United States Department of Energy
Office of Hearings and Appeals

In the Matter of Alison Marschman	)	
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Filing Date: June 28, 2013	)	Case No.: WBA-13-0007
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	)	

Issued: August 7. 2013

Decision and Order

This Decision considers an Appeal of a Dismissal issued by the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) on June 13, 2013, of a Complaint filed by Alison Marschman (the Appellant or Marschman) against her former employer, Battelle Energy Alliance, LLC (Battelle), under the DOE's Contractor Employee Protection Program, 10 C.F.R. Part 708.[1] In her Complaint, the Appellant alleges that Battelle terminated her employment in retaliation for filling filed a prior Part 708 Whistleblower complaint. As set forth in this Decision, I have determined that the Appeal be granted.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE'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, contractor-operated facilities. 57 Fed. Reg. 7533 (March 2, 1992). 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 retaliation by a DOE contractor against an employee because the employee has engaged in certain protected activity, including "disclosing to a DOE official, . . . any other government official who has responsibility for the oversight of the conduct

[1] Battelle operates the Idaho National Laboratory (INL) for the DOE. INL is a science-based, applied engineering national laboratory dedicated to supporting the U.S. Department of Energy's missions in nuclear and energy research, science, and national defense. *See* https://www.inl.gov (visited July 29, 2013).

of operations at a DOE site, your employer, or any high tier contractor, information that [the employee] reasonably 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." 10 C.F.R. § 708.5(a).

Part 708 sets forth the procedures for considering complaints of retaliation. OHA is responsible for investigating complaints, holding hearings, and considering appeals. 10 C.F.R. Part 708, Subpart C. According to the Part 708 regulations, a complaint must include a "statement specifically describing the alleged retaliation" and "the disclosure, participation, or refusal that [the complainant believes] gave rise to the retaliation." 10 C.F.R. § 708.12.

B. Factual and Procedural Background

Marschman began working for Battelle on September 24, 2007, as a Radiological Control Technician. June 10, 2013, Affidavit of Alison Marschman (Affidavit) at 1. In September 2009, Marschman filed a Part 708 Complaint of Retaliation (2009 Complaint) alleging that Battelle, her employer, had retaliated against her for raising safety issues. February 19, 2010, Letter from Janet N. Freimuth to Alison Marschman (2010 Dismissal Letter). On February 19, 2010, Marschman's complaint was dismissed by OHA since, as a result of negotiations, Battelle offered Marschman the remedy she requested to resolve the 2009 Complaint – a transfer to another position and the removal of documentation concerning a verbal warning she had received. 2010 Dismissal Letter at 2; *see* 10 C.F.R. § 708.17(c)(6).

In early 2010, pursuant to their negotiations, Marschman was transferred from the Central Facilities Area (CFA) to a part-time position as a Health Physics Technician (HP Tech) in the Materials and Fuels Complex (MFC). Affidavit at 1. Upon her transfer, Marschman alleged that Maxine Rubrik, Marschman's then immediate supervisor, began to retaliate against her. Affidavit at 1-2. Additionally, she believed that the Manager of the MFC, Paul Nelson (Nelson), was trying to find an excuse to discharge her. Affidavit at 3. Marschman believed that the alleged retaliation was motivated by the fact that she was the only part-time employee in her group and that the MFC had been "forced" to employ her. Affidavit at 2-4.

During the period that Marschman was employed at MFA, INL began to experience reduction in budget. May 20, 2013, Battelle Response to Marschman Complaint at 2 (Response). As a result, Battelle began to examine its workforce structure to reduce its personnel costs and to maximize the effectiveness of its workforce. Response at 2. Nelson knew that Marschman was the only part-time HP Tech working the MFC. Consequently, Nelson allegedly concluded that, to improve MFC's capabilities, Marschman would need to become a full-time employee or MFC should hire another full HP Tech and employ Marschman only on an as-needed basis. Response at 2.

On December 18, 2012, Nelson met with Marschman and her immediate supervisor at the time, Trenna LePage. Response at 2; Affidavit at 4. At the meeting, Nelson gave Marschman a memorandum (December 18, 2012, Memorandum) offering her a full-time position as a HP Tech at the MFC. Response at 2; Affidavit at 4; December 18, 2012, Memorandum. The December 18, 2012, Memorandum also stated Marschman could instead accept a "casual" part-time position

where she would be employed on an as-needed basis. In the alternative, the December 18, 2012, Memorandum stated that Marschman could resign her position if she did not elect either of the first two job options. The December 18, 2012, Memorandum also stated that in the event Marschman did not sign the letter and make a selection among the options, Battelle would consider Marschman to have voluntarily resigned. Affidavit at 4. On January 21, 2013, Nelson met with Marschman, and Marschman informed him that she was not going to sign the December 18, 2012, Memorandum. Nelson informed her that he would then be accepting her voluntary resignation from her position. Affidavit at 4.

On April 19, 2013, Marschman filed another Part 708 Complaint of Retaliation (2013 Complaint). In the 2013 Complaint, Marschman alleges that "[i]n 2/17/2010 [the 2009 Complaint] was dismissed because [Battelle] provided a remedy to the situation. Now the remedy has been removed. [Battelle] says they don't recognize my whistleblower remedy or if there was one. My remedy [her new position at Battelle] has been removed. I am seeking to be compensated three hundred thousand dollars onetime payment tax free." Her 2013 Complaint also requested an OHA investigation and hearing regarding her complaint. 2013 Complaint at 1.

The OHA Director appointed Shiwali Patel, OHA Staff Attorney (Investigator), to investigate Marschman's 2013 Complaint on May 29, 2013. The Investigator interviewed Marschman and obtained an affidavit containing Marschman's answers to various questions concerning the 2013 Complaint. *See* Affidavit.

The Investigator subsequently issued a letter dismissing Marschman's 2013 Complaint. June 19, 2013, Letter from Shiwali Patel, OHA Staff Attorney, to Alison Marschman (2013 Dismissal Letter). In dismissing the 2013 Complaint, the Investigator found that Marschman had voluntarily resigned from her position at Battelle because she failed to sign the December 18, 2012, Memorandum. Because Marschman had voluntarily resigned, the Investigator found that she had not suffered retaliation as defined by 10 C.F.R. § 708.2. Additionally, the Investigator found that Marschman had not been the victim of constructive discharge because Marschman had not alleged sufficiently intolerable workplace conditions such that a reasonable person in Marschman's position would have felt compelled to resign. See 2013 Dismissal Letter at 2 (*citing Richard L. Urie*, Case No. TBH-0063 (2008)). As support for this conclusion, the Investigator cited Marschman's statement in her Affidavit stating that, despite Battelle officials' attempts to make her resign by mistreating her, she did not resign from her position. 2013 Dismissal Letter at 2; Affidavit at 5. Thus, the Investigator concluded that the "intolerable conditions" of Marschman's employment had no affect on her resignation. 2013 Dismissal Letter at 2; Affidavit at 5. Lastly, the Investigator found that Marschman's 2009 Complaint could not have been a contributing factor in Marschman's claimed termination from her position given the amount of time which had elapsed from the 2009 Complaint until her termination in 2013. 2013 Dismissal Letter at 2-3.

II. Appeal

In her June 28, 2013, Appeal, Marschman argues that the Investigator erred in finding that she had voluntarily resigned her position. June 28, 2013, Appeal at 1. In support of her argument, Marschman submitted a portion of the Battelle Employee's Handbook that describes the

procedures for voluntary resignation. Because her termination did not follow these procedures, she argues that she did not voluntarily resign from her position. June 28, 2013, Appeal at 1. Marschman also argues that, after she took her new position, she continued to experience acts of harassments such as being subject to false accusations by LePage and Nelson, being given an excessive amount of work, and being told that Nelson's superior manager, Chere Morgan (Morgan), had problems with the idea of Marschman working part-time. June 28, 2013, Appeal at 1. Marschman apparently argues that, given the harassment she was experiencing, it was likely that her 2009 Complaint was still an issue with her supervisors and that consequently, the 2009 Complaint was a contributing factor in her dismissal and the harassment was such to make her resignation a "constructive discharge."[2]

III. Analysis

As set forth in our other Part 708 appeal cases, the standard of review for appeals is well-established. Conclusions of law are reviewed *de novo. See Curtis Hall,* Case No. TBA-0002 at 5 (2008). Findings of fact, however, are overturned only if they are clearly erroneous, giving due regard to the trier of fact to judge the credibility of the witness. *Id.; Salvatore Gianfriddo,* Case No. VBA-0007 (1999). Below, I will review the bases upon which the Investigator dismissed Marschman's 2013 Complaint.

A. The Lack of Retaliation against Marschman

As described above, the gravamen of Marschman's 2013 Complaint is that she was terminated from her position because of her 2009 Complaint. However, the Investigator found that Marschman had voluntarily resigned from her position, and thus had not suffered from retaliation, because she had failed to sign the December 18, 2012, Memorandum. As an initial matter, I agree with the Investigator's finding that a voluntary resignation (unless under such circumstances to be considered a "constructive discharge") is not a retaliation under Part 708. Section 708.2 of Part 708 defines retaliation as:

> 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. A voluntary resignation is not an action taken *against* an employee and as such is not retaliation under Part 708.

Marschman argues that Battelle's own personnel policies prohibit her removal from being considered a voluntary resignation. Section 4.2 of the Battelle Employee Handbook defines voluntary

[2] Marschman also argues that "[Battelle] has accused me of not showing up to work after the Curtailment. This is not true. I showed up on January 3, 2012. I would like to be paid for the days they said I was not there." June 28, 2013, Appeal at 1. This argument is not relevant to Marschman's June 28, 2013, Appeal and thus, I will not consider it in this Decision.

resignation as an "employee-initiated termination of employment. . . ." June 28, 2013, Appeal at 12 (copy of Section 4.2 of Battelle Employee Handbook). Nonetheless, the Battelle Employee Handbook is not a controlling authority under Part 708 for the purpose of determining what is a voluntary resignation for the purposes of Part 708.[3] The available facts as outlined in the Affidavit and the Battelle Response indicate that Marschman did not wish to leave her part-time position. The fact that the terms of the December 18, 2012, Memorandum left no option for Marschman to remain as a part-time employee does not make Marschman's loss of employment "voluntary." Consequently, I find, for Part 708 purposes, that Marschman's loss of position was involuntary and could be considered retaliation under Part 708's section 708.2.[4]

B. The 2009 Complaint as a Contributing Factor in the 2013 Termination

As described above, the Part 708 regulations require that a Part 708 complainant prove by a preponderance of the evidence that his or her protected disclosure or activity was a contributing factor in the retaliation the complainant suffered. Because of the difficulty in producing direct evidence of an employer's retaliatory intent, OHA has held that a complainant can meet his or her burden of proof through circumstantial evidence and that a protected disclosure or activity can be found to be a contributing factor if there is sufficient temporal proximity between the protected disclosure or activity and the claimed retaliation. *Curtis Hall*, Case No. TBA-0042, *slip op*. at 6 (2008).

In her 2013 Complaint, Marschman apparently alleges that, despite the resolution of the 2009 Complaint, she continued to suffer retaliation during the period 2010 to 2013 because she had previously filed the 2009 Complaint. The Investigator found that, given the amount of time that had elapsed between the filing of the 2009 Complaint and the retaliation she received, approximately three years, the 2009 Complaint could not have been, as a matter of law, a contributing factor in the retaliation she received or the loss of her job.

Assuming *arguendo* that a three-year period between Marschman's filing of the 2009 Complaint and the loss of her position is too long of a period to use the temporal proximity presumption to establish that the 2009 Complaint was a contributing factor to Marschman's loss of employment, such lack of proximity is not necessarily fatal to Marschman's complaint. Section 708.29 does not mandate that a whistleblower must prove that his or her protected disclosure or activity was a contributing factor to retaliation by virtue of the temporal proximity presumption. A whistleblower may show by other evidence that a protected action or disclosure was a contributing factor to retaliation. *Dorsey v. Dep't of Army*, 2012 MSPB 28 at ¶ 14 (2012) (Whistleblower Protection Act holding "the knowledge/timing test [temporal proximity] is not the only way for an appellant to satisfy the contributing factor standard; rather, it is only one of many possible ways to satisfy the standard").

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[3] A notice contained in the Battelle Employee Handbook states "[n]othing in this Employee Handbook may be construed as . . . . a binding contract with [Battelle] for any other purpose." June 28, 2013 Appeal at 5 (copy of Battelle Employee Handbook).

[4] Because I find, for the purposes of this appeal, that Marschman may have experienced retaliation, I need not review the Investigator's findings regarding constructive discharge.

In her Affidavit, Marschman alleges various negative personnel actions that were taken after her transfer to the MFC.[5] If Marschman can present sufficient evidence to establish a pattern of retaliation after her 2009 Complaint and transfer, a Hearing Officer might find sufficient evidence to conclude that her 2009 Complaint was, in fact, a contributing factor in her loss of employment. *See Agoranos v. Dep't of Justice*, 2013 MSPB 41 at ¶ 23 (2013) (Whistleblower Protection Act case where retaliation occurring longer than two years later found to meet the knowledge-timing test because the complainant demonstrated a "continuum of related performance-based actions"); *O'Neal v. Ferguson Construction Company*, 237 F. 3d 1248 (10th Cir. 2001) (finder of fact might could infer causation between filing of EEOC complaint and adverse employment action through a number of intervening negative personnel actions not withstanding a lack of temporal proximity). As such, I cannot conclude that, as a matter of law, Marschman can not demonstrate that the 2009 Complaint was a contributing factor in the loss of her employment.

In sum, I find that the Investigator inappropriately dismissed Marschman's 2013 Complaint. I will remand the matter to the Investigator for further investigation. In making this finding, it is important to note that my holding applies only to the question as to whether Marschman's 2013 Complaint, as a matter of law, should be dismissed at this stage of the investigation. If this matter goes to a hearing, Marschman will have the burden of proving by a preponderance of the evidence that 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 Marschman satisfies this burden at a hearing, Battelle will have to opportunity to avoid liability by proving by clear and convincing evidence that it would have taken the same action without Marschman's disclosure, participation, or refusal. *Id.*

It Is Therefore Ordered That:

(1) The Appeal filed by Alison Marschman (Case No. WBA-13-0007) is hereby granted and her Part 708 complaint is remanded to the Investigator for further processing as set forth at 10 C.F.R. § 708.22.

(2) This is an Interlocutory Order of the Department of Energy. This Order may be appealed upon issuance of a decision by the Hearing Officer on the merits of the complaint.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: August 7, 2013

[5] The parties disagree as to whether Marschman's superiors at the MFC had actual knowledge of her 2009 Complaint and the circumstances leading to her transfer to the MFC.