In the Matter of:

SHARYN ERICKSON,	**ARB CASE NOS. 04-024** **04-025**
COMPLAINANT,	
v.	**ALJ CASE NOS. 03-CAA-11** **03-CAA-19**
U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 4, ATLANTA, GA,	**04-CAA-1**
	DATE: October 31, 2006
RESPONDENTS.	

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Sharyn Erickson, *pro se*, Lawrenceville, Georgia

For the Respondent:
Robin B. Allen, Esq., *Associate Regional Counsel, EPA*, Atlanta, Georgia

FINAL DECISION AND ORDER

In 1998, Sharyn Erickson filed the first of 28 environmental whistleblower complaints against her employer, the Environmental Protection Agency (EPA). Erickson claims that EPA violated the employee protection provisions of six federal statutes.[1] This case concerns seven of those complaints, filed during the period October 2002 through October 2003. After a hearing, a United States Department of Labor Administrative Law

[1] The Safe Drinking Water Act, 42 U.S.C.A. § 300j-9(i)(1)(A) (SDWA)(West 2003); the Clean Air Act, 42 U.S.C.A. § 7622(a) (CAA)(West 2003); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. § 9610(a) (CERCLA)(West 2005); the Toxic Substances Control Act, 15 U.S.C.A. § 622(a) (TSCA)(West 1998); the Federal Water Pollution Prevention and Control Act, 33 U.S.C.A. § 1367(a)(FWPPCA)(West 2001); the Solid Waste Disposal Act, 42 U.S.C.A. § 6971(a) (SWDA)(West 2001). Regulations implementing these statutes are found at 29 C.F.R. Part 24 (2006).

Judge (ALJ) recommended that we dismiss some of Erickson's claims but uphold others. We find that Erickson did not prove by a preponderance of the evidence that EPA violated the statutes and therefore dismiss all of the claims that are before us.

BACKGROUND

Erickson has worked in EPA's regional offices in Atlanta, Georgia (Region 4) since 1989. From 1989 until 1993, she worked in the Contracts Unit, administering contracts between the region and private companies to clean up environmentally contaminated sites in the southeastern portion of the United States.

In 1995, EPA assigned Erickson to the position of Information Management Specialist in the Information Management Branch (IMB). Erickson's primary responsibilities at IMB concern the region's information technology (IT) system. She oversees aspects of software development, serves as the project officer for an interagency agreement (IAG) between Region 4 and the General Services Administration (GSA), and performs special projects as assigned.

Erickson's Previous Litigation, 1993-2002

In the early 1990s, while still employed in EPA's Contracts Unit, Erickson filed several grievances against her supervisors. She alleged that her supervisors discriminated against her because she had exercised her union rights. Erickson lost each grievance and exhausted her appeal rights without success.

In 1998, Erickson filed an environmental whistleblower complaint. She claimed that her supervisors retaliated against her because, in 1993, she called attention to flaws in a Superfund contract that she administered and, in 1995, questioned a Superfund contract proposal.

From 1998 through 2002, Erickson filed 27 more environmental whistleblower complaints, all asserting that EPA was continuing to retaliate against her because of her Superfund criticisms in 1993 and 1995. Among other things, Erickson claimed that EPA removed her from her job of choice as a contract officer and subjected her to a hostile work environment when it transferred her to IMB and required her to oversee software development even though she lacked necessary computer skills and information about work in progress. She also contended that her supervisor kept her substantially idle.

After an evidentiary hearing in 2002 on Erickson's complaints, Ron Barrow, IMB's Chief, sought to address Erickson's claim that she was idle. He asked Erickson to estimate how much free time she had so he could give her additional assignments and make appropriate additions to her position description. Erickson refused to tell Barrow how much of her time was unoccupied and objected to any changes in her position description. Knowing that only work listed in the position description could count for

Erickson's annual performance appraisal, Barrow decided it was not feasible to expand Erickson's duties. T 1150-1154, 1305-1306. [2]

Later, in September 2002, the ALJ who had presided over the evidentiary hearing dismissed some of Erickson's claims but affirmed most of them, including her claim that EPA subjected her to a hostile work environment between 1995 and 1998 and kept her idle for substantial periods. He recommended that EPA be ordered to pay Erickson compensatory and punitive damages, transfer her to a contract officer position, and raise her pay grade.[3] Barrow then asked Erickson again to tell him how much free time she had and to agree to an expansion of her position description. Again, Erickson refused. "My attorney advised me that the judge has already decided what my PD is, and despite EPA's appeal, the Agency has a duty under the avoidable consequences rule to implement at least that part of what the judge decided while the appeal is pending. Any other duties are still idling and an ongoing hostile work environment, increasing damages." T 1423, 1433-1435; RX 24.

Both parties appealed the ALJ's recommended decision. On review, we determined that EPA removed Erickson from the Contract Unit at her request and because she could not get along with her Contract Unit supervisors. We also found that the evidence did not support Erickson's claim that she was idle a substantial portion of the time or that she lacked the expertise and information she needed to oversee development of software programs. We dismissed all of Erickson's complaints.[4]

The Instant Litigation, 2002-2003

Two weeks after the ALJ issued his recommended decision, Erickson filed a new complaint. She alleged that EPA was still harassing her because of her 1993 and 1995 Superfund criticisms and because of her whistleblower litigation against EPA. Erickson again alleged that EPA subjected her to a hostile work environment by giving her tasks she could not perform. This time she focused on the budget aspects of her job. As part of overseeing the computer software development program, Erickson had significant budgetary responsibilities. She had to verify the accuracy of bills that contractors submitted for computer support services and to assure that adequate funds were always available to pay the contractors. T 48, 61-67, 1531, 1544. Erickson claimed that Barrow

---

[2] We refer to transcript pages with the abbreviation "T," to Erickson's exhibits with the abbreviation "CX," and to EPA's exhibits with the abbreviation "RX."

[3] *Erickson v. EPA*, ALJ Nos. 1999-CAA-2, 2001-CAA-8, 2001-CAA-13, 2002-CAA-3, 2002-CAA-18 (ALJ Sept. 24, 2002) (*Erickson I*).

[4] *Erickson v. EPA*, ARB Nos. 03-002, 03-003, 03-004, 03-064, ALJ Nos. 1999-CAA-2, 2001-CAA-8, 2001-CAA-13, 2002-CAA-3, 2002-CAA-18 (ARB May 31, 2006) (*ARB Erickson I*). On July 28, 2006, Erickson appealed *ARB Erickson I* to the United States Court of Appeals for the Eleventh Circuit. *Erickson v. EPA*, No. 06-14120-E (11th Cir.).

required her to do these things even though he knew that she had no way of knowing whether the contractors' bills were accurate. Furthermore, according to Erickson, Barrow knew that the computer budget recordkeeping system was too flawed for her to keep track of the budget balance. In addition, she alleged that Barrow and others withheld the results of a budget audit from her and told her she had to allocate computer costs according to a specific program area, e.g., Superfund, Clean Air, Clean Water, even though no such information existed.

Then, on November 1, 2002, Russell Wright took over as Region 4 Assistant Regional Administrator as part of a nationwide rotation of EPA managers. T 357. He did not know about Erickson's litigation before coming to Region 4. T 358. On November 6, Wright met with about 100 regional employees to introduce himself and his work philosophy and to give a general "pep talk." T 356. In his prepared remarks, Wright asked the employees to work together as a team. CX 67 ("You are just as important to this team as the next person"; "I fully expect each and every one in this Office to: work together as a team. . . ."). And he said that he was not interested in what had happened in the region before he came; his objective was to move forward. T 356.

During the question and answer period, Erickson asked what Russell meant by saying people should "leave the past behind." T 1511. As Erickson recalled it, Wright answered that, "anybody who didn't get on the program – on board with the new program and leave the past would be left behind to their detriment." *Id.* In March 2003, Erickson amended her hostile work environment complaint to include an allegation that Russell Wright had "publicly humiliated, blacklisted, coerced, and intimidated her" in his pep talk.

Earlier that year, Erickson had announced she would not verify any more invoices unless EPA provided her with a written guarantee to not hold her personally responsible for any errors. She claimed, as she had several times earlier, that if she approved invoices based on the available information, she could be prosecuted for violating the Antideficiency Act.[5] T 1268-1271; RX 69A at 7-8. By June 2003, Erickson had refused to verify 35 bills which had accumulated since January, and Barrow told another IMB employee, Richard Sheckell, to verify their accuracy and reasonableness so the contractors could be paid. CX 69A at 7-8; T 1598, 1691-1694. Sheckell was not familiar with the IAG system, and although he had computer expertise, he relied only on the information the invoices provided and the GSA payment data to link the invoices to the IAG and establish their reasonableness and accuracy. *Id.* Sheckell completed the job in one week. T 1694.

Erickson filed another environmental whistleblower complaint in March 2003 that alleged that Barrow had interrogated her for being late. T 1000, 1029, 1300, 1376-1380, 1384, 1393-1394; RX 3; RX 12. Erickson routinely arrived at her own office anywhere from 15 minutes to two hours late. Sometimes her lateness was planned, as when she ran personal errands before coming to work. RX 6. On other occasions she was delayed by

[5] 31 U.S.C.A. § 1341 (West 2006).

traffic, child care problems, or health problems. T 1463, 1466-1468; RX 8, RX 14. She also made it a point to schedule meetings and other work-related errands for the first thing in the morning so she could go directly to other offices and not arrive in IMB until mid or late morning. T 1643; RX 1. Erickson sometimes spent as much as two hours in the ladies room due to irritable bowel syndrome. T 1643-1644.

Erickson did not notify Barrow in advance when she planned to arrive at her IMB office late, nor did she call in when she was delayed unexpectedly. T 1301, 1307, 1386-1389. When Barrow needed her for a meeting or other time-sensitive matter and she was not in her office, he left notes on her office door asking her to come see him as soon as she arrived. RX 15; T 1303. Barrow frequently reproved Erickson for her tardiness and failure to keep him apprised of her whereabouts, but he imposed no discipline and did not downgrade her for this in her annual performance evaluations. RX 6, 8, 13; T 1376.

Erickson resented Barrow's practice of leaving notes on her door. She felt that Barrow should have permitted her more latitude in her attendance because she willingly worked at home without compensation on her days off while others did not. T 998, 1649-1652. Therefore, Erickson added a "disparate surveillance" allegation to her 2002 hostile work environment complaint.

Later in 2003, Erickson also filed complaints alleging that Barrow criticized her without justification, and "stole" nine hours of her annual leave. And in another complaint she asserted that Region 4 refused to approve two of her applications for contract specialist positions because of her Superfund criticisms and whistleblowing litigation.[6]

The ALJ's Recommended Decision and Order (R. D. & O.)

The Occupational Safety and Health Administration (OSHA) investigated Erickson's complaints and concluded that they lacked merit. Erickson requested a hearing before a Labor Department ALJ. After a seven-day hearing in May, July, and October 2003, the ALJ concluded that EPA had violated the environmental whistleblower provisions as to some, but not all, of Erickson's claims. He ordered that EPA reinstate Erickson to a contract officer position, award her back pay and compensatory damages, and pay punitive damages. Both parties appealed.[7]

---

[6] We are addressing only the claims and arguments that the parties actually raise on appeal. Erickson devoted substantial portions of her briefs to lengthy verbatim quotations from the ALJ's recommended decision and order without any accompanying argument. We limit our review to Erickson's claims that contain discernible arguments and supporting authorities.

[7] *See* 29 C.F.R. §§ 24.4, 24.6, 24.7, 24.8. In her complaints, Erickson named EPA's Office of Inspector General (IG) and certain supervisors as individual parties respondent. The ALJ dismissed them as respondents. R. D. & O. at 2 n.1. Erickson challenges this ruling. C. Opening Br. at 2 – 13. In *ARB Erickson*, we held that the IG is an integral part of

JURISDICTION AND STANDARD OF REVIEW

"The United States, as sovereign, 'is immune from suit, save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'"[8] We have jurisdiction over this complaint against a federal agency because Congress waived the federal government's sovereign immunity from actions under the whistleblower provisions of the SWDA and the CAA, two of the environmental statutes Erickson invokes.[9] The ARB has jurisdiction to review the ALJ's recommended decision.[10] Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes.[11] The ARB engages in de novo review of an ALJ's recommended decision in cases pertaining to the environmental acts.[12]

EPA and not properly a separate party respondent to Erickson's environmental whistleblower complaints against EPA. Thus, OIG is not a proper separate party respondent here. *ARB Erickson I*, slip op. at 2 n.2. With respect to the individual supervisors, they are not proper parties either because supervisors are not "employers" within the meaning of the environmental whistleblower provisions. *See Culligan v. American Heavy Lifting Shipping Co.*, ARB No. 03-046, ALJ Nos. 2000-CAA-20, 2001-CAA-09, 2001-CAA-11, slip op. at 14-15 (ARB June 30, 2004).

The ALJ also denied Erickson's motion for discovery of any documents in the Office of the Inspector General that contained her name. R. D. & O. at 2 n.1. Erickson challenges this ruling. C. Opening Br. at 2 - 11. Erickson's sole basis for discovery into IG records was the fact that the ALJ had found in *Erickson I* that the IG took retaliatory action against Erickson. But the only adverse action she claimed that the IG took against her was to file a petition for review of *Erickson I.* As more fully discussed below, petitioning for review of an ALJ recommended decision and order is not an adverse action; it is a right afforded by law. 29 C.F.R. § 24.8(a). Therefore, the ALJ did not abuse his discretion in denying Erickson's discovery request. *Cf. First Nat'l Bank of Az. v. Cities Serv. Co*, 391 U.S. 253, 289-290 (1968) (rule disfavoring summary judgment without discovery does not "permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations.").

[8] *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

[9] *ARB Erickson I*, slip op. at 12 (citing binding opinion of the Office of Legal Counsel).

[10] Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 24.8.

[11] *See* 5 U.S.C.A. § 557(b) (West 2004).

[12] *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ No. 97-CAA-2, slip op. at 15 (ARB Feb. 29, 2000).

DISCUSSION

1. The Legal Standard

To prevail on her environmental whistleblower complaints under SWDA and CAA, Erickson must prove by a preponderance of the evidence that she engaged in protected activity, that EPA knew about her protected acts, and that EPA took adverse action because of her protected activity.[13]

A. Protected Activity

The environmental whistleblower provisions protect employees who commence a proceeding under any of the acts or a proceeding to administer or enforce any requirements the acts impose, or who testify in such a proceeding, or who assist or participate in such a proceeding or in any other action to carry out the purposes of the acts.[14] The term "proceeding" encompasses all phases of a proceeding that relates to public health or the environment, including an internal or external complaint that may precipitate a proceeding.[15]

An employee who makes a complaint to the employer that is "grounded in conditions constituting reasonably perceived violations" of the environmental acts, engages in protected activity.[16] Similarly, expressing concerns to the employer that constitute reasonably perceived threats to environmental safety is protected activity under the environmental whistleblower protections.[17]

---

[13] *Sayre v. Veco Alaska, Inc*., ARB No. 03-069, ALJ No. 00-CAA-7, slip op. at 7-8 (ARB May 31, 2005); 29 C.F.R. § 24.2(a).

[14] 29 C.F.R. § 24.2(b). *See* 42 U.S.C.A. § 6971(a) (SWDA); 42 U.S.C.A. § 7622(a) (CAA).

[15] *Jenkins v. EPA,* ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 18 (ARB Feb. 28, 2003).

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

[17] *See, e.g., Knox v. United States Dep't of Interior,* ARB No. 06-089, ALJ No. 01-CAA-3, slip op. at 3 (ARB Apr. 28, 2006).

The employee need not prove that the hazards he or she perceived actually violated the environmental acts.[18] Nor must an employee prove that his assessment of the hazard was correct.[19] And we have also held that an employee need not prove that the condition he or she is concerned about has already resulted in a safety breakdown.[20] On the other hand, a complaint that expresses only a vague notion that the employer's conduct might negatively affect the environment is not protected.[21] Nor is a complaint that is based on numerous assumptions and speculation.[22]

Erickson claims that her 1993 and 1995 Superfund criticisms, her participation in *Erickson I*, and the filing of her whistleblower complaints in 2002-2003 constitute protected activity. The statutes that apply here specifically protect employees who file environmental whistleblower complaints and participate in the resultant proceedings.[23] Thus, to the extent that Erickson relies on the premise that EPA subjected her to a hostile work environment or rejected her job applications because she participated in *Erickson I* or because she filed the complaints giving rise to this case, she has established the protected activity element of her case.

With respect to Erickson's 1993 and 1995 Superfund criticisms, we expressed substantial reservations in *ARB Erickson I* on this point. "The question becomes whether she was merely speculating that the environment might be at risk."[24] We concluded, however, that because Erickson failed to establish other essential elements of her complaints, we would "assume without deciding" that her Superfund criticisms were

---

[18] *Yellow Freight Sys. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992); *Minard v. Nerco Delamar Co.*, No. 92-SWD-1 (Sec'y Jan. 25, 1994); *Crosby v. Hughes Aircraft Co.*, No. 85-TSC-2, slip op. at 25-26 (Sec'y Aug. 17, 1993).

[19] *Cf. Passaic Valley Sewerage Comm'rs v. United States Dep't of Labor*, 992 F.2d 474, 479 (3d Cir. 1993) (protecting employee warnings even when the employee is mistaken encourages resolution of the dispute without litigation and affords management the opportunity to justify or clarify its policies to the employee).

[20] *High v. Lockheed Martin Energy Sys.*, ARB No. 03-026, ALJ No. 96-CAA-8, slip op. at 8 (ARB Sept. 29, 2004) ("High's expression of concern did not have to be borne out later in catastrophe to have protected status.").

[21] *Kesterson*, slip op. at 2; *Gain v. Las Vegas Metro. Police Dep't*, ARB No. 03-108, ALJ No. 02-SWD-4, slip op. at 3 n.3 (ARB June 30, 2004).

[22] *Crosby*, slip op. at 27-28.

[23] 42 U.S.C.A. § 6971(a); 42 U.S.C.A. § 7622(a).

[24] *ARB Erickson I*, slip op. at 15, 16.

sufficiently related to environmental safety to count as protected activity.[25] As we explain below, Erickson's complaints in the instant case also fail for lack of evidence on other essential elements. Therefore, we will again assume without deciding that her Superfund criticisms constituted protected acts.

B. Employer Knowledge

An employee alleging discrimination under the environmental whistleblower statutes must prove by a preponderance of the evidence that the employer knew of the employee's protected activity when it took the adverse action.[26] In our analysis of Erickson's claims below, we will discuss, when necessary, whether Erickson proved that her supervisors knew about her protected activity.

C. Adverse Actions Because of Protected Activity

Erickson contends that, because of her protected activity, EPA subjected her to a hostile work environment, wrongfully omitted her from a list of "best qualified applicants" for a job she was seeking, and "stole" nine hours of annual leave from her. The ALJ concluded that EPA violated the whistleblower provisions because it subjected Erickson to a hostile work environment and omitted her from the "best qualified applicants" list because of her protected activities. But he rejected Erickson's claim that EPA meant to harass her by temporarily deducting nine hours from her annual leave.[27]

According to regulations implementing the environmental whistleblower statutes, adverse action occurs when an employer "intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates."[28] An employment action is adverse when it results in some tangible negative effect on the employee's compensation, terms, conditions, or privileges of employment.[29] An adverse employment action may take the form of a discrete act such as termination, denial of a transfer, or refusal to hire.

---

[25] *Id.*

[26] *See, e.g., Trachman v. Orkin Exterminating Co.*, ARB No. 01-067, ALJ No. 2000-TSC-3, slip op. at 4 (ARB Apr. 25, 2003).

[27] In the seven complaints she filed, Erickson alleged 18 different adverse actions. R. D. & O. at 3-6. The ALJ found merit in some, not all, of those claims. And, as earlier noted, we are deciding the merits of only the claims that Erickson and EPA raised and sufficiently argued on appeal. See n.6.

[28] 29 C.F.R. § 24.2(b).

[29] *See Jenkins*, slip op. at 21-22; *Shotz v. Plantation*, 344 F.3d 1161, 1181-1182 (11th Cir. 2003) ("an employee must show a *serious* and *material* change in the terms, conditions, or privileges of employment . . . as viewed by a reasonable person in the circumstances.").

On the other hand, a hostile work environment claim involves repeated conduct or conditions that occur "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."[30] To recover on a hostile work environment claim, the employee must establish that the conduct complained of was serious and pervasive.[31] 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."[32]

2. The GSA-EPA Interagency Agreement (IAG)

To assist in understanding Erickson's hostile work environment claim, the following overview of the interrelationships between and among the General Services Administration (GSA), EPA, and private contractors is helpful.

A. IAGs Generally

EPA receives many services from private contractors under the auspices of the GSA. T 109. Companies contract with GSA and GSA pays them, but EPA plays a significant role in administering the contract. For example, GSA and EPA work together in drafting the contract's Statement of Work, which specifies the services the contract employees will provide to EPA and the pay they will receive. EPA and GSA also establish an Interagency Agreement (IAG) to guide the day-to-day administration of the contract. T 47-50, 62, 67, 78-79, 80-82, 102, 477, 524; CX 69 at 51; CX 75 at 14.

The IAG identifies the tasks the contractor will perform for EPA, the time period, and the funding EPA will allocate to each task. T 464-466. For example, an IAG may stipulate that Region 4 will allocate $2 million for two tasks – computer programming and computer-related facilities management – for calendar year 2008. Or it might provide that the Region will allocate $ .5 million for the first quarter of 2008, expecting that EPA and GSA will amend the IAG at quarterly intervals thereafter to extend the time period and allocate additional funds. GSA and EPA might also amend the IAG to reflect changes in the scope of work and compensation rates. CX 69 at 30-31, CX 69 at 201-203; T 91-95.

EPA assigns a project officer, like Erickson, to every IAG. T 471, 523. The project officer has two primary responsibilities. He or she must determine whether the invoices that the contractor submits to GSA for payment are accurate and reasonable.

---

30 *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114-115 (2002).

31 *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

32 *Berkman*, slip op. at 16.

And the project officer must assure that EPA has committed sufficient funds to cover the bills. As funds are used up, the project officer initiates the process for supplementary funding and extension of the IAG term if necessary. T 48-50, 57, 111, 172, 322, 405, 533, 1666.

GSA sends the contractors' invoices to the EPA project officer for verification before paying the contractor. To accomplish this, GSA forwards a copy of each invoice, together with information from GSA's payment system, to EPA's Central Finance Center in Cincinnati, Ohio. T 93. There, Jeffrey Marsala, an accountant in the Office of the Chief Financial Officer, forwards the invoices to the appropriate EPA project officers and monitors the project officers' verifications. If the project officer does not verify an invoice within 20 days, an automated reminder system sends the project officer a reminder every 10 days. If a project officer is chronically late in approving invoices, Marsala must report that person to a Senior Resource Official. CX 69 A at 10; RX 57, RX 63; T 125, 529.

Once the project officer determines that an invoice is accurate and reasonable and that the region has allocated funds to cover it, he or she notifies Marsala. Marsala then releases EPA funds into the Interagency Payment and Correction System (IPAC), an internet-based system that the United States Treasury Department operates to transfer funds between federal agencies. GSA withdraws the EPA funds from IPAC. T 63-65, 83-87.

B. Region 4's Computer Services IAG

Most of EPA's regional offices, including Region 4, receive computer services from GSA-provided contractors. In Region 4, the Dyntel company provides programming services, and ACS Government Services (ACS) provides a variety of other facilities management services such as help desk assistance.[33] Region 4's IAG designates the work of the two contractors as separate tasks. T 523, 532-533, 1681; CX 69 at 200, 201-203.

Erickson began serving as the Region 4 project officer on the computer services IAG in 1995. Erickson reviewed and approved invoices, monitored the IAG balances, and prepared the necessary paperwork each time the IAG needed extensions and additional funding. T 77-78, 81, 172, 188, 192, 465, 1531, 1544.

In reviewing invoices for accuracy, Erickson had access to several sources of information: (1) The invoice itself. The invoices that Dyntel submitted for the programming task and that ACS submitted for the facilities management task showed the IAG task number, hours worked, rates of pay, and the dates of performance. T 57, 80-82. Each bill included the contractor's certification of accuracy. T 167. (2) IAG amendments that Erickson herself would have prepared. The IAG amendment shows the

[33] The ALJ referred to Dyntel as Dynatel. R. D. & O. at 7.

amount and time period the Region allocated for the programming and facilities management tasks. T 576-578, 1570-1572; CX 69A at 27. (3) The EPA computerized Data Warehouse system. The Data Warehouse shows the funding balance for each task as of the last official debit or credit. T 87, 192, 1569; CX 79 at 45. (4) The GSA contract officer. Robert Spratling was GSA's contract officer responsible for administering the Dyntel and ACS contracts and the EPA-GSA IAG. Spratling and Erickson kept each other informed about all aspects of the IAG by email and telephone throughout the term of the IAG. T 1549, 1660-1664, 1666; RX 68. (5) Erickson's personal knowledge. Most of the Dyntel and ACS employees worked in EPA's Atlanta office where Erickson worked. EPA work assignment managers (WAMs) directly supervised the contract employees. Thus, Erickson could freely observe and communicate with the individual contract employees and the WAMs. T 561-562, 577.

Over the years Erickson frequently initiated the IAG amendment process. She recommended specific amounts of money for each task based on the services she knew the contractors had already provided and would be providing in the future, and on her knowledge of the available funding. T 140, 172, 187.

The Data Warehouse System is like a checking account, with a recorded balance that reflects completed deposits and withdrawals but does not reflect deposits or withdrawals that are still in progress. To determine the exact amount available at a given moment, the project officer must deduct from the Data Warehouse System figure the cost of services that a contractor has already provided but for which GSA has not yet paid and add to the balance any funding supplements that the region has authorized but that have not yet been deposited. T 192.

The regional project officer is the one person in the entire IAG system with enough knowledge of the "intermediate" transactions that affect the Data Warehouse System balance to calculate the actual balance reliably. T 87. Because she works side by side with the contract employees and their WAMs, she knows whether the contract and its associated costs need to be expanded or reined in, whether the contractor is having problems getting paid by GSA, how much money the region can commit to IAG now and how much they will be committing in the future, whether the region needs the contractor to provide more or fewer services and therefore raise or lower its charges, whether the contractor could perform a project that the region had expected would need separate funding, and whether project priorities can be changed to accommodate budget considerations. RX 59; CX 69 at 1; T 70, 192, 609-610, 995, 1134.

C. The June 2000 GSA-EPA Audit

Region 4's computer services IAG began in 1993, before IAG records were computerized. Thus, early portions of the IAG record were on paper and only the latter part of the record was computerized. Moreover, between 1993 and 2000, the IAG was amended 33 times without being audited. T 1672. Therefore, GSA and Region 4's Comptroller collected the entire IAG record and conducted a joint audit in 2000. T 526, 1671. In June 2000, they concluded that the IAG had accumulated a surplus of about

$1.5 million. T 319-322, 525, 624-627, 1671. Region 4 decided to use the $1.5 million over the next three years by committing $500,000 less to the IAG than Erickson calculated would be necessary for each of the next three years. T 319-320. GSA and EPA would then close out the IAG and start a new one. The new IAG would be just like the old one in its terms and conditions, but would have the advantage of providing a clean slate for recordkeeping purposes. T 464.

3. Erickson's Hostile Work Environment Claim

Erickson contends that various supervisors and managers subjected her to a hostile work environment. As proof of hostility, Erickson claims that Barrow, her supervisor, and Wright, Region 4's Assistant Regional Administrator, "doomed her to failure" by requiring her to serve as the IAG project officer even though she lacked necessary expertise and information. Furthermore, she claims that Wright told her to "leave the past behind," and that Barrow kept her idle 50 to 75% of the time, voiced unfair oral criticisms on three occasions, and regularly left "please see me when you arrive" notes on her door when she was late or absent without leave. C. Opening Br. at 2, 13, 20; C. 2d Br. at 1-8, 12, 15, 18.[34]

To succeed on her hostile work environment claim, Erickson must prove by a preponderance of the evidence that: 1) she engaged in protected activity; 2) she suffered intentional harassment related to that activity; 3) the harassment was sufficiently severe or pervasive so as to alter the conditions of her employment and to create an abusive working environment; and 4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect her.[35] We have already determined that Erickson engaged in protected activity. Therefore, we now examine each component of Erickson's hostile work environment claim.

A. Impossible-to-Perform Work

Erickson argues, and the ALJ found, that Wright and Barrow decided to keep Erickson in the IAG project officer position even though they knew that it was impossible for her to perform the two critical elements of the job – verifying invoices and tracking funding balances. C. 2d Br. at 25, 29; R. D. & O. at 17.

Giving an employee impossible-to-perform work assignments can contribute to an abusive working environment. "[T]here are diverse ways of subverting a [victim's] perceived or actual competence. Sometimes it takes the form of deliberate sabotage of a [victim's] work performance, such as . . . simply assigning her tasks that are impossible

---

[34] We refer to Erickson's opening brief as "C. Opening Br.," to Erickson's second brief, as "C. 2d Br.," and to her third brief at "C. 3d Br." We refer to EPA's opening brief as "EPA Opening Br."

[35] *Jenkins*, slip op. at 43.

to accomplish."[36] Erickson, however, did not prove by a preponderance of evidence that verifying invoices and tracking account balances were impossible tasks. Therefore, she did not prove that Wright and Barrow intentionally harassed her.

Verifying Invoices

Beginning in January 2003, Erickson refused to verify the contractors' computer services invoices unless EPA would guarantee not to hold her responsible for errors. T 1598. In June 2003, Barrow instructed Sheckell, another IMB employee, to verify 35 invoices that had accumulated due to Erickson's refusal to verify. Sheckell testified that he was able to determine whether the charges on the contractor invoices were reasonable and accurate and was able to link the invoices with the GSA payment documents. T 1691-1699. The ALJ discounted Sheckell's work on the ground that, unlike Erickson, Sheckell did not have to break down the invoices according to the time a contractor spent working on specific computer programs, e.g., Superfund, Clean Air, Clean Water, etc. R. D. & O. at 7, n.5, n.10. But as we discuss below, the record does not support the ALJ's finding that Erickson had to break down invoice costs according to specific program areas.

Erickson argues that Sheckell's success does not refute her impossibility claim because in verifying 35 invoices which had accumulated over six months, Sheckell had more information with which to judge the accuracy and reasonableness of the charges than she generally had. In her brief, Erickson asserts for the first time that she had only five days within which to verify invoices. Therefore, she did not have the additional information that was available to Sheckell. C. 2d Br. at 29 n.12.

But Erickson's argument fails because Marsala, the IAG specialist in the EPA Office of the Chief Financial Officer, testified without rebuttal that project officers have a 20-day minimum to verify invoices. T 108. The only consequence of missing the deadline is that an automated program begins to send out reminders to the project officer every ten days. *Id.* Furthermore, the record shows that it was not unusual for Erickson to miss the 20-day deadline. As a result, she accumulated a substantial number of invoices for computer services that the contractors performed over a period of months. She then verified them in batches. Thus, Sheckell did not have a significantly different assignment than Erickson. T 1409; RX 69; CX 69 at 18-21; CX 69A.

Moreover, Erickson's impossibility claim depends in large part on her own over-broad definition of her role in the IAG process. Her job was to determine whether the invoice accurately reflected the pay rates and other terms specified in the IAG and that the region had committed sufficient funds to cover the charges. T 556, 1544-1545. According to Erickson, however, she cannot verify the accuracy of an invoice unless she has direct personal knowledge about all of the work an invoice covers and pay rate being

[36] Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1687, 1764 (1998), cited with approval in *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 149 (3d Cir. 1999).

billed. But this is clearly not the level of involvement EPA has assigned to her. It is the WAMs, not the project officer, who directly supervise the contractors' technicians and have personal knowledge of the work and pay rates involved. Erickson claims that the WAMs refused to tell her about unauthorized absences or other problems which could affect her ability to administer the IAG, thus making her work impossible to perform. But WAMs and others did tell Erickson about problems with contract employees, and Erickson involved herself in these issues. *See e.g.,* RX 66 (Erickson email concerning contractor performance issue: "I have talked to the contractors and GSA and am in the process of getting feedback and input from the WAMs."); RX 67 (Erickson email concerning contractor training issue: "I'm not sure whether [WAM] just wants us to advise the contractor to get his people up to speed (which the [IAG statement of work] will do, but I would also verbally advise them), or whether he is trying to justify us paying for the training. Please let me know. . . ."); CX 76A (Erickson email concerning contract employee discomfort: "I've just gotten a report from Kelly Sisario, Branch Chief for Facilities, that Melissa and Latonya are causing and [sic] employee of hers discomfort in the workplace."). And Erickson's related argument that she could not accomplish her work because she lacked computer skills also fails because she offered no evidence that lack of computer skills prevented her from judging the reasonableness or accuracy of an invoice.

Finally, Erickson argues, and the ALJ found, that she had to perform the impossible task of breaking down invoice costs according to the time each technician spent on work related to a specific environmental program such as the Clean Air Act, Superfund, the Clean Water Act, and so on. C. 2d at 28-29; R. D. & O. at 7-8. The parties agree that such information does not exist. And Erickson testified that it would be extremely difficult, if not impossible, for the technicians to account for their time at this level of detail. T 1555-1556.

Nevertheless, according to Erickson (and the ALJ), Marsala testified that project officers like Erickson were responsible for tying invoices to specific program accounts. She also argues that the Government Performance and Results Act of 1993 requires that agencies account for IT costs according to program area.[37] GPRA requires federal agencies to set goals for program performance, to measure performance results, and to report the results annually to the President and Congress. T 584.[38]

But Marsala did not testify that project officers must tie IT charges to specific EPA programs. Instead, he testified that Erickson could verify invoices if she had four items of information: the task performed, cost per task, task number, and funding per task. T 111-113. By "task," Marsala meant "programming" or "facilities management, as the computer IAG itself specified:

---

[37] Pub. L. No. 103-62, 107 Stat. 285 (codified at 31 U.S.C.A. § 1115, and in scattered sections of 5 U.S.C.A. and 39 U.S.C.A.).

[38] Mary L. Heen, *Congress, Public Values, and the Financing of Private Choice*, 65 Ohio St. L.J. 853, 907 (2004).

> This IAG hereby provides funds in the amount of $155,000 to support EPA's Region 4 facilities management and programming ADP [automated data processing] activities in accordance with the Statement of Work. The EPA Project Officer has approved that the funds provided by this agreement may be allocated by GSA as needed, for funding the following two task orders: Programming tasks with Dyntel and the Facilities Management Task with ACS.

CX 69 at 201. *See* T 57 ("The project officer is to track by the work related to task, and the funding related to the task and match them up."); T 79 ("The project officer is responsible for tracking the costs . . . and then the second part is once you determine they are accurate bills, allocating the costs to the appropriate accounts that are assigned on the IAG").

Furthermore, Erickson did not establish that GPRA requires her to tie EPA's computer services costs to specific EPA environmental programs. On its face, GPRA contains no such requirement, and Erickson points to no implementing regulation or other authority for that proposition. Moreover, Comptroller Bramlett testified that the GPRA requirement that agencies report how much money they spent on the programs they administer does not apply to computer services costs. T 555 ("If you put in 100,000 and 50,000 and one is Superfund and one is Water, once it goes into this fund [information technology fund] it loses identity."). Barrow also testified that computer services spending does not have to be tracked by program area. T 1123-1124, 1373-1374. As did the Chief of the Grants and IAG Division. T 1700-1701.

Tracking IAG Balances

As noted above, Erickson contends that EPA contributed to her hostile work environment by not providing her with information necessary to do her job. Erickson argues that we should accept the ALJ's finding that EPA did not provide her with information in 2000 concerning the IAG fund balance and therefore she could not track funds, an essential part of her job. C. 2d Br. at 18; C. 3d Br. at 15. The ALJ made this finding because he found that Region 4 Comptroller Bramlett "admitted that she instructed those connected with the [2000 IAG] audit not to provide [Erickson] with the results of the audit." R. D. & O. at 11. As noted earlier, the 2000 IAG audit uncovered a $1.5 million surplus and Region 4 decided to use it by committing $500,000 less to the IAG budget for three years.

We reject the ALJ's finding, and thus reject Erickson's argument, because Bramlett did not testify, or otherwise "admit," that she instructed others not to tell Erickson about the audit results. Though Bramlett testified that she told GSA not to deal with Erickson concerning the audit process but instead to deal with her office [EPA Region 4 Comptroller], she also told GSA to continue to work with Erickson on current IAG transactions. T 617-621.

Furthermore, Patty Bettencourt, a supervisory budget analyst in Bramlett's office, testified that she personally discussed the audit results with Erickson. "[R]ight after the audit was done, the monies showed that we had 1.5. Then for fiscal year 2001, she [Erickson] brought me up a commitment notice to fund it another 1,045,000. And so, what I did was I struck it saying, 'Well, we've got the surplus that's been built up over the years at 1.5. I explained to her that we wanted to use 500 of the surplus money, so we struck it and actually only committed 545,000." T 321-322.

Erickson herself provided the most compelling evidence that she was aware of the $1.5 million surplus. According to Erickson's own exhibit, an email to Barrow and the GSA contract officer:

> [A]lthough we need $715,214 for the remainder of the year, and GSA has closed out and rolled over all but one task order, we had also taken the amount funded and billed on it to get the remaining balance of $119,572—which I had also deducted. Then, to get closer to the actual amount we will need, I had deducted 5% of the amount needed. Since we add 10% of the original total wages for overtime (including money for sick and vacation time not taken), and we had used quite a bit of overtime, and the 5% of the total amounted to more than 5% of the original amount, I felt that was about as close as we could get to a realistic estimate to make sure that we had enough funds for the remainder of the year, without having much left over. Then I showed him [Region 4 senior budget analyst Thad Allen] where I had deducted the $175,770 being provided by the programs, which left a balance of $384,112 to be funded from Regional administrative funds—including the 30% SF (Superfund) administrative funds.
>
> Thad said we had already funded $500,000 this year, and I reminded him that the total needed for the year is over a million and a half ($1,587,827.16). He then asked about the $500,000 in invoice credits that Ron [Barrow] had recently given him. I told him that GSA was just re-billing things to what they felt were the correct, oldest accounts, and those amounts were re-billed. He said that we couldn't have spent $500,000 in two months, and I said that invoices I received around that time had amounts from back to 1998, they weren't for two months. He asked about program money, and I again showed him where I had deducted [sic] it, and pointed out that we hadn't gotten all of the funds that the programs were supposed to provide. . . .

> I told him that the funds had already run out on one task order at the end of June, and would on the other in mid-July, and that $119,000 of residual would only last about a month. . . .
>
> Since I am unable to do anything further to fund this IAG, please let me know first thing tomorrow whether to complete the paperwork just for the $175,770 of program money that I have, or whether to prepare it for the $384,112 that is needed for the rest of the year. . . .

CX 69 p. 1. Here Erickson demonstrates complete familiarity with all aspects of the IAG budget, including the balance. Thus, this July 2002 email, Erickson's own exhibit, utterly contradicts her argument that she was not aware of the IAG fund balance.

B. "Idling"

Erickson argues, and the ALJ found, that Barrow left Erickson without work to do 50 to 75% of the time, thus contributing to her hostile work environment. C. 2d Br. at 12, 15; R. D. & O. at 16. But the record shows otherwise.

After Erickson testified in the 2002 *Erickson I* hearing that she did not have enough work to do, Barrow offered to give her more work and expand her position description accordingly. Erickson refused this offer. Then, after the ALJ's 2002 *Erickson I* finding that EPA underutilized Erickson, Barrow again offered to add to her duties and make corresponding changes to her position description. This time Erickson declared that asking her to do any work other than contracting work would still amount to unlawful "idling." Therefore, given the efforts EPA made to accommodate her, we find that EPA did not idle Erickson.

In any event, Erickson did not prove that she was idle 50 to 75% of the time. In fact, Erickson either made herself unavailable for work or was busy. *See, e.g.*, RX 44 at 6 (Erickson refused to verify invoices because she lacked written guarantee of non-liability for errors); CX 70A at 1 (Erickson refused to complete special assignment because she lacked written guarantee of non-liability for errors); T 1377 (Barrow needed Erickson urgently in the morning because of an unexpected deadline but she did not appear in the Division until 1:30 p.m.); T 1394 (Barrow had to give training to contract employees in Erickson's stead because she was late); T 1505 (Erickson testifying that "if he [Barrow] will give me something in writing saying I'm not going to be held responsible, I'd do whatever they say"); CX 71A at 32 (Erickson email to coworker stating: "We have gone out of our way to try to help you get what you wanted—even though it meant a lot of extra, unpaid hours for both Aroosa and I, and giving up two and a half days of my vacation to try to satisfy you—even though we are now getting a lot of the fallout, extra work, and difficulties. . ."); T 1476 (Erickson working on day off); T

1389, 1649-1652 (Erickson discusses work questions with Barrow when on approved leave).

C. Wright's Pep Talk

Erickson argues that Wright, Region 4's new Assistant Regional Administrator, contributed to the hostile work environment when he introduced himself to 100 or so regional employees and explained that he would be running things differently than his predecessor and that, therefore, people should "leave the past behind." C. 2d Br. at 1-8, C. 3d Br. *passim*.

Wright began the meeting by reading out loud a memorandum he had sent to the group in which he described his management philosophy and encouraged the employees to treat his arrival as an opportunity for a fresh start. T 377; CX 67.[39] Wright testified that he told the group to be team players, and by that he "meant that everywhere I've worked and the people that have worked with me, we have always rallied to work as a team. And, I only meant that we would continue to try and work as a team. And, we would be a team in this new setting." T 360. Matthew Robbins, Chief of the Grants and Procurement Branch and under Wright's direct supervision, testified that after reading his memo to the group, Wright "talked about the office of policy and management being a team and basically he was the coach. He talked about trying to bring in imagination and a new style with the office of policy and management, that we should not be afraid to fail, you know, that we can be innovative. He would support us, et cetera." T 1712-1713.

On direct examination, Erickson described Wright's general remarks and his response to a question from her:

> Q. What happened in that meeting that stood out in your mind?
>
> A. Well, he was going on about, you know, since he had just become the new - - he took over what Mike Payton used to be as the new assistant regional administrator and the head of OPM, our division.
>
> And going on about - - about his expectations for everybody being part of the team and going along and supporting the team and he - - he had - - he had said something about - - I'll say he said something about - - and forgetting the - - what was it, forgetting the - - forgetting the past, and that he expected everybody now to come forward with any suggestions, problems, whatever, and if

[39] The ALJ mistakenly concluded that Wright's written remarks were not part of the record. R. D. & O. n.19. But the memo was admitted as Complainant's Exhibit 67. T 5.

they - - if their manager doesn't listen, to come directly to him.

And so I asked a question and I said, "Well, you know, given - - oh, and prior to that he had been talking about remembering a meeting with Pat Tobin, who had been our former deputy regional administrator, and Pat talking about EPA being such an unforgiving agency, that if you ever - - ever, you know, made a mistake or did anything, that they would - - you would never live it down. They would never forget it.

And he had been talking - - Russ had been talking about this conversation he had with Pat Tobin making this comment. And then he went through, you know, the stuff in his memo and said about coming to - - come forward to him if, you know, our manager - - our immediate managers, we didn't feel like were listening or, you know, would do anything about it.

And I asked - - so I asked him, I said, "well, how are we supposed to" - - you know, I said, "Well, what are you going to do to give people any confidence that, you know, given what you just said about Pat Tobin making the comment about EPA being so unforgiving, what are you going to do to give people any confidence that things have changed and that they are not going to have any retaliation?

And he came back with, "Well, you'll just have to trust" - - something basically to the effect of, "Well, you just have to trust that this is - - this is the new way of doing business," something, you know, something to that effect.

And so I said, you know, yes, right. More of the same. I didn't - - I mean, that was just to myself. I didn't - - I just - - I didn't say anything else. I just let it drop at that point.

And then several other people said - - came up, and Marlin Brinson jumped in and said, "Well, what about people who have things, you know, already going on?" She said, "Are you going to do anything about - - about, you know, resolving the problems and correcting them?"

And he said - - he said, "No, what's in the past is in the past." They just needed to drop it, and - -

Q. Are you planning to drop it in response to what he said?

A. No.

T 1509-1510.

The ALJ found that Wright's remarks constituted "a threat of retaliation directed at employees, such as Complainant, for refusing to abandon prior discriminatory charges. Such comments, although limited in duration, were harassing and pervasive, leaving about 100 employees with an understanding that management would not condone employees engaging in protected activity and thereby creating a hostile work environment." R. D. & O. at 19. But we find that neither Erickson's account nor the memo Wright distributed and read aloud evidences anything more than a speech that new managers typically give. Therefore, we find that Wright did not intend to harass Erickson or anyone else when he spoke.

More importantly, Erickson failed to establish that Wright knew anything about her, her whistleblower activities, or anyone else's whistleblower activities when he gave these remarks on November 6, 2002. As part of her hostile work environment claim, Erickson must prove that Wright knew about her protected activities and made the offending statements because of those protected activities.[40] Erickson made no such showing.

Nor did Erickson prove that Wright's remarks detrimentally affected her, another essential element of a hostile work environment claim. Her own account of the event indicates only that she did not find Wright's remarks reassuring and that she was skeptical about his statement that she could trust him.

D. "Disparate Surveillance"

Erickson argues that after the ALJ's 2002 *Erickson I* decision, Barrow began surveilling her attendance closely. According to Erickson, Barrow "contrived to be looking for [her] . . . always before 9:30 AM." C. Opening Br. at 14. "EPA suddenly obsessed on whether an employee who has been idled and given little work to do was on a few days not at her desk at precisely the starting time," and "Mr. Barrow unreasonably expected Ms. Erickson to attend early morning meetings that did not pertain to her work." C. Opening Br. at 13-14. Erickson appears to argue that Barrow contributed to the hostile work environment by criticizing her for being late or absent without notice. The ALJ rejected this argument. R. D. & O. at 13-14. So do we.

Erickson testified that she spent as much time away from her office as possible, especially in the mornings and that she did not give Barrow notice of her absences or late arrival times. When Barrow could not find Erickson, he left yellow "post-its" on her

[40] *Jenkins,* slip op. at 43-44.

door asking her to see him as soon as she arrived. On several occasions when Barrow thought Erickson had arrived late, he asked her why she was late. The ALJ found that "Barrow was merely performing routine and necessary supervisor duties when questioning complainant." He concluded that Barrow was not harassing Erickson. R. D. & O. at 14.

Erickson's argument that she was hardly ever late, and then only for a few minutes, fails because Erickson herself testified that she made a point of not being in her office for substantial periods of time, especially first thing in the morning. And she made a point of doing this without getting permission or even giving Barrow notice. She also testified that she stayed in the ladies room for more than normal amounts of time because she had an intestinal disorder.

The record does not support Erickson's contention that Barrow unreasonably expected her to attend meetings that did not pertain to her work or "contrived" reasons to look for her. The meetings that Barrow wanted her to attend were either IMB staff meetings or pertained to Erickson's duties as the IMB's Information Management Specialist. We find no evidence that Barrow left notes for Erickson to come to his office when in fact he had nothing to discuss with her.

Furthermore, like the ALJ, we conclude that looking for an employee during official duty hours, leaving notes on the door of her empty office, and asking her where she was during extended absences is not harassment. *Id.* at 14.

E. False Criticisms

Erickson contends that Barrow added to the hostile work environment by making false and unfounded criticisms of her. She claims that Barrow "falsely criticized" her for accusing another employee of unlawfully recommending that EPA purchase a particular software program. Likewise, she argues that Barrow criticized her work as "too detailed and at the same time lacking in sufficient detail," and falsely accused her of failing to tell contractors about new security measures. C. Opening Br. at 20. The ALJ concluded that the criticism was not severe and pervasive enough to alter Complainant's terms and conditions of employment and therefore was not harassment. R. D. & O. at 18.

Hostile work environment liability does not require that any single act of harassment or some subset of harassing acts be severe and pervasive enough to alter the complainant's terms and conditions of employment.[41] Thus, the ALJ erred in finding that that a subset of circumstances that allegedly contributed to a multi-factor hostile work environment must themselves be severe and pervasive.

---

[41] S*ee Morgan*, 536 U.S. at 115 (a hostile work environment "claim is composed of a series of separate acts that **collectively** constitute one unlawful employment practice") (emphasis added).

But we do agree with the ALJ that the criticisms did not contribute to a hostile work environment. Erickson did imply to Barrow that another worker had recommended purchase of a software program for dubious, if not illegal reasons, when in fact he made the recommendation for entirely legitimate reasons. RX 18, RX 61. But a supervisor's oral rebuke to an employee for impugning a co-worker's judgment or honesty does not constitute harassment. "[M]ere utterance of an epithet which engenders offensive feelings in a[n] employee . . . does not sufficiently affect the conditions of employment to implicate Title VII."[42]

Erickson's second claim, that Barrow harassed her by criticizing her work as too detailed and not detailed enough, is entirely conclusory. Erickson does not tie this assertion to any record evidence, leaving us to guess to what she might be referring. And with respect to Barrow's third "criticism," for not conveying information to contract employees about new security measures, Erickson's complaint is frivolous. The record shows only that Barrow at first doubted her when she told him she had delivered the information, asked again, "Are you sure?" and then accepted her word. Complaint filed Mar. 21, 2003.

To sum up, Erickson's hostile work environment claim fails because she did not prove by a preponderance of the evidence that EPA harassed her. The record demonstrates, and we find, that EPA personnel did not require Erickson to perform impossible tasks, did not idle her, did not threaten her because of prior protected activity, did not surveill her too closely, and did not falsely criticize her.

4. Discrete Acts

In addition to her hostile work environment claim, Erickson also argues that EPA took two discrete adverse actions against her because of her protected activity.

A. The Contract Specialist Applications

In one of her whistleblower complaints, Erickson alleged that EPA refused to place her in a contract specialist position because of her protected activity. R. D. & O. at 6. In April 2003, Erickson submitted two applications, each for a contract specialist position at Region 4 EPA. Both position announcements specified that unless the applicant was currently a contract specialist, the application must include a college transcript. The personnel specialist who reviewed all the applications did not place Erickson's name on the list of certified eligible candidates for the contract specialist positions because Erickson did not include a college transcript. T 800-813.

The ALJ found "no evidence that [the personnel specialist] intentionally discriminated against Complainant because of her protected activities. [He] treated Complainant like any other applicant." R. D. & O. at 20. But the ALJ went on to find that "had Respondent restored her to a contracting position [as the ALJ had

[42] *Id.* at 115.

recommended in *Erickson I*], it would not have been necessary for Complainant to supply a college transcript in order to be placed on a certified list of eligibles. By excluding her from that list, Respondent perpetuated and continued its discrimination against Complainant as found in *Erickson I*." *Id.* The ALJ continued, "While Respondent had every right to appeal the previous RDO [*Erickson I*], it had no legitimate reason to simply keep Complainant in the same position she occupied after her transfer into the Information Management Branch." *Id.* at 27. And, "Respondent's refusal to implement any recommended changes including a reassignment back to contracts, constitutes both adverse action and creation of hostile working conditions." *Id.* at 17.

In effect, then, the ALJ concluded that since EPA did not implement his *Erickson I* recommended order that Erickson be transferred back to the Contracts Unit, it retaliated against Erickson which, in turn, caused her to be excluded from the eligibility list. This conclusion is grossly contrary to law. An ALJ's recommended decision and order issued pursuant to the environmental whistleblower provisions that is timely appealed to the Administrative Review Board has no legal force or effect.[43] Therefore, EPA did not discriminate against Erickson when it appealed *Erickson I*, or when it did not transfer her to the Contracts Unit, or when it did not place her on the contract specialist eligibility list.

B. "Stealing" Annual Leave

On May 8, 2003, Erickson failed to appear for work without authorization or notice to Barrow. Barrow assumed she had taken annual leave and marked her time card accordingly. When Erickson discovered that she had been charged annual leave, she protested on the ground that she had worked eight hours on May 6 and 7 when she was officially on annual leave. Whereupon Barrow restored the May 8 annual leave to Erickson. CX 77A.

Erickson argues that Barrow improperly charged her with annual leave because of her protected activity. C. Opening Br. at 27-29. The ALJ found that Barrow had ample reason to believe that Erickson was out on annual leave and acted in good faith. R. D. & O. at 21.

Erickson's argument consists of three parts: (1) The bald assertion that the ALJ erred in making this finding; (2) An extended extract from the R. D. & O. on this issue; and (3) A paragraph of citations to the record and Erickson's proposed findings of fact – a paragraph which contains no discernible argument. Erickson's brief does not dispute Barrow's testimony or point to any contradictory evidence in the record. Therefore, we

---

[43] 29 C.F.R. § 24.8(a) ("If a timely petition for review is filed, the recommended decision of the administrative law judge shall be inoperative unless and until the [Administrative Review] Board issues an order adopting the recommended decision . . . ."). *See also* 5 U.S.C.A. § 557(b) (when an agency employee makes an initial or recommended decision, it "becomes the decision of the agency without further proceedings *unless there is an appeal to, or review on motion of, the agency within time provided by rule.*") (emphasis added).

accept Barrow's testimony and find that he charged Erickson with annual leave for a legitimate business reason.

CONCLUSION

Erickson's complaints alleged that EPA took adverse actions against her because she engaged in activity that the environmental statutes protect. Specifically, she argued to us that EPA supervisors subjected her to a hostile work environment, an adverse action. She also argued that EPA rejected her applications for the contract specialist position and wrongfully charged her with taking annual leave, discrete adverse actions. But since Erickson did not prove by a preponderance of the evidence, as she must, that EPA actually took these alleged actions, or that they were in fact adverse, her arguments fail. Therefore, we **DISMISS** Erickson's complaints.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge