United States Court of Appeals
for the Federal Circuit

SHARON FINIZIE, FLORENCE KOCHER,
Petitioners

v.

DEPARTMENT OF VETERANS AFFAIRS,
Respondent

2021-1493

Petition for review of the Merit Systems Protection Board in No. PH-1221-18-0304-W-2.

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

November 3, 2021 /s/ Peter R. Marksteiner

Peter R. Marksteiner
Clerk of Court

NOTE: This disposition is nonprecedential.

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Petition for review of the Merit Systems Protection Board in No. PH-1221-18-0304-W-2.

Decided: November 3, 2021

FAYE COHEN, Law Office of Faye Riva Cohen, Philadelphia, PA, for petitioners.

MATTHEW JUDE CARHART, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by BRIAN M. BOYNTON,

MARTIN F. HOCKEY, JR., ELIZABETH MARIE HOSFORD.

Before LOURIE, DYK, AND REYNA, *Circuit Judges*.

PER CURIAM.

Sharon Finizie and Florence Kocher (collectively, "Petitioners") appeal from the decision of the Merit Systems Protection Board ("the Board") dismissing their consolidated appeal under the Whistleblower Protection Act ("WPA"). We affirm.

BACKGROUND

During 2016, Petitioners were employed at the Cor- poral Michael J. Crescenz Department of Veterans Affairs Medical Center. This appeal concerns three events in 2016 that Petitioners argue prompted protected disclosures by them under the WPA.

The first alleged disclosure concerns an argument between Kocher and her colleague, Patricia Simon, over a missing report ("First Incident"). J.A. 7–8. Kocher alleges that during the argument, Simon shouted, cursed, and gesticulated wildly. *Id.* Finizie witnessed the event. *Id.* Afterward, Kocher and Finizie jointly sent a report of the incident to their supervisor. J.A. 9, 41–42.

The second alleged disclosure concerns a crude sexual joke and shoulder massage directed to Finizie

from Peter Leporati ("Second Incident"). J.A. 19. Eight days after this incident, Finizie reported the incident to her supervisor. *Id.*; J.A. 22. In her report, she wrote that Leporati intended to intimidate her. J.A. 23.

The last alleged disclosure concerns a finger gun pantomime that Leporati pointed at Kocher, accompanied by a "click, click" sound ("Third Incident"). J.A. 20. Six days later, Kocher reported the incident to her supervisor and Veterans Affairs ("VA") police headquarters. *Id.*

The agency's Administrative Investigative Board ("AIB") investigated the three incidents. It found that Kocher and Finizie had not been subject to a hostile work environment because the incidents were isolated. J.A. 66–67. Moreover, although Kocher alleged that her co-workers bullied her, the AIB found that it was Kocher who had created a hostile work environment. *Id.*

Following AIB review, Petitioners suffered several negative consequences at work, which they allege were in retaliation for their protected disclosures. For example, a VA supervisor issued Kocher a memorandum regarding her misconduct, delayed issuing her evaluation, and proposed reprimanding her. J.A. 15, 16. The VA supervisor also moved Finizie to a smaller office. J.A. 3. Finizie has since retired. J.A. 2.

Kocher and Finizie each filed an appeal to the

Board and, because their underlying claims are related, the Board consolidated their appeals.

The Board's administrative judge ("AJ") dismissed Petitioners complaint, holding that their reports regarding the three alleged incidents were not protected disclosures under the WPA. First, the AJ found that the First Incident was not evidence of wrongdoing by the agency and was, in- stead, an ordinary dispute among co-workers. J.A. 17–19. The AJ noted that such a "petty grievance" was not within the WPA. J.A. 17. Second, the AJ found that Finizie's allegations concerning the Second Incident were not credible because she did not expressly state that she was sexually harassed and did not mention this incident in an email to a union representative regarding a separate incident. J.A. 25–26. Third, the AJ found that Kocher's allegations regarding the Third Incident were not credible due to discrepancies between Kocher's testimony at the hearing and her allegations to the police. *Id.*

The AJ also noted that Kocher's demeanor during her own testimony and during Simon's testimony hurt her credibility. For example, the AJ observed that Kocher was "antagonistic," aggressively "chomping on gum," and "glowering" at Simon. J.A. 13.

Petitioners did not appeal the AJ's decision to the full board. The decision of the AJ thus became the decision of the Board. *See* 5 C.F.R. § 1201.113(a). Petitioners then appealed to this court. Pursuant to 5

U.S.C. § 7703(b)(1)(A) and 28 U.S.C. § 1295(a)(9), we have juris- diction over "final order[s] or final decision[s]" of the Board. *See Weed v. Soc. Sec. Admin.*, 571 F.3d 1359, 1361 (Fed. Cir. 2009).

DISCUSSION

We review the Board's legal determinations *de novo* and its underlying findings of fact for substantial evidence. *See, e.g., Welshans v. United States Postal Serv.*, 550 F.3d 1100, 1102 (Fed. Cir. 2008). A court will not overturn an agency decision if it is not contrary to law and was supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. Nat'l Lab. Rel. Bd.*, 305 U.S. 197, 229 (1938). "[T]he standard is not what the court would decide in a de novo appraisal, but whether the administrative determination is supported by substantial evidence on the record as a whole." *Parker v. United States Postal Serv.*, 819 F.2d 1113, 1115 (Fed. Cir. 1987).

The WPA prohibits an agency from taking a personnel action against an employee for disclosing information that the employee reasonably believes evidences a violation of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8)–(9). The employee has the burden to establish, by a preponderance of evidence, that she made a protected disclosure and that her disclosure was a contributing factor to the agency's decision to take a

reprisal action against her. *Id.*

If the employee establishes a prima facie case of reprisal, the Board will order corrective action unless the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action(s) in the absence of the activity or activities. 5 U.S.C. § 1221(e)(2).

Here, substantial evidence supports the Board's conclusion that none of the three disclosures asserted by Petitioners were protected disclosures.

For the First Incident, substantial evidence supports the Board's finding that Petitioners did not prove that they reasonably believed that Simon (1) violated a VA policy, or (2) threatened public safety. Petitioners did not state which specific policy they believed Simon violated and proffered no evidence that Simon's behavior threatened the public. This evidence supports the Board's finding that the incident was simply a workplace disagreement that did not fall within the scope of the WPA. In fact, the Board deter- mined that Kocher herself initiated the confrontation and that her disagreement with Simon was purely verbal.

For the Second Incident, substantial evidence supports the Board's conclusion that Leporati did not engage in the described conduct. The Board found Finizie's testimony "simply not credible" in light of her behavior in reporting the incident. Finizie first reported the incident two days later to a union

official. However, earlier that day, Finizie had emailed that same union official inquiring about the investigation of the First Incident but "inexplicabl[y] . . . did not mention the joke/massage incident in the same message." J.A. 25. Finizie waited six more days to bring the matter to her director's attention. The Board concluded based on Finizie's actions that "she fabricated the story because she believed the VA had taken no action on her com- plaint against Simon and was concerned that Leporati would support Simon regarding the [First Incident]." *Id.* The Board also reasonably credited Leporati's testimony that he did not recall telling an off-color joke or giving a massage.

For the Third Incident, substantial evidence supports the Board's finding that Kocher did not prove that she reasonably believed that Leporati's behavior threatened public safety. The Board found that Kocher's testimony was not credible. For example, Kocher's testimony to the police varied from her testimony to the Board: Kocher told the police that Leporati did not make any noises when doing the gun pantomime, but she testified to the Board that he had made a "click, click" noise. The Board also found note- worthy, given the allegation's seriousness, that Kocher waited six days before reporting the incident to police. Lastly, the Board properly credited Leporati's statement that Kocher had been hostile to him earlier, calling him "perverted."

With respect to Petitioners' argument that it

was "in- appropriate, unprofessional, and perhaps defamatory" for the AJ to take into account Kocher's demeanor in making its credibility determinations, we disagree. It is appropriate for an AJ to take into account demeanor when assessing credibility. *See, e.g., Purifoy v. Dep't of Veterans Affairs*, 838 F.3d 1367, 1373 (Fed. Cir. 2016). Indeed, we have explained that credibility determinations based upon demeanor observations are entitled to special deference. *See id*.

In sum, substantial evidence supports the Board's conclusion that none of the events cited by Petitioners constituted protected disclosures under the WPA.

CONCLUSION

For the foregoing reasons, the decision of the Board is affirmed.

AFFIRMED

COSTS

No costs.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NORTHEASTERN REGIONAL OFFICE

FINIZIE KOCHER CONSOLIDATION, Appellant,	DOCKET NUMBER PH-1221-18-0304-W-2
v.	DATE: September 30, 2020
DEPARTMENT OF VETERANS AFFAIRS. Agency.	

Faye R. Cohen, Esquire, Philadelphia, Pennsylvania, for the appellant.

Lauren Russo, Esquire, Philadelphia, Pennsylvania, for the agency.

Marcus S. Graham, Esquire, Pittsburgh, Pennsylvania, for the agency.

BEFORE
Kara Svendsen
Administrative Judge

INITIAL DECISION

On February 9, 2018, Sharon Finizie timely filed an individual right of action (IRA) appeal under the Whistleblower Protection Act (WPA) and Whistleblower Protection Enhancement Act (WPEA) in which she alleged that the Department of Veterans Affairs (VA or agency) had retaliated against her as a result of her whistleblowing activities. Finizie Appeal File, PH-1221-18-0168- W-1 (FAF-1), Tab 1. Subsequently, on March 20, 2018, Florence Kocher timely filed an IRA appeal in which she alleged that the VA had retaliated against her as a result of the same whistleblowing activities. Kocher Appeal File, PH-1221-18- 0236-W-1 (KAF-1), Tab 1.

Because the underlying claims were related, by order dated May 10, 2018, these appeals were consolidated for purposes of judicial economy. Consolidated Appeal File, PH-1221-18-0304-W-1 (CAF-1). In order to afford the parties an opportunity to complete discovery, the consolidated appeal was dismissed without prejudice by initial decision dated November 26, 2018. *Id.*, Tab 17. The appeal was automatically refiled by the Northeastern Regional Office of the Merit Systems Protection Board (Board) on January 31, 2019 after the government shutdown ended. Refiled Consolidated Appeal File, PH-1221-18-0304-W-2 (CAF-2), Tab 2.

The requested hearing was held on March 10 and 11, 2020. CAF-2, Tab 22. Oral closing arguments were received on March 17, 2020. *Id.*, Tabs 32, 34. That same date, the appellants also filed the written version of their closing argument. *Id.*, Tab 33. For

reasons set forth below, the appellants' IRA appeals are dismissed for lack of jurisdiction.

Background

Appellant Finizie was employed as a Nurse (Quality Management Specialist) in the Quality Management (QM) Service at the Corporal Michael J. Crescenz Medical Center in Philadelphia, Pennsylvania. She began her career with the VA on June 5, 1977. CAF-2, Tab 36 (Hearing Testimony, Day 1). She began working QM Specialist in June or July 1994. She retired from federal service effective October 31, 2017. *Id.*In addition to being a registered nurse, she earned both a Bachelor and a Master's degree in Science in Nursing. *Id.*

Appellant Finizie filed a complaint with the Office of Special Counsel (OSC) on or about May 5, 2017 in which she alleged that she made protected disclosures on October 5, 2016 and October 25, 2016. FAF, Tab 1 at 5 (MSPB Form 185-2, Page 2, block 9); at 13-15. As a result, she claimed that the VA took the following personnel actions against her: on April 27, 2017, Bruce Boxer, Former Director of QM, sent her an email summarizing their April 26, 2017 meeting during which he discussed the results of a VA Administrative Investigation Board (AIB)[1],

[1] The AIB was convened by Daniel Hendee, Medical Center Director, on February 2, 2017. CAF-2, Tab 35. The three-member panel was tasked with investigating complaints of unprofessional behavior, hostile work environment, and threatening behavior and comments in the QM Service. *Id.*;

report, informed her that the behavior ascribed to her in the AIB report would not be tolerated, and directed that she move from the QM trailer to the QM main office within one week. *Id*. By letter dated December 17, 2017, OSC informed Finizie that it had closed its investigation into her complaint. She timely filed her IRA appeal with the Board on February 9, 2018.

Appellant Kocher is employed by the VA as a Nurse (Patient Safety Manager) at the Crescenz Medical Center. KAF, Tab 4 at 3, 100, 108; CAF-2, Tab 36. She began her career with the VA on October 20, 2013. *Id*.; KAF, Tab 4 at 100. In addition to a Bachelor of Arts degree in nursing, she holds a Master's of Science in Nursing degree and Doctor of Nursing Practice degree. CAF-2, Tab 36.

Appellant Kocher filed a complaint with OSC on May 17, 2017 in which she also alleged that she made protected disclosures on October 5 and 26, 2016. KAF, Tab 1, MSPB Form 185-2 Continuation Sheet; at 9 (Form 11 complaint). In her petition for appeal (PFA), Kocher contended that she was subjected eight personnel actions. *Id*., Tab 1, MSPB Form 185-2 Continuation Sheet. However, as noted by OSC in its February 15, 2018 closure letter, in response to OSC's January 25, 2018 preliminary determination letter, Kocher attempted to raise new personnel actions which were not raised in her existing OSC complaint. Therefore, OSC could not

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KAF, Tab 4 at 16.

consider those claims; nor may the Board. *See Sazinski v. Department of Housing & Urban Development*, 73 M.S.P.R. 682, 686-87 (1997) (the scope of an IRA appeal is limited to those disclosures and those personnel actions raised before and investigated by OSC).

Broadly reading Kocher's OSC complaint, the alleged personal actions she raised before OSC were: 1) receipt of a December 13, 2016 written counseling; 2) a five month delay in receiving her performance evaluation, which noted that she needed to improve (but not a diminished rating as claimed in her PFA); 3) withholding monetary recognition for achieving a National Certification; 4) receipt of intimidating communications from her supervisor, Bruce Boxer; and 5) being accused of being untruthful and collusive by Boxer on April 27, 2017 in connection with her AIB testimony. *Cf.*, *id.*, at 6 with 9-21, 22-23. By letter dated February 15, 2018, OSC informed Kocher that it had closed its investigation into her complaint. She timely filed her IRA appeal with the Board on March 20, 2018.

Legal standards

The WPA prohibits an agency from taking a personnel action against an employee for disclosing information that the employee reasonably believes evidences a violation of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. *See Chambers v. Department*

of the Interior, 602 F.3d 1370, 1375-76 (Fed. Cir. 2010) (*citing* 5 U.S.C. § 2302(b)(8)); *Mudd v. Department of Veterans Affairs*, 120 M.S.P.R. 365, ¶ 5 (2013); *see also Linder v. Department of Justice*, 122 M.S.P.R. 14, ¶ 11 (2014) (the employee need not "label" the disclosure correctly). However, the disclosure must be specific and detailed, not just vague allegations of wrongdoing. *See Scoggins v. Department of the Army*, 123 M.S.P.R. 592, ¶ 6 (2016).

The proper test for determining whether an employee had a reasonable belief that her disclosures revealed misconduct described in 5 U.S.C. § 2302(b)(8) is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the government evidenced wrongdoing as defined by the WPA. *See Chambers*, 602 F.3d at 1382; *Mithen v. Department of Veterans Affairs*, 119 M.S.P.R. 215, ¶ 13 (2013). Whether an appellant had a reasonable belief that she was making a disclosure is determined at the time of the disclosure, not in light of subsequent events. *See Webb v. Department of the Interior*, 122 M.S.P.R. 248, ¶ 13 (2015). A purely subjective assessment of an employee is not sufficient even if shared by another employee. *LaChance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999) (the WPA is not a weapon in arguments over policy or a shield for insubordinate conduct); *Salerno v. Department of the Interior*, 123 M.S.P.R. 230, ¶ 7 (2016) (general philosophical or policy disagreements do not

constitute protected disclosures).

A broad range of personnel actions fall within the Board's jurisdiction under the WPA, including a significant change in an appellant's duties. *See Herman v. Department of Justice*, 115 M.S.P.R. 386, ¶ 7 (2001); *Ingram v. Department of the Army*, 116 M.S.P.R. 525, ¶ 4 (2011) (the terms "significant change in duties" and "working conditions" should be construed broadly); *see also Savage v. Department of the Army*, 122 M.S.P.R. 612, ¶ 23 (2015) (the creation of a hostile work environment is a personnel action under the WPA); see generally 5 U.S.C. § 2302(a)(2)(A). The employee must also prove the disclosure was a contributing factor to the personnel action; a "contributing factor" means the disclosure affected the agency's decision to threaten, propose, take, or not take the personnel action regarding the appellant. *See Mudd*, 120 M.S.P.R. 365, ¶ 10.

An employee can show that her disclosure was a contributing factor to the personnel action by satisfying the knowledge/timing test, that is by presenting evidence that the official taking the personnel action was aware of the disclosure, and the official took the action within a short enough period after the disclosure for a reasonable person to conclude that the disclosure was a contributing factor to the personnel action. *See Gonzalez v. Department of Transportation*, 109 M.S.P.R. 250, ¶ 19 (2008). But timing alone does not suffice; the knowledge component is required and can be determinative to the question of the Board's

jurisdiction. *See Kerrigan v. Merit Systems Protection Board*, 833 F.3d 1349, 1354 (Fed. Cir. 2016).

At a hearing, an appellant must prove her IRA claim by preponderant evidence. *See Scoggins*, 123 M.S.P.R. 532, ¶ 5. Preponderant evidence is the degree of relevant evidence 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). If an appellant proves that she made a disclosure and the disclosure was a contributing factor in an adverse personnel action, the burden shifts to the agency to prove by clear and convincing evidence that it would have taken the same action in the absence of the disclosure. *See Whitmore v. Department of Labor*, 680 F.3d 1353, 1364 (Fed. Cir. 2012). Clear and convincing is a high evidentiary standard; the evidence only clearly and convincingly supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, including the evidence that detracts from the conclusion. *Id.* at 1368. Relevant factors under this legal test include: (1) The strength of the evidence in support of the agency's action; (2) the existence and strength of any motive to retaliate on the part of the agency officials involved in the decision; and (3) any evidence the agency takes similar actions in similar circumstances against non-whistleblowers (the *Carr* factors).[2] *Id.*; *Mithen*, 119 M.S.P.R. 215, ¶ 17. The

[2]*Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

agency does not have an affirmative burden to produce evidence as to each *Carr* factor, nor must each factor weigh in the agency's favor. *See Miller v. Department of Justice*, 842 F.3d 1252, 1257 (Fed. Cir. 2016).

Regarding the witnesses who testified at the hearing, I had the opportunity to observe each witness, and I have carefully considered his/her demeanor. *See Hamilton v. Department of Veterans Affairs*, 115 M.S.P.R. 673, ¶ 18 (2011).[3]

Analysis and Findings

1. October 5, 2016

The genesis of the appellants' first alleged protected disclosure was an October 5, 2016 verbal altercation between Kocher and employee Patricia Simon, the Administrative Officer for QM. According to Kocher, at around 7:30 a.m. on that date, she was

[3] To resolve any credibility issues, I utilized a *Hillen* analysis. An administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen version more credible, considering such factors as: (1) The witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness' bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987).

walking toward the QM conference room to prepare for a morning meeting when she encountered Simon. Kocher continued into the trailer where the QM conference room was located because she wanted to speak with Simon, but not in the hallway because "things bellow." CAF-2, Tab 36. Kocher stated she then asked Simon what time reports were due, referring to slides that needed to be uploaded regarding an Electronic Patient Event Reporting (ePER) report before the meeting began at 8:15 a.m. *Id*. The responsibility for providing the ePER report for the daily morning meeting alternated between Kocher and Peter Leporati, then the Patient Safety Manager on the QM Service. *Id*.

Kocher testified that in response, Simon began ranting and dropping the "f" word while yelling at Kocher. Kocher contended she had never seen anyone act like Simon was behaving except when she previously worked with the "criminally insane." CAF-2, Tab 36. Kocher described that Simon spun her head around, and her "eyes rolled." *Id*. Kocher said she thought Simon was having "an organic incident" or "nervous breakdown." Kocher testified that Suzanne Fritz, an infection control nurse, was nearby during this exchange. According to Kocher, after approximately three minutes, she left the area, went to her office and locked the door, claiming, "I was frightened." *Id*.

Although Kocher testified that upon returning to her office after the 7:30 a.m. incident, she "immediately emailed Robert LaPointe," then the

Interim Director of QM,[4] her email is time stamped 9:46 a.m. *Cf.* CAF-2, Tab 36; Tab 25 at 5 (Exhibit A). In her email, she stated, "I need to meet with you urgently today," and asked what time was convenient for LaPointe. *Id.* Based on the time of his third response, LaPointe met with Kocher at some point after 9:55 a.m. *Id.*

Kocher stated that after the incident with Simon, Finizie knocked on her door and advised her that she had witnessed the entire event. Finizie was in Kocher's office when LaPointe arrived at some point after 9:55 a.m. When LaPointe asked Kocher whether they could discuss the incident in front of Finizie, Kocher said it was fine because Finizie had witnessed the event. CAF-2, Tab 36. Kocher then testified, "She had been standing there; I didn't even see her," presumably meaning during the incident with Simon (because she was aware that Finizie was in her office at that time.) *Id.* But, just a few minutes earlier, in response to being asked whether she noticed if anyone else was present during the incident with Simon (emphasis supplied), Kocher testified, "Sharon Finizie was there." *Id.* She did not qualify her response to indicate that she ascertained this information from Finizie, rather than personally noticing Finizie's presence. *Id.* By this point, Kocher and Finizie had had approximately two and one-half

[4] LaPointe, a Clinical Nurse Leader at the Crescenz Medical Center for approximately five years, served as the Interim Director for QM from March 2016 to February 2017. CAF-2, Tab 35.

hours to discuss the 7:30 a.m. incident.

Before leaving Kocher's office, LaPointe asked both Kocher and Finizie to write a statement regarding the incident with Simon. CAF-2, Tab 36. LaPointe did not direct them to write the statement together. *Id*., Tab 35. They prepared a joint statement, although it was written in the singular first-person narrative by Kocher, and referred to Finizie as "Sharon," rather than use the word "we." KAF, Tab 4 at 45. Nonetheless, both signed the statement. *Id*. The joint statement essentially revealed that Simon and Kocher disagreed about when Kocher was supposed to provide the ePER slides to Simon. *Id*. It also reflected that Simon apparently was frustrated with the amount of work it took her to prepare for the morning meeting. *Id*.

At 2:39 p.m. on October 5th, approximately four and one-half hours after he requested it, Kocher emailed the statement to LaPointe. Her email also was addressed to Finizie. KAF, Tab 4 46. At 4:57 p.m., LaPointe emailed Kocher as follows:

> I know today was stressful for you. I'm glad we had the opportunity to talk through the day, and that you are feeling better this afternoon. I do want to follow up to make sure that you know there is always an Employee Assistance Program [EAP] available if you feel the need to talk with someone other than me or outside of the

department, or for any reason.

Id. at 48. Kocher responded that she did not think EAP was necessary. *Id*.

While Kocher's attitude and tone during her direct examination generally were agreeable, from the outset of her cross-examination, her demeanor changed. Her voice became louder and more forceful, and, not infrequently, her answers were somewhat antagonistic. At no time during her testimony did Kocher appear upset or anxious.

Regarding the October 5, 2016 incident, Finizie asserted that Kocher and Simon were having a discussion about what time Kocher needed to give Simon the slides so that Simon would have everything ready for the 8:15 a.m. meeting. CAF-2, Tab 36. When Finizie first observed them, Kocher and Simon were having a "normal conversation" and neither was yelling. Then, according to Finizie, Simon "went off; it was like somebody flipped a switch," and started using profanity. *Id*. Finizie claimed only Simon was yelling, not Kocher. She further maintained that she had never heard someone use the "f" word so many times, and estimated Simon uttered it 30 times in less than one minute. *Id*. She described Simon's behavior as "so erratic and so crazy," claiming she was waving her arms and that at one point, Simon's "eyes rolled back." *Id*. Finizie testified, "I thought she was having a seizure. It was really dramatic." *Id*. Like Kocher, Finizie testified that Fritz "saw and heard the whole

thing, absolutely." *Id*.

Initially, Finizie claimed that at some point during the incident, she began taking notes "because I'd never seen anything like that." CAF-2, Tab 36. A few minutes later, when asked what she did after Kocher returned to her office, Finizie testified, "I started writing things down." *Id*. CAF-2, Tab 36; KAF, Tab 4 at 47. A review of her notes supports the conclusion that Finizie wrote her summary of incident after the fact, particularly in view of the length and content of the document and her limited use of abbreviations. *See* KAF, Tab 4 at 56.

It also appears that Finizie added to her notes at some later time. Specifically, in the left hand margin, written perpendicular to the rest of her summary, Finizie wrote, "Pete [Leporati] knew about + talked to S" and, closer to the top of the page, "Peter knew about it." KAF, Tab 4 at 47. However, no one saw Leporati in the QM area during this incident. In fact, during her cross- examination, Finizie testified, "I never said he [Leporati] was there." CAF-2, Tab 36. Likewise, in an email she sent on October 24, 2016, Finizie expressly stated, "Peter Leporati was not in the QM trailer at the time of the event on October 5, 2016." *Id*., Tab 25 at 17 (Exhibit G). Finizie never explained how or when she learned that Leporati knew about the event, or when she annotated her allegedly contemporaneous handwritten notes to reflect Leporati's supposed knowledge of the event.

In her notes, Finizie used the words "crazed" and "meltdown" and said that Simon had used "multiple F-bombs in under a minute." KAF, Tab 4 at 47. Finizie's notes did not indicate that Simon's eyes had rolled back or appeared to be having a seizure, as she had testified. *Cf. id.* and CAF-2, Tab 36. Finizie testified that she gave her handwritten notes to LaPointe and later to the VA police. CAF-2, Tab 36. Interestingly, Kocher did not mention Finizie's notes during the Board hearing, even though it is evident from a comparison of the two documents that she utilized Finizie's notes to prepare the joint statement. *Cf.* KAF, Tab 4 at 47 and 46. Yet, during her February 21, 2017 sworn testimony before the AIB, Kocher testified, "I have the original at home. I made a copy." *Id.* at 112.

It is also noteworthy that it was Finizie, not Kocher, who forwarded the October 5th jointly written statement to the VA police. She did so by email dated October 7th. CAF-2, Tab 25 at 9 (Exhibit C). Finizie claimed she had to report the incident because it was workplace violence. *Id.*, Tab 36. No where in their joint statement, which was provided to LaPointe several hours after he requested it, did Kocher and Finizie indicate that they were frightened by Simon's purported behavior. KAF, Tab 4 at 45. Nor did Finizie's handwritten note reflect that she felt threatened or that Kocher appeared scared. *Id.* at 47.

Finizie's testimony regarding the October 5, 2016 incident can only be described as fast and

frantic. Her answers went well beyond what she was asked on direct examination and she often jumped in to answer before her attorney had finished asking a question, as if she needed to tell her story before she forgot it. CAF-2, Tab 36. In fact, during her February 21, 2017 AIB sworn testimony, Finizie needed to rely on her notes, stating, "I'm just going to refer to my notes. I have to remember everything." *Id*., Tab 28 at 359. One would assume that if the event was as "dramatic" as Finizie testified, it would be imprinted in her mind and she would not have needed to refer to notes only four and one-half months later. Additionally, on numerous occasions during her direct examination, Finizie responded using the word "we," referring to her and Kocher, rather than limit her responses to her own actions. CAF-2, Tab 36.

Simon also testified. She has been an Administrative Officer with the VA since 2002 and has a total of 42 years of government service. While she generally recalled the incident, she was unable to remember her exact exchange with Kocher line by line like Kocher and Finizie claimed they did. Simon noted that the incident had occurred "a while ago," in fact, almost three and one-half years before the hearing. CAF-2, Tab 36. However, Simon did recollect that Kocher instigated the verbal confrontation that occurred on October 5, 2016.

According to Simon, as she was preparing for the morning report, Kocher approached her and, in a confrontational manner, asked why Simon had asked Leporati for the ePER report, declaring, "If you need

a report, you come to me." CAF-2, Tab 36. Simon stated Kocher then motioned for them to talk in room A107, rather than in the hallway. *Id*. This comports with Kocher's testimony that she said she did not want to talk in the hallway because "things bellow." *Id*. Nevertheless, Finizie testified that she somehow was able to overhear the entire incident. *Id*.

Simon admitted that after she and Kocher went into A107, their conversation devolved into a shouting match. She also acknowledged that she likely used profanity. CAF-2, Tab 36. She elaborated that she reacted in such a manner because she felt she had been "attacked" by Kocher that morning. *Id*. In fact, her voice quavered and she appeared upset while recounting the incident. Simon stated that before this incident, she got along with Kocher, and Finizie, and thus she felt "bewildered" and "gobsmacked" by Kocher's verbal attack. *Id*.

Because she was upset and "taken aback" by the incident, Simon believes that at some point during the October 5th workday, she mentioned it to LaPointe. At 5:00 p.m. on October 5th, LaPointe sent her the following email:

> I know today was stressful for you. I'm glad we had the opportunity to talk through the day, and that you have a couple of days of scheduled AL [annual leave] as you mentioned. I do want to follow up to make sure that you know there is always an Employee

> Assistance Program available if you feel the need to talk with someone other than me or outside of the department, or for any reason. I know you mentioned earlier today that you were not interested in this, but it's part of my responsibility as a manager to make sure that you have the knowledge of the support resources that are available to you, should you need them for any reason.

KAF, Tab 4 at 52. This email is comparable to the one LaPointe sent to Kocher only three minutes earlier. *Cf*. *id*. at 48.

Subsequently, at 8:37 p.m. on Wednesday, October 5th, Simon emailed LaPointe a "Report of Contact" concerning the incident with Kocher from home using her personal email. In her email, Simon asserted, "I feel like I am being ***bullied*** and threatened" (emphasis in original). KAF, Tab 4 at 53-54. Noting her then 38 years of impeccable government service, Simon stated, "I won't have a bully besmirch my record." *Id*. Simon contended that Kocher, who had a reputation for being difficult with numerous employees, had accosted her in the hallway merely because Simon had asked Leporati for the ePER report that morning. *Id*. At the conclusion of her email, Simon stated, "When I come back I expect to find that this has been resolved; that she has been spoken to and put in her place." *Id*. Simon then took her pre-scheduled leave to make a

long weekend out of the Columbus Day holiday. CAF-2, Tab 36; Tab 25 at 93 (Exhibit T).

I note that in addition to exhibiting a different, more antagonistic demeanor during her cross-examination, Kocher's demeanor also changed noticeably while Simon was testifying. In addition to aggressively chomping gum, Kocher literally glowered at Simon.

Shortly after the October 5th incident, LaPointe asked Casey McCollum, a Licensed Social Worker, to serve as the fact-finder regarding the incident. He wanted an independent fact-finder. LaPointe only casually knew McCollum, but was aware that she was a long-time supervisor. She did not work in the QM Service. CAF-2, Tab 35.

Prior to preparing her summary of findings, McCollum met with Kocher, Simon, Finizie, Cheryl Johnson and Suzanne Fritz. KAF, Tab 4 at 43-44. During her testimony, Finizie initially insisted that Johnson had not witnessed the event. She then grudgingly admitted that she could not see whether Johnson was in the QM office or not. CAF-2, Tab 36. In view of Finizie's contention that Simon had yelled during the incident, it was possible that Johnson overheard the verbal altercation. *Id*. In fact, Johnson did overhear the altercation, as evidenced by her October 5th 2:43 p.m. email to LaPointe. In her message, Johnson reported, "I was sitting at my desk around 7:39 am as Pattie Simon went out [of] the room[;] the door was ajar and I heard Flo Kocher

called [sic] Pattie's name loudly. I looked up and saw Flo coming down the hall. She said to Pattie, "If you need a report, you ask me not Peter." KAF, Tab 4 at 51.

What Fritz and Johnson reported to McCollum corroborated Simon's assertion that Kocher instigated the October 5th event. Fritz related her impression that Kocher was "offended" because Simon had requested report information from Leporati and this led to the two of them yelling in the hallway. KAF, Tab 4 at 44. Similarly, Johnson reported that she heard as Kocher "yelled" down the hallway to Simon, "If you need a report, ask me not Peter." *Id*. at 44.

In her February 22, 2017 AIB testimony, Fritz related that Simon had asked for a report and Kocher "didn't like how it went down." CAF-2, Tab 28 at 426. Fritz stated that it "kind of came into a verbal screaming match," but "[i]t was over in a brief period of time." *Id*. Fritz further noted that Kocher "had gotten loud with other people in the past, so it wasn't unusual." *Id*. Fritz did not support Kocher and Finizie's claim that Simon was profane, let alone excessively profane. *Id*. at 421-29. Furthermore, she refuted Finizie's claim that Kocher did not yell during the incident. *Id*. at 426.

In her February 22, 2017 AIB testimony about the incident, Johnson also substantiated Simon's assertion that Kocher instigated the event. Johnson described that Kocher "just hollered down the hall at

Simon," expounding, "Not only were they [Kocher] accusatory, they were so angry at the other one [Simon] that it was like – I was stunned." CAF-2, Tab 28 at 407-08. Johnson confirmed that Kocher was angry that Simon had asked Leporati for ePER information. *Id.* Johnson further characterized Kocher's behavior toward Simon as "like a mother scolding a child." *Id.* at 408-09.

Based on McCollum's fact-finding report, on December 13, 2016, LaPointe issued Kocher a memorandum with the following subject line: "Written Counseling – MISCONDUCT." CAF-2, Tab 35; KAF, Tab 4 at 41. The purpose of the memorandum was "to formally counsel [Kocher] regarding expectations for professionalism in communication in the workplace, specifically: Disrespectful language towards another employee," and specifically referenced the October 5th incident with Simon. *Id.* The document further explained, "This counseling memo is not a formal disciplinary action, and it will not be placed into your Official Personnel Folder (OPF)." *Id.* Kocher testified that she refused to sign the memorandum because the allegations regarding her conduct "were fabricated." CAF-2, Tab 36. Kocher also testified that she filed grievance as a result of receiving the written counseling.[5] *Id.*

[5] Matters that are covered under a negotiated grievance procedure and Board jurisdiction "may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title [Title 5 of the United States Code] or under the negotiated grievance procedure, but

LaPointe issued Kocher a second memorandum dated December 13, 2016 regarding her assertion that Simon's conduct on October 5th had created a hostile work environment. CAF-2, Tab 35; Tab 25 at 52 (Exhibit M). Again, based on the fact-finding report, LaPointe determined that Kocher's claim was "unfounded," noting, "The facts of the case are not consistent with the definition of hostile work environment." *Id*. To prevail on a hostile work environment claim, an appellant must show that she was subjected to unwelcome conduct related to a protected class, that the harassment was based on the statutorily protected class, and the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create an intimidating hostile, or offensive working environment. *Harris v. Forklift Systems*, 510 U.S. 17, 21 (1993). The conduct must be severe or pervasive and alter the terms and conditions of her employment. *See Miller v. Department of Defense*, 85 M.S.P.R. 310, ¶ 32 (employee is not guaranteed a work environment free of stress). Again, Kocher refused to sign this memorandum. *Id*.

On December 13, 2016 LaPointe also issued Finizie an identical memorandum regarding her assertion that Simon had created a hostile work environment. CAF-2, Tab 35; Tab 25 at 52 (Exhibit M). Finizie also refused to sign her memorandum. *Id*. Based on her admitted conduct on October 5th, it

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not both." *Pirkkala v. Department of Justice*, 123 M.S.P.R. 288, ¶ 6 (2016); 5 U .S.C. § 7121(e)(1).

appears that Simon also should have received a written counseling. Nonetheless, there is no record of any such document in this consolidated appeal file. Simon herself could not recall whether she actually received a written counseling, but "was worried that something would be placed in her file after the AIB." CAF-2, Tab 36. The AIB panel also noted, "There was no evidence provided that Patricia Simons received a Written Counseling." KAF, Tab 4 at 19, ¶ 19.

Nevertheless, LaPointe definitively recalled issuing Simon a written counseling on December 13, 2016 and further recalled Simon being "pretty upset" about it. CAF-2, Tab 35. Although the appellants attempted to impugn LaPointe's recollection by asserting that Simon utilized a lot of leave after the October 5th incident, her leave usage summary reflects that she was at work on December 13, 2016. *Id.*, Tab 25 at 91 (Exhibit T).[6] Moreover, LaPointe's testimony was credible. He answered questions fluidly, without any pause, in a straight forward manner. At no time during his testimony did he become flustered or hostile.

Regardless of whether Simon was issued a counseling memorandum, for purposes of an IRA appeal, the Board has held that a memorandum of counseling is not a disciplinary or corrective action

[6] The leave usage summary also refutes the appellants' claim that Simon took extended sick leave after the October 5th incident. The first time she used sick leave after the incident was on October 19th, and only from 1:00 to 3:00 p.m. CAF-2, Tab 25 at 93 (Exhibit T).

under 5 U.S.C. § 2302(a)(2)(A)(iii) because it was not memorialized in the employee's OPF. To deem such a counseling to be disciplinary or corrective action could discourage the resolution of workplace issues "short of formal disciplinary action." *Special Counsel v. Spear*s, 75 M.S.P.R. 639, 670 (1997).

The appellants did not establish by preponderant evidence that they engaged in protected whistleblowing activity on October 5, 2016. Not only was the appellants' presentation of evidence problematic, particularly regarding the inconsistencies noted above, but the similarity of some of their claims regarding Simon's actions suggests that they either manufactured or embellished some of these assertions.[7] Moreover, the WPA "is intended to protect government employees who risk their own personal job security for the advancement of the public good by disclosing abuses by government personnel." *Willis v. Department of Agriculture*, 141 F.3d 1139, 1144 (Fed. Cir. 1998). Kocher and Finizie's complaints about Simon yelling at Kocher and using profanity under the particular circumstances of October 5, 2016 do not support a finding that they made any protected disclosures regarding the incident. The purpose of the WPA is to root out material wrongdoing, not to remedy this type of petty grievance or trivial allegations of

[7] The AIB panel questioned their credibility, noting, "There is evidence that Florence Kocher and Sharon Finize [sic] collaborated together on multiple occasions." CAF-2, Tab 4 at 20, Conclusion 7.

unprofessionalism. *See Frederick v. Department of Justice,* 73 F.3d 349, 353 (Fed. Cir. 1996); *see also Herman v. Department of Justice*, 193 F.3d 1375, 1379-81 (Fed. Cir. 1999).

Nor did Kocher and Finizie's October 5th disclosure reveal a substantial and specific danger to public health and safety. The disclosure of a speculative danger does not meet this test. *Herman* 193 F.3d at 1379. Disclosure of an imminent event is protected. *See, e.g., Miller v. Department of Homeland Security*, 111 M.S.P.R. 312, ¶ 19 (2009). Factors to be considered in determining whether a disclosed danger is sufficiently substantial and specific to be protected under the WPA include: (1) the likelihood of harm resulting from the danger, (2) the imminence of the potential harm, and (3) the potential consequences of the harm. *Chambers v. Department of the Interior*, 515 F.3d 1362, 1369 (Fed. Cir. 2008); *Parikh v. Department of Veterans Affairs*, 116 M.S.P.R. 197, ¶ 14 (2011).

Here, the appellants disclosed the October 5, 2016 verbal altercation after the entire incident was over. There is no evidence that the disagreement, which two independent witnesses asserted was initiated by Kocher, continued beyond the early morning of October 5th. The parties involved, and witnesses, agreed that nothing physical occurred during the brief verbal exchange. Nor did anyone allege that Simon made any threat during the incident or any threat of future harm.

As discussed above, the appellants' joint statement did not reflect that they were frightened by Simon's supposed behavior that morning. KAF, Tab 4 at 45. Nor did Finizie's handwritten notes indicate that she felt threatened or that Kocher appeared scared. *Id.* at 47. In fact, since they believed Simon was having an "organic incident" (Kocher) or "seizure" (Finizie) and claimed that her "eyes rolled" back, there was no reason to believe Simon was capable of engaging in any substantial and specific harm. CAF-2, Tab 36. On the contrary, Kocher and Finizie should have been concerned for Simon's health and safety, particularly in view of their multiple nursing degrees.

Regarding Kocher and Finizie's October 5, 2016 disclosure (and subsequent communications referencing the incident), a disinterested observer with knowledge of the essential facts known to and readily ascertainable by them could not reasonably conclude that Simon's actions, during this one isolated event, evidenced a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety a substantial and specific danger to public health or safety. While an employee may be justified in reporting a co-worker's angry outburst and use of profanity, the appellants' reports regarding Simon's conduct on October 5, 2016 do not rise to the level of a whistleblowing disclosure.

2. October 25, 2016

The appellants' second purported protected disclosure arose from two separate incidents involving Leporati, one with Finizie on October 17, 2016 and one with Kocher on October 19, 2016. According to Finizie, on Monday, October 17th, while getting a cup of coffee from her area, Leporati told her and Fritz a joke and then walked to where Finizie was sitting and massaged her shoulders. Finizie first reported the incident to Karen Ford-Styer, a VA union official, by email dated October 19th and time stamped 2:05 p.m. KAF, Tab 4 at 57-58. By that point, however, even though she did not witness the alleged incident, Kocher already had reported the incident to Ford-Styer in an email she sent at 8:05 a.m. on October 19th. Kocher copied Finizie on the email. Although Finizie did not characterize the joke in her email, Kocher termed it "a crude sex joke." CAF-2, Tab 25 at 11 (Exhibit D). During her testimony, Finizie elaborated on her accusation and asserted that Leporati said, "That bathroom reminds me of the first time I had sex in the dark." *Id.*, Tab 36. She also testified that the shoulder massage lasted approximately 15 to 20 seconds. *Id.*

Both Kocher and Finizie expressed their belief that Leporati told the joke and massaged Finizie's shoulders in an effort to intimidate Finizie in her capacity as a witness to the October 5th verbal altercation between Kocher and Simon. CAF-2, Tab 25 at 11 (Exhibit D); KAF, Tab 4 at 57-58. Yet, during her testimony, Finizie admitted that she had no evidence to support her belief. Moreover, neither

Finizie nor Kocher offered any motive for the ostensible witness intimidation. Leporati did not witness the October 5th event and never claimed that he had. Nor was he tasked with investigating the matter. Furthermore, he did not supervise Kocher or Finizie and thus was not in a position to counsel or discipline them. CAF-2, Tab 35.

According to Kocher, the second incident occurred on October 19th, a Wednesday. On direct-examination, she testified that at 4:15 p.m. on that date, she went to LaPointe's office to provide him with slides for an upcoming presentation. Leporati was nearby and he allegedly pointed both hands and fingers at her, like guns, and pulled his trigger fingers and said "click, click," while he nodded his head to the side. CAF-2, Tab 36. On cross-examination, she testified that Leporati was "making clicking noises with his mouth." *Id*.

Six days after incident, on Tuesday, October 25th, Kocher filled out a Workplace Incident Documentation Form (Incident Form). She asserted that the delay in completing the form was precipitated by LaPointe's absence from work on the intervening Thursday and Friday and by his failure to respond to her on Monday. She did not indicate what LaPointe was supposed to have responded to. The record contains her October 27th email to LaPointe stating, "Can you please let me know when you are available to complete a Police report? This report is to be completed by both Supervisor and Employee." CAF-2, Tab 25 at 19-20 (Exhibit H). But,

this date is two days after she purportedly completed the Incident Form and, as is discussed below, informed the VA police about the gun gesture incident. KAF, Tab 4 at 35-36, 37-39.

On the Incident Form, Kocher indicated the event occurred at 3:55 p.m. KAF, Tab 4 at 35-36. While this is 20 minutes earlier than she testified to, the difference is not significant. On the other hand, unlike her Board testimony, she wrote that Leporati pulled the trigger twice on each hand but "did not state any words to me." KAF, Tab 4 at 35-36. More particularly, she did not report that Leporati either said "click, click" or made clicking noises with his mouth, as she had testified. *Id.*

On the second page of the Incident Form, in response to the question, "Has the alleged perpetrator been involved in previous incidents of violence," Kocher checked, "Yes." KAF, Tab 4 at 36. She then reported that Leporati had "physically assaulted" Finizie "by touching her without consent." *Id.* Kocher made no reference to a crude joke, or any joke, on the form. *Id.* at 35-36. Kocher acknowledged that she "collaborated" with Finizie to complete the Incident Form, but contended that Finizie did not help her complete it. CAF-2, Tab 36. After she completed the form, Kocher scanned it to the VA police, as directed at the end of the form. *Id.*; KAF, Tab 4 at 36.

Shortly thereafter, Kocher went to VA police headquarters. Although she stated she was too

nervous to sit down and answer questions, she agreed to demonstrate the gesture she allegedly observed Leporati make. The officer who prepared the Investigative Report noted:

> I observed Kocher demonstrate pointing with both index fingers and both thumbs in the "up" position with the middle, ring, and little/pinky fingers curled toward the palms and she used quickly pressed down [sic] and raised her thumbs back into the "up" position as if cocking the hammers of two handguns.

KAF, Tab 41 at 37-39. In contrast, on the Incident Form she had just completed and sent to the police, Kocher described Leporati's actions as "pulling the trigger twice," which implied using his trigger, or index, fingers, as she testified, and not his thumbs as if to "cock" a gun. *Cf. id.* at 35; CAF-2, Tab 36. She also told the police that Leporati made the gesture "without saying anything to her." KAF, Tab 41 at 37-39. Again, her Board testimony was quite divergent in that she claimed that Leporati either said "click, click" or made clicking noises with his mouth. CAF-2, Tab 36. In the interim, during her February 21, 2017 AIB testimony, she contended that Leporati, "clicked his head twice to the left, shrugged his shoulders and walked right by me like he didn't even see me," but did not claim that Leporati said "click, click" or made a similar sound. KAF, Tab 4 at 117.

The VA police also interviewed Leporati about the finger gun allegation. Leporati, who was somewhat soft-spoken, denied making any hand gesture directed toward Kocher. CAF-2, Tab 35. While he tended to be a bit detailed, his answers were responsive and given without hesitation. He testified in a calm and collected manner, and his demeanor did not change on cross-examination. Conversely, much like what happened when Simon was testifying, at times during Leporati's testimony, I observed Kocher glaring at him, most noticeably when he discussed a "patient safety huddle" that had occurred on June 28, 2016, an issue not encompassed by Kocher's OSC complaint and thus not at issue in this appeal. KAF, Tab 1 at 8-23.

Ultimately, the VA police concluded that Kocher's allegations regarding a gun gesture could not be proven or disproven "due to lack of evidence," "no witnesses," "the time delay in which [Kocher] reported the event," and the fact that Kocher "refuse[d] to give a written police statement." KAF, Tab 4 at 39. The police report concluded, "No criminal actions were discovered" and the investigation was closed. *Id.*

In addition to inconsistencies among her testimony, the Incident Form she completed, and what she demonstrated and related to the VA police, in an October 27, 2016 email to LaPointe, Kocher reversed the order of the two events. Specifically, Kocher stated that the "imaginary gun shooting event was followed by a physical assault (touching of

an employee without consent) of a QM RN in this area [Finizie] by Peter Leporati." CAF-2, Tab 25 at 19 (Exhibit H). According to Kocher's October 19th email to Ford-Styer, and Finizie's October 19th email to Ford-Styer, the massage incident occurred first, two days before the supposed finger gun incident. *See id*. at 11 (Exhibit D) and KAF, Tab 4 at 57-58.

In an October 26th email to LaPointe, Finizie acknowledged that she first notified LaPointe about the alleged October 17th joke and massage incident only the day before, meaning October 25th. KAF, Tab 4 at 61. She never offered an explanation for the eight-day dely. In this email, Finizie also conveyed her unsubstantiated belief that Leporati's purported conduct of touching her as well as the alleged finger gun incident were "both witness intimidation" (emphasis in original). *Id*. Finizie also communicated her unsupported belief that Leporati had helped Simon write a statement about the October 5th verbal altercation with Kocher and that Leporati had claimed he witnessed the event, when he had not. *Id*. She also added the following unsolicited, self-serving comment:

> Another thing I want to mention is that because [Kocher] and I reported the events involving Peter Leporati, it can serve to make us appear as overly sensitive about seemingly trivial events, and therefore, poor and not credible witnesses to the event involving Patricia Simon. However,

this is not the case.

Id. As noted above, neither Finizie nor Kocher offered any motive for the ostensible witness intimidation. As Leporati testified, he did not witness the October 5th event. Nor did he supervise Kocher or Finizie. CAF-2, Tab 35.

Although Finizie reported that Leporati had told the joke to both her and Fritz (KAF, Tab 4 at 57-58), Finizie did not request to present the testimony of Fritz. CAF-2, Tab 24 at 8-9. Fritz did not report the alleged incident to McCollum (KAF, Tab 4 at 43-44) or discuss it during her AIB testimony. CAF-2, Tab 28 at 412-29.

LaPointe acknowledged that Kocher notified him about the supposed finger gun incident. CAF-2, Tab 35. He knew Kocher had reported the matter to VA police and believed the police were investigating it. *Id*. By the time LaPointe became aware of the alleged joke and shoulder massaging incident via a conversation with Finizie on October 25, 2015 (KAF, Tab 4 at 61), LaPointe already had tasked McCollum with investigating the October 5th incident between Kocher and Simon. CAF-2, Tab 35; KAF, Tab 4 at 43-44. As such, LaPointe did not ask McCollum to investigate the touching incident. CAF-2, Tab 35. Nevertheless, Finizie related both the joke/massage incident and the finger gun incident (to which she was neither a participant nor a witness) to McCollum. KAF, Tab 4 at 44.

During his interview with the police on October 25, 2016, Leporati "adamantly" denied making any gun-like hand gesture directed toward Kocher. KAF, Tab 4 at 39. He also denied making that such gesture during his Board testimony and his AIB testimony. CAF-2, Tab 35; Tab 28 at 326-31. Likewise, Leporati had no recollection of telling an off-color joke or rubbing Finizie's shoulders. *Id*., Tab 35; Tab 28 at 331-33. As he noted during his AIB testimony, if he had directed a finger gun gesture when and where Kocher claimed, she could have immediately report the incident to LaPointe, her supervisor, since she literally was entering LaPointe's office when she alleged the incident occurred. *Id*. Instead, she waited six days to complete an Incident Form and report the purported incident to the VA police. Such delay is implausible, even if LaPointe was on leave for two days immediately following the incident.

Conversely, I found nothing incredible about Leporati's testimony. His statement to the police, as well as his AIB and Board testimony were all consistent. Again, his deportment while testifying was clam and composed.

The agency's response to Kocher's and Finizie's allegations against Leporati was somewhat incongruous. More particularly, LaPointe issued Leporati two separate memoranda on December 13, 2016. The purpose of one memorandum, which had the following subject line, "Written Counseling – MISCONDUCT," was to formally counsel him about

"[d]isrespectful or obscene language or conduct towards another employee," and stated, "On October 19, 2016, you told an inappropriate joke and touched another employee without consent." CAF-2, Tab 25 at 50. The second memorandum, which had the following subject line, "Finding of fact outcome - re: sexual harassment and intimidation allegation," stated, "This memorandum is to inform you that the sexual harassment and intimidation allegations against you have been concluded, and have been determined to be unfounded" (emphasis in original). *Id*. at 56.

On December 13, 2016, LaPointe also issued Finizie a memorandum with the following subject line, "Written Counseling – MISCONDUCT." CAF-2, Tab 25 at 54. In this memorandum, LaPointe informed Finizie that the sexual harassment and intimidation allegations she leveled Peter Leporati had "been determined to be **unfounded**" (emphasis in original). *Id*. While noting that Finizie had "alleged" that Leporati told a crude sexual joke and messaged her shoulders in attempt to intimidate you, the memorandum did not declaim that the VA had corroborated Finizie's allegations. *Id*.

Despite LaPointe's issuance of a "Written Counseling – MISCONDUCT" memorandum to Leporati, I find that Finizie's testimony regarding this alleged October 17, 2016 joke and massage event is simply not credible. Again, Finizie first reported this supposed incident to Ford-Styer by email dated October 19th and time stamped 2:05 p.m. KAF, Tab 4

at 57-58. However, nearly six hours earlier, at 8:20 a.m., Finizie had emailed Ford-Styer and inquired, "Why aren't VA Police investigating the QM [October 5th] event I reported to them? Why was a "fact-finder"' appointed?" CAF-2, Tab 25 at 13 (Exhibit E). It is inexplicable that she did not mention the joke/massage incident in the same message. Beyond this baffling omission, her 2:05 p.m. email to Ford-Styer relating the alleged event demonstrated neither urgency nor offense. She did not state that the joke was crude or that the massage constituted an assault. She merely stated she "was not expecting the incident." KAF, Tab 4 at 57. She then waited six days to bring the matter to LaPointe's attention. Finizie's actions support the conclusion that she fabricated the story because she believed the VA had taken no action on her complaint against Simon and was concerned that Leporati would support Simon regarding the events of October 5th.

Likewise, I find Kocher's claim that Leporati directed a finger gun gesture toward her to be incredible. Her divergent accounts concerning what and when it purportedly occurred, and her delay in reporting the matter, cast serious doubt on the reliability of her accusation.

Ultimately, I conclude that Leporati did not engage in the conduct as described by Kocher and Finizie. Consequently, any reports they made regarding these supposed incidents of October 17 and 19, 2016 do not constitute protected disclosures.

The appellants failed to establish that they made protected disclosures by preponderant evidence. Therefore, this consolidated appeal is dismissed for lack of jurisdiction.

DECISION

The appeal is DISMISSED.

FOR THE BOARD:

Kara Svendsen
Administrative Judge

5 U.S.C. § 2302(a)(2)(A)-(B)

For the purpose of this section—

(A) "personnel action" means—

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

(iv) a detail, transfer, or reassignment;

(v) a reinstatement;

(vi) a restoration;

(vi) a reemployment;

(vii) a performance evaluation under chapter 43 of this title or under title 38;

(viii) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion,

performance evaluation, or other action described in this subparagraph;

(ix) a decision to order psychiatric testing or examination;

(x) the implementation or enforcement of any nondisclosure policy, form, or agreement; and

(xi) any other significant change in duties, responsibilities, or working conditions;

with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31;

(B) "covered position" means, with respect to any personnel action, any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include any position which is, prior to the personnel action—

(i) excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

(ii) excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration;

5 U.S.C. § 2302(b)(8)

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

…

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences;

(i) any violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs."

5 U.S.C. § 7703(c)

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.