

# Report of Investigation:

# Whistleblower Reprisal Investigation

September 29, 2023 | Report No. 23-N-0039



Contents of this report and its exhibits may contain personally identifiable information, including sensitive PII, that is protected by the Privacy Act and subject to the EPA policy on PII and SPII. As such, EPA personnel should follow the Agency's policy on PII and SPII, to include ensuring that this report and its exhibits are properly safeguarded. Pursuant to the nondisclosure provisions of 41 U.S.C. § 4712, the inspector general requests that you refrain from distributing this document to unauthorized individuals.

## REPORT OF INVESTIGATION

### WHISTLEBLOWER REPRISAL INVESTIGATION

#### I. Introduction and Summary

On October 28, 2022, the U.S. Environmental Protection Agency Office of Inspector General received an allegation of whistleblower reprisal under 41 U.S.C. § 4712 from the [REDACTED], a recipient of an EPA subaward, in [REDACTED] Colorado. The complainant alleged that foundation board members took three discriminatory personnel actions against [REDACTED] in retaliation for making protected disclosures relating to the EPA subaward in November and December 2021: (1) creating a hostile work environment, (2) failing to pay [REDACTED] commissions, and (3) failing to pay [REDACTED] a retention bonus.

Our investigation first sought to determine whether the complainant made disclosures that are protected under 41 U.S.C. § 4712 and whether those disclosures were a contributing factor in any actions taken against [REDACTED] that are covered, that is, prohibited, under the statute. We determined that the complainant made three protected disclosures to members of the foundation's board, and one protected disclosure to the OIG, and that [REDACTED] was a perceived whistleblower with respect to one disclosure. We also determined that the board took a covered action in failing to pay the complainant a commission. The alleged hostile work environment and failure to pay the retention bonus were not covered actions under 41 U.S.C. § 4712. The board knew about the three protected disclosures and the perceived disclosure, and the covered action occurred within a period such that a reasonable person could conclude that the complainant's protected disclosures were a contributing factor in the covered action.

Next, we assessed whether the foundation could establish that it would have failed to pay the commissions even if the complainant had not made the protected disclosures. After reviewing the evidentiary support for the covered action, as well as any evidence of a retaliatory motive and evidence of how comparable employees were treated, we did not substantiate the complainant's retaliation allegations with respect to the failure to pay the commission.

#### II. Findings of Fact

##### *Background*

[REDACTED] The foundation is managed by its board of directors, which consists of at least nine members. Exhibit 3. Among other

responsibilities, the board has the authority to investigate and address misconduct of foundation employees. Exhibit 3; Exhibit 4 at pp. 11–12; Exhibit 5 at pp. 15–16; Exhibit 6 at p. 11–12; Exhibit 7 at p. 18.

On [REDACTED], the foundation received a [REDACTED] an EPA subaward, [REDACTED]. Exhibit 8. The original grant to [REDACTED] was sponsored by the EPA's [REDACTED]. Exhibit 13; Exhibit 46. [REDACTED]

The complainant became [REDACTED] of the foundation on [REDACTED] 2021. Exhibit 9. [REDACTED] responsibilities included [REDACTED].

[REDACTED]. Exhibit 1; Exhibit 5 at pp. 26–27; Exhibit 6 at p. 16; Exhibit 7 at pp. 28–29. The complainant's job offer included a salary and additional financial incentives, including an award of 15 percent of the administration fees for grants that directly benefit the foundation and a 15 percent commission on the initial contribution of any new donor contributing \$1,000 or more to the foundation. Exhibit 9; Exhibit 3.

As [REDACTED] the complainant reported to the foundation's board of directors.<sup>1</sup> Exhibit 4 at p. 10; Exhibit 5 at pp. 27–28; Exhibit 6 at p. 17; Exhibit 10 at p. 1. For day-to-day business, [REDACTED] worked mostly with a subcommittee of the board known as the executive committee, which consisted of the board's chairman, vice chairman, and treasurer/secretary.<sup>2</sup> Exhibit 4 at p. 10; Exhibit 5 at p. 10; Exhibit 6 at p. 8; Exhibit 7 at p. 8; Exhibit 10 at p. 1. One of the complainant's responsibilities [REDACTED], which included the EPA subaward and a grant from the [REDACTED]. Exhibit 10 at p. 2; Exhibit 11 at p. 6. [REDACTED]

[REDACTED] Employee 1, who was responsible for implementing the training program under the EPA subaward and whose salary was funded in [REDACTED]

<sup>1</sup> Although the complainant was an employee of the foundation and subject to the board's supervision, [REDACTED] issued [REDACTED] paychecks and maintained [REDACTED] personnel file. Exhibit 10 at p. 1; Exhibit 14 at p. 6.

<sup>2</sup> [REDACTED]

part by the EPA subaward and the [REDACTED] grant. Exhibit 11 at pp. 6, 18. Employee 1 kept track of the time [REDACTED] spent on various activities and billed [REDACTED] time to whichever grant applied to each activity. Exhibit 4 at pp. 15, 26; Exhibit 12 at p. 6. The EPA subaward operated on a reimbursable basis: the foundation would make expenditures related to the grant and report them to [REDACTED] and [REDACTED] would then reimburse the foundation for the expenditures. Exhibit 7 at p. 74; Exhibit 8 at pp. 8, 33–34. The breakdown of Employee 1’s time would be reflected in timesheets that were submitted to [REDACTED] Exhibit 4 at p. 26; Exhibit 15 at pp. 22–23; Exhibit 42.

Early in the complainant’s tenure as [REDACTED], the board’s chairman asked [REDACTED] to look into the [REDACTED] grant because the foundation had not received any reimbursements under that grant for several months. Exhibit 6 at p. 32; Exhibit 16. According to the board’s vice chairman, the board wanted the complainant to “unclog whatever needed to be unclogged” so that the foundation could be reimbursed for its expenses under the grant. Exhibit 5 at p. 131. The complainant testified that [REDACTED] was also directed to make sure that the reimbursements for the EPA subaward were matching the grant language. Exhibit 11 at pp. 19–20.

The complainant began gathering information about the two grants and [REDACTED] eventually disclosed concerns [REDACTED] had about them to members of the executive committee, as outlined below.

### ***The Complainant’s Disclosures Regarding the EPA Subaward***

The complainant disclosed two overarching concerns to the board’s executive committee: (1) problems with Employee 1’s timesheets, including lack of supporting documentation and billing the EPA subaward for activities outside the scope of the grant, and (2) the foundation’s lack of compliance with certain terms of the EPA subaward. Exhibit 4 at p. 34; Exhibit 6 at p. 18; Exhibit 10 at p. 3; Exhibit 17; Exhibit 18; Exhibit 19.

#### ***1. The Complainant’s Disclosures Regarding Employee 1’s Timesheets***

The complainant first became aware that there could be a problem with Employee 1’s timesheets as a result of reviewing documentation for the [REDACTED] grant. Exhibit 10 at p. 2. In early November 2021, the complainant began reviewing Employee 1’s timesheets with a [REDACTED] representative and said that [REDACTED] understood that the supporting documentation was “completely insufficient.” Exhibit 11 at pp. 14–15. According to [REDACTED] the [REDACTED] representative explained why the supporting documentation was insufficient and the complainant agreed. Exhibit 11 at p. 15. The documentation of Employee 1’s time was “minimal,” and the complainant did not think that it “clearly outlined what aspects of the grant that [REDACTED] was ... contributing [REDACTED] time to.” Exhibit 11 at p. 15. After seeing the alleged deficiencies in the [REDACTED] timesheets, the complainant became concerned that the timesheets submitted for reimbursement under the EPA subaward could be deficient as well. Exhibit 10 at p. 2; Exhibit 4 at p. 15.

The complainant testified that [REDACTED] disclosed [REDACTED] concerns about Employee 1's timesheets to the chairman during a meeting in the chairman's office in early or mid-November 2021. Exhibit 11 at pp. 15–18; Exhibit 16. The complainant told the chairman that, based on [REDACTED] meeting with the [REDACTED] representative, [REDACTED] was concerned that if the documentation for Employee 1's timesheets did not meet [REDACTED] standards, then [REDACTED] "highly doubted" it was sufficient for the EPA subaward. Exhibit 11 at pp. 17–18; Exhibit 4 at pp. 15–16, 18–21.

On November 16, 2021, the chairman emailed the vice chairman and the treasurer/secretary stating that [REDACTED] and the complainant discussed the "payment status of the various grants" and the fact that the foundation had "not been paid by the [REDACTED] for quite some time." Exhibit 16. In the email, the chairman noted that the complainant was "very concerned about the status of these and was quite upset." *Id.* In [REDACTED] testimony, the chairman said that [REDACTED] primary objective was to understand why the foundation did not receive reimbursements from the [REDACTED] grant, but [REDACTED] could not rule out the possibility that the complainant also raised concerns about the EPA subaward in the meeting. Exhibit 6 at pp. 32–33. The chairman testified that [REDACTED] did not understand that the complainant was reporting violations of law; [REDACTED] only understood [REDACTED] to be reporting that the foundation was funding expenses that may not be eligible for reimbursement under the grants. Exhibit 6 at p. 35.

In mid-November 2021, the complainant met with the executive committee and disclosed [REDACTED] concerns about Employee 1's timesheets and the EPA subaward. Exhibit 4 at p. 25; Exhibit 20. According to the complainant, [REDACTED] explained that if Employee 1's timesheets were insufficient for reimbursement under the [REDACTED] grant, they were likely insufficient for the EPA subaward too. [REDACTED] also pointed out that Employee 1 billed the EPA for holding a board meeting for "[Employee 1's] [REDACTED]," which [REDACTED] noted was not part of the grant. Exhibit 4 at p. 27. [REDACTED] testified that [REDACTED] was "very specific" that the foundation did not want to "be doing anything illegal" and needed to ensure there was documentation that could justify the requests for reimbursement under the grant. *Id.* at pp. 26–27.

Employee 1 resigned from [REDACTED] position with the foundation on [REDACTED], citing personal reasons for [REDACTED] decision. Exhibit 21.

## 2. The Complainant's Disclosures Regarding Compliance with the EPA Subaward

Starting in mid-November 2021, the complainant disclosed to the members of the executive committee concerns relating to the foundation's compliance with the EPA subaward.

The complainant received the EPA subaward documents in mid- or late November 2021. Exhibit 11 at pp. 34, 39; Exhibit 43. On November 19, 2021, the complainant emailed the executive committee stating that the foundation was not able to perform its "due diligence" in following the "federal Uniform Guidance" criteria for the EPA subaward. Exhibit 24. [REDACTED] provided a link to the Code of Federal Regulations and stated that [REDACTED] would "sift through these regulations, [and] highlight the important parts" for the executive committee. *Id.*

On November 23, 2021, the complainant emailed the vice chairman a multipage document containing a summary of [REDACTED] concerns about the foundation's compliance with various terms of the EPA subaward. Exhibit 11 at pp. 33–34; Exhibit 17; Exhibit 22. In the summary document, the complainant listed 26 sections of the EPA subaward and, for most of them, [REDACTED] provided brief comments in red font about [REDACTED] concerns.<sup>3</sup> Exhibit 17. [REDACTED] concerns included allegations that [REDACTED] had failed to comply with its obligation to monitor the EPA subaward, that the funds from the subaward were being used to recruit and pay for participants outside the designated service area, and that the foundation was not complying with its obligation to administer the subaward.<sup>4</sup> *Id.* The complainant also alleged that certain required monthly reports were not in the foundation's possession. *Id.*

The complainant's comments were brief, and most of the points lacked detail and supporting factual allegations. *Id.* For example, in discussing a provision regarding financial conflicts of interest among employees, the complainant commented, "Debatable," without making a specific allegation of wrongdoing or providing relevant factual detail, such as the names of any employees who had a potential financial conflict of interest. *Id.* In another section, the complainant appeared to suggest that something improper had occurred with the initiation of payment requests by stating, "The Grantee is identified as the one to initiate payment requests. Authorizing another to do so is in violation of this contract." *Id.* The complainant did not make a specific allegation of wrongdoing or provide any details. Some of the complainant's comments focused only on specific provisions of the EPA subaward without considering other relevant provisions. For example, in alleging that the foundation used EPA subaward funds to recruit participants outside the three-county service area specified in the grant, the summary document did not mention that the EPA subaward permitted recruitment outside the service area. Exhibit 8. The vice chairman forwarded the November 23, 2021 email and attached summary document to

---

<sup>3</sup> For many sections of the document, the complainant's comments do not raise material concerns with compliance but only state facts, such as that the foundation is defined as "the Grantee," or that the foundation is responsible for paying Employee 1's [REDACTED]. Exhibit 17.

<sup>4</sup> In an interview, the complainant testified that [REDACTED] did not know what protocols [REDACTED] had in place for monitoring the EPA subaward. Exhibit 11 at p. 60.

the [REDACTED] program manager, who replied that “there is too much to correct here to respond in writing. ... [The complainant] is wrong in almost every one of these concerns.” Exhibit 25.

On or around November 23, 2021, the complainant met with two board members who were not on the executive committee and discussed the summary document with them. Exhibit 4 at pp. 36–39; Exhibit 11 at pp. 85–87; Exhibit 44. According to the complainant and a board member present at the meeting, the other board member, [REDACTED] stated during the meeting that [REDACTED] was not sufficiently “well-versed” in grant law to understand the complainant’s concerns. Exhibit 4 at pp. 36–39; Exhibit 11 at pp. 85–87; Exhibit 26 at pp. 40–44. The other board member testified that [REDACTED] recalled the meeting and the complainant discussing [REDACTED] concerns about the EPA subaward, but [REDACTED] could not recall any details about the specific concerns [REDACTED] expressed. Exhibit 26 at pp. 16, 40–45.

On November 29, 2021, the complainant emailed the executive committee a summary of the call with the [REDACTED] grant director in which [REDACTED] reported that the [REDACTED] had deemed the foundation’s grant to be “illegal.” Exhibit 27. At the end of the email, [REDACTED] noted, “my other concern remains that we are out of compliance with the [EPA subaward] as well,” but [REDACTED] did not provide any detail or further discussion regarding those concerns.<sup>5</sup> *Id.*

On December 2, 2021, the complainant met with the executive committee and the [REDACTED] program manager and reviewed [REDACTED] November 23, 2021 summary document point by point. Exhibit 6 at p. 42; Exhibit 11 at pp. 43, 89–92; Exhibit 28 at p. 123; Exhibit 29 at pp. 18–20. In interviews with the OIG, the members of the executive committee were not able to recall the December 2 meeting itself or the contents of the summary document, but they expressed mixed views regarding the validity of complainant’s concerns generally. Exhibit 5 at pp. 71–72, 117; Exhibit 6 at pp. 21, 45–48; Exhibit 7 at pp. 34, 70, 80. The vice chairman, for example, had previously worked on two similarly structured EPA subawards to the foundation, and [REDACTED] felt comfortable that the foundation “knew what [it was] doing” with the EPA subaward. Exhibit 5 at pp. 34–35. Based on that experience, [REDACTED] believed that the complainant’s concerns were “just not right.” *Id.* at pp. 68–69. [REDACTED] also testified, however, that [REDACTED] “perceived” that the complainant “was reporting what [REDACTED] thought to be violations” of law or regulations, even if [REDACTED] did not think that all the complainant’s concerns constituted actual violations. *Id.* at pp. 70–71. The chairman had no recollection of the December 2, 2021 meeting, but [REDACTED] testified generally that [REDACTED] did not perceive that the complainant was blowing the whistle. [REDACTED] could not say whether, at the time, [REDACTED] perceived that the complainant’s concerns were valid, however. Exhibit 6 at pp. 33, 42, 52. The treasurer/secretary testified that the complainant frequently made allegations of fraud in connection with the EPA subaward, but [REDACTED] was skeptical about the allegations because no

---

<sup>5</sup> According to the complainant, the [REDACTED] representative said that the grant was “illegal” and should never have been approved because [REDACTED] believed some elements of the application had been falsified. According to the complainant, one of the concerns was that one or more businesses that submitted letters in support of the application were not real businesses but had addresses that were for vacant or abandoned buildings. Exhibit 11 at pp. 16–17, 19.

investigation had taken place and no determination had been made about willfulness, which [REDACTED] understood to be a necessary element of fraud. Exhibit 7 at pp. 71–73, 89.

On December 3, 2021, the complainant submitted a hotline complaint to the EPA OIG alleging potential fraud in connection with the EPA subaward. Exhibit 23. [REDACTED] alleged that the foundation had spent approximately \$100,000 in salary for an employee who did not perform any work under the EPA subaward.<sup>6</sup> *Id.* In [REDACTED] initial interview with the OIG for this investigation, the complainant said [REDACTED] did not think that the vice chairman knew about [REDACTED] December 3 OIG Hotline complaint and [REDACTED] did not know whether others knew. Exhibit 10 at p. 5. The complainant also testified about a meeting with members of the board that took place in the winter of 2021–2022 in which the vice chairman allegedly made a comment about the complainant making a report of some kind, but the complainant was not able to provide any further details. Exhibit 4 at pp. 47–49. The OIG reviewed the meeting minutes for board meetings during the relevant time period and found no reference to the vice chairman’s alleged comment or any discussion about an OIG Hotline complaint.

On October 28, 2022, the complainant submitted [REDACTED] claims of retaliation to the OIG, and the claims were referred to the OIG’s Administrative Investigations Directorate.

### ***The Complainant’s Allegations of Retaliatory Discrimination***

The complainant alleged that the foundation took three actions against [REDACTED] in retaliation for the disclosures in November and December 2021 described above: (1) creating a hostile work environment, (2) failing to pay [REDACTED] commissions, and (3) failing to pay [REDACTED] a retention bonus.

#### ***1. Hostile Work Environment***

According to the complainant, the hostile work environment started in mid-November 2021, when [REDACTED] first met with the executive committee about [REDACTED] concerns with the EPA subaward and the [REDACTED] grant. Exhibit 10 at pp. 2–3. The complainant testified that the vice chairman and the [REDACTED] program manager told the complainant that [REDACTED] was wrong about [REDACTED] concerns, that [REDACTED] was lying, and that [REDACTED] was trying to present a story about the grants that was not accurate. *Id.* at p. 4; Exhibit 4 at p. 55. From the first meeting with the board to discuss [REDACTED] concerns, the complainant alleged that [REDACTED] was yelled at and ostracized. Exhibit 10 at p. 2.

[REDACTED] testified that, starting in the mid-November 2021 meeting and continuing through multiple meetings to discuss concerns with the EPA subaward, members of the executive committee and the [REDACTED] program manager “ganged up on” [REDACTED] and “would just come after” [REDACTED] Exhibit 4 at p. 61. When [REDACTED] was asked by the OIG what [REDACTED] meant when [REDACTED] said the others were “ganging up on” [REDACTED] [REDACTED] said that they would “establish that they were very certain that [REDACTED] was

<sup>6</sup> The complainant’s fraud claim was referred to the OIG’s Office of Investigations. Exhibit 23.



incorrect ... like [REDACTED] was somebody going ... down a rabbit hole or being like a conspiracy theorist.” Exhibit 11 at p. 98. [REDACTED] added that “they were just very critical of me, saying that ... I should know that what I’m saying is completely incorrect and if [the [REDACTED] program manager] said it’s fine then it’s fine.” *Id.* at pp. 98–99.

The complainant also alleged that, during the December 2, 2021 meeting, the vice chairman accused [REDACTED] of “lying” regarding a matter that was not directly related to the EPA subaward. Exhibit 4 at pp. 56–57; Exhibit 11 at p. 105; Exhibit 44.

In [REDACTED] testimony to the OIG, the complainant called the meetings with the executive committee to discuss the EPA subaward “really hostile.” Exhibit 4 at p. 61. [REDACTED] testified that the other participants in the meetings seemed “frustrated” with [REDACTED] Exhibit 11 at p. 30. The complainant explained that the meeting participants were “not argumentative but really defensive” regarding [REDACTED] concerns about the timesheets. *Id.* at pp. 30–31. In a later interview, the complainant backtracked somewhat on [REDACTED] prior testimony, stating that [REDACTED] would not characterize the attitude of the meeting participants as hostile. *Id.* at p. 31. [REDACTED] called the December 2, 2021 meeting “very, very negative,” but not hostile. *Id.* at p. 93. [REDACTED] testified that [REDACTED] the board members told [REDACTED] that [REDACTED] had “no idea” what [REDACTED] was talking about. *Id.* At one point, [REDACTED] testified that [REDACTED] was “going through living hell.” *Id.* at pp. 85–86.

The complainant also alleged that the vice chairman tried to humiliate [REDACTED] in meetings. For example, in one meeting the vice chairman allegedly told the board that Employee 1 resigned because the complainant created a hostile work environment. Exhibit 4 at pp. 55, 58. According to the complainant, a board member suggested that the vice chairman read Employee 1’s resignation letter and the vice chairman declined to do so. *Id.* at p. 55; Exhibit 18. The complainant later saw the letter, which [REDACTED] said did not allege that the complainant created a hostile work environment. Exhibit 4 at p. 55; see also Exhibit 21. The complainant also recalled a meeting of the [REDACTED] in which the vice chairman yelled at [REDACTED] “What are you doing here?” Exhibit 4 at p. 72. The complainant described such treatment as humiliating. *Id.*

In [REDACTED] testimony, the vice chairman said that [REDACTED] had been frustrated with the complainant on occasion, and that [REDACTED] raised [REDACTED] voice and spoke in a condescending tone, but [REDACTED] denied calling the complainant a liar or yelling at [REDACTED] Exhibit 5 at pp. 169–170. The treasurer/secretary testified that [REDACTED] never observed any unprofessional conduct or name-calling from the board members toward the complainant. Exhibit 7 at pp. 166–168. The [REDACTED] program manager testified that [REDACTED] never observed any inappropriate behavior from board members toward the complainant during meetings. Exhibit 29 at pp. 23–25. The chairman also testified that [REDACTED] could not recall any hostility directed at the complainant in meetings. Exhibit 6 at pp. 43, 63, 67, 76–77, 121–122.

The complainant also alleged that, after the disclosures, the chairman and the treasurer/secretary “were no longer friendly” to [REDACTED] and that their tone was no longer “welcoming or warm.”

Exhibit 4 at pp. 54–55. Before the disclosures, [REDACTED] used to spend “hours” talking with the chairman. *Id.* at pp. 62–63. After the disclosures, [REDACTED] avoided eye contact and public interaction with [REDACTED]. *Id.* The complainant testified that whenever [REDACTED] sees the chairman or treasurer/secretary in public, they do not speak to [REDACTED]. *Id.* at p. 63. [REDACTED] went on to explain that, after making the disclosures about the grant, [REDACTED] never received positive feedback on [REDACTED] performance from the board members, which [REDACTED] found “disheartening.” *Id.* at pp. 64–65.

The complainant alleged that, after the vice chairman resigned from the board on [REDACTED], the two of them had “very little interaction,” but the vice chairman continued to mistreat [REDACTED]. Exhibit 4 at p. 63; Exhibit 31. For example, the complainant alleged that the vice chairman “cornered” [REDACTED] event in May 2022 and told the complainant that [REDACTED] had “hate” for [REDACTED]. Exhibit 35; Exhibit 4 at p. 68. According to the complainant, the vice chairman said, “I know it’s my issue, but I have hate for you, and I have to work on that, but — I’m working on it, but I have hate for you.” Exhibit 4 at p. 68. The vice chairman confirmed that [REDACTED] approached the complainant at the [REDACTED] event, [REDACTED] [REDACTED] approached the complainant to say that [REDACTED] had been angry with [REDACTED] and to ask for forgiveness. Exhibit 5 at pp. 183–184. The vice chairman testified that [REDACTED] anger towards the complainant was related to an incident that pre-dated the complainant’s disclosures about the EPA subaward, where [REDACTED] felt that the complainant spread inaccurate information about [REDACTED]. *Id.*

[REDACTED]

7

[REDACTED]

Because [REDACTED] is not an EPA grantee or subgrantee, however, the OIG does not have jurisdiction over these allegations.

## 2. Failure to Pay Commissions

The complainant alleged that the board retaliated against [REDACTED] by failing to pay [REDACTED] commissions to which [REDACTED] was entitled. Under the terms of [REDACTED] employment, the complainant was entitled to 15 percent of the administration fees for any new grants received while [REDACTED] was [REDACTED] that directly benefit the foundation and 15 percent of the initial contribution of any new member donating \$1,000 or more. Exhibit 9.

In [REDACTED] 2021, the foundation received a [REDACTED] grant from the [REDACTED]. Exhibit 4 at pp. 92–93; Exhibit 18; Exhibit 36. Both the chairman and the complainant testified that the grant did not include an administration fee.<sup>8</sup> Exhibit 6 at p. 85; Exhibit 12 at p. 39. The foundation also received a \$5,000 initial contribution from a new donor. Exhibit 36. The grant and the new donor were announced to the board in a January 3, 2022 meeting. *Id.* The complainant testified that [REDACTED] did not receive a commission for either. Exhibit 4 at pp. 87, 92–93; Exhibit 11 at p. 112.

The complainant testified that as soon as funds from a contribution or grant came in, the executive committee should have directed [REDACTED] to pay [REDACTED] the appropriate amounts. Exhibit 4 at p. 95. [REDACTED] testified that this was the process followed for payments made to [REDACTED] predecessor. *Id.* The chairman, vice chairman, and treasurer/secretary all testified, however, that the commission payments to the complainant's predecessor were triggered by the predecessor's own requests. When funds were received, the predecessor created a spreadsheet of commission amounts that were owed to [REDACTED] and submitted it to the board. Exhibit 5 at pp. 150–151; Exhibit 6 at pp. 79–80; Exhibit 7 at p. 124. The predecessor then obtained approval of the requests from one or more members of the board, and the requests were then forwarded to [REDACTED] for payment. Exhibit 6 at pp. 79–80; Exhibit 7 at p. 124.

The complainant testified that [REDACTED] had no recollection of requesting commission payments or speaking with anyone on the board about [REDACTED] entitlement to commissions or awards. Exhibit 4 at p. 96; Exhibit 11 at pp. 107–108. [REDACTED] testified that [REDACTED] informed the chairman when the funds were received and had been deposited in the foundation's account. Exhibit 4 at p. 96. The complainant explained that [REDACTED] did not ask for the commission payments because [REDACTED] compensation was the board's responsibility and that it was not within the scope of [REDACTED] position as an employee to direct how [REDACTED] was paid. Exhibit 11 at pp. 114–115.

The complainant told the OIG that [REDACTED] never received any indication from the board that the commissions were being withheld intentionally, a point that was corroborated in testimony from

---

<sup>8</sup> The OIG was not able to determine independently whether the grant included an administration fee. The OIG requested a copy of the grant agreement from the foundation, but the foundation was not able to locate the documentation. Exhibit 40.

the board chairman. Exhibit 4 at pp. 96–97; Exhibit 6 at p. 109. However, the complainant went on to state that not paying the compensation was part of the “environment of being shunned” after [REDACTED] made [REDACTED] disclosures about the EPA subaward. Exhibit 4 at p. 97.

After the complainant’s initial testimony regarding the commissions, the OIG uncovered an email from the complainant to the OIG’s Office of Investigations stating that [REDACTED] had in fact *refused* all commissions. The email was sent to a special agent in the Office of Investigations on February 24, 2022, in connection with the complainant’s December 2021 hotline complaint. In it, [REDACTED] told the special agent that [REDACTED] had “*refused all bonuses, admin fees, travel and phone reimbursements, and any financial perk in my job* because this position was so abused by [REDACTED] predecessor] that [REDACTED] d[id] not want any doubt cast upon [REDACTED] integrity.” Exhibit 37 (emphasis added).

Testimony from the chairman corroborated the complainant’s statement in the February 24, 2022 email. [REDACTED] recalled a conversation with the complainant in which [REDACTED] declined to accept any commissions or awards. Exhibit 6 at pp. 88–89, 98–100, 113. Although [REDACTED] characterized [REDACTED] recollection as vague and was not able to recall details, [REDACTED] believed that such a conversation took place early in the complainant’s tenure as [REDACTED] when [REDACTED] compensation was being discussed. *Id.* at pp. 99–100.

In a follow-up interview, the OIG asked the complainant about the February 24, 2022 email and the conversation with the chairman. The complainant recalled a conversation with the executive committee in which [REDACTED] expressed the view that “monetary incentives should be removed from the position” of [REDACTED]. Exhibit 12 at pp. 30–31. On November 23, 2021, soon after [REDACTED] meeting with the executive committee in mid-November, [REDACTED] prepared a document intended to “set a pathway” for how the foundation could “remedy the situation” with the grants. *Id.* at p. 30. The document contained a list of several items, the final one of which was, “Remov[ing] all monetary incentives from the [REDACTED] position in terms of grants and soliciting members.” Exhibit 38.

With regard to [REDACTED] February 24, 2022 email to the OIG special agent, the complainant told the OIG that [REDACTED] refused travel and phone reimbursements. Exhibit 12 at p. 41. [REDACTED] explained, however, that the email’s reference to bonuses and administrative fees only referred to bonuses and administrative fees on the [REDACTED] grant and the EPA subaward. *Id.* at pp. 34–36. When the OIG pointed out that the email did not appear to be limited to those two grants, the complainant testified that [REDACTED] “didn’t want to receive anything in conjunction with grants at that time” and that [REDACTED] made a point of not including administrative fees in grant applications. *Id.* at pp. 37–38. [REDACTED] then stated that [REDACTED] refused any bonuses or commissions tied to grants because, as [REDACTED] told the chairman, “I’m fine with my salary. And when it comes to, you know, getting money out of grants, I don’t want anything to do with that.” *Id.* at p. 38.

### 3. Failure to Pay Retention Bonus

The complainant alleged that the foundation retaliated against [REDACTED] by failing to pay [REDACTED] a retention bonus that [REDACTED] alleged had been provided by the [REDACTED]. In January 2022, the foundation received a [REDACTED] increase in funding from the [REDACTED]. Exhibit 36. The complainant testified that [REDACTED] told [REDACTED] that it was their intention that the funds were to be used for employee retention. [REDACTED]. Exhibit 4 at pp. 97–102. The complainant told the OIG, however, that [REDACTED] did not document this alleged intention and the minutes of the board meeting that discussed this additional funding do not reflect that the complainant was the intended recipient of the funds or that the funds were earmarked for employee retention. Exhibit 11 at p. 111; Exhibit 36. The chairman testified that, if [REDACTED] had intended for the funds to go to the complainant, [REDACTED] would have heard about it, and [REDACTED] had no recollection of any such discussion taking place. Exhibit 6 at pp. 105, 107.

## III. Analytic and Legal Framework

Pursuant to 41 U.S.C. § 4712, “Enhancement of Contractor Protection from Reprisal for Disclosure of Certain Information,” an employee of a contractor, subcontractor, grantee, subgrantee, or personal services contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for making a protected disclosure. 41 U.S.C. § 4712(a)(1). Unless the inspector general determines that the complaint is frivolous, the complainant fails to allege a violation of the prohibition in subsection (a), or the complaint has previously been addressed in another federal or state judicial or administrative proceeding initiated by the complainant, the inspector general shall investigate the complaint and submit a report of the findings of the investigation to the person, contractor, subcontractor, grantee, subgrantee, or personal services contractor concerned, as well as to the head of the agency.<sup>9</sup> 41 U.S.C. § 4712(b). Complaints may not be brought more than three years after the date on which the alleged reprisal occurred. 41 U.S.C. § 4712(b)(4).

The legal burdens of proof set out in the Whistleblower Protection Act of 1989, 5 U.S.C. § 1221(e), are controlling for the purposes of any investigation conducted by an inspector general regarding whether there has been a prohibited reprisal under section 4712. 41 U.S.C. § 4712(c)(6). To allege a violation under section 4712(a), complainants must allege that they made a protected disclosure and that the protected disclosure was a contributing factor in a covered action taken or threatened to be taken against them. A protected disclosure is defined as a communication about actual or suspected wrongful conduct “that the employee reasonably

<sup>9</sup> The report must be provided within 180 days after receiving the complaint, unless the 180-day period is extended by agreement between the inspector general and the complainant. 41 U.S.C. § 4712(b)(2)(A)-(B). In this case, the complainant agreed to an extension of the 180-day period. Exhibit 41.

believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant.” 41 U.S.C. § 4712(a)(1). A reasonable belief exists if a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions that are the subject of the complaint fall into one of the categories of wrongdoing listed in the statute. *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999). In order for a disclosure to be protected under the law, it must be made to certain persons or entities, including to an inspector general or “a management official or other employee of the contractor, subcontractor, grantee, subgrantee, or personal services contractor who has the responsibility to investigate, discover, or address misconduct.” 41 U.S.C. § 4712(a)(2).

An individual who has not made a protected disclosure may still be entitled to protection under section 4712 if the individual is perceived to be a whistleblower. *See King v. Dep’t of the Army*, 2011 M.S.P.B. 83, ¶ 6. In such cases, the analysis focuses on the perceptions of the officials involved in the personnel actions at issue and whether those officials believed that the complainant made or intended to make disclosures that evidenced the type of wrongdoing listed in the statute. *Id.* at ¶ 7.6. The perceived whistleblower doctrine does not apply where the complainant’s allegations are frivolous. *Montgomery v. M.S.P.B.*, 382 F.App’x 942, 947 (Fed. Cir. 2010).

In order to allege a prima facie allegation of whistleblower retaliation under section 4712, covered employees must allege that they have been “discharged, demoted, or otherwise discriminated against” in reprisal for making a protected disclosure. 41 U.S.C. § 4712(a)(1). The statute does not explain what is meant by the phrase “otherwise discriminated against,” and there is no case law defining discrimination under section 4712. As such, we use the standard established in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), for retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). An alleged retaliatory employment action is “adverse,” and therefore covered, if the employee can show that the action would dissuade a reasonable employee from making a protected disclosure. *See Burlington Northern*, 548 U.S. at 68.

In assessing whether a hostile work environment rises to the level of an adverse action, courts look at factors such as the frequency of the hostile conduct; its severity, such as whether the conduct is physically, as opposed to verbally, threatening or humiliating; and whether it unreasonably interferes with the employee’s work. *Boss v. Castro*, 816 F.3d 910, 920 (7th Cir. 2016). The determination is an objective one and is not based on a complainant’s personal feelings. *Semsroth v. City of Wichita*, 555 F.3d 1182, 1184 (10th Cir. 2009) (citing *Burlington Northern*, 548 U.S. at 68). “[P]etty slights, minor annoyances, and simple lack of good manners”

do not rise to the level of adversity that would deter employees from pursuing their rights. *Burlington Northern*, 548 U.S. at 68.

Courts have consistently held that the prospect of losing wages and benefits would dissuade a reasonable person from making or supporting a charge of discrimination. *See, e.g., Mickelson v. New York Life Ins. Co.*, 460 F.3d 1304, 1316 (10th Cir. 2006). By contrast, sporadic incidents of disrespectful behavior—including yelling, severe criticism, and insults—do not. *See, e.g., Baloch v. Kempthorne*, 550 F.3d 1191, 1199 (D.C. Cir. 2008) (holding that profanity-laden yelling and outbursts were “disproportionate” but “did not meet the requisite level of regularity or severity” to constitute an adverse action); *Somoza v. University of Denver*, 513 F.3d 1206 (10th Cir. 2008) (holding that “extreme public humiliation” in a meeting, including individuals rolling their eyes and laughing at complainant’s opinions and statements, does not constitute an adverse action).

After it has been established that the complainant made a protected disclosure, the next step is to analyze whether it can be established by a preponderance of the evidence that one or more of the protected disclosures was a contributing factor in the decision to discharge, demote, or otherwise discriminate against the complainant.<sup>10</sup> *Contributing factor* is defined as any factor that, alone or in connection with other factors, tends to affect in any way the outcome of the decision. *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993). The complainant can establish that a disclosure was a contributing factor through circumstantial evidence showing that (1) “the official taking the personnel action knew of the disclosure” and (2) “the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action.” 5 U.S.C. § 1221(e)(1)(A)-(B).

If it is established that one or more protected disclosures contributed to the decision to discharge, demote, or otherwise discriminate against the employee, the retaliation allegation is substantiated unless there is clear and convincing evidence that the employer would have taken the covered action in the absence of the protected disclosure.<sup>11</sup> 5 U.S.C. § 1221(e)(1). In other words, if the evidence shows that it is highly probable that the employer would have taken the actions against the employee regardless of the protected disclosure, then the retaliation allegation is not supported. The relevant factors to consider in this determination are (1) the strength of the employer’s evidence in support of its decision, (2) the existence and strength of any retaliatory motive by the officials involved in the decision, and (3) any evidence that the employer has taken

<sup>10</sup> A preponderance of the evidence is defined as “[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.” 5 C.F.R. § 1201.4(q).

<sup>11</sup> Clear and convincing evidence is defined as “that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established,” and it is a higher standard than preponderance of the evidence. 5 C.F.R. § 1209.4(e).

similar actions against employees who are not whistleblowers but are otherwise similarly situated. *Carr v. Social Sec. Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

No later than 30 days after receiving an inspector general report, the head of the agency shall determine whether there is sufficient basis to conclude that the employer has subjected the complainant to a prohibited reprisal and shall issue an order denying relief or ordering the contractor or grantee to take appropriate corrective action. 41 U.S.C. § 4712(c)(1).

#### IV. Analysis

The complainant was an employee of an EPA subgrantee, the foundation, that received a [REDACTED] award in federal funds from [REDACTED] in [REDACTED]. [REDACTED] alleged that the foundation discriminated against [REDACTED] in retaliation for making protected disclosures concerning the EPA subaward by (1) creating a hostile work environment, (2) failing to pay [REDACTED] commissions, and (3) failing to pay a retention bonus. We did not find the complainant's allegation to be frivolous, nor do we know of any instance in which [REDACTED] allegations have already been addressed in another federal or state judicial or administrative proceeding initiated by the complainant. The complaint is timely, as it was filed within three years after the date on which the alleged reprisal occurred. As such, the OIG has jurisdiction over the complainant's allegations.

##### ***Did The Complainant Make Protected Disclosures?***

A disclosure is protected under 41 U.S.C. § 4712 if the complainant has a reasonable belief that it evidences a covered wrongdoing and if it is made to a covered person or body. The complainant alleged that [REDACTED] made protected disclosures to the board regarding Employee 1's timesheets and the foundation's lack of compliance with certain provisions of the EPA subaward. Exhibit 4 at p. 34; Exhibit 10 at p. 3; Exhibit 17. The complainant also made a hotline complaint to the OIG alleging fraud in connection with the EPA subaward. Exhibit 23.

We determined that three of the complainant's communications to board members regarding Employee 1's timesheets constituted protected disclosures under 41 U.S.C. § 4712. We determined that none of the complainant's communications to the board regarding the foundation's compliance with the EPA subaward constituted protected disclosures, but that [REDACTED] was a perceived whistleblower based on [REDACTED] disclosures. We also determined that the complainant's December 3, 2021 hotline complaint to the OIG was a protected disclosure.



### 1. *The Complainant's Disclosures Regarding Employee 1's Timesheets*

In November and December 2021, the complainant made disclosures to members of the foundation's board about two overarching problems with Employee 1's timesheets: (1) lack of supporting documentation and (2) billing for time spent on activities not within the scope of the EPA subaward. Exhibit 10 at p. 3. Three of the complainant's communications about Employee 1's timesheets constituted protected disclosures under 41 U.S.C. § 4712.

The complainant's communication with the chairperson in early November 2021 about Employee 1's timesheets constituted a protected disclosure regarding the EPA subaward. The complainant testified that [REDACTED] told the chairman that [REDACTED] was "very concerned" about the supporting documentation for the [REDACTED] timesheets and that the source of [REDACTED] concern was the [REDACTED] itself. Exhibit 11 at pp. 16–17. Based on this information, and its source, [REDACTED] "highly doubted" that the supporting documentation was sufficient for the EPA subaward. Exhibit 11 at pp. 17–18. It was reasonable for the complainant to believe that if the timesheets did not meet another federal agency's standards, they would not meet the standards for the EPA subaward and that there was a violation of law, rule, or regulation related to a federal grant. 41 U.S.C. § 4712(a)(1); *Lachance*, 174 F.3d at 1381. The disclosure was made to the chairman of the board, and the board was responsible for investigating, discovering, or addressing misconduct; thus the chairman is a covered person under 41 U.S.C. § 4712(a)(2)(G). Exhibit 4 at p. 11; Exhibit 5 at pp. 15–19; Exhibit 6 at pp. 11–12; Exhibit 7 at pp. 15–19; Exhibit 33 at pp. 16–18, 21. Accordingly, the complainant's early November 2021 conversation with the chairman constituted a protected disclosure.

The complainant's communications regarding Employee 1's timesheets in the mid-November 2021 meeting with the executive committee constituted protected disclosures. In that meeting, the complainant raised both issues regarding the timesheets: the lack of supporting documentation and Employee 1's billing for time spent on activities outside the scope of the EPA subaward. Exhibit 4 at pp. 25–27. Specifically, the complainant told the executive committee that Employee 1 was billing to the EPA subaward time during which [REDACTED] held a board meeting for [REDACTED], which was not part of the grant. *Id.* at pp. 26–27. The OIG confirmed that the timesheets contained entries for meetings related to Employee 1's [REDACTED] and other activities that appeared to be outside the scope of the EPA subaward.<sup>12</sup> *See, e.g.*, Exhibit 42 at pp. 56–58. The complainant also noted that the issues could require the foundation to give the money back. Exhibit 4 at pp. 26, 29–30. It was reasonable for the complainant to believe that the lack of documentation and billing the EPA subaward for activities outside the scope of the subaward constituted a violation of law, rule, or regulation under 41 U.S.C. § 4712(a)(1). *See Lachance*, 174 F.3d at 1381. The disclosures were made to board members, who were responsible for investigating, discovering, or addressing misconduct; thus they were made to

<sup>12</sup> Determining whether Employee 1 in fact billed the EPA subaward for activities not authorized by the EPA subaward was outside the scope of this investigation.

covered persons under 41 U.S.C. § 4712(a)(2)(G). Exhibit 5 at pp. 15–19; Exhibit 6 at pp. 11–12; Exhibit 7 at pp. 15–19; Exhibit 30 at p. 11; Exhibit 33 at pp. 16–18, 21. Accordingly, the complainant’s disclosure of two issues in the mid-November 2021 meeting with the executive committee constituted protected disclosures.

## *2. The Complainant’s Disclosures Regarding the Foundation’s Compliance with Certain Provisions of the EPA Subaward*

In November and December 2021, the complainant made disclosures to the executive committee that the foundation failed to comply with certain provisions of the EPA subaward. Exhibit 4 at pp. 34–37. We determined that the complainant’s communications regarding the foundation’s compliance did not constitute protected disclosures under 41 U.S.C. § 4712 but that they provide the basis for considering the complainant to be a perceived whistleblower.

The complainant’s November 19, 2021 email to members of the executive committee does not constitute a protected disclosure as it did not provide details of any alleged wrongdoing. The complainant wrote that the foundation was not able to perform its “due diligence” in following the “federal Uniform Guidance” criteria for the EPA subaward. Exhibit 24. [REDACTED] stated that [REDACTED] would “sift through these regulations, [and] highlight the important parts” for the executive committee’s reference. *Id.* To be entitled to protection, disclosures must be “specific and detailed, not vague allegations of wrongdoing regarding broad or imprecise matters.” *Rzucidlo v. Dep’t of the Army*, 2006 M.S.P.B. 109, ¶ 17 (holding that conclusory allegations regarding the “lies” of coworkers lacked specificity and did not constitute protected disclosure). The complainant’s email does not allege any specific facts that would evidence a covered wrongdoing. Thus, the complainant’s November 19, 2021 email did not constitute a protected disclosure.

The complainant’s November 23, 2021 email to the vice chairman and the attached summary document do not constitute protected disclosures because they were either vague and lacking in factual detail, or the complainant did not have a reasonable belief that the allegations in the summary document constituted violations of law, rule, or regulation.<sup>13</sup> For example, the complainant raised concerns about [REDACTED] obligation to monitor the EPA subaward, Exhibit 17, but it was not reasonable for [REDACTED] to believe that those concerns constituted a violation of law, rule, or regulation. In the summary document, the complainant stated, “Federal Uniform Guidance supersedes the state’s right to change monitoring procedures because it is federal money,” and that “[t]he state has failed to comply with this.” *Id.* Later in the summary document, the complainant stated that [REDACTED] has not performed its duty to monitor the EPA subaward “in accordance with its [REDACTED] Policy.” *Id.* As the complainant stated in testimony to the OIG, however, [REDACTED] did not know what [REDACTED] monitoring protocols were. Exhibit 11 at

<sup>13</sup> As noted above (see *supra*, footnote 3), the complainant’s summary document includes comments on other sections of the EPA sub-award, but those comments do not include allegations of wrongdoing. Exhibit 17.

pp. 59–60. Without knowing what ██████ monitoring protocols were, ██████ could not have had a reasonable belief that ██████ was not complying with its obligation to monitor the EPA subaward.

Similarly, the complainant raised concerns that the foundation was not administering the EPA subaward and that “██████ [was] administering ██████ grant.” Exhibit 17. The complainant’s testimony on this issue was somewhat vague, but ██████ believed that ██████ was “cut[ting the Foundation] out of the loop” of administering the EPA subaward. Exhibit 11 at p. 53. In support of this allegation, ██████ cited an email in which the ██████ program manager supposedly said that the complainant’s only role was to “writ[e] the checks” and that ██████ was “overseeing” the grant. *Id.* at p. 10; *see also id.* at pp. 45, 48, 62. The complainant was not able to identify the email ██████ was referring to, but the OIG uncovered an email from November 5, 2021, fitting the description of the email from the complainant’s testimony. Exhibit 43; Exhibit 45. Contrary to the complainant’s testimony, however, the email shows that the ██████ program manager was cooperating with the complainant’s efforts to administer the EPA subaward funds. Exhibit 43. The complainant’s belief that the ██████ program manager’s email was cutting the foundation out of the loop was not reasonable, and this statement in the summary document was not a protected disclosure.

The complainant’s summary document also alleged that funds from the EPA subaward were used to recruit and pay for participants outside the three-county service area designated by the grant. Exhibit 17. The EPA subaward expressly allowed the foundation to “extend recruitment outside of the target area,” however. Exhibit 8. A disinterested observer reading the grant language could not reasonably conclude that recruiting participants outside the service area was a violation of the grant. Thus, the complainant could not have had a reasonable belief that this was a violation of law, rule, or regulation.

The complainant also alleged that certain monthly reports were not in the foundation’s possession. Exhibit 17. ██████ testified to the OIG, however, that ██████ “wasn’t sure if [not having the reports in the Foundation’s possession] was a violation at that time.” Exhibit 11 at pp. 55–57. If ██████ did not know whether the lack of reports constituted a violation, then it would not have been reasonable for ██████ to believe that it was, and therefore ██████ allegation would not be a protected disclosure under section 4712.

Other allegations in the complainant’s summary document are too vague to constitute protected disclosures. For example, the complainant raised a question about whether personnel at ██████ or the foundation had obtained a conflicting financial interest in the EPA subaward. Exhibit 17. Instead of making an actual allegation, however, ██████ said that it was “[d]ebatable” whether such a thing had happened. *Id.* The summary document does not provide any details such as who the affected employees were or what the nature of the alleged financial interest was. *Id.* In another section, the complainant appears to be suggesting that something improper had occurred with the

initiation of payment requests by stating, “The Grantee is identified as the one to initiate payment requests. Authorizing another to do so is in violation of this contract.” *Id.* Again, the complainant did not provide any details or make an actual allegation. To be entitled to protection, disclosures must be “specific and detailed, not vague allegations of wrongdoing regarding broad or imprecise matters.” *Rzucidlo*, 101 M.S.P.R. at 621. Because this allegation lacked specificity and detail, it does not constitute a protected disclosure under section 4712. For these reasons, the concerns expressed in the complainant’s summary document do not constitute protected disclosures under section 4712.

The complainant’s communications with the two board members during the meeting on or around November 23, 2021, did not constitute protected disclosures. The discussion in the meeting was focused on the summary document discussed above, and the summary document did not constitute a protected disclosure. Exhibit 4 at pp. 36–39; Exhibit 11 at pp. 85–87. Accordingly, the discussion in the November 23, 2021 meeting did not constitute a protected disclosure.

The complainant’s November 29, 2021 email to board members did not constitute a protected disclosure because it did not provide specifics about any alleged wrongdoing. The complainant wrote that the foundation was “out of compliance” with the EPA subaward, but [REDACTED] did not provide any further details. Exhibit 27. To be entitled to protection, disclosures must be “specific and detailed, not vague allegations of wrongdoing regarding broad or imprecise matters.” *Rzucidlo*, 101 M.S.P.R. at 621. Because the November 29, 2021 email did not allege any specific facts about the EPA subaward that would evidence a covered wrongdoing, it did not constitute a protected disclosure.

The complainant’s communications with members of the executive committee and the [REDACTED] program manager at the December 2, 2021 meeting also did not constitute protected disclosures because the discussion consisted of the complainant going point by point through [REDACTED] November 23, 2021 summary document. Exhibit 11 at p. 91. At the meeting, the complainant did not make any additional disclosures beyond what was set forth in the document. *Id.* at p. 92. As discussed above, the summary document did not constitute a protected disclosure. Accordingly, the complainant’s discussion in the December 2, 2021 meeting did not constitute a protected disclosure.

The complainant’s disclosures in the November 23, 2021 summary document did provide the basis for considering the complainant a perceived whistleblower, however. Perceived disclosures of covered wrongdoing receive the same protections as actual disclosures of covered wrongdoing. *King*, 116 M.S.P.R. at 694. Although the vice chairman expressed some doubt in [REDACTED] testimony about the validity of the complainant’s allegations, [REDACTED] perceived that the complainant was “reporting what [REDACTED] thought to be violations” and acting as a potential whistleblower. Exhibit 5 at pp. 70–71. In addition, the treasurer/secretary testified that the

complainant frequently made allegations of fraud in connection with the EPA subaward. Exhibit 7 at pp. 71–73. The testimony of the vice chairman and treasurer/secretary provide the basis for concluding that the complainant was a perceived whistleblower.

### ***3. The Complainant's Disclosures to the OIG Hotline Regarding Possible Grant Fraud***

The complainant's December 3, 2021 hotline complaint alleging possible fraud in connection with the EPA subaward constituted a protected disclosure. Exhibit 10 at p. 3; Exhibit 23. The complaint was about suspected wrongful conduct that [REDACTED] reasonably believed was evidence of a violation of law, rule, or regulation related to a federal grant. 41 U.S.C. § 4712 (a)(1). The complaint is protected because it was made to an inspector general. 41 U.S.C. § 4712(a)(2).

After reviewing the evidence concerning the complainant's emails and discussions with members of the executive committee, we determined that the complainant made three protected disclosures to members of the board under 41 U.S.C. § 4712 regarding Employee 1's timesheets. None of the complainant's communications to the board regarding the foundation's compliance with the EPA subaward constituted protected disclosures, but the complainant was a perceived whistleblower as a result of these communications. The complainant's December 3, 2021 OIG Hotline complaint was a protected disclosure.

### ***Covered Actions: Was the Complainant Discharged, Demoted, or Otherwise Discriminated Against?***

The complainant raised three alleged discriminatory employment actions: (1) hostile work environment, (2) failure to pay commissions, and (3) failure to pay a retention bonus. An employment action is considered discriminatory if it would dissuade a reasonable employee from making a protected disclosure. We determined that the failure to pay a commission constitutes a covered action under 41 U.S.C. § 4712.

#### ***1. Hostile Work Environment***

The complainant alleged that, beginning in November 2021, the foundation created a hostile work environment in retaliation for [REDACTED] disclosures about the EPA subaward. [REDACTED] alleged that board members yelled at [REDACTED] disagreed with [REDACTED] disclosures, were critical of [REDACTED] views, and that one board member accused [REDACTED] of lying in a meeting. Exhibit 10 at pp. 2–3; Exhibit 11 at pp. 98–99. [REDACTED] testified that [REDACTED] left the December 2, 2021 meeting [REDACTED] because the board members told [REDACTED] “[y]ou have no idea what you’re talking about.” Exhibit 11 at pp. 89–93. [REDACTED] alleged that the hostile environment extended beyond meetings as well. For example, [REDACTED] testified that [REDACTED] relationships with members of the executive committee were no longer warm, that members avoided eye contact and that they would not speak to [REDACTED] if they saw [REDACTED] in public.

Exhibit 4 at pp. 55, 62–63. At one point, [REDACTED] testified that [REDACTED] was “going through living hell.” Exhibit 11 at pp. 85–86.

In determining whether a hostile work environment constitutes an adverse action, courts look at the frequency and severity of the hostile conduct, whether the conduct is physically threatening or humiliating, and whether it unreasonably interferes with the employee’s work. *Boss*, 816 F.3d at 920. “Petty slights, minor annoyances, and simple lack of good manners” do not rise to the level of adversity that would deter employees from pursuing their rights. *See Burlington Northern*, 548 U.S. at 68.

Despite the difficulties that the complainant experienced, [REDACTED] has not alleged conduct that was severe or pervasive enough to constitute an adverse action. Incidents of disrespectful or insulting behavior are not sufficient.<sup>14</sup> Just as the court in *Baloch* held that “profanity-laden yelling” over the course of several months did not constitute an adverse action, the complainant’s allegations of disrespectful treatment and yelling are not severe or pervasive enough to constitute an adverse action. *See Baloch*, 550 F.3d at 1199. As such, the hostile environment alleged by the complainant is not a covered action under 41 U.S.C. § 4712.

## 2. Failure to Pay Commissions

The complainant’s offer of employment entitled [REDACTED] to 15 percent of the administrative fees on any new grant that directly benefited the foundation and 15 percent of the initial contribution of any new donor contributing over \$1,000. Exhibit 9; Exhibit 37. During [REDACTED] tenure as [REDACTED] [REDACTED] the foundation received one new grant and one \$5,000 initial contribution from a new donor. The complainant testified that the grant did not include any administrative fees. Exhibit 12 at p. 39. Under the terms of [REDACTED] employment, if there is no administrative fee, then [REDACTED] would not have had an entitlement to a commission from that grant. Exhibit 9.

While the prospect of losing wages and benefits would dissuade a reasonable person from making a protected disclosure, the grant received by the foundation did not contain an administrative fee. *See Mickelson v. New York Life Ins. Co.*, 460 F.3d 1304, 1316 (10th Cir. 2006). The complainant therefore cannot establish by a preponderance of the evidence that, in failing to receive a commission on the grant, [REDACTED] lost any wage or benefit to which [REDACTED] was entitled. As such, the foundation’s failure to pay the complainant the commission for the grant does not constitute a covered action under 41 U.S.C. § 4712. The complainant did not receive a

---

<sup>14</sup> *See Baloch*, 550 F.3d at 1199 (holding that profanity-laden yelling and outbursts were “disproportionate” but “did not meet the requisite level of regularity or severity to constitute material adversity for purposes of a retaliation claim.”); *Mitchell v. Qwest Communications Int’l, Inc.*, No. 06–cv–00708–WDM–BNB, 2007 WL 4287499, \*5 (D. Colo. Dec. 4, 2007) (“shortness and rudeness” on the part of a supervisor falls into the category of petty slights, minor annoyances, and simple lack of good manners that would not deter a reasonable worker from making or supporting a charge of discrimination); *Greenspan v. Dept. of Veterans Affairs*, 94 M.S.P.R. 247, ¶ 22 (2003) (severe criticism not an adverse personnel action for purposes of retaliation claim).

commission on the contribution from the new donor as outlined in [REDACTED] employment offer. Exhibit 4 at p. 87; Exhibit 11 at p. 112. The foundation's failure to pay the complainant the commission for the new donor contribution does constitute a covered action under 41 U.S.C. § 4712.

### *3. Failure to Pay a Retention Bonus*

In January 2022, the foundation received a [REDACTED] increase in funding from the [REDACTED], which the complainant alleged was intended to be given to [REDACTED] as a retention bonus. Exhibit 36; Exhibit 4 at p. 98. The complainant testified that [REDACTED] believed [REDACTED] was the intended recipient because [REDACTED] told [REDACTED] this was the purpose, even though they failed to document it. Exhibit 11 at pp. 111. The minutes of the board meeting in which the increased funding was discussed do not reflect that the complainant was the intended recipient of the funds or that the funds were earmarked for employee retention. Exhibit 36. The chairman testified that no such discussion occurred with [REDACTED]. Exhibit 6 at pp. 105, 107. The complainant testified that there was no mention of [REDACTED] intent in the [REDACTED] meeting agenda or minutes. Exhibit 11 at pp. 110–111. The complainant cannot establish by a preponderance of the evidence that, in failing to receive the retention bonus, [REDACTED] lost any wage or benefit to which [REDACTED] was entitled. As such, the foundation's failure to pay the complainant the retention bonus did not constitute an action that might dissuade a reasonable employee from making a protected disclosure, and it was not a covered action under 41 U.S.C. § 4712.

### ***Were the Complainant's Protected Disclosures a Contributing Factor in the Covered Action?***

A protected disclosure is considered a contributing factor in a decision to take a covered action if the official taking the covered action knew of the protected disclosure and the action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. 5 U.S.C. § 1221(e). We determined that, based on the timing and the board's knowledge, the complainant's protected disclosures were a contributing factor in the foundation's failure to pay the complainant's commission. Board members had direct knowledge of the complainant's disclosures at the time the action was taken because the disclosures were made to them beginning in mid-November 2021. Exhibit 11 at p. 15; Exhibit 17; Exhibit 22. The new donor contribution was received by the foundation between December 2021 and January 3, 2022. Exhibit 36. The timing between the complainant's protected

disclosures and the failure to pay [REDACTED] the commission was less than two months, which is a reasonable amount of time to conclude that the disclosures were a contributing factor.<sup>15</sup>

Because the board had knowledge of the complainant's disclosures and the covered action was taken within two months of the first disclosure, the complainant can establish by a preponderance of the evidence that [REDACTED] protected disclosures were a contributing factor in the foundation's failure to pay the commission.

With respect to the December 3, 2021 OIG Hotline complaint, the complainant was not able to provide evidence that any board members knew about the complaint before the covered actions were taken. [REDACTED] initially testified in an interview with the OIG that [REDACTED] did not believe that the vice chairman knew about [REDACTED] December 3 hotline complaint, and [REDACTED] did not know whether others knew about it. Exhibit 10 at p. 5. In a later interview with the OIG, the complainant testified that in a meeting with members of the board in the winter of 2021–2022, the vice chairman allegedly made a comment about the complainant making a report of some kind, but the complainant was not able to provide any further details about the meeting or the supposed statement. Exhibit 4 at pp. 47–48. The OIG did not uncover any evidence to support the complainant's testimony on the vice chairman's alleged comment. Given the lack of evidence that the board knew about the hotline complaint prior to the failure to pay the commission, the complainant could not establish by a preponderance of evidence that this protected disclosure was a contributing factor in the foundation's covered action.

### ***Would the Foundation Have Taken the Covered Action in the Absence of the Complainant's Protected Disclosures?***

Because the complainant can establish that the protected disclosures were a contributing factor in the foundation's failure to pay the commission, the retaliation allegation is substantiated unless there is clear and convincing evidence that the foundation would have failed to pay the commission in the absence of the protected disclosures. In analyzing this question, we consider (1) the strength of the evidence in support of the covered action; (2) the existence and strength of any motive to retaliate on the part of the officials who were involved in the action, referred to as *animus evidence*; and (3) any evidence that the employer has taken similar actions against employees who are not whistleblowers but are otherwise similarly situated, referred to as *comparators*. After analyzing the three factors, we determined that there is clear and convincing evidence that the foundation would not have paid the commission to the complainant in the absence of [REDACTED] protected disclosures.

---

<sup>15</sup> The U.S. Merit Systems Protection Board has found time periods longer than a year between the protected disclosure and adverse action to be reasonable in establishing that a disclosure was a contributing factor. *See e.g., Redschlag v. Dep't of the Army*, 89 M.S.P.R. 589, ¶187 (2001) (holding that a suspension proposed 18 months after an employee's protected disclosure was a sufficient time period where a reasonable person could conclude that the disclosure was a contributing factor in the suspension).



The evidence in support of not paying the commission is compelling. First, the complainant never made a request for the commission when it was due. Exhibit 4 at p. 96; Exhibit 5 at pp. 150–151; Exhibit 6 at pp. 79–80; Exhibit 7 at p. 124; Exhibit 11 at pp. 107–108. Second, the weight of evidence suggests that the complainant refused all commissions. According to the complainant’s February 24, 2022 email to the OIG, [REDACTED] refused all “bonuses, admin fees, travel and phone reimbursements, and any financial perk in [REDACTED] job.” Exhibit 37. Testimony from the chairman and from the complainant corroborated the complainant’s statement in the February 24 email, as did a document that the complainant drafted suggesting that the foundation “Remove all monetary incentives from the [REDACTED] position in terms of grants and soliciting members.” Exhibit 6 at pp. 84, 88–89, 98–100, 113; Exhibit 12 at pp. 31, 38, 46–47; Exhibit 38.

The animus evidence comes primarily from the complainant’s own testimony regarding [REDACTED] treatment by members of the executive committee and by the vice chairman at [REDACTED] event. See *supra* at pp. 7–9. The vice chairman testified that [REDACTED] occasionally became frustrated with the complainant, sometimes “visibly so.” Exhibit 5 at pp. 169–170. [REDACTED] raised [REDACTED] voice at the complainant and at times spoke to [REDACTED] in a condescending tone. *Id.* at pp. 170–171. The vice chairman also testified that [REDACTED] had been angry with the complainant, though [REDACTED] testified that [REDACTED] anger was due to an incident that predated the complainant’s disclosures regarding the EPA subaward. Exhibit 5 at pp. 183–184. The treasurer/secretary also seemed to express displeasure with the complainant in noting that instead of the complainant “figur[ing] out [the issues] and get[ting] it fixed” [REDACTED] chose to throw “a grenade” and make “all kinds of allegations.” Exhibit 7 at p. 33.

Comparator evidence shows that commission payments to the [REDACTED] were not made automatically when funds were received. The complainant’s predecessor received commissions on donations and grants, but [REDACTED] requested them when they came due. Exhibit 5 at pp. 150–151; Exhibit 6 at pp. 79–80; Exhibit 7 at p. 124. Members of the executive committee testified that the commission payments made to the complainant’s predecessor were triggered by the predecessor’s written requests for amounts that were owed to [REDACTED], and that the predecessor obtained approval from one or more members of the board before the requests were forwarded to human resources for payment. Exhibit 6 at pp. 79–80; Exhibit 7 at p. 124–126. The complainant testified that [REDACTED] never made such requests. Exhibit 4 at p. 96; Exhibit 11 at pp. 107–108.

We find that the foundation’s support for not paying a commission to the complainant, together with the comparator evidence, outweighs the animus evidence. The complainant told the OIG that [REDACTED] specifically refused commissions and other “financial perk[s]” of [REDACTED] job. Exhibit 12 at pp. 31, 38; Exhibit 37. The complainant’s predecessor was not automatically paid [REDACTED] commissions but had to take steps to receive them, which the complainant did not do. As such, there is clear and convincing evidence that the foundation would not have paid the complainant the commission in the absence of [REDACTED] disclosures about the EPA subaward.

## V. Conclusion

We determined that the complainant made three protected disclosures to the board and one to the OIG Hotline. We found that [REDACTED] disclosures to the board were contributing factors in one covered action taken against [REDACTED]: the failure to pay a commission. For the reasons explained above, however, we did not substantiate the complainant's allegation of retaliation.