U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

PAUL BERKMAN,

COMPLAINANT,

v.

UNITED STATES COAST GUARD ACADEMY,

RESPONDENT.

ARB CASE NO. 98-056

ALJ CASE NOS. 97-CAA-2
97-CAA-9

DATE: February 29, 2000

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Scott W. Sawyer, Esq., *New London, Connecticut*

For the Respondent:
William G. Haskin, Esq., *United States Coast Guard, Norfolk, Virginia*

DECISION AND REMAND ORDER

This case was brought under the employee protection (whistleblower) provisions of five Federal environmental statutes: the Clean Air Act (CAA), 42 U.S.C. §7622; the Federal Water Pollution Control Act (WPCA), 33 U.S.C. §1367; the Toxic Substances Control Act (TSCA), 15 U.S.C. §2622; the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9610; and the Solid Waste Disposal Act (SWDA),[1/] 42 U.S.C. §6971 (all 1994). In a Recommended Decision and Order (RD&O), the Administrative Law Judge (ALJ) found that Respondent, the United States Coast Guard Academy (Academy), violated the whistleblower provisions of the environmental acts by engaging in conduct that resulted in a tangible job detriment to Complainant, Paul Berkman (Berkman). We agree with the ALJ's conclusion that the Academy

[1/] The SWDA also is known as the Resource Conservation and Recovery Act (RCRA). We will refer to the five statutes collectively as "the environmental acts."

took adverse employment action against Berkman in violation of the whistleblower protection provisions although we reach that conclusion based upon an analysis different from the ALJ's. Specifically, we find that the adverse employment action against Berkman was the Academy's creation of a hostile work environment.

ISSUES FOR DECISION

This case presents several issues for review:

1) Whether Berkman was subjected to a hostile work environment in retaliation for having engaged in protected environmental whistleblower activities.

2) If so, whether Berkman was constructively discharged.

3) If we find a violation of the environmental acts, whether and to what extent Berkman is entitled to certain remedies, including reinstatement, back pay, front pay, compensatory and exemplary damages, attorney fees, and costs.

FACTUAL BACKGROUND

The ALJ's factual findings, RD&O at 2-33, are well supported in the record. We provide here a recounting of the facts relevant to our determination of the case.

I. The Academy's Environmental Compliance Efforts Prior to Berkman's Arrival

In October, 1993, the Academy hired Berkman to fill the recently-created position of Environmental Engineer with the Academy's Facilities Engineering Division. In this position, Berkman was responsible for ensuring the Academy's environmental protection compliance and hazardous waste management. CX at 1. In order to more fully appreciate the difficulties Berkman encountered in fulfilling his responsibilities on behalf of the Academy, which give rise to this litigation, it is helpful to first briefly recount the history of his immediate predecessor in charge of environmental compliance.

The United States Coast Guard Academy is located in New London, Connecticut on the banks of the Thames River. From 1987 to 1992, the Academy's environmental compliance was the responsibility of a civil engineer, Douglas Frey, who had some training and experience in environmental compliance. T. 328-332. Among his other duties, Frey was the Academy's hazardous materials (HAZMAT) officer. According to Frey, there were many people at the Academy who used hazardous materials and generated hazardous wastes, but environmental compliance was not high on their priority lists. T. 335. Frey experienced friction with his management when environmental issues arose that he believed needed to be reported to environmental regulatory agencies. T. 333. For example, when the Connecticut Department of Environmental Protection (Connecticut DEP) sent an inspector to the Academy, in response to Frey having contacted the state agency about pollution problems at the Academy, T. 389, Frey's supervisor, Greg Carabine, yelled at Frey for having contacted the agency, T. 349, and ordered Frey

to refrain in the future from any direct contact with Connecticut DEP on environmental issues. T. 412

In 1992, workers at the Academy's "North Site"[2/] unearthed some barrels, one of which was leaking a noxious liquid. T. 122-23, 161, 174, 317-18. Frey gathered soil samples from the site and had a laboratory analyze them. T. 357-58. The results indicated to Frey that the area was hazardous and should be reported to environmental agencies. T. 356, 358, 395. He recommended that his superiors report the site, but did not make a report on his own because he had been ordered not to have any direct contact with Connecticut DEP. T. 411-12. In a later memorandum, Frey listed the North Site as an area that was not in compliance with environmental laws. T. 362- 63, 374.

A final example offered by Frey: later in 1992, at the conclusion of an environmental review conducted jointly by the state and by the United States Environmental Protection Agency (EPA), Carabine abruptly released Frey from all of his environmental duties. T. 331. In Frey's opinion, the Academy "had never been comfortable with me as a hazardous material officer, and it seemed like it was an opportune moment for them to move me aside in favor of someone who would pursue the Academy's interests rather than my concerns as an environmentalist." T. 332. A Coast Guard officer took over Frey's environmental duties. T. 333.

II. Berkman's Efforts at Environmental Compliance in 1994-1995

In an effort to achieve better compliance with environmental laws and requirements, in 1993 the Academy created a new position of Environmental Engineer, "responsible for the activities of the . . . Academy to ensure compliance with all applicable environmental regulations and design criteria." CX 7 at 1. The position, in the Academy's Facilities Engineering Division, Construction and Engineering Branch, had two principal facets: environmental protection compliance and project management. *Id.* The duties of the position included acting as project manager on contract design and studies, assuring environmental protection, and managing hazardous wastes. *Id.*

As previously noted, the Academy hired Berkman for the new Environmental Engineer position, beginning in October 1993. Berkman has a bachelor's degree in biochemistry and a master's degree in chemical engineering. T. 565; CX 21. In a prior job, Berkman had held the position of environmental protection specialist dealing with solid waste issues. T. 566-67; CX 21. Berkman had taken dozens of environmental courses and was familiar with the requirements of numerous environmental statutes. T. 565-66. Berkman was enthusiastic about his new position as environmental engineer and initiated new instructions and management plans for environmental compliance at the Academy. T. 70, 80-81; see CX 23 (performance evaluation covering November 1993 through March 1994).

[2/] The Academy's "North Site" is located on the Thames River between the Academy's rowing center and the Thames Shipyard. CX 11. The site, which formerly belonged to a commercial shipyard, contained metal scraps, metal cans, glass, rusted metal, and a sand plateau on which there was no vegetation. T. 468.

In 1994, Berkman read a preliminary environmental assessment of the North Site together with a copy of the results of the soil samples taken from the site in 1992. CX 28C; T. 597. Based on the test results and his own observation, Berkman believed that the soil at the site contained a high level of lead that required reporting the site to the appropriate environmental agencies. T. 598-99, 708. In October 1994, Berkman sent a memorandum (CX 30a) to his immediate supervisor, Lieutenant (LT) Ingalsbe, advising that the CERCLA required reporting of the North Site. Although Berkman attached a draft letter reporting the site to the EPA, CX 28d, it was never sent because Ingalsbe's superior, Captain (CAPT) Florin,[3/] decided that the North Site need not be reported. T. 600-602, 1025.

Berkman informed Florin of his belief that he (Berkman) could be held liable personally for failure to report the North Site. T. 1034.[4/] Florin responded that it was not likely that Berkman would be held liable. T. 1037.

Notwithstanding their disagreement on reporting the North Site, Berkman's superiors rated his work highly. In an April 1995 performance evaluation, Berkman received a "meritorious" rating, with praise given for his project management on an environmental study and his oversight of the removal of storage tanks and related testing. CX 24 (Narrative, Job Element No. 1).

Berkman continued to press his superiors for compliance with environmental reporting. On September 1, 1995, he sent a memorandum to Florin, the head of the Facilities Engineering Department, suggesting that the existing organization of the Department "adversely affect[ed] the [environmental] compliance status of the Academy. It is not effective to have the Environmental Office placed under the organization it is required to review and regulate, analogous to the fox guarding the hen house." CX 31.

Florin met with Berkman two weeks later to discuss the memorandum. Florin did not agree with the need for reorganizing the department. Instead, he curtailed Berkman's environmental duties. Florin told Berkman not to perform any reviews of contracts and specifications for environmental compliance, to discontinue National Environmental Policy Act reviews, and to ignore the requirements of the Headquarters Pollution Prevention Program. CX 32.

Perceiving no improvement on environmental issues, Berkman sent another memorandum two months later to the Academy's Assistant Superintendent, CAPT Olsen, suggesting actions "which must be implemented in order to achieve and maintain environmental compliance." CX 32 at 1. Berkman mentioned the reduction in his environmental responsibilities and asked for a change in the job elements on which he would be rated in his performance appraisal to avoid being penalized for not performing the work that he had been directed not to do. *Id.* Berkman also complained that

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[3/] At the time, Berkman's chain of command was: LT Ingalsbe, Greg Carabine (a civilian), CAPT Florin, CAPT Olsen, and Admiral (ADM) Versaw. Florin initially was a commander (CDR) and was promoted to captain.

[4/] Other knowledgeable witnesses agreed that individuals can be held liable for not reporting an environmental problem. T. 77-78 (Suzanne Berkman); 362 (Frey).

he was being shut out of other environmental compliance duties, for example, that Florin had revised the Academy's Waste Management and Minimization Plan without consulting him. *Id*. Berkman explained that his second-level supervisor, Carabine, was setting back RCRA compliance by giving out information that conflicted with the program and by giving orders "detrimental to us ensuring compliance." *Id*. Berkman stressed that "I now feel uncomfortable doing the legally right thing since it conflicts with Mr. Carabine's and CDR Florin's directives and concepts." *Id.* Berkman concluded:

> I was hired for my expertise and experience which I have used to develop an environmental program at the Academy. Under Mr. Carabine, and the lack of action by CDR Florin, I am no longer being used for my expertise and many of our compliance programs are reverting back to what they were before I was hired.

Id.

Berkman's superiors called a meeting on November 20, 1995, to discuss his request for a change in the job elements for his position.[5/] In attendance were Berkman, his new immediate supervisor, LT Opstrup[6/], Carabine and Florin. Carabine was distraught about Berkman's memo to CAPT Olson. He screamed and threatened to sue Berkman for defamation of character for going behind his back with criticism to the Assistant Superintendent. CX 10; T. 616-17. In the heat of the moment, Berkman responded that he would sue Carabine. T. 617. Upon leaving the meeting, Berkman feared that he would be fired for raising the issue of lack of environmental compliance with the Assistant Superintendent. T. 619. Berkman believed that he was being subjected to retaliation simply because he was doing his job properly. He consulted an academy legal officer about his potential liability. T. 622-23.

The next day, in a "much more relaxed" meeting between Florin, Carabine, Opstrup, and Berkman, all agreed that nobody would sue anybody, that there would be weekly staff meetings to open communications, and that Florin would speak with Berkman about environmental issues. T. 490, 620-21; CX 37. The attendees agreed that Berkman's critical job elements "would be rewritten to reflect reduced environmental tasking." CX 37. Notwithstanding the difficulties Berkman was encountering, he was upbeat and enthusiastic about his work throughout 1994 and 1995. T. 170, 865; RD&O at 50.

III. The Work Atmosphere in 1996, the Deterioration in Berkman's Health, And Berkman's Retirement

Beginning in 1996, Berkman's work situation began to deteriorate noticeably, particularly in response to his efforts to ensure environmental compliance. In January, about two months after the conciliatory meeting in which his superiors promised that they would hold meetings and engage

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[5/] The job elements eventually were changed after April 1996. T. 505.

[6/] Opstrup had replaced Ingalsbe.

in more open communications, Berkman realized that the promised "open communications" on environmental issues had not occurred. T. 633. Consequently, Berkman sent another memorandum to Olsen concerning the Academy's lack of environmental compliance. CX 42. Berkman emphasized that, "[i]n light of [the Academy] being under a consent order, any further RCRA violations we receive could result in much higher fines to the Academy including civil or criminal actions against personnel." Berkman again expressed his fear of personal civil and criminal liability. *Id*. at ¶2. He concluded,

> I am caught between a rock and a hard place. I have to make recommendations based on legal requirements to keep us in compliance. When these recommendations conflict with management concepts I am accused of setting them up for taking the fall for future violations. * * * I am only doing the job I was hired for, trying my best to keep the Academy in environmental compliance.

Id. at ¶¶4, 5.

In response, Olsen told Berkman that he would hold an environmental quality team meeting, but the meeting did not take place. T. 636-637. Berkman concluded that Olsen was not going to help obtain environmental compliance and that taking the issue to the next level in the chain of command would be fruitless. On several prior occasions, he had raised the environmental compliance issue with the Academy's Superintendent, ADM Versaw. T. 639. Even though he told Versaw that he had exhausted the chain of command, Versaw nevertheless told him to go back through the chain to raise environmental issues. *Id.*

In March 1996, Berkman requested permission to use advanced "compensatory time" to observe a religious holiday with the plan of making up the time after the holiday. CX 47. Carabine initially denied the request and asked for proof that Berkman could use compensatory time for that purpose. *Id.* After receiving confirmation that Berkman could accrue the compensatory time after the religious holiday, Carabine initially took the position that Berkman could make up the time only at the close of his regular work day, which was not possible because of Berkman's child care responsibilities. *Id.* Subsequently, Carabine assigned specific Saturdays for making up the time and required that a supervisor be present. T. 862. Office secretary Beverly Campbell testified that Berkman was the only employee required to have a supervisor present when making up advanced leave time. T. 862-63.[7/]

On March 15, 1996, Berkman met with Opstrup, Carabine, and the Academy's chief legal officer, CDR Mackell, concerning Berkman's continuing request for environmental reporting of the North Site. CX 49. When Berkman again raised the issue of his personal liability, Mackell stated that Berkman's duties were satisfied by reporting the issue up the chain of command. *Id.* at ¶1.b.

[7/] Berkman filed an Equal Employment Opportunity complaint, on the basis of religious discrimination, about the initial denial of his leave request and the lack of sensitivity in the way it was handled. CX 52.

Mackell offered the opinion that Berkman's superiors ("the command") would look upon it unfavorably if Berkman reported the site on his own. T. 656; CX 49 at ¶1.c.

A few days later, at a meeting about environmental studies that Berkman had organized with an environmental consulting company, Carabine cut off Berkman abruptly and made satirical remarks about him. CX 48. At one point, Mackell interrupted Berkman and said, "Now, let the professionals speak," meaning the private consultants. T. 659. Berkman, who considered himself to be a professional, was offended. *Id.* As the meeting went on, Berkman gave up trying to speak. *Id*. Although at the meeting the consultants gave no clear cut answer whether the Academy had to report the North Site,[8/] after the meeting the consultants told Berkman privately that the site should be reported. T. 659-60.

Later in March, Mackell stated in a memorandum to Florin that Berkman did not understand the procurement process and recommended that Berkman not be permitted to conduct unsupervised meetings with contractor personnel. CX 54, ¶4. As a result, Berkman was taken off a number of projects. T. 694. For example, in April his superiors informed Berkman that he no longer would work with contractors on any construction projects. CX 10. Berkman was immediately removed from his duties as assistant Contracting Officer's Technical Representative (project manager) on the Tank Consolidation Project. At the time, Berkman's superiors stated that they removed him from these duties because he lacked the proper skills and training to be a contract manager. CX 64. (Opstrup later gave an additional reason for removing Berkman from the project: his erratic attendance at work. T. 507; CX 116 at 91.)

During this same time (April of 1996), Berkman discussed with Mackell his long-standing recommendation to remove the environmental office from the Facilities and Engineering Department because Carabine, who had no training in environmental matters, was impeding environmental compliance. T. 694-95. Mackell agreed that the environmental office probably would work better as part of the Public Works Department. T. 695. In a separate discussion, Berkman recommended to Florin that the environmental office ought to report directly to Florin, rather than Carabine. T. 696. Florin promised Berkman that there would be a reorganization. T. 697.

A few days later, Berkman learned that Mackell had changed his mind and decided not to support the reorganization of the reporting structure for the environmental office. T. 699; CX 19. Berkman considered this news "the straw that broke the camel's back." T. 696. Berkman testified that the decision not to reorganize was devastating, particularly as he would still be required to report to Carabine, who impeded Berkman's efforts to effect environmental compliance at the Academy and was personally abusive toward him in the process. T. 698.

Upon being informed that there would be no reorganization, Berkman began to suffer anxiety attacks in which he experienced shortness of breath, tightness in his chest, and breathing difficulties, as well as difficulty sleeping and concentrating. T. 696, 699. Consequently, Berkman sought

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[8/] Opstrup described the consultants as being divided on the issue of reporting the North Site. CX 116 at 31.

medical treatment for stress and anxiety.[9/] CX 61; T. 699-700. The physician who examined Berkman, a Dr. Okasha, diagnosed him with major depression, which Dr. Okasha in turn determined was caused by "supervisor harassment at the Academy." T. 772. Berkman began taking Prozac and started psychotherapy. T. 700-01.

In the course of Berkman's psychotherapy, in June, 1996, his physician again attributed his deteriorated physical and mental state to work-place harassment:

> [Mr. Berkman] shows signs of depression in the form of tiredness, lack of ambition and motion, hypersomnia, generalized pain, anhedonia, and lack of concentration. Typically his depression is in the morning and made worse because of the stress caused by harassment from his supervisors leading to his inability to get up and get started.

CX 61.

Feeling very stressed from conditions at work, Berkman often was absent. He was unable to work a full day because of the debilitating effects of his depression, which caused extreme fatigue. T. 627; CX 10.

Others who worked in the Facilities Engineering Department confirmed that Berkman's personality changed in 1996. According to one of the Department's gardeners, Charles Carey, Berkman became a nervous, downtrodden, and "stressed out" person beginning that year. T. 127-28, 171. Other workers confirmed that, in 1996, Berkman walked with his head down, looking tired and sad. T. 212, 214-15 (Adams); T. 286, 316 (Marek). Berkman seemed to have lost interest. T. 293. Beverly Campbell described Berkman as "worn out," stating that he got tired just climbing the stairs. T. 865. Berkman's wife likewise observed great changes in Berkman's personality at that time.

Ensuing events further exacerbated Berkman's problems. One such event arose out of a HAZMAT training course that Berkman conducted for Academy personnel in May 1996. In response to a worker's question, Berkman revealed that the lead concentration at the North Site exceeded the allowable limit. T. 143. Opstrup later yelled at Berkman and accused him of inciting the workers and making a problem worse. T. 702. From that point, Berkman was not allowed to give training without Opstrup being present. T. 705. In notes he made some three months later, Opstrup recollected his discussion with Berkman after the HAZMAT training session, noting that he did not understand Berkman's "agenda." CX 76.

[9/] A year earlier, in April, 1995, Berkman sought medical treatment to determine the reason for fatigue he was then experiencing. CX 55. Berkman was examined by a rheumatologist because he had a rheumatological condition called fibromyalgia. T. 602. The physician referred Berkman to a psychiatrist who diagnosed him as suffering depression. T. 603. However, the depression was not affecting Berkman's work; thus Berkman did not seek or receive any treatment for the depression at that time. T. 775

In July 1996, Berkman informed Opstrup that he was not able to complete his assigned projects because of his depression, and requested another adjustment to the job elements of his performance appraisal to reflect his medical situation. CX 61. Berkman also asked to be permitted to perform some of his work at home on evenings and weekends. Opstrup would have permitted it, CX 116 at 92-93, but was overruled by superiors who did not permit anyone to work at home. T. 653, 972; CX 66. Florin and Carabine opined that Berkman simply did not want to work. CX 66. Berkman renewed the request to work at home in early August. CX 68. The Academy demurred, stating that it could not grant any accommodation to Berkman's condition of depression until it received more detailed information from his physician. CX 70. Berkman provided the requested medical records. CX 79, 88, 102.

Still believing that he risked prosecution if he did not report the North Site, Berkman telephoned the EPA's National Response Center on August 23, 1996, to make the report. T. 727-28. Berkman was told to follow up with a letter reporting the site to Connecticut DEP. T. 730, 732.

As he had two years earlier, Berkman drafted a reporting letter for Florin's signature, but Florin again said that he would not sign it. T. 733. Nor would Carabine sign the letter. CX 73. Consequently, on August 23, Berkman sent the letter to Connecticut DEP on Academy letterhead, signed "P.D. Berkman, Academy Environmental Engineer." CX 77.

At a subsequent counseling session, Florin reacted angrily to Berkman's sending the letter, indicating that Berkman had stabbed him in the back. T. 738, 1002. Florin reminded Berkman that he was not authorized to sign letters to anyone outside the Academy and that he should be careful about calling himself the Academy's Environmental Engineer. T. 738, 811, 1001. Florin explained that the letter made it look like the Academy took the position that the North Site had to be reported. T. 1004.

After the meeting with Florin, Berkman felt hopeless and his depression worsened. T. 740. His work attendance became more sporadic and the Academy asked him to provide doctor's notes giving more information on his medical condition. T. 546-47; Respondent's Exhibit (RX 5); CX 70. Berkman provided a doctor's note indicating that he could not work full time, was on medication, and that his prognosis was good with continued treatment. CX 79.

In September 1996, the Academy granted Berkman a part time work schedule for four weeks to accommodate his medical condition. CX 80. Opstrup wanted Berkman to return to a full work schedule in order to meet the office's work demands. CX 80, 82. Opstrup asked for updated medical documentation regarding the part time work schedule, CX 87, which Berkman supplied with a note from his doctor. CX 88. On September 18, Berkman filed a complaint with the Department of Labor (ALJ Case No. 97-CAA-2) alleging retaliation for engaging in activities protected under the environmental acts.

In late October 1996, Opstrup told Berkman that he had exceeded the allowable leave under the Family and Medical Leave Act. Opstrup also indicated that soon he would be deciding whether Berkman could continue working part time, which was a "hardship" on the office. CX 91. Opstrup told Berkman that the Academy would consider terminating him if he did not return to full time

work within a reasonable time. T. 755. In response, Berkman submitted a doctor's letter stating that his condition left him fatigued, depressed, and with poor concentration. CX 101. The doctor indicated that Berkman should continue to work part time to lessen the severe stress he experienced at work. *Id.* Also in October, the office instituted a new sick leave policy which led to Berkman being given "absent without leave" (AWOL) status on two days. CX 93. Citing the notes from doctors that Berkman routinely provided, Beverly Campbell, the office secretary, initially declined to sign the cards showing Berkman as AWOL, but changed her mind when Carabine became angry. T. 877-78. Campbell believed that the new policy was a set up to get Berkman, since it was not applied to anyone but him. T. 878. She testified that although the new policy remains in effect, it has not been used since Berkman's departure. T. 879, 883.

In November 1996, Berkman applied for disability retirement. CX 10. He based his request on his medical condition, which made it difficult for him to work, and on his doctor's recommendation that it would be better to retire than be subjected to stress at work. T. 754-55. While the request for disability retirement was pending, the Academy issued a notice of proposed removal to Berkman. CX 2. Berkman believed that the Academy gave him an ultimatum to accept retirement disability or be removed from his job. T. 772. He chose retirement because it was the "less painful course." T. 810. He retired effective February 1997 and that month filed a second complaint, ALJ Case No. 97-CAA-9, alleging continuing harassment, citing, among other things, the notice of proposed removal.

THE ALJ'S DECISION

The ALJ found that the tone of the August 1996 counseling session after Berkman sent his letter to the Connecticut DEP demonstrated that the Academy had animus against Berkman for insisting on compliance with environmental laws. RD&O at 34. The ALJ reasoned that the animus resulted in stress that caused Berkman to take additional sick leave and unpaid leave, which prevented Berkman from completing his assigned tasks and led to the notice of proposed removal. *Id.* The ALJ concluded that the Academy's actions adversely affected Berkman, and that its adverse actions "were motivated by its disapproval of [Berkman's] repeated insistence on environmental compliance and his efforts to obtain that compliance," and that the adverse actions therefore were unlawful. *Id.* at 34-35. However, the ALJ rejected Berkman's claim that he also was subjected to a hostile work environment. RD&O at 38-39.

As for remedies, the ALJ determined that Berkman was not constructively discharged and therefore that he was not entitled to reinstatement or back pay.[10/] RD&O at 39-42. The ALJ found that Berkman was entitled to $70,000 in compensatory damages because of his depression and frequent anxiety attacks. RD&O at 51. The judge separately awarded remuneration for the cost of obtaining medical treatment and medications for depression. RD&O at 53. The ALJ denied Berkman's request for exemplary damages and both parties' requests for sanctions. RD&O at 52. The judge also recommended ordering the Academy to expunge the notice of proposed removal from

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[10/] In the alternative, if Berkman were determined to have been constructively discharged, the ALJ found that Berkman would be entitled to back pay and one year of front pay until reinstatement to his former position. RD&O at 44-45.

Berkman's personnel file and to post a notice advising its employees that this complaint was decided in Berkman's favor. RD&O at 53. Finally, the ALJ awarded Berkman costs and attorney fees totaling $63,341.65. RD&O at 51.

DISCUSSION

I. Jurisdiction over a Federal Government Entity

As an entity of the United States government, the Academy cannot be held liable unless the United States has waived its sovereign immunity under the statutory provisions at issue. Any waiver of the government's sovereign immunity must be "unequivocal." *United States Dep't of Energy v. State of Ohio*, 503 U.S. 607, 615 (1992). We examine whether the United States has waived its sovereign immunity concerning the five whistleblower provisions under which Berkman brought his complaints. This examination is important because the remedies available under the different environmental statutes are not uniform.

A. Comprehensive Environmental Response, Compensation and Liability Act

The United States unequivocally has waived its sovereign immunity under the CERCLA's whistleblower provision. *Marcus v. U.S. Environmental Protection Agency*, Case No. 92-TSC-5, Sec. Dec. and Ord., Feb. 7, 1994, slip op. at 2-3; *accord Pogue v. U.S. Dep't of Navy Mare Island Shipyard*, Case No. 87-ERA-21, Sec. Dec., May 10, 1990, slip op. at 4-12, *rev'd on other grounds sub nom. Pogue v. Dep't of Labor*, 940 F.2d 1287 (9th Cir. 1990).

B. Clean Water Act

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

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

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

C. Clean Air Act

The CAA has a similar Federal facilities provision at 42 U.S.C. §7418(a) (1994). The legislative history indicates that the CAA whistleblower provision applies to facilities of the United

States: "This section is applicable, of course, to Federal . . . employees to the same extent as any employee of a private employer." H.R. Rep. No. 294, 95th Cong., 1st Sess. 326, *reprinted in* 1977 U.S. Code Cong. & Admin. News 1405. *See Jenkins v. U.S. Environmental Protection Agency*, Case No. 92-CAA-6, Sec. Dec. and Ord., May 18, 1994, slip op. at 5.

D. Solid Waste Disposal Act

Turning to the SWDA, its Federal facilities provision applies to any Federal agency "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 (1994). The Secretary has found that the SWDA whistleblower provision applies to all entities of the United States government by means of the Federal facilities provision. *Jenkins*, slip op. at 7.

E. Toxic Substances Control Act

In contrast, the United States has not waived its sovereign immunity under the TSCA's employee protection provision, except for certain whistleblower complaints involving lead-based paint. *Stephenson v. NASA*, Case No. 94-TSC-5, Sec. Dec. and Ord. Of Rem., July 3, 1995, slip op. at 6-8; *accord Johnson v. Oak Ridge Operations Office*, *United States Dep't of Energy*, ARB Case No. 97-057, ALJ Case Nos. 95-CAA-20, -21, -22, Final Dec. and Ord., Sept. 30, 1999, slip op. at 9.

To determine whether Berkman's protected activities concerning the North Site are covered by the TSCA's partial waiver of sovereign immunity, we turn to the text of the waiver. The TSCA's Federal facilities provision states at 15 U.S.C. §2688 (1994):

> Each department, agency, and instrumentality of executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in a lead-based paint hazard, and each officer, agent, or employee thereof, shall be subject to, and comply with, all Federal . . . requirements, both substantive and procedural . . . respecting lead-based paint, lead-based paint activities, and lead-based paint hazards in the same manner, and to the same extent as any nongovernmental entity is subject to such requirements. * * * The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement. . . .

The Academy is a facility of the United States government. Under the terms of the TSCA's federal facilities provision, it must comply with Federal requirements respecting "lead-based paint hazards." 15 U.S.C. §2688. The TSCA defines that term to mean "any condition that causes exposure to lead from . . . lead-contaminated soil. . . ." 15 U.S.C. §2681(10) (1994). In turn, "lead-contaminated soil" is defined as "bare soil on residential real property that contains lead at or in

excess of the levels determined to be hazardous to human health . . . ." 15 U.S.C. §2681(12). Finally, "residential real property" is defined as "real property on which there is situated one of more residential dwellings used or occupied, or intended to be used or occupied, in whole or in part, as the home or residence of one or more persons." 15 U.S.C. §2681(15).

Berkman's protected activities in this case included internal and external complaints about the need to report the North Site because its soil contained high concentrations of lead. Nothing in the record indicates that the lead levels in the soil were due to lead-based *paint*. More importantly, the Academy's North Site does not contain any residential dwellings or buildings intended to be used as a residence. Therefore, the site is not residential real property as defined by the TSCA, and its lead-contaminated soil need not comply with the Federal requirements respecting lead-based paint hazards. The text of the Federal facilities provision and the applicable definitions, taken together, demonstrate that Berkman's complaints about the North Site do not fall within the ambit of TSCA complaints for which the United States has waived its sovereign immunity.

Federal facilities also must comply with Federal requirements for certification of lead abatement workers. 15 U.S.C. §2688; 138 Cong. Rec. S17,904, S17,917 (1992). Berkman's protected activities did not include any complaints about the certification or training of lead abatement workers, and even if Berkman had made such a complaint, the North Site did not contain the types of structures for which lead abatement activities are covered. *See* 138 Cong. Rec. S17,931 (1992) (EPA required to issue training and certification standards for those involved in lead abatement activities in public and private housing, public and commercial buildings, bridges, and other structures).

We therefore conclude that the United States has not waived its sovereign immunity as to this action brought under the TSCA's whistleblower provision. Therefore, there is no subject matter jurisdiction in this case under the TSCA.[11/]

II. Timeliness of the Complaint

There is a 30-day statute of limitations in each of the environmental whistleblower provisions under which Berkman filed his complaints. In a hostile work environment case, like a continuing violation case, the complainant must show a course of related discriminatory conduct consisting of pervasive and regular incidents and the complaint must be filed within 30 days of the last discriminatory act. *Varnadore v. Oak Ridge National Laboratory*, Case Nos. 92-CAA-2, et al., Sec. Dec. and Ord., Feb. 5, 1996, slip op. at 61, 66, *(Varnadore I), aff'd sub nom. Varnadore v. Secretary of Labor*, 141 F.3d 625 (6th Cir. 1998). *See also Connecticut Light & Power Co. v. Secretary of Labor,* 85 F.3d 89, 96 (2d Cir. 1996) ("Under the continuing violation standard, a timely charge with respect to any incident of discrimination in furtherance of a policy of discrimination renders claims against other discriminatory actions taken pursuant to that policy timely, even if they would be untimely if standing alone.").

[11/] For the remainder of this decision, the term "environmental acts" will not include the TSCA.

The final element of discriminatory conduct alleged by Berkman was the notice of proposed removal issued on January 7, 1997. He filed his second whistleblower complaint against the Academy on February 3, 1997, which was within the 30-day limitation period. Accordingly, the complaints were timely as to all of the alleged regular and pervasive incidents of hostility against Berkman.[12/]

Assuming for the sake of argument that Berkman's earlier-filed complaint was not subsumed in his second complaint, we find that Berkman's first complaint also was timely. In a "counseling" session held on August 27, 1996, Florin reacted angrily and used a gesture to indicate that Berkman had stabbed him in the back when Berkman reported the North Site to Connecticut DEP. In that session, Florin demonstrated a discriminatory animus against Berkman. The first whistleblower complaint was filed fewer than 30 days later, on September 18, 1996. Therefore, Berkman timely complained about the elements of a hostile work environment that predated the counseling session.

III. Standard of Review of ALJ's Findings and Conclusions

The Board has jurisdiction to decide appeals from recommended decisions of Administrative Law Judges arising under the environmental acts. As the designee of the Secretary of Labor,[13/] the Board's review of the ALJ's decision is controlled by 5 U.S.C. §557 (1994) and 29 C.F.R. §24.8 (1999). Pursuant to the Administrative Procedure Act, in reviewing the ALJ's initial decision, the Board acts with "all the powers [the Secretary] would have in making the initial decision . . . ." 5 U.S.C. §557(b), *quoted in Goldstein v. Ebasco Constructors, Inc.*, No. 86-ERA-36, Sec'y D&O (April 7, 1992). Accordingly, the Board is not bound by either the ALJ's findings or his conclusions of law, but reviews both *de novo*. *See Starrett v. Special Counsel*, 792 F.2d 1246, 1252 (4th Cir. 1986) (under administrative law principles, agency or board is free to either adopt or reject ALJ's findings and conclusions of law).

> In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision, as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. [Citation omitted].

Att'y Gen. Manual on the Administrative Procedure Act, Chap. VII, §8 pp. 83-84 (1947); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). *See generally Mattes v. United States Dep't*

[12/] In the second complaint, Berkman realleged incidents of harassment that predated his first complaint. Berkman requested consolidation of his first and second complaints. ALJX 26 at ¶42. The ALJ granted consolidation. ALJX 29.

[13/] Secretary Order 2-96, 61 Fed. Reg. 19,978 (May 23, 1996).

of Agriculture, 721 F.2d 1125, 1128-30 (7th Cir. 1983); *McCann v. Califano,* 621 F.2d 829 (6th Cir. 1980).

IV. The Merits

A. The Burdens of Production and Proof

In performing its *de novo* review, the Board applies the "preponderance of the evidence standard" to the evidence. *Martin v. Dep't of the Army*, ARB Case No. 96-131, ALJ Case No. 93-SDW-1, Dec. and Ord., Jul. 30, 1999, slip op. at 6, *citing Ewald v. Commonwealth of Virginia*, Case No. 89-SDW-1, Sec. Dec. and Rem. Ord., Apr. 20, 1995, slip op. at 11.

To prevail on a whistleblower complaint under the environmental acts, a complainant must establish by a preponderance of the evidence that the respondent took adverse employment action because he engaged in protected activity. *Jones v. E.G.&G Defense Materials, Inc.*, ARB Case No. 97-129, ALJ Case No. 95-CAA-3, Fin. Dec. and Ord., Sept. 29, 1998, slip op. at 9, *petition for review filed*, No. 99-9501(10th Cir. Jan. 1, 1999).

B. The Nature of a Hostile Work Environment

The Academy denies generally that it engaged in any acts of retaliation against Berkman. More specifically, the Academy contends that "the pleadings and the evidence are in agreement that there was no retaliation prior to [Berkman's] notification to [the Connecticut] DEP in August, 1996." Open. Br. at 11. The contention simply is erroneous because it ignores the hostile work environment form of adverse action which we analyze below.

The environmental acts forbid an employer from "discriminat[ing] against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment" because the employee engaged in protected activities.[14/] The discrimination may take the form of a tangible job detriment, such as dismissal, failure to hire, demotion, and the like. *Varnadore I,* slip op. at 92 n.93. The discrimination may also take the form of harassment that is "sufficiently severe or pervasive as to alter the conditions of employment and create an abusive or hostile work environment." *Smith v. Esicorp, Inc.*, Case No. 93-ERA-16, Sec'y Dec. and Ord. of Rem., Mar. 13, 1996, slip op. at 23-24, citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986).

The concept of a hostile work environment, first developed in the context of race and sex based employment discrimination, applies to whistleblower cases. *Varnadore v. Oak Ridge National Laboratory*, Case Nos. 92-CAA-2, *et al.*, ARB Final Consolidated Dec. and Ord., June 14, 1996, slip op. at 71 (*Varnadore II), aff'd, Varnadore*, 141 F.3d at 625. The Supreme Court articulated the standards to be applied in hostile work environment cases:

> [W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may

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[14/] The quoted language is found in the CAA, 42 U.S.C. §7622(a). The other environmental acts at issue in this case, the WPCA, 33 U.S.C. §13679(a), the CERCLA, 42 U.S.C. §9610(a), and the SWDA, 42 U.S.C. §6971(a), use the language: "No person shall fire, *or in any other way discriminate against*, any employee" because he engaged in protected activities (emphasis added).

> include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

In *Varnadore I*, slip op. at 80, the Secretary adopted the following factors to be weighed in a hostile work environment claim, *quoting West v. Philadelphia Elec. Co.*, 45 F.3d 744, 753 (3d Cir. 1995):

> (1) the plaintiff suffered intentional discrimination because of his or her membership in the protected class;
> (2) the discrimination was pervasive and regular;
> (3) the discrimination detrimentally affected the plaintiff;
> (4) the discrimination would have detrimentally affected a reasonable person of the same protected class; and,
> (5) the existence of respondeat superior liability.

See also Rabidue v. Osceola Ref. Co., 805 F.2d 611, 619-20 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) (applying same factors in a Title VII sex discrimination case).

C. There Was a Hostile Work Environment Motivated By Berkman's Protected Activities

The record in this case demonstrates clearly that the Academy created a hostile work environment in response to Berkman's efforts to achieve compliance with the environmental acts. Time and again, the Academy and its staff took direct action to reduce Berkman's duties, to diminish his responsibilities, and to enforce work place rules against him but not others.

As the record reflects, Berkman pressed for environmental compliance in furtherance of his job responsibilities at the Academy in several ways, including insisting upon reporting the North Site to environmental authorities. Berkman was so insistent that when one of his superiors turned Berkman down on these suggestions regarding environmental compliance, Berkman brought up the issue with the next level superior.

Whereas Berkman had initially been ignored in his efforts, as Berkman continued to press for environmental compliance the Academy began to cut back Berkman's job responsibilities and duties. Initially, Florin told Berkman not to perform any reviews of contracts and specifications for environmental compliance, to discontinue reviews under the National Environmental Policy Act, and to ignore pollution prevention program requirements. CX 32 at 1; *compare* CX 7 (Berkman's position description). The Academy's explanation for curtailing Berkman's environmental

compliance duties did not ring true, as Berkman noted in a memorandum: Florin blamed "under staffing" as the reason he told Berkman not to do these duties, but Florin recently had told Berkman the department was "overstaffed." CX 32 at 1. Clearly, the reduction in Berkman's job duties and responsibilities was a change in the conditions of Berkman's employment.

Berkman responded to the reduction in his job responsibilities by requesting that his superiors reorganize the reporting structure of the environmental office and amend the "program elements" of his performance evaluation to reflect his restricted duties. At the meeting called to address Berkman's request, the subject of Berkman's *approach* to environmental compliance arose. In angry tones, Carabine accused Berkman of going behind his back to express criticism of the environmental compliance program in a memorandum sent to the Academy's Assistant Superintendent. Raising Berkman's approach to obtaining environmental compliance during a meeting on the revision of Berkman's job duties indicates to us that Carabine connected the two issues.

Moreover, the Academy earlier had taken the same approach of removing job duties when a different employee was adamant in pursuing environmental compliance. When Berkman's predecessor, Douglas Frey, caused the Connecticut DEP to inspect the Academy, Carabine responded by telling Frey that he could not, on his own, communicate with that department. Later, at the end of another environmental inspection visit, the Academy abruptly removed Frey's duties as HAZMAT officer.

In addition to reducing Berkman's duties generally, supervisors took Berkman off specific projects. Focusing on one such occasion, the removal of Berkman's duty as project manager of the Tank Consolidation project, the Academy gave different explanations for its action. Florin told an Equal Employment Opportunity counselor that Berkman was removed from the project because he lacked the proper skills and training to be a contract manager. CX 64. Opstrup later testified, however, that he removed Berkman from the project because of his erratic attendance at work. CX 116 at 90-91; T. 507. Significantly, Berkman earlier had received praise for his oversight of removal of storage tanks. CX 24. Now he was accused of lacking skills in such oversight.

An employer's shifting explanations for taking action against an employee often is an indication that the asserted legitimate reasons are pretext. *See Hoffman v. Bossert*, Case No. 94-CAA-0004, Sec'y Dec. and Rem. Ord., Sept. 19, 1995, slip op. at 9 (finding shift in respondent's theory of the case a strong indication of pretext); *Priest v. Baldwin Assoc.*, Case No. 84-ERA-30, Sec'y Fin. Dec. and Ord., June 11, 1986, slip. op. at 12 (holding that the reasons not relied upon at the time of the adverse action, but later presented, were pretextual). In view of the shifting explanations given by Academy witnesses, we find that the assertion that Berkman – who had extensive experience in contracting both at the Academy and in prior jobs, T. 628, 693 – lacked sufficient knowledge and training to be a contract manager is pretext. Indeed, "project management" was one of the two major skills listed for the position Berkman held, according to the position description. CX 7 at 1; T. 454. Rather, we find that the Academy removed Berkman as project

manager of the Tank Consolidation project for an impermissible reason, his insistence on environmental compliance.[15/]

The Academy also took another action that limited Berkman's ability to perform his job duties. Although the job description called for Berkman to act as a coordinator with the personnel of various contractors performing projects at the Academy, Berkman's superiors prohibited him from meeting alone with contractors and instead required one of Berkman's supervisors to be present at these meetings.

In an even more blatant act of retaliation, the Academy also prevented Berkman from conducting HAZMAT training without a supervisor present. This retaliation occurred immediately after the training session in which members of the grounds crew indicated that they were upset about the Academy's handling of the North Site. Opstrup accused Berkman of "throwing fuel on a volatile group" at that meeting, CX 76, but the record shows that Berkman simply answered the grounds crew's questions about the nature of the contamination at the North Site. The Academy was particularly sensitive about the contamination, because a few months later Florin sent an e-mail message to Opstrup indicating that it was necessary to "put the right spin" on environmental training concerning the site. CX 19 (message of July 16, 1996); RD&O at 36.

The Academy's actions had the effect of isolating Berkman from others and taking him "out of the loop" in ensuring environmental compliance. As Berkman testified,

> as time went on I met more and more resistance from the command. [T]hey were isolating me and not allowing me to have contact. And that to me was one of the things that was preventing me from doing my job. I was not being allowed to interface with people to get the proper information.

T. 583.

There were several additional indications of hostility by Academy managers toward Berkman. Perhaps the most blatant was Carabine's screaming and threatening to sue Berkman for defamation because he informed the Assistant Superintendent that there were problems with the Academy's environmental compliance.[16/] Carabine and other managers also treated Berkman rudely at a meeting with outside consultants by interrupting him and telling him not to talk. We find that this treatment of Berkman was outside the normal range of work place give and take. And, in both of these instances, the hostility arose in the context of Berkman pursuing his duty of ensuring environmental compliance at the Academy.

[15/] Therefore, we reject the ALJ's finding, RD&O at 38, that Berkman's removal from the Tank Consolidation Project was not part of a hostile work environment.

[16/] According to Opstrup, Carabine called Berkman an environmental zealot or words to that effect. CX 116 at 63-64.

The harassment and hostility toward Berkman continued after he reported the North Site to Connecticut DEP. We acknowledge that Florin had a legitimate reason to chastise Berkman for signing the reporting letter on behalf of the Academy. *See Holtzclaw v. Commonwealth of Kentucky,* ARB No. 96-090, ALJ No. 95-CAA-7, Fin. Dec. and Ord., Feb. 13, 1997, slip op. at 5 (it was legitimate to fault an employee for sending a letter that wrongfully gave the impression that the State had taken a position on an issue), *aff'd sub nom. Holtzclaw v. Secretary of Labor*, 172 F.3d 872 (6th Cir. 1999) (table), 1999 WL 68745 (finding no pretext in not renewing Holtzclaw's employment "because of Holtzclaw's propensity to portray his feelings and conclusions as those of his employer"). The other witnesses all agreed that Berkman did not have authority to sign official letters destined outside the Academy.

However, the fact that Florin angrily criticized Berkman because the reporting letter "went out without [Berkman] discussing it up the chain of command" strongly suggests retaliatory animus. T. 1002. [17/] Moreover, Florin's statement simply is not true, because Berkman had submitted the letter to both Carabine and Florin, both of whom refused to sign it. Therefore, we conclude that the real source of Florin's anger was the fact that Berkman reported the site on his own. This is further evidence of animus against Berkman.

The hostility toward Berkman took other forms as well, including disparate treatment. For example, Carabine required only Berkman (and not other employees) to have a supervisor present when making up advanced leave.

Another example of disparate treatment was the enforcement of the office's policy for taking leave. The leave policy was the subject of a September 1996 staff meeting and a follow up memorandum explaining that employees wishing to take leave must speak directly with Carabine. T. 745; CX 95. According to Beverly Campbell, Berkman was treated differently from other employees in this regard. T. 883-84. On October 16 and 17, 1996, Berkman either spoke directly with Opstrup or left a message for him about his need to take leave, and Berkman tried to speak with Carabine but could not reach him. Because Berkman left a message with Carabine, rather than speaking directly with him, Berkman was placed on AWOL status. This hyper-literal application of the policy toward Berkman (*i.e.*, that leaving a message for Carabine was unacceptable, even when Carabine was unreachable) was so egregious that Beverly Campbell told Carabine that she did not want to sign the timecards that placed Berkman on AWOL status. She signed the cards only when Carabine got angry and ordered her to sign. T. 877-78.

In contrast, Frey testified that on one occasion when he left a message about taking sick leave with Carabine, rather than speaking directly to him, Frey did not receive AWOL. The Academy produced no evidence to rebut the testimony of Campbell and Frey that other employees were not placed on AWOL status when they did not speak directly with Carabine when taking leave. In the

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[17/] We note that an employer may not, with impunity, fault an employee for going outside the chain of command to make a complaint about an environmental concern to a government agency. *See Fabricius v. Town of Braintree/Park Dep't*, ARB Case No. 97-144, ALJ Case No. 97-CAA-14, Fin. Dec. and Ord., Feb. 9, 1999, slip op. at 5 and cases there cited, including *Pogue v. Dep't of Labor*, 940 F.2d 1287, 1290 (9th Cir. 1991).

absence of any explanation for the disparate treatment of Berkman, we conclude that the Academy applied the leave policy uniquely against Berkman because of his protected activities.[18/]

As the stress from harassment at work took its toll on Berkman, his depression deepened and he was unable to work a full day. The Academy would not allow Berkman to continue to work part time. Consequently, in November 1996 Berkman applied to retire on disability.

Not content to await the outcome of Berkman's retirement application, which the Academy did not oppose, Florin issued a notice of proposed removal of Berkman "to promote the efficiency of the Federal service." The Academy could well have awaited the decision of the Office of Personnel Management on the retirement application, which would have obviated the need for the proposed removal action. We find that the issuance of the notice while the uncontested request to retire was pending was the final instance of hostility toward Berkman.

The incidents described above fall into two general categories. The first group includes all the actions that had the effect of isolating Berkman from decision making and responsibilities for ensuring environmental compliance. The Secretary has found in another case that removing a person's job duty may be part of a hostile work environment. *Carter v. Electrical District No. 2 of Pinal County,* Case No. 92-TSC-11, Sec. Dec. and Ord. Of Rem., July 26, 1995, slip op. at 16.

The second category of hostile actions consists of singling out Berkman for hostile treatment not accorded to other employees. Actions in this group include requiring Berkman to have a supervisor present when making up advanced leave, placing Berkman on AWOL status, and Carabine's threat to sue Berkman for raising environmental compliance issues with the Assistant Superintendent. Other incidents included not allowing Berkman to meet alone with contractors or HAZMAT trainees. The Secretary has found that hostile working conditions existed where managers singled out an employee with criticism for not volunteering for overtime duty. *Boytin v. Pennsylvania Power & Light Co.*, Case No. 94-ERA-32, Sec. Dec. and Ord. Of Rem., Oct. 20, 1995, slip op. at 8-9, 12.

These actions against Berkman altered his work environment, and were pervasive and regular. In addition, the actions had a very detrimental effect on Berkman, who became completely demoralized, was not able to concentrate enough to work a full day, and eventually could not work at all. As for Berkman's reaction to the hostile actions taken against him, we find that a reasonable person in the same position also would have been affected detrimentally by the removal of many of his job responsibilities, the threat of a lawsuit for raising environmental concerns, and the various ways in which the Academy singled him out for harsh, abusive, and discriminatory treatment.

Finally, we note that in each instance, the harassing actions were taken by Berkman's supervisors. In *Smith v. Esicorp*, slip op. at 24, we found that the complainant established the employer's *respondeat superior* liability by showing that management had notice of, and did not attempt to remedy, the abuse to which the complainant was subjected. In this case, Berkman

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[18/] Although the leave policy remained in effect at the time of the hearing, Campbell testified that it was not being enforced against other employees. T. 879.

complained to higher levels of management about each element of the hostile work environment, but the Academy did not put an end to the abuse. *See, e.g.*, CX 32 (complaining to Olsen, the Assistant Superintendent, about Florin removing some of Berkman's environmental duties, which were not restored); CX 47 (complaint to Florin about Carabine requiring a supervisor to be present only when Berkman makes up borrowed time); CX 92 (grievance to Florin about Carabine placing Berkman on AWOL status, which was not changed).

In light of Berkman's notice to superiors about instances of harassment, and the superiors' failure to remedy the harassment, we find that the Academy has *respondeat superior* liability for those harassing actions. Consequently, we find that a hostile work environment existed, that it was motivated by Berkman's protected activities, and that the hostile environment constituted a violation of the whistleblower provision of the environmental laws.

V. Remedies

A successful complainant under the whistleblower provisions of the environmental acts is entitled to affirmative action to abate the violation, including reinstatement to his former position, back pay, costs, and attorney fees. *E.g.,* 42 U.S.C. §7622(b)(2)(B) (1994) (CAA). In addition, compensatory damages may be awarded under the environment acts. *E.g.*, 42 U.S.C. §7622(b)(2)(B) (CAA).

Berkman asked for reinstatement, back pay, compensatory and exemplary damages, and costs and attorney fees. RD&O at 39. The ALJ reasoned that Berkman was not entitled to reinstatement or back pay unless he was constructively discharged. *Id.* The ALJ found that there was no constructive discharge and therefore he did not order reinstatement or back pay. RD&O at 42.[19/] The ALJ ordered compensatory damages and denied exemplary damages. We examine the constructive discharge claim first.

A. Constructive Discharge

The standard for finding constructive discharge is a higher one than for finding a hostile work environment. *See Moore v. KUKA Welding Systems*, 171 F.3d 1073, 1080 (6th Cir. 1999) (in a race discrimination case, "[t]he plaintiff must show more than a Title VII violation to prove constructive discharge, so the fact that the plaintiff may have proven a hostile work environment is not enough by itself to prove constructive discharge also."). To prove constructive discharge, the employment conditions must be such that a reasonable person would feel compelled to resign. *Mosley v. Carolina Power & Light Co.*, Case No. 94-ERA-23, ARB Fin. Dec. and Ord., Aug. 23, 1996; *see also Martin,* slip op. at 8.

[19/] In the alternative, in case of a finding of constructive discharge, the ALJ found that Berkman was entitled to an offer of reinstatement to be made one year from the date of final judgment. The ALJ also ordered payment of back pay until the date of final judgment and one year of front pay. RD&O at 43-45.

In cases arising in the United States Court of Appeals for the Second Circuit, including this case, it is also necessary to prove that "the employer *deliberately* created working conditions that were 'so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.'" *Stetson v. NYNEX Svc. Co*., 995 F.2d 355, 360-61 (2d Cir. 1993) (under Age Discrimination in Employment Act), *quoting Pena v. Brattleboro Retreat*, 702 F.2d 322, 325 (2d Cir. 1983). This is commonly referred to as the "subjective" standard. This is the same standard we applied in *Martin*, which discusses extensively the "subjective" and "objective" standards employed by the various circuits for resolving claims of constructive discharge.

With the "subjective" standard in mind, we turn to the facts of this case. In April 1996, Berkman was devastated by the news that the Academy had decided not to reorganize the reporting structure of the environmental office despite its earlier promises. T. 699. Thus, Berkman still faced possible personal liability, still had to report to an abusive supervisor who had threatened to sue him, and had no hope that environmental compliance would be achieved. Berkman began suffering anxiety attacks, depression, shortness of breath, lack of concentration, memory lapses, and sleeplessness. T. 701. Berkman was experiencing difficulty in getting up in the morning and getting to work. Soon he was unable to concentrate sufficiently to work a full day. Berkman's physician formed the opinion that work place harassment was causing his anxiety, stress, and depression.

The harassment against Berkman continued to mount. In April 1996, Berkman was removed from duty as project manager on the Tank Consolidation Project and the Academy punished Berkman by announcing that he would not be permitted to be a project manager in the future. The next month Opstrup reacted hostilely to Berkman's conduct of HAZMAT training. Subsequently, the Academy decided that Berkman could not give such training without Opstrup present.

In the case of a whistleblower under the False Claims Act, an appeals court has found that where a supervisor made threats to "get" the snitch, engaged in tirades against the employee, and removed most of her job duties, the employee's resignation constituted constructive discharge. *Neal v. Honeywell, Inc.,* 191 F.3d 827, 829-31 (7th Cir. 1999). *See also Shelton v. Babbitt,* 921 F.Supp. 787 (D. D.C. 1994) (finding constructive discharge in a Title VII case where the employer removed long-standing role from employee's job description and excluded him from management conferences and presentations). Likewise, here, Carabine engaged in tirades, threatened Berkman with a lawsuit, and removed many of Berkman's environmental duties or diminished his position by requiring a supervisor to be present when he engaged in work duties. We conclude that Berkman's supervisors deliberately created working conditions designed to force Berkman to resign or retire.

Berkman did not abandon his job when he experienced all of these difficulties. Rather, he sought some accommodation that would permit him to continue to work full time. As a way to minimize the stress he experienced at work, Berkman asked permission to work part of the time at home. His request was denied on the ground that the Academy did not permit anyone to work at home.

Berkman's next approach to minimizing his stress was to request a part time work schedule. The Academy asked for additional medical documentation of Berkman's illness and eventually granted a temporary part time work schedule of four hours per day. At the same time, Opstrup,

Berkman's immediate supervisor, insisted that Berkman return to full time work to serve the needs of the office.

Berkman's doctor, however, recommended strongly against full time work. Berkman was faced with a dilemma: on the one hand, his supervisor's demand that he return to full time work or be fired; and on the other, medical advice that he should not work full time for fear of risking deterioration in his already precarious mental condition. Berkman chose to follow his physician's advice and, instead of returning to work full time, applied for disability retirement.

We must determine if Berkman's decision to retire constituted the action of a reasonable person in the same situation. We emphasize in this regard that the undisputed medical evidence indicates that work place harassment was the cause of Berkman's anxiety attacks and his need for antidepressant medication and psychotherapy. In other words, the evidence shows that the Academy's harassment was the cause of Berkman's debilitation and, in turn, the cause of his inability to work a full day at the office. Yet his superiors would not permit Berkman either to work part of the time at home, or to remain on a part time work schedule for an extended period of time.

Indeed, in addition to refusing to accommodate Berkman's illness, the Academy took active steps to exacerbate the adversity of Berkman's work situation, further affecting Berkman's health. There is uncontradicted evidence that the Academy applied unfairly to Berkman an otherwise neutral sick leave policy. This action heaped insult on injury.

We are persuaded by the uncontroverted evidence that work place harassment caused Berkman's anxiety and attendant symptoms, and that Berkman's physician recommended against his returning to full time work in his position at the Academy. *Compare Krulik v. Board of Ed. of City of New York,* 781 F.2d 15, 23 (2d Cir. 1986) (denying claim of constructive discharge where record did not support the argument that the retired plaintiff's humiliation and anguish caused his heart attack).

We would not be inclined to find constructive discharge if the Academy had been willing to accommodate, for more than a short time, Berkman's medical need for part time work. *Compare Spence v. Maryland Casualty Co*., 995 F.2d 1147, 1158 (2d Cir. 1993) (denying constructive discharge claim where there was "no dispute that the Company was trying to accommodate [the plaintiff's] health concerns"). In finding no constructive discharge in *Spence*, the court relied heavily on the fact that the plaintiff had a "quite effective alternative to resignation" because the company had demoted the plaintiff's abusive superiors and agreed that the plaintiff would not have to report to them again. 995 F.2d at 1157. By contrast, in this case, the Academy denied each of Berkman's requests for a long term accommodation to his anxiety and depression and declined to remove an abusive superior, Carabine, from Berkman's reporting chain.

We are mindful that another employee, Frey, who experienced some of the same hostility as Berkman, did not resign. But Frey's situation differed in significant respects. First, the office leave policy was not enforced against Frey. Second, Frey was a civil engineer who had his usual engineering duties to perform even after the Academy removed his duties as HAZMAT officer.

In contrast, Berkman was trained for, and hired specifically to perform, environmental compliance work. This work was the entirety of his duties at the Academy. When he faced the removal of many of his environmental duties and responsibilities, the very core of Berkman's job was affected. Plus, the Academy singled out Berkman for enforcement of the leave policy. For these reasons, we are not persuaded that Frey's remaining employed at the Academy indicates that Berkman was unreasonable in feeling compelled to retire.

The Academy's hostile action of singling out Berkman in the context of the sick leave policy further convinces us that its actions met the Second Circuit's standard for constructive discharge because it deliberately created working conditions so difficult or unpleasant that a reasonable person in Berkman's position would have felt compelled to resign or retire. Therefore, we find that the Academy constructively discharged Berkman. The following section will discuss the attendant remedies: reinstatement, front pay, and back pay.

B. Reinstatement and Front Pay

Berkman requested reinstatement to his position at the Academy if his health permitted it. T. 770. The ALJ determined that immediate reinstatement was not possible because of Berkman's mental condition:

> It is plain that despite Complainant's expressed desire for reinstatement, such remedy is not possible under the peculiar facts of this case. Initially, Complainant's diagnosed major depression and medically imposed work restriction clearly bar an immediate reinstatement. (CX 119).

RD&O at 44.

The ALJ ordered that the Academy delay its reinstatement offer for one year from the final judgment and pay front pay during that year. RD&O at 44. The ALJ found that "[t]his one year period of front pay more than adequately compensates Complainant, whom Dr. Okasha predicted would see a significant improvement in his condition once he was not subjected to the work environment at the Academy and whom APRN Rasie predicted a recovery for once he was removed from his stressors." *Id.*

Since the evidence on Berkman's medical condition is rather old, we will not adopt the ALJ's finding that Berkman will be able to return to work one year from the final judgment in this case. The most recent evidence is an October 1997 letter from Berkman's therapist giving her medical opinion that Berkman was unable to concentrate sufficiently to work at that time. CX 119. We have no knowledge of Berkman's mental condition in the more than two years that have elapsed since Rasie's evaluation.

Because the record on Berkman's current ability to work is stale, we will remand this case to the ALJ with instructions to take evidence and make a supplemental recommended decision concerning Berkman's medical ability to be reinstated. The evidence should include a treating

professional's assessment whether Berkman presently has the ability to resume his former position at the Academy. If any party submits evidence that Berkman is not, at this time, able to resume his position, the party should submit evidence whether he ever will be able to do so, and if so, when.

If a party's evidence indicates that Berkman never will be able to resume his position at the Academy, further evidence should indicate whether he will be capable, in the future, of obtaining other employment commensurate with his Academy position. Such evidence should indicate when Berkman is expected to be sufficiently recovered that he can seek other commensurate employment.

In light of the remand, we will discuss some of the issues concerning reinstatement, front pay, and back pay for the benefit of the parties and the ALJ. Regarding Berkman's reinstatement, the ALJ correctly explained that he did not have the authority to order the Academy to reorganize the environmental office. RD&O at 44-45. As the ALJ stated:

> While this Judge is empowered to fashion such equitable relief as is consistent with the remedial purposes of the various statutes, it would be beyond that authority to order a complete restructuring of the environmental compliance program at the Academy. There may be better, more effective means of conducting environmental business at the Academy, but this Judge is not the authority to issue such a mandate. Instead, I can fashion the more appropriate remedy of ordering reinstatement to Complainant's position, with the same terms, conditions and privileges of employment as he previously enjoyed, and a stern reminder to Academy officials that they are legally obligated to conduct themselves in a manner that does not violate the whistleblower statutes.

RD&O at 45.

We agree with the ALJ's analysis on this issue. The environmental acts allow us only to remedy violations of the employee protection provisions. The organization of the Academy's environmental program does not itself constitute a violation. Therefore, any reinstatement order will be simply that; it will not include any requirement or suggestion to reorganize the environmental program.

As the parties are aware, front pay is used as a substitute when reinstatement is not possible for some reason. *E.g., Michaud and Ass't Sec. v. BSP Transport, Inc.,* ARB Case No. 97-113, ALJ Case No. 95-STA-29, Fin. Dec. and Ord., Oct. 9, 1997, slip op. at 6, *reversed on other grounds sub nom. BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38 (1st Cir. 1998) (reinstatement not possible because of complainant's depression) ; *Doyle v. Hydro Nuclear Svcs*., Case No. 89-ERA-22, Sec. Fin. Dec. and Ord., slip op. at 7 (reinstatement not possible because of divestiture of business in which complainant had been employed).

If, on remand, the ALJ determines that Berkman's medical condition will permit reinstatement at some future time, the ALJ shall order payment of front pay for the period until reinstatement is possible.

If, on the other hand, the ALJ finds that Berkman will not be able to be reinstated as the Academy's environmental engineer, the ALJ shall order payment of front pay for the period until Berkman is able to obtain other work commensurate with that position.

C. Back Pay

In the usual case, a complainant who has been discharged (or constructively discharged) is entitled to back pay from the date his employment ended until the tender of an offer of reinstatement, even if the offer is declined. *West v. Systems Applications Int'l*, Case No. 94-CAA-15, Sec. Dec. and Ord. Of Rem., Apr. 19, 1995, slip op. at 11-12. In this case, if on remand the ALJ finds that Berkman is not physically able to be reinstated immediately, the proper cut-off for back pay is the date of final judgment because front pay begins at that point.

An employee who has been constructively discharged usually has the burden of mitigating his damages by seeking suitable employment. *See, e.g., Parrish v. Immanuel Medical Center*, 92 F.3d 727, 735 (8th Cir. 1996) (under ADEA and Nebraska Fair Employment Practice Act). The respondent has the burden of establishing that the back pay award should be reduced because the complainant did not exercise diligence in seeking and obtaining other employment. *West, id.* at 12.

Berkman contended that, after his retirement from the Academy, he was unable to work for pay because of the debilitating effects of his depression and anxiety.[20/] The Academy did not submit any evidence, let alone prove, that Berkman was able to work for pay. Therefore, we find that the Academy did not meet the respondent's burden of showing that the complainant failed to mitigate his damages.

The next issue is whether the disability retirement payments Berkman received should be deducted from his back pay. Citing *Williams v. TIW Fabrication & Machining, Inc.*, Case No. 88-SWD-3, June 24, 1992, the ALJ noted that benefits that are designed as compensation for lost wages are deducted from back pay. RD&O at 43. Finding that Berkman's retirement payments were compensation for lost wages, the ALJ further found that the retirement payments must be deducted from back pay. *Id.*

We agree with the ALJ on this point because the goal of a back pay award under the environmental acts is to place the complainant in the position he would have occupied but for the discrimination. *Hoffman v. Bossert*, ARB Case No. 96-091, ALJ No. 94-CAA-004, Fin. Dec. and Ord., Jan. 22, 1997, slip op. at 2 (under CAA); *Williams*, slip op. at 14 (under SWDA). If the retirement payments were not deducted from the back pay award, Berkman would be in a better

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[20/] At the time of the hearing, Berkman spent his days fixing furniture in a retail store owned by his wife. T. 100. He was not paid for that work. *Id.* Mrs. Berkman testified that he worked slowly and sometimes needed to rest on the job. T. 101.

position than if there had been no violation of the whistleblower provisions because he would enjoy a double recovery.

We acknowledge that the Academy's hostile work environment is the reason for Berkman's inability to work. Notwithstanding that fact, the retirement payments still must be deducted where, as here, the goal of a back pay award is to make the employee whole. This is the rule under a similar Federal anti-discrimination statute, Title VII, which provides back pay as a remedy. *See Nichols v. Frank*, 42 F.3d 503, 516 (9th Cir. 1994) (under Title VII, where the employer's sexual harassment caused post-traumatic stress disorder, which in turn led to federal disability benefits, employee received "the difference between [her] disability benefits and 100% of the salary she would have received during her disability period."). *See also Williams*, slip op. at 13 ("workers' compensation awards that are identifiable as compensation for lost wages during a back pay period may be deducted from a back pay award") and *Graves Trucking, Inc. v. NLRB,* 692 F.2d 470, 475 n.4 (7th Cir. 1982) (affirming the order of the National Labor Relations Board that to the extent an employee's workers' compensation award replaced lost wages, it shall be deducted from back pay).

The record establishes that Berkman did not engage in any paid work for eight months after his retirement. Of course, if he has worked for pay since that time, his earnings must be deducted from the back pay. On remand, the ALJ shall take evidence on Berkman's work history since October 1997.

To summarize: upon remand the ALJ shall calculate the back pay owed. If immediate reinstatement is possible, the back pay period will cease upon the tender of the offer of reinstatement. If immediate reinstatement is not possible, the back pay shall cease upon the date of the final judgment on this complaint. In that event, the ALJ shall order the payment of an award of front pay for a period that will allow Berkman to recover sufficiently to be able either to be reinstated or to obtain commensurate work with another employer.[21/]

D. Compensatory Damages

Compensatory damages may be awarded under the environmental acts for pain and suffering, mental anguish, embarrassment and humiliation caused by the discriminatory treatment. RD&O at 45. The complainant has the burden of establishing the causation and the extent of his suffering. *Id.* The ALJ awarded $70,000 in compensatory damages premised upon Berkman's clinical diagnosis of major depression and the severity of impact of the Academy's actions on Berkman's personality. RD&O at 51. The ALJ also separately awarded Berkman "remuneration for the cost of obtaining medical treatment and medications for his diagnosed major depression caused by Respondent's wrongful conduct." RD&O at 53.

A defendant may be held liable for damages when its negligent or unlawful actions have aggravated a preexisting psychiatric condition. *Dindo v. Grand Union Co.*, 331 F.2d 138, 141 (2d Cir. 1964). For example, in a §1983 action alleging constitutional violations and intentional

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[21/] As a payment of future damages, any front pay award shall be discounted to present value. *Michaud,* slip op. at 6.

infliction of emotional distress based on a prison director's sexual abuse of an inmate, the court affirmed the award of $250,000 in compensatory damages even though a portion of the plaintiff's mental distress was caused by other factors. *Mathie v. Fries,* 121 F.3d 808, 812-13 (2d Cir. 1997). The court noted that it had to be careful not to compensate the plaintiff for the non-related distress. *Id.*

We will now examine the evidence concerning the contention that the work environment at the Academy caused Berkman's depression to deepen and require treatment. At least as early as April 1995, a physician diagnosed that Berkman was depressed. At that time, Berkman reported still feeling upbeat about his job and still entertained hope that the Academy would do the things necessary to achieve environmental compliance. Berkman did not seek any treatment for his depression because he was able to work a full day and to function in all facets of his life.

Things changed for the worse for Berkman early in 1996, when he recognized that the Academy was not going to open the channels of communication regarding environmental compliance or reorganize the reporting structure to foster such compliance. In April, Berkman felt completely devastated and began to experience depression so deep that he found it difficult to get up in the morning and work a full day. Consequently, for the first time, Berkman sought treatment for his depression, went on medication, and began weekly psychotherapy.

Various witnesses verified that there was a great change in Berkman's personality in 1996. Berkman's wife testified that he changed from a positive, affectionate person who was energetic and enthusiastic about his job to an inactive person who did not enjoy his work and experienced fatigue and memory loss. RD&O at 48. In addition, Academy employees Charles Carey, Eric Roy Adams, Earl Marek, and Beverly Campbell similarly observed changes in Berkman's personality. RD&O at 50. As Carey testified, prior to 1996 Berkman was "very outgoing and just bubbling with enthusiasm," T. 179, whereas, starting in early 1996, Berkman was "obviously stressed out." T. 191. We conclude that the evidence fully establishes a worsening of Berkman's depression in 1996, as evidenced by his need for medical treatment and the startling changes in his personality.

Berkman's statements at the hearing were consistent with the statements he made to his treating physicians, namely, that harassment at work was causing him great stress and anxiety. In addition, Berkman reported to his wife that harassment at work and the Academy's lack of support for environmental compliance were the reasons for the change in his personality. *Id*. at 48-49. Contrary to the Academy, we do not dismiss Berkman's testimony about the causes of his depression as "self-serving," Open. Br. at 34-35, because he reported the same causes to the professionals who treated him.[22/]

[22/] We reject the Academy's suggestion, Rebuttal Br. at 3, that a physician could not conclude that Berkman's work situation caused his anxiety and major depression unless the doctor visited the work site, spoke to Berkman's supervisors and coworkers, or independently substantiated Berkman's allegations of stress and harassment. A treating professional has received training in determining the source of a patient's depression, and we rely upon the medical professionals' application of their training in treating Berkman.

In June 1996, Dr. Okasha reported that "[t]ypically [Berkman's] depression is in the morning and made worse because of the stress caused by harassment from his supervisors leading to his inability to get up and get started." CX 61. The doctor recommended that Berkman work only part time to ameliorate the depressive effect of stress in his work place. RD&O at 47; CX 101. Berkman also suffered anxiety attacks, characterized by shortness of breath and chest pains, which were treated with Prozac. RD&O at 47. Other anti-anxiety medications followed. *Id.*; CX 101.

Okasha was not the only medical professional who gave an opinion on the source of Berkman's anxiety and depression. Berkman was being treated by Sylvia Rasie at the time of the hearing in July 1997 and for some months thereafter. According to Rasie, in October 1997 Berkman complained of depression and anxiety because of harassment by his supervisors and his "forced retirement." CX 119 at 1. Rasie recommended continued treatment, including medication for depression and anxiety. *Id.* at 2.

The Academy contends that there is a flaw in Berkman's testimony about the source of his stress. It contends that Berkman cited the failure to report the North Site to environmental agencies as the "primary source" of his stress and anxiety. Open. Br. at 25. The Academy notes that Berkman did not report feeling better after he reported the North Site. *Id.* In view of the lack of improvement in Berkman's mental condition after he reported the site, the Academy concludes that there must have been some source of stress other than the work place that was responsible for Berkman's depression and anxiety.

The Academy's argument fails because it is based upon an incorrect premise. Although Berkman cited the failure to report the North Site, and his fear of personal liability, as one of the sources of his stress, he did not limit the sources to the North Site issue alone. Rather, he also reported stress because the Academy was not willing to organize the department in a way that would foster environmental compliance. Berkman also was stressed because the Academy reduced his environmental duties, made decisions regarding environmental issues without consulting him, and because superiors such as Carabine treated him hostilely.

We agree with the ALJ that Berkman established that the workplace environment caused anxiety and personality changes, and also exacerbated his depression. We affirm the ALJ's award of $70,000 in compensatory damages for the pain and suffering that accompanied Berkman's personality changes and deepened depression.[23/]

The Academy did not present any argument specifically addressing the ALJ's award of the medical expenses related to Berkman's treatment for depression, other than the general contention that other stresses in Berkman's life caused or contributed to his depression. We have found that the hostile work environment caused Berkman to seek and receive treatment for major depression. Therefore, we agree with the ALJ that, in addition to $70,000 for pain and suffering, Berkman also is entitled to payment of "the cost of obtaining medical treatment and medications for his diagnosed major depression." We clarify that the Academy is liable only for the amounts that Berkman himself

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[23/] We agree with the ALJ's analysis that Mrs. Berkman is not entitled to any separate damages for loss of consortium. RD&O at 50.

paid for this treatment and medication, and is not liable for any amounts that were paid (or reimbursed) by another person or entity, such as a provider of health insurance.

E. Exemplary Damages

Berkman sought an award of $150,000 in exemplary damages "to send a clear message to [the Academy] that retaliation against whistleblowers, particularly in the context of impacting the environment, is intolerable." CX 120 at 56; *see also* Comp. Br. at 37 n.42. On the basis that the Academy's behavior was not sufficiently egregious, the ALJ denied exemplary damages. RD&O at 52.

Of the statutes under which Berkman brought his complaint, only the TSCA authorizes awards of exemplary damages. *See* 15 U.S.C. §2622(b)(2)(B)(iv). We have found that the United States did not waive its sovereign immunity concerning this whistleblower complaint, and therefore there is no subject matter jurisdiction under the TSCA. Accordingly, there is no legal basis for an award of exemplary damages, and we deny Berkman's request in this regard.

F. Attorney Fees and Costs

The environmental acts entitle a winning complainant to an award of "the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint." 42 U.S.C. §7622(b)(2)(B) (CAA).[24/] We use the lodestar method of calculating attorney fees, calculated by multiplying the number of hours reasonably expended by a reasonable hourly rate. *Fabricius,* slip op. at 9. The Academy does not dispute the reasonableness of the claimed hourly fee, but rather argues that some of the attorney time expended was not in connection with this complaint.

A brief outline of the various fee petitions submitted by Berkman's attorney and the responses of the Academy will focus the discussion of this issue. Berkman's post-hearing brief, submitted to the ALJ, included a request for attorney fees in the form of a bill from his counsel for payment of $63,341.65 in fees and costs. The ALJ criticized the fee request because it did not identify adequately the date, time, and duration necessary to accomplish the activities it listed. RD&O at 51. Nevertheless, the ALJ awarded the requested amount because the Academy did not file an objection to the fee petition. *Id.*

The Academy explained to us that it was not able to submit a meaningful response to the fee petition because of its cursory form. Consequently, the Academy asked us to remand the attorney fee issue to the ALJ for issuance of an order requiring Berkman's counsel to submit the fee request in a proper format. Open. Br. at 38-39.

Instead of opposing the request for a remand, Berkman's counsel submitted to us an affidavit of counsel (Schedule A) and a much clearer listing of the tasks and the number of hours for which

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[24/] The other environmental acts contain similar language.

he seeks attorney fees. (Schedule B) (both attached to Comp. Br.). The new fee petition covers the attorney's work through the filing of Berkman's brief to this Board. Berkman argues that the Academy waived its right to object to the amount of fees it requested before the ALJ. Open. Br. at 39.

In its Rebuttal Brief, the Academy objected to several items in the newly submitted fee petition. In light of Berkman's submission of a clearer fee petition and the Academy's objections to portions of the petition, we deny as moot the Academy's request for remand of the issue to the ALJ.

After receiving the Academy's Rebuttal Brief, Berkman submitted a motion to clarify the fee petition. We grant the motion to clarify.

As for Berkman's waiver argument, we find that the Academy did not waive its right to object to portions of a fee "petition" that lacked the required affidavit of counsel and was not specific enough to permit the formulation of meaningful objections. Accordingly, we will discuss, *seriatim*, the objections the Academy raises to the requested fees.

1. The Academy objects to paying the fees incurred in responding to the Notice of Proposed Removal, contending that these efforts were not made in connection with this complaint. Rebuttal Br. at 4. In his second complaint, Berkman contended that issuing the notice was itself a violation of the environmental acts, and we have found that it was the final incident of hostility toward Berkman. Thus, we find that the efforts of Berkman's counsel to respond to the Notice reasonably were made "for, or in connection with," this complaint. Accordingly, we will not eliminate any of the hours Berkman's counsel devoted to responding to the Notice.

2. The Academy also objects to paying for the hours expended by Berkman's counsel in discussing the complaint with the Department of Labor investigator because these efforts were made "in anticipation of litigation" rather than "in furtherance of this litigation." Rebuttal Br. at 5. We reject the Academy's argument because a proceeding under the environmental acts "has begun when it first reaches [the] Secretary, triggering her obligation to conduct an investigation." *Beliveau v. United States Dep't of Labor*, 170 F.3d 83, 86 (lst Cir. 1999). The hours expended by Berkman's counsel in conferring with the Department's investigator clearly were incurred in connection with this complaint. Consequently, we allow those hours.

3. The next objection is to the hours expended in connection with the Connecticut Attorney General's Office. The corresponding entries in the fee petition are:

Date	Work Performed	Time Spent
5/2/97	Call client, travel to [sic] client to Hartford, meet with Connecticut Attorney General's Office, research and preparation for hearing.	5.25 hours
7/15/97	Connecticut State Attorney's Office, call	2.00 hours

from investigator, letter to opposing counsel.

We agree with the Academy that these hours were not incurred in connection with this case, in which the State of Connecticut is not a party. We recognize that Berkman reported the North Site to the Connecticut Department of Environmental Protection. It is possible that the meetings with the state Attorney General's office and the State Attorney's office (if indeed they are different) may have concerned that report. The outcome of this proceeding before the Department of Labor does not depend on any actions that the State may have taken in response to Berkman's environmental report however. Therefore, we find that any meetings with the State's attorneys were not part of pursuing this complaint. Accordingly, we disallow the 7.25 hours listed above.

4. The Academy asks us to disallow the attorney hours expended in pursuing Berkman's application for a disability retirement. We deny the request. We have found that Berkman was constructively discharged because the harassment he experienced was intolerable and forced him to cease working at the Academy. Since the Academy caused the deterioration in health that forced Berkman to leave his job, we find that attorney efforts expended on Berkman's retirement application reasonably was done in connection with this complaint. Accordingly, we allow the 2.75 hours related to the application for disability retirement.

5. The Academy objects to the request for fees in connection with a dinner with opposing counsel on May 6, 1997, in which the attorneys discussed "possible resolution of the case." Rebuttal Br. at 5. The Academy objects that the expense is more appropriately a tax write-off. Counsel did not include the cost of the dinner in the fee petition. The attorney time spent discussing settlement will be allowed because the time was expended in furtherance of this complaint. We accept as true the argument of Respondent's counsel that the amount of time spent discussing settlement was "about 30 minutes." Accordingly, we allow 0.5 hours spent discussing settlement and disallow the remaining 1.25 hours.

6. The Academy also objects to the hours counsel spent talking to the media. Rebuttal Br. at 6. Attorney discussions with the media may be recovered in certain instances. For example, in a case discussing entitlement to attorney fees under Title VII, the district court had determined that counsel's public relations work "represented a valid effort to lobby the San Francisco Board of Supervisors, and that 'obtaining the support of the board of Supervisors . . . was as vital to the consent decree [that resolved the litigation] as were the negotiations with the City's administrative officials.'" *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1545 (9th Cir. 1992), *rehearing denied and vacated in other part*, 984 F.2d 345 (9th Cir. 1993) (*quoting* the district court, 748 F.Supp. at 1423). The Ninth Circuit determined that attorney time spent in press conferences and public relations work "directly and intimately related to the successful representation of a client" was compensable, but "any hours . . . for public relations work which did not contribute, directly, and substantially, to the attainment of appellees' litigation goals" should not be disallowed. 976 F.2d at 1545.

In this case, there is no connection between attorney time spent talking with the press and the outcome of the litigation. According to the fee petition, Berkman's counsel spent a total of 1.25

hours in three telephone calls from the media. Berkman cites newspaper articles, CX 16, 16a, as evidence of his loss of professional reputation and inability to pursue his vocation, which he claimed were elements of his request for compensatory damages. We have awarded compensatory damages based upon depression, anxiety, the change in personality experienced by Berkman, and his out of pocket medical costs related to depression, but not upon embarrassment or loss of professional reputation caused by newspaper articles. Accordingly, we find that the attorney time spent talking with the press did not contribute, directly and substantially, to the attainment of Berkman's litigation goals. Therefore, we disallow the 1.25 hours listed for April 14, 1997.

7. The Academy asks for a reduction of the fee petition "on a percentage basis" because of the "vagueness" of the items listing attorney time for consulting with co-counsel. Rebuttal Br. at 6-7. The only record reference to co-counsel is in the two fee petitions submitted by Berkman. Even though only one attorney entered an appearance in this case, we do not dispute the reasonableness of that attorney consulting with another attorney in preparation for a rather extensive hearing in a difficult administrative case. We find that the time spent in such consultation reasonably was expended in pursuit of this complaint. Therefore we will allow the time spent in consulting with co-counsel.

8. The Academy raises an objection to attorney time spent in seeking funding for Berkman's prosecution of this complaint. Rebuttal Br. at 7. Berkman testified that a group called Public Employees for Environmental Responsibility (PEER) was paying his costs associated with the litigation. Rebuttal Br. at 7; T. 782. Citing the lack of any evidence that Berkman must reimburse PEER, the Academy argues that he should not recoup costs for items for which he has no liability and did not pay. *Id*.

We must distinguish between litigation costs and attorney time. The revised fee petition attached to Complainant's Brief to this Board does not list any litigation costs, such as purchase of the transcript.[25/] The only issue here is whether we will allow the one quarter hour claimed on July 11, 1997, for attorney time spent on the item labeled "Research try to find funding for client." Based upon Berkman's testimony, it appears that his attorney's efforts were successful. We find that the attorney's efforts to obtain funding for the costs Berkman incurred in litigating this complaint reasonably were incurred in connection with the complaint. We allow the one quarter hour at issue.

9. We turn to the Academy's objection to the attorney hours associated with a Motion to Disqualify Opposing Counsel (LCD Tom Lennon). The Academy concedes that the ALJ "ruled in favor of the Complainant on this motion." Rebuttal Br. at 7; *see* Administrative Law Judge's Exhibit 34 (Order Granting Complainant's Motion to Disqualify and Notice to Complainant). Notwithstanding Berkman's success on the motion to disqualify, the Academy argues that "Complainant's failure to depose LCD Lennon and call him as a witness" indicates that "it is more probable that LCD Lennon's assertions [in opposition to the motion] were true." *Id*. at 8. In view of the granting of the motion to disqualify, we find that attorney time spent in researching and

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[25/] The earlier, defective petition attached to Berkman's post-hearing brief included costs of $2,500 for deposition transcripts and $1,154.15 for hearing transcripts. Those costs are absent from the updated fee petition that we are considering here.

preparing the motion reasonably was incurred in pursuing this complaint. Accordingly, we allow the claimed hours concerning this motion.

10. We also allow the attorney time spent in preparing and reviewing a March 4, 1998, letter to opposing counsel offering to settle the case for a stated sum, a total of 0.75 hours. We reject the Academy's argument, Rebuttal Br. at 8-9, that the settlement offer was "unnecessary" in view of its earlier rejections of settlement offers for lesser amounts. The new settlement offer was made just after the ALJ issued a recommended decision and order in Berkman's favor. Consequently, it was logical for Berkman to revisit the issue of settlement and to increase the requested amount.

11. We come to the final objection to the fee petition: the request to disallow two entries that are set forth below.[26/]

Date	Work Performed	Time Spent
6/26/97	Research and draft Objection to Protective Order.	5 hours
10/30/97	Review Transcripts and prepare brief.	1.75 hours

The Academy objects to these items because "the Board is not allowed to consider new evidence on review." Rebuttal Br. at 9. Berkman's initial, defective fee petition, which was submitted to the ALJ, did not include these two items because counsel had failed to bill for these services. Affidavit of Scott W. Sawyer, attached to Comp. Br. Counsel discovered the omission when he reviewed his day planner in response to the Academy's argument that the initial petition was defective. *Id.*

Although this Board is constrained to make final decisions based upon the record before the ALJ, that constraint does not apply to fee petitions. We routinely have awarded attorney fees for the time spent in preparing the briefs submitted to this Board, and those briefs obviously were not in the record before the ALJ. We will allow the claimed attorney hours since they were expended in connection with this complaint.

We have disallowed a total of 9.75 hours of attorney time. Accordingly, we find that the fees and costs reasonably incurred in bringing this complaint total $72,075.00 (480.5 hours times $150 per hour) for the work performed prior to the issuance of this decision.

Berkman will be entitled to attorney fees for the work to be performed before the ALJ in the remanded proceedings, as well as for work to be performed before the Board on review of the ALJ's recommended decision to be issued after the close of the remanded proceedings. Accordingly, the ALJ shall afford Berkman the opportunity to submit a petition for the attorney fees (and costs, if

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[26/] The Academy's objection to paying ten hours of attorney travel time on July 8, 1997, Rebuttal Br. at 8, is now moot because Berkman's counsel has documented that the claimed ten hours includes the taking of four depositions on that date. *See* Complainant's Petition to Clarify, dated May 8, 1998.

borne by Berkman) that will be incurred in presenting evidence in the remanded proceeding. The Academy shall be afforded the opportunity to submit a response to the petition. The ALJ shall recommend the amount of additional attorney fees and costs to which Berkman is entitled for the proceedings that occur before the ALJ on remand.

DISPOSITION

The Academy violated the employee protection provisions of the environmental acts when it subjected Berkman to a hostile work environment and constructively discharged him.

It is **ORDERED** that these consolidated complaints are **REMANDED** to the ALJ for proceedings consistent with this Decision, including taking evidence on, and making recommendations about, reinstatement and the amount of back pay and front pay (if any) to which Berkman is entitled, as well as additional attorney fees and costs incurred in the remanded proceeding.

It is further **ORDERED** that Respondent shall:

1. Immediately expunge Complainant's personnel file of the Notice of Proposed Removal and any other negative reference relative to his protected activity;

2. For sixty days, post a written notice in a centrally located area frequented by most, if not all, of Respondent's employees that the disciplinary action taken against Complainant has been expunged from his personnel record and that Complainant's complaint has been decided in his favor;

3. Pay Complainant for the cost of obtaining medical treatment and medications for his diagnosed major depression to the extent Complainant bore the costs himself;

4. Pay Complainant compensatory damages in the amount of $70,000; and

5. Pay Complainant's counsel attorney fees in the amount of $72,075.00, for the work expended prior to the issuance of this Decision.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member