January 20, 2011

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Motion For Summary Judgement
Initial Agency Decision

Name of Case:	Colleen Monk
Date of Filing:	August 25, 2010
Case Number:	TBH-0105

This Decision concerns a Complaint filed by Colleen Monk (hereinafter referred to as "Ms. Monk" or "the 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's (DOE) Contractor Employee Protection Program regulations found at 10 C.F.R. Part 708. At all times relevant to this proceeding, the Respondents were DOE contractors operating in Los Alamos, New Mexico. It is the Complainant's contention that during her employment with VJT, she engaged in protected activity and, as a consequence, suffered reprisals by the Respondents. Among the remedies that the Complainant is seeking are reinstatement of her former pay, back pay, and compensation for the time that she has spent representing herself in this proceeding. As discussed below, I have concluded that Ms. Monk is not entitled to the relief that she seeks.

I. Background

A. Regulatory Background

The DOE established its Contractor Employee Protection Program 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. *See* Criteria and Procedures for DOE Contractor Employee Protection Program, 57 Fed. Reg. 7533 (1992). The Program's 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 a DOE contractor from retaliating against its employee because the employee has engaged in certain protected activity, including:

> (a) Disclosing to a DOE official, a member of Congress, . . . [the employee's] employer, or any higher tier contractor, information that [the employee] reasonably believe[s] reveals—

(1) A substantial violation of any 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, or . . .

(c) . . .[R]efusing to participate in an activity, policy or practice if you believe participation would . . .

(2) Cause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public.

10 C.F.R. § 708.5.

An employee who believes that he or she has suffered retaliation for making such disclosures may file a complaint with the DOE. It is the burden of the complainant under Part 708 to 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.*

B. Factual Background

Except as otherwise indicated, the following facts are not in dispute. 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.

Ms. Monk was hired by VJT, an MCS subcontractor, in September 2001 as an Administrative Manager and Lead Facility Records Coordinator for the Savannah River Site. In 2005, she relocated to the Los Alamos National Laboratory (LANL) and began training for a position as an RTR Operator. The Complainant received her qualifications and became an RTR Operator in January 2006.

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). Ms. Monk alleges that, during that same time, she made protected disclosures, primarily regarding issues related to safety at LANL.

In particular, she alleges that a WTS manager came to LANL to oversee RTR operations. The manager allegedly told the RTR Operators that they were rejecting too many drums for containing an excessive amount of liquid wastes, and asked that the Operators use an Excel spreadsheet provided by WTS to quantify the drums' liquid content. The Complainant and other RTR Operators did not believe that this spreadsheet accurately calculated the amount of liquid in a drum, and resisted the use of this tool, preferring to use other estimation techniques and their experience and training to perform this task.

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 the drums, WTS revoked the qualifications of all RTR Operators at LANL in October 2009. 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, 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, Ms. 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.

C. Procedural Background

On January 20, 2010, Ms. Monk filed a Part 708 Complaint with the DOE's Carlsbad Field Office. That Office attempted to mediate the Complaint on June 18, 2010, but those efforts failed. Ms. Monk requested that her Complaint be forwarded to the Office of Hearings and Appeals (OHA) for an investigation and hearing. The Carlsbad Field Office forwarded the Complaint to OHA and the OHA Director appointed an investigator. The OHA investigator interviewed Ms. Monk and other VJT employees and reviewed a number of documents before issuing a Report of Investigation (ROI). I will discuss Ms. Monk's Complaint and the ROI in greater detail in section I.D below.

The OHA Director appointed me as the Hearing Officer in this case. In a letter to the parties, I requested that they submit briefs focusing on the findings and conclusions in the ROI with which they disagree, and the reasons for that disagreement. The parties submitted briefs and replies setting forth their positions concerning the issues raised in the ROI.

D. Ms. Monk's Complaint and the Report of Investigation

1. Ms. Monk's Complaint

Ms. Monk alleges in her Complaint that she engaged in activities that are protected by the Part 708 regulations, and that the Respondents retaliated against her because of those activities. Specifically, 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, Ms. 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 informed her supervisor of her concerns in March 2009. She alleges that WTS management was "not happy with her over this refusal." *See* addendum to Part 708 Complaint at 2. The Complainant contends that her actions in this regard were both a protected disclosure (that employees who were not forklift-

qualified were being required to act as "spotters"), and a refusal to participate in an activity that caused her to have a reasonable fear of serious injury to herself or to other employees.

The Complaint also alleges that in March 2009, Ms. Monk 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. According to the Complainant, the Manager had determined that the RTR Operators' rejection 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. Ms. 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. This constitutes Ms. Monk's second alleged protected disclosure.

The Complainant's final alleged protected disclosure concerns a March 2009 incident during which a technician improperly performed maintenance on an energized RTR generator. Ms. 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.

The Complaint further states that, because Ms. Monk engaged in this protected activity, the Respondents retaliated against her. Specifically, the Complainant alleges that she was transferred to an administrative position, with a reduction in pay of approximately $2.00 per hour, that her name was not included on the LOQI despite having passed the re-qualification test, and that she was made to endure a hostile work environment from March 2009, after her disclosure concerning the technician working on the energized equipment, until October 2009. *See generally* Addendum to Complaint; Complainant's Brief in Opposition to Summary Judgement (hereinafter referred to as "Comp. Reply") at 4.

2. The ROI

In her ROI, the OHA Investigator discussed the Complainant's allegations relating to protected activity and retaliatory acts taken against her. Regarding Ms. Monk's refusal to act as a "spotter" for forklift operators and her disclosure that non-forklift qualified personnel were being required to perform "spotter" duties, the Investigator took note of (i) Ms. Monk's admission that she and other RTR Operators were told that they did not have to act as a "spotter" if doing so made them uncomfortable, (ii) the evidence that she could have taken a test to become forklift-qualified, and (iii) the lack of corroboration from other RTR Operators that WTS insisted that Operators serve as "spotters." For these reasons, the Investigator concluded that the Complainant's refusal to act as a "spotter" and her disclosure did not constitute protected activity under Part 708.

The OHA Investigator also found that Ms. Monk's complaint to management about the Excel spreadsheet was not a protected disclosure. The Investigator cited WTS's contention that its major concern was that Operators were not using a consistent, justifiable process to estimate the amount of liquid in the drums, and its claim that Operators were not forced to use the spreadsheet, but could also estimate the volumes by performing manual calculations. The Investigator found that management was making an attempt to improve upon its procedures, and concluded that the

Complainant had not demonstrated, by a preponderance of the evidence, that she reasonably believed that the use of the Excel spreadsheet would result in a substantial and specific danger to public health or safety.

However, the Investigator reached a different conclusion with regard to Ms. Monk's disclosure concerning the technician's unauthorized work on an energized piece of equipment. The Investigator noted that VJT management admitted that this was a serious incident because safety protocols were violated, and that they acknowledged that the Complainant communicated her concerns about the incident to them. The Investigator found that, although the incident raised issues about Ms. Monk's own culpability in the events that occurred, "it is possible that [she] can demonstrate by a preponderance of the evidence that she reasonably believed this incident was a substantial and specific danger to employees or to public health or safety." ROI at 7.

The ROI also discussed the retaliations alleged by the Complainant. The Investigator concluded that the primary retaliation alleged by Ms. Monk was her transfer from her position as an RTR Operator to an administrative position, with the accompanying reduction in pay. However, the Investigator found there to be some question as to whether the reassignment rose to the level of a retaliation under Part 708. In this regard, she noted the Respondents' claims that the Complainant was taking pain medication that raised concerns about her fitness for duty and that Ms. Monk requested to be taken from the field and placed in an administrative position because of that medication. Proceeding on the assumption that the transfer was a retaliation, the Investigator stated that the Complainant might be able to show that her alleged protected disclosure was a contributing factor to this action.

The Investigator then pointed out that, if the Complainant were able to make these showings, the burden would then shift to the Respondents to show, by clear and convincing evidence, that they would have taken the same actions in the absence of any protected disclosure. The Investigator concluded that, in all likelihood, the Respondents would be able to make this showing. She based her conclusion on evidence in the record indicating that the Complainant asked for this reassignment because of her medical condition, and on concerns by the Respondents that Ms. Monk's pain medications might render her unfit for duty as an RTR Operator. Regarding the issue of Ms. Monk's exclusion from the LOQI, the Investigator cited the rationale of VJT management that, since the Complainant was being transferred to an administrative position, there was no need to include her on the List. There was also evidence that the Respondents took a similar action with a comparably-situated individual. Because of this conclusion, the Investigator recommended that I consider whether this case should be decided by means of summary judgement. [*]

II. Analysis

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*/ With regard to the allegation of a hostile work environment, the Investigator concluded that "a mere assertion of a hostile work environment does not rise to the level of retaliation." ROI at 8, n.11. I agree. However, even if the Complainant's pleadings regarding this issue had gone beyond mere assertion, the record in this matter clearly indicates that she 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. 10 C.F.R. § 708.14(a).

The Part 708 regulations do not include procedures and standards governing summary judgment. I note, however, that the Federal Rules of Civil Procedure provide that a Motion for Summary Judgement 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). 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. *Cf. 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).

As previously set forth, in order 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. 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.* Therefore, if there are no genuine issues as to any material fact and the Respondents are entitled to a judgement as a matter of law on any of these elements, then summary judgement in favor of the Respondents is appropriate.

For the reasons that follow, I harbor serious doubts as to whether the Complainant's reassignment, which is the primary alleged retaliatory act, can properly be considered as retaliation. However, even if the Respondents' actions could be considered as retaliation as that term is defined in the Part 708 regulations, and the Complainant could demonstrate that she made a protected disclosure that was a contributing factor to that retaliation, I conclude, as a matter of law, that the Respondents would have taken the same actions in the absence of any protected activity on the part of the Complainant. The Complainant is therefore not entitled to the relief that she seeks.

"Retaliation" is defined in the Part 708 regulations as being "an action (including intimidation, threats, restraint, coercion or similar action) 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 described in § 708.5 of this subpart." 10 C.F.R. § 708.2 (italics added). Certainly, reassignment to a less desirable position can constitute retaliation. *See, e.g., Deford v. Secretary of Labor*, 700 F.2d 281, 287 (6th Cir. 1983). However, in this case, not only is it undisputed that the Complainant requested the reassignment, but she included a permanent transfer to an administrative position as part of the relief that she sought in her Part 708 complaint. Complaint at 3. It would therefore turn the definition of "retaliation" on its head to consider an action that she indicated would help "make her whole," *id.*, as being a "negative" action taken "against" her by the Respondents.

In her response opposing summary judgement, the Complainant argues that she requested the transfer because she feared being fired. Oct. 21, 2010 Response at 4. She explains that in July 2009, she had a discussion with the VJT Human Resources (HR) Director about her working conditions as an RTR operator. She told the director that she had been told by her RTR Lead that, because of a periodic shortage of RTR operators, she and another operator were prohibited from taking time off during the

month of August 2009. Her manager allegedly told her that, if she or the other operator took time off or called in sick, they would be reprimanded. Ms. Monk and the HR Director discussed the Complainant's concerns about the RTR operators going from 10 to 12 hour shifts in August and about getting in trouble because of possible "flare-ups" of her medical condition. According to Ms. Monk, the HR Director raised the possibility of the Complainant going on disability, and when she declined to consider this option, the HR Director allegedly said that if Ms. Monk could not perform her duties as an RTR operator 100 percent of the time, including going into the field when needed, she might be terminated.

Even if these allegations are true, the Complainant 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.

The undisputed facts in this case also compel a conclusion that the Respondents would have taken the same actions regarding Ms. Monk's employment in the absence of any protected activity. In cases interpreting the federal Whistleblower Protection Act (WPA), upon which Part 708 is modeled, the Federal Circuit has identified several factors that may be considered in determining whether an employer has shown that it would have taken the 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)).

Applying these standards to the case at hand, the Respondents' reasons for transferring the Complainant to an administrative position were exceptionally strong. First, according to the Complainant, her medical condition was such that, when combined with the stress that the Complainant was under while working as an RTR operator, it "debilitated [her] body to the point where [she was] not able to return to the field." Complaint at 3. Her condition was known to the Respondents, to the extent that VJT's HR Director suggested that Ms. Monk consider going on disability. OHA Investigator's Record of Telephonic Interview with the Complainant at 3. Second, because of this condition, Ms. Monk was taking prescription drugs, including hydrocodone, that, at least on occasion, rendered her unfit for work in the field. *Id.* at 1; Addendum to Complaint at 7. The Respondents agreed with the Complainant that she could not work in the field on days that she had to take her pain medication. *See* affidavit of Karen Ventura, VJT Director of Human Resources at 2. There is further evidence that the Respondents were concerned about "liability issues" that could result from allowing the Complainant to continue to work as an RTR operator. OHA Investigator's Record of Telephonic Interview with Ms. Ventura at 2. Finally, as set forth above, it is undisputed that Ms. Monk requested the transfer.

Furthermore, the strength of the Respondents' motive to retaliate appears to have been minimal. Ms. Monk's alleged protected disclosure about the technician's unauthorized work on an energized piece of equipment did not directly implicate the Respondents' employees who played a role in the Complainant's reassignment. Also, I agree with the OHA Investigator that this incident was

appropriately investigated and adequately addressed with the findings made by the Respondents' Root Cause Analysis Report. There is little or no evidence of a retaliatory motive on the part of the Respondents.

Finally, there is evidence that the Respondents took similar actions against a similarly-situated employee for reasons that had nothing to do with "whistleblowing." The record indicates that another RTR operator requested reassignment because of the superior benefits that he would be eligible for in his new position. *See* OHA Investigator's Record of Telephonic Interview with Steve Halliwell, Head of Nuclear Division, VJT, at 2. His request was granted, and, like Ms. Monk, his name was taken off the LOQI and not placed back on the List because he was being reassigned. For these reasons, I find that the record, as it currently stands, conclusively indicates that the Respondents would have taken the same actions regarding the Complainant in the absence of any alleged protected activities.

III. Conclusion

As discussed above, I find that, even if Ms. Monk's reassignment could be defined as "retaliation," and even if she could show that she engaged in protected activity that was a contributing factor to that "retaliation," the record in this matter conclusively demonstrates that the Respondents would have taken the same actions in the absence of that protected activity. I therefore conclude that there are no genuine issues as to any material fact, and that the Respondents are entitled to a judgement in their favor as a matter of law.

It Is Therefore Ordered That:

(1) Treating the Respondents' Brief in Support of Summary Judgement as a Motion for Summary Judgement, that Motion is hereby granted.

(2)The Request for Relief filed by Colleen Monk under 10 C.F.R. Part 708 is hereby denied.

(2) This is an Initial Agency Decision, which shall become the 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.

Robert B. Palmer
Senior Hearing Officer
Office of Hearings and Appeals

Date: January 20, 2011