Case No. VBH-0025

June 22, 2000

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Case: Alizabeth Aramowicz Smith

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This Initial Agency Decision concerns a whistleblower complaint filed by Alizabeth Aramowicz Smith, a former contractor employee at the Oak Ridge National Laboratory. As explained below, Smith's complaint should be denied.

This case arises under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708, the "whistleblower" regulations. The whistleblower regulations prohibit a contractor from retaliating against a contractor employee who engages in protected conduct. Protected conduct includes disclosing information that the employee believes reveals 1) a substantial violation of a law, rule, or regulation; 2) a substantial and specific danger to employees or to public health or safety; or 3) fraud, gross mismanagement, gross waste of funds, or abuse of authority.

If a contractor retaliates against an employee for making a protected disclosure, the employee can file a complaint. The employee must establish by a preponderance of the evidence that 1) the employee made a protected disclosure; and 2) the disclosure was a contributing factor to an alleged retaliatory act. If the employee makes the required showings, the burden shifts to the contractor to prove, by clear and convincing evidence, that it would have taken the same action in the absence of the protected disclosure. If the employee prevails, the Office of Hearings and Appeals (OHA) may order employment-related relief such as reinstatement and back pay.

Background

The following background information is taken primarily from Smith's submissions.

From March 1993 through September 1997, Smith was a full-time employee of Jaycor Environmental. She worked at the Department's Oak Ridge National Laboratory (ORNL), where Jaycor was a subcontractor to Lockheed Martin Environmental Research (LMER), the management and operating contractor for the facility. Smith was assigned to a team working on the Environmental Compliance and Management Program (ECAMP), a project of the Air Force that was being performed at ORNL under the Department's "Work for Others" program. As a member of the ECAMP team, Smith specialized in issues involving pesticide, wastewater, and drinking water management, and environmental compliance.

Smith's whistleblower complaint concerns certain actions of her supervisor on the ECAMP team. The supervisor, who was an employee of LMER, holds a doctoral degree in science and was the principal investigator for the ECAMP. Two other members of the ECAMP team filed essentially identical

whistleblower complaints concerning the supervisor. *See* *Matthew J. Rooks*, Case No. VBH-0024, 27 DOE ¶ _____ (March 1, 2000), and *Stephanie A. Ashburn*, Case No. VBH- 0023, 27 DOE (March 31, 2000).

In brief, the supervisor was dissatisfied with the way LMER managed the ECAMP, and actively searched for another firm that would take on the contract with the Air Force and hire herself and the other members of the ECAMP team. As early as 1994, Smith notes that the supervisor "was expressing frustration with (as she perceived it) [LMER's] inability to support her and the ... sponsor's work. [The supervisor] routinely became angry with [LMER] management and threatened to leave constantly...." Complaint at 4.

In March 1996, Smith was present on a field assessment when the supervisor learned that LMER had laid off an ECAMP team member without consulting her. The supervisor became irate, and spoke with two officials from the Air Force sponsor that she planned to remove the ECAMP contract to another consulting firm, where she would have complete control of financial and staff resources. In August 1996, Smith was present at another meeting, arranged by the supervisor and a representative from the Air Force, during which Smith and another team member were asked if they would support the supervisor's move to a new contractor.

During the next few weeks, the supervisor approached various consulting firms about taking over the ECAMP contract. I will refer to two of the consulting firms that the supervisor dealt with as consulting firms "A" and "B." The supervisor discussed with Smith and other team members the preparation of a budget for transferring the ECAMP to consulting firm "A." In September 1996, Smith learned that the Air Force had placed a notice in the *Commerce Business Daily*, which stated that consulting firm "A" "is the only known source with the expertise and is capable of providing services for this specialized effort."

Later that month, Smith met with the supervisor and Ashburn. Smith states that the supervisor was distressed because the Air Force received more than twenty bids for the ECAMP contract. The supervisor told Smith that the Air Force would either have to award the contract to the low bidder, or "find another means of moving the money to [the supervisor]." Soon after the meeting, the Air Force withdrew the solicitation for bids, and ultimately renewed its contract with LMER for another year.

At this point, it will be helpful to summarize the situation. The supervisor has been dissatisfied with LMER for several years. She has openly discussed with officials of the contracting agency her dissatisfaction with LMER's management and her intention to have the contract placed with a different firm. She entered into negotiations with at least six consulting firms to employ her and take over the ECAMP contract. In October 1996, Smith and other ECAMP team members attended employment interviews, arranged by the supervisor, with two consulting firms. The supervisor pressured the ECAMP team members to chose one firm they would all work for. In addition, the supervisor found out, through research done at her request by Ashburn, that she would be eligible for a pension from LMER on October 8, 1997. She solicited offers from a number of contractors, rejecting some because she did not want to lose her retirement benefits by leaving LMER prematurely. All of this happened before Smith made her first protected disclosure.

In November 1996, after several months of the supervisor's attempts to find a new contractor, Smith and Ashburn complained to Jim Loar, the supervisor's manager. Loar angrily ordered the supervisor to stop interfering with LMER's subcontracts, and to apologize to Smith and Ashburn. Although the supervisor apologized, her relationship with Smith became unpleasant.

In January 1997, under the provisions of the "PRO-7" plan, Smith was assigned to work in the Jaycor office space, where she did not have day-to-day contact with the supervisor. See *Rooks* for further information on the PRO-7 plan. Smith became increasingly concerned that the supervisor was giving Jaycor's work to other subcontractors, was not communicating with her and was "speaking ill" of her to other employees. Along with Ashburn and Rooks, Smith met with Charlene Edwards, an LMER ethics officer, and filed a complaint against the supervisor. Edwards conducted an investigation and issued a report in August 1997, finding that the supervisor had acted unfairly toward Ashburn, Rooks, and Smith,

and that her actions constituted a conflict of interest.

Edwards' report coincided with two other events. The Air Force notified LMER that the ECAMP contract, which expired on September 30, 1997, would not be renewed. The new contract for the ECAMP project was awarded to consulting firm "B." The supervisor, meanwhile, resigned from LMER the day after her retirement benefits vested and accepted a position with consulting firm "B," where she worked on the ECAMP.

Jaycor was not a subcontractor of consulting firm "B," and therefore had no further work to perform on the ECAMP. Smith was given part-time work. In January 1998, Smith found full-time employment outside of Jaycor, although she continued to do part- time work for Jaycor until August 1999.

On November 5, 1997, Smith filed the present complaint against LMER. The OHA issued a Report of Investigation on July 6, 1999. In accordance with 10 C.F.R. § 708.21(a), a hearing on Smith's complaint was scheduled. Smith and LMER subsequently requested that the Initial Agency Decision be issued on the basis of the existing record, without a hearing. 10 C.F.R. § 708.31.

Analysis

The Part 708 regulations provide that the employee who files a complaint has the burden of establishing by a preponderance of the evidence that her whistleblowing was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. 10 C.F.R. § 708.29. Retaliation is defined as "an 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 whistleblowing]."

Smith's central claim is her transfer to part-time work was retaliation for her whistleblowing. There is no dispute that the reduction in her working time was a negative action with respect to her employment, and could be found to be retaliation if it was the result of a protected disclosure. 10 C.F.R. § 708.2 (definition of "retaliation"). The question remains, however, as to whether Smith's disclosures were a contributing factor in the reduction of her working time.

A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Luis P. Silva*, 27 DOE ¶ _____ (Case No. VWA-0039, February 25, 2000), citing *135 Cong. Rec. H747* (daily ed. March 21, 1989) (Explanatory Statement on Senate Amendment-S.20); *see also Marano v. Department of Justice*, 2 F.3d 1137 (Fed. Cir. 1993) (applying the "contributing factor" test in a case under the Whistleblower Protection Act, 5 U.S.C. § 1201).

The process by which LMER lost the ECAMP contract and Smith was transferred to part-time work cannot be attributed to a retaliatory motive by the supervisor. The decisive factor in the placement of the ECAMP contract was the supervisor's attitude about LMER, which had been formed before Smith made any disclosures. For example, in August 1996, more than a year before Smith's first disclosure, the supervisor told her contacts at the Air Force about her desire to find a new firm for the ECAMP contract. When the supervisor was apparently about to accept a position with consulting firm "A," the Air Force announced its intent in the *Commerce Business Daily* to award the ECAMP contract to the same firm. Though this plan was unsuccessful, the supervisor continued to arrange for the ultimate placement of the ECAMP contract outside LMER. For much of the time that the supervisor was attempting to have the contract placed with a different firm, she was actively arranging a position for Smith with the new firm, which shows that the supervisor's plan for moving the ECAMP contract was not retaliatory against Smith.

In addition, the record indicates that the supervisor's decision to leave LMER for a new contractor was motivated by a long-standing dissatisfaction with LMER management that predated any disclosure by Smith. Smith notes in her complaint that when the supervisor first interviewed her in 1994, she expressed frustration with LMER's lack of support for the ECAMP. In March 1996, according to Smith, the

supervisor met with Air Force personnel to express her dissatisfaction with her management and to discuss moving the ECAMP contract to another firm. In September 1996, the supervisor began negotiating for a position with consulting firm "A." It was only in November 1996, after the supervisor had taken steps to ensure that the ECAMP contract would be placed with another firm, that Smith made her first disclosure.

LMER's eventual loss of the ECAMP contract followed, but was unrelated to, Smith's disclosures. Two factors, unconnected to Smith's disclosures, were responsible for the timing of the Air Force's award of the ECAMP contract to consulting firm "B." First, the contract was up for renegotiation at the end of September 1997. Second, the supervisor had ascertained, through Ashburn, that she was eligible to leave LMER with retirement benefits as of October 8, 1997. However, the supervisor had established e-mail and voice mail accounts with consulting firm "B" by September 1997, strengthening the bid of consulting firm "B" for the ECAMP contract and assuring that this attempt to move the contract would be successful. Smith's disclosures, however, had no effect on the process to place the ECAMP contract outside LMER.

In summary, there is ample evidence in the record to make the following four findings:

1) That the supervisor had determined to leave LMER before Smith made a protected disclosure;

2) That the supervisor herself was a key factor in determining the recipient of the ECAMP contract;

3) That LMER lost the ECAMP contract because the supervisor went to work for another firm: and

4} That the termination of Smith's employment was due to LMER's loss of the ECAMP contract.

Considering these four findings together, it is clear that Smith's disclosures did not affect in any way her transfer to part-time work. The supervisor would have left LMER, and Jaycor would have lost its subcontract for ECAMP work, regardless of whether Smith had made any protected disclosures. Consequently, I find that Smith's disclosures were not a contributing factor to her transfer to part-time work.

Smith alleges a number of other lesser retaliations in addition to her transfer to part-time work. For example, she claims that after January 1997, her work assignment was greatly changed so that she "went from a protocol team leader for three environmental protocols to basically clerical support." As Smith relates, preparing for, performing, and reporting on the assessments was the bulk of her work. The assessments typically involved traveling to an Air Force site. In 1994, Smith states, the ECAMP team's work load increased from ten to eighteen assessments per year. In 1997, however, there were only two ECAMP assessments, one in April and one in August. Smith was replaced on the April assessment by another team member, and took part in the August assessment. Since LMER has shown that the amount of assessment work was greatly reduced, there is clear and convincing evidence that, absent the protected disclosures, such work would not have been available to be assigned to Smith.

Smith also claims as retaliation the fact that "those [ECAMP team] employees ... who did not speak out regarding [the supervisor's] actions ... continued on with the ECAMP work through [consulting firm "B"]. Smith is apparently claiming that the supervisor committed an act of retaliation by not hiring her to work at consulting firm "B." There is no indication, however, that Smith applied for a job with consulting firm "B," nor is there any reason to believe that LMER should be held responsible for the hiring practices of consulting firm "B." Consequently, I find no evidence of retaliation in this assertion.

Conclusion

The evidence clearly establishes that Smith's disclosures were not a contributing factor in her transfer to part-time work. Given the supervisor's determination to take the ECAMP contract elsewhere, the loss of Smith's position as a subcontractor of LMER was inevitable. Accordingly, her complaint will be denied.

It Is Therefore Ordered That:

(1) The complaint filed under 10 C.F.R. Part 708 by Alizabeth Aramowicz Smith, OHA Case No. VBH-0025, is hereby denied.

(2) 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 fifteenth day after the party's receipt of the Initial Agency Decision.

Warren M. Gray

Hearing Officer

Office of Hearings and Appeals

Date: June 22, 2000