May 5, 2011

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

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| Names of Petitioners: | Colleen Monk |
| Date of Filing: | February 10, 2011 |
| Case Number: | TBA-0105 |

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on January 20, 2009, involving a complaint of retaliation filed by Colleen Monk ("Monk," or "Complainant") against Washington TRU Solutions, VJ Technologies, and Mobile Characterization Services (hereinafter referred to individually as "WTS," "VJT," and "MCS," respectively, or collectively as "the Respondents"), under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In her complaint, Monk alleged that, during her employment with VJT, she engaged in protected activity and, as a consequence, suffered reprisals by the Respondents. In the IAD, an Office of Hearings and Appeals (OHA) Hearing Officer granted a Motion for Summary Judgment filed by the Respondents, and denied Monk's complaint. Monk appealed the decision. As set forth below, the Appeal is denied.

## I. BACKGROUND

### A. The DOE Contractor Employee Protection Program

The Department of Energy'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 or-leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they "reasonably and in good faith" believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. 10 C.F.R. § 708.5 (a). Thus, contractors found to have taken adverse personnel actions against an employee for such a disclosure or for seeking relief in a "whistleblower" proceeding [a "protected activity"] will be directed by the DOE to provide relief to the complainant. See 10 C.F.R. § 708.2 (definition of retaliation).

The DOE Contractor Employee Protection Program regulations set forth at 10 C.F.R. Part 708 establish administrative procedures for the processing of complaints. Under these regulations, review of an IAD, as requested by Monk, is performed by the Director of OHA. 10 C.F.R. § 708.32.

### B. History of the Complaint Proceeding

For purposes of review, I set forth the pertinent facts as averred in the Report of Investigation (ROI) and in the subsequent IAD.[1] WTS is the Management and Operations contractor for the DOE's Waste Isolation Pilot Plant (WIPP) in Carlsbad, New Mexico. The function of the WIPP is to safely store radioactive waste collected from various defense-related facilities around the United States. One of the departments within WTS is the Central Characterization Project (CCP).

It is the responsibility of the CCP to provide on-site analysis of the radioactive wastes, which are usually contained in 55-gallon drums, to determine their composition and to ensure that no prohibited items are included in the drums for shipment to the WIPP. Drums shipped to WIPP are subject to strict controls regarding their content, and specifically regarding the amount of liquid wastes they contain. This analysis, called "characterization," is sometimes performed by subcontractors. MCS is one such subcontractor, providing Real Time Radiography (RTR) and Non-Destructive Assay services for WTS. RTR, which is the only characterization procedure that is relevant to this proceeding, essentially consists of X-raying the 55-gallon drums and analyzing their contents.

Monk was hired by VJT, an MCS subcontractor, in September 2001. The Complainant received her qualifications and became an RTR Operator in January 2006. The Complainant alleges that, during the period from 2007 to 2009, WTS wanted all operators to also act as "spotters" for the forklifts used to move the 55-gallon drums of radioactive waste. However, Monk refused to act as a "spotter" because of a LANL rule that required forklift "spotters" to be qualified forklift operators. The Complainant had no such qualification. She alleges that WTS management was "not happy with her over this refusal." *See* Addendum to Complaint at 2. Monk alleged that her action was protected under Part 708 as a refusal to participate in an activity that caused her to have a reasonable fear of serious injury to herself or to other employees. *See* 10 C.F.R. § 708.5(c)(2).

Beginning in January 2009, the Complainant began experiencing constant pain and fatigue. She was subsequently diagnosed as suffering from Fibromyalgia. She informed her supervisor that she was taking pain medication and that she could not take her medication while working in the field (as an RTR Operator). Monk alleges that, during that same time, she made protected disclosures, primarily regarding issues related to safety at LANL.

In March 2009, she informed her supervisor of her concern that employees who were not forklift-qualified were being required to act as "spotters." *Id.* The Complainant also alleges that in the same month, she approached a Site Project Manager at LANL with her concerns about the use of an Excel spreadsheet to calculate the amount of liquid in the drums of radioactive waste. According to the Complainant, the Manager had determined that the RTR Operators' rejection

[1] The events leading to the filing of Monk's complaint are fully set forth in the IAD. *See Colleen Monk*, Case No. TBH-0105 (2011). 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.

rate for the drums was too high, and asked that the Operators use the spreadsheet. Specifically, the spreadsheet would calculate the amount of liquid in a drum after the Operator entered the physical measurements of the liquid observed inside the drum. Monk and other RTR Operators believed that the spreadsheet would underestimate the amount of liquid in the drums. The Complainant states that she told the Site Project Manager of her concerns in this area during February and March 2009, and that the Manager informed her that she and other RTR Operators would have to use the spreadsheets or he would find other RTR Operators who would.

The Complainant's final alleged protected disclosure concerns a March 2009 incident during which a technician improperly performed maintenance on an energized RTR generator. Monk stated that she informed VJT and WTS management of this unsafe situation, and unsuccessfully tried to stop the technician herself, but was told by one of the VJT employees that she was "overstepping her bounds." *See* Addendum to Complaint at 13.

In August 2009, Monk, for reasons that are discussed in more detail below, requested that she be moved to another position. *Id.* at 8; *See* OHA Investigator's Record of Telephonic Interview with Steve Halliwell, Head of Nuclear Division, VJT, at 2 (Halliwell Interview) (stating the Halliwell met with Monk on August 12th or 13th and she expressed to him that she was looking for office work); OHA Investigator's Record of Telephonic Interview with Karen Ventura, HR Director, VJT, at 2.

In October 2009, because of concerns on the part of WTS and VJT management that RTR Operators were not following a consistent procedure for determining the amount of liquid in drums of radioactive waste, WTS revoked the qualifications of all RTR Operators at LANL. In November 2009, WTS management informed the Operators that they would be trained on the use of the spreadsheet and would be tested on their knowledge in order to be re-qualified. Six Operators took the test, and two of the six passed. These two were placed on the List of Qualified Individuals (LOQI), and were subsequently re-qualified as RTRs. The Complainant also passed the test, but she was not placed on the LOQI. In December 2009, Monk was moved to an administrative position with MCS. As a result of this reassignment, the Complainant's pay was reduced by about $2.00 per hour.

On January 20, 2010, Monk filed a Part 708 complaint with the DOE's Carlsbad Field Office, which referred the complaint to OHA for an investigation and hearing. The Carlsbad Field Office forwarded the complaint to OHA and the OHA Director appointed an Investigator, who issued a Report of Investigation (ROI) on August 25, 2010. 10 C.F.R. §§ 708.22-23. In the ROI, the Investigator concluded that the only alleged action of Monk that might have been protected under Part 708 was her disclosure concerning the technician's unauthorized work on an energized piece of equipment. ROI at 7; *see* 10 C.F.R. § 708.5(a)(2).

Regarding the alleged retaliations, the Investigator found that, while Monk alleged she had been subjected to a hostile work environment, the "mere assertion of a hostile work environment does not rise to the level of retaliation." ROI at 8 n.11. The Investigator also found there to be some question as to whether Monk's transfer from her position as an RTR Operator to an administrative position, with the accompanying reduction in pay, rose to the level of a retaliation under Part 708, due to the circumstances surrounding the reassignment. *Id.* at 7-8. Assuming

that it did, the Investigator stated that the Complainant might be able to show that her alleged protected disclosure was a contributing factor to this action. *Id.* at 8. However, the Investigator concluded that, in all likelihood, the Respondents would be able to show, by clear and convincing evidence, that they would have taken the same actions in the absence of any protected disclosure. *Id.* at 8-10.

On August 26, 2010, the OHA Director appointed a Hearing Officer, who requested that the parties submit briefs focusing on the findings and conclusions in the ROI with which they disagreed, and the reasons for their disagreement. The parties submitted briefs and replies setting forth their positions concerning the issues raised in the ROI. Among the briefs submitted was Respondent VJT's September 30, 2010, "Brief in Support of Summary Judgment" joined in by Respondents WTC and MCS.

### C. The Initial Agency Decision (IAD)

In the IAD, the Hearing Officer noted that, while the Federal Rules of Civil Procedure do not govern a Part 708 proceeding, Rule 56 has been used as a guide in the evaluation of Motions for Summary Judgment. That rule provides that such a motion shall be granted "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." Fed. R. Civ. P. 56(c).

The Hearing Officer discussed the burdens of the parties under Part 708, that the complainant must establish "by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29. If the complainant meets this burden of proof, "the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal." *Id.* The Hearing Officer found that summary judgment in favor of the Respondents would be appropriate if there are no genuine issues as to any material fact and the Respondents are entitled to a judgment as a matter of law on *any of these elements*.

Thus, the Hearing Officer did not determine whether the Complainant engaged in activity protected under Part 708 or whether, if she had, such activity was a contributing factor to an act of retaliation by the Respondents. Neither did the Hearing Officer rule on whether the transfer of Monk to an administrative position could be considered as retaliation as defined in section 708.2, though he expressed "serious doubts" as to whether, under the circumstances, it could. IAD at 8. Rather, the Hearing Officer concluded that, *even if* the Complainant could meet her burden as set forth in section 708.29, "as a matter of law, . . . the Respondents would have taken the same actions in the absence of any protected activity on the part of the Complainant." *Id.*

In reaching his conclusion, the Hearing Officer considered factors that have been applied by the U.S. Court of Appeals for the Federal Circuit in cases interpreting the federal Whistleblower Protection Act (WPA), upon which Part 708 is modeled. The court has identified several factors that may be considered in determining whether an employer has shown that it would have taken

an alleged act of retaliation against a whistleblower in the absence of the whistleblower's protected conduct. Those factors include "(1) the strength of the [employer's] reason for the personnel action excluding the whistleblowing, (2) the strength of any motive to retaliate for the whistleblowing, and (3) any evidence of similar action against similarly situated employees for the non-whistleblowing aspect alone." *Kalil v. Dep't of Agriculture*, 479 F.3d 821, 824 (Fed. Cir. 2007) (*citing Greenspan v. Dep't of Veterans Affairs*, 464 F.3d 1297, 1303 (Fed. Cir. 2006)). Because the showing that must be made by an employer is virtually identical under the WPA and Part 708, prior OHA decisions have applied the factors set forth in *Kalil*. 5 U.S.C. § 1214(b)(4)(b)(ii); 10 C.F.R. § 708.29; *see, e.g., Dean P. Dennis*, Case No. TBH-0072 (2009), *aff'd* Case No. TBA-0072 (2009); *David L. Moses*, Case No. TBH-0066 (2008), *aff'd* Case No. TBA-0066 (2008).

First, the Hearing Officer found that the Respondents' reasons for transferring the Complainant to an administrative position were "exceptionally strong," including the undisputed fact, noted above, that she had requested the transfer. IAD at 7. In addition, the Hearing Officer cited evidence that her employer was concerned about her Fibromyalgia and the pain medication that she would sometimes have to take, "including hydrocodone, that, at least on occasion, rendered her unfit for work in the field." *Id.* The Hearing Officer also found evidence of management concerns "about 'liability issues' that could result from allowing the Complainant to continue to work as an RTR operator." *Id.*

Regarding the second *Kalil* factor, the Hearing Officer found that "the strength of the Respondents' motive to retaliate appears to have been minimal." *Id.* He noted that Monk's disclosure about the technician's unauthorized work on an energized piece of equipment, the only action alleged by Monk that the OHA Investigator found might have been protected under Part 708, did not directly implicate the Respondents' employees who played a role in the Complainant's reassignment. Further, the Hearing Officer agreed with the OHA Investigator that this incident was appropriately investigated and adequately addressed by the Respondent's in a "Root Cause Analysis Report." *Id.*

Finally, the Hearing Officer found evidence that the Respondents took similar actions against a similarly-situated employee for reasons that had nothing to do with "whistleblowing." The IAD cited the record of the OHA Investigator's interview with Steve Halliwell, VJT's Head of Nuclear Division, as indicating that another RTR operator requested reassignment because of the superior benefits that he would be eligible for in his new position, *id.* at 8 (citing Halliwell Interview at 2), and that, like Monk, his name was taken off the LOQI and not placed back on the List because he was being reassigned.

**D. The Appeal**

In her Appeal, Monk does not take issue with the analysis of the Hearing Officer in his consideration of the second and third *Kalil* factors. Instead, she focuses on the reasons cited in the IAD for the Respondents' decision to transfer her to an administrative position. The Complainant disputes that VJT had a "genuine concern to limit liability and keep me out of the field," and contends that she "was able to perform my job functions and keep my medication to a minimum." Appeal at 2.

## II. ANALYSIS

Because this case involves an Appeal of a grant of summary judgment, I review the Hearing Officer's decision *de novo*, applying the appropriate standard of law. *See Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 465 n.10 (1992) ("on summary judgment we may examine the record de novo without relying on the lower courts' understanding"); *Maydak v. United States*, 630 F.3d 166, 174 ("We review the grant of summary judgment *de novo*, applying the same standard of review as that of the District Court."). As noted by the Hearing Officer in the IAD, prior decisions of our office have considered motions for summary judgment under the standard used by the federal courts in applying Rule 56 of the Federal Rules of Civil Procedure. *See, e.g., Mary Ravage*, Case No. TBA-0102 (2011).

Applying this standard, *de novo*, to the facts before me, I find that the Hearing Officer appropriately granted the summary judgment motion. The Complainant notes what are, arguably, genuine disputes in the record as to facts that the Hearing Officer relied upon in the IAD in reaching his conclusion. *See Scott v. Harris*, 550 U.S. 372, 380 (2007) ("At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party if there is a 'genuine' dispute as to those facts."). [2] However, as explained below, even viewing those facts in the light most favorable to the Complainant,[3] there is ample basis for finding clear and convincing evidence that VJT would have transferred Monk to an administrative position in the absence of any protected activity. As such, the Respondents were entitled to judgment as a matter of law, the basis upon which a summary judgment motion must be granted.

In addition to the undisputed findings in the IAD under the second and third *Kalil* factors, there is still a solid basis for the Hearing Officer's finding on the first factor, the strength of VJT's reason for transferring Monk to an administrative position. There is no dispute that Monk requested the transfer, and I agree with the Hearing Officer that this stands as an "exceptionally strong" reason for VJT's action. In her Appeal, Monk contends that her "request was made solely out of my fear of being let go by VJT. At the time of my request I had been through several months of a hostile work environment, . . ." Appeal at 2. However, as explained below, the Hearing Officer addressed these issues in the IAD.

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[2] In her Appeal, the Complainant asks why, if she in fact posed a liability concern for VJT, did the company not keep her working as an RTR Operator, and allow her to do office work during the time she could not work in the field. Monk states, as an "undisputed fact," that "there have been and continue to be RTR personnel, both VJT and WTS employees, who are qualified RTR Operators/ITRs at LANL who cannot work in the field for medical, training deficiencies, or logistical issues." Appeal at 2. However, this issue, disputed or not, is not one of "material" fact. In other words, the Hearing Officer's decision did not turn on what actions VJT *could have taken*, but rather on the action that VJT *did take*, and whether it would have taken the same action in the absence of any protected activity by the Complainant. As such, the issue is not relevant to the disposition of the Motion for Summary Judgment.

[3] Monk also states in the Appeal her opinion that the investigation of her complaint was not "adequate," that "[s]everal key personnel were not interviewed," and that a hearing would allow her to "have witness validation of my allegations." Appeal at 3. However, because I agree with the Hearing Officer's conclusions, even when viewing any facts as to which there is a genuine dispute in the light most favorable to the Complainant, validation of the individual's allegations as to any such facts would not alter the outcome of this case. Thus, the Complainant's opinion notwithstanding, the Respondents are entitled to summary judgment as a matter of law.

Regarding the Complainant's allegation of a hostile work environment, the Hearing Officer found that Monk "knew, or should have known, of any hostile work environment more than 90 days prior to the date on which she filed her Part 708 complaint. Her allegation regarding a hostile work environment is therefore time-barred." IAD at 5 n.1 (citing 10 C.F.R. § 708.14(a)). Though Monk's complaint does not specify when she made her request for a transfer, the OHA Investigator cited her interview with a VJT management official that Monk approached him regarding her request on August 12 or 13, 2009. ROI at 9 (citing Halliwell Interview). In her response to the ROI, Monk does not take issue with this account, nor does she specify a later date on which she made her request.

The critical point here is that, by her own admission, the Complainant was aware of what she claims were already "several months of a hostile work environment" by the time she requested a transfer and, as the Hearing Officer correctly found, she did not file her January 20, 2010, complaint "by the 90th day after the date [she] knew, or reasonably should have known, of the alleged retaliation." 10 C.F.R. § 708.14(a).

As for her expressed fear of being fired motivating her request for a transfer, the Hearing Officer found that Monk

> appears to be claiming that she feared termination because of a potential inability to be available for duty as an RTR operator to the extent demanded by her employer, and not because of retaliation for engaging in protected activity. Termination solely because of an inability to be available for duty on the schedule set by the employer is not a violation of the Part 708 regulations.

IAD at 7. More importantly, even if the Complainant believed in August 2009 that she faced a threat of termination in retaliation for conduct protected under Part 708, her complaint, filed on January 20, 2010, would have been untimely, just as it was as to any claim of hostile work environment. In short, to the extent Monk argues that her request for a transfer was a result of retaliation she perceived as of August 2009, her complaint as to that retaliation is clearly time-barred. If, on the other hand, the transfer is claimed to be a discrete act of retaliation by VJT, there is clear and convincing evidence that VJT would have taken the same action in the absence of any protected activity, even viewing the facts in the record in a light most favorable to the Complainant.

In addition, the burden of the Respondents aside, I share the "serious doubts" of the Hearing Officer as to whether the transfer of the Complainant could even be considered as "retaliation" under section 708.2, and this issue goes to whether the Complainant met *her* initial burden in this case. To meet the definition of "retaliation" under Part 708, an action must taken "against an employee," and the examples of actions given in the definition are described as "negative action[s] with respect to the employee's compensation, terms, conditions or privileges of employment." 10 C.F.R. § 708.2. First, the undisputed fact that Monk requested the transfer makes it extremely difficult for her to prove that the action was taken "against" her. And while the resulting reduction of pay, from $25.75 to $23.50 per hour, is clearly a "negative action," there is evidence in the record that Monk was well aware that the position being offered to her in

response to her request would pay less, and wanted the position nonetheless. Halliwell Interview at 2; Ventura Interview at 2. The Complainant does not dispute this, but chooses to focus on her alleged reasons for requesting the transfer: "I did not seek out a lower paying position because of my illness. I was afraid of losing my job." Complainant's Response to ROI at 3. Whatever her reasons, it is difficult to see how transferring Monk to a position *she sought* can be construed as an action taken "against" her.

## II. CONCLUSION

For the reasons set forth above, I conclude that the Hearing Officer correctly granted the Respondent's Motion for Summary Judgment and denied Monk's complaint, as there was clear and convincing evidence that VJT would have transferred the Complainant to an administrative position in the absence of any protected activity. Moreover, while the IAD stopped short of a definitive finding on whether Monk's transfer could be considered retaliation under section 708.2, the record, as a matter of law, would support a finding that the Complainant did not meet her burden of proving that the transfer is within the scope of the definition of retaliation under Part 708. Accordingly, I will deny the Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Colleen Monk from the Initial Agency Decision issued on January 20, 2011, is hereby denied.

(2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.35.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 5, 2011