. EG&G Defense Materials, Inc.**, 1995-CAA-3 (ARB Sept. 29, 1998).

As I have also noted above, it is appropriate to review other types of wrongful termination cases, as well as awards in other whistleblower decisions involving emotional distress, to assist in the analysis of the appropriate measure of compensatory damages in a whistleblower case. Accordingly, this is precisely what this Judge has done. **See Crow v. Noble Roman's, Inc.**, 1995-CAA-8 (Sec'y Feb. 26, 1996)(approving an award of $10,000.00 in compensatory

damages);[20] **Creekmore v. ABB Power Sys. Energy Servs., Inc.**, 1993-ERA-24 (Dep. Sec'y Feb. 14, 1996) (wherein the Deputy Secretary upheld this ALJ's recommendation of $40,000.00 in compensatory damages);[21] **Gaballa v. Atlantic Group, Inc.**, 1994- ERA-9 (Sec'y Jan. 18, 1996)(wherein the Secretary reduced the ALJ's recommended compensatory damage award from $75,000.00 to $25,000.00);[22] **Smith v. Littenberg**, 992-ERA-52 (Sec'y Sept. 6, 1995) (wherein the Secretary affirmed the ALJ's award of $10,000.00);[23] **Blackburn v. Metric Constructors, Inc.**, 86-ERA-4 (Sec'y Aug. 16, 1993) (wherein the Secretary reduced the ALJ's recommended award of compensatory damages to $5,000.00);[24] **Lederhaus v. Paschen**, 1991-

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[20]The evidence proved that the complaint was terminated without any warning, and could not afford insurance. The complainant also had to receive food stamps for a period of time.

[21]The ALJ found that the evidence established that the discriminatory conduct caused Complainant severe stress, leading to a heart attack. While questioning the sufficiency of the causative evidence in regard to the heart attack, the Deputy Secretary concluded that the record of the stress claim and pain attacks was sufficient to justify the award of compensatory damage. Specifically, the Deputy Secretary noted that the complainant suffered a great deal of embarrassment over a lay off after twenty-seven years with the employer, and that complainant suffered family disruption by his need to travel for consulting work.

[22]The ALJ recommended a $75,000 compensatory damage award based on the treating psychologist's finding that complainant suffered from chronic stress, paranoid thinking, a general distrust of others, a lack of confidence in his engineering judgment, a fear of continuing repercussions, and a general feeling of apathy. The psychologist further testified complainant will forever suffer from a full-blown personality disorder and a permanent strain on his marital relationship. The Secretary reduced the award based on the fact that the same psychologist indicated this psychological state was caused in part by a co-respondent who had previously settled out of the case and that part of that settlement compensated for part of complainant's compensatory damages.

[23]The evidence established that the complainant suffered from severe mental and emotional stress, including psychiatric evidence that the complainant was "depressed, obsessing, ruminating and ha[d] post-traumatic problems," following the discriminatory discharge.

[24]The testimony of complainant, his wife, and his father established complainant was of the opinion that firing someone was like saying that person is no good. The evidence also established complainant felt really low and that he relied on is father to come out of depression. The termination affected complainant's self-image

ERA-13 (Sec'y Oct. 26, 1992) (wherein the Secretary reduced the compensatory award from a recommended amount of $20,000.00 to $10,000.00);[25] **McCuistion v. Tennessee Valley Auth.**, 1989-ERA-6 (Sec'y Nov. 13, 1991) (wherein the Secretary increased compensatory damages from the ALJ's recommended award of $0.00 to $10,000.00);[26] **Martin v. The Department of Army**, 1993-SDW-1 (ARB July 30, 1999) (wherein the ARB awarded $75,000.00 in compensatory damages for emotional distress);[27] **Jones v. EG&G Defense Materials, Inc.**, 1995-CAA-3 (ARB Sept. 29, 1998) (wherein Board adopted ALJ's award of

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and impacted his behavior, which became short with his wife. The wife testified to the stress and emotional strain on the marital relationship and the father testified to complainant's pride and work ethic and the fact that complainant felt sorry for himself after the termination.

[25]In **Lederhaus**, the evidence established complainant remained unemployed for 5 ½ months after his termination, he was harassed by bill collectors, foreclosure was begun on his home and he was forced to borrow $25,000 to save the house. In addition, complainant's wife received calls at work from bill collectors and her employer threatened to lay her off. Complainant had to borrow gas money to get to an unemployment hearing and experienced feelings of depression and anger. Complainant fought with his wife and would not attend her birthday party because he was ashamed he could not buy her a fit, the family did not have their usual Christmas dinner, and complainant would not go to visit his grandson. In fact, complainant cut off almost all contact with his grandson. The evidence revealed complainant became difficult to deal with and this was corroborated by testimony from complainant's wife and a neighbor. Complainant contemplated suicide twice.

[26]The evidence revealed the complainant was harassed, blacklisted, and fired. In addition, complainant lost his livelihood, he could not find another job, and he forfeited his life, dental and health insurance. The blacklisting and termination exacerbated complainant's pre-existing hypertension and caused frequent stomach problems necessitating treatment, medication, and emergency room admission on at least on occasion. Complainant experienced problems sleeping at night, exhaustion, depression, and anxiety. Complainant introduced into evidence medical documentation of symptoms, including blood pressure, stomach problems, and anxiety. Complainant's wife corroborated his complaints of sleeplessness and testified he became easily upset, withdrawn, and obsessive about his blood pressure.

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$50,000.00);[28] **Smith v. Esicorp, Inc.**, 1993-ERA-16 (ARB Aug. 27, 1998) (wherein the Board reduced the ALJ's recommendation of $100,000.00 in compensatory damages to $20,000.00);[29] **Michaud v. BSP Transport, Inc.**, 1995-STA-29 (ARB Oct. 9, 1997) (wherein the Board approved an award of $75,000.00 in compensatory damages);[30] **Doyle v. Hydro Nuclear Services**, 1989-ERA-22 (ARB Sept. 6, 1996) (wherein the Board affirmed the ALJ's recommendation of $40,000 compensatory damages);[31] **Bigham v. Guaranteed Overnight Delivery**, 1995-STA-37 (ALJ May, 8, 1996) (adopted by ARB Sept. 5, 1996) (wherein the Board increased the ALJ's award of compensatory damages from $2,500 to $20,000 after reviewing the observations and accounts of complainant's emotional distress);[32] **Sayre v. Alyeska Pipeline**,

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[28]The evidence Complainant suffered embarrassment from having to look for work, and having his car and home repossessed. Evidence also reflected stress due to loss of medical insurance and familial stress.

[29]The evidence that the discriminatory conduct was limited to several cartoons lampooning complainant, and that the complainant did not suffer loss of a job or blacklisting and did not incur financial losses, and evidence of mental and emotional injury was limited to his own testimony and that of his wife.

[30]The evidence established that complainant from major depression caused by a discriminatory discharge, as supported by reports of a licensed clinical social worker and psychiatrist. Further, evidence showed increased stress and humiliation at having a bank foreclose on Complainant's home and the loss of savings.

[31]The evidence which supported an award in this amount consisted of complainant's consulting physicians who prescribed anxiety and depression medications, as well as other medications for chest pain; a treating psychologist testified that respondent's discriminatory acts caused complainant's anxiety disorder and post-traumatic stress disorder and respondent failed to offer any countervailing evidence on causation; and that same psychologist testified complainant's wife and children noticed a radical change in complainant's behavior, a serious strain in the marital relationship, and that divorce proceedings were begun, although the couple did eventually reconcile.

[32]At the hearing, the complainant testified to his lowered self-esteem and uncommunicativeness, to his change in sleep and eating habits, and to the adverse effect on his marriage. He also testified that he was not interested in socializing, felt 'less than a man' because he could not support his family, and that the family experienced a sparse Christmas. Finally, complainant testified the family had to cancel their annual summer vacation and charge the credit cards to the limit. Complainant's wife testified she noticed

1997-TSC-6 (ALJ May 8, 1999)(wherein ALJ awarded $10,000.00 in compensatory damages);[33] **Leveille v. New York Air Nat'l Guard**, 1994-TSC-3/4 (ALJ Feb. 9, 1998)(wherein ALJ awarded over $80,000.00 in compensatory damages based upon past and future emotional stress, past and future medical expenses, and damage to professional reputation);[34] **Berkman v. United States Coast Guard Academy**, 1997-CAA-2/9 (ALJ Jan. 2, 1998)(wherein the ALJ awarded $70,000.00 in compensatory damages).[35]

In **Van Der Meer v. Western Kentucky Univ.**, 1995-ERA-38 (ARB Apr. 20, 1998), the complainant suffered little out-of-pocket loss: he lost no salary as a result of the leave of absence and there was no evidence of uncompensated medical costs. Other losses were non-quantifiable. The complainant, however, was awarded $40,000 in compensatory damages because the respondent took extraordinary and very public action against the complainant which surely had a negative impact on complainant's reputation among the students, faculty and staff at the school, and more generally in the local community; complainant was subjected to additional stress by the respondent's failure to follow the conciliatory procedures contained in its handbook and complainant testified that he felt humiliated.

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complainant's withdrawal in the weeks after Christmas.

[33]The complainant testified to severe stress caused by work-place discrimination.

[34]The evidence established severe emotional pain and suffering. Further the complainant suffered from anxiety attacks, shortness of breath and dizziness caused on the work-related stress. The complainant also submitted evidence of marital friction, and psychological evidence of depressive disorder dysthmia. The complainant requested $130,000 in compensatory damages, but the ALJ only awarded $45,000 for past and future emotional pain; $25,000 in a loss of professional reputation and $10,529.28 for past and future medical costs.

[35]The evidence established that complainant suffered from clinical, major depression require medication and therapy, in addition to suffering from frequent anxiety attacks.

distress may be." **Id.** (**citing United States v. Balistrieri**, 981 F.2d 916, 932 (7th Cir. 1993)).

As I stated more recently in another decision, and it is equally applicable herein, I find that Complainant has submitted sufficient evidence justifying a claim for compensatory damages based on her severe emotional pain and suffering cause by Respondent's discriminatory conduct. Complainant has testified concerning how, as a result of RIDEM's alleged discrimination and harassment, she has suffered substantial emotional, physical and professional harm. (TR 381-93) Additionally, Complainant has submitted medical records from Nephrology Associates, Harvard Pilgrim Healthcare, the RIDEM Medical Monitoring Program, and the RI EAP, to substantiate her claim. (CX 36-39) These records reflect a two year period of Complainant's suffering from severe stress, sleep disorders, anxiety and symptoms of clinical depression. (CX 36-39) The records of Dr. Stephen Zipin indicate serious stress disorder and problems during 1996 through 1998. (CX 36; CX 62; CX 64; CX 65; CX 67) Further, in late 1997, Complainant met with Counselor Raymond Cooney, and psychiatrist Dr. Giselle Corre, both of whom noted the "severe stress from work-related issues," and recommend that Complainant take time off from work on stress leave. (CX 61) As a result, Complainant then took five weeks of stress leave in September and October of 1997, as well as other occasional days off. (TR 387) Complainant also alleges that she has been emotionally strained, and that her family has been severely impacted by her stress. In fact, her husband, Joseph Migliore, relayed his concern about Complainant's stress and its effect on their family to Mr. Fester who shared this information with Ms. Marcaccio.

Likewise, what I wrote earlier applies herein. I find and conclude that Complainant has suffered over two years of continuous and severe harassment by Respondents. I reject Respondent's argument that Complainant's stress is self-imposted and is unrelated to this current claim. Rather, I have previously held that Complainant began engaging in protected activity, for the purposes of these claims, almost from the beginning of his employment at the Job Center when he was voicing his concerns about the asbestos hazards there. I also have found that Respondent's retaliatory actions, in the form of harassment, began at this time. Complainant's supervisors were aware that Complainant was being subject to a great deal of stress by their actions, yet the discrimination and retaliation continued, through undermining his authority, subjecting him to disciplinary actions, and threatening him with future retaliation for engaging in protected activity.

Accordingly, in the case at bar, I find and conclude that Complainant has submitted a well-documented and well-supported

claim for compensatory benefits based on emotional distress. I also note, in comparison with similarly situated cases, that Respondent's awareness of Complainant's stress disorder and anxiety, makes its actions particularly offensive. I also find that the medical record documentation presented, coupled with Complainant's credible testimony, presents a strong case for compensatory damages. Therefore, I find and conclude that Complainant is entitled to $50,000.00 in compensatory damages based upon his claim of emotional distress.

2. ADVERSE PHYSICAL HEALTH CONSEQUENCES

In the case at bar, Complainant will be awarded $25,000 in compensatory damages based upon his adverse physical health consequences directly caused by Respondent's discriminatory conduct.

I note that in **Varnadore v. Oak Ridge Nat'l Laboratory,** 1992-CAA-2/5 and 1993-CAA-1 (ALJ June 7, 1993), the Administrative Law Judge found that the complainant was not entitled to an award of compensatory damages based upon adverse health consequences where the Complainant's evidence was merely speculative.

I find and conclude, that upon review of the evidence, Complainant has more than adequately proved that he has suffered physical consequences as a result of Respondent's actions, and that such actions have resulted in his worsening medical condition. I find that Complainant has candidly and honestly testified to his emotional stress that he has experienced since he began to work at the Center. Complainant credibly testified that his physical health condition has worsened and that he has suffered additionally as the direct result of his work-related stress. Accordingly, I find that Complainant's physical condition, as impacted by the work-related stress and anxiety, is well documented in this closed record.

Accordingly, in view of the foregoing, I find that Complainant is entitled to compensatory damages based on his adverse health condition. Further, after a comparison of these facts to other whistleblower cases involving compensatory damages based on adverse medical conditions, I find and conclude that Complainant is entitled to an award of $50,000.00 as a more reasonable amount.

3. EXEMPLARY AND PUNITIVE DAMAGES

I must begin by noting that punitive damages are not

allowable, absent express statutory authorization, in whistleblower cases, and that the SWDA whistleblower provision does provide for such damages. **See** 42 U.S.C. §§ 6971. Further, an ERA complainant may not attempt to sneak a punitive award through the wooden horse of compensatory damages. **Cf. Smith v. Esicorp, Inc.**, 1993-ERA-16 (ARB Aug. 27, 1998).[36] In the case at bar, Complainant has presented a compelling case for the award of appropriate exemplary damages, as shall now be discussed.

The SDWA provides for exemplary damages and the extreme facts of this case, as in those below where such damages were awarded, warrants such an award. The facts discussed in the Findings of Fact **supra** regarding both the pattern of blatant actions taken against Mr. Knox, and the blatant direct evidence of Respondent's retaliatory motive for a two plus year period, make clear that Respondent did not stumble into this discrimination accidentally. Respondent knowingly and in blatant disregard of Mr. Knox's rights under federal law took a series of actions intended to force him to resign or abandon his protected activities even if this resignation and abandonment came at the expense of his mental and physical health has been aware of Mr. Knox's rights almost from the very beginning.

Respondent's conduct in this matter, particularly given that Respondent as a government agency, should set an example of compliance with the law, and given the extremely dangerous nature of asbestos, is offensive and shocks the conscience. Under the applicable law, an award of exemplary and punitive damages to deter such future conduct is appropriate and required.

As I wrote in another context:

> Two of the environmental statutes under which Ms. Anderson's additional complaints arise - the Toxic Substances Act, 15 U.S.C. §2622(b), and the Safe Drinking Water Act, 42 U.S.C. §300j-9(i)(2)(B)(ii) - explicitly permit "where appropriate, exemplary damages." Punitive damages may be awarded to punish "unlawful conduct" and to deter its "repetition." **BMW v. Gore**, 517 U.S. 559, 568 (1996). The Secretary of Labor has held that exemplary damages are appropriate under certain environmental whistleblower statutes in order to punish an employee for wanton or reckless conduct and to deter such conduct in

[36] I note that the facts in the **Smith** more clearly showed an intent to award large compensatory damages in order to "send a message." **Id.**

the future. **Johnson v. Old Dominion Security**, 86-CAA-3/4/5, (Sec'y May 29, 1991). The Secretary explained:

> "The threshold inquiry centers on the wrongdoer's state of mind: did the wrongdoer demonstrate reckless or callous indifference to the legally protected rights of others, and did the wrongdoer engage in conscious action in deliberate disregard of those rights? The 'state of mind' thus is comprised both of intent and the resolve actually to take action to effect harm. If this state of mind is present, the inquiry proceeds to whether an award is necessary for deterrence." **Id**. at 29, citing the Restatement (Second) of Torts, §908 (1979). **Accord, Pogue v. United States Dept. of the Navy**, 87-ERA-21, (**D&O on Remand Sec'y** April 14, 1994).
>
> An award of punitive damages is appropriate where "the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." **Smith v. Wade**, 461 U.S. 30, 56 (1983). Once the requisite state of mind has been found, the "trier of fact has the discretion to determine whether punitive damages are necessary, 'to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future.'" **Rowlett v. Anheuser-Busch, Inc.**, 832 F.2d 194, 205 (1st Cir. 1987). The appropriate standard to use in determining the amount of exemplary damages is the amount necessary to punish and deter the reprehensible conduct. **CEH, Inc. v. F/V Seafarer**, 70 F.3d 694, 705-6 (1st Cir. 1995); **Ruud v. Westinghouse Hanford Co**., 88-ERA-33 (ALJ Mar. 15, 1996).

Anderson v. Metro Wastewater Reclamation District, ARB No.: 98-087, Case No.: 1997-SDW-7 (ALJ RDO Sept. 18, 2001). As I wrote in **Anderson**:

> The record is replete with evidence of outrageous, hostile, disparate, discriminatory and egregious behavior by Metro against Ms. Anderson, with continuing and even escalating retaliation and other violations of law while on express notice of the illegality of their actions, especially after the filing of the May 2, 1997 complaint herein and the ARB's decision. Such clear evidence of defamatory and discriminatory conduct, and Respondent's evident cavalier attitude towards its conduct, justifies an award of exemplary damages ... .

Id.

As already noted above, the case before me involves an egregious and blatant conspiracy against Mr. Knox by the Respondent, a conspiracy that lasted over two (2) years. As also noted above, punitive, or exemplary, damages are specifically available under the SDWA and TSCA[37] "where appropriate."

It is well-settled that exemplary or punitive damages are permitted under the CAA. In this regard, **see Jenkins v. EPA,** 92-CAA-6 (ALJ Dec. 14, 1992); **Varnadore v. Oak Ridge National Laboratory,** 92-CAA-2, 5, 93-CAA-1 (ALJ June 7, 1993); **Ruid v. Westinghouse Hanford Co.,** 88-ERA-33 (ALJ Mar. 15, 1996. In **Ruid**, the ALJ recommended that exemplary damages not be awarded because the only statutes under which he found jurisdiction did not provide for such damages. Assuming that it was proper to award exemplary damages, however, the ALJ concluded that an award of exemplary damages of $12,500 was appropriate. The ALJ arrived at this figure by comparing the facts and recommended award in the case of **Varnadore v. Oak Ridge National Laboratories,** 95-CAA-2 (ALJ June 27, 1993). The ALJ concluded that the retaliation in the instant case was less serious than in **Varnadore.**

Consistent with the cases above, an award of exemplary and punitive damages is appropriate here. Accordingly, I find and conclude that Respondent shall also pay to Mr. Knox the amount of $25,000,00 as exemplary and punitive damages for its egregious actions herein and as a deterrent for other employers who may be similarly inclined in the future.

D. INJUNCTIVE RELIEF

As in **Migliore**, some injunctive relief is appropriate here. In **Migliore**, this Administrative Law Judge held:

> Respondent is hereby ordered to cease and refrain from discriminating against Complainant based upon her now-recognized protected activity. Further, Respondent is hereby ordered to immediately expunge Complainant's personnel file of any and all negative references related to her protected activity. **See McMahan v. California Water Quality Control Bd.**, 1990-WPC-1 (Sec'y July 16, 1993).

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[37]As noted above, TSCA does not apply herein as Congress has not waived the Army's sovereign immunity.

> Second, Complainant requests that Respondent be ordered to "publish, through news release and correspondence with EPA Region One, a retraction of all negative and false statements, reports and comments made to outside entities about Complainant's professional performance and abilities." (CX 126 at 209) I hereby deny this request as too broad and cumbersome. Rather, I hereby recommend that Respondent post a written notice in a centrally located area frequented by most, if not all, of Respondent's employees for a period of sixty (60) days, advising its employees that the disciplinary action taken against Complainant have been expunged from her personnel record and that Complainant's claims have been decided in her favor. Further, I hereby recommend that Respondent make available the Final Order of the Administrative Review Board and/or Secretary of Labor, when issued, to any employee or individual requesting it. Further, I recommend that Respondent forward a copy of the final order of the Administrative Review Board and/or Secretary of Labor to the EPA Region One office. ... I hereby recommend that Respondent be Ordered to cease all discriminatory action, and refrain from taking retaliatory action against Complainant in the future based upon her protected activities as noted in this Recommended Decision and Order.

Migliore, **supra**.

As I also ordered in another decision,

> Respondent shall immediately expunge from Complainant's personnel records all derogatory or negative information contained therein relating to Complainant's employment with the Respondents and his termination on September 10, 1992. Respondent shall also provide neutral employment references when inquiry is made about Complainant by another firm, entity, organization or an individual.

Creekmore, **supra**. As in these prior cases, Mr. Knox's record should be cleared and Respondent is prohibited from all further retaliation against Mr. Knox and will be required to publicly post the Order so stating, and I so find and conclude, and an appropriate **ORDER** will be entered herein.

E. ATTORNEY FEES AND LITIGATION COSTS AND EXPENSES

The law provides for recovery of attorney fees and litigation expenses and costs by a prevailing Complainant. For example,

> Under the SWDA, a prevailing party in a so-called whistleblower case is entitled to recover costs for attorney fees and expenses. 42 U.S.C. § 6971. In this context, a party may be considered to have prevailed if he or she succeeds on any significant issue in litigation which achieves some of the benefits the party sought in bringing the suit. **Hensley v. Eckerhart**, 461 U.S. 424, 433 (1983). I have found and concluded that Complainant is a prevailing party, and thus, her counsels are entitled to a reasonable fee.

This Administrative Law Judge Ordered at the close of trial in the instant case that any attorney fees and costs petition be submitted separately after issuance of the Decision. Accordingly, Complainant's attorney and his co-counsel shall file the usual fee petition within thirty (30) days of receipt of this Recommended Decision and Order and Respondent's counsel shall have fourteen (14) days to file a response thereto.

This Administrative Law Judge, in calculating attorney fees under the whistleblower statutes, will utilize the lodestar method that requires multiplying the number of hours reasonably expended in bringing the litigation by a reasonable hourly rate. **See Clay v. Castle Coal and Oil Co., Inc.**, 1990-STA-37 (Sec'y, June 3, 1994). The fee petition must be based on records providing details of specific activity taken by counsel and indicating the date, time and duration necessary to accomplish the specific activity. **Sutherland v. Spray Sys. Envtl.**, 1995-CAA-1 (ARB July 9, 1996); **West v. Sys. Applications Int'l**, 1994-CAA-15 (Sec'y Apr. 19, 1995). Complainant's counsel have the burden to establish the reasonableness of the fees. **West v. Sys. Applications Int'l**, 1994-CAA-15 (Sec'y Apr. 19, 1995).

IX. RECOMMENDED ORDER

Based upon the foregoing findings of fact, conclusions of law and upon the entire record, I **RECOMMEND** Complainant William T. Knox be awarded the following remedy:

1) Respondent, U. S. Department of the Interior, shall reinstate Complainant to his former or comparable position, together with the compensation, terms, conditions and privileges of his former employment.

2) Respondent shall pay to Complainant an award of back pay. Such amount should be submitted to the ARB for their consideration, as well as any out of pocket medical expenses

that he has incurred as a result of the Respondent's illegal actions herein.

3) Respondent shall pay Complainant compensatory damages in the amount of $75,000.00 representing mental anguish and emotional distress, adverse physical health consequence, and loss of professional reputation.

4) Respondent shall pay to Complainant the amount of $25,000.00 as exemplary damages and as a deterrent to other employers.

5) Respondent shall pay an attorney fee award to Attorney Glen M. Fallin and his co-counsel after the fee petition is filed and comments are received from Attorney Harris.

It is **FURTHER RECOMMENDED** that

6) Respondent shall immediately expunge from Complainant's personnel file any and all negative references relative to his protected activity and his employment with the Respondent.

7) Respondent shall post a written notice in a centrally located area frequented by most, if not all, of Respondent's employees for a period of sixty (60) days, advising its employees that all disciplinary action taken against Complainant has been expunged from his personnel record and that Complainant's complaints have been decided in his favor.

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DAVID W. DI NARDI
District Chief Judge

Boston, Massachusetts
DWD:dr

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §§ 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. **See** 29 C.F.R. §§ 24.7(d) and 24.8.