Case No. VBA-0042

November 1, 2001

DECISION AND ORDER OF

THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Richard Sena

Date of Filing: March 15, 2001

Case Number: VBA-0042

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on March 1, 2001, involving a Complaint filed by Richard Sena (Sena or the Complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In this case, Sena made a protected disclosure regarding subcontracator personnel who were using the Internet improperly at the DOE's Sandia National Laboratories. In his Complaint, Sena maintains that his former employer, Sandia Corporation (Sandia), a contractor that operates Sandia National Laboratories on behalf of the DOE, retaliated against him for making that protected disclosure. The retaliation Sena alleges is constructive discharge by Sandia. In the IAD, the Hearing Officer determined that Sena had made a disclosure that is protected under Part 708, and that Sandia created a hostile work environment, causing Sena to go on temporary sick leave and ultimately to retire from Sandia on disability. The Hearing Officer therefore sustained Sena's Complaint, and ordered Sandia to pay Sena an amount that would put Sena in the same position as if he had worked for Sandia until retirement age. *Richard R. Sena*, 28 DOE ¶ 87,009 (2001)(*Sena*). In a separate phase of this proceeding, the Hearing Officer calculated the appropriate amount of that compensation, plus costs and attorney fees, and ordered Sandia to pay a total of $367,088.69. Of that amount, $342,324.77 was awarded to Sena as compensation. The remainder represents attorney's fees and other costs. *Richard R. Sena*, 28 DOE ¶ 87,012 (2001). Sandia filed an appeal of the IAD. 10 C.F.R. § 708.32. As set forth in this decision, I have determined that the IAD should be sustained.

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 believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. Thus, contractors found to have retaliated against an employee for such a disclosure, will be directed by the DOE to provide relief to the complainant. *See* 10 C.F.R. § 708.2 (amended regulations) (definition of retaliation). (1)

B. History of the Complaint Proceeding

The events leading to the filing of Sena's Complaint are fully set forth in *Sena*, and I will not reiterate all the details of that case here. For purposes of the instant appeal, the relevant events are as follows. In 1995, as stated above, Sena made a protected disclosure regarding improper use of office Internet connections. Six subcontractor employees were fired. Three years later, two of those employees returned to Sandia and worked in the same area as Sena. Sena found their presence caused him considerable stress and, after a period of sick leave, retired on disability in 1999. He filed a Complaint of Retaliation with the DOE, claiming constructive discharge by Sandia as a retaliation for the protected disclosure. A DOE Investigator performed an investigation of the circumstances surrounding this case and on February 24, 2000, issued a Report of Investigation (ROI). The ROI found that Sena made a protected disclosure, but that it was not a contributing factor to a retaliation by Sandia, and further that Sandia did all that it could reasonably be expected to do to accommodate Sena. After the completion of an investigation, Sena requested and received a hearing on this matter before an OHA Hearing Officer. There were seven witnesses and the hearing lasted two days. After considering the testimony at the hearing and other relevant evidence, the Hearing Officer issued the IAD that is the subject of the instant appeal.

C. The Initial Agency Decision

In the IAD, the Hearing Officer cited the burdens of proof under the Contractor Employee Protection Program Regulations. They are as follows:

> The employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure, . . . 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. 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. . . .

10 C.F.R. § 708.29(d).

The factual findings made by the Hearing Officer are as follows. As stated above, Sena was an employee of Sandia. In 1995 he noticed that a number of subcontractor employees were using the Internet connection in their offices to view sexually explicit materials, in violation of Sandia policy. He reported this information to Sandia, which conducted an investigation and ultimately caused six employees to be fired. At the time of the terminations, Neil Hartwigsen, a Sandia senior manager, told each of these employees that they would not be allowed to work in the same area at Sandia again. He also told Sena that he (Sena) would never have a working relationship or contact with these employees again. On the day of the firing, someone blew up Sena's home mailbox. Shortly thereafter, Sena received several threatening telephone calls at his residence. *Sena*, 28 DOE at 89,069-70.

In July 1998, two of the fired employees (hereinafter "offending employees") returned to the Sandia site as employees for other contractors. They were permitted access to the same general area in which Sena worked. Sena objected to this and immediately told Hartwigsen that he feared for his safety. While Hartwigsen permitted the two individuals to return as subcontractor employees, he did not allow them to have on site offices and computers. *Id*. at 89,070.

Sena could not accept the stress that the presence of the offending employees caused him and, with the approval of Dr. Clevenger, the Sandia Medical Director, went on temporary sick leave for nine days in August 1998. Sena returned to work on August 17. After two working days, Sena returned to sick leave status.(2) While Sena was on sick leave, Hartwigsen offered to transfer Sena first to one job, and then, when Sena rejected that placement, to another job that would put some distance (100 yards) between him and the offending employees. These transfers would have placed Sena in buildings where the offending employees would not have a business reason to visit. When Sena declined the two placements, Sandia agreed not to move him. *Id.*

In September 1998, Sena was evaluated by a private psychologist who determined that he was suffering from Post Traumatic Stress Disorder (PTSD). In November 1998, all medical personnel involved with Sena concluded that he would be unable to return to work at Sandia. In November 1999, Sena's retirement on disability from Sandia was effective. *Id.* at 89,071.

After reaching the above findings of fact, the Hearing Officer reached the following conclusions.

He first found that Sena had made a protected disclosure, by revealing that employees were abusing the office Internet connection. He also found that this disclosure was a contributing factor to an act of retaliation.

The Hearing Officer concluded that Sandia management deliberately created the beginning of a hostile work environment because Hartwigsen sponsored the reinstatement of security clearances for the offending employees. He stated that even if it was not immediately clear that the presence of the offending employees was hurtful to Sena, Sandia management should have realized that the environment was hostile by the time that Sena had been on supervised medical leave for an extended period of time, by early November 1998. The Hearing Officer also found that Sandia had the authority to ban the offending employees from the site. *Id.* at 89,074. The Hearing Officer stated that "Sandia management's failure to remove the offending employees and alleviate the hostile work environment for Sena indicates intent to harm Sena." *Id.* at 89,072. The Hearing Officer concluded that "nothing was done, even though there was clear, simple, straightforward ways to get the situation ?under control:' remove the offending employees." *Id.* at 89,074. Based on these findings, the Hearing Officer sustained Sena's Complaint and granted him relief in the amount of $342,324.77.

II. Sandia's Statement of Issues and Sena's Response

Sandia filed a submission identifying the issues that it wishes the Director of the Office of Hearings and Appeals to review in this appeal phase of the Part 708 proceeding (hereinafter Statement of Issues or Statement). 10 C.F.R. § 708.33.

The Statement raises the following four issues for my review:

1. Whether the Hearing Officer erred in refusing to allow Sandia to introduce evidence at the hearing of an offer to remove the offending employees from performance of the contract, thereby preventing them from having contact with Sena in the workplace.

2. Whether the Hearing Officer erred in finding a causal relationship between the alleged retaliation and the disclosure. Sandia states that the only finding by the Hearing Officer in this regard was that Sandia management was aware of the disclosure when it allowed the offending employees to return to Sandia. Sandia believes that mere knowledge of the disclosure at the time that the offending employees returned to Sandia is not enough to establish a contributing factor under 10 C.F.R. § 708.29.

3. Whether the Hearing Officer erred in failing to adopt a "reasonable person" standard to determine whether Sandia subjected Sena to a hostile work environment, leading to the alleged constructive discharge.

4. Whether the Hearing Officer erred in failing to consider the Investigator's findings in the ROI, which were contrary to those in the IAD.

In his Response to the Statement, Sena offers the following reply to the issues Sandia has raised on appeal.

1. Sena states that the Hearing Officer properly excluded Sandia's offer to terminate the offending employees. Sena claims that this offer, which was made in a letter of October 2, 1998, written by Sandia's attorney, was not unconditional, but rather a negotiation position offered in the context of attempts to

settle the case. According to Sena, such a conditional offer is not admissible under Rule 408 of the Federal Rules of Evidence. Sena claims that since Sandia expected assurances from him in return for the firing, it was not unconditional, and therefore not admissible. Sena also claims that this offer was untimely, since it was made after the damage to his mental state was done, when he could never return to work at Sandia.

2. Sena challenges Sandia's claim that the Hearing Officer erred in finding that there was a causal relationship between his disclosure and the firm's treatment of him. In this regard, Sena claims that the real issue here is "whether conduct by non- supervisory or non-managerial fellow workers may constitute actionable retaliation by the employer." Sena maintains that condoning mistreatment of an employee makes it official mistreatment and since "retaliation" includes intimidation and threats by a contractor, Sandia's actions, allowing mistreatment of Sena by other employees, fall within the coverage of the regulations. 10 C.F.R. § 708.2.

3. Sena contends that the Hearing Officer used the correct standard in finding that Sandia created a hostile work environment. In this regard, Sena states that Sandia recognized that it had a responsibility to correct a hostile work environment, but simply did not take adequate steps to remedy the situation.

4. Sena states that the IAD was not arbitrary or capricious and that, after fully reviewing the record, the Hearing Officer was entitled to remain silent on the validity of the findings of the ROI.

III. Analysis

It is by now well-established that a key purpose of the Part 708 regulations is the protection of public and employee health and safety by ensuring that DOE contractor-employees feel secure when they bring forward in good faith evidence of unsafe and unlawful behavior. 64 Fed. Reg. 12862 (March 15, 1999). These protections would have no substance if employers may, by mere inaction, allow an unsafe or hostile workplace to exist, one that would make an employee fearful about disclosing information concerning dangers to public health and safety and other serious violations. Accordingly, in order to ensure that those contractor-employees who do advance such concerns are fully protected, contractor-employers are charged with the responsibility for keeping them safe from harm in the work place. If an employer allows an unsafe or hostile workplace for the whistleblower to exist, even by negligence, that employer breaches his fiduciary duty to protect the whistleblower- worker. It is this duty that is at the very core of Part 708. As discussed below, I find that by allowing a severely threatening work environment to exist in this case, Sandia breached its duty to Sena. There is no dispute that Sena ultimately developed post traumatic stress disorder (PTSD) which incapacitated him and ended his work career. The record also confirms that his PTSD was caused by his work environment. In fact, the Sandia Medical Director testified that had the offending employees not returned to Sandia, Sena would probably not have succumbed to PTSD. Transcript of Hearing (Tr.) at 368. Sandia's breach of its duty to Sena is all the more serious in light of the promise that the firm specifically made to Sena that he would never again have a working relationship or work contact with the offending employees. It is these underlying principles that inform my analysis of the facts and the law in this case.

A. I turn first to the alleged retaliation by Sandia. It is the complainant's burden in Part 708 cases to prove by a preponderance of evidence that his employer retaliated against him for making a protected disclosure 10 C.F.R. § 708.29. Sena claims Sandia retaliated for his protected disclosure by allowing the existence of a hostile work environment which ultimately forced him to leave the company on disability.

The general rule is that if the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into involuntary resignation, then the employer has committed a constructive discharge. *See Martin v. Cavalier Hotel Corp.,* 48 F. 3d 1343 (4th Cir. 1995)(*Martin*). Thus, in order to prevail in this type of case, a plaintiff must allege and prove two elements: (1) intolerableness (hostility) of the working conditions (hereinafter hostile work environment element) and (2) the employer created the hostile environment in order to cause the employee to resign (hereinafter forced resignation element). *Id.* at 1354.

1. Hostile Work Environment Element

The Supreme Court recently analyzed in detail the elements of a hostile (i.e. intolerable) work environment. *Harris v. Forklift Systems Inc.*, 510 U.S. 17 (1998)(*Harris*). (3) The environment must be severely and pervasively hostile, one that a reasonable person would find abusive, and one that the complainant himself perceives to be so. The conditions of the victim's employment must be altered. *Id.* at 21. The Court stated:

whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include 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. The effect on the employee's psychological well-being is of course relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Id. at 23.

In addition to establishing the abusive elements that pervaded his workplace, the complainant alleging a hostile work environment must show that the employer knew or should have known of the hostile environment and failed to take appropriate action. *E.g., Moore v. Kuka Welding Systems and Robot Corp.*, 171 F. 3d 1073 (6th Cir. 1999).

After reviewing the record in this case, I find that there are undisputed facts which support a finding that (a) a hostile work environment existed in this case, and (b) Sandia knew of the environment and failed to take prompt, appropriate corrective action.

As the hearing transcript indicates, after the offending employees were rehired to work at the same location as Sena, there were numerous direct confrontations between them and Sena.(4)

There is no question that these repeated, unwanted contacts with the offending employees caused Sena great mental anguish and resulted in his Post Traumatic Stress Disorder. Sena Exh. 5,6,11,12,14,15. There is also no question that a reasonable person would have felt threatened by being forced to work in the same building and on some of the same projects with the very individuals who were terminated as a result of his protected disclosure, particularly if these individuals made a point of appearing in his work space without a reason to do so, and asking him direct questions about the 1995 termination. These actions severely altered Sena's working conditions. They unreasonably interfered with his work performance and his ability to work, to the point that he was obliged to take sick leave. A reasonable person would have found these conditions to be hostile.

Having concurred with the Hearing Officer that Sena's work environment was hostile, I will next turn to a consideration of whether the employer deliberately created this environment, i.e., whether Sandia knew or should have known about the conditions and whether it failed to take prompt remedial action.

Sandia clearly knew about the actions of the offending employees, Sena's working conditions, and the adverse effects on Sena. Sena immediately relayed his concerns to Hartwigsen. Tr. at 438. In fact, the firm did take some remedial actions in an attempt to alleviate the abusive conditions. However, the record indicates that Sandia failed to take prompt, reasonable remedial actions. The steps Sandia took to resolve the hostile work environment were halfhearted, at best. In reality, they provided no meaningful alternative to Sena. For example, Sandia contends that from the outset it limited access by the offending employees to Sena's work area, and did not allow the offending employees to have any office space or computers. Tr. at 442-43, 459, 472-474, 476, 494, 476. Yet, as discussed above, almost immediately after being rehired, one of the offending employees appeared in Sena's work space, even though he had no reason to be there. Although the employee was instructed not to have interaction with Sena, this allegedly preventative measure by Sandia was essentially meaningless.

Sandia stated that it offered Sena two positions in areas away from those in which the offending employees were likely to have business. Tr. at 214, 215-16, 358-60, 385, 386, 397. The first position offered to Sena would have placed him in a building that was less than one block away from his old location. The site would have been accessible to the offending employees. Tr. at 212. Given the fact that the offending employees confronted Sena at the old location when they were not supposed to, Sena had no reason to believe he could avoid them at the new location. Sena had no reason to accept such a position or have any faith in its efficacy.

Sandia offered Sena another position in September 1998, after he had already been absent on sick leave. Letter of August 26, 1999 from Michael Danoff to Ellen Gallegos at 6. This job would have been located in a more distant building, one that was much less comfortable than Sena was accustomed to. The job involved a type of mechanical work that Sena believed would have been difficult for him to perform, given his fibromyalgia. Tr. at 215. Sena described both of these positions as "go-nowhere type of jobs." Tr. at 264. In my view, both job offers were empty, impractical proposals. Further, the fact that they were made after Sena's mental health became severely compromised indicates that the company did not act with due diligence.

As the Hearing Officer noted, there was a clear and rather simple solution to this problem: terminate the offending employees. Why Sandia failed to do this is not apparent to me. Hartwigsen professed not to know that he had such authority, but I am doubtful of this, and in any case, do not believe that his ignorance on this point should be a deciding factor here. (5) Hartwigsen was, in any event, fully aware of Sandia's duty to act if a hostile work environment existed. He testified: "If we have somebody who is in a hostile work environment, I believe it's our responsibility to resolve that hostile work environment. Now, if that means removing somebody, then I think they have to be removed." Tr. at 487-88.

There is some evidence that in a letter of October 2, 1998, Sandia did offer to terminate the offending employees. (6) However, this solution was only a conditional proposal, and in any case came too late. It would have been undertaken only if Sena first agreed to it. He was by that time already diagnosed as suffering from Post Traumatic Stress Disorder. Tr. at 141. I cannot see how Sena could have reasonably agreed to the termination, thereby implicitly making a commitment to return to the site, given the fact that his mental condition had already significantly deteriorated, and it was unclear whether he would ever be able to return to Sandia. Thus, at the point when the contingent offer to terminate the offending employees was finally made, it was no longer a viable solution.

In sum, although Sandia asserts that it made every effort to ensure that the offending individuals would not work directly with Sena, the assertions ring hollow, indeed. Tr. at 442, 443, 459, 473. The evidence is to the contrary. A reasonable person would perceive this work environment as threatening and out of control, and Sena in fact did so. Although Sandia arguably did not know when it first permitted the rehiring of the offending employees that the rehiring would cause such dramatic harm to Sena, it should have realized this very soon. Testimony at the hearing confirmed that Hartwigsen, Sena's supervisor's supervisor, knew of the extent of the trauma to Sena by early November 1998. By that time, all of the Sandia medical personnel also knew that Sena could no longer return to Sandia to work. *Sena*, 28 DOE at 89,074. Based on the above, I find that Sena has established that Sandia allowed a hostile working environment to exist, and that the firm failed to take prompt remedial action to alleviate that hostile environment.

2. Forced Resignation Element

The fact that a hostile work environment existed is not sufficient in and of itself to support a claim for constructive discharge. Once the hostile environment is demonstrated, the complainant must then show that the resignation was coerced, i.e. that the employer deliberately created the intolerable working conditions for the purpose of causing the employee to resign. I agree with the Hearing Officer in this case, who found that Sandia intended to harm Sena. *Sena*, 28 DOE at 89,072. He found that while the precise date when Sena's trauma became evident to Sandia is unclear, Sena's trauma was certainly clear to Sandia by November 1998, and yet it failed to dismiss the offending employees even then. Ultimately, there can

be no doubt that by permitting the offending employees to be hired and allowing them on site, Sandia deliberately created a hostile work environment severely adverse to Sena, one that caused him to resign.

The foregoing conclusion is consistent with prevailing legal authority on the subject.

There are two schools of thought among the U.S. courts of appeals regarding the evidence necessary to establish the forced resignation element of the constructive discharge showing. The majority of circuits focuses almost exclusively on a so-called "objective" standard. (7) This standard asks whether a reasonable person in the employee's position would have felt compelled to resign. It does not actually look at the employer's intent. *Bourke v. Powell Electrical Manufacturing Co.*, 617 F. 2d 61 (5th Cir. 1980). The tenth circuit, in which the instant case arises, has used the majority standard. *Derr v. Gulf Oil Co.*, 796 F. 2d 340 (10th Cir. 1986)(*Derr*)(whether the employer, by its illegal discriminatory acts, has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign). *See also Sanchez v. Denver Public Schools,* 164 F.3d 527 (10th Cir. 1998).

I find that a reasonable person would have felt compelled to resign from Sandia under the circumstances of this case. (8) Sandia promised Sena that the offending employees would never return to Sandia, and further that he would never again have any workplace contact with the offending employees. Notwithstanding the fact that he was severely affected by the violent incident (explosion of his home mailbox) that took place immediately after the firing of the offending employees, Sena relied on Sandia's promises and continued to work for the firm. Suddenly, and without warning to Sena, the offending employees not only are rehired at Sandia, but without any reason to do so, one of them almost immediately appears in Sena's cubicle. They allude to the 1995 incident, and make threatening gestures to Sena. They intentionally cross his path when they have no reason to do so, and even though they are instructed to avoid him. All of this causes Sena great physical and mental stress. Tr. at 468. Under these circumstances, a reasonable person, one whose mental and physical status was severely adversely affected, would have no choice but to resign, rather than suffer continued degradation of his health, and continual fear for his own safety.

I therefore find that Sena has established both elements of the constructive discharge showing: the hostile work environment and the forced resignation.

B. In addition to showing by a preponderance of evidence that an employer retaliated against him, a Part 708 Complainant must establish that the protected disclosure was a contributing factor to the retaliation. 10 C.F.R. § 708.29.

In the case at hand, the Hearing Officer correctly found that Sandia knew of the protected disclosure. However, a complainant must bring forward additional evidence to establish that the disclosure and the alleged retaliation were causally related.

As discussed above, Sandia knew or should have known that rehiring the offending employees would have a severe adverse effect on Sena, but nevertheless allowed those employees to return to the site where Sena worked. Sandia breached its duty to Sena by allowing a threatening work environment to exist. The protected disclosure, the promise by Sandia to keep the offending employees away from the work site, the breach of that promise, the ensuing hostile work environment, Sandia's breach of its duty to Sena and Sena's resignation all spring from the very same incident. This tightly woven pattern of interconnecting events, all directly related to the protected disclosure and flowing from it, demonstrates a causal relationship between the protected disclosure and the retaliation.

C. Sandia objects to the fact that the Hearing Officer failed to consider the findings set forth in the ROI. I find no error here. The findings in the ROI are preliminary and are made after only a limited inquiry. 10 C.F.R. §§ 708.22; .23. They serve as guidance for the Hearing Officer in ascertaining and limiting the issues in the case and in structuring the hearing. They also help the parties to focus on relevant issues at the hearing. They are thus only tentative and not entitled to deference. Reliance on the ROI is

discretionary. Neither the Hearing Officer nor the Director of the Office of Hearings and Appeals is bound by the ROI. 10 C.F.R. §§ 708.30(c); .34(b)(1).

D. Sena has objected to the calculation of the damages awarded in this case. He claims that he should have been awarded a cost of living increase in the calculation of his loss of income, interest on the loss of income and a damages for loss of retirement. Sandia has not filed any objections to the calculations of the remedy performed by the Hearing Officer. I see no merit in any of Sena's objections to the remedy calculated by the Hearing Officer, and I will give them no further consideration.

This decision and order has been reviewed by the National Nuclear Security Administration (NNSA), which has determined that, in the absence of an appeal or upon conclusion of an unsuccessful appeal, the decision and order shall be implemented by each affected NNSA element, official or employee and by each affected contractor.

It Is Therefore Ordered That:

(1) The Appeal filed by Sandia National Laboratories on March 15, 2001, (Case No. VBA-0042), of the Initial Agency Decision issued on March 1, 2001, is denied.

(2) The cross appeal filed by Richard Sena on May 1, 2001 is denied.

(3) 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 thirty days after receiving this decision. 10 C.F.R. § 708.35.

George B. Breznay
Director
Office of Hearings and Appeals
Date: November 1, 2001

(1)The DOE Contractor Employee Protection Program regulations, which are codified as Part 708 of Title 10 of the Code of Federal Regulations and became effective on April 2, 1992, establish administrative procedures for the processing of complaints. On March 15, 1999, DOE issued an amended Part 708, effective April 14, 1999, setting forth procedural revisions and substantive clarifications to the April rule. 10 C.F.R. § 708.8; *see* 64 Fed. Reg. 12862 (March 15, 1999). Under the revised regulations, review of an Initial Agency Decision, as requested by Sandia in the present Appeal, is performed by the Director of the DOE's Office of Hearings and Appeals. 10 C.F.R. § 708.32.

(2)He never returned to Sandia again and retired on disability effective November 2, 1999.

(3)Harris and most of the other federal cases cited herein were brought under Title VII of the Civil Rights Act of 1964, and not, like the instant case, as a whistleblower protection claim. However, it is by now well-established that the principles set forth in so-called hostile work environment cases under Title VII are applicable to cases brought under whistleblower protection statutes, because Title VII and the whistleblower statutes use similar language to describe the prohibited retaliatory acts. *English v. Whitfield*, 858 F. 2d 957, 964 (4th Cir. 1988). In defining "retaliation," Part 708 adopts language similar to that found in whistleblower protection provisions of statutes, such as the Energy Reorganization Act of 1974. I therefore believe that in some instances it may be useful to refer to Title VII cases in analyzing cases brought under Part 708.

(4) *E.g.*, Tr. at 196, 198, 199, 201, 202, 207, 208, 209. It is most troubling that the offending employees were assigned to work at the same site as Sena. Moreover, Sena was actually assigned to work directly with both offending employees by performing site investigations with them. Tr. at 198, 199. The record contains ample evidence of the adverse effects upon Sena which ensued. Sena had unexpected contact

with the offending employees which was threatening to him. *E.g.*, Tr. at 209. In fact, one of the offending employees appeared in Sena's work cubicle almost immediately after he was rehired. Tr. at 196, 197. Thus, one of the first things that this offending employee did after being rehired was to make his presence known to Sena. This same offending employee appeared in Sena's cubicle on at least one other occasion. Tr. at 201. In another instance when Sena walked by two of the offending employees in the hallway, one of them pulled out a pen knife and made slashing motions. One of the offending employees intruded in a meeting that Sena was having with an inspector and asked Sena directly if he was involved in keeping other offending employees from returning to work at Sandia. Tr. at 208.

(5)As the Hearing Officer pointed out, a full year before the offending employees returned to Sandia, a Sandia manager directed the contractor to remove another offending employee who created a hostile work environment for a whistleblower. *Luis P. Silva*, 27 DOE ¶ 87,550 (2000). I do not believe that Sandia should prevail here simply because one of its managers was ignorant.

(6)The letter was submitted as part of Sandia's Response. Although Sandia offered the letter as evidence during the hearing, the Hearing Officer refused to admit that letter into the record on the grounds that under Federal Rule of Evidence 408, offers of settlement are inadmissible. Tr. at 282-91. I have decided to consider this letter. Even if the proposal to terminate constituted an offer of settlement, I am not convinced that this piece of evidence should be excluded based on that rule. Under Part 708, formal rules of evidence do not apply, but may be used as a guide. 10 C.F.R. § 708.28(a)(4). In Part 708 cases, I believe the Hearing Officer should generally adopt a liberal approach to admission of evidence. Given the fact that adherence to the rules is only advisory, I am not inclined to exclude this evidence unless there is a particularly strong reason to do so, such as unusual or extreme prejudice to the non-offering party. I can see none in this case. Accordingly, I will consider this evidence at this point in the proceeding.

(7)The minority adds a so-called "subjective" prong to the forced resignation element. According to the minority, a complainant must also prove that the actions complained of were intended by the employer as an effort to force the employee to quit. In this aspect of the proof, the key is the employer's subjective intent. Under this subjective prong, a complainant may prove an employer's "intent" by establishing either that (1) the employer consciously intended to coerce the employee's resignation, or (2) the resignation of this employee was the reasonably foreseeable consequence of the employer's actions. *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1353-57 (4th Cir. 1995). *See also*, *Johnson v. Bunny Bread Co.*, 646 F.2d 1250 (8th Cir. 1981); *Hukkanen v.International Union of Operating Engineers* , 3 F.3d 281 (8th Cir. 1993)(constructive discharge plaintiffs satisfy the . . . intent requirement by showing their resignation was a reasonably foreseeable consequence of their employers' discriminatory actions).

(8)The illegal act in the instant case is, of course, the retaliation prohibited under Part 708, for the protected disclosure, i.e., the hostile working environment and the constructive discharge. *Derr*, 796 F.2d at 344. As will be discussed more fully below, I find that the protected disclosure was a contributing factor to the creation by Sandia of the hostile environment.