

September 8, 2011

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision
Motion for Summary Judgment

Name of Case: Greta Kathy Congable

Dates of Filing: June 1, 2011
August 12, 2011

Case Numbers: TBH-0110
TBZ-0110

This Decision will consider a Motion for Summary Judgment filed by Sandia Corporation ('Sandia' or 'the Respondent'), in connection with a complaint filed against the company by one of its employees, Greta Kathy Congable ('Ms. Congable' or 'the Complainant'), on September 14, 2010, under the Department of Energy's (DOE) Contractor Employee Protection Program, set forth at 10 C.F.R. Part 708.¹ OHA has designated Ms. Congable's hearing request as Case No. TBH-0110, and the present Motion for Summary Judgment as Case No. TBZ-0110. For the reasons set forth below, I have determined that Sandia's Motion should be granted and Ms. Congable's complaint should be dismissed in its entirety.

I. BACKGROUND

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 2, 1992). Its primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The Part 708 regulations prohibit retaliation by a DOE contractor against an employee because the employee has engaged in certain protected activity, including "disclosing to a DOE official... information that [the employee] reasonably believes reveals (1) a substantial violation of a law, rule, or regulation; (2) a substantial and specific danger to employees or to public health or

¹ Sandia Corporation, a wholly owned subsidiary of Lockheed Martin Corporation, manages and operates Sandia National Laboratory in Albuquerque, New Mexico, pursuant to a contract with the Department of Energy.

safety; or (3) fraud, gross mismanagement, gross waste of funds, or abuse of authority.” 10 C.F.R. § 708.5(a).

Part 708 sets forth the procedures for considering complaints of retaliation. The DOE’s Office of Hearings and Appeals (OHA) is responsible for investigating complaints, holding hearings, and considering appeals. 10 C.F.R. Part 708, Subpart C. According to the Part 708 regulations, a complaint must include “a statement specifically describing the alleged retaliation taken against [the complainant] and the disclosure, participation, or refusal that [the complainant believes gave rise to the retaliation.” 10 C.F.R. § 708.12.

B. Factual Background

The Complainant has been employed by Sandia in a variety of administrative support positions since 1994. In August 2004, she was promoted to Administrative Staff Assistant (ASA) and assigned to Sandia’s Corporate Investigations (CI) office. In September 2006, Christopher Padilla was named Senior Manager for CI, becoming Ms. Congable’s direct supervisor. Between September 2008 and April 2010, Ms. Congable purportedly disclosed to several individuals at Sandia and Lockheed Martin, Sandia’s parent company, the presence of unprotected personally identifiable information (PII) on Sandia’s computer network, and Mr. Padilla’s allegedly improper alteration of inquiry and case files. In June 2010, Ms. Congable was transferred from her ASA position in CI to an ASA position in Sandia’s Management Assurance and Reporting Department (MA), retaining her same job title, job level, and salary.

C. Procedural Background

Ms. Congable filed a Part 708 complaint with the National Nuclear Security Administration Service Center (NNSA/SC) in Albuquerque, New Mexico, on September 14, 2010. In her complaint, Ms. Congable alleged that Sandia retaliated against her for making disclosures regarding the unsecured PII and Mr. Padilla’s alleged misconduct by involuntarily transferring her from CI to MA. On October 27, 2010, NNSA/SC dismissed the complaint. Ms. Congable appealed the dismissal of her complaint to the OHA Director, pursuant to 10 C.F.R § 708.18. On December 6, 2010, the OHA Director granted Ms. Congable’s appeal in part, and remanded her complaint back to NNSA/SC for further processing. *See Greta Kathy Congable*, Case No. TBU-0110 (2010).²

On April 5, 2011, NNSA/SC transmitted Ms. Congable’s complaint to OHA, together with her request for an investigation followed by a hearing. The OHA Director appointed an Attorney-Investigator, who conducted an investigation and issued a Report of Investigation (ROI) on June 1, 2011. On June 2, 2011, I was appointed the Hearing Officer in this matter. I sent a letter to the parties directing them to submit briefs identifying areas of disagreement with the ROI and areas of agreement to which they were willing to stipulate. The parties submitted briefs and replies setting forth their positions regarding the findings in the ROI. After reviewing the documents in the record and the parties’ submissions, I determined that further briefing was

² Decisions issued by OHA are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

necessary on a threshold issue, namely whether Ms. Congable's transfer constituted an alleged retaliation within the meaning of Part 708. On July 20, 2011, I sent a letter to the parties, instructing Ms. Congable to submit an additional brief specifically addressing this issue and affording Sandia the opportunity to submit a reply. Ms. Congable submitted the additional brief on August 6, 2011. On August 12, 2011, Sandia submitted its reply brief wherein the company requested that Ms. Congable's complaint be dismissed.

II. ANALYSIS

A. The Applicable Legal Standards

In order to meet his or her burden under Part 708, a complainant must demonstrate, by a preponderance of the evidence, each of the following elements: (i) he or she made a protected disclosure or engaged in protected activity; (ii) he or she was the subject of a retaliation; and, (iii) the protected disclosure or activity was a contributing factor to the retaliation.³ 10 C.F.R. § 708.29. Only if the complainant meets his or her burden does the burden then shift to the contractor to prove, by clear and convincing evidence, that it would have taken the same action absent the protected disclosure or activity. *Id.*

In her complaint, Ms. Congable alleges that she made several protected disclosures and that Sandia retaliated against her for making those disclosures by transferring her from an ASA position in CI to an ASA position in MA. In its August 12, 2011, brief, Sandia maintained that Ms. Congable's transfer, although involuntary, did not constitute a "retaliation" within the meaning of Part 708 and, therefore, her complaint should be dismissed in its entirety.

Although Sandia has moved for dismissal of the complaint, given the facts at hand, Sandia's motion is more aptly characterized as a Motion for Summary Judgment. Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."⁴ Fed. R. Civ. P. 56(c). Under this standard, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). Summary judgment may be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such cases, there can be "no genuine issue as to any material fact," since the non-moving party's complete failure of proof concerning an essential, threshold element of his case necessarily renders all other facts immaterial. The moving party is then "entitled to a judgment as a matter of law"

³ The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely than not true when weighed against the evidence opposed to it. *See Joshua Lucero*, Case No. TBH-0039 (2006) (citing *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990)).

⁴ While the Federal Rules do not govern Part 708 proceedings, Rule 56 has been used by OHA as a guide in considering Motions for Summary Judgment filed in Part 708 cases. *See Colleen Monk*, Case No. TBH-0105 (2011); *Edward J. Seawalt*, Case No. VBZ-0047 (2000).

because the non-moving party has failed to satisfy his burden of proof on an essential element of his case. *See Mary Ravage*, Case No. TBH-0102 (2011) (*citing Celotex v. Catrett*, 477 U.S. 317 (1986)).

As noted above, an essential element of Ms. Congable's case is proving, by a preponderance of the evidence, that she was the subject of "a retaliation" within the meaning of Part 708. If Ms. Congable cannot meet this threshold showing, then judgment cannot be awarded in her favor in this proceeding.

B. Whether the Complainant's Transfer Could Constitute a "Retaliation" Under Part 708

The Part 708 regulations define "retaliation" as "an action (including intimidation, threats, restraint, coercion or similar actions) taken by a contractor against an employee with respect to employment (*e.g.*, discharge, demotion, or other *negative action* with respect to the employee's compensation, terms, conditions or privileges of employment) as a result of the employee's disclosure of information, participation in proceedings, or refusal to participate in activities' protected under Part 708. 10 C.F.R. § 708.2 (emphasis added). It is well-established in OHA precedent that in order to constitute "a retaliation" within the ambit of Part 708, the allegedly retaliatory personnel action must negatively affect the terms and conditions of the complainant's employment. *See Colleen Monk*, Case No. TBA-0105 (2011) (transfer requested by complainant not a "negative action" within the meaning of Part 708, despite entailing slightly lower salary); *Vinod Chudgar*, Case No. TBH-0100 (2011) (transfer "did not have a negative effect on the terms and conditions of [his] employment because his new position retained his salary and grade level"); *Mark D. Siciliano*, Case No. TBH-0098 (2010) (contractor's failure to invite complainant to an event did not negatively affect the complainant's "compensation, terms, conditions or privileges of employment" and, therefore, was not a "negative action" within the meaning of Part 708).

In this case, the Complainant maintains that her transfer from her ASA position in CI to the ASA position in MA was retaliatory, basing her assertion primarily on the fact that the transfer was involuntary. It is undisputed, however, that Ms. Congable's transfer did not result in a loss in pay, benefits, or seniority. Ms. Congable also alleges that she has no meaningful job duties in her new position. Nonetheless, the record indicates that Ms. Congable's job duties in her new position are comparable to those in her old position.⁵ The fact that the Complainant clearly preferred her old position to her current one is of little import in determining whether her transfer constitutes a retaliation under Part 708. The relevant standard is an objective one—whether the personnel action negatively affected the terms and conditions of employment. The evidence in the record clearly indicates that it did not. Therefore, the transfer was not a "retaliation," as that

⁵ The performance reviews include a description of each of the Complainant's duties and her own input regarding each of the duties she accomplished during the review period. Among the job duties listed on Ms. Congable's 2009 performance review, the last complete year she worked as an ASA in CI, are: maintaining databases and websites, collecting data and maintaining files, preparing certain reports, and providing administrative support to CI by scheduling meetings, keeping meeting minutes, arranging travel, and composing, transcribing, and proofreading correspondence. Ms. Congable's current performance review, which covers the time she has worked as an ASA in MA, includes the following job duties: assisting in improving a "monthly recurring assessment evaluations process" used by the company; maintaining websites, collecting data, preparing reports, and assisting her supervisor with organizing monthly meetings by managing logistics, taking notes, and posting meeting materials.

term is defined in the Part 708 regulations. *See Vinod Chudgar*, Case No. TBH-0100 (2011). Accordingly, I find that Ms. Congable cannot satisfy her burden of proof on an element essential to her case and, as a result, is not entitled to the relief that she seeks.

III. CONCLUSION

As discussed above, I find that the Complainant's alleged retaliation, her involuntary transfer from an ASA position in Sandia's Corporate Investigations Office to a comparable ASA position in the company's Management Assurance and Reporting Department, does not constitute a 'retaliation' within the meaning of Part 708. Therefore, the Complainant cannot satisfy her burden of proof on an essential element of her case, entitling the Respondent to a judgment in its favor as a matter of law. Accordingly, I conclude that Sandia's Motion for Summary Judgment should be granted and Ms. Congable's Complaint of Retaliation should be dismissed.

It Is Therefore Ordered That:

(1) The Motion for Summary Judgment filed by Sandia Corporation on August 12, 2011, Case No. TBZ-0110, is hereby granted as set forth in paragraph (2) below.

(2) The Complaint of Retaliation filed by Greta Kathy Congable against Sandia Corporation on September 14, 2010, is hereby dismissed.

(3) This is an Initial Agency Decision, which shall become a Final Decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after the party's receipt of the Initial Agency Decision, in accordance with 10 C.F.R. § 708.32.

Diane DeMoura
Hearing Officer
Office of Hearings and Appeals

Date: September 8, 2011