May 7, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Order to Show Cause
Motion for Summary Judgment
Initial Agency Decision

Name of Cases:	Billy Joe Baptist
Dates of Filing:	December 19, 2008 February 18, 2009
Case Numbers:	TBH-0080 TBZ-0080

This decision will consider an Order to Show Cause that I issued on February 3, 2009, regarding a March 6, 2008, whistleblower complaint filed by Billy Joe Baptist (Baptist) under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708, against his employer, CH2M-WG Idaho, LLC (CWI). I will also consider in this decision as a Motion for Summary Judgment that CWI filed on February 18, 2009 regarding this complaint.

Pursuant to Part 708, an OHA attorney conducted an investigation of Baptist's whistleblower complaint and issued a Report of Investigation (Report) on December 19, 2008. The Report noted that Baptist filed his whistleblower complaint on March 6, 2008[1], but that five of the six alleged retaliations occurred on June 4, 2007. The investigator opined that these retaliations may be barred by the fact that Part 708 requires a complaint to be filed no later than the 90th day after the individual knows or reasonably should have known of the alleged retaliation. 10 C.F.R. § 708.14. In a conference call to the parties on February 3, 2009, I ordered counsel for Baptist to submit a brief showing cause why these retaliations are not barred from consideration pursuant to the 90-day deadline in 10 C.F.R. § 708.14. Subsequently, CWI moved for a summary judgment regarding the remaining retaliation alleged by Baptist in his complaint.

As discussed below, I find that the first five alleged retaliations are time-barred from consideration under 10 C.F.R. § 708.14. I also find that CWI is entitled to Summary Judgment in its favor regarding the remaining sixth alleged retaliation.

I. Background

[1] Baptist sent a complaint under 10 C.F.R. § 851 (DOE Worker Health and Safety Program) dated January 10, 2008, to Beth Sellers (Sellers) at the Department of Energy's Idaho Operation Office (DOE-ID) detailing various electrical safety complaints. In his letter he seeks to "invoke the whistleblower clause." *See* Tab A Report of Investigation Exhibits at 21. He later filed his Part 708 whistleblower complaint on March 6, 2008.

The Department of Energy established its Contractor Employee Protection Program to safeguard "public and employee health and safety; ensure compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste, and abuse" at DOE's Government-owned or -leased facilities. Criteria and Procedures for DOE Contractor Employee Protection Program, 64 Fed. Reg. 12862 (March 15, 1999) (interim final rule). 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 discrimination by a DOE contractor against its employee because the employee has engaged in certain protected activity, including when the employee has

> (a) Disclos[ed] to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your employer, or any higher tier contractor, information that you reasonably believe reveals—
>
> (1) A substantial violation of a law, rule, or regulation;
> (2) A substantial and specific danger to employees or to public health or safety; or
> (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority . . . .

10 C.F.R. § 708.5(a).

CWI is the management and operating contractor for the Idaho Cleanup Project[2] at the DOE's Idaho National Laboratory site. Baptist was hired in March 2004 as a temporary laborer at INL by Bechtel BWXT Idaho, LLC (BBWI). In May 2004, Baptist was promoted to Electrician 1st class and was given regular, full-time employment status in January 2005. In May 2005, Baptist was hired by CWI when it was awarded the prime contract to perform the ICP.

In response to a April 2005 memorandum issued by the Secretary of Energy directing all DOE facilities to improve electrical safety performance, CWI submitted its plan to improve electrical safety for ICP employees entitled *First 90-Days Safety Assurance Plan*. CWI also subsequently drafted and implemented an Electrical Safety Improvement Plan (ESIP), designated PLN-1971. The ESIP mandated that an Electrical Safety Committee (ESC) be formed for the ICP. Baptist was one of the employees who drafted the charter for the newly formed ESC and was appointed to serve on the ESC. The ESC was designed to be the company vehicle to monitor implementation of the ESIP. He was also selected to serve on two CWI boards, the Project Evaluation Board (PEB) and the Energy Facilities Contractor's Group (EFCOG), a committee to look at electrical safety issues complexwide.

To support the Secretary of Energy's emphasis on electrical safety, the DOE's Office of Environmental Management offered a $10,000 prize (the DOE-EM Challenge) to the site or project that demonstrated the most improved safety culture. CWI won the DOE-EM Challenge and Baptist was individually recognized for his efforts in winning the prize. Approximately two weeks after

[2] The Idaho Cleanup Project (ICP) is tasked with the environmental cleanup of the Idaho National Laboratory (INL) site.

CWI won the prize, Baptist alleges that the then-President of CWI, Alan Parker, designated him and another employee, James Watters, as Subject Matter Experts (SMEs) for electrical safety.[3]

In addition to his responsibilities on the ESC, Baptist alleges that he was responsible for conducting independent assessments regarding electrical safety. In 2006, an electrician for the Idaho Nuclear Technology and Engineering Center (INTEC) raised a safety concern regarding a particular electrical transformer and its related equipment, Transformer XRF-YDH-666 (INTEC Transformer).[4] Baptist alleges that he conducted several inspections of the INTEC Transformer and submitted several reports in the Issues Communication and Resolution Environment (ICARE) tracking system concerning safety issues in late 2006.[5]

The ICARE report at issue in this case, ICARE #102586 (the ICARE), was submitted by Baptist on May 2007. The ICARE detailed a number of alleged safety and regulatory violations concerning the INTEC Transformer. In late May 2007, Baptist alleges that he spoke to William Reed (Reed), Engineering Group Supervisor at CWI and Chairman of the ESC, concerning his findings regarding the INTEC Transformer. He informed Reed that he would report these safety concerns directly to DOE if CWI took no action to remedy the concerns by CWI. During their conversation, Reed informed Baptist that going directly to DOE with his concern would be "career limiting" and a "poor career move." Report at 6.

At a June 4, 2007, ESC meeting, Baptist expressed his safety concerns about the INTEC Transformer to CWI senior management. During the meeting Baptist discussed "lock and tag" [6] issues regarding the INTEC Transformer and questioned how CWI officials could calculate a Flash Hazard Analysis[7] for the transformer "without all of the proper information." Report at 4. Immediately after the meeting, Baptist alleges that he was removed from his supervisory duties, his duty as a SME for Electrical Safety and was removed from his positions on the PEB, the EFCOG Committee and the PLN-1971 Board. [8]

At the time of the June 2007 ESC meeting, Baptist had been experiencing pain in his hands which subsequently spread to his fingers and wrists, and took personal leave later on June 4, 2007. On

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[3] CWI disputes Baptist's account regarding his SME status.

[4] A transformer is a device than allows electrical energy to be transformed from one voltage to another. The INTEC Transformer was a temporary transformer that had been installed over 15 years prior to the dates of Baptist's inspections. Report at 6.

[5] The reports were submitted to CWI via the ICARE system. The ICARE system is a tool by which any employee can identify and report a safety concern. Report at 5 n.11.

[6] A "lock and tag" issue is an issue relating to the proper isolation of hazardous electrical energy.

[7] A Flash Hazard Analysis (or Flash Calculation) is a determination that mandates what type of electrical equipment is necessary for an electrician to wear to avoid injury while working on a particular electrical equipment.

[8] The nature of the PLN-1971 Board is not described in the Report of Investigation.

June 6, 2007, Baptist completed an application for short-term disability (STD) benefits with CWI's insurance carrier, Cigna Group Insurance (Cigna). Baptist would subsequently require surgery to correct his condition. Memorandum in Opposition to Motion for Summary Judgment, Case No. TBH-0080 (April 20, 2009) at 3-5. Sometime in June 2007, Baptist began to receive disability benefits from Cigna. In September 2007, Baptist was transferred to another ICP organization - INTEC Area Operations Electrical.

On October 15, 2007, Cigna contacted CWI to determine if Baptist could return to work. Baptist claims that his personal physician cleared him to go back to work with a "15-pound weight restriction." Report at 8. Such a weight restriction, he asserted, would prohibit him from performing his regular work tasks but would not have restricted him in performing the duties of a SME for Electrical Safety.

Debbie Anglin (Anglin), CWI Benefits Specialist, sent an E-mail to Baptist's then supervisor, Richard Tullock (Tullock), inquiring if he could accommodate Baptist in a light-duty position. Exhibit (Ex.) 2 Complainant's Opposition to Summary Judgment Exhibits (SJ Exhibits), Case No. TBH-0080 at 46. Later, Anglin reported to Cigna that CWI could not accommodate Baptist by placing him in a light-duty position.

In December 2007, Baptist was approved for long-term disability (LTD) benefits. Baptist submitted an Inactive Employee Status (IES) request (Request) form signed on December 19, 2007.[9] Anglin sent an E-mail to Jeffrey Hobbes (Hobbes), Baptist's then-manager, on January 10, 2008, asking if he would approve IES status for Baptist. Hobbes approved IES status for Baptist later that day. CWI subsequently placed Baptist on IES on January 7, 2008.[10] Baptist was transferred again in February 2008 to the Water/Steam organization at INTEC.

The Request states that an employee on IES who wishes to return to work must obtain a written release from their personal physician and then report to the nearest INL medical dispensary for an examination by a company-designated physician. Baptist received a letter from CWI on April 29, 2008, stating that if he wished to return to work he needed to obtain the medical clearances as specified in the Request. CWI asserts that it was never informed by Baptist that he sought to return to work. CWI also asserts that Baptist never contacted the INL medical dispensary to obtain a medical clearance to return to work. Subsequently, because Baptist had been on IES for one year, on June 10, 2008, CWI terminated his employment.

Baptist asserts that he made two protected disclosures regarding INTEC Transformer safety concern while employed at CWI: his submission of ICARE #102586 and his discussion of safety concerns at

[9] Baptist's IES status was deemed to start from the first day of his absence due to disability, June 5, 2007. *See* Motion Ex. H (January 23, 2008 E-mail); Report at 7 n.21.

[10] IES refers to the status of an employee who is on STD and LTD. CWI asserts that its consistent policy is that all employees on IES for one year who have not sought reinstatement or other employment with it are automatically terminated from employment. This policy was stated in the Request for Inactive Employee Status that Baptist received on January 14, 2008.

the June 4, 2007, ESC meeting. He alleges that he experienced six acts of retaliation caused by his two protected disclosures. Five of the retaliations occurred immediately after the June 4, 2007, ESC meeting: (1) Relief from Supervisory Duties; (2) Removal as a SME for Electrical Safety; (3) Removal from PEB; (4) Removal from EFCOG Committee; and (5) Removal from PLN-1971 Board. The sixth alleged retaliation was his termination by CWI on June 10, 2008. [11]

II. Analysis

As described above, in a conference call to the parties on February 3, 2009, I ordered counsel for Baptist to submit a brief showing cause why Retaliations Nos. 1-5 are not barred from consideration pursuant to the 90-day deadline in 10 C.F.R. § 708.14. Subsequently, on February 18, 2009, CWI filed a Motion for Summary Judgment asking that the remaining alleged retaliatory act, Baptist's termination on June 10, 2008 also be dismissed. Baptist filed responses to my show cause order and CWI's Motion on April 20, 2009. CWI filed a reply to Baptist's Summary Judgment response on April 27, 2009.

The Part 708 regulations do not include procedures and standards governing summary judgment motions. I note that the Federal Rules of Civil Procedure provide 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). While the Federal Rules do not govern this proceeding, Rule 56 has been used as a guide in the evaluation of Motions for Summary Judgment filed in a Part 708 proceeding. *See Edward J. Seawalt*, Case No. VBZ-0047 (August 20, 2000).[12] Prior cases of this office considering Motions for Summary Judgment instruct that such a motion should only be granted if it is supported by "clear and convincing" evidence. *Fluor Daniel Fernald*, Case No. VBZ-0005 (October 4, 1999) (motion to dismiss should only be granted where there are clear and convincing grounds for dismissal).

To prevail in a whistleblower complaint, a complainant has the burden of establishing by a preponderance of the evidence that he or she made a protected disclosure and that the disclosure was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. 10 C.F.R. § 708.29.[13] Once the employee has met this burden, 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.*

[11] In this decision, I will also refer to these alleged retaliations by retaliation number (Retaliation No.).

[12] Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996 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.

[13] For the purpose of deciding the Motion for Summary Judgment addressed in this Decision, I will assume that Baptist made protected disclosures and that he in fact had SME status. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) (court must consider all materials in the light most favorable to the party opposing the motion for summary judgment).

After considering the record before me, I find that Retaliation Nos. 1-5 are time-barred. Additionally, I find clear and convincing evidence that the contractor would have terminated Baptist from his position notwithstanding his disclosures. Accordingly, I will grant the motion for summary judgment.

A. Retaliations Nos. 1-5 – Removal from Supervisory Duties, Subject Matter Expert Status, Project Evaluation Board, EFCOG Committee and PLN-1971 Board

The Report of Investigation recorded that Baptist alleged that after June 4, 2007, ESC meeting, he was removed from all supervisory duties, as a SME for Electrical Safety, the PEB, the EFCOG Committee and the PLN-1971 Board (Retaliations Nos. 1-5). Baptist filed his whistleblower complaint on March 6, 2008.

Section 708.14 of Part 708 states in relevant part "[Y]ou must file your complaint by the 90th day after the date you knew, or reasonably should have known, of the alleged retaliation." 10 C.F.R. § 708.14(a). In the present case, Baptist did not file a complaint until some 11 months after he claimed that he had suffered Retaliation Nos. 1-5.

In his response, Baptist makes three arguments. First, Baptist argues that officials at the DOE field Office at Idaho Falls (DOE-ID) accepted his whistleblower complaint and that it now should not be deemed untimely. In support of this argument, Baptist asserts that the DOE-ID never informed him that his complaint was untimely or otherwise defective, despite having a series of contacts from September 2007 until the filing of his complaint on January 10, 2008. With regard to his position that DOE-ID erred in its processing of his whistleblower case, Baptist draws our attention to *Charles Evans*, Case No. TBU-0026 (June 2, 2004) (*Evans*) which he believes stands for the proposition that whistleblower complaints should not be dismissed where a field office gives erroneous information about Part 708 procedures.

Baptist's second argument is that when he contacted Anglin in June 2007 and told her of the retaliation he experienced, he expected that CWI's HR department (CWI-HR) would investigate his whistleblower complaint. Because CWI-HR did nothing in regard to this alleged complaint, Baptist was not aware that he was being retaliated against and the failure to investigate constitutes "a violation" that is renewed with each failure to investigate. Response to Order to Show Cause, Case No. TBH-0080 (April 20, 2009) at 6. (Response). Once he discovered that CWI-HR was not going to take any action on his complaint, Baptist promptly filed his Part 708 complaint with DOE-ID.

Lastly, Baptist argues that Retaliation Nos. 1-5 are a part of a "continuing violation" by CWI of Part 708. Specifically, Baptist asserts that the retaliations are part of a "hostile work environment claim." Response at 6. In this regard, Baptist points to *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116-17 (2002) (*Morgan*) for the proposition that, as long as one of the retaliations occurred within the 90-day deadline, all of the acts may be considered for determining liability. Response at 6-7. In the present case, Baptist argues that Retaliations No. 1-5 were a "pattern of hostile acts that culminated in the on-going failure of HR to investigate his [whistleblower] claims or accommodate his restrictions." Further, Baptist asserts that even if Retaliations Nos. 1-5 are not actionable in

themselves, they still can form a basis of a hostile work environment claim that can be considered as timely filed.

After considering each of these arguments, I find that Baptist has failed to show good cause why Retaliations Nos. 1-5 should not be time-barred.

With regard to Baptist's first argument, the fact that a field office has accepted a complaint for processing does not overcome timeliness requirements. In *Donald E. Searle*, Case No. TBU-0065 (May 16, 2007) (*Searle*), the field office accepted the whistleblower's complaint for processing. Nonetheless, OHA later dismissed the complaint for the failure of the whistleblower to comply with the 90-day deadline. Nor does Baptist's assertion regarding the fact that he was not apprised of any potential timeliness issues change the result. OHA case law has consistently held that complainants are presumed to understand their rights and obligations under applicable DOE regulations notwithstanding claims that they did not have an actual knowledge of the regulations. *Searle* at 3; *Carolyn C. Roberts*, TBU-0040 (January 26, 2006) at 3. Baptist's invocation of *Evans* is unavailing. Unlike the facts in *Evans*, in which a DOE field office provided a whistleblower inaccurate information which led to the whistleblower missing a deadline, there has been no allegation that DOE-ID affirmatively provided Baptist with any incorrect information concerning his complaint.

Baptist's second argument is also unconvincing. Baptist's new allegation is that he suffered retaliation due to CWI-HR's failure to investigate his complaint about retaliation. Baptist raises this allegation now, for the first time in this proceeding. Given the fact that Baptist did not complain of this retaliation at any time during the Part 708 process until responding to the Order to Show Cause, I find that such an allegation can not now be used to excuse non-compliance with the 90-day deadline. Just as importantly, I find that Baptist could not have had any reasonable expectation that his conversation with Anglin, a CWI-HR Benefits Specialist, would trigger a formal (or informal) whistleblower investigation. Baptist avers in a sworn declaration accompanying his response that after the June 4, 2007, meeting, he called Anglin and told her that he had been relieved of his duties and subjected to a hostile work environment and also informed her as to his need for "time off" to get surgery for his hand and arm. Exhibit 1, Baptist Opposition for Summary Judgment (Baptist Affidavit) at ¶ 4. Baptist goes on to describe Anglin's response "so you want to take STD [Short Term Disability]. I can help you with that." Baptist Affidavit at ¶ 4. According to Baptist, Anglin went on to explain about STD and inform him that the STD insurance company was Cigna, and that she would be responsible for providing him the forms needed to file for STD. She also stated that she would help him through the "benefits" process. Baptist Affidavit at ¶ 5. I see no possible way that Baptist could have reasonably interpreted Anglin's response as promising that CWI-HR would conduct an investigation of his whistleblower allegations. Baptist's claim that he was not aware of this retaliation until he sent his Part 851 complaint to DOE-ID on January 10, 2008. *See* note 1 *supra*. Especially telling is that there is no mention of this particular "retaliation" in his complaint. In sum, the fact that Baptist may have verbally informed Anglin of his belief that he had been retaliated against is not good cause to waive the 90-day deadline.

Finally, I do not find that Retaliations Nos. 1-5 can be found to be a part of a hostile work

environment claim.[14] The Supreme Court, in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (*Vinson*), defined a hostile workplace environment for Title VII purposes as one where the workplace is sufficiently permeated with harassment that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. *Vinson*, 477 U.S. at 67. Subsequently, the Supreme Court, in *Harris v. Forklift Systems, Inc*., 510 U.S. 17 (1993) (*Harris)* held that the determination as to whether a hostile workplace exists must be made by examining all of the circumstances of a particular case. *Harris*, 510 U.S. at 23. The court went on to give a non-exhaustive list as of factors that could establish a hostile workplace: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Harris*, 510 U.S. at 23. In *Morgan*, the case to which Baptist directs my attention, the U.S. Supreme Court affirmed a Court of Appeals finding that evidence of similar types of negative employment actions, the frequency the actions, and evidence that the actions were perpetrated by the same managers, were sufficient to establish a claim of a hostile work environment. *Morgan*, 536 U.S. at 120-21.

As discussed above, I do not find CWI-HR's failure to investigate to be a retaliation at all. Even if I did, I can not find that Retaliations Nos. 1-5 and the failure to investigate to be related such that a pattern of retaliation exists. Retaliations Nos. 1-5 are discrete acts of retaliation not related to the alleged retaliation for failure to investigate. In the present case, Retaliations Nos. 1-5 are of a totally different type of retaliation from that of the alleged failure to investigate and involved different supervisors and employees. Further, Baptist was on medical leave and not working at his job when the alleged failure to investigate his allegations of retaliation occurred. None of the alleged conduct was physically threatening or humiliating or of a severe or pervasive nature that would raise of hostile work environment claim. Nor can I find any other factual circumstance in this case that would support a finding of a hostile workplace environment. Thus, Baptist has failed to demonstrate an actionable hostile workplace environment claim that would save Retaliations No. 1-5 from dismissal.

B. Retaliation No. 6 - Termination from CWI

In its Motion, CWI argues that there are no disputed material facts concerning Baptist's complaint and that the facts demonstrate as a matter of law that Baptist's protected disclosures could not have been a contributing factor regarding his termination. This argument is based upon three separate grounds. First, CWI argues that Anglin, the CWI official that terminated Baptist, had no actual or constructive knowledge of Baptist's protected disclosures and thus his disclosures could not have been a contributing factor in Anglin's decision to terminate Baptist. Motion for Summary Judgment (Motion) at 8. Second, CWI argues that given the period of time that elapsed from the date of his

[14] Hostile work environment claims, while historically originating in Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.*, litigation, have been found to be a cognizable action under Part 708. *Cf. Richard R. Sena*, Case No. VBH-0042 (February 24, 2000) (Part 708 whistleblower complaint alleging constructive discharge by virtue of a hostile work environment).

disclosures, June 2007, to the date of his termination, June 2008, there is no evidence, nor can an inference be made, via temporal proximity, that the protected disclosure was a contributing factor in his termination. Motion at 11. Lastly, CWI argues that Baptist was terminated for failure to comply with the requirements for reinstatement from IES and that it has shown by clear and convincing evidence that it would have terminated Baptist notwithstanding his disclosures. Motion at 9.

1. Anglin's Actual or Constructive Knowledge of Baptist's Protected Conduct

With its Motion, CWI has submitted an affidavit from Debbie Anglin (Anglin), an ICP Benefits Specialist. In the affidavit, Anglin affirms that as the Benefits Specialist for CWI, she supervised and reviewed Baptist's medical disability leave comprising both short- and long-term disability benefits and was responsible for making the decision to terminate his employment because of a failure to comply with the requirements for reinstatement from IES. CWI Motion for Summary Judgment Attachment E (Anglin Affidavit) at ¶¶ 6, 12. In her affidavit, Anglin states that in performing her job responsibilities, she had no contact with Baptist's former supervisors, managers or co-workers regarding his job performance. Anglin Affidavit at ¶ 8. Further, she states that she did not become aware of Baptist's safety concerns and Part 708 complaint until after his termination in June 2008. Anglin Affidavit at ¶¶ 14, 16.

In his response, Baptist has averred in an affidavit that, in fact, he told Anglin of the retaliation he experienced when he contacted her in June 2007. He also points out that several E-mails indicate that Anglin had contact with Baptist's manager and supervisor. *See* SJ Exhibits 9, 10 and 20. Specifically, Anglin had involvement in soliciting CWI's response to a Cigna inquiry that it had no light-duty jobs available for accommodating Baptist. Baptist points out that Anglin, in a deposition, stated that with regard to the Cigna inquiry, she had spoken to Tullock and he informed her that Baptist's organization could not accommodate him with a light-duty position. SJ Exhibit 2 at 46.

Baptist also believes that several E-mails concerning Baptist's request for IES also provide credibility issues with regard to Anglin. These E-mails are "suspicious" because, on an E-mail dated January 9, 2008, to Richard Tullock reminding him that unless Baptist's IES status was approved HR would be forced to place him on time without pay status, there was a handwritten notation "Verbal Jeff Hobbes 1-10-09." SJ Exhibit 17. The date of the notation is one year in advance of the date of the E-mail. Additionally, in an E-mail dated January 10, 2008, from Hobbes approving IES status, there is no mention of the supposed conversation referenced in the prior "Verbal" notation on the E-mail. SJ Exhibit 20.

2. Baptist's Protected Disclosure's Temporal Proximity To His Termination

In its Motion, CWI also argues that the lengthy period of time, 12 months, between Baptist's protected disclosures and his termination does not allow any inference that the termination was a factor in the decision to terminate Baptist. This is especially true since an independent, intervening event, Baptist's failure to establish medical fitness to return to work by the end of his IES period, severs any conceivable connection between the protected disclosures and the termination.

Baptist attempts to rebut CWI's arguments by asserting that there was an "uninterrupted and contiguous" "chain of events" between Baptist's disclosure and his termination. These events are described below:

> 1. On June 4, 2007, when Baptist took medical leave, he had been in the preceding 48 hours removed from his inspection duties, but as of the day he was given medical leave he had not been reassigned to a different set of duties;
> 2. After his surgery in July 2007 and an alleged September 10th end of his family leave, Baptist was assigned to a new unit, but not given any description of what his duties would be;
> 3. In October 2007 he inquired of CWI, via Cigna, about accommodation with job duties not requiring significant lifting but Cigna did not inform him until December or early January that CWI did not offer any such accommodation. On January 7, 2008, his status was changed from STD to LTD/IES;
> 4.On January 10, 2008, Baptist sent his Part 851 complaint to Sellers concerning electrical safety issues and within weeks he was reassigned to another unit with unspecified job duties;
> 5. On March 6, 2008, Baptist filed his whistleblower complaint with DOE-ID;
> 6. From January 2008 through his termination in June 2008, neither Anglin or anyone at else at CWI offered Baptist any assistance in understanding or exercising the policy options for an employee to remain at CWI after the expiration of IES.

Given this chain of events, Baptist argues that a *prima facie* nexus exists between his protected disclosure and his termination in 2008.

3. CWI Would Have Terminated Baptist Notwithstanding His Disclosures

CWI has submitted a copy of its policy regarding IES employees. It states that an employee may be on IES status for a maximum of 12 months and that prior to that period running out must either (1) obtain a medical release to return to his or her former position; (2) obtain a medical release to return to a part-time position with permission of his or her manager; (3) terminate his or her employment by taking an Administrative Leave of Absence; or (4) otherwise terminate his or her employment. Attachment D to Motion at 2; Anglin Affidavit at ¶ 4. CWI has also provided a copy of the IES request form signed by Baptist which explains the requirements for reinstatement. Attachment F to Motion.

Anglin, in her affidavit, states that she was the sole person who reviewed and managed all CWI employees on IES. She managed Baptist's STD and LTD benefits and his IES and was the sole person responsible for managing his IES. Anglin Affidavit at ¶ 6. In this role, she sent Baptist a letter dated November 7, 2007, providing him with a copy of a "Request for Inactive Status" form and explaining the IES process for reinstatement of employment. She received the completed form on January 7, 2008, and processed his request on that same day. Anglin Affidavit at ¶ 6.

In an April 28, 2008 letter, she again explained the procedures required for an employee on IES to reinstate his employment with CWI. Anglin Affidavit at ¶ 8. The CWI policy required that an employee provide the firm with a medical release before his or her IES status expired. She subsequently received a receipt indicating that Baptist had received the letter on April 29, 2008. [15] She goes on to affirm in her affidavit that at no time did she receive a medical release from Baptist authorizing him to return to work. Nor did Baptist obtain an evaluation from the CWI medical dispensary to obtain reinstatement. Anglin Affidavit at ¶ 10. Baptist did not communicate to Anglin any interest in returning to work nor did Baptist seek an Administrative Leave of Absence. Anglin also avers that in several telephone conversations with Baptist, with one such conversation occurring as early as May 2007, he indicated his belief that he would not be returning to work. Because Baptist had not taken any of the required actions to be reinstated from work before his IES status expired on June 5, 2008, Anglin made the decision to process Baptist's termination, which became effective on June 10, 2008. Anglin Affidavit at ¶ 11. Additionally, Anglin stated that the policy of terminating employees whose IES expired had been in effect for at least 10 years before she took this action. She is aware of 10 employees whose IES status expired, and all were terminated. Anglin Affidavit at ¶ 5.

In his response, Baptist does not specifically provide an argument as to CWI's assertion that it would have terminated him notwithstanding his disclosures for failure to comply with company policy regarding IES. Baptist does argue that Anglin's handling of his STD request did not comport with the written policy since Anglin, and not Baptist, went to his supervisors to apply for Baptist's STD. Memorandum in Opposition to Summary Judgment Motion at 8. Baptist also notes that Anglin never discussed the options of returning to work, accommodation or administrative leave with him before terminating him. Memorandum in Opposition to Summary Judgment Motion at 9.

4. Analysis

My review of the evidence and submissions regarding the Motion for Summary Judgment leads me to conclude that the Motion should be granted. As discussed earlier, a Motion for Summary Judgment should only be granted where the available pleadings and affidavits 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. With regard to CWI's first two arguments, there is sufficient evidence to conclude that there may be disputable factual issues concerning whether Baptist's disclosures were a contributing factor in his subsequent termination. As to CWI's assertion that Anglin did not have any knowledge of Baptist's safety concerns or his belief that he had been retaliated against prior to his termination, I find that there is a potential issue of fact. In his affidavit, Baptist states that when he contacted CWI-HR in June 2007 that he told a CWI-HR representative and Ms. Anglin about the retaliation he was experiencing. Baptist Affidavit at ¶ 4. This presents a factual issue as to whether Anglin had actual knowledge of Baptist's protected disclosures. In light of this evidence, Summary Judgment on this ground would be inappropriate.

CWI also asserts that there could be no causal nexus between Baptist's protected disclosures and his termination since they occurred some 12 months apart.[16] While there does not appear to be any

[15] With its Motion, CWI has provided copies of the letters and requests for IES referenced in Anglin's Deposition.
[16] OHA has held that a period as long as 12 months between a disclosure and an alleged retaliation may be sufficient to

direct connection between the protected disclosure and the "chain of events" suggested by Baptist, these events might create a disputable issue as to whether that CWI management's attention was directed to Baptist and his disclosures between the date of his protected disclosures on June 4, 2007 and his termination on June 10, 2008.

However, with regard to CWI's third argument, I find that there is no issue of material fact concerning CWI's claim that it would have terminated Baptist notwithstanding his protected disclosure. The evidence before me clearly indicates that CWI would have terminated Baptist for failure to follow the procedures for reinstatement from IES. Since CWI has met its burden under 10 C.F.R. § 708.29, the issue of whether Baptist's disclosures were a contributing factor in his dismissal is moot. Consequently I find as a matter of law that CWI, as the contractor, has met it burden with clear and convincing evidence under Part 708 and Summary Judgment should be granted.

As mentioned above with regard to CWI's third argument, my review of the evidence and submissions regarding the Motion for Summary Judgment leads me to conclude that there is no issue of material fact regarding the defense under 10 C.F.R. § 708.29 offered by CWI against Baptist's Part 708 complaint, i.e., that it would have dismissed Baptist notwithstanding his disclosure. Baptist does not dispute that he requested STD status in June 2007. Baptist then submitted a IES request (Request) form signed on December 19, 2007. The Request stated that an employee on IES who wishes to return to work must obtain a written release from his personal physician and then report to the nearest INL medical dispensary for an examination by a company-designated physician. Baptist received a letter from CWI on April 29, 2008, again informing him that if he wished to return to work, he needed to obtain the medical clearances as specified in the Request. CWI has provided copies of these documents for the record. Baptist has not alleged at any time that he tried to comply with the stated requirements of IES. Nor has he alleged that the CWI policy has been capriciously applied to him or that CWI has not applied its IES policy uniformly towards its employees. Baptist failed to comply with the requirements to return to duty after one year of IES and was terminated pursuant to the IES policy. After a period of discovery, Baptist has failed to produce any evidence that would raise an issue of material fact regarding CWI's defense that it would have terminated him notwithstanding his disclosure. As a matter of law, I find that CWI would have dismissed Baptist notwithstanding the protected disclosures he alleges.

None of the alleged factual disputes raised by Baptist affects the material facts described above. Even if I conclude that Anglin had some type of animus against Baptist or was influenced by CWI management, there is no evidence that the CWI IES policy was improperly applied to Baptist. The one example of Anglin's variation from the policy, pointed out by Baptist, actually accommodated his effort to receive STD and provides no evidence as to the CWI's IES policy being applied in a manner prejudicial to Baptist. Further, Baptist has not presented sufficient evidence that would cause Anglin's credibility to become an issue of material fact with regard to the application of IES to all CWI employees.[17]

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conclude there is not sufficient temporal nexus to support a finding that the disclosure was a contributing factor for the retaliation. *See Donald E. Searle*, TBU-0079 (July 25, 2008).

[17] The issue of whether Baptist told Anglin about his retaliations in June 2007 is not relevant to my finding that CWI has presented sufficient evidence to establish that it would have terminated Baptist notwithstanding his protected disclosures.

III. Summary

As to Retaliation Nos. 1-5 as described in the Report of Investigation regarding the whistleblower complaint filed by Billy Joe Baptist, I find that each of the alleged retaliations is time-barred under 10 C.F.R. § 708.14. Consequently, none of these are actionable under Part 708. With regard to the last remaining retaliation referenced in the Report of Investigation, Retaliation No. 6, I will grant CWI's Motion for Summary Judgment.

It Is Therefore Ordered That:

(1) Retaliations Nos. 1-5 as specified on page 8 of the Report of Investigation concerning Billy Joe Baptist, Case No. TBI-0080, dated December 19, 2008, are hereby dismissed.

(2) The Motion for Summary Judgment filed by CH2M-WG Idaho, LLC on February 18, 2009, Case No. TBZ-0080, regarding Retaliation No. 6, is hereby granted.

(3) The Request for Relief filed by Billy Joe Baptist, Case No. TBH-0080, under 10 C.F.R. Part 708 on December 19, 2008, is hereby denied.

(4) This is an initial agency decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the 15th day after receipt of the decision in accordance with 10 C.F.R. § 708.32.

Richard A. Cronin, Jr.
Hearing Officer
Office of Hearings and Appeals

Date: May 7, 2009