United States Department of Energy
Office of Hearings and Appeals

In the Matter of Alison Marschman	)	
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Filing Date: October 18, 2013	)	Case No.: WBH-13-0011
	)	
	)	

Issued: May 8, 2014

Initial Agency Decision

Robert B. Palmer, Administrative Judge:

This Decision concerns a Complaint filed by Alison Marschman (hereinafter referred to as "Ms. Marschman" or "the Complainant") against Battelle Energy Alliance (hereinafter referred to as "BEA" or "the Respondent"), her former employer, 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, BEA operated the Idaho National Laboratory (INL) pursuant to a contract with the DOE. It is the Complainant's contention that during her employment with BEA, she engaged in protected activity and, as a consequence, suffered reprisals by BEA. As a remedy, the Complainant seeks back pay and reimbursement for legal and other expenses. As discussed below, I have concluded that Ms. Marschman 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 retaliation by a DOE contractor against its employee because the employee has engaged in certain protected activity, including disclosing to his or her employer information that he or she reasonably believes reveals a substantial and specific danger to employees or to the public, and for participating "in a Congressional proceeding or an

administrative proceeding conducted under this regulation." 10 C.F.R. § 708.5(b). An employee who believes that he or she has suffered retaliation for engaging in protected activity 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

The following facts are not in dispute. The Complainant was hired by BEA in September 2007 and went to work on a full time basis as a Senior Radiological Control Technician (RCT) in the company's Central Facilities Area (CFA). In September 2009, Ms. Marschman filed a complaint under 10 C.F.R. Part 708, in which she alleged that she was retaliated against by BEA for raising safety concerns while working at CFA. As a result of discussions between BEA and Ms. Marschman that followed the filing of this complaint, BEA transferred the Complainant from CFA to a part-time position as a Health Physics Technician (HPT) at the Materials and Fuels Complex (MFC). [1] This position was created for her as a result of these discussions, and she was the only part-time HPT at MFC during the period in question. In February 2010, the OHA dismissed Ms. Marschman's complaint because she was offered the remedy that she requested to resolve the complaint she had filed in September 2009 (the transfer to MFC and the removal from her personnel file of the documentation of a verbal warning that she received while at CFA). 2010 Dismissal letter at 2; *see* 10 C.F.R. § 708.17(c)(6).

After this transfer, the Complainant initially worked at the Fuel Conditioning Facility (FCF) and reported to Steve Aitken, the Radiological Control (RADCON) Manager, and Maxine Rubick, her direct supervisor. Ms. Rubick was Ms. Marschman's direct supervisor until November 2011. In January 2011, Paul Nelson transferred from the Advanced Test Reactor Complex and replaced Mr. Aitken as MFC's RADCON Manager. In August 2012, Ms. Marschman transferred from the FCF to a new instrument group in MFC supervised by Trenna LePage. From then until the Complainant's termination in January 2013, her first, second, third and fourth line managers were, respectively, Ms. LePage, Mr. Nelson, Chere Morgan, and Sharon Dossett.

On November 27, 2012, Mr. Nelson issued a verbal warning with written documentation (hereinafter referred to as a "verbal warning") to Ms. Marschman in response to an incident that involved the Complainant and a co-worker. [2] According to the written documentation, on October 10, 2012, the Complainant had a "verbal altercation" with the co-worker, during which Ms. Marschman allegedly stated that the co-worker "had better stop belittling [her] or [the co-

[1] HPTs monitor radiation levels to protect workers and the public and to ensure compliance with company procedures and regulations.

[2] A verbal warning is the mildest formal disciplinary measure that can be taken by BEA against an employee. Those measures, in ascending order of severity, are (i) verbal warning with written documentation, (ii) written notice, (iii) suspension without pay, and (iv), discharge.

worker] would be sorry." Complainant's Exhibit (Comp. Ex.) 19; Respondent's Exhibit (Resp. Ex.) 21. The documentation went on to explain that statements of this nature are viewed as threatening, and that while Ms. Marschman allegedly told Mr. Nelson that the intent of the statement was that she would talk to management about the co-worker's behavior, that intent was not made known to the co-worker. *Id.*

On December 18, 2012, Ms. Marschman met with Mr. Nelson and Ms. LePage. During this meeting, Ms. Marschman was presented with a memorandum in which she was given three choices concerning her continued employment with the Respondent. Those choices were (1) to accept reassignment to regular full-time employment, (2) accept reassignment to casual part-time employment, or (3) decline the reassignment and "voluntarily" resign from employment, with an effective date of December 20, 2012. Resp. Ex. 26. [3] BEA alleges that it took this step because it needed a full-time HPT for business-related reasons. Because remaining in her current part-time position was not an option, Ms. Marschman complained that requiring her to choose was a violation of the settlement agreement that resulted in the dismissal of her 2009 Part 708 complaint. Mr. Nelson replied that he would need to see a copy of the agreement. Ms. Marschman also noted that the full-time position that she would be accepting if she chose that option was not specified in the memorandum, and Mr. Nelson responded that it was the same position that she currently held, with the only change being from part-time to full-time.

On December 19, 2012, Mr. Nelson contacted Ms. Marschman to determine if she had a copy of the settlement agreement and if she had decided which option to accept. Ms. Marschman informed Mr. Nelson that her husband, Steve Marschman, who also worked for BEA as a Level 5 Manager, had arranged for a meeting with Victor Alvarez, BEA's Executive Vice President, to discuss the situation. Later that day, Mr. Alvarez sent Mr. Marschman an e-mail, in which he said that BEA would defer further discussion and a decision on the December 18th memorandum until after the New Year. Resp. Ex. 29. Mr. Alvarez also "encourage[d] an open mind as the lab needs full time help in this area and can use [Ms. Marschman's] talents accordingly." *Id.*

On January 9, 2013, Ms. Morgan and Ms. LePage met with Ms. Marschman and presented her with a revised copy of the memorandum. The only revision that was made, however, was that the date of termination, should she choose not to accept reassignment to full-time or casual part-time status, was changed from December 20, 2012, to January 14, 2013. Resp. Ex. 32. Ms. Marschman refused to choose any of the three options, refused to sign the memorandum, and said that she and her husband would be meeting with Mr. Alvarez. Ms. Morgan replied that she would get the right people together to resolve the matter and would get back with Ms. Marschman.

On January 21, 2013, Mr. Nelson, Ms. Morgan and Ms. LePage met with Ms. Marschman again. The Complainant again refused to choose one of the three options or to sign the memorandum. Instead, she presented Mr. Nelson, Ms. Morgan and Ms. LePage with a copy of an e-mail that she had sent earlier to Jan Oglivie of the DOE's Idaho Operations Office. That e-mail said, in

[3] "Casual part-time" employment would have differed from Ms. Marschman's part-time position in that, instead of working a set number of days per week, she would have been called in only on an "as needed" basis. This would have resulted in a decrease in the number of hours worked, and consequently, in her pay.

pertinent part, that "[d]ue to the workforce restructuring happening within the Idaho National Laboratory, the loss of work scope and a possibility of up to four hundred and fifty layoffs, I choose to remain a regular part time employee as agreed upon between DOE, BEA and myself as part of my 708 agreement." Comp. Ex. 22. Mr. Nelson informed Ms. Marschman that because she had failed to choose one of the three options set forth in the memorandum, she would be considered to have voluntarily resigned from her position with BEA. She was then escorted off of the premises.

C. Procedural Background

On April 19, 2013, Ms. Marschman filed the Part 708 "Whistleblower" Complaint that is the subject of this proceeding. That Complaint states that "[i]n 2/17/2010 TBI-0093 [Ms. Marschman's 2009 Part 708 Complaint] was dismissed because BEA provided a remedy to the situation. Now the remedy has been removed. BEA says that they don't recognize my whistle blower remedy or if there was one. My remedy has been removed." She went on to request relief in the form of monetary damages. Comp. Ex. 23.

The Complaint was forwarded to the Office of Hearings and Appeals, and Ms. Shiwali Patel was appointed the Attorney-Investigator. On June 19, 2013, Ms. Patel dismissed the Complaint. Comp. Ex. 26. She concluded that, by refusing to sign or to choose one of the three options on the memoranda that were presented to her on December 18, 2012, January 9, 2013, or January 21, 2013, Ms. Marschman voluntarily resigned from her position as an HPT. She further concluded that voluntary resignation does not qualify as "retaliation" as that term is defined by 10 C.F.R. § 708.2. Additionally, Ms. Patel found that Ms. Marschman had not been the victim of a constructive discharge because the Complainant had not alleged sufficiently intolerable workplace conditions such that a reasonable person in Ms. Marschman's position would have felt compelled to resign. Finally, Ms. Patel concluded that Ms. Marschman had not alleged facts that, if proven, would support a claim that her 2009 Complaint was a contributing factor in her termination. *Id.*

Ms. Marschman appealed the dismissal of her Complaint. On August 8, 2013, the OHA Director granted her Appeal and remanded the matter to Ms. Patel for a full investigation. *Alison Marschman*, Case No. WBA-13-0007 (2013). In granting the Appeal, the Director found that Ms. Marschman's loss of position was not voluntary because she was not allowed to remain in her regular part-time employment, a status that she clearly preferred. He further concluded that because the loss of position was involuntary, it could be considered retaliation under 10 C.F.R. § 708.2. The Director went on to note that, because of the difficulty in producing direct evidence of an employer's retaliatory intent, the 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 disclosure or activity and the alleged retaliation. Assuming, without deciding, that the approximately three-year period between Ms. Marschman's 2009 Complaint and her 2013 termination was too long a period to establish temporal proximity, the Director concluded that there were other ways by which the Complainant could prove that her protected activity was a contributing factor to her loss of position. Specifically, he stated that such a nexus could be established if Ms. Marschman was able to demonstrate a pattern of retaliation after her 2009

Complaint. Because the Director was unable to conclude, as a matter of law, that Ms. Marschman could not demonstrate that her protected activity was a contributing factor to her loss of position, he granted the Complainant's Appeal. *Id.*

On remand, Ms. Patel conducted an investigation, during which she interviewed Ms. Marschman and 20 other witnesses and reviewed a large number of documents. On October 18, 2013, Ms. Patel issued her Report of Investigation (ROI). In the ROI, Ms. Patel discussed ways in which it could be demonstrated that a protected disclosure or activity was a contributing factor to a negative personnel action. One such way, she continued, is the "knowledge/timing test." Under this test, whether a protected disclosure or activity was a contributing factor can be established by demonstrating that the officials who decided to take the negative action knew of the disclosure or activity, and that the action occurred within a reasonable time of that protected disclosure or activity. Ms. Patel further stated that "contributing factor" can be demonstrated through a consideration of other factors, such as the strength or weakness of the employer's reasons for taking the adverse action, whether the "whistleblowing" was personally directed at the deciding officials, and whether these officials had a desire or motive to retaliate against the complainant. In this case, Ms. Patel found that Ms. Marschman engaged in a protected activity when she filed her 2009 Part 708 Complaint, and that BEA terminated the Complainant on January 21, 2013. Ms. Patel further concluded that it was Mr. Nelson who decided to change Ms. Marschman's employment status. Ms. Patel went on to state that there was conflicting evidence in the record as to whether Mr. Nelson had actual or constructive knowledge of Ms. Marschman's Complaint prior to their December 18, 2012, meeting, and she then discussed whether the three-year period between the 2009 Complaint and Ms. Marschman's termination was too long to establish temporal proximity. If Ms. Marschman is able to demonstrate that her 2009 Complaint was a contributing factor to her loss of position, Ms. Patel continued, it would then be incumbent upon BEA to demonstrate, by clear and convincing evidence, that it would have taken the same action against Ms. Marschman in the absence of her protected activity. Ms. Patel concluded that, although there was some evidence that the Respondent would have taken the same action based on business needs, it was unclear that this evidence was "clear and convincing." Comp. Ex. 53.

On October 18, 2013, I was appointed the Administrative Judge in this matter. After discovery and the submission of pre-hearing briefs, I convened a hearing on January 8-10, 2014. Ms. Marschman submitted 57 exhibits and presented the testimony of six witnesses, in addition to testifying herself. BEA submitted 62 exhibits and presented the testimony of seven witnesses.

II. ANALYSIS

As previously discussed, in order to prevail in a Part 708 proceeding, a complainant must show, by a preponderance of the evidence, that he or she engaged in an activity that is protected by 10 C.F.R. § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the complainant by the respondent. 10 C.F.R. § 708.29. If the complainant meets this burden of proof, the burden shifts to the respondent to prove by clear and convincing evidence that it would have taken the same action absent that protected activity. *Id.*

A. Ms. Marschman's Protected Activity

The sole protected activity alleged in Ms. Marschman's most recent Complaint was her filing of the September 2009 Part 708 Complaint. However, at the hearing Ms. Marschman testified that she made multiple disclosures to BEA management concerning working conditions during her time at MFC. She said that in December 2010, she was asked by Ms. Rubick to monitor the radiation exposure for employees working with a glove box. [4] She asked Ms. Rubick whether the proper equipment to do such monitoring was available, and Ms. Rubick allegedly replied that the instruments that Ms. Marschman requested were all broken, and that the Complainant would have to use the equipment that was on hand. Hearing Transcript (Tr.) at 252, Comp. Ex. 46 at 3. Ms. Marschman continued that she refused to perform the monitoring without the proper equipment, and she told Ms. Rubick that she believed that she could obtain the proper equipment from a nearby location. She went to that location, and was not successful in obtaining the equipment that she sought. When she returned, the work had already been completed. Tr. at 252-253.

It is undisputed that Ms. Marschman engaged in protected activity when she filed her September 2009 Complaint, and I find that this December 2010 disclosure about the proper equipment to be used in measuring radiation exposure from the use of glove boxes was also protected by the Part 708 regulations. [5] That she reasonably believed that this disclosure revealed a substantial and specific danger to employees is attested to by the fact that BEA was subsequently fined by the DOE for lax procedures that led to an incident during which workers received elevated doses of radiation to their hands while working with a glove box. Resp. Ex. 52 at 7.

B. Ms. Marschman's Protected Activity as a Contributing Factor to Her Termination

The next issue that I must address is whether Ms. Marschman has shown that her protected activity was a contributing factor to any allegedly retaliatory act taken against her by BEA. For the reasons that follow, I find that she has not shown this by a preponderance of the evidence.

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[4] A glove box is a sealed container with gloves built into the sides that allows an employee to stand outside the container and handle objects inside the container without exposing the employee to the container's contents.

[5] In her testimony, Ms. Marschman refers to other instances during which she raised safety concerns, disagreed with BEA management as to the proper procedures to be used to ensure worker safety, or was asked to "cut corners." Tr. at 245-251; 254-257, 276, 312, 333, 377-380. I conclude that these alleged instances do not amount to activity that is protected by the Part 708 regulations. In some cases, it is not clear that she reported any concerns to BEA management or to individuals other than her co-workers. In others, it is not clear that she reasonably believed that any disclosures revealed a substantial and specific danger to employees or to the public. Furthermore, these alleged instances were raised by Ms. Marschman for the first time at the hearing. It would be manifestly unfair to BEA to accept these alleged disclosures as protected activity, given the lack of any notice to the Respondent.

Neither the investigation in this case nor the hearing produced any direct evidence that BEA retaliated against Ms. Marschman because she filed her 2009 Complaint, or because of her December 2010 protected disclosure. However, such a nexus may also be established by circumstantial evidence. One such way of establishing a nexus through circumstantial evidence is the previously-discussed "knowledge/timing" test. However, I find that the period of over three years between the filing of Ms. Marschman's September 2009 Part 708 Complaint and her January 2013 termination, and the period of over two years between her December 2010 disclosure and that termination are simply too long to establish any kind of presumption that this protected activity was a contributing factor to that termination. *See, e.g., Greta K. Congable*, Case No. TBU-0110 (2010) (20-month period between protected action and alleged retaliation too long to establish nexus); *Donald Searle,* Case No. TBU-0079 (2008) (12 months too long); *Elaine Blakely,* Case No. VBH-0086 (2002) (13 months too long); *Jean Rouse*, Case No. VBH-0056 (2001) (24 months too long).

Another way of demonstrating such a nexus would be to show the existence of a pattern of retaliatory acts on the part of BEA management between the protected activity and Ms. Marschman's January 2013 termination. *Agoranos v. Dep't of Justice,* 2013 MSPB 41 at ¶ 23 (2013); *O'Neal v. Ferguson Construction Company,* 237 F. 3d 1248 (10th Cir. 2001). "Retaliation" is defined at 10 C.F.R. § 708.2 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" protected activity. Ms. Marschman attempted to establish a nexus at the hearing between her protected activity and her January 2013 termination by demonstrating a pattern of retaliatory acts on the part of BEA management.

According to Ms. Marschman, the first such act occurred during her first week at MFC. She and another employee were assigned by Ms. Rubick to check the Continuous Air Monitors (CAMs) at an MFC facility. [6] The employee was not following the proper procedure for doing this, which was "really confusing" Ms. Marschman. Tr. at 243. Nevertheless, the Complainant said, "'Well, hey, let me help you.'" At this time, Ms. Rubick came into the room and said to Ms. Marschman "You can help [the other employee], you know." Ms. Marschman replied that she was helping him, and Ms. Rubick said, "Well, just don't do nothing." Later, Ms. Rubick asked "What is taking you guys so long to do this CAM," and the other employee replied, "Well, I guess some people are just slower than others." Tr. at 244.

Ms. Marschman claims that this treatment was typical of what she encountered when she transferred to MFC. She was asked why she got "special treatment," and why she was "on part-time." She was repeatedly asked, "Well, why don't you just quit?" Tr. at 237. She further stated that Ms. Rubick sent her an e-mail saying that, despite Ms. Marschman's experience, she was "slower than the other RCTs." Tr. at 239. Marcus Kelly, a coworker of Ms. Marschman's at CFA who also worked at MFC for 20 years, testified that he was told by RCTs at MFC that "they were going out of their way to make her life tough." Ralph Stanton, who worked with Ms. Marschman at MFC, said that he was told by others that Ms. LePage and Ms. Morgan mistreated the Complainant by "talking down to her," and "not treating her with dignity." Tr. at 88.

[6] CAMs are used to assess airborne particulate radioactivity in a given area.

This conduct, even if it did actually occur, simply does not rise to the level of "retaliation," as that term is defined in § 708.2. As an initial matter, much of the conduct, including the comments about quitting and about "special treatment," originated from Ms. Marschman's co-workers, and not by BEA management. They are therefore not "actions taken by a contractor" within the meaning of § 708.5. Furthermore, the actions complained of are of a much less serious nature than those set forth as examples of "retaliation" in § 708.5. Remonstrations and negative comments of the sort described above surely made Ms. Marschman's transition from CFA to MFC uncomfortable, but they are of an essentially different sort than the intimidation, threats, coercion, discharge or demotion given as examples of negative actions taken with respect to an employee's compensation, terms, conditions or privileges of employment in § 708.5's definition of "retaliation." In addition, the record in this matter clearly indicates that the sometimes rocky relationship between Ms. Marschman and her co-workers and Ms. Rubick improved as they became more familiar with her. Ms. Marschman testified that once her co-workers got to know her, their treatment of her changed for the better. Tr. at 238. She added that her relationship with Ms. Rubick also improved over time. Tr. at 288. This suggests that any difficulties encountered by Ms. Marschman in these relationships were due to her being new to the position and to her part-time status, and not to retaliation. [7] Finally, Mr. Stanton testified that he did not personally witness any of Ms. Marschman's interactions with Ms. LePage or Ms. Morgan, Tr. at 87, and his testimony about their treatment of the Complainant is too vague and unsubstantiated to conclude that it was evidence of retaliation.

Ms. Marschman also claims that she was not given adequate training for her duties at MFC. She testified that her training consisted of following MFC personnel around, but she said that "it was like . . . some of them were trying to . . . ditch me, or run away from me . . . ." Tr. at 236. She added that she was not adequately trained to perform at least some of the duties assigned to her. Tr. at 244. Mr. Braase testified that he believed that Ms. Marschman "needed a lot more training than she got," because "when she got [to MFC] they didn't help her much," believing that as a "Senior HP, she shouldn't need as much help." Tr. at 114-115. He added that regardless of an employee's experience level, there were facility-specific factors that he or she needed to be trained on, and that he did not believe that Ms. Marschman had been as thoroughly trained as he was when he came to MFC. Tr. at 139-145.

Despite this testimony, I cannot conclude that any lack of training on Ms. Marschman's part was due to retaliation for her previous Part 708 Complaint. This is because the record indicates that a lack of sufficient training was a problem for all HPTs at MFC, and that Ms. Marschman did not receive less training than most of her co-workers. In an August 2012 internal Idaho National Laboratories Assessment Report entitled "INL Extremity Exposure Control and Radiological Training" (INL Report), the authors concluded that "Facility specific on the job training for HPTs at MFC is currently not adequate to ensure proficient RADCON coverage of program work scope involving new and emerging hazards." Resp. Ex. 49 at 8. Training deficiencies at MFC were also cited in a Preliminary Notice of Violation that was issued to BEA by the DOE on

[7] Steven Braase, another of Ms. Marschman's co-workers at MFC, indicated that the other HPTs treated her poorly because she was slower in her work than everybody else, and because they often had to do extra work because of her part-time status. Tr. at 132, 135. This testimony further supports my conclusion that Ms. Marschman's treatment at MFC was not due to retaliation.

October 4, 2012. Resp. Ex. 52 at 11. Mr. Nelson testified that "When you . . . looked at the training program for the Health Physics Technicians at MFC, it was lacking significantly, and improvements needed to be made in it." Tr. at 460. He went on to state that Ms. Marschman received the same training that the other HPTs at MFC received. Tr. at 468; Resp Ex. 6 at 5.

The Complainant further testified that she was over-worked during her tenure at MFC. Specifically, she stated that although she was part-time, she "was expected to do as much work as a full-time person." Tr. at 268. Whenever she was absent, "it took two people to do what I did part-time, two full-time people, as [opposed] to one part-time person." *Id.* She added that when she was out sick, it took two HPTs to do her work, and that when she was terminated, her duties were given to two full-time employees. Tr. at 268-269. They gave her so much work, she continued, that she was working "through [her] lunches and after work, and I wasn't getting paid for working . . . after hours. . . . But, that's what I had to do to get the job done." Tr. at 269.

The record indicates, however, that Ms. Marschman's heavy workload was due to a shortage of staff at MFC, and not to any protected activity by the Complainant. The INL Report concluded that staffing at MFC "is inadequate to support work planning and support." Resp. Ex. 49 at 7. The Report goes on to conclude that "HPT staff shortages have been frequently cited by [MFC] organizations as a cause for delaying program work in the MFC facilities." *Id.* at 8. In a report dated September 25, 2012, prepared by INL's Office of Nuclear Operations and RADCON Excellence, the authors cited "concerns with adequate HP staffing and training" at MFC, and concluded that "it is imperative that detailed plans be developed and implemented for re-assigning, hiring, training and deploying the necessary talent to support . . . safe operation of the MFC facilities" given the attrition there "of key qualified personnel . . . who are trained in process, facility, and RADCON operations." Resp. Ex. 50 at 8. Mr. Nelson testified that MFC was "understaffed and struggling to support the demands of the ongoing work activities." Tr. at 444. He said that in planning for work to be done in a given week, management would normally assign work to each group that would amount to 80 percent of that group's capacity to perform their jobs during that week. That way, he explained, if someone calls in sick on a given day, that day's work could still be performed. However, because his organization (which included Ms. Marschman) was a "limiting resource" (meaning that other organizations were not able to work to their capacity because of a shortage of HPTs), his group was often scheduled to 100 percent of capacity. Even the supervisors in his group were overloaded with administrative duties, he added. Tr. at 463. Consequently, when one person called in sick, his organization could not do all of the work that it was tasked with doing. Tr. at 457-458. This also made training the HPTs more difficult, since it took time away from their regularly scheduled duties. Mr. Nelson said that they ended up having most of them come in on their off day, and receive over-time pay. Tr. at 460-461. Ms. LePage confirmed this during her testimony. Tr. at 588. Accordingly, the preponderance of the evidence indicates that Ms. Marschman's heavy workload was due to a shortage of HPTs at MFC, rather than to retaliation.

Ms. Marschman also claims that the verbal warning that she received on November 27, 2012, was a negative action with regard to the terms and conditions of her employment taken by BEA as a result of her protected activity. The incident that gave rise to this warning occurred on October 10, 2012. Ms. Marschman testified that on that date, she and a co-worker got into a disagreement because the co-worker was interfering with her work, making incorrect entries on

paperwork that the Complainant was supposed to complete, and acting like she was supervising Ms. Marschman, when in fact they were equals. Tr. at 352-353. Ms. Marschman added that the co-worker had been "picking on" her ever since the Complainant was given the same position in Ms. LePage's Instruments group that the co-worker had also sought. Tr. at 350. She told the co-worker "Hey, you need to stop acting ignorant with me, you know." The co-worker allegedly replied, in a raised voice, "I don't know what you're talking about, Alison," and started getting upset. The co-worker then said, "Okay, let's agree to disagree, shall we?" At that time, Ms. Marschman added, the co-worker was sitting in a chair, and the Complainant was standing approximately six feet away from her. Ms. Marschman then said "Yes, we can do that, but this has got to stop or you'll be sorry because I'm not going to stand for this type of behavior." The co-worker then leapt out of her chair, put her face within "two inches" of Ms. Marschman's face and yelled, "Fine. You want to see Paul [Nelson]? We'll go see Paul." Ms. Marschman said that, although the co-worker yelled at her, she never raised her voice, touched her, or made any threatening gestures. Tr. at 350-359. Although Ms. Marschman stated that she was not allowed to "tell her side of the story," she was interviewed by Mr. Nelson about the incident. Tr. at 341. She explained that although she informed Mr. Nelson of other employees who witnessed the confrontation and could corroborate her version of the events, those witnesses were never interviewed. Tr. at 873-874.

In an e-mail dated October 15, 2012, from the other employee to Mr. Nelson, Resp. Ex. 21 at 4, the other employee provided her version of the events in question. She said that she and Ms. Marschman were working in the same location, when the other employee told Ms. Marschman that the other employee had not performed a certain duty in a while, and asked the Complainant to "show her what to do from that point. Allison took over." *Id.* As the other employee was preparing to perform another task,

> Allison stood before me sounding angry and began to address me by directing me to never look over her paperwork again. She went on to say that I talk down to her, I have always talked down to her, I treat her as if she were (*sic*) unimportant and I belittle her. I was confused and angered by this verbal attack and said I don't know what this is about but let's agree to disagree. I went back to my work. She went on to say that I [the other employee] think my husband is good (or so important), well, [Ms. Marschman's husband] is good (or so important) too and if you belittle me anymore you'll be sorry. I abruptly rose from my chair, looked her closely in her eyes and said let's go talk to Paul. She agreed.

Id. [8]

Mr. Nelson testified about his investigation of this incident and about his decision to issue the verbal warning. He said that he met individually with both Ms. Marschman and with the other employee to get their respective versions of what occurred. "The issue I had as far as company policy from workplace violence," he continued, "is that you cannot make threatening remarks to any employee." When Ms. Marschman looked at the other employee and said "If you don't stop it you're going to be sorry," he considered it to be an open-ended threat. According to Mr.

[8] Both Ms. Marschman's husband and the other employee's husband were directors with BEA. Tr. at 521.

Nelson, Ms. Marschman said, "Yes, I did make that statement." Mr. Nelson replied that Ms. Marschman was not allowed to make threatening remarks to any employee, and if she meant that her words should not constitute an open threat, that's not how the other employee interpreted it, because that was not what she said. Tr. at 522-523. He added that, after consulting with Ms. Toni Vandel, a human resources manager, he concluded that Ms. Marschman should be issued a verbal warning. In reaching this decision, he determined that, although Ms. Marschman's statement that "you'll be sorry" violated that portion of the Employee Handbook concerning workplace violence, the offense was a relatively minor one. Tr. at 522-523, 524.

Ms. Vandel also testified. She said that BEA's "Workplace Violence Prevention" policy, set forth at paragraph 3.4 of BEA's Employee Handbook, includes examples of prohibited employee behavior. Resp. Ex. 42 at 19-20; Tr. at 817. One such example is "Profane, abusive, or threatening language directed at another employee, vendor, customer, or visitor in anger, with the purpose of causing intimidation." Resp. Ex. 42 at 19. Ms. Vandel testified that the verbal warning given to Ms. Marschman was consistent with BEA's treatment of similarly-situated employees. Tr. at 830. Regarding BEA's investigation of the incident, she said that although the policy calls for an investigation by BEA Security of alleged violations, when an employee is aware that their behavior was inappropriate and "offers some kind of . . . explanation or remorse for their behavior, then we would not launch a full-blown investigation." Tr. at 819.

At the hearing, Ms. Marschman did not acknowledge that her behavior was inappropriate, and expressed no remorse for her actions. Instead, she took the position that the other employee initiated the incident, that she was "the victim," and that the verbal warning was unwarranted and was part of a pattern of retaliatory acts taken against her. Tr. at 340, 872-873, 346. She did not sign the verbal warning, and she denied having made the statement attributed to her in the warning that the other employee "had better stop belittling [her] or she would be sorry." Tr. at 353-354. However, as previously set forth, Ms. Marschman then went on to testify that she told the other employee that "this has got to stop or you'll be sorry because I'm not going to stand for this kind of behavior." Tr. at 354. According to Mr. Nelson's notes of his conversation with Ms. Marschman about the incident, what the Complainant meant by this statement was that if the other employee did not desist from the behavior that Ms. Marschman found objectionable, she would "take the issue to management." Resp. Ex. 21 at 2. However, Mr. Nelson found her statement that the other employee would "be sorry" to be unacceptably threatening because she did not convey to the other employee what she meant by it. *Id.* Based on Ms. Marschman's own testimony, I conclude that she did tell the other employee that if the employee persisted in her behavior, she would "be sorry," and that she did not explain to that employee during the incident that what she meant was that she would elevate the issue to management. Mr. Nelson could reasonably have determined that this statement violated BEA's "Workplace Violence Prevention" policy, and that it warranted the punishment imposed.

I also see no evidence of retaliatory intent in Mr. Nelson's failure to interview others whom Ms. Marschman claims could corroborate her version of the incident. According to Mr. Nelson's notes, Ms. Marschman told him that she told the other employee that if she did not stop what she was doing, the other employee would be sorry, a statement that is consistent with her testimony during the hearing, and that Mr. Nelson concluded was a violation of BEA policy. Given these

circumstances, Mr. Nelson could reasonably have concluded that interviews of other alleged witnesses were unnecessary.

I therefore find that Ms. Marschman has failed to demonstrate, by a preponderance of the evidence, that her protected activity was a contributing factor to her termination. The period of over two years between her December 2010 disclosure and her termination is simply too lengthy to establish any kind of presumption that this protected activity was a contributing factor, and there is little or no evidence of a pattern of retaliatory actions or of other circumstances that would demonstrate a nexus between her protected activity and her termination. [9]

C. BEA Would Have Taken The Same Action In The Absence Of Ms. Marschman's Protected Activity

Even if I was to find that Ms. Marschman had demonstrated that her protected activity was a contributing factor to one or more acts of retaliation, I would not be able to conclude that she is entitled to the relief that she seeks. This is because BEA has shown, by clear and convincing evidence, that it would have taken the same action with respect to Ms. Marschman's employment even in the absence of her protected activity.

It is well settled that several factors may be considered in determining whether an employer has shown, by clear and convincing evidence, that it would have taken the alleged act of retaliation against a whistleblower in the absence of the whistleblower's protected conduct. The Federal Circuit, in cases interpreting the federal Whistleblower Protection Act (WPA), upon which Part 708 is modeled, has identified several factors that may be considered, including "(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)).

1. BEA's Reasons For Eliminating Ms. Marschman's Part-Time Position

Several of BEA's witnesses testified about the Respondent's decision to require Ms. Marschman to choose between assuming full-time status, working on a casual part-time basis, or leaving the company. Mr. Nelson said that there were two incidents that occurred at MFC in August and November of 2011 that involved the exposure of employees to elevated doses of radiation. During the August incident, a worker received an unplanned and unmonitored dosage of radiation to his right hand, and during the November event, 16 workers were contaminated. Tr. at

[9] Ms. Marschman also finds retaliatory intent in the fact that she was transferred from CFA to MFC in mid-week, which she claims was not the norm for transfers. Comp. Ex. 25. However, given that Ms. Marschman wanted the transfer, I cannot conclude that it constituted a negative action with respect to the employee's compensation, terms, conditions or privileges of employment. She further claims that she was repeated taken down to Mr. Nelson's office and "'chewed out' for things that she didn't do." Tr. at 306. However, she did not present any evidence as to details of these alleged instances or the nature of any accusations that were made against her, and I am therefore unable to make any findings as to the veracity of this allegation.

435-436, Resp. Ex. 52. These incidents led to the issuance of a Preliminary Notice of Violation by the DOE against BEA, and a fine of $412,500. Tr. at 440-441, Resp. Ex. 52. Mr. Nelson further stated that significant corrective actions had to be taken by BEA to avoid future radiological events that could lead to a shutdown of the Idaho National Laboratory or to serious injury to employees. Tr. at 442-443. The need for these corrective actions led to the generation of an "Implementation Plan to Strengthen MFC Nuclear Operations." Resp. Ex. 47. This Plan "was to document that the MFC is understaffed and struggling to support the demands of the ongoing work activities." Tr. at 444. The Plan concludes that four additional HPTs "are required for routine surveys and activities performed to maintain compliance with" applicable federal and company regulations. Resp. Ex. 47 at 11. "Additional labor hours are required," the Plan continues, "due to increased radiological control requirements . . . ." *Id.* Mr. Nelson then referred to another document, "INL Extremity Radiation Exposure Control and Radiological Training," dated August 3, 2012. Resp. Ex. 49. This assessment also concluded that there was a shortage of HPTs at MFC. *Id.* at 7-8, Tr. at 455-456. A "Monthly Report of Observations at MFC," dated September 25, 2012, also noted continuing problems with RADCON staffing levels. Resp. Ex. 50 at 5, 8, Tr. at 464.

Mr. Nelson then testified that given this need, and the lack of additional funding to hire more full-time employees, "the one thing I could do to increase my resources available was to switch my one part-time employee to full-time." Tr. at 491. Having Ms. Marschman remain in her regular part-time position was not a viable option, Mr. Nelson continued, because he would not have had the funds available to hire another full-time HPT had she done so, and hiring another part-time HPT was impracticable because of difficulties in meshing two schedules and "the increased costs and management of training and qualifications for two employees versus one." Tr. at 492.

Trenna LePage testified that her group was "extremely busy," to the point where they had to pay overtime for employees to come in on Fridays, normally a day off, for needed training. Tr. at 587-588. She then said that Ms. Marschman's regular part-time status caused problems because the work that she performed needed to be done every day, and that she would have to "backfill," or get someone else to do Ms. Marschman's work, when she was not there. Tr. at 588. Sharon Dossett testified that there were "some serious events" at the MFC complex and "a lot of assessment" of how MFC could perform its duties better. Tr. at 661. Those assessments concluded that "there were a lot of demands on the resources we had, and we were resource-constrained." *Id.* MFC was "working people overtime to get the training done and still trying to cover the work during non-overtime hours," during a time of limited funding. Tr. at 661-662. Mr. Alvarez said that management wanted Ms. Marschman to work full-time because of the workload at MFC and "what we needed to do to fix the problem there." Tr. at 692.

However, there is an inconsistency between this testimony, that BEA wanted Ms. Marschman to go full-time because of business needs, and certain aspects of Ms. Marschman's testimony. Specifically, Ms. Marschman said that she repeatedly asked Mr. Nelson, Ms. LePage and Ms. Morgan to specify in the memorandum setting forth her future employment options the exact position that she would be taking on a full-time basis, and that she told them that she would sign the memorandum and take the full-time position if this was done. Tr. at 259, 324, 326, 329-330. She indicated that she was upset when she received the memorandum during the December 18

meeting with Mr. Nelson and Ms. LePage, and when she asked Mr. Nelson whether she would remain in her current job if she accepted full-time employment, Mr. Nelson said that she would. Ms. Marschman stated that she "agree[d] to full-time employment," adding that "All you have to do is . . . put it there, sign and date it, what my position is." Tr. at 259. However, he would not modify the letter to specify her position, and she did trust him sufficiently to rely on his promise. She alleged that Mr. Nelson had lied to her before, that BEA had tried to demote her, and that she believed that the memorandum was "a pathway for demotion." Tr. at 309-310. The clear implication of this testimony is that if BEA's need for HPTs was as dire as is claimed, and Ms. Marschman would have gone full-time if her position was specified on the memorandum, management would have taken the simple step of including that information in the document in question. Ms. Marschman claims that BEA's failure to do so indicates that their real intention was to terminate the Complainant.

A preponderance of the evidence of record does not support Ms. Marschman's position. Mr. Nelson admitted that during the December 18th meeting, Ms. Marschman observed that the memorandum "'doesn't state what I'll be doing.'" Tr. at 539. It was then that Mr. Nelson explained that it was the same position that Ms. Marschman currently occupied, with "just a change in schedule." *Id.* He added that he did not specify the job in the memo because he believed that Ms. Marschman was satisfied with the verbal assurance that he had given her, and that if she had said that she wanted to see it in writing, he would have done so. Tr. at 540. He further stated that Ms. Marschman did not indicate in any way that she would have signed the memorandum if it had specified that she was going to remain in her same position. Tr. at 516. Ms. LePage also testified that she never heard Ms. Marschman ask that her full-time position be specified in the memorandum, explaining that she thought that "it was assumed by everybody that she would continue working for me as a full-time tech." Tr. at 607.

Furthermore, if it was BEA's intent to terminate Ms. Marschman, as she claims, it seems counter-intuitive that they would seek to accomplish this by offering her a choice between working more hours, and working on a casual part-time basis. Mr. Nelson testified that he included the casual part-time option because he "wasn't sure, since she was part-time, that she would want to go full-time. So, I made casual part-time an option." Tr. at 491. This is not the action of someone who is seeking to terminate a part-time employee. Also, it is uncontroverted that Mr. Nelson told Ms. Morgan prior to the January 9, 2013, meeting with Ms. Marschman that he believed that the Complainant would accept the full-time position, that both Mr. Nelson and Ms. LePage told Ms. Marschman that they really wanted her to work on a full-time basis, Tr. at 331-332, and that the Complainant had greater value to BEA than a new hire because of her training and her "Q" clearance. Based on these factors, I find that BEA's reasons for taking the action that it took with regard to Ms. Marschman's employment were very strong, excluding her protected activity.

2. The Strength Of Any Motive To Retaliate For The Whistleblowing

The testimony at the hearing indicated that Mr. Nelson, Ms. Morgan, and Ms. Dossett were the BEA management officials who were primarily responsible for issuing the memorandum to Ms. Marschman. Tr. at 620, 662. Therefore, the next factor to be examined is the strength of any

motive on the part of these individuals to retaliate against Ms. Marschman. For the reasons that follow, I find that there is no evidence of any such motive.

As an initial matter, none of these individuals were directly implicated either in the protected disclosures that led to the filing of Ms. Marschman's 2009 Part 708 Complaint, or in Ms. Marschman's December 2010 protected disclosure. Indeed, the record indicates that Mr. Nelson had not even Joined MFC until after the December 2010 disclosure. Tr. at 413. Moreover, the internal assessments that MFC had performed after the radiological incidents discussed earlier acknowledged the existence of safety shortcomings similar to those brought to light by Ms. Marschman in December 2010. It therefore seems unlikely that BEA would terminate her for making that disclosure. There is simply no evidence in the record that any of Ms. Marschman's protected activity impacted Mr. Nelson, Ms. Morgan or Ms. Dossett in such a way as to provide a motive to retaliate.

3. BEA's Treatment Of Similarly-Situated Employees

As for the final factor, Ms. Marschman was the only part-time HPT at MFC during the period of time in question. Consequently, there were no other employees who were in precisely the same situation that she was in. However, other employees were reassigned in a manner that was similar to the reassignment attempted with Ms. Marschman.

Ms. Vandel testified that a "directed reassignment," which is BEA's term for the involuntary reassignment of company personnel for business-related purposes, is a common occurrence that took place 115 times in the 12 months preceding Ms. Marschman's departure. Tr. at 821. She added that Ms. Marschman's directed reassignment was issued in accordance with BEA policy governing such actions, Tr. at 811, and that it followed the template that the company used for such reassignments, with the exception that the document did not specify the position to which Ms. Marschman was being reassigned to. Tr. at 798. This is because there was not going to be a change in her position, title or salary. *Id.* That template included the language that was also in Ms. Marschman's December 18 memo, to the effect that if she declined the reassignment, she would be deemed to have voluntarily resigned from employment with BEA. Tr. at 799. Ms. Vandel also stated that since the beginning of her tenure with BEA, no one else had ever refused or declined an offer of reassignment. Tr. at 821. Given these factors, I find that, even if Ms. Marschman had been able to demonstrate a nexus between her protected activity and her termination, she would not prevail in this proceeding, because BEA has shown, by clear and convincing evidence, that it would have taken the same action that it took absent the protected activity.

D. Conclusion

The record in this matter is clear that Ms. Marschman engaged in protected activity when she filed her 2009 Complaint and when she disclosed to BEA management in December 2010 a condition that she reasonably believed presented a substantial danger to other MFC employees. However, the Complainant has not been able to demonstrate, by a preponderance of the evidence, that that activity was a contributing factor to the action that BEA took with respect to her employment in January 2013. There is no direct evidence that Ms. Marschman was

terminated because of her protected activity, and little or no circumstantial evidence that would support the existence of such a nexus. The period of time that elapsed between that protected activity and Ms. Marschman's termination is too long to presume the existence of a causal relationship, and the Complainant has been unable to produce other circumstantial evidence that is sufficient to meet her burden in this case. I therefore conclude that Ms. Marschman is not entitled to the relief that she seeks. [10]

It Is Therefore Ordered That:

(1) The request for relief filed by Alison Marschman 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
Administrative Judge
Office of Hearings and Appeals

Date: May 8, 2014

[10] Ms. Marschman also argues that her 2013 termination was a violation of her settlement agreement with BEA that led to OHA's dismissal of her 2009 Complaint. However, I did not consider this argument because the enforcement of settlement agreements is beyond the scope of the Part 708 regulations that govern this proceeding. *Jonathan Lucero*, Case No. TBH-0039 (2007).