In the Matter of:

GREGORY C. SASSE,	**ARB CASE NOS. 02-077**
	02-078
COMPLAINANT,	**03-044**
v.	**ALJ CASE NO. 98-CAA-7**
OFFICE OF THE UNITED STATES ATTORNEY, UNITED STATES DEPARTMENT OF JUSTICE,	**DATE: January 30, 2004**
RESPONDENT.	

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant
Steve Bell, Esq., ***The Simon Law Firm, LLP, Cleveland, Ohio***
Gregory A. Gordillo, Esq., ***Cleveland, Ohio***

For the Respondent:
Marcia W. Johnson, Esq., Chief, Civil Division, ***U.S. Attorney's Office, Cleveland, Ohio***

Carol Catherman, Esq., EOUSA, ***Department of Justice, Washington, D.C.***

***For the Amicus Curiae*:**
Allen H. Feldman, Associate Solicitor; Nathaniel I. Spiller, Deputy Associate Solicitor, Edward Sieger, Senior Appellate Attorney, ***U. S. Department of Labor, Washington, D.C.***

FINAL DECISION AND ORDER

This case arises under the whistleblower protection provisions of the Federal Water Pollution Prevention Control Act (the Clean Water Act or CWA), 33 U.S.C.A. § 1367 (West 2001), the Clean Air Act (CAA), 42 U.S.C.A. § 7622 (West 1995), and the

Solid Waste Disposal Act (SWDA), 42 U.S.C.A. § 6971 (West 1995), and implementing regulations at 29 C.F.R. Part 24 (2003). In 1996, Gregory C. Sasse, an Assistant United States Attorney, filed a complaint against his supervisors, the United States Attorney and the Executive Office for United States Attorneys (EOUSA) alleging that they took adverse employment actions against him and created a hostile working environment because of Sasse's prosecution of environmental crimes.[1]

After an evidentiary hearing, a Labor Department Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.). *Sasse v. United States Dep't of Justice*, ALJ No. 1998-CAA-7 (May 8, 2002).[2] The ALJ ruled that Sasse's prosecution of environmental crimes was not protected activity for purposes of the CWA, CAA and the SWDA and recommended dismissal of the original complaint on that ground. However, the ALJ amended the complaint to add an additional claim based on Sasse's communications about a contaminated landfill with persons outside his chain of command staff and recommended affirmance of that claim.

Both parties timely petitioned for review. For the reasons that follow we dismiss the complaint and remand for excision of parts of the R. D. & O.

BACKGROUND

I. Facts

A. Pre-Complaint activities

From 1983, Gregory Sasse was an Assistant United States Attorney (AUSA) in the Northern District of Ohio. Hearing Transcript (Tr.) 32. In 1987, the Chief of the Criminal Division sent Sasse to an environmental seminar, Tr. 899; *see* Tr. 40-42. In 1988 and 1999, Sasse's supervisor and the Division Chief assigned him two environmental crimes cases, one of which involved the dumping of toxic materials at Cleveland's airport. Tr. 47, 903. Sasse received overall "excellent" performance appraisals in the years he worked on these cases. *See* RX 0-2.

In 1991, Sasse attended an environmental conference in New Orleans with the United States Attorney, and after the conference she asked him to help form an environmental task force of federal, state and local agencies. Tr. 123, 127-129. During

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[1] The Respondent in interest is the Department of Justice. *Sasse v. United States Dep't of Justice*, No. 1998-CAA-00007 (ALJ Mar. 3, 1999), Order Dismissing Individual Respondents.

[2] The ALJ R. D. & O. and ARB decisions are available at: www.oalj.dol.gov. We cite to the electronic opinions at this web site.

the next "file review," Sasse told the Division Chief that he was going to be very busy on the task force and did not know if he would be able to get to his other cases. Tr. 1078.[3] The Division Chief checked with the First Assistant United States Attorney, who had also attended the New Orleans conference, to see whether Sasse should make the task force a full time job to the exclusion of his other cases. Tr. 1078-1079, RX N-3. The First Assistant, who had supervisory responsibility over the Division Chiefs, viewed it appropriate to assign other work. Tr. 1136, *see* Tr. 1079. At the next file review, the Division Chief told Sasse that "[j]ust because he went gallivanting around New Orleans with the United States Attorney, didn't mean he didn't have to finish his other work." Tr. 1079.

In 1992, Sasse received an overall rating of "excellent" for his 1991 appraisal, but believed he was "downgraded" from outstanding to excellent on one of the elements because of his work on environmental cases. Tr. 116-123; *see* RX 0-2.

For 1993, Sasse again received an overall rating of "excellent," but the Deputy Chief noted concerns that Sasse was taking too much leave, was not returning phone calls, and was not moving his cases. Tr. 934-945; *see* RX 0-4; RX 0-6.

For 1994, Sasse again received an overall rating of "excellent." Tr. 355; RX G-2a. He filed a grievance because he had been downgraded on two elements. Tr. 357, RX G-2b. Sasse argued that he had been handicapped in 1994 by an incompetent secretary. *Id*. In February 1996, the Executive Office for United States Attorneys denied the grievance. Tr. 390, RX G-3.

While Sasse was grieving his 1994 "downgrades," an environmental crimes case involving a company that collects and disposes of hazardous waste throughout the United States, was transferred from Sasse to DOJ's Environmental and Natural Resources Division (ENRD) in Washington, D.C. *See* Tr. 275-276, 560-565, 580-582, CX 31-P. The ENRD later decided to close the case without prosecuting anyone. Tr. 591-621. Sasse disagreed with ENRD's decision and believed that his Division Chief had transferred the case to ENRD because of his personal antipathy toward environmental crimes enforcement and to protect former Environmental Protection Agency (EPA) officials who now worked for the company. Tr. 271-286.

In April 1996, Sasse agreed that the secretary he had complained about should be rated "excellent" in all elements of her job and that restrictions which had resulted in other secretaries being assigned to do her work should be lifted. Tr. 965; RX D-4. In November 1996, the Deputy Chief made new secretarial assignments but did not give Sasse a new secretary. Tr. 310. Sasse, who had been giving work to other secretaries, viewed the failure to assign him a new secretary as a re-initiation of discrimination. On

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[3] The Division Chief, with a supervisor present, held "file reviews" four times a year to discuss pending cases. *See* Tr. 132, 924-925.

November 25, 1996, within thirty days of the new secretarial assignments, he filed the complaint at issue here.

B. Post-Complaint activities

In 1997, Sasse, while still working as an AUSA, proposed to officials of the National Aeronautics and Space Administration (NASA) that he work for them in a private capacity to help ensure that NASA contractors were adhering to environmental laws. *See* 1/14/00 Letter from DeFalaise to Sasse (attached to 6/6/02 Letter from DOJ attorney Johnson to ALJ Tierney); Tr. 505-507. At that time, NASA owned property next to the Cleveland airport that Sasse had discovered, from environmental crimes work, to be severely contaminated. Tr. 256-269; see also Tr. 206-221 (testimony of former chief of NASA's environmental compliance office). The NASA officials referred Sasse's business proposal to NASA's Office of Inspector General (OIG), which in turn referred the matter to DOJ's OIG. DeFalaise Letter, *supra*, at 2. In late 1998, DOJ officials informed Sasse that he was under criminal investigation in connection with his proposal to NASA. Tr. 502, 507.

On January 14, 2000, EOUSA proposed to suspend Sasse for five days because his business proposal to NASA violated ethical standards of the DOJ and Office of Government Ethics. DeFalaise Letter, *supra*, at 1-2. Those standards require, among other things, that DOJ employees obtain prior approval before engaging in outside employment that involves a subject matter in the component's area of responsibility, 5 C.F.R. § 3801.106(c), and prohibit a government employee from using public office for his own private gain, 5 C.F.R. § 2635.702. See 18 U.S.C.A. § 208 (West 2000) (criminal conflict of interest provision).

In late January or early February 2000, Sasse received a request from a staff person in Congressman Kucinich's office to assist that office in evaluating environmental issues at the Cleveland airport, which was in the Congressman's district, and on February 2, 2000, Sasse informed the First Assistant United States Attorney of this contact. Tr. 254-256; RX Z-4. The First Assistant obtained more details from Sasse on the environmental problems and then asked Sasse to write a memo detailing his concerns. Tr. 831-832, 839; RX Z-5.

In his memo, Sasse alleged that NASA officials were engaged in a coverup of contamination on NASA property near the Cleveland airport. Based on Sasse's memo, the First Assistant, who carried special responsibility for public corruption cases, called in the FBI and EPA to investigate Sasse's charges. Tr. 258, 721-723, 840; CX17-E. In June or July 2000, investigators from the FBI, EPA, DOJ, and NASA's IG met with the First Assistant and unanimously concluded that there was no current evidence of criminal wrongdoing. Tr. 842.

On May 2, 2000, acting on the January 14, 2000 proposed disciplinary action, the Director of EOUSA suspended Sasse for five days for his October 1997 attempt to obtain private employment with NASA. 5/2/00 Letter from Santelle to Sasse (attached to 6/6/02

Letter from DOJ attorney Johnson to ALJ Tierney). The Director concluded that Sasse had violated the DOJ ethical regulation requiring prior approval before an employee engages in outside employment and the Office of Government Ethics regulation prohibiting an employee from using his public office for private gain. Santelle Letter, *supra*, at 2. Sasse did not appeal the suspension, and he was suspended from July 17, 2000 through July 21, 2000. *See* RX X-1.[4]

II. Procedural history

Sasse filed the instant complaint with OSHA on November 25, 1996. Sasse asserted that Cain unfairly downgraded Sasse's performance evaluations in 1991 and 1994, failed to nominate Sasse for advanced litigation training from 1989 until December 1995, failed to nominate Sasse for performance awards and for teaching assignments at the Justice Department, and assigned him an impaired secretary because Cain disapproved of Sasse's work in environmental crimes prosecution. Sasse also asserted that Cain treated him in a threatening and demeaning manner. Sasse complaint, *passim*.

OSHA opened an investigation and requested access to the personnel files of all the attorneys in the Cleveland office. Tr. 869. The U.S. Attorney's Office (USAO) denied the request. *Id.* Accordingly, OSHA deemed Sasse's allegations uncontested and on that basis affirmed the complaint. *Id.*

The Justice Department invoked its right to a hearing pursuant to 29 C.F.R. § 24.4(d) (2003). Before the ALJ, the Justice Department argued that the complaint should be dismissed because Sasse's claims were time barred, performance of his assigned duties prosecuting criminal violations of the CAA, CWA, and SWDA is not protected activity within the meaning of the statutes' whistleblower provisions, and principles of prosecutorial discretion and sovereign immunity bar review of prosecutorial activity in a United States Attorney's Office.

The ALJ denied the motion to dismiss and the case went to hearing in June 2001. Over DOJ's objections, at the close of the hearing the ALJ sua sponte amended Sasse's

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[4] On July 20, 2000, Representative Burton, as Chairman of the House Government Reform Committee, and Representative Kucinich wrote a letter to Attorney General Reno requesting her to detail Sasse to that Committee to assist in assessing the nature of the toxic contamination on the NASA site at the Cleveland Airport. CX 17-F, p. 166. The Justice Department officials in Washington responsible for responding to this request decided to deny the request because DOJ was at or near the "ceiling" it had established for detailees. RX Z-6, p. 1430. Accordingly, the Justice officials denied the request without discussing it with EOUSA or with the United States Attorney's office in the Northern District of Ohio. *Id.*; see also Tr. 833-834 (First Assistant did not see the request until a week and a half before the June 2001 ALJ hearing).

complaint to add a claim based on Sasse's five-day suspension. Tr. 1108 – 1109; R. D. & O. elec. op. at 15.

In his R. D. & O., the ALJ concluded that DOJ did not retaliate against Sasse for prosecuting the environmental crimes assigned to him and that the CAA, SWDA, and WPCA whistleblower provisions do not protect activities that are part of an employee's assigned duties. R. D. & O. elec. op. at 8, 9. However, the ALJ also concluded that Sasse's communications with persons outside his chain of command about contamination on NASA property was protected activity, and that DOJ retaliated against Sasse for these efforts under the pretext of ethics violations on Sasse's part. R. D. & O. elec. op. at 20, 23. The ALJ recommended back pay for the five-day suspension, $200,000 in punitive damages, attorney's fees, and a cease and desist order. Both parties petitioned for review of the R. D. & O.

On review, Sasse argues that the ALJ erred in ruling that Sasse's performance of assigned work prosecuting environmental crimes and assisting the Environmental Task Force is not protected activity under the relevant statutes. The Justice Department argues that the ALJ erred in his findings of fact, in denying the motion to dismiss for untimely filing, in reviewing exercises of prosecutorial discretion, in amending Sasse's complaint to add a claim based on Sasse's Congressional communications, and in awarding punitive damages against the United States absent a waiver of sovereign immunity.

OSHA filed an amicus curiae brief on behalf of the Justice Department. OSHA argues that Sasse's complaint is barred in its entirety by principles of sovereign immunity and prosecutorial discretion, that the ALJ erred in finding that the five-day suspension was imposed in retaliation for Sasse's Congressional contacts, and that sovereign immunity bars the award of punitive damages.

JURISDICTION AND STANDARD OF REVIEW

The environmental whistleblower statutes authorize the Secretary of Labor to hear applications of alleged discrimination in response to protected activity and, upon finding a violation, to order abatement and other remedies. *E.g.*, 42 U.S.C.A § 6971(b). The Secretary has delegated authority for review of initial decisions of an ALJ to the Administrative Review Board (ARB). 29 C.F.R. § 24.8 (2002). *See* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

Under the Administrative Procedure Act, the ARB, as the designee of the Secretary, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The Board engages in de novo review of the recommended decision of the ALJ. *See* 5 U.S.C.A. § 557(b) (West 2000); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman,* 115 F.3d 1568, 1571-1572 (11th Cir. 1997). The Board is not bound by an ALJ's findings of fact and conclusions of law because the recommended decision is advisory in nature. *See* Attorney Gen. Manual on

the Administrative Procedure Act, Chap. VII, § 8 pp. 83-84 (1947) ("the agency is [not] bound by a [recommended] decision of its subordinate officer; it retains complete freedom of decision as though it had heard the evidence itself"). *See generally Starrett v. Special Counsel*, 792 F.2d 1246, 1252 (4th Cir. 1986) (under principles of administrative law, agency or board may adopt or reject ALJ's findings and conclusions); *Mattes v. United States*, 721 F.2d 1125, 1128-1130 (7th Cir. 1983) (relying on *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), in rejecting argument that higher level administrative official was bound by ALJ's decision). An ALJ's findings constitute a part of the record, however, and as such are subject to review and receipt of appropriate weight. *Universal Camera*, 340 U.S. at 492-497; *Pogue v. United States Dep't of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991); *NLRB v. Stor-Rite Metal Products, Inc.*, 856 F.2d 957, 964 (7th Cir. 1988); *Penasquitos Vill., Inc. v. NLRB*, 565 F.2d 1074, 1076-1080 (9th Cir. 1977).

STATEMENT OF ISSUES

We deem the following issues to be dispositive:

1. Whether the Complainant Sasse's 1996 complaint and amendment were timely filed.

2. Whether Complainant Sasse's activities prosecuting environmental crimes entitled him to whistleblower protection under the CWA, CAA, and SWDA.

3. Whether Respondent DOJ's decisions involving appeals and prosecution of Complainant Sasse's cases are unreviewable acts of prosecutorial discretion.

4. Whether Complainant Sasse prevailed on the merits of personnel actions that did not involve prosecutorial discretion: performance appraisals and awards; service on an environmental task force; secretarial assignment; caseload; and training and teaching.

5. Whether the issue of the Complainant's five-day suspension was tried by mutual consent and, if so, whether he established that it was based on his protected Congressional contacts rather than his unethical proposal to NASA.

6. Whether the Complainant proved a hostile work environment complaint, based largely on the manner in which he was treated by his supervisor.

DISCUSSION

I. Dismissal of the Complaint and Amendment as Untimely

The environmental whistleblower statutes carry limitations periods of thirty days, meaning that, for the complaint to be timely, a complainant must file a complaint of unlawful discrimination within thirty days of a discrete adverse action. 33 U.S.C.A. § 1367(b); 42 U.S.C.A. § 7622(b)(1); 42 U.S.C.A. § 6971(b). The thirty-day limitations period begins to run on the date that a complainant receives final, definitive and unequivocal notice of a discrete adverse employment action. The date that an employer communicates its decision to implement such an action, rather than the date the consequences are felt, marks the occurrence of the violation. *Jenkins v. EPA*, ARB No. 98-146, ALJ No. 88-SWD-2, elec. op. at 14 (ARB Feb. 28, 2003). *See generally Chardon v. Fernandez*, 454 U.S. 6 (1981) (proper focus contemplates the time the employee receives notification of the discriminatory act, not the point at which the consequences of the act become painful); *Delaware State Coll. v. Ricks*, 449 U.S. 250 (1980) (limitations period began to run when the employee was denied tenure rather than on the date his employment terminated).

A complaint alleging hostile work environment is timely if all the acts comprising the claim are part of the same practice and at least one act comes within the thirty-day filing period. *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002) (application of doctrine under Civil Rights Act Title VII).

The Justice Department argues that Sasse's 1996 complaint is time barred because each adverse action alleged in the complaint occurred more than thirty days before November 25, 1996, when Sasse filed his complaint. Furthermore, DOJ argues, it is evident from the complaint itself that Sasse recognized the adverse nature of the listed employment actions at the time they occurred. DOJ points out that Sasse's August 1995 grievance of his 1994 performance evaluation listed the same employment actions as are listed in the 1996 complaint to OSHA. A side-by-side comparison of the grievance and his complaint reveals passages that are nearly identical and irrefutably establishes that the Complainant was fully aware of all the events complained of sufficient to assert a claim by August 2, 1995 (when Sasse filed his grievance). Indeed, Sasse admitted as much at the hearing below. Tr. 377-78. DOJ First Br. at 11.

At the hearing, Sasse testified that secretary X ceased to be his secretary at "some time" before he filed his complaint. Tr. 516. He stated that he filed his November 25, 1996 complaint within a week or two after he learned that secretary X was being "reassigned" to him. "[T]o me, it was – there had been some comments made to me about, you're not going to have her forever, you know, don't worry about it, we're going to receive [sic] secretarial assignments and whatnot, and then they assigned her to me again . . . . it seemed to me the reinitiation of the whole negative way in which I had been treated in my work at the office." Tr. 310.

The Deputy Chief testified that there was no "re-assignment" in 1996. Tr. 978-980. Even though some of Sasse's work was handled by other secretaries for a time, secretary X remained Sasse's secretary until and after Sasse filed his November 1996 Complaint – as evidenced by Sasse's signed concurrence on her April 1996 performance appraisal and by Sasse's complaint itself:

> 71. In or about October, 1992 . . . complainant asked Defendant Cain that his secretary be anyone but "secretary X. . . ."
>
> 72. Complainant informed Defendant Cain that assigning secretary X to complainant would jeopardize the success of the task force . . . .
>
> 73. Defendant Cain promised that complainant's views would be carefully considered in making the new secretarial assignments.
>
> 74. Defendant Cain assigned secretary X as complainant's secretary. *After continuous problems began with this secretary, complainant requested a new secretary, and continued to do so. To date, secretary X continues to be complainant's secretary.*

November 25, 1996 complaint (emphasis added).

Sasse's only response to DOJ's argument is that "[t]he continuing violation doctrine applies to address statute of limitations issues. Obviously, the statute of limitations is not at issue when the triggering event happens after the action is pending." Complainant's Second Appeal Br. at 27.[5]

We reject Sasse's claim that secretary X was "reassigned" to him. Therefore no discrete adverse employment action existed that generated a thirty-day window for Sasse to file a complaint about adverse actions more than thirty days old. Sasse's own testimony and complaint show that secretary X was assigned to him in 1992 and that Sasse's real objection was that she was not reassigned away from him in November 1996. Thus, the filing of the complaint in November 1996 comes too late to encompass claims about unfair performance appraisals in 1991 and 1994, the 1992 decision to assign

[5] In his brief to the Board Sasse also argues that DOJ violated the whistleblower provisions in various respects in 1999 and 2000. Complainant's first Br. at 8, 14, 32, 33. The ALJ did not purport to amend, and DOJ did not consent to amendment of Sasse's complaint to add additional claims based on these post-complaint actions. Therefore, we need not discuss them here.

secretary X to Sasse, and the failure up to 1995 to send Sasse to training he wanted. *Morgan*, supra.

The five-day suspension claim is also time barred because DOJ did not consent to amendment of the complaint to include it. The thirty-day limit for filing a complaint about the suspension expired 30 days after Sasse received notice of the decision to suspend him sometime in May 2000. And in point of fact, Sasse did file a complaint with OSHA about the suspension. As far as the record shows, that complaint was timely filed but rejected by OSHA on its merits. Tr. 508–509.

Some of the allegations in the complaint appear to be claims of a "hostile environment" that began in 1991 and continued into or recurred during the thirty days before Sasse filed his November 25, 1996 complaint. To the extent Sasse's complaint alleges a hostile work environment and at least one instance of hostile employment action occurred with 30 days of Sasse's complaint, the complaint was timely. *Morgan*, *supra*. However, after reviewing the record evidence, we have held, *infra*, that a hostile work environment did not exist. Therefore, the limitation period for filing a claim was not enlarged.

We consequently rule that the discrimination complaint and amendment were untimely and therefore dismiss them. Despite this finding, we proceed in the alternative to other bases for disposition in this case.

II. Complainant's 1996 Whistleblower Complaint and Amendment

A. Employee protection under environmental statutes

The employee protection (whistleblower) provisions of the CWA, CAA, and SWDA prohibit an employer from discharging or otherwise discriminating against an employee with respect to compensation, terms, conditions or privileges of employment, i.e., take adverse action, because the employee has notified the employer of an alleged violation of the Acts, has commenced any proceeding under the Acts, has testified in any such proceeding or has assisted or participated in any such proceeding.

Under the CWA, no person shall discriminate against any employee "by reason of the fact" that such employee has engaged in enumerated protected activity, namely

> filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

33 U.S.C.A. § 1367(a).

Under the CAA, no employer may discriminate against any employee "because" the employee has engaged in enumerated protected activity, namely

> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan,
>
> (2) testified or is about to testify in any such proceeding, or
>
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

42 U.S.C.A. § 7622(a).

Under the SWDA, no person shall discriminate against any employee "by reason of the fact that" such employee has engaged in enumerated protected activity, namely

> filed, instituted, or caused to be filed or instituted any proceeding under this chapter or under any applicable implementation plan, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter or of any applicable implementation plan.

42 U.S.C.A. § 6971(a).

We have construed the term "proceeding" broadly. The term "proceeding" encompasses all phases of a proceeding that relate to public health or the environment, including the initial statement of the employee that points out a violation, whether or not it generates a formal or informal "proceeding." *Passaic Valley Sewerage Com'rs v. United States Dep't of Labor*, 992 F.2d 474, 479 (3d Cir. 1993). *Cf. Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159 (9th Cir. 1984) (Energy Reorganization Act); *Phillips v. Interior Board of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1974) (Coal Mine Safety Act); *Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 959 (D.C. Cir. 1984) (Federal Mine Safety and Health Act).

We have also construed the terms "commenced, testified, assisted, or participated" broadly. Petitioning Congressional subcommittees about diminished environmental regulation, and complaining internally about inadequate and inappropriate regulation are protected activities. *See, e.g., Passaic Valley Sewerage Com'rs*, 992 F.2d at 478-480 ("proceeding" includes intracorporate complaints that sewerage system was "inordinately expensive, inefficient, scientifically unreliable and in violation of the Clean Water Act user charge provisions"); *Pogue*, 940 F.2d at 1288-1289 (complainant employed in "hazardous waste oversight position charged with the responsibility for surveying and reporting on hazardous waste compliance[;]" undisputed protected activity

included preparation of internal reports documenting noncompliance at Navy shipyard and transmittal of letter to shipyard commander detailing environmental violations).

Self-auditing work, and the compliance and retaliation concerns it generates, and development of a methodology to be used for risk assessment are protected activities. *Jarvis v. Battelle Pac. Northwest Lab.*, ARB No. 97-112, ALJ No. 97-ERA-15 (ARB Aug. 27, 1998). The reporting of statutory violations by an employee whose assigned job is to discover and report instances of noncompliance so that the employer may correct them can be protected activity within the meaning of these provisions. *Jenkins v. EPA*, ARB No. 98-146, ALJ No. 88-SWD-2, elec. op. at 18 (ARB Feb. 28, 2003), citing *Pogue.*

At issue is whether Sasse's participation in criminal enforcement actions are "proceedings" and whether he made internal complaints that that would bring him under the protection of the whistleblower statutes and decisions.

B. R. D. & O. analysis; ARB decision to assume without ruling that the Complainant is protected employee

The ALJ made no reference to CWA, CAA or SWDA precedents in determining that Sasse's work as a prosecutor was not protected activity. The ALJ relied instead on decisional law arising under the whistleblower protection provision of the Civil Service Reform Act (CSRA). 5 U.S.C.A. § 2302(b)(8)(A) (West 1996). Protected activity under § 2302(b)(8) is "any disclosure of information by an employee . . . which the employee reasonably believes evidences" a violation of law or gross mismanagement. The Federal Circuit has ruled that § 2302(b)(8) "was established to protect employees who go above and beyond the call of duty and report infractions of law that are hidden. The situations which Congress specifically covered [in legislative history] were disclosures to the press and to Congress itself." *Huffman v. OPM*, 263 F.3d 1341, 1353 (Fed. Cir. 2001) (footnote omitted). "All government employees are expected to perform their required everyday job responsibilities 'pursuant to the fiduciary obligation which every employee owes to his employer.'" *Id.*, citing *Willis v. Department of Agric.*, 141 F.3d 1139, 1144 (Fed. Cir. 1998). R. D. & O. elec. op. at 6.

Reporting wrongdoing through normal channels is not protected activity under § 2302(b)(8) because such reporting does not put the employee's personal job security at risk. "A law enforcement officer whose duties include the investigation of crime by government employees and reporting the results of an assigned investigation to his immediate supervisor is a quintessential example." *Willis*, 141 F.3d at 1144. R. D. & O elec. op. at 6.

Applying principles derived under § 2302(b)(8), the ALJ concluded that Sasse's performance of assigned work prosecuting environmental crimes and assisting the Environmental Task Force was not protected activity. "In order for Complainant's activity to be protected, his disclosure would have necessarily been to someone outside of the DOJ chain of command or involve matters other than his daily activities." R. D. & O.

elec. op. at 8. However, Sasse's contacts with Congressional staffers and others outside his office was not assigned work and therefore could be counted as protected activity. "Congressman Kucinich is not in Complainant's chain of command and Complainant's dealings with the Congressman are not a part of his normal work duties." *Id.* at 20.

As is evident from our discussion of relevant environmental whistleblower precedents, the environmental whistleblower provisions are significantly broader in scope than the CSRA whistleblower protection provision. Under these statutes, going outside the chain of command or putting one's job at risk is not necessary for reporting to qualify as protected activity. To the extent the ALJ relied on 5 U.S.C.A. § 2302(b)(8) and defines protected activity more narrowly than does our own precedent, he erred.

Before us, Sasse contends, as he did below, that his prosecution and investigation of environmental crimes under the CAA, CWA and SWDA is protected activity within the meaning of the statutes' whistleblower provisions because prosecution and investigation of environmental crimes is an "action to carry out the purposes of the Act" under the CAA, and "institut[ing] a proceeding" under the CWA and SWDA. Complainant's First Br. at 28.

Sasse's reasoning is novel; we have not had occasion to decide the protected status of attorneys litigating against violators of the environmental protection statutes. We disagree with Sasse's proposition that his work prosecuting environmental crimes is protected activity per se, and that his management's disagreements on case prosecution should be deemed actionable interference. As we note below, we will not review the prosecutorial decisions of his supervisors, and therefore his claims cannot be predicated on his employment status alone. On the other hand, as we also discuss, DOJ as an employer is not wholly immune from challenge that it took discriminatory acts because Sasse was engaged in statutorily protected activities. We need not and therefore do not draw a fixed line between protected and unprotected acts in this case, since Sasse's claims all fail for a variety of other reasons: timeliness, prosecutorial discretion, and burden of proof. Thus for purposes of this decision, we assume without deciding that under the environmental whistleblower precedents Sasse's work on environmental crimes was protected activity.

C. Non-reviewability of actions based upon prosecutorial discretion

1. Respondent DOJ and amicus OSHA's assertion of immunity

Sasse cites as evidence of Cain's hostility to Sasse's prosecution of environmental crimes three cases in which Cain opposed prosecutive action. In two cases, Cain opposed

appeals from district court decisions. In the third case, Cain decided to decline prosecution.[6]

DOJ argued below, as it does on appeal, that Cain and DOJ's decisional process in those cases constitutes an unreviewable exercise of prosecutorial discretion. The ALJ agreed that prosecutorial discretion does bar review of prosecutive decision making. However, his discussion of the issue indicates that in his view, the only person at the USAO office with prosecutorial discretion was the U. S. Attorney. "The United States Attorney is the chief law enforcement officer in each federal judicial district and has the authority, within certain guidelines [such as] the United States Attorney's manual, principles of federal prosecution, to run the office the way he or she sees fit for the benefit of the citizens of that district." R. D. & O. elec. op. at 9, quoting First Assistant Edwards. "None of the prosecutions handled by Complainant involve any aspect of protected activity. The decision of whether to prosecute must be left to those with authority to do so. This is the essence of prosecutorial discretion." R. D. & O. elec. op. at 9. The ALJ went on to analyze the decisional process in which Cain, Stickan, Sasse and others engaged to decide whether to appeal and whether to seek indictment in certain cases.

The Justice Department argues that prosecutorial decisions are shielded from review because they are purely discretionary. "Prosecutorial discretion is the exercise of professional judgment to decide if and how a case will be prosecuted. Prosecutorial decisions made by USAO management officials are not reviewable. Prosecutorial discretion is an inviolate right of the Executive Branch rooted in the Separation of Powers doctrine under the United States Constitution." DOJ Response Br. at 19. "It would raise serious separation of powers questions—as well as a host of virtually insurmountable practical problems—for the district court to inquire into and supervise the inner workings of the United States Attorney's Office." *United States v. Redondo-Lemos*, 955 F.2d 1296, 1299 (9th Cir. 1992). *Id.* at 20. "[N]othing in the environmental acts authorizes the DOL to breach the authority vested by statute and by the Constitution in the Executive Branch, and specifically in the Attorney General, by examining the basis for DOJ decisions to decline or pursue prosecution of federal environmental laws." *Id.* at 20-21.

As amicus, OSHA contends that prosecutorial discretion bars review of any part of Sasse's complaint. "We agree with DOJ that its prosecutorial decisions are not subject to review. . . . To avoid interference with DOJ's prosecutorial decision making, however,

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[6] In his post-hearing brief and briefs on review, Sasse argues that Cain and others declined to prosecute the case because former EPA employees worked there. Sasse First Appeal Br. 16-23; Post-hearing Br. 32-36. This is a baseless accusation; not a scintilla of evidence supports the notion that Cain or anyone else was influenced by the fact that former EPA employees worked at the company in question.

the ARB should do more than merely strike portions of the ALJ's decision, as DOJ argues." OSHA Br. at 12. OSHA offers two reasons for nonreviewability. First, "just as courts 'presume that Congress would have specifically so provided had it wished to abolish' a prosecutor's absolute immunity from suit for acts taken in a prosecutorial capacity, *Buckley [v. Fitzsimmons*, 509 U.S. 259, 268 (1993)], so the ARB should presume that Congress would have specifically provided if it intended the environmental whistleblower provisions to abolish the rule against review of DOJ's prosecutorial decision making." OSHA Br. at 13-14.

"[A] related reason the CAA, SWDA, and WPCA provisions should not be construed to protect Sasse's activities in this case is to avoid serious separation of powers questions." *Id.* at 20. "Protecting Sasse's activities in this case would . . . allow a court, on review of a DOL's decision on a discrimination Complaint, to decide (as Sasse argues) that supervisory hostility to environmental cases (or to the way a particular AUSA wants to litigate them) violates the statute. And it could open the door to intrusive remedies . . . and court oversight of DOJ's prosecutorial priorities to ensure that DOJ complied with such a remedy." *Id.* at 16.[7]

Sasse makes no response to these arguments except to note that prosecutorial discretion exists and that applying it to the CAA, CWA and SWDA whistleblower provisions would effectively immunize supervisory prosecutors for violations of those provisions. Complainant's First Br. at 30.

We agree with DOJ and OSHA that the whistleblower provisions, which make no reference to prosecutorial discretion, must be construed in light of that doctrine. We also agree with DOJ that the portion of the R. D. & O. reviewing USAO and DOJ's prosecutive decisional process intrudes into the realm of prosecutorial discretion and should therefore be stricken. *Armstrong, supra.*

However, we find OSHA's argument that prosecutorial discretion bars review of any part of Sasse's complaint overbroad and inconsistent with the doctrine itself.

2. Prosecutorial functions

Prosecutorial discretion is the exercise of professional judgment to decide if and how a case will be prosecuted. *Kalina v. Fletcher*, 522 U.S. 118, 126 (1997). The

[7] With respect to the separation of powers argument, we note that the Supreme Court has "never held that the Constitution requires that the three branches of Government 'operate with absolute independence.'" *Morrison v. Olson*, 487 U.S. 654, 689 n. 27 (1988). As OSHA concedes, courts have authority to review Constitutional claims against prosecutors. And the Appointments Clause of the Constitution provides that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the courts of Law, or in the Heads of Departments." U.S.C.A. Const. Art 2, § 2, cl. 2.

exercise of prosecutorial discretion is unreviewable; the prosecutor is absolutely immune from suit for the exercise of prosecutorial discretion. *Id.*; *United States v. Armstrong*, 517 U.S. 456 (1996). Prosecutorial discretion has its roots in the common law and in the Separation of Powers doctrine under the United States Constitution. "The case law is legend from the Supreme Court and the courts of appeals that investigatory and prosecutorial function rests exclusively with the Executive." *United States v. Derrick*, 163 F.3d 799, 824-25 (4th Cir. 1998). "Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." *Wayte v. United States*, 470 U.S. 598, 607, 1530 (1985).

The prosecutor's decision not to take prosecutive action is never reviewable. *Cf. Heckler v. Chaney*, 470 U.S. 821, 831 (1985). However, even core functions of the prosecutor are reviewable for Constitutional violations. *United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("Of course, a prosecutor's discretion is 'subject to constitutional constraints,'" quoting *United States v. Batchelder*, 442 U.S. 114, 125 (1979)).

The Justice Department argues that "as a Constitutionally-based doctrine, prosecutorial discretion cannot be overridden or curtailed by federal statute or agency regulations." Complainant's Response Br. at 20. Thus, DOJ asserts, we are Constitutionally bound to apply the doctrine of prosecutorial discretion to the whistleblower provisions.

We need not decide whether it is the Constitution or the doctrine itself that forbids an interpretation of the whistleblower provisions permitting review of prosecutors' decisions to appeal or to seek indictment. We conclude instead that prosecutorial discretion occupies such a prominent place in American jurisprudence that Congress would have been explicit had it intended to abrogate prosecutorial discretion in the whistleblower provisions. *See Forrester v. White*, 484 U.S. 219, 225 (1988) (the Court "has not been quick to find that federal legislation was meant to diminish the traditional common-law protections extended to the judicial process"); *Nixon v. Fitzgerald*, 457 U.S. 731, 746 (1982) (Abrogation of executive, legislative and juridical immunities must be express, because the public interest is best served by such vital decision makers if they can exercise their functions with independence and without fear of personal consequences).

3. Scope of prosecutorial discretion

Having concluded that prosecutorial immunity applies to Sasse's complaint, we must determine the scope of the immunity. DOJ invokes prosecutorial discretion only as it relates to DOJ's deliberative process for deciding to appeal or indict in three of Sasse's cases. DOJ Response Br. at 21-22. OSHA argues that immunity applies to all the supervisory actions of which Sasse complains because they all implicate prosecutive judgments. OSHA Br. at 12.

As we understand OSHA's position, OSHA views Sasse's claims that Cain overburdened him with assignments, held him to disparate performance standards, imposed unfair time restraints, and assigned Sasse an incompetent secretary as inextricably bound up in core prosecutorial decisions such as when to seek an indictment in a particular case, how much of the office's resources to devote to a case or a class of cases, prioritizing enforcement strategies, e.g., creating a task force for a particular category of offenses. *Id*. at 16. Correspondingly, OSHA argues, the remedies Sasse seeks, such as reassignment to another supervisor, would interfere with the U.S. Attorney's policy choices about resource allocation, prioritizing categories of crimes and so on. *Id.* at 15-16.

OSHA does not, however, address Supreme Court and appeals court decisions holding that prosecutors do perform functions other than prosecutive functions and that unreviewability applies only to some of those prosecutive functions. In *Imbler v. Patchman*, 424 U.S. 409, 430 and n. 33 (1976), the Court expressly differentiated between prosecutive functions and administrative and employer functions of prosecutors. The Court stated that the policy considerations that justified the common-law decisions affording absolute immunity to prosecutors when performing traditional functions included both the interest in protecting the prosecutor from harassing litigation that would divert his time and attention from his official duties and the interest in enabling him to exercise independent judgment when deciding which suits to bring and in conducting them in court.

The former interest would lend support to immunity from all litigation against the occupant of the office whereas the latter is applicable only when the official is performing functions that require the exercise of prosecutorial discretion. "[I]t [is] clear that it is the interest in protecting the proper functioning of the office, rather than the interest in protecting its occupant, that is of primary importance." *Imbler*, 522 U.S. at 125.

The *Imbler* Court specifically noted that it might not be appropriate to apply prosecutorial immunity when the prosecutor acts as administrator or investigative officer). *Id.*, 424 U.S. 409, 430 and n. 33. In *Forrester*, 484 U.S. at 226, a case in which the Court held that a judge did not have absolute immunity for a personnel decision, the Court described the scope of prosecutorial discretion as to those tasks that are "intimately associated with the judicial phase of the criminal process." In *Kalina*, *supra,* the Court held that a prosecutor's preparation and filing of charging documents were prosecutive actions, but her certification for a determination of probable cause was not one of the traditional functions of an advocate. Only the prosecutor could prepare and file charging documents; any witness could attest to facts alleged for probable cause purposes.

"The common-law immunity of a prosecutor [from civil suit] is based upon the same considerations that underlie the common-law immunities of judges and grant [sic] jurors acting within the scope of their duties." *Imbler*, 424 U.S. at 422-423. Like prosecutors, judges and grand juries have unreviewable discretion only for core functions. "A judge who hires or fires a probation officer cannot meaningfully be

distinguished from a district attorney who hires and fires assistant district attorneys, or indeed from any other Executive Branch official who is responsible for making such employment decisions." *Forrester,* 484 U.S. at 229. "Such decisions, like personnel decisions made by judges, are often crucial to the efficient operation of public institutions (some of which are at least as important as the courts), yet no one suggests that they give rise to absolute immunity . . . ." *Id.* "In determining the scope of judicial immunity, a line must be drawn between judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges." *Id.,* 484 U.S. at 227.

Based on this body of law, we conclude that a distinction can and should be drawn between the prosecutor's function as advocate in the judicial process and the prosecutor's function as an employer and administrator – despite the fact that the latter significantly affects the former. In the instant case, OSHA's argument that prosecutorial discretion bars Sasse's complaint in its entirety seems inconsistent with a functional approach to prosecutorial discretion. We agree with DOJ that the deliberative process involving questions whether to appeal or to indict are unreviewable exercises of prosecutorial discretion. However, we disagree with DOJ insofar as DOJ's actions in applying performance standards, assigning support staff to AUSAs, affording opportunities for training and teaching are not so "intimately associated with the judicial phase of the criminal process" as to be unreviewable. Accordingly, we proceed to review those portions of Sasse's complaint.

D. Merits of 1996 environmental whistleblower complaint

1. Elements, burdens of proof and persuasion

To prevail on a complaint of unlawful discrimination under these environmental whistleblower statutes, a complainant must establish by a preponderance of the evidence that the respondent took adverse employment action against the complainant because she engaged in protected activity. *Carroll v. United States Dep't. of Labor,* 78 F.3d 352 (8th Cir.1996); *Ellis Fischel State Cancer Hosp. v. Marshall,* 629 F.2d 563, 566 (8th Cir.1980). The ARB and reviewing courts may apply the framework of burdens developed for use in performing a pretext analysis under Title VII of the Civil Rights Act of 1964 and other employment discrimination laws. *See, e.g., Kahn v. Secretary of Labor,* 64 F.3d 271, 277 (7th Cir. 1995); *Couty v. Dole,* 886 F.2d 147 (8th Cir. 1989).

A complainant, at hearing, first must establish a prima facie case, thus raising an inference of unlawful discrimination. A complainant meets this burden by showing that the employer is subject to the applicable whistleblower statutes, that the complainant engaged in activity protected under the statutes of which the employer was aware, that he suffered adverse employment action and that a nexus existed between the protected activity and adverse action. *See Bechtel Constr. Co. v. Secretary of Labor,* 50 F.3d 926, 933-934 (11th Cir. 1995); *Simon v. Simmons Foods, Inc.,* 49 F.3d 386, 389 (8th Cir. 1995) (*citing Couty,* 886 F.2d at 148 ("[p]roximity in time is sufficient to raise an inference of causation")).

The burden then shifts to the employer to produce evidence that it took adverse action for a legitimate, nondiscriminatory reason. In the event that the employer meets this burden of production, the inference of discrimination disappears, leaving the single issue of discrimination vel non. The complainant then must prove by a preponderance of the evidence that the employer intentionally discriminated. *E.g., Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) (Age Discrimination in Employment Act); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

The ultimate burden of persuasion rests always with the complainant. To meet this burden, a complainant may prove that the legitimate reasons proffered by the employer were not the true reasons for its action, but rather were a pretext for discrimination (*St. Mary's Honor Center*, 509 U.S. at 507-508, i.e., a complainant may prove that he suffered intentional discrimination by establishing that the employer's proffered explanation is unworthy of credence. *Burdine*, 450 U.S. at 256. An adjudicator's rejection of an employer's proffered legitimate explanation for adverse action *permits* rather than compels a finding of intentional discrimination. Specifically, "[i]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." *Burdine*, 450 U.S. at 519.

We proceed to a review of the evidence in this case in the light of the legal standards just enunciated for establishing an environmental whistleblower claim: Sasse's prima facie case; DOJ's articulation of legitimate, non-discriminatory reasons for the personnel actions taken; and finally whether Sasse has proven by a preponderance of the evidence that DOJ intentionally discriminated against him.

2. Performance appraisals and awards

Cain and Stickan gave Sasse an "Excellent" overall performance evaluation for each year 1990 through 1994. The overall evaluation was based on ratings for specific job elements: manages caseload assignments; conducts trials and/or arguments before judges and/or juries; effectively deals with courts, clients and others; appeals, and training.

In 1990, Sasse received an "outstanding" for appeals work. However, he received "excellent" for appeals work in 1991, 1992, 1993, and 1994. Had Sasse received outstandings for appeals work in the years 1991 through 1994, his overall performance evaluation would have remained "Excellent."

Sasse contends that the change from outstanding to excellent for appeals work was unjustified and discriminatory. We have held that a downgraded personnel evaluation can constitute an adverse action. *Jenkins*, elec. op. at 18. We have not had occasion to determine whether an excellent rather than outstanding on an element of a performance appraisal which does not affect the overall performance appraisal rating is a material adverse action – particularly since Sasse suffered no economic loss or opportunities for advancement as a result of his "Excellent" performance appraisals. R.

D. & O. elec. op. at 8 (undisputed on appeal).[8] *Cf. Griffith v. Wackenhut Corp*. ARB No. 98-067, ALJ No. 97-ERA-52 (ARB Feb. 29, 2000) (not everything that makes an employee unhappy is actionable adverse action; the employer action must be "materially" adverse); *Jenkins*, elec. op. at 20 (expressing uncertainty on the question whether employment evaluations that do not result in material disadvantage constitutes materially adverse action).

Sasse felt he should have received outstanding for appeals work in 1991 because of his work on two successful appeals in that year. Tr. 119, 123. When Sasse asked the Deputy Chief why he did not receive an outstanding, the Deputy Chief reminded Sasse that the Justice Department's Environmental Crimes Section had "helped" with both appeals. Tr. 119, 122. Indeed, DOJ wrote the appellate brief in *Bogas* and substantially re-wrote Sasse's draft in *Rutana*. *Id.* To Sasse, this was irrelevant. "I've never known anyone to be reduced for having a fabulous conclusion to a case just because someone else assisted them." Tr. 120. In addition, the fact that Sasse presented the oral argument in *Bogas* in 1990 could not help his 1991 appeals rating.

Sasse also believed the outstanding he deserved for 1991 should have been carried over to rating year 1992 even though he did no appellate work in 1992. "I said, well, it isn't the practice of the office to reduce you in an area if you haven't had activity. . . . I mean, it's not like we presume your skills have eroded unless you show us to the contrary. . . ." Tr. 120. Sasse stated that he formed the impression that it was office practice to carry over outstanding ratings in conversations he had with a supervisor in the General Crimes Division in 1986. Tr. 360-361.

In 1993, Stickan warned Sasse that his rating for case management might drop because Sasse had missed deadlines that, in Stickan's judgment, compromised cases. RX 0-6. Sasse's 1994 rating for case management did drop, from excellent to fully successful. Sasse's rating for training also dropped, from outstanding to excellent. RX 0-5 at 1028. Neither rating caused Sasse to lose his overall performance evaluation of Excellent.

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[8] Sasse claims these ratings were the reason Sasse was not selected for two supervisory positions for which he applied. Tr. 301-303. *But compare* Tr. 477 (Sasse does not know why he was not for which selected). However, the record shows that the selecting officials chose other candidates based in large part on their supervisory and management experience – of which Sasse had none. RX Z-3. *Cf. Bassett v. Niagara Mohawk Power Co.*, No. 86-ERA-2, elec. op. 6 (Sec'y Sept. 28, 1993) ("employer did not discriminate against Complainant by relying in part on Complainant's lack of recent supervisory experience); *Stewart v. Ashcroft*, 353 F.3d 422 (D.C. Cir. 2003) (superior managerial expertise of chosen applicant was legitimate, nondiscriminatory reason for attorney's nonselection for chief of DOJ's Environmental Crimes Section).

Sasse filed a grievance over the 1994 performance evaluation. As in this case, Sasse argued that he was held to a higher performance standard than other AUSAs because of his environmental crimes work. RX G-2b. The Executive Office for U.S. Attorneys denied Sasse's grievance.

The Deputy Chief testified that the reduced ratings were due to Sasse's failure to bring several non-environmental crimes cases to a successful and timely conclusion. Tr. 946-948. In one case, the Deputy tried to salvage one of Sasse's cases by assigning another attorney to help, but the second AUSA concluded that too many mistakes had been made to save the case. Tr. 949-951. In another case, Sasse let the statute of limitations pass. Tr. 956-958. In a third case, Sasse declined to prosecute a case that the Deputy considered actionable. Tr. 962.

Sasse's argument that he was held to a different and harsher performance standard than other AUSAs in the Criminal Division in 1991 and 1994 rests entirely on his uncorroborated and vague testimony about the performance standards applied to similarly situated AUSAs. Sasse has the burden of proof and persuasion on each claim of adverse action. *McDonnell Douglas; Burdine* (the complainant alleging disparate treatment carries the burden of proving how similarly situated persons were treated more favorably because of the employer's illegal motive); *Overall v. TVA*, ARB Nos. 98-111, 98-128, ALJ No. 97-ERA-53 (ARB Apr. 30, 2001) (disparate treatment claim is evaluated based on evidence of treatment accorded to complainant "*vis-à-vis* treatment of employees who were comparably qualified or even less qualified"). Sasse's vague impressions of office practices is insufficient to support a finding of disparate treatment. Moreover, DOJ proved that Sasse's performance appraisals were based on the quality of his work rather than discriminatory animus.

3. Environmental Task Force

In January 1991, U.S. Attorney Joyce George attended a Justice Department seminar on environmental crimes in New Orleans, where Sasse gave a presentation on application of sentencing guidelines to environmental crimes. Tr. 20-24. After that, George decided to form an Environmental Task Force for northeastern Ohio. Tr. 129. The Environmental Task Force would include Federal, State, and local law enforcement agencies with overlapping jurisdictions and serve as a clearinghouse for information and coordination. George asked Sasse to assist in the drafting of letters of invitation. Tr. 135. In May 1991, Sasse became chairman of the task force. Tr. 136-137.

Sasse contends that George did not consult Cain about putting Sasse on the task force and that Cain resented that. According to Sasse, this was an important reason for Cain's harsh treatment. Tr. 523-524.

Sasse's perception does not square with the record evidence. Even before the New Orleans conference, Sasse was falling behind in his assignments, including non-environmental matters. RX N-3. In their February 1991 file review, Cain remonstrated with Sasse about specific cases that had not been worked on for several months. Tr.

1076. Cain raised the matter with First Assistant U.S. Attorney Foley, who had also attended the New Orleans conference and participated in development of the Environmental Task Force. In a note to Foley after the February file review, Cain stated: "Greg is making the Task Force a full time job to the exclusion of his other cases. Some have not been looked at since October: RX N-3; Tr. 1077. Cain had Foley's full support. "Mr. Sasse didn't want anything but environmental work and Mr. Kane [sic], as the division chief, assigned him other than environmental work, and . . . it was my strong view that that was appropriate." Tr. 1136, *see* 1079.

That Cain's true concern was with Sasse's low productivity rather than Sasse's work on the Task Force is supported by Sasse's history of productivity problems. When Sasse was first hired in 1983, he was assigned to the Organized Crimes Drug Task Force. Tr. 30-33. His first supervisor, Kenneth McHargh, considered Sasse competent but not on par with the other attorneys in the unit. Tr. 35, 890-891. Then-Chief of the Criminal Division Kevin Connelly and McHargh concluded that Sasse "would be better suited to try another unit" and transferred him to the Economic Crimes Unit. Tr. 897; 891. There, his second supervisor, Ann Rowland, found Sasse to be experienced and able but not productive enough. Tr. 898.

In 1987, "[c]oncerned about trying to give Mr. Sasse a niche in the office that would satisfy and motivate him," Rowland and Cain (who had replaced Connelly as Criminal Division Chief) decided to send Sasse to an environmental crimes seminar in New Orleans. Tr. 42, 899. Congress had recently passed legislation criminalizing environmental protection violations and it was clear this would be a burgeoning area of law. Tr. 112, 551. After that, Cain authorized Sasse to travel around the country to attend dozens of seminars and give presentations on environmental law issues. Tr. 441.

Moreover, anyone in the position of Chief of the Criminal Division would have an interest in the success of the Task Force since the Task Force would supplement the USAO's access to information and resources and thereby help in accomplishment of the USAO's mission. We agree with the Justice Department that it would be highly unlikely that a person in Cain's position would attack an AUSA as a means of undermining his U.S. Attorney. Considering all the circumstances surrounding Sasse's assignment to the Environmental Task Force, we cannot find Cain acted against him because Cain was not consulted about the assignment. Thus, Sasse failed to prove an essential element of a whistleblower claim – that the employer's proffered legitimate reason was pretextual. *Burdine, supra.*

4. Secretarial assignment

Sasse contends that Cain took adverse action against him by assigning Sasse a secretary who was not up to the job. Tr. 307. However, Stickan testified that neither Cain nor Sasse's environmental work had anything to do with the secretarial assignment. New secretarial assignments were made when the USAO moved to another building in October 1992, when the USAO moved to new quarters in Cleveland. Tr. 512. Sasse's new office was adjacent to AUSA Polster, for whom "secretary X" had worked for many

years. Secretary X's office was near the two AUSAs. Stickan testified the assignment was based solely on the proximity of the two AUSAs to this secretary. Tr. 989-990,

We find Stickan's testimony that the secretarial assignment was based on office layout more persuasive than Sasse's unsupported conjecture that Cain was willing to undermine Sasse's work – only some of which was environmental – out of personal antipathy to environmental matters. Nor does Sasse's conjecture square with the fact that this secretary had worked for years for AUSA Polster, who did no environmental work. Tr. 990.

Additionally, Stickan and Cain's response to Sasse's complaints to them about secretary X is inconsistent with Sasse's theory. After Sasse repeatedly complained about secretary X, Stickan placed her on leave restrictions and a performance improvement plan. This required her to sign in each day with Stickan. Tr. 514; 992. She had to keep a log of assignments coming in and assignments completed. Stickan personally conducted a desk audit and monitored her progress in clearing up a back log of work. Tr. 965-966, 992. AUSA Polster personally counseled her during this period. Tr. 954.

By the end of 1995, secretary X had improved so much that Stickan rated her excellent in every performance element for that year. Tr. 993; RX D-4. Sasse agreed with this assessment and wrote "I agree" on the appraisal, which was dated April 1966. Tr. 965; 516. Moreover, an interoffice memorandum issued in 1997 shows that secretary X was actually reassigned away from Sasse several months after he filed his complaint. CX D-7.

We conclude that Sasse did not prove that his secretarial assignment was retaliatory. DOJ established by a preponderance of the evidence that the assignment was based solely on office proximity.

5. Caseload

Sasse worked in the Economic Crimes unit of the Criminal Division. There, a caseload of 40 matters (not in litigation) and cases (in litigation) was considered "average." Tr. 920. Barring unusual circumstances, an AUSA would be expected to produce about 20 final dispositions per year. Final dispositions could be anything from verdict after trial to a decision to decline prosecution. Tr. 399-401; 920; 1023. The sole evidence Sasse offered in support of his claim that he was burdened with twice the average caseload is the following testimony:

> Q Now, you indicated several times on direct that there was a period of time when you had a high of 87 cases on your personal docket.
> A Correct
>
> A It was whenever I stated it. It was the mid-90s. I don't recall the exact date.

> Q Now, how long did you have these 87 cases on your docket in the mid 90s?
>
> A That was a peak. There were other numbers. There were 84, some in the 70s, and I would have to review the documents that we gave you to determine exactly what the numbers were but it bounced around, obviously. I mean, as you close cases out, the number would go down; as you got new cases, the number would go up, that kind of thing.
>
> Q And you don't know for how long it stayed at that 87 level, whether it was three months, six months, nine months?
>
> A That was one snapshot in time, and that was a high as I recall. It was the most, so it didn't stay at that level at all, to my recollection.
>
> Q Did you snapshot in time any periods when you had lows in your caseloads?
>
> A There were periods when there were fewer cases, and I think we gave you those documents, too. Whatever they say, they say.

Tr. 402-403. The record contains no documents supporting Sasse's testimony.

We find Sasse's testimony so vague and conclusory that Sasse failed to show discriminatory animus. Nonetheless, DOJ put on rebuttal evidence.

The Deputy Chief testified that Sasse never had 87 cases on his personal docket. Tr. 1020. The Deputy testified that he reviewed Sasse's quarterly case load printouts, was unable to find any with 87 entries, but did find one quarterly printout dated July 1, 1993, with 81 entries. Tr. 1021; RX Z-8. The Deputy Chief explained that matters and cases with multiple defendants appear on the list with a separate entry for each defendant. The Deputy testified that 81 entries amounted to 39 cases, of which five required little or no action by Sasse. That left Sasse with 34 pending matters/cases. Tr. 1023.

The Deputy further testified that Sasse resolved eight cases in 1993, four of which were fast track bankruptcy cases. In 1994, Sasse resolved nine cases, four of which were fast track cases. In 1995, Sasse resolved close to 20 cases. In 1996 Sasse's productivity went down. In all, Sasse had four trials from 1991 through July 2001. Tr. 1023-1024.

On this record we cannot find that Sasse carried a significantly greater caseload than the average for the Economic Crimes unit, much less that his caseload reflected supervisory animus.

6. Training and teaching

Between April 1987, when Cain became Chief of the Criminal Division, and December 1995, he authorized Sasse to attend dozens of legal seminars and classes, including eleven seminars or classes related to environmental crimes. RX V-4, V-3; Tr. 88-89. Sasse participated as a speaker at most of the environmental events. Tr. 88.

However, Sasse also wanted to attend specific seminars on white collar crime and advanced evidence. Tr. 298-299. Further, Sasse wanted to teach at the Justice Department's Attorney General's Advocacy Institute. Sasse testified that he received all the advanced training he wanted starting January 1996, but he attributed this to the fact that in October 1995 he "gave notice" of his intent to file the complaint in this case. Tr. 298; 444. He never got to teach at the Advocacy Institute. Tr. 300.

At the hearing, Sasse conceded that he was asked during discovery if he knew how AUSAs are selected for training and teaching at DOJ and that he had testified then that he did not know. Tr. 431. By the time of the hearing in 2001, Sasse had made some effort to learn the procedure: "there are various slips for various approvals that go through the office now . . . and I know that when you're nominated, you're not always selected." Tr. 431-432.

Nonetheless, Sasse was adamant that Cain deliberately withheld training and teaching opportunities from Sasse because of Sasse's environmental work. "Cain was mad at me. He didn't like me. He was upset over the environmental stuff." Tr. 299. "It's my conclusion I drew from the hostile manner in which he treated the cases and me, and the lack of any kind of perks [sic] of the office or positive recognition, and, you know, the negative actions taken. I kind of put it all together and inferred that was the reason." Tr. 299-300; 452.

Sasse explained that he based his belief that other AUSAs in the Economic Crimes unit were receiving more training on "office scuttlebutt." Tr. 432.

> Q You really don't know, do you, whether they [other AUSAs] have been provided with greater training opportunities or advantages than you have, do you?
>
> A Well, I would hear that they would go to seminars. I heard that someone went twice to the same seminar, because the guy who was going to go couldn't go, so they just needed someone quick, and they used him to go, but I don't even recall whether that was within the Economic Crimes or General Crimes or what unit.

> I know a little bit about it, and I knew people would say things like I went to the advanced evidence seminar, so I heard there were such things, but I didn't have any, you know, great knowledge.

Tr. 433.

We find Sasse's uncorroborated assumptions and inferences insufficient to establish discrimination. Nonetheless, we note that DOJ affirmatively proved that Sasse himself was responsible for the amount of training he received and gave. First Assistant U.S. Attorney Edwards, who served as training officer for the Cleveland USAO, testified that the courses Sasse wanted were given by the Justice Department. U.S. Attorney offices can nominate AUSAs for attendance and for teaching, but DOJ makes the final selections. Tr. 789-790.

Between 1991 and the time of the hearing in 2001, AUSAs in the Cleveland office were regularly apprised of the DOJ curriculum through memos and later, e-mails. AUSAs wishing to be nominated to attend or teach a course had to fill out a form (or later, indicate by e-mail) to request nomination to attend courses on the curriculum and submit the form to the Training Officer. Tr. 792. The Training Officer, together with supervisors, then prioritized the nominations and forwarded them to DOJ. Tr. 789-793.

The record shows that Sasse made little use of office procedures for requesting educational assignments. Sasse submitted requests to attend complex criminal litigation courses only in 1993 and 1996. He submitted no requests to teach during the period 1995-2001. Tr. 790; RX V-2. Sasse testified that he made his desires known by asking for training and teaching opportunities at file reviews. Tr. 298.

Despite Sasse's failure to follow procedure, Sasse was in fact nominated for Evidence for Experienced Criminal Litigators in March and December 1995, Criminal Federal Practice in July 1994, and Advanced Money Laundering in June 1994. Tr. 791; RX V-15, V-17, V-17a, V-20. When confronted with this evidence at the hearing, Sasse expressed surprise. Tr. 451. "I know it was pretty clear that I wasn't going to go, so it's possible I didn't complete some of them because I felt it was pointless, but some – obviously, I mean, you showed me one. Obviously I completed that one. I didn't even remember doing it in 1993." Tr. 452-453.

Clearly, DOJ proved that Sasse's access to training and instruction was not obstructed, much less obstructed for discriminatory reasons.

E. Amendment of 1996 whistleblower complaint to include suspension

1. Admission of evidence relating to the Complainant's post-complaint activities

During the hearing, DOJ elicited testimony from Sasse that the Executive Office of United States Attorneys suspended him for violating rules of ethics. Sasse violated rules of ethics by making an employment proposal to an agency that Sasse had investigated and might prosecute in the future.

Sasse testified that in late 1997, while this case was pending with OSHA, he requested a meeting with NASA's Regional Director and Legal Counsel. Tr. 507. At this meeting Sasse proposed to leave the U.S. Attorney's Office and open his own hazardous waste consulting firm, The Good Guys. The Good Guys would work as a contractor to NASA advising the agency about compliance with Federal environmental protection laws. Tr. 505 – 507. Sasse had decided NASA could use his services because of information he gained as a prosecutor. "[B]eginning in 1988 with my prosecution of the Bogas case, it kind of opened up a major can of worms, we called it, kind of an historic misconduct between NASA and the Cleveland airport regarding environmental matters. There were civil inquiries and investigations and enforcement actions." Tr. 256.

Sasse further testified that the NASA officials he approached complained to DOJ about his employment overture. Tr. 504-505. As a result of NASA's Complaint, the Justice Department's Office of the Inspector General (OIG) opened an investigation into Sasse's conduct. Tr. 504. According to Sasse, "about a year and a half later" – which would be early 1999 – investigators from the OIG came to Cleveland and interviewed Sasse about NASA's Complaint. Tr. 502.

OIG concluded that Sasse had made an employment request to NASA and used office equipment to produce his proposal. [9] OIG referred its findings to EOUSA. Based

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[9] DOJ provided the letter announcing the proposed sanction and the letter announcing the final decision along with pay calculations for the Sasse's five-day suspension that the ALJ requested in the R. D. & O. DOJ Letter to ALJ dated June 6, 2002 with attachments.

Sasse objects to use of these letters on the ground that they exceed the scope of the ALJ's request for information for a backpay award. Complainant's Second Br. n.1. We note, however, that Sasse's testimony described the events leading up to his suspension. The two letters are corroborative and helpful in establishing dates.

The sequence of events is, of course, critical to Sasse's claim that the suspension was in retaliation for his January or February 2000 Congressional contacts. Sasse carried the

Continued . . .

on the OIG's findings of fact, EOUSA determined that Sasse's conduct violated Department of Justice and Federal regulations governing the ethical conduct of federal employees. Specifically, the EOUSA determined that Sasse violated a DOJ regulation that requires DOJ employees to obtain prior approval before engaging in outside employment that involves "a subject matter, policy, or program that is in his component's area of responsibility." 5 C.F.R. § 3801.106(c). Sasse also violated a DOJ regulation prohibiting employees from using government property for other than authorized purposes. 5 C.F.R. § 3801.105; 5 C.F.R. § 2635.704. Finally, Sasse violated regulations of the Office of Government Ethics which provide that "[a]n employee shall not use his public office for his own private gain . . . including . . . persons with whom the employee has or seeks employment or business relations." 5 C.F.R. § 2635.702.

On January 14, 2000, the Senior Counsel to the Director, EOUSA, proposed that Sasse be suspended for five days. DeFalaise Letter, Jan. 14, 2000. The Senior Counsel stated, inter alia*:*

> Your conduct in preparing and presenting this personal, business proposal to a client agency, an agency with whom you had and continue to have a relationship in your work as an Assistant United States Attorney, violated the ethical standards which govern your conduct as an AUSA. Moreover, your lack of judgment in making this proposal adversely impacts the reputation of your office and its employees.

DeFalaise letter at 2.

Sasse was afforded an opportunity to respond to EOUSA's recommendation, and in February 2000, counsel for Sasse requested documents from EOUSA. However, neither Sasse nor his counsel made further contact with EOUSA. Santelle Letter May 2, 2000.

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burden for establishing a causal relationship between his protected Congressional contacts and the adverse personnel action. Sasse's testimony failed to establish the necessary chronology and therefore failed to support his claim of retaliation. Reference to the EOUSA letters is both helpful to an understanding of the case and harmless, since we do not rely on the letters in reaching the conclusion that Sasse did not prove that his Congressional contacts **caused** the suspension.

We also note that Sasse's own brief cites to information contained only in the second letter, viz., the fact that EOUSA issued is final decision suspending Sasse in May 2000. Complainant's Second Br. at 3, 19, 22.

By letter dated May 2, 2000, EOUSA notified Sasse of its final decision to impose the five-day suspension and of Sasse's right to grieve the suspension. One of the factors the Principal Deputy Director considered in reaching his determination was that Sasse had been an AUSA for approximately 17 years when he approached NASA and had "received extensive instruction on your ethical obligations as an AUSA. Accordingly, I find that you knew or should have known that your conduct was improper but you engaged in such conduct in spite of such knowledge." Santelle letter (May 2, 2000).

Sasse filed a whistleblower complaint with OSHA, complaining that the suspension was in retaliation for filing the whistleblower complaint now before us. Tr. 509. OSHA investigated Sasse's complaint and concluded that the OIG's investigation was not in retaliation for protected activity. Tr. 510. Sasse did not appeal OSHA's finding. "I was of the opinion that DOJ was using it, the proposal, to retaliate against me for pursuing this case, and that was found to be not meritorious by the Department of Labor and I did not appeal that, and, you know, that may be correct, I don't know." Tr. 509.

At the hearing below, Sasse testified that he had changed his mind about the reasons for his suspension. He now believed that the suspension was "in some way connected" to his speaking out about the contaminated condition of NASA property that might become part of the Cleveland airport. "I know that some of those individuals [at NASA] had previously [in 1988] caused contaminated soil to be taken to a daycare center from that area of the back forty, and I know that I had informed those individuals who complained just how bad the contamination was . . . and then I found out that the runway expansion was proceeding initially with no mention of the contamination at all." Tr. 503. "And while all that was kind of swirling around, this proposal was used first for a criminal investigation of me which then got shut down very quickly, and then a civil matter which led to a one-week suspension." Tr. 504.

2. ALJ's sua sponte amendment of the complaint

Over DOJ's objections, the ALJ treated Sasse's testimony about the suspension as raising a claim for relief for loss of income in addition to the relief requests presented in Sasse's complaint. "I determined that the evidence was admissible on a theory of a continuing violation." R. D. & O. elec. op. at 14. "I amended the Complaint to include continuing violations." *Id.* at 15.

The ALJ's reliance on the "continuing violation" theory as a basis for amending the complaint to add a new claim was an error of law. "[D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Morgan*, 536 U.S. at 113. The final decision to suspend Sasse was made in

May 2000. Therefore, the limitations period for filing a whistleblower complaint based on the suspension ended in June 2000.[10]

At the close of testimony, the Justice Department moved to strike evidence concerning conditions at NASA's landfill and the Congressional detail request because "these events post-date by several years Mr. Sasse's November 1996 Complaint . . . and . . . their inclusion in this case . . . goes to issues of notice and due process." Tr. 1107. Sasse's counsel objected to the motion for the reason that both sides had submitted evidence about post-complaint events and it would be impractical to "start separating out little pieces of the record." Tr. 1108. Sasse's counsel also stated that, "it just seems to me that, you know, there is no specific claim related to NASA. There is no specific claim related to the other matters which the Government seeks to strike." Tr. 1108. The ALJ denied the motion to strike because "the matters mentioned go to a continuation of a pattern of violations. Besides these matters have been tried these past two weeks and even if were [sic] not so, we're – going to amend the Complaint to include continuing violations." Tr. 1109.

On review, Sasse contends that amendment was proper because the suspension "issue" was tried by mutual consent. Respondent Second Br. at 26-67. It is true that DOJ did question Sasse about his Congressional contacts, NASA's landfill, and the suspension. However, it is one thing to probe evidence about post-complaint activities for whatever light they might shed on the complaint's reasoning and credibility. It is another thing entirely to agree to treat this evidence as raising a new and independent claim for relief. *See Douglas v. Owens*, 50 F.3d 1226, 1235-37 (3d Cir. 1995) (introduction of evidence without objection on one theory of liability did not show trial by consent or fair notice of new theory of recovery); *Carlisle Equip. Co. v. United States Sec'y of Labor*, 24 F.3d 790, 794-95 (6th Cir. 1994) (due process violation where introduction of evidence did not fairly serve notice that new safety violation was entering case); *Yellow Freight Sys. Inc. v. Martin*, 954 F.2d 353, 357-59 (6th Cir. 1992) (STAA defendant deprived of due process when Secretary's decision based on theory that was not included in notice to carrier or tried by implied consent of parties).

We agree with the government when it states that the ALJ's R. D. & O. was the first notice it received of a claim based solely on Sasse's suspension. DOJ Opening Br. at 14. And it is apparent that Sasse himself did not regard his testimony about his suspension as raising a new and severable complaint. Even when the ALJ announced he was amending the complaint, Sasse did not ask for back pay. Indeed, Sasse's counsel objected to the government's motion to strike testimony about the landfill and

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10 As noted previously, Sasse filed a complaint with OSHA in 2000 alleging that the suspension was in retaliation for his filing the complaint in this case. OSHA investigated but concluded that the suspension was not retaliatory. Sasse did not appeal OSHA's determination.

Congressional contacts for the sole reason that extirpating evidence about post-complaint events was not practicable and "there is no charge involving NASA." Tr. 1108.

In the end, the ALJ had to use the R. D. & O. to direct the Justice Department to submit the salary information that would make a back pay award possible. R. D. & O. elec. op. 26 at ¶ 9 & at 27 ("An Order setting the exact amount [of backpay] will be issued after the receipt of the information required").

The ALJ's amendment of the complaint and consideration of the post-complaint suspension therefore was error.

3. Merits consideration of suspension

In any event, even if Sasse's suspension had been properly before the ALJ, Sasse would not be entitled to relief, because he failed to prove that the suspension was retaliatory in purpose. The burden is on Sasse to prove a causal link between his suspension and his protected activity. *Burdine, McDonnell Douglas, St. Mary's Honor Society.* Evidence that Sasse made himself known to EOUSA as person concerned about a possible NASA coverup before EOUSA made the decision to suspend him is an absolute prerequisite to a finding that his Congressional contact activity caused the suspension. *Duncan v. United States Sec'y of Labor*, Fed. Appx 822 (9th Cir. May 2003).

Equally necessary, but also missing from Sasse's case, is evidence that those persons within EOUSA who recommended Sasse's suspension in January 2000 knew about Sasse's concerns about contaminated land near the Airport. By Sasse's own account, he told First Assistant Edwards that Kucinich's office had contacted him on February 2, 2000 – immediately after Kucinich's office called him. However, he presented no evidence that that information was presented to the decision-maker who recommended suspension, nor did he present evidence that Edwards functioned as a decision-maker for EOUSA with respect to the suspension recommendation.

Even if the EOUSA decision makers had known about Sasse's Congressional contact, there is no basis in the record for the inference that they had any reason to care whom Sasse spoke to about the NASA property. Sasse's own testimony shows that trying to silence him in 1997 would be shutting the barn door after the horse escaped. Sasse's silence could have had little value to anyone, since conditions at the south 40 were no secret: "I had and the Ohio EPA had and Dan Watson had provided NASA with knowledge of what was going on in the back forty and how badly it was contaminated, and I know there were many documents referencing that which Congressman Kucinich had FOIA'd, which had not been examined and which, for a time period, NASA was balking at allowing him to copy or examine." Tr. 503-504.

Sasse himself entered into evidence a 1991 draft Findings and Order by the Director of the Ohio EPA requiring Airport authorities to deal with the contamination.

CX 17-A. Finally, as a result of Sasse's February 2000 memo, both EPA and FBI investigators interviewed the Ohio EPA official responsible for environmental compliance at the airport. She explained that "no one ever said that this property was all clean, that there were still problems in certain areas, and that there were areas that were going to have to be remediated before there could be any runway expansion. . . ." Tr. 844, 8840-845.

Thus, the record boils down to Sasse's uncorroborated testimony that NASA was engaged in criminal coverup, a full blown FBI investigation that found no coverup, a total lack of evidence that EOUSA knew about Sasse's views about NASA contamination at the airport, no evidence other than Sasse's unsubstantiated speculation that EOUSA knew of, much less acted upon Sasse's Congressional contacts, and the inherent implausibility that DOJ or EOUSA – neither of which had a stake in the airport expansion – would have attempted to coerce Sasse into "silence." Thus, Sasse failed utterly to establish the causality element of this claim, either as to timing or motivation.

4. Disagreement with the ALJ's analysis

The ALJ reasoned as follows: "It was during the period of Complainant's recent involvement with this site [the south 40] that the retaliatory action took place." R. D. & O. at 21. "The retaliation took the form of an arbitrary enforcement of a petty government regulation. The regulation violated prohibits federal personnel from using government owned equipment for their own use." *Id.* "Because of the enforcement of a petty regulation in such close proximity to the protected activity, I find that Complainant established a nexus between his protected activity and the subsequent five-day suspension. Complainant's business proposal to NASA was drafted in 1997. It is important that the adverse employment action was not taken until after his contact with the Congressman in 2000." *Id.* at 22. "Complainant has persuaded the undersigned that the adverse employment action taken by Respondent was pretextual in nature." *Id.* at 23.

The ALJ's analysis is based on errors of fact. First, the ALJ found that the suspension was imposed for only one reason: because Sasse used government owned equipment for his personal use. To the ALJ, a five-day suspension for using a government-owned copier to copy personal papers is inherently suspect because the punishment is excessive given the nature of the offense.

The ALJ simply overlooked Sasse's testimony that the suspension was imposed only in part because of his use of the office copier; the second – and obviously far more serious – reason for the suspension was that Sasse used his position as an Assistant U.S. Attorney to gain access to NASA officials to offer himself to them for employment based on knowledge he gained about possible criminal violations by NASA through his work as

an environmental crimes prosecutor. Tr. 510. By any standard, this is a serious breach of the public trust; a five-day suspension is not disproportionate to the offense.[11]

Moreover, the period of time – October 1997 until January 2000 – between Sasse's proposal to NASA and EOUSA's proposal to suspend him is well accounted for by the necessarily sequential action of three agencies – NASA's IG, the OIG, and the EOUSA. During the period 1998 through 1999, OIG investigated the matter by, among other things, interviewing Sasse in his Cleveland office, issued findings of fact and referred its findings to the EOUSA. EOUSA staff considered OIG's findings, reached the decision to propose a five-day suspension, and notified Sasse in January 2000. More time passed as Sasse was afforded an opportunity to reply to EOUSA's recommendation. Notice to Sasse in May 2000 of EOUSA's final decision is entirely consistent with the progress of this matter as it actually evolved and as could reasonably be expected.

The ALJ's second error was his finding that "the adverse employment action was not taken until after his contact with the Congressman in [February] 2000." R. D. & O. elec. op. at 22. Sasse's testimony provides no support for the finding that the suspension decision came after February 2000. See our earlier analysis of Sasse's testimony on this point.

The ALJ was suspicious of the gap between Sasse's misconduct in October 1997 and the suspension in 2000. The ALJ failed, however, to give any consideration to the fact that the suspension decision was the culmination of a process that began with the NASA officials' complaining to their own IG, who in turn referred the matter to the DOJ OIG, who conducted an investigation which included the personal interview with Sasse in Cleveland, and the matter then being taken over by EOUSA, the agency with authority to impose the sanction. Thus, the record does not support the ALJ's inference that action on Sasse's 1997 misconduct was dropped after DOJ OIG investigators interviewed Sasse in 1999 but revived to punish Sasse for speaking out about contamination on NASA's property.

The ALJ based his inferential reasoning in part on his conclusion that Sasse's sole supporting witness, Daniel C. Watson, a former NASA employee, was subjected to "similar treatment during the same period." R. D. & O. elec. op. at 21. However, the record shows no nexus whatever between Watson's employment experience and Sasse's. Watson testified that he was in charge of environmental compliance at NASA's Cleveland facility in the 1980s, that NASA loaned him to EPA for much of the 1990s where he was also responsible for environmental compliance, and that when he returned

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[11] The extreme seriousness of this offense is underscored by the fact that although Sasse claimed to be concerned about airport expansion into the landfill since *Bogas*, he did not raise alarms about a NASA coverup until after NASA turned him down for employment. Thus Sasse opened himself and the Cleveland U.S. Attorney's Office to the appearance of impropriety.

to NASA in 2000, he was demoted and isolated and required to report to individuals he considered hostile to environmental compliance. He believed that he was being retaliated against by NASA officials who were opposed to environmental compliance. Tr. 165-168, 235.

First Assistant Edwards' response to Sasse's memo was the polar opposite of a coverup. Edwards, whose special area of responsibility was public corruption, treated Sasse's memo as a serious charge of public corruption and called in the FBI to investigate. Tr. 841. The FBI and EPA conducted a full investigation in which they interviewed Sasse, Watson, NASA officials and Cleveland officials. The Cleveland official responsible for the airport expansion told them that her office was well aware of the contamination on NASA's property and was making plans for remediation of the hazards before using the land for the airport. Tr. 840-841. Thus, Sasse's fears notwithstanding, Edwards and the EPA, FBI and NASA IG concluded that there was no plan afoot to sell unremediated hazardous land to Cleveland. Tr. 842.

Sasse's specific allegation that one particular NASA official misrepresented conditions at the landfill in 1988 or 1989 was not itself a basis for action, since the five-year statute of limitations had long passed. Tr. 844-847.

Accordingly, we find that Sasse failed to prove by a preponderance of the evidence that he was suspended in retaliation for speaking out about NASA's contaminated property and that DOJ proved by a preponderance of the evidence that Sasse was justly suspended for serious breaches of ethics.

IV The Complainant's Hostile Work Environment Claim

A. Applicable law

Our cases draw heavily on the body of hostile work environment law that developed under the Civil Rights Act of 1964. *E.g., Morgan,* 536 U.S. 116; *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 754 (1998). "A discrete retaliatory or discriminatory act 'occurred' on the day that it 'happened.' A party therefore must file a charge within [the number of days allowed by statute] of the date of the act or lose the ability to recover for it." *Morgan,* 536 U.S. at 110. Discrete adverse employment actions have tangible effects such as "termination, failure to promote, denial of transfer, or refusal to hire." *Id.* 536 U.S. at 114.

A hostile work environment "occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." *Id.* 536 U.S. at 115. Discriminatory jokes, comments and epithets may create a hostile working environment. *Id.* 536 U.S. at 120. Behavior that strikes fear in the employee for his or her personal safety may create a hostile working environment.

Robinson v. Sappington, 351 F.3d 317, 330 (7th Cir. 2003). Some gray area exists between the two categories of conduct. However, the essential difference between conduct that amounts to discrete adverse employment action and conduct that amounts to a hostile work environment is that the former has an immediate and tangible effect on the employee's income or employment prospects while the latter does not. Hostile work environment conduct affects the employee's psyche first, and his earning power or prospects only secondarily. *Cf. Morgan, supra.*

To prevail on a hostile work environment claim, the complainant must establish that the conduct complained of was extremely serious or serious and pervasive. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). Discourtesy or rudeness should not be confused with harassment, nor are the ordinary tribulations of the workplace, such as the sporadic use of abusive language, joking about protected status or activity, and occasional teasing actionable. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998). Under this theory of recovery, a complainant is required to prove that: 1) he engaged in protected activity; 2) he suffered intentional harassment related to that activity; 3) the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment; and 4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect the complainant. *Jenkins*, elec. op. at 42; *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ Nos. 97-ERA-14 *et al.*, elec. op. at 13 (ARB Nov. 13, 2002); *Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ Nos. 97-CAA-2, -9, elec. op. at 16-17, 21-22 (ARB Feb. 29, 2000); *Freels v. Lockheed Martin Energy Systems*, ARB No. 95-110, ALJ Nos. 94-ERA-6, 95-CAA-2, elec. op. at 13 (Sec'y Dec. 4, 1996); *Varnadore v. Oak Ridge Nat'l Lab.*, Nos. 92-CAA-2, -5; 93-CAA-1, elec. op. at 90-101 (Sec'y Jan. 26, 1996). Circumstances germane to gauging a work environment include "the frequency of the discriminatory conduct; its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance." *Berkman*, slip op. at 16. A respondent is liable for the harassing conduct of a complainant's coworkers or supervisors if the employer knew, or in the exercise of reasonable care should have known of the harassment and failed to take prompt remedial action. *Williams*, slip op. at 55; *Varnadore*, slip op. at 75-78.

B. Merits of the Complainant's hostile environment claim

Sasse claimed that Cain made life unbearable for him by harassing and demeaning him. Sasse testified that when he presented Cain with the paperwork for the *Rutana* indictment in 1988, Cain threw it across the room and yelled at Sasse. Tr. 109-112. Sasse testified that when Sasse went the New Orleans conference in 1991, Cain loomed over him in the hallway and said "you better not let this go to your head." Tr. 123, 408. Cain reportedly told someone other than Sasse that Bogas was "an old fart dumping paint thinner in a hole." Tr. 124. Although Sasse realized this was meant as a joke, he was offended at what he regarded as lack of respect for this case. *Id.* Sasse claimed that Cain made the following statement, "You go gallivanting all over New Orleans with the U.S.

Attorney and come back with this new priority area of Environmental Crime and an Environmental Crimes Task Force," in exactly those words six times during the Spring 1991 file review, 12 times during the July/July file review, 13 times during the October 1991 file review, and five times during the January 1992 file review. 1998 List of Discriminatory Acts, ¶¶ 24-31, 36-47, 50-53, 55, 57, 59, 60, 62, 63, 66-69, 71-72, 76, 79, 80, 82, 84 and 85; Tr. 523-524. According to Sasse, Cain seemed angry and unreceptive to discussion of Sasse's environmental crimes assignments. Tr. 148. Sasse testified that in their quarterly file reviews throughout the 1991-1996 period, Cain presented a dismissive demeanor towards Sasse's environmental cases but often said "now there's a good case" when Sasse mentioned non-environmental matters such as bank fraud. 1998 List ¶¶ 41, 81, 86, 98; Tr. 132. According to Sasse, he dreaded the quarterly file reviews so much that he was nauseated the day before. Tr. 318.

The ALJ concluded that Sasse's allegations did not meet the standard for a hostile work environment. "The nature of the interactions described by Complainant regarding prosecution decisions are to be expected and are found to be a normal part of the give and take expected in [a prosecutor's] office. When forceful individuals have differing opinions, tempers are bound to flare. In such an atmosphere arguments are likely to occur and it can be expected that language may at times be significantly less than polite." R. D. & O. elec. op. at 9.

We agree. Even if the conduct of which Sasse complained occurred, it does not meet the high bar for a hostile work environment claim. Sasse himself testified that he considers environmental crimes harder to develop and prove than, for example, bank fraud. Tr. 84-85. Thus Sasse himself tends to ratify Cain's more skeptical and challenging approach to environmental cases than to economic cases.

Sasse attributed Cain's alleged hostility to environmental enforcement to the fact that Cain once worked for Diamond Shamrock Chemical Company. Sasse claimed that when Cain threw the *Rutana* indictment papers, Cain yelled: "I did that," meaning that when Cain worked for Shamrock, he "blew out a public treatment works." Tr. 108. Cain flatly denied that any such event occurred. Tr. 1062. We find Sasse's testimony on this point implausible, given the fact that Cain worked for Diamond Shamrock from 1966 to 1973 – as an employee relations specialist. Tr. 1061.

None of Sasse's testimony about Cain's treatment of him is corroborated in any way. Cain flatly denied that he ever warned Sasse not to let his New Orleans trip "go to this head." Tr. 409. Stickan testified that he attended every file review and that they were "fairly businesslike" and "pretty low key type events." Tr. 927. Stickan never heard Cain swear at Sasse or demean his environmental work; Cain was never rude, angry or abusive, though he was "firm" and his tone was "serious" when telling Sasse to move his cases along. Tr. 928, 930-32. Stickan denied that Cain parroted the same phrase about "gallivanting all over New Orleans" over and over at each file review for a year after the New Orleans conference. Tr. 892-893, 901. Cain testified that he made that statement only once. Tr.1079.

First Assistant Edwards testified that he had known Cain for more than twenty years. As Cain's immediate supervisor, Edwards observed Cain's management of the Criminal Division attorneys. In Edwards' view, if anything, Cain is "too nice . . . his management style is that he wants to get the job done but he really wants everybody to remain friendly. He wa[nt]s a pleasant atmosphere . . . ." Tr. 780. Both Deputy Chief McHargh and AUSA Ann Rowland testified that Cain was "supportive, encouraging" and had never yelled, been abusive or threatening toward employees. Tr. 892-893, 901.

Consequently, the hostile work environment claim, like the individual whistleblower claims, fails on its merits.

CONCLUSION

To recapitulate, we have held that:

1. Complainant Sasse's 1996 complaint and amendment are untimely to the extent they raise discrete acts of discrimination, and are therefore **DISMISSED.**

2. Alternatively, prosecutorial discretion precludes consideration of Sasse's claims involving prosecutorial discretion, namely the decisions whether to appeal or indict.

3. Reaching the merits of Sasse's claims that did not involve prosecutorial discretion, performance appraisals and awards, service on an environmental task force, secretarial assignment, caseload, and training and teaching, we ruled that Sasse failed to prove intentional discrimination in violation of the whistleblower protection provisions of CWA, CAA, and SWDA.

4. The ALJ improperly amended the complaint to add an additional charge based on Sasse's communications about a contaminated landfill and resulting suspension. On the merits, we held that the suspension was based on legitimate, non-discriminatory reasons and that Sasse had failed to prove intentional discrimination.

5. We ruled that, even if the conduct Sasse complained of occurred, he was not subjected to a hostile work environment as a result of his protected activity.

6. Finally, the Order recommending remedies is vacated, as is the Recommended Supplemental Decision and Order Awarding Attorney Fees and Litigation Expenses dated January 17, 2003.

Accordingly, the Complainant's complaints are in their entirety **DENIED.**

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge