THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, NY 10007

MICHAEL A. CARDOZO
Corporation Counsel

JESSE LEVINE
Assistant Chief WTC Unit
212 341 3713

Re: World Trade Center File Retention

Dear NYC Employee:

These original World Trade Center documents have been collected and scanned by the New York City Law Department. **DO NOT DISPOSE OF THESE DOCUMENTS**: they must be preserved to serve as evidence in the event future WTC-related legal actions are brought against the City.

If you would like to dispose of any of these documents, contact me directly at the New York City Law Department at (212) 341-3713. If I am not available, please contact Carlos Dennis at (212) 788-8696. If appropriate, the Law Department will arrange for the pick up of any documents that you no longer need.

Also, in the event you are planning to leave your current position, please email me at jlevine@law.nyc.gov to inform me of the identity of the new custodian of these documents.

Thank you for your cooperation.

Sincerely,

Jesse Levine, Esq.

Dr. Jenkins met with two agents from the National Enforcement Investigations Center (NEIC), a division of the EPA's Office of Criminal Enforcement, Forensics and Training, concerning her allegations of fraud (TR 732). After this meeting, Jenkins wrote two follow-up memoranda to the NEIC, one dated November 16, 1990 and the other dated January 24, 1991, detailing how she believed the alleged Monsanto fraud affected the EPA regulatory process (CX 305, CX 307). She sent copies to a number of outside parties (CX 305 at 6, CX 307 at 9-10). After writing the first memo, Jenkins was contacted by one of the investigators and asked not to reveal that there was an ongoing criminal investigation (TR 1206-07). Jenkins informed the investigator that she already had spoken to a veteran's group and sent copies of her memo to outside groups which revealed a criminal investigation was underway (TR 1207). She told the investigator there "was no way I could honor his request at this point, whether or not I agreed with whether or not such a request was appropriate" (TR 1207-08). Jenkins' supervisor, Mike Petruska, testified that he considered disciplining Jenkins for publicly revealing an ongoing criminal investigation because doing so violated EPA policy (TR 1574). However, Petruska decided against disciplining Jenkins because the policy had not yet been codified as a regulation in the Code of Federal Regulations (TR 1574-75). Jenkins had no further contact with the NEIC after the second memo was sent (TR 758).

Monsanto wrote its first letter to the EPA about Jenkins' fraud accusations on March 26, 1990 (CX 321). Monsanto stated its concern that Jenkins' memo, which was characterized as "simply parroting unsupported arguments contained in a plaintiff's brief," was now being viewed by the media as the official EPA position *(id.)*. The assistant administrator of the EPA, Don Clay, responded with a letter stating that Jenkins' memo reflected only her opinion and not that of the EPA and regretted "any problems that Monsanto may have had as a result of the news media's use of this memorandum" (CX 321).

Monsanto wrote a second letter to the EPA on April 8, 1991 which also was concerned with Jenkins revealing the preliminary criminal investigation to the public (CX 305). The letter stated in part that:

[Page 21]

> [O]ur basic frustration with this investigation does not extend to the EPA criminal program's handling of this matter. However, this investigation has become a media event through the unprofessional efforts of a single EPA employee not resident in the criminal program. Specifically, memoranda . . . prepared by this employee detailing many untrue allegations provoking the investigation have been improperly released to the public . . . and, consequently, have been widely discussed in the lay and scientific press.

CX 323 at 1. In a third letter on November 15, 1991, Monsanto's attorney expressed more concern over "Dr. Jenkins' insistence in a continued public discussion of the matters addressed in . . .her affidavit" (CX 324 at 1). This letter stated that:

> it is highly inappropriate and a violation of the agency's responsibility . . . for an employee publicly to discuss matters of the type to which Dr. Jenkins refers. This is the third occasion on which this has happened.

CX 324 at 1. Jenkins testified that she learned in 1992 that both the Department of Justice and the EPA's Inspector General's office investigated possible personnel actions that could be taken against complainant for publicly revealing the ongoing investigation of Monsanto (TR 742). The EPA's Office of Enforcement also addressed Jenkins' violation of EPA policy and requested that appropriate administrative action be taken (CX 326). However, no formal personnel action was taken.

Jenkins' performance standards for FY 1991 included "Agency policies concerning communicating with the public are followed" as a criterion required for an outstanding or fully successful rating (CX 334 at 6). Petruska, complainant's supervisor, testified that he believed she was the only person in the office who had this criteria listed on her performance rating (TR 1632-33). Jenkins believed that her performance rating of "fully successful" rather than "outstanding" for FY 1991 was based on the "follows agency policies on communications" criterion (TR 737). However, Petruska testified that he used many different criteria in determining Jenkins' performance evaluation for that year and not just "one thing" (TR 1600-01).

b. Discussion

1. Complainant's Credibility

Claimant's credibility is the key issue in this case both because there is frequent conflict between her version of events and that of other witnesses and because her

---

[Page 22]

perception of events is the principal component in her belief that she has been discriminated against for her protected activities. Accordingly, much of this part of the decision will address claimant's credibility.

Getting right to the point, Cate Jenkins is the most disingenuous, evasive, and self-serving witness I have ever observed. She is an intense woman who believes that any means are acceptable if, in her view, the ends are desirable, including lying (even under oath), searching through co-workers' personal effects, and leaking confidential information. She further believes that any person, rule, or law which stands in her way can be ignored. She has acted and continues to act as if she believes she is the only person at EPA who is concerned with the public interest and everyone else is selling out to the industries regulated by EPA. Accordingly, she irrationally assumes that every criticism of her job performance, no matter how obviously valid, is part of a plan to impede her efforts to protect the public and the environment. It does not appear to have entered her mind that proposals which differ from hers may nevertheless be meritorious or even worthy of consideration, nor does it appear to have occurred to her that her "ends justify the means" philosophy may compromise both her credibility and that of the EPA. Dr. Jenkins' sanctimonious, condescending, and distrusting attitude toward her colleagues made it inevitable that serious problems would develop in her employment relationships.[8]

What makes the foregoing particularly lamentable is that Dr. Jenkins is without doubt an extremely intelligent woman and a capable chemist. Her near photographic memory was demonstrated repeatedly at the hearing (when it suited her convenience) through her uncanny ability to instantaneously identify the exhibit numbers of documents and to locate particular passages in these documents. This was all-the-more impressive when it is considered that complainant had marked almost 400 documentary exhibits taking up five loose-leaf binders. Moreover, she firmly believes in the mission of the EPA, and in that respect is well-intentioned. But she is so lacking in judgment that she actually has made it more difficult for EPA to accomplish its mission.

Complainant's utter lack of credibility could only truly be appreciated through personally observing her six days of testimony. I do not often rely solely on demeanor in determining a witness's credibility, but the complainant's demeanor was so disquieting that it is dispositive here by itself. Complainant often appeared to be in her own world, divorced from reality. She frequently answered questions with long discourses that quickly became unfocused. During her period on the witness stand complainant lied with impunity and did not appear the least embarrassed when she was caught in these lies (*e.g.*, TR 968-82, 1014-17). She bragged about her bizarre behavior which she seemed to have no idea was in any way aberrant or unusual (*e.g.* TR 1245-55). In addition, she had alleged lapses of memory on unfavorable points so frequently that it was obvious the problem was one of honesty rather than memory. She has her own moral standards which are not in accord with those of the rest of society. She has no concept of team or organization, refuses to

[Page 23]

recognize the authority of her supervisors, and has no sense of loyalty to anything other then herself. She also has an enormous ego. When Thoreau wrote supportively about marching to the beat of a different drummer, I do not think this is what he had in mind.

Examples of these points abound. Complainant made it a practice to snoop through other people's offices (TR 1245-55). When confronted about this by Scarberry, she justified her actions by stating "if anything's private, you should keep it locked up." (TR 1245-46) She stated that starting in late 1987 she "was in a data collection mode . . . ." (TR 1247). When asked whether she went through her co-workers' files, she testified:

> Yeah. After November of '87, I was very diligent in looking at anything around, you know, that was coming in, the general mail or the branch files or anything like that, yes. Anything that was being sent out -- if something was put on a secretary's desk[,] in her Xerox ... box, I would go through that.

(TR 1248). She also admitted going through a file that was in a credenza in Petruska's office and removing some documents from that file to copy them (TR 1249). She subsequently stated that she might have been going through her co-workers' files as early as June 1986 (TR 1251), and apparently she continued her snooping at least through December 1989, when she removed a document from Sylvia Lowrance's in-box (TR 528-32). Thus it would not be surprising if the complainant went through Scarberry's desk to retrieve the within-grade raise form he signed but did not turn in, and turned it in herself.

Not only did complainant snoop through other people's files, but as above noted, she surreptitiously recorded her conversations with co-workers and supervisors. Although complainant alleges that she was unaware until 1988 of the longstanding EPA Order prohibiting its employees from secretly tape-recording conversations *(see* RX 67), her testimony is not believable. Complainant was aware of every statute, court decision, and regulation which supported her actions, whether in regard to the secret taping of telephone conversations, stigmatization, or the leaking of confidential information *(see, e.g.* TR 309-10, 1054-56, 1145-49). It is simply not believable that she was unaware of a specific EPA Order directly on point in this regard. More likely, she simply ignored the EPA Order, rationalizing that it was either outdated or somehow did not apply to her (TR 1145-51).

An enlightening incident related to the complainant's surreptitious tape recording is that on May 16, 1988, complainant wrote a memo to then-EPA Administrator Lee Thomas requesting that the EPA Order banning secret tape recordings be immediately retracted (CX 222). In this memo, complainant stated that:

> A few years ago, I was informally advised by law enforcement officials and legal associates that carrying a surreptitious tape recorder was legal and a good idea *since I was receiving death threats associated with my professional duties.*

[Page 24]

(Id. at 1) (emphasis added). She also stated in a letter she wrote to several Congressmen that she was a victim of "inferential death threats"(TR 1021), and informed co-workers of these death threats as well (TR 1022). But she admitted on cross-examination that she never received any death threats (TR 1025-26; *see also* TR 2083). In fact, she never received any threats at all.

Complainant also contends she was unaware that it was impermissible for her to send out her own unauthorized letters to members of Congress, government agencies, the media, and environmental groups on official EPA letterhead stationery (TR 656; *see CX* 151, 157, 250). In fact, she argues that EPA policy permitted it (TR 1059-61). But she is lying. She admits that Scarberry, who was her supervisor at the time, informed her that her April 13, 1988 memo to EPA Region 9 was improperly written on EPA letterhead stationery because it contained her personal opinion (TR 1068-69). Further, she admits she used EPA letterhead to give her letters more authority (TR 1066); and her testimony that she accidentally used the letterhead stationery of the EPA Administrator in her February 7, 1990 letter regarding the Toth study of dioxin toxicity (CX 250) is laughable (TR 1070-71). It is clear that complainant deliberately used EPA letterhead stationery to make it appear that her letters stated the position of EPA and did not care that it was improper to do so, in effect daring EPA to do something about it. Nothing was done.

Similarly, complainant was called by Special Agents of EPA's National Enforcement Investigations Center in November 1990 to set up an interview to discuss her allegations that Monsanto Company falsified health studies regarding the effects of dioxin *(see, e.g.* CX 301). Apparently, based on this telephone call, complainant adduced that NEIC was conducting a criminal investigation of Monsanto, and almost immediately disclosed this in a speech to a Vietnam veterans organization (TR 1201-04).[9] Although on December 22, 1989, EPA had issued a series of memoranda informing its staff not to disclose the existence of ongoing criminal investigations (CX 332), complainant alleges that at this time she did not know it was against EPA policy to do so (TR 737-38, 1210-12). However, she met with the NEIC agents on November 14, 1990, and at that meeting she was told not to discuss the investigation with anyone (CX 326; TR 1575). Notwithstanding this instruction, complainant prepared a memo for the NEIC agents on November 15, 1990 reiterating the substance of her complaint against Monsanto, and sent copies of this memo to 16 people or organizations outside of EPA, including environmental and veterans' groups (CX 305). Although complainant contends -- I believe untruthfully -- that she was not informed of the non-disclosure policy until after she sent out this memo (TR 1207), complainant concedes that she was aware of this policy by January 24, 1991 when she wrote a follow-up memo to the NEIC agents (CX 307). Nevertheless, she sent copies of this memo to the same people and organizations to whom she sent her November 5, 1990 memo (TR 1207-08). Complainant's tortured explanation of why she made this memo public despite specifically being instructed not to make further disclosures regarding the investigation is

---

[Page 25]

illustrative of how out of control she was by that time *(see* TR 1206-19).

Other examples of complainant's character which deserve notice are illustrated by the following incidents:

-- Complainant was calculating enough to notify her supervisors when she was engaging in protected activity, believing that if they were aware she engaged in protected activity it would be more difficult to take action against her. She stated that "it was important in employee discrimination cases at all times to ensure that your management was aware of your protected activity." (TR 536; *see* TR 537-38).

-- In a May 17, 1989 memo to Dellinger summarizing the status of her work on the methyl bromide and UDMH listings (CX 241), complainant became extremely defensive. She complained she was being assigned an "inordinate work load" *(id.* at 3), lashed out at Dellinger for plotting against her, and offered a number of excuses why the work was not going to be completed on time. She added that, "[a]s I told you on May 12, my first priorities will not be any HSWA listing work, but instead pursuing my EEO and DOL complaints" *(id.* at 2). Conversely, at the same time complainant was alleging that she had little to do (TR 437).

--The adulation, attention, and publicity complainant received from the media, special interest groups, and Congress for her public criticism of her employer and disclosure of confidential information was very important to her, apparently more important than performing the job she was being paid to do at EPA. She was proud of being labeled a whistleblower. Complainant not only collected all the articles she could find criticizing EPA's regulation of dioxin and the wood preserving industry in which her name is mentioned *(e.g., CX* 6, 153, 154, 171, 178-80, 195-96, 199-201, 203, 205-07, 342, 345-64, 366-86, 388-89, 391), but usually she both starred and underlined her name in these articles. Several of these publications include her picture, and a report by the environmental organization Greenpeace regarding a wood treating pesticide is virtually dedicated to her *(see* CX 196, at 1-4). She even received an award from a Vietnam veterans' organization (TR 777). She exulted in her television appearances, and made sure everyone was informed of her media coverage *(see, e.g.* TR 474-82, 535-36, 546-47). It is also revealing that complainant referred to the wood preserving regulations as "my wood preserving regulations" (TR 127) ten years after being removed from the project.

--Complainant's refusal to acknowledge, let alone accept, criticism is astounding. Despite all the criticism complainant received for her work on the wood preserving listing, when she was asked to fill out her performance evaluation for the year October 1, 1986 through September 30, 1987 she gave herself a perfect rating, 500 out of a possible 500 points. On the other hand, her supervisors, Scarberry and Straus, rated her unsatisfactory, 190 out of 500 (*see* CX 66). In this performance evaluation,

---

[Page 26]

complainant's supervisor, Scarberry, stated that he "had to rewrite a poorly written memo . . . that [complainant] would not deal with" *(id.* at 5). Complainant concedes that the memo had both grammatical and spelling errors but, noting that *Spellcheck* was not yet available, argued that "it was really an unreasonable thing to fault an employee for." (TR 840-41). Even more extraordinary testimony concerned the issue/options paper for the wood preserving listing that Scarberry instructed

Complainant's Credibility

Claimant's credibility is the key issue in this case, both because there is frequent conflict between her version of events and that of other witnesses and because her

[Page 22]

perception of events is the principal component in her belief that she has been discriminated against for her protected activities. Accordingly, much of this part of the decision will address claimant's credibility.

Getting right to the point, Cate Jenkins is the most disingenuous, evasive, and self-serving witness I have ever observed. She is an intense woman who believes that any means are acceptable if, in her view, the ends are desirable, including lying (even under oath), searching through co-workers' personal effects, and leaking confidential information. She further believes that any person, rule, or law which stands in her way can be ignored. She has acted and continues to act as if she believes she is the only person at EPA who is concerned with the public interest and everyone else is selling out to the industries regulated by EPA. Accordingly, she irrationally assumes that every criticism of her job performance, no matter how obviously valid, is part of a plan to impede her efforts to protect the public and the environment. It does not appear to have entered her mind that proposals which differ from hers may nevertheless be meritorious or even worthy of consideration, nor does it appear to have occurred to her that her "ends justify the means" philosophy may compromise both her credibility and that of the EPA. Dr. Jenkins' sanctimonious, condescending, and distrusting attitude toward her colleagues made it inevitable that serious problems would develop in her employment relationships.[8]

What makes the foregoing particularly lamentable is that Dr. Jenkins is without doubt an extremely intelligent woman and a capable chemist. Her near photographic memory was demonstrated repeatedly at the hearing (when it suited her convenience) through her uncanny ability to instantaneously identify the exhibit numbers of documents and to locate particular passages in these documents. This was all-the-more impressive when it is considered that complainant had marked almost 400 documentary exhibits taking up five loose-leaf binders. Moreover, she firmly believes in the mission of the EPA, and in that respect is well-intentioned. But she is so lacking in judgment that she actually has made it more difficult for EPA to accomplish its mission.

Complainant's utter lack of credibility could only truly be appreciated through personally observing her six days of testimony. I do not often rely solely on demeanor in determining a witness's credibility, but the complainant's demeanor was so disquieting that it is dispositive here by itself. Complainant often appeared to be in her own world, divorced from reality. She frequently answered questions with long discourses that quickly became unfocused. During her period on the witness stand complainant lied with impunity and did not appear the least embarrassed when she was caught in these lies (*e.g.*, TR 968-82, 1014-17). She bragged about her bizarre behavior which she seemed to have no idea was in any way aberrant or unusual (*e.g.* TR 1245-55). In addition, she had alleged lapses of memory on unfavorable points so frequently that it was obvious the problem was one of honesty rather than memory. She has her own moral standards which are not in accord with those of the rest of society. She has no concept of team or organization, refuses to have been, despite the fact that Jenkins testified that she missed the application deadline for that promotion (TR 1883-84). It may not be coincidental that complainant's aberrant work performance began at the time Scarberry became her supervisor.

--It was clear from Jenkins' own testimony that she had difficulty getting along with her co-workers. Many of Jenkins' own actions contributed to the discordant office environment, including her surreptitious taping of conversations and phone calls which was eventually discovered (TR 247-48), her bringing media crews to the office to tape her opinion concerning controversial subjects (TR 759-60), her demeaning description of her supervisor, Robert Scarberry, to others in the office (TR 1160-61), her looking through support staff's in-boxes to collect data (TR 1245-55), her reading of papers left out on people's desks in their offices (*id.*), and her filing of numerous grievances and law suits. Jenkins' apparent lack of awareness that these actions, meritorious or not, could lead to a tense work environment lessens her credibility as a witness. Jenkins was and clearly continues to be very emotionally involved with this case. The longer she testified, the more rambling and accusatory her testimony became. She is so emotionally involved that she can not possibly be objective.

In sum, I find that her testimony was inherently unreliable, and absent corroborating evidence is insufficient to establish any controverted fact.

2. Merits of 1987 Allegations[11]

Under the Solid Waste Disposal Act:

[Page 28]

> [n]o person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has 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. § 6971 (a) (1994). The other environmental statutes under which complainant has filed this claim have similar employee protection provisions.

To prevail under the environmental whistleblower statutes, including the Solid Waste Disposal Act, a complainant must establish that: (1) the complainant engaged in protected activity, (2) the employer knew of the complainant's protected activity, (3) an adverse employment action was taken, and (4) the adverse employment action was motivated, in whole or in part, by the complainant's protected activity. *See Dartey v. Zack*, 82-ERA-2 (1983); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984). If the complainant is successful in proving these points, the burden then shifts to the respondent to produce evidence that the adverse action was motivated by a legitimate, non-discriminatory reason. *See Guttman v. Passaic Valley Sewerage Comm'rs v.*

have been, despite the fact that Jenkins testified that she missed the application deadline for that promotion (TR 1883-84). It may not be coincidental that complainant's aberrant work performance began at the time Scarberry became her supervisor.

--It was clear from Jenkins' own testimony that she had difficulty getting along with her co-workers. Many of Jenkins' own actions contributed to the discordant office environment, including her surreptitious taping of conversations and phone calls which was eventually discovered (TR 247-48), her bringing media crews to the office to tape her opinion concerning controversial subjects (TR 759-60), her demeaning description of her supervisor, Robert Scarberry, to others in the office (TR 1160-61), her looking through support staff's in-boxes to collect data (TR 1245-55), her reading of papers left out on people's desks in their offices (*id.*), and her filing of numerous grievances and lawsuits. Jenkins' apparent lack of awareness that these actions, meritorious or not, could lead to a tense work environment lessens her credibility as a witness. Jenkins was and clearly continues to be very emotionally involved with this case. The longer she testified, the more rambling and accusatory her testimony became. She is so emotionally involved that she can not possibly be objective.

In sum, I find that her testimony was inherently unreliable, and absent corroborating evidence is insufficient to establish any controverted fact.

2. Merits of 1987 Allegations[11]

Under the Solid Waste Disposal Act:

[Page 28]

> [n]o person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has 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. § 6971 (a) (1994). The other environmental statutes under which complainant has filed this claim have similar employee protection provisions.

To prevail under the environmental whistleblower statutes, including the Solid Waste Disposal Act, a complainant must establish that: (1) the complainant engaged in protected activity, (2) the employer knew of the complainant's protected activity, (3) an adverse employment action was taken, and (4) the adverse employment action was motivated, in whole or in part, by the complainant's protected activity. *See Dartey v. Zack*, 82-ERA-2 (1983); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984). If the complainant is successful in proving these points, the burden then shifts to the respondent to produce evidence that the adverse action was motivated by a legitimate, non-discriminatory reason. *See Guttman v. Passaic Valley Sewerage Comm'rs v. Department of Labor*, 85-WPC-2 (1992), *aff'd sub nom, Passaic Valley Sewerage Comm'rs v. Department of Labor*, 992 F.2d 474 (3d Cir.), *cert. denied*, 510 U.S. 964 (1993). If the respondent is successful, the complainant then must prove that the respondent's asserted reason for taking the adverse action is not the true reason, but rather is a pretext for retaliation. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

For the purposes of this decision, it will be assumed that the complainant's activities were protected and that the Environmental Protection Agency was aware of the complainant's activities. Therefore, this decision will discuss only the next two elements required for complainant to meet her initial burden. First, whether adverse actions were taken against the complainant, and second, if adverse actions were taken, whether they were in retaliation for the complainant's having engaged in protected activity.

"An adverse action is simply something unpleasant, detrimental, even unfortunate, but not necessarily (and not usually) discriminatory." *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1573 (11th Cir. 1997). Clear examples of adverse employment actions include dismissal, demotion, or an involuntary transfer to a less desirable position. *See Mandreger v. Detroit Edison Co.*, 88-ERA-17 (Sec'y, March 30, 1994); *Nichols v. Bechtel Constructors, Inc.*, 87-ERA-44 (Sec'y, Oct. 26, 1992); *English v. General Electric Co.*, 85-ERA-2 (Sec'y, Feb. 13, 1992). Monetary loss is not required. *See Boytin v. Pennsylvania Power and Light Co.*, 94-ERA-32 (Sec'y, Oct 20, 1995).

[Page 29]

Complainant contends that she was subjected to five adverse actions that precipitated the filing of the original April 11, 1987 complaint. These actions include: 1) removal from the wood preserving issues/option paper in September 1987, 2) removal from the wood preserving listing project in September 1987, 3) denial of a within-grade increase in November 1987, 4) being given an unsatisfactory performance evaluation in November 1987 and 5) a March 1988 elevation of an unsatisfactory evaluation to "satisfactory," rather than "exceeds expectations."

a. Removal from Wood Preserving Options Paper and Listing Project

The record contains ample evidence that Jenkins' protected activities, such as writing letters to Congress, were not the reason for the adverse actions taken against her in September through November of 1987. While it was permissible for Jenkins to write letters to Congress and to her supervisors expressing her concern over the regulatory course that was being explored, her refusal to address certain issues in her work assignments that her supervisors instructed her to address was not acceptable. Jenkins certainly was under no obligation to support ideas she disagreed with, however, she did have an obligation to follow her supervisors' instructions to address certain issues in the options paper. For example, Jenkins' supervisors wanted her to address the stigmatization issue. While Jenkins acknowledged in her testimony that stigmatization is a "genuine concern" (TR 148), she refused to address this issue in the paper because she believed it had "nothing to do with the criteria for listing hazardous wastes" (CX 32 at 5). This was not her decision to make.

Jenkins' position was clearly frustrating to her superiors. She was repeatedly asked to address certain issues in the paper and she repeatedly refused to do so. Straus believed that her draft of the paper was "biased" and lacked a "fair analysis" and he asked her to write the paper again. Jenkins refused again on the grounds that she believed that analyzing the stigma issue as it related to listing wastes was illegal and wanted to ask the Office of General Counsel for their opinion on the issue. Lowrance, the division director of the Office of Solid Waste, was frustrated by Jenkins' position as well. Lowrance testified that she did not think it appropriate to contact the Office of General Counsel at that point because OSW was only examining options and the OGC eventually reviews all final regulatory proposals. She made comments on a memo by Jenkins that "it is not illegal to consider programmatic policy factors" and even wrote "This is silly -- what is in an options paper is a policy call - not a legal one" (CX 39). Jenkins' supervisors felt that her drafting of the options paper never adequately addressed the stigma issue and had other problems, and ultimately removed her from the project (CX 43).

The events that led to Jenkins' removal from the wood preserving project illustrate her inability to relate to others in her workplace and to follow the instructions of her supervisors if she disagreed with them. These are problems that continued throughout the time period concerning this case. Her approach to her work on the options paper and the listing

[Page 30]

project reveals Jenkins' belief that she was right, her supervisors were wrong, and therefore she need not heed the instructions she was given. To say the least, this does not facilitate a good working relationship. All of her supervisors at this time -- Scarberry, Straus, and Lowrance -- gave Jenkins extensive feedback on the options paper and were quite generous in providing her numerous opportunities to re-draft the paper so that it would address the options they felt needed to be addressed. Lowrance, who is an attorney, teaches classes at Catholic University's law school, and, more importantly, was the top supervisor in OSW, informed Jenkins that simply addressing issues in a paper, which is not a final regulatory proposal, was not illegal. Lowrance testified credibly that she believed and continues to believe that "policy work and technical work should be done looking at a broad array of options and variables in the agency" (TR 1710). This is a point Jenkins failed to understand, as she continued to insist, even at the hearing, that addressing the stigma issue in the options paper was illegal.

Most, if not all, employees disagree with their supervisors at some point in their careers. During the many opportunities Jenkins was given to re-draft the paper, she could have, at any point, addressed the issues she was instructed to by her supervisors and formally noted her disagreement with their position. Instead, she refused to address these options at all. Jenkins' refusal to write the paper in a manner consistent with her supervisors' instructions caused a significant delay in developing the regulatory package. In order to alleviate that delay and facilitate the process, she was removed from the paper and the project. This removal was not in retaliation for any protected activity, but rather was based on her refusal to address issues that her supervisors ordered her to examine. That type of refusal is not protected by any of the environmental whistleblower statutes. Furthermore, the record clearly demonstrates that Jenkins' participation in protected activities during this period -- for example, writing letters to Congress -- in no way precipitated her removal from the paper or the listing project. Rather, her removal was precipitated by her own refusal to perform the work required of her.

b. Denial of Within-Grade Increase, Unsatisfactory Performance Evaluation, and Change in Performance Evaluation

The denial of Jenkins' within-grade increase and her unsatisfactory performance evaluation were based on many of the same reasons that she was removed from the wood preserving paper and project, namely her poor performance. Scarberry's memo addressing the denial of the salary increase explained that he expected a "GS-13 professional . . . to be able to work independently and come up with a satisfactory product . . . ." (CX 65 at 1). The memo continued, stating:

> I have to give you specific work instructions, and your products have to be rewritten with substantial revisions in order to be acceptable. Your work is generally completed late, and I

have expressed to you on several occasions over the past two years, both orally and in writing, my concern over the quality and timeliness of your assignments. As a result, an abnormal amount of my time has been used in providing detailed instructions as well as rewriting/editing your technical assignments. After these discussions, guidance, and recommendations, there has been no demonstrable improvement in your work performance.

[Page 31]

CX 65 at 1. The record supports Scarberry's statements in this memo. Both Jenkins and Scarberry testified that they had numerous meetings over Jenkins' work. Numerous drafts prepared by Jenkins have extensive comments written on them. While these comments by themselves are not necessarily probative as to the quality of Jenkins' work, the fact that almost all Jenkins' drafts required extensive re-writes is probative. Jenkins is a high-level professional and her work should not have needed the close supervision that it did. Furthermore, Scarberry's statement that Jenkins consistently missed deadlines is also supported by the record.

Jenkins's difficulty in meeting deadlines and communicating effectively with her supervisors is demonstrated by her December 1, 1986 memo stating that she would re-draft a document and turn it in to her supervisors in "two weeks or so" (CX 13). However, Jenkins did not turn in this draft until early February (TR 1846) (*see supra* pages 25-26). Jenkins' refusal to address certain issues in the options paper was another legitimate performance related problem.

Thus from September to November 1987, the record is replete with performance related concerns from her supervisors before, during, and after she engaged in protected activity. If anything, the record reflects that Jenkins' supervisors were extraordinarily generous in providing her many opportunities to improve her work; when no improvement was seen, these adverse actions followed. Therefore, I find that complainant's removal from the wood preserving paper and project, denial of salary increase, and unsatisfactory performance evaluation were not acts of discrimination based on protected activities, but rather actions taken because of Jenkins' poor work performance.

Finally, that Jenkins ultimately was granted a within grade salary increase and given a satisfactory performance evaluation by Lowrance was not an adverse action. Lowrance credibly testified that she did this because she was leaving her position and she wanted the issue put aside so that the slate would be clean for her replacement. Though Jenkins contends that not raising her evaluation to "exceeds expectations" is an adverse action, I disagree. Jenkins' supervisors had legitimate, well-documented performance problems with complainant's work, such that her performance did not deserve even a "fully satisfactory" rating, let alone an "exceeds expectations" evaluation. In fact, the decision by Lowrance to grant Jenkins a salary increase and raise her performance evaluation was made in an effort to put the issue to rest so that the office would be more harmonious and better able to perform its work, rather than an effort to commend Jenkins for her work performance.

[Page 32]

4. Merits of 1988-1989 Allegations

Complainant next contends that during 1988 and 1989 she was subject to the following adverse actions:

6/10/88: Reassignment to report to branch chief, removal of Listing Section to another branch within 3 months of reassignment, resulting in isolation

11/87 - 6/88: Imposition of IDP

12/88: Satisfactory rather than exceeds expectation performance rating

1989 - 1989: Period of no duties and isolation

Compl. brief at 177.

a. Reassignment to New Supervisor

The first alleged adverse action, reassignment to a different branch chief, was a decision to which Jenkins agreed. Barnes, the new director of the Character and Assessment Division, thought Jenkins might work more productively than she had under Scarberry if she was reassigned to Dellinger, who he believed was an excellent supervisor (TR 1732). While Jenkins testified that she did not believe that she agreed to this transfer, but rather that she "chose the lesser of two evils or three evils or four evils," the record reflects that Jenkins had input into this decision (TR 1138). In fact, Barnes offered Jenkins the option of working directly for him, but she turned that option down so she could continue with her listings work (TR 598-99). Hence, Jenkins was given a choice of whom to work for other than Scarberry and she chose Dellinger over Barnes.

This reassignment was designed to remove Jenkins from working with a supervisor who she clearly did not respect and with whom she had difficulty working. It is not credible that Jenkins would want to continue working for a supervisor against whom she had made such serious accusations as sexual harassment and forgery. Barnes took these accusations into account and no doubt also considered the stressful work situation that resulted between Scarberry and Jenkins when he decided to reassign her. Barnes' attempt to place complainant in a more amenable supervisory situation where it was hoped she could work more comfortably and productively clearly was not a punitive measure. Accordingly, I find that her reassignment to another supervisor was not an adverse action and in any event was not in retaliation for protected activity.

[Page 33]

b. Reorganization of Office Resulting in Isolation

Complainant next states that she was subject to an adverse action when the listings section was removed from her branch and moved to another branch in 1988, which allegedly resulted in her isolation. During the time period in which the isolation was alleged, the office was reorganized as a result of an unanticipated medical waste crisis (TR 1803-04).[12] One of the results of the reorganization was that the listing section was removed from Dellinger's supervision and transferred to another branch within the division (TR 1805). Jenkins suggested that she be transferred to the branch where the listing section was located, but Barnes denied this request because the chief of that branch was in the process of leaving and it was anticipated that Scarberry would become the new branch chief (TR 1806). After this re-organization, Jenkins continued to work on listings projects (TR 1807-08).

Jenkins has failed to show that the removal of the listing section from her branch and the following denial of transfer to where the listing section was located was discriminatory. First, the reorganization was precipitated by a crisis having nothing to do with Jenkins. Second, Barnes had legitimate reasons to want to prevent Scarberry and Jenkins from working together. He described their relationship as "dysfunctional" and "impeding the flow of work in the division" (TR 1731-32). It is reasonable that he would not want to recreate that situation by again placing Jenkins under Scarberry's authority. While the circumstances under which Jenkins was performing listing work may have been unique, for she was the only one in her branch doing listings, Jenkins' situation was unique because of the difficult relationship that had developed between her and Scarberry. Accordingly, I find that the failure to transfer Jenkins to the branch performing listings work and any resulting isolation was not discriminatory.

c. Imposition of IDP

Complainant next contends that the imposition of an Individual Development Plan (IDP) from November 1987 to June 1988 was an adverse action. First, the record indicates that Jenkins was only subject to an IDP from December 2, 1987 to January 31, 1988 (CX 72). Second, EPA policy required that Jenkins be placed on the IDP after an unsatisfactory performance evaluation *(id.)*. As discussed above, I found that the unsatisfactory performance evaluation was based on Jenkins' work-related performance problems, not retaliation for protected activity. Therefore, placing her on an IDP was not only justified because of her performance problems, but required by EPA policy. Because the goal of an IDP is to give the employee the opportunity to demonstrate her fitness for government service, it should not be viewed as an adverse action. However, even assuming that it was an adverse action, placing her on the IDP was clearly not motivated by discriminatory reasons, but rather by her performance problems and EPA policy. Accordingly, I find that Jenkins has failed to establish that placing her on the IDP was based on her participation in protected activities.

[Page 34]

d. FY 1988 Performance Rating

The December 1988 performance rating of "fully successful" rather than "exceeds expectations" is the next alleged adverse action.[13] Scarberry testified that while he viewed Jenkins' performance as unsatisfactory in the beginning of the year, he thought her work had improved as the year progressed (TR 1868). He stated that he believed her work became minimally satisfactory during the time period in which he was her supervisor, which was from October 1987 to June 1988 (TR 1869). Dellinger testified that he rated Jenkins as "exceeds expectations" for the time period in which he supervised her, June 1988 to September 30, 1988. Therefore, averaging the two evaluations, Jenkins was given a "fully successful" rating for this time period. Jenkins has not shown how a "fully successful" rating in this situation is an adverse action or why she would have been entitled to a higher rating.

e. Period of No Duties and Isolation 1988 - 1989

Complainant's next asserted adverse action is that from 1988 to 1989 she was subjected to a "period of no duties and isolation" (Compl. brief at 177). The record does not support this contention, but instead shows that complainant was given appropriate job duties during this period. Jenkins did testify that from June to August of 1988 she did not meet regularly with her supervisor to discuss her work. However, her supervisor at this time, Dellinger, testified that he was responsible for handling an unexpected medical waste crisis during this time period (TR 1803). Dellinger explained that Jenkins was responsible for working on "at least two hazardous waste" listings during 1988 (TR 1807-08). Jenkins testified that she also worked on a solvents exemptions project in 1988 (TR 1261).

In May of 1989 Jenkins wrote a letter to Dellinger stating that she was overburdened by her workload.

> As I told you on May 23, my first priorities will not be any HSWA listing work, but instead pursuing my EEO and DOL complaints. This means that any anticipated milestones that you set up must slip considerably, especially considering the fact that I will need to spend significant time with a District Court suit to force EPA to complete my EEO investigative file during the months of May, June, and July. Your assignment of the inordinate work load of both UDMH, methyl bromide, and chlorinated aliphatics becomes even more infeasible in light of these other duties.

CX 241. In light of the above evidence, I find that Jenkins was not subject to a period of "no duties" in the 1988-1989 period.

[Page 35]

4. Merits of 1990 -1991 Allegations

a. Removal from Solvents and UDMH II Listing Projects

The next adverse action asserted by complainant was her removal from the solvents and UDMH II listing assignments on August 30, 1990 (Compl. brief at 177). Assuming this was an adverse action, Jenkins cannot show that the motive for removing her was discriminatory. Jenkins claims that she was removed from this project because she raised the possibility of the presence of dioxins in solvents other than the four that had been listed by the contractor (CX 267). Petruska testified that confusion existed over the meaning of the HSWA and that he believed the statute meant for the EPA to conclude solvents listing work that had already commenced at the time of HSWA's passage (TR 1583). Jenkins disagreed strongly with this position in a memo (CX 270).

Petruska forwarded this memo to Scarberry and Abrams and asked if they had "any thoughts." Abrams replied, stating in part "[i]t depends whether we want to satisfy the HSWA statute or make work for Cate with an unlimited budget for dioxin analysis" (CX 271). Jenkins prepared a $24 million proposed budget to study new solvents listings. Her supervisors responded to this proposal with statements such as "this is absurd" and "this is a farce" (CX 273 A). In a later memo concerning the solvents II project, Petruska stated we "don't need more data" and later informed Jenkins that she should focus her work on the four solvents that had already been listed. Complainant wrote a July 25,1990 memo stating that the UDMH Listings, Olin Process should be tested for dioxins "in the absence of definitive data to rule out their presence" (CX 260). Her supervisors disagreed. Finally, on August 30, 1990, Petruska told Jenkins that while she could continue work on the UDMH listing, she should stop work on UDMH II because "[w]e may take the position that given the lack of data on the Olin process, that this is not a HSWA listing" (CX 261).

For the purposes of this decision, even assuming that Jenkins' actions regarding this project were protected and that removing her from the project was an adverse action, the EPA had legitimate, non-discriminatory business reasons to do so. First, the decision to list or not list a solvent was in many ways a political and a policy decision based on how HSWA was interpreted. Though Jenkins clearly believed, and continues to believe, that only her interpretation of HSWA was the proper one, alternate theories of what HSWA required were permissible and certainly not illegal. Jenkins' supervisors were ultimately responsible for deciding what initially should be listed, not her. Second, the only option advocated by Jenkins, more testing, required an expenditure of $24 million. Her supervisors believed complainant's proposal of spending that amount of money on additional testing was misdirected and they wanted to proceed with the listing process without additional testing, delay, and cost. Finally, as Petruska's memo indicates, OSW was investigating whether UDMH II should even be listed under HSWA. Therefore, in light of OSW's position regarding HSWA, as well as Jenkins' contrary position, her supervisors removed her from the project. This was a legitimate, non-discriminatory reason to remove Jenkins from the UDMH project.

[Page 36]

b. Period of Isolation and No Duties, 1990 -1991

Complainant alleges that from 1990-1991 she faced another period of no duties and isolation which constituted an adverse action. This assertion cannot be supported regarding her activities in 1990. She worked on both Uniroyal's UDMH listing and UDMH II until August 30, 1990 at which point she was removed from UDMH II but continued work on the Uniroyal listing. Complainant also interacted significantly with the public during this time period, which she argues was a part of her official duties (Compl. brief at 135). She was interviewed in connection with a criminal investigation of Monsanto in February and November of 1990 and wrote a follow up memo regarding Monsanto in January 1991. Accordingly, I find that complainant was not subject to a period of no duties and isolation in 1990.

After January 1991, however, Jenkins did experience a period where she was assigned no duties. This was confirmed by Petruska as being unusual (TR 1491-92). One of the reasons Jenkins had no duties during this time period was due to the fact that her supervisors decided she should not work on any listings involving Monsanto products (TR 1554-56). Even assuming that the no work period was an adverse action motivated in part by Jenkins protected activities involving Monsanto, the EPA had a legitimate, non-discriminatory business reason to not assign her to any work involving Monsanto products.

Prior to the time of Jenkins' period of no duties, she engaged in several interactions regarding Monsanto. In February of 1990, she wrote the chair of EPA's Science Advisory Board alleging that Monsanto had fraudulently prepared an epidemiological study. The information contained in this letter was based on a plaintiff's brief in a suit against Monsanto. She worked with Vietnam veterans groups and Congress regarding dioxin exposure and the Monsanto study. She met with two agents from the National Enforcement Investigations Center about her fraud allegations concerning Monsanto. She wrote two follow-up memos after the meeting describing how she believed the allegedly fraudulent study affected EPA's regulatory process and sent copies to outside parties. One of the investigators contacted her after she sent out her first memo and asked that she not reveal the ongoing criminal investigation of Monsanto, to which she responded she could not comply. Petruska testified that he considered disciplining Jenkins for revealing an ongoing criminal investigation because doing so violated EPA policy. Monsanto wrote several letters to the EPA expressing their concern over Jenkins' actions. The Department of Justice, EPA's Inspector General's office, and EPA's Office of Enforcement all investigated possible personnel actions that could be taken against complainant for revealing this information and violating EPA policy (TR 74, CX 326).

Because of these incidents, it would have been foolhardy for Petruska to have assigned Jenkins work concerning Monsanto products. He testified that he was concerned that Monsanto might have a legal basis to challenge any listings that Jenkins worked on because of the "appearance that she wasn't completely objective" concerning

[Page 37]

Monsanto (TR 1555-56). He further stated that a person doing listing work must have a good relationship with the industry and that he thought that would not be the case if Jenkins was working on a listing project involving Monsanto (TR 1603). Therefore, I find that the decision to not place Jenkins on any Monsanto listing projects, which was part of the reason Jenkins had no work in 1991, was based on legitimate, non-discriminatory reasons.

There were other reasons why Jenkins was assigned no duties during 1991 that were acknowledged in complainant's brief. First, three potential listing projects were ruled out because Petruska decided either that more data was not needed for the listing or that the particular waste need not be listed (TR 1560-62). Second, complainant's participation in another dye and pigment listing was ruled out because she had once alleged the industry had made threats against her (TR 1491). Her supervisors decided this was a reason not to assign Jenkins to dye and pigment work (TR 1491). These reasons support the conclusion that Jenkins' "no-work" period in 1991 emerged from Petruska's legitimate concerns, rather than malicious or discriminatory intent.

5. Merits of 1991 Allegations

Jenkins final contentions are:

> 4/29/91: Retroactive imposition of a clause in performance standards requiring adherence to an unpublished unavailable policy on communications
>
> 10/29/91: Satisfactory rather than exceeds expectations performance evaluation based on alleged non-adherence to policy on communications.

Compl. brief at 177.

Jenkins did not receive her final performance standards for FY 1991 until April or May of 1991 (TR 737-38). When she received them a requirement had been added stating "Agency policies concerning communicating with the public are followed" (CX 334 at 6). Petruska agreed that this clause was put into her standards after she had already revealed the criminal investigation of Monsanto to the public. Adding this criteria was not an adverse action.

By adding the criteria, Petruska was ensuring, in a formal manner, that Jenkins was notified of the communications policy and the importance of adhering to it. Jenkins claimed at the hearing that she was not familiar with the communications policy prior to April, a contention that is not credible in light of her testimony that she would regularly read through files to determine what EPA policy was on various subjects and because she had been involved previously with investigations. Furthermore, Petruska testified that he thought Jenkins should have been aware of the policy and not disclosed the information to the public. However,

[Page 38]

because Jenkins insisted that she was not familiar with the policy, Petruska took the formal action of inserting a provision requiring her adherence to it into her performance standards. That was not an adverse action, but rather an action motivated by the need for Jenkins to understand and adhere to EPA's communications policy.

Finally, Jenkins' allegation that the October 29, 1991 performance rating of "fully successful" rather than "outstanding" was an adverse action cannot be supported. Jenkins contends that this rating was based solely on her non-adherence to communications policy. However, Petruska testified credibly that the evaluation was based on a number of factors, including adherence to communications policy (TR 1600-01). Subsequent to the addition of the communications policy criteria to her performance standards, Jenkins again violated the communications policy by publicly discussing the Monsanto investigation (CX 324). Therefore, rating her performance on that criteria as "unsatisfactory" was reasonable (CX 334). Furthermore, Jenkins' ratings in most other performance areas for that evaluation were "fully successful" rather than "outstanding." Therefore, a "fully successful" evaluation was not an adverse action because it was based accurately on Jenkins' performance during this period.

C. Conclusion

In sum, complainant has failed to prove that the respondents discriminated against her due to activity protected under the any of the six environmental statutes. Any adverse actions taken against the complainant from 1987 to 1991 were taken for legitimate business reasons and were not retaliatory. Therefore, it is recommended that this case be dismissed in its entirety.

RECOMMENDED ORDER

On the basis of the foregoing, it is recommended that the case of Dr. Cate Jenkins be dismissed in its entirety.

JEFFREY TURECK
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-

---

[Page 39]

4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).

[ENDNOTES]

[1]This case also arises under the Clean Air Act, Safe Drinking Water Act, Water Pollution Control Act, Comprehensive Environmental Response, Compensation and Liability Act, and Toxic Substances Control Act. The Solid Waste Disposal Act is also known as the Resource Conservation and Recovery Act (RCRA).

[2]In a later case brought by the complainant, Judge Glenn Lawrence issued a *Recommended Decision and Order* ordering, *inter alia*, that complainant be re-instated to her previous position, that respondent pay all fees and costs, and that complainant be awarded $10,000 in exemplary damages (*see Jenkins v. United States Environmental Protection Agency*, 92-CAA-6 (ALJ, Dec. 14, 1992)). This decision was adopted by the Secretary of Labor on May 18, 1994 (*see* 92-CAA-6 (Sec'y, May 18, 1994)).

No request was made by either the complainant or respondent to treat Judge Lawrence's decision as having a collateral estoppel effect on the instant case. *See, e.g.* ALJX 2 at 5-6. Further, regardless of whether collateral estoppel could have had an effect on this case had either party raised it, I find that the issues contested and relief requested in 92-CAA-6 are sufficiently different such that collateral estoppel would not apply.

[3]Despite the extensions of time ultimately granted to the parties to file their briefs, it is obvious that respondent's brief was hastily written, and calling it a half-hearted effort would be giving it too much credit.

[4]Citations to the record of this proceeding will be abbreviated as follows: ALJX -- Administrative Law Judge's Exhibit, CX -- Complainant's Exhibit; RX -- Respondent's Exhibit; TR-- Hearing Transcript.

[5]Although complainant intimates that she was excluded from these meetings for nefarious purposes, there is no evidence in the record indicating either that the meetings were deliberately scheduled when she was unable to attend them or that it would have been normal agency practice for her to have attended these meetings.

[6]On January 7, 1988, while under her IDP, complainant filed an EEO complaint for sexual harassment against Scarberry for an innocuous comment about her smile This complaint was ultimately dismissed because it was not timely filed.

[7]"Penta" is an abbreviation for Pentachlorophenol, "an organic chemical produced by reacting chlorine gas with phenol, used primarily in the U.S. for wood treatment." (CX 196 at vii)

[8]Complainant appears surprised that her relationship with her then-supervisor, Matthew Straus, began to deteriorate in October 1986 after she wrote a memo which was critical of Straus. *See* TR 767. Likewise, complainant seems not to have drawn a connection between her bizarre behavior at work, such as searching through colleagues' offices, brandishing a fake pistol and disclosing the existence of a confidential criminal investigation, and her estrangement from the EPA staff. *See* TR 790-92.

[9]Dioxin toxicity is a concern to Vietnam veterans because dioxin is a major component of Agent Orange, a defoliant used during the Vietnam War which is suspected of being the cause of health problems which have arisen in Vietnam veterans. *See,* e.g., CX 196.

[10]We are not talking about a handful of personal copies that someone might make on his or her employer's copying machine for the sake of convenience. It is likely that complainant copied tens of thousands of pages of EPA documents.

11 While the timeliness of the complaint was raised initially as an issue, neither party raised it at the hearing, and the respondent devoted only a short paragraph in its brief to the issue. Therefore, it is unclear whether timeliness continues to be an issue. Further, a discussion of the timeliness of the complaints is very complicated, since six separate complaints were filed and issues such as the continuing violations theory would have to be addressed. Regardless, because it is recommended that the complaints be dismissed on the merits, there is no reason to discuss the timeliness question, and it will not be addressed in this decision.

12Dellinger testified that during the summer of 1988 medical waste began to wash up on the shores of New Jersey and New York. As a result of this crisis, Dellinger was made responsible for supervising all activity regarding a newly created medical waste project.

13While complainant's brief states the lower rating was "satisfactory," the record reflects that the lower rating was "fully successful" (CX 224-B).