Jenkins v. United States Environmental Protection Agency, 92-CAA-6 (Sec'y May 18, 1994)

DATE: May 18, 1994
CASE NO. 92-CAA-6

IN THE MATTER OF

CATE JENKINS,

COMPLAINANT,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND ORDER

Complainant Cate Jenkins brings the captioned complaint of unlawful discrimination against her employer, the U.S. Environmental Protection Agency (EPA), under the employee protection provisions of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622 (1988); Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i) (1988); Clean Air Act (CAA), 42 U.S.C. § 7622 (1988); Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971 (1988); [1] Water Pollution Control Act or Clean Water Act (CWA), 33 U.S.C. § 1367 (1988); Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9610 (1988); and the applicable regulations which appear at 29 C.F.R. Part 24 (1993). The case proceeded to hearing before a Department of Labor Administrative Law Judge (ALJ), and on December 14, 1992, the ALJ issued a Recommended Decision and Order (R.D. and O.) in favor of Dr. Jenkins. As discussed below, I agree with the ALJ that Dr. Jenkins should prevail in her complaint of unlawful discrimination. The record generally supports the ALJ's factual findings, and I adopt them as described below.

Waiver of immunity

EPA argues that the above employee protection provisions do

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not apply to Federal employees. I note, however, that at least one of those provisions, arising within the context of the CERCLA, incorporates exceptionally broad coverage. In

particular,

> No *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 provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

42 U.S.C. § 9610(a) (emphasis added). Under the CERCLA, "[t]he term 'person' means . . . the United States Government. . . ." 42 U.S.C. § 9601(21). Moreover, "[e]ach department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity. . . ." 42 U.S.C. § 9620(a)(1) (Federal facilities provision). Accordingly, the CERCLA contains express language subjecting EPA, as an agency of the United States, to its provisions, including its employee protection provision. I find EPA to be a "person" within the meaning of 42 U.S.C. § 9610. *Marcus v. U.S. Environmental Protection Agency (Marcus)*, Case No. 92-TSC-5, Sec. Dec., Feb. 7, 1994, slip op. at 3. *Cf. Pogue v. U.S. Department of the Navy Mare Island Shipyard (Pogue)*, Case No. 87-ERA-21, Sec. Dec., May 10, 1990, slip op. at 4-12, *rev'd on other grounds*, 940 F.2d 1287 (9th Cir. 1990) (Department of the Navy subject to CERCLA employee protection provision).

The SDWA also contemplates broad coverage. Its employee protection provision refers interchangeably to "employer[s]" and "person[s]" as being subject to its prohibitions. 42 U.S.C. § 300j-9(i)(1) and (2). While the SDWA does not define the term employer for purposes of Section 300j-9(i), "[t]he term 'person' means [a] Federal agency" which in turn is defined as "any department, agency, or instrumentality of the United States." 42 U.S.C. § 300(f)(11) and (12). I deem this language sufficient to subject EPA to the SDWA employee protection provision.

I note that Federal facilities expressly are subject to the SDWA, an additional indication that Congress intended to waive

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governmental immunity. 42 U.S.C. § 300j-6(a). *See* H.R. Rep. No. 338, 95th Cong., 1st Sess. 12-13, *reprinted in* 1977 U.S. Code Cong. & Admin. News 3659 (Federal

facilities would have to comply with State and local requirements including recordkeeping or reporting requirements, permit requirements, and any other type of Federal, State, or local requirements"). The SDWA states in relevant part:

> Each Federal agency (1) having jurisdiction over any federally owned or maintained public water system or (2) engaged in any activity resulting, or which may result in, underground injection which endangers drinking water . . . shall be subject to, and comply with, all Federal, State, and local requirements, administrative authorities, and process and sanctions respecting the provision of safe drinking water and respecting any underground injection program in the same manner, and to the same extent, as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural . . . .

42 U.S.C. § 300j-6(a).

Employing a similar statutory scheme, the CAA prohibits discrimination by any "employer," and by any "person." 42 U.S.C. § 7622(a) and (b). The term "person" is defined to include "any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof." 42 U.S.C. § 7602(e). The CAA Federal facilities provision covers each Federal agency "(1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants . . . ." 42 U.S.C. § 7418(a). Such agencies "shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity." *Id.*

The CWA Federal facilities provision, which employs language common to the other environmental statutes mentioned above, provides in relevant part:

> (a) Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged

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> in any activity resulting, or which may result, in the discharge or runoff of pollutants . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements,

> administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity. . . . The preceding sentence shall apply
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> (A) to any requirement whether substantive or procedural. . . .

33 U.S.C. § 1323(a). Accordingly, although the CWA definition of the term "person," 33 U.S.C. § 1362(5), does not expressly include the United States Government, Federal agencies are subject to the CWA employee protection provision "in the same manner, and to the same extent as any nongovernmental entity" by means of the CWA Federal facilities provision.

Legislative history supports this application. Congress pointed out that one of the models for the whistleblower provision of the CAA was the whistleblower provision of the CWA. H.R. Rep. No. 294, 95th Cong., 1st Sess. 326, *reprinted in* 1977 U.S. Code Cong. & Admin. News 1404. The legislative history of the CAA whistleblower provision states that "[t]his section is applicable, of course, to Federal . . . employees to the same extent as any employee of a private employer." *Id.* at 1405.

Prior to 1977, the CWA and the CAA required Federal facilities to comply with Federal, State, interstate and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements. Relying on principles of sovereign immunity and on legislative history arguably limiting the term "requirements" to "effluent limitations and standards and schedules of compliance," the Supreme Court held that Federal facilities were not subject to State permit requirements. *EPA v. State Water Resources Control Bd.*, 426 U.S. 200, 215, 227 (1976); *Hancock v. Train*, 426 U.S. 167 (1976). Thereafter, Congress amended the Federal facilities provisions of the CWA and the CAA to overrule *EPA* and *Hancock* and to clarify that the Federal Government was required to comply with State permit, reporting and other procedural requirements. S. Rep. No. 370, 95th Cong., 1st Sess. 67, *reprinted in* 1977 U.S. Code Cong. & Admin. News 4326, 4392; H.R. Rep. No. 6161, 95th Cong., 1st Sess. 12, *reprinted in* 1977 U.S. Code Cong. & Admin. News 1077, 1089-1090. Congress's concern that Federal facilities comply with all State requirements suggests that it also intended all requirements of the Federal statutes to apply. *See* 1977 U.S. Code Cong. & Admin. News 4392 (amendment to CWA Section 1323 clarifies that "all Federal facilities must comply with all substantive and procedural requirements of Federal, State, or local water pollution control laws").

Finally, the Federal facilities provision of the SWDA applies to any Federal agency "(1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste." 42 U.S.C. § 6961. Such agencies are subject to "all Federal, State, interstate, and local requirements, both substantive and procedural . . . respecting control and abatement of solid waste or hazardous waste disposal." *Id.* Although the SWDA, like the CWA, does not define the term "person" to include the United States, 42 U.S.C. § 6903(15), the SWDA whistleblower provision applies by means of the Federal facilities provision.

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

The Civil Service Reform Act

EPA next contends that Dr. Jenkins' exclusive remedy arises under the Civil Service Reform Act (CSRA), which provides protection for whistleblowers. *See* 5 U.S.C. § 2302(b)(8) (Supp. IV 1992). This argument essentially is one of implied repeal, specifically that the CSRA, with its comprehensive scheme of remedies to enforce personnel prohibitions, effectively has repealed the environmental whistleblower statutes as they apply to Federal Government employees. This argument previously has been rejected under both the CERCLA and CWA. *Marcus*, slip op. at 5; *Pogue*, slip op. at 13-16; *Conley*, slip op. at 9-17. For the reasons set forth in those decisions, [3] I find EPA's instant argument to be without merit.

The merits

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To prevail on a whistleblower complaint, a complainant must establish that the respondent took adverse employment action against him because he engaged in an activity protected under the applicable statute. A complainant initially must show that it was likely that the adverse action was motivated by a protected activity (prima facie showing). *Guttman v. Passaic Valley Sewerage Comm'rs*, Case No. 85-WPC-2, Sec. Dec., Mar. 13, 1992, slip op. at 9, *aff'd*, 992 F.2d 474 (3d Cir.), *cert. denied*, 114 S.Ct. 439 (1993). The respondent may rebut such a showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. The complainant then must prove that the proffered reason was not the true reason for the adverse action and that the complainant's protected activity was the reason for the action. *St. Mary's Honor Center v. Hicks*, 125 L. Ed.2d 407, 416 (1993).

1. *Protected activity*

The employee protection provisions of the environmental statutes at issue afford protection for participation in activity in furtherance of the statutory objectives and traditionally have been construed broadly. [4] Here, the parties have stipulated that Dr. Jenkins engaged in activity protected under the statutes and that EPA management knew about the activity. Exh. J-1 at 2, Nos. 10, 17. In fact, Dr. Jenkins served EPA management with copies of all her protected letters and memoranda.

Employed in 1979 by EPA's Office of Toxic Substances, Dr. Jenkins transferred in mid-1980 to the Office of Solid Waste (OSW) to perform "listings" work which entailed developing regulations under the SWDA. EPA examines industry-generated wastes and "lists" them upon determining that their incorrect management would present a hazard. When assigned an industrial listing, Dr. Jenkins would design studies to gather information about the waste being regulated, conduct an industry overview, collect waste samples at industry sites, perform sample analyses and determine toxicity and environmental "fate," *i.e.*, "if you spill it on the ground, is it going to just stay there or is it going to go some place?" Hearing Transcript (T.) 20. The work also entailed coordinating contractors to perform aspects of the studies, writing a Federal Register notice for the proposed rule, responding to comments, and promulgating the final rule. *See* T. 19-23.

In June 1988, Dr. Jenkins complained to a number of congressional oversight subcommittee chairmen about improprieties at EPA. Specifically, (1) she charged regional EPA officials responsible for a Superfund site in California with failure to disclose and address "citizen exposures to high levels of dioxin and pentachlorophenol in their drinking water, air, and food

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chain," Exh. C-9 at 3-8; (2) she charged national EPA officials

with deliberately delaying and obstructing regulation of dioxin contaminated wood preserving wastes, *id.* at 8-11; and (3) she charged EPA with failure to regulate hazardous wastes from 19 industry sources as required under the Hazardous and Solid Waste Amendments of 1984. *Id.* at 11-22. Jenkins expressed particular concern at EPA's so-called "re-listing" initiative, a form of deregulation which permitted industries to determine for themselves whether their wastes were hazardous, without EPA oversight. *Id.* at 12. In October 1988 and December 1989,

Dr. Jenkins supplemented her congressional charges with accounts of consultant abuse at EPA, *i.e.*, conflicts of interest, improper activities, and contract tampering, Exh. C-10 at 2-11, 14-20; and she charged EPA's Office of the Inspector General (IG) with failing to investigate and concealing evidence of contractor improprieties. [5] *Id.* at 7, 11-14. *See* Exh. C-11.

In February 1990, Dr. Jenkins complained to congressional subcommittees about EPA attempts to misrepresent a 1972 study establishing that Alar, the apple pesticide, and its metabolite UDMH [6] are potent carcinogens. As project officer for hazardous waste listing regulations for UDMH, which also comprises the raw material used to manufacture Alar, Dr. Jenkins was responsible for the Federal Register response to industry comments challenging the validity of the 1972 study. Dr. Jenkins complained that while drafting her response, she was pressured by EPA's Office of Pesticide Programs (OPP) and by her own OSW supervisor to downgrade the significance of the study in order to protect the OPP Assistant Administrator, who had declined to cancel the sale of Alar. Exh. C-12. Dr. Jenkins refused, and her draft language characterizing the study ultimately was approved. [7]

About two weeks later, also in February 1990, Dr. Jenkins complained internally about fraudulent methods employed by Monsanto Company in epidemiologic studies which permitted the studies to show no statistically significant excess cancer deaths from exposure to dioxin. Exh. C-13. EPA relied on these studies to conclude that dioxin did not cause cancer or other health effects in humans, and thus EPA had accorded dioxin a reduced "carcinogenic potential ranking" for regulatory purposes. Exh. C-16 at 2. According to Dr. Jenkins, "[t]he Monsanto studies . . . also have been a key basis for denying compensation to Vietnam Veterans exposed to Agent Orange and their children suffering birth defects from such parental exposures." *Id.* Jenkins' complaint was forwarded to the National Institute for Occupational Safety and Health (NIOSH) and EPA's National Enforcement Investigation Center (NEIC). NIOSH ultimately refuted the Monsanto finding of no statistically significant

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excess cancers, and NEIC initiated a criminal investigation of Monsanto. Access to additional information enabled Jenkins to

provide NEIC with further instances of Monsanto's fraudulent dealings and to explain the extent to which the fraud had affected EPA regulation. Exhs. C-16 (Nov. 15, 1990, mem.), C-17 (Jan. 24, 1991, mem.).

In September 1991, Dr. Jenkins executed a 150-page affidavit "supporting a causal relationship between dioxin and human health effects" for use by Vietnam Veterans in litigation against the manufacturers of Agent Orange. Exh. C-19; T. 38. Dr. Jenkins provided a copy of the affidavit to a Washington, D.C., public interest group to counteract statements by then EPA Administrator William Reilly that new research had demonstrated dioxin to be less potent than previously thought. In her covering letter, Jenkins stated:

> What is the motivation for this recent media blitz by Mr. Reilly and [Centers for Disease Control] Dr. [Vernon] Houk, before EPA's new dioxin risk assessment is complete. . . . Mr. Reilly and Dr. Houk are aware that EPA's new risk assessment will not be complete for at least two years. As a result, public statements purporting to reflect alleged conclusions of the scientists actually performing EPA's risk assessment will be quite useful in swaying the current decisions of a jury or community. It is my wish that this affidavit will mitigate the recent public posturing by high-level government officials regarding the effects of dioxin, and prevent the statements of Mr. Reilly [and] Dr. Houk . . . from biasing the case being brought by veterans of the Vietnam war.

Exh. C-18. In October 1991, the Attorney General for the State of Alabama filed with EPA Administrator Reilly a petition for rulemaking and notice of intent to sue under the CWA which relied heavily on Dr. Jenkins' dioxin affidavit. Exh. C-20 at 18-20, 24 and n.9.

2. *Adverse action*

The environmental whistleblower provisions generally prohibit discrimination with respect to an employee's compensation, terms, conditions, or privileges of employment,

including transfer to a less desirable position even though no loss of salary may be involved. *DeFord v. Secretary of Labor*, 700 F.2d 281, 283, 287 (6th Cir. 1983) (although rate of

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compensation not changed, transferred employee "found he was not welcome, that he was no longer a supervisor, and that his job was by no means secure"). *See Holsey v. Armour & Co.*, 743 F.2d 199, 206-212 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985) (manipulation of an employee's bumping privileges, preventing a black manager from supervising white employees in her department, and systematic harassment are examples of adverse action). *See also Klein v. Indiana Univ. Trustees*, 766 F.2d 275, 277-278, 280-281 (7th Cir. 1985) (altering an employee's work schedule); *Griffin v. Michigan Dep't of Corrections*, 654 F. Supp. 690, 695 (E.D. Mich. 1982) (false accusations and setups, intimidating comments, threats to terminate employment); *Sparrow v. Piedmont Health Sys. Agency*, 593 F. Supp. 1107, 1118 (M.D.N.C. 1984) (denial of customary employment recommendation).

Dr. Jenkins testified that shortly after she issued her February 1990 memoranda concerning the Alar/UDMH rulemaking and the Monsanto fraud, her work assignments ceased. She testified:

> I had been working on two regulations and there was a lot of paper work because it was in the final stages . . . you have to get approvals from different offices; get work group review or whatever. My paperwork, I would turn stuff around within a few hours or a half day and send it forward: It stopped moving. Essentially, then, in the summer and the spring, I was not really getting new assignments. All of my duties pretty much tapered off and I was always given some excuse. I asked [Supervisor] Petruska, "I am sitting around here with nothing to do. . . ." And he said that it will "be one of my first priorities; I am going to find work for you." A year after that. I mean, not even letter writing -- nothing.

T. 40-41. Then in November 1991, following the State of Alabama's October citizen suit petition, her supervisors began discussing her reassignment, which took effect in April 1992. Dr. Jenkins was transferred to a predominantly administrative position in OSW's Technical Assessment Branch. With regard to her new job, Dr. Jenkins testified: "[I]t is totally non-technical, it is kind of policy analyst budgetary work that I am doing -- kind of comparisons of numbers and seeing what we have the money for in the program to do. It is not very good. . . . It is very isolated." T. 54.

In short, Dr. Jenkins no longer performed the kind of

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challenging, technical work that utilized her chemical background fully and required interaction with the regulated community and the public. She had excelled at this work during her decade of tenure at OSW, and she clearly enjoyed it. T. 104. In these circumstances, I agree with the ALJ that her transfer to an isolated, administrative position constituted adverse action. The ALJ's observation, that "putting an employee in isolation with little to do [can] have as adverse [an] impact on an employee . . . as reducing his or her pay or even firing the employee," applies especially to the highly motivated Dr. Jenkins.

3. *Causation*

Temporal proximity between a complainant's protected activity and an employer's adverse action has been held sufficient to meet the causation requirement of a complainant's prima facie case. *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989); *Mitchell v. Baldrige*, 759 F.2d 80, 86 and n.6 (D.C. Cir. 1985); *Burrus v. United Telephone Co. of Kansas, Inc.*, 683 F.2d 339, 343 (1Oth Cir.), *cert. denied*, 459 U.S. 1071 (1982).

Here, the sequence of events supported Dr. Jenkins' claim. Within weeks of her February 1990 coercion and fraud complaints, processing of her previously active listings ceased and she received no further listings assignments. Both of these complaints related directly to her listings assignments. Between mid-1990 and the fall of 1991, Dr. Jenkins assisted in the NEIC fraud investigation and engaged in outside research for the Agent Orange litigation. Then, after completion of the dioxin affidavit in September 1991 and its use in the October 1991 citizen suit petition, EPA decided to transfer Dr. Jenkins to an essentially administrative position, isolating her from contact with the regulated community and the public. [8] EPA management first approached Dr. Jenkins with the possibility of transfer in November 1991 and completed the paperwork in March 1992.

Furthermore, draft disciplinary memoranda, which addressed Dr. Jenkins' earlier (1988-1989) as well as later (1990-1991) protected activity but which never were transmitted to or discussed with her, suggest EPA's displeasure with her whistleblowing. Exhs. C-21, C-22, C-23, C-24, C-25. Indeed, language in her supervisor's draft "memorandum to the file" suggests that he objected to the content of her "communications to the public" absent compliance with certain unspecified EPA procedures. Exh. C-23 at 1, third paragraph. Taken together, these exhibits document an ongoing, unsuccessful effort by EPA to find a legitimate reason for disciplining Dr. Jenkins [9] when the real reason appears to have been her whistleblowing. I find that this evidence shows causation for purposes of Dr. Jenkins'

prima facie case.

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4. *EPA's defense*

David Bussard, Director of OSW's Characterization and Assessment Division, made the decision to transfer Dr. Jenkins to the division's Technical Assessment Branch (TAB). Jenkins previously had been doing listings work under the supervision of Michael Petruska, chief of the division's Regulatory Development Branch, which ordinarily does not perform listings work. The reason for this arrangement was that Dr. Jenkins had filed harassment charges against Robert Scarberry, chief of the division's Waste Identification Branch (WIB), which contained the Listings Section, and a change in supervision was deemed appropriate while the charges were pending. Director Bussard testified that he decided to transfer Dr. Jenkins to the TAB because her current listings assignments had concluded and continued supervision by Chief Petruska would prove "awkward" and "difficult" since he was not responsible for and lacked expertise in the listings area. T. 111-114.

Bussard's proffered rationale for the transfer is troublesome, however, and for the following reasons I agree with the ALJ that it is pretextual. First, the timing is suspect. Although Petruska had complained about what he viewed as an unworkable supervisory arrangement throughout its more than two-year duration, T. 318-319, 327, Bussard took no action until Jenkins' February 1990 whistleblowing activity began to elicit results and it became apparent that no legitimate basis existed for disciplining her.

Second, testimony by EPA listings management revealed Dr. Jenkins to be "highly skilled" at listings, a "top" candidate for listings work "from a technical . . . and experience standpoint," and "brilliant . . . under certain circumstances." T. 234-235, 238-239. Accordingly, the logical transfer choice was WIB's Listing Section, especially since WIB Chief Scarberry no longer worked for EPA. T. 318. WIB listing assignments had increased dramatically as the result of a settlement reached in a court action brought against EPA by the Environmental Defense Fund, Exh. R-20, and the burden placed on the Listings Section as the result of the settlement exceeded that placed on the TAB. T. 148, 215-216, 235. Moreover, TAB Chief Alexander McBride testified that Jenkins was not qualified to perform the work done by his branch, and he was required to create a special position for her which alternatively could be filled by an employee of lesser grade. T. 205, 218-219, 220, 226; Exh. C-2 at 4. *See* T. 154-155 (Bussard).

Finally, Edwin Abrams, chief of the Listings Section, testified that he "made [his] feelings known" that because of her "zealousness," especially concerning dioxins, he did not want Dr. Jenkins assigned to his branch. T. 237, 242; Exh. C-3. *See*

T. 144-145 (Bussard). In a memorandum regarding possible assignments for Dr. Jenkins, Abrams wrote: "I don't think Cate should be involved with anything that puts her in direct contact with the regulated community or the general public. If we insist on retaining her, place her in some administrative or staff position (like Bill Sanjour) and not worry about whether she is happy. . . ." Exh. R-15. Bill Sanjour is a "well known" whistleblower in EPA's Characterization and Assessment Division who "either has no duties or if [he] is given duties, they are definitely of an administrative type." [10] T. 54-55 (Jenkins). Based on the above considerations, I find that EPA transferred Dr. Jenkins in retaliation for her protected activity.

ORDER

Respondent U.S. Environmental Protection Agency is ordered to offer Complainant Dr. Cate Jenkins reinstatement to her former or comparable position performing the work assigned to the Listings Section, Waste Identification Branch, Characterization and Assessment Division, Office of Solid Waste, Office of Solid Waste and Emergency Response, U.S. EPA. I also adopt the ALJ's recommendations that this decision be posted and circulated and that Complainant be compensated for costs and expenses. Accordingly, counsel for Complainant are granted a period of 20 days from receipt of this decision to submit any petition for costs and expenses, including attorney fees. Respondent thereafter may respond to any petition within 20 days of receipt. The ALJ also has recommended, without discussion, that Complainant be awarded exemplary damages. Assuming, without deciding, that exemplary damages are available against the United States Government, I find that they are not appropriate here. Beyond the bare statutory violations, the record in this case suggests that on more than one occasion EPA punished whistleblowers by removing them from assignments and transferring them to undesirable positions, and accordingly that EPA routinely may have dealt with its whistleblowers in this manner. The record also suggests that EPA carefully scrutinized Dr. Jenkins' actions in an attempt to find a legitimate basis for its retaliation. This showing, however, does not appear to meet the threshold "state of mind" standard for awarding such damages adopted in *Johnson, Hernandez, and Bradley v. Old Dominion Security*, Case Nos. 86-CAA-3, 86-CAA-4, 86-CAA-5, Sec. Dec., May 29, 1991, slip op. at 28-30, and I therefore do not award them. [11]

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] The SWDA also is known as the Resource Conservation and Recovery Act (RCRA).

[2] EPA has jurisdiction over properties and facilities as a regulator and an occupant. As a regulator, it has jurisdiction over solid waste management facilities and disposal sites and as an enforcer it engages in activities resulting in disposal and management of solid waste and hazardous waste. It also engages in activity which may endanger drinking water. For example, the manner in which EPA manages the cleanup of a Superfund site may result in contaminated drinking water. As part of her regulatory "listing" activities, Dr. Jenkins assisted an EPA regional office which was responsible for overseeing the cleanup of a hazardous waste facility in California. In so doing, she discovered evidence that omissions by the regional office may have resulted in prolonged contamination of residential drinking wells. EPA's attempt to cover up this evidence formed the basis for one of Dr. Jenkins' whistleblower complaints. *See* Exh. C-9 at 2-8.

[3] Those decisions note that the Whistleblower Protection Act of 1989 amended the CSRA to provide that CSRA remedies "shall [not] be construed to limit any right or remedy available under a provision of [another] statute." 5 U.S.C. § 1222. As its legislative history makes clear, that provision was intended to preserve whistleblower remedies under "a large number of environmental and labor statutes which provide specific protection to employees who cooperate with federal agencies." 135 Cong. Rec. 5035 (1989). In the instant case, much of Dr. Jenkins' protected activity and all of EPA's retaliation occurred after July 9, 1989, the effective date of the Whistleblower Protection Act. *See infra* at 11-16.

[4] CERCLA Section 9610(a) is quoted above under the "waiver of immunity" issue. Another example, SDWA Section 300j-9(i), provides:

> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has --

(A) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this subchapter or a proceeding for the administration or enforcement of drinking water regulations or underground injection control programs of a State,

(B) testified or is about to testify in any such proceeding, or

(C) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this subchapter.

[5]
EPA's IG thereafter became the subject of a congressional investigation. Exh. C-2 at 13 and 14 n.28.

[6]
UDMH is the chemical unsymmetrical dimethylhydrazine. T. 47.

[7]
At the time that the OPP Branch Chief requested the misrepresentation, she may have been unaware that the meeting was being audio-recorded. Exh. C-12 at 7.

[8]
The Chairman of the National Vietnam Veterans Coalition testified that he was referred to Dr. Jenkins when he contacted EPA for assistance in conjunction with prospective Agent Orange legislation and that she assisted him as directed under the "public interaction" standard in her job description. T. 174-189.

[9]
Dr. Jenkins was charged with (1) creating confusion about EPA's official positions by issuing external whistleblower complaints on agency letterhead, (2) compromising the integrity of the Alar/UDMH rulemaking by disclosing OPP's "position" that the 1972 study should be downgraded, and (3) disclosing the fact that Monsanto was being investigated. With regard to the final charge, EPA's Deputy Assistant Administrator, Office of Enforcement, in a "confidential, personnel-sensitive" memorandum, requested that Dr. Jenkins be subject to "appropriate administrative action" because she may have "damage[d] both the efficiency of the criminal investigation at issue and the legitimate interests of companies and individuals who have neither been charged with, nor convicted of, any crime." Exh. C-30 at 1-2. After researching the charges, Dr. Jenkins' supervisor, Branch Chief Petruska, determined that they would not support discipline. T. 306-316.

[10]
In a separate memorandum concerning Dr. Jenkins, Abrams cautioned: "I think you (Mike P[etruska]) need to define the scope of her work *very carefully* or you'll create another monster." Exh. C-27 (emphasis in original).

[11]
Under the *Old Dominion* standard, the threshold inquiry centers on the wrongdoer's state of mind: did the wrongdoer demonstrate reckless or callous indifference to the legally protected rights of others, and did the wrongdoer engage in conscious action in deliberate disregard of those rights? The "state of mind" thus is comprised both of intent and the resolve actually to take action to effect harm. If this state of mind is present, the inquiry proceeds to whether an award is necessary for deterrence.