United States Department of Energy
Office of Hearings and Appeals

Greta Kathy Congable,	)	
	)	Case No. TBA-0110
v.	)	
	)	Filing Date: September 26, 2011
Sandia Corporation.	)	
	)	

Issued: May 4, 2012

Appeal

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on September 8, 2011, involving a Complaint of Retaliation that Greta Kathy Congable (Ms. Congable or the complainant) filed under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In her Complaint, Ms. Congable alleged that she engaged in activity protected under that program and that her employer, Sandia Corporation (Sandia or the contractor), retaliated against her for doing so. In the IAD, the Office of Hearings and Appeals (OHA) Hearing Officer denied relief to Ms. Congable, dismissing her complaint. Ms. Congable appeals that determination. As set forth in this decision, I have decided that her Appeal should be denied.

I. BACKGROUND

A. The DOE Contractor Employee Protection Program

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, 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 … information that [the employee] reasonably believe[s] 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).

If an employee believes that a Part 708 retaliation has occurred, the employee may file a complaint requesting that the DOE order the contractor to provide relief. 10 C.F.R. § 708.1, The DOE's Office of Hearings and Appeals (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 taken against [the complainant] and . . . the disclosure, participation, or refusal that [the complainant] believe[s] gave rise to the retaliation." 10 C.F.R. § 708.12.

B. Factual Background

The Complainant has been employed by Sandia in a variety of administrative support positions since 1994. In August 2004, she was promoted to Administrative Staff Assistant (ASA) and assigned to Sandia's Corporate Investigations (CI) Office. In September 2006, Christopher Padilla was named Senior Manager for CI, becoming Ms. Congable's direct supervisor. Shortly thereafter, she was promoted to PASA (Principal ASA). Between September 2008 and April 2010, Ms. Congable purportedly disclosed to several individuals at Sandia and Lockheed Martin, Sandia's parent company, the presence of unprotected personally identifiable information (PII) on Sandia's computer network, and Mr. Padilla's alleged improper alteration of inquiry and case files. In June 2010, Ms. Congable was transferred from her PASA position in CI to a PASA position in Sandia's Management Assurance and Reporting Department (MA), retaining her same job title, job level, and salary.

C. Procedural Background

The facts surrounding Ms. Congable's complaint were set forth in detail in the IAD from which Ms. Congable has taken this appeal, and a full recounting will not be reproduced here. Ms. Congable filed a Part 708 complaint with the National Nuclear Security Administration Service Center (NNSA/SC) in Albuquerque, New Mexico, on September 14, 2010. In her complaint, Ms. Congable alleged that Sandia retaliated against her for making disclosures regarding the unsecured PII and Mr. Padilla's alleged misconduct by involuntarily transferring her from CI to MA. On October 27, 2010, NNSA/SC dismissed the complaint. Ms. Congable appealed the dismissal of her complaint to the OHA Director, pursuant to 10 C.F.R. § 708.18. On December 6, 2010, the OHA Director granted Ms. Congable's appeal in part, and remanded her complaint back to NNSA/SC for further processing. *See Greta Kathy Congable*, Case No. TBU-0110 (2010).[1]

On April 5, 2011, NNSA/SC transmitted Ms. Congable's complaint to OHA, together with her request for an investigation followed by a hearing. The OHA Director appointed an Attorney-Investigator, who conducted an investigation and issued a Report of Investigation (ROI) on June 1, 2011. On June 2, 2011, a Hearing Officer was appointed in this matter. At the Hearing

[1] Decisions issued by OHA are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

Officer's direction, the parties submitted briefs and replies setting forth their positions regarding the findings in the ROI. After reviewing the documents in the record and the parties' submissions, the Hearing Officer determined that further briefing was necessary on a threshold issue, namely whether Ms. Congable's transfer constituted retaliation within the meaning of Part 708. Ms. Congable submitted her additional brief on August 6, 2011. In this brief, Ms. Congable argued that her transfer led to specific, negative consequences: (1) she does not have comparable duties and, in fact, very little work, in her new position; (2) she does not have promotional opportunities in her new position, whereas she was a subject matter expert with significant responsibilities in her former position; and (3) her security clearance was downgraded due to her transfer, which further limits her employment opportunities. Complainant's Response to Request for Information Regarding Complainant's Transfer (Case No. TBH-0110) at 4-5. On August 12, 2011, Sandia submitted its reply brief in which it contended that Ms. Congable's transfer did not constitute a "retaliation" because her new position provided her the same pay, title, and benefits, and therefore was not a "negative action with respect to [her] compensation, terms, conditions or privileges of employment." Respondent's Reply to Complainant's Response to Request for Information Regarding Complainant's Transfer (Case No. TBH-0110) at 5. Absent any negative action, there could be no retaliation, Sandia argued, and requested that Ms. Congable's complaint be dismissed. *Id.*

The Hearing Officer considered the issues raised in the parties' briefs, including Sandia's request for dismissal of the complaint and, on September 8, 2011, issued an IAD. In keeping with OHA precedent, the Hearing Officer recharacterized Sandia's request for dismissal as a Motion for Summary Judgment. In the IAD, the Hearing Officer found that, based on the record in this case, the transfer did not negatively affect the terms and conditions of Ms. Congable's employment. IAD at 4-5. She determined that Ms. Congable had not shown, and could not show, that her transfer constituted a retaliation as defined at 10 C.F.R. § 708.2, an essential element of her burden under Part 708. She then granted summary judgment in favor of Sandia, and dismissed Ms. Congable's Part 708 complaint. *Greta Kathy Congable*, Case Nos. TBH-0110, TBZ-0110 (2011).

Pursuant to 10 C.F.R. § 708.32, Ms. Congable filed an appeal of the Hearing Officer's IAD on September 28, 2011. In her brief, she argues that the Hearing Officer erred (1) by *sua sponte* converting a reply brief into a Motion for Summary Judgment, (2) by ruling on that Motion without affording her, as the non-moving party, the opportunity to respond to the Motion, (3) by ruling on the Motion before scheduled discovery was completed, (4) by failing to consider the evidence in the record in the light most favorable to her, as the non-moving party, and (5) by determining that her transfer did not constitute retaliation for purposes of Part 708. Complainant-Appellant's Statement of Issues Regarding Her Notice of Appeal of Initial Agency Decision (Congable Appeal Brief). Sandia addressed each of Ms. Congable's arguments in its reply brief, contending that the Hearing Officer's IAD was correct and should stand as written. Respondent's Response to Complainant's Statement of Issues (Sandia Appeal Brief).

II. ANALYSIS

A. The Applicable Legal Standards

1. Retaliation

In order to meet his or her burden under Part 708, a complainant must demonstrate, by a preponderance of the evidence, each of the following elements: (i) he or she made a protected disclosure or engaged in protected activity; (ii) he or she was the subject of a retaliation; and, (iii) the protected disclosure or activity was a contributing factor to the retaliation.[2] 10 C.F.R. § 708.29. Only if the complainant meets his or her burden does the burden then shift to the contractor to prove, by clear and convincing evidence, that it would have taken the same action absent the protected disclosure or activity. *Id*. Because the Hearing Officer granted summary judgment for Sandia on a determination that Ms. Congable would not be able to prove retaliation, we focus the analysis on that element of Ms. Congable's burden.

The Part 708 regulations define "retaliation" as "an action (including intimidation, threats, restraint, coercion or similar actions) 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" protected under Part 708. 10 C.F.R. § 708.2 (emphasis added). It is well established in OHA precedent that in order to constitute a "retaliation" within the ambit of Part 708, the allegedly retaliatory personnel action must negatively affect the terms and conditions of the complainant's employment. *See Colleen Monk*, Case No. TBA-0105 (2011) (transfer requested by complainant not a "negative action" within the meaning of Part 708, despite entailing slightly lower salary); *Vinod Chudgar*, Case No. TBH-0100 (2011) (transfer "did not have a negative effect on the terms and conditions of [his] employment because his new position retained his salary and grade level"); *Mark D. Siciliano*, Case No. TBH-0098 (2010) (contractor's failure to invite complainant to an event did not negatively affect the complainant's "compensation, terms, conditions or privileges of employment" and, therefore, was not a "negative action" within the meaning of Part 708).[3]

Ms. Congable argues, *inter alia*, that her new position held very little work and that it diminished her opportunities for promotion. The issue of whether the alleged reduction in workload or in advancement opportunities qualifies as retaliatory because it is a "negative action with respect to the employee's . . . terms, conditions or privileges of employment" has not previously been addressed in the Part 708 context. In cases arising under Title VII of the Civil Rights Act, which provides relief for "adverse employment actions," the courts have found that significantly

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[2] The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely than not true when weighed against the evidence opposed to it. *See Joshua Lucero*, Case No. TBH-0039 (2006) (*citing Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990)).

[3] Sandia also contends that Ms. Congable has never presented any evidence that Sandia intended or expected her new position to be "meaningless or worthless." Sandia Appeal Brief at 10-11. Sandia's intent or expectation regarding the transfer is irrelevant. Retaliatory intent is required under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Title VII), which requires a "causal connection" between protected activity and adverse employment action. The legal burden of proof in cases arising under Part 708 is different, in that it requires only that the protected activity is a "contributing factor" in one or more alleged acts of retaliation, a test that can be met through, *e.g.*, management knowledge and temporal proximity of the two events. *Curtis Hall*, Case No. TBA-0042 at 7 n.8 (2008).

reduced work responsibilities and reduced promotion potential may constitute "adverse employment actions."[4] Nevertheless, the outcomes of these cases are entirely dependent on the facts presented in each case.

2. Motion for Summary Judgment

The Part 708 regulations do not include procedures and standards governing motions to dismiss or motions for summary judgment. In the absence of such standards, the Federal Rules of Civil Procedure, though not governing this proceeding, may be used for analogous support. *See, e.g., Billy Joe Baptist*, Case No. TBH-0080 (2009). OHA has used Rule 56(a) of the Federal Rules of Civil Procedure as a guide in considering motions for summary judgment filed in Part 708 cases. *See Mary Ravage*, Case No. TBH-0102 (2011); *Colleen Monk*, Case No. TBH-0105 (2011); *Edward J. Seawalt*, Case No. VBZ-0047 (2000).

Under Rule 56, summary judgment is proper "if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). Under this standard, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). The Supreme Court has viewed the plain language of Rule 56 to mandate "the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In such cases, there can be "no genuine issue as to any material fact," since the non-moving party's complete failure of proof concerning an essential, threshold element of his case necessarily renders all other facts immaterial. The moving party is then "entitled to a judgment as a matter of law" because the non-moving party has failed to satisfy his burden of proof on an essential element of his case. *Id.* at 323.

The Hearing Officer specifically referred to the above standards in the IAD. IAD at 3. In addition to those standards, it is well recognized that, when considering whether summary judgment is proper, the decisionmaker must draw inferences from the existing evidence "in the light most favorable to the non-moving party, and where the non-moving party's evidence

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[4] *See Martires v. Conn. Dep't of Transpo.*, 596 F. Supp. 2d 425, 438 (D. Conn. 2009) (disproportionately heavy workload or significantly diminished material responsibilities may constitute adverse employment actions); *Bennett v. Watson Wyatt Co.*, 136 F. Supp. 2d 236 (S.D.N.Y. 2001) (employment action is adverse if the employee endures a materially adverse change in the terms or conditions of employment, including significantly diminished work responsibilities, citing *Galabya v. New York City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000)). In the same context, the courts have stated that a diminution of advancement possibilities can, if objectively established, constitute an adverse employment action: even if a transfer does not "result in a decrease in pay, title or grade, it can be a demotion if the new position proves objectively worse—such as . . . providing less room for advancement." *Alvarado v. Texas Rangers*, 492 F.3d 605, 613 (5th Cir. 2007) (internal citation omitted). *See also De la Cruz v. New York City Human Resources Admin.*, 82 F.3d 16, 21 (2d Cir. 1996) (transfer from an "elite division . . . which provided prestige and opportunity for advancement, to a less prestigious unit with little opportunity for professional growth" is adverse employment action); *Cepada v. Bd. of Educ. of Baltimore Cty.*, 814 F. Supp. 2d 500, 510 (D. Md. 2011) (*citing Boone v. Goldin*, 178 F.3d 253, 255 (4th Cir. 1999)) (adverse employment actions can include reduced opportunities for promotion).

contradicts the movant's, then the non-movant's evidence must be taken as true." *Big Apple BMW, Inc. v. BMW of N. Am., Inc*., 974 F.2d 1358, 1363 (3d Cir. 1992), *cert. denied,* 507 U.S. 912 (1993); *see also Matsushita Elec. Indus. Co.. Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 158-59 (1970) (burden on moving party to show absence of genuine issue as to any material fact).

B. Whether Summary Judgment for Sandia Was Appropriate

The standard of review for Part 708 appeals is well established. Conclusions of law are reviewed *de novo. See Curtis Hall*, Case No. TBA-0042 at 5 (2008). Findings of fact are overturned only if they are clearly erroneous, giving due regard to the trier of fact to judge the credibility of the witness. *Billy Joe Baptist*, Case No. TBA-0080 at 7 (2009). *See also Pierce v. Underwood*, 487 U.S. 552, 558 (1988) ("For purposed of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')."). Because the Hearing Officer determined, as a matter of law, that Ms. Congable could not demonstrate retaliation, we review *de novo* whether that determination was appropriate.

As discussed above, OHA has often looked to Rule 56 for guidance on the matter. While we are not bound by the Rule and therefore not subject to all of its procedural requirements, we should ensure that fundamental due process be provided to the parties when we rule on a Motion for Summary Judgment. At a minimum, we consider, as the Hearing Officer stated, whether there is an absence of genuine issue of material fact and whether there has been adequate time for discovery. Any inferences we draw from the evidence are drawn in favor of the non-moving party, in this case, Ms. Congable.

The plain language of the definition of "retaliation" clearly encompasses a broad scope of negative actions, including those affecting the terms, conditions and privileges of employment. 10 C.F.R. § 708.2. *See also Lucy B. Smith*, Case No. VWZ-0020 (1999) ("privilege" held to include inclusion in a preferential rehiring database). The Hearing Officer reached her conclusion that Ms. Congable could not demonstrate retaliation after finding (1) that the record established that Ms. Congable's transfer did not result in a loss in pay, benefits, or seniority, and (2) that, despite her contention that she had no meaningful duties in her new position, her duties were comparable in her new position. IAD at 4-5. It is clear from the definition of "retaliation" that, for Part 708 purposes, retaliation may take forms other than those the Hearing Officer considered. As set forth above, Ms. Congable points to three forms of alleged retaliation in a brief requested by the Hearing Officer: (1) her security clearance was downgraded due to her transfer, (2) she does not have comparable duties and, in fact, very little work, in her new position, and (3) she does not have comparable promotional opportunities in her new position.[5] If any one of those truly constitutes retaliation, then evidence of such would be a material fact,

[5] In her Appeal Brief, Ms. Congable also alludes to an actual demotion following the transfer. She contends that she was a PASA in her old position but only an ASA in her new position. Congable Appeal Brief at 11-12. Sandia replied that Ms. Congable retained her PASA status in her new position. Sandia Appeal Brief at 12. The record clearly supports Sandia's contention, *id.* at Attachment 1-B, and I find that no actual demotion took place as the result of the transfer.

on which a legal determination could be made of an essential, threshold element of her complaint. Conversely, if none is a form of retaliation under Part 708, or if the evidence in the record demonstrates that no facts could support her claims, then Ms. Congable could not demonstrate retaliation as a result of her transfer. Under those circumstances, she would have failed to make a showing sufficient to establish the existence of an element essential to her case, and on which she bears the burden of proof, specifically retaliation, and summary judgment would be appropriate. We address Ms. Congable's arguments *seriatim.*

1. Security Clearance Downgrade as a Retaliatory Act

Ms. Congable claims that, as a result of her transfer, her security clearance was downgraded after her employer transferred her to her new position. Even if Ms. Congable established that such a downgrade in fact occurred, it could not possibly be found to be retaliation under Part 708. As defined above, "retaliation" is an action that must be taken by the contractor. Determinations regarding levels of security clearance are made by the DOE, not by contractors. Therefore, even assuming that Ms. Congable's security clearance level was reduced after her transfer, and assuming that this reduction constituted a negative consequence of the transfer, it is a negative consequence that cannot be attributed to Sandia.

2. Lack of Meaningful Work and Lack of Promotion Potential as Retaliatory Acts

Ms. Congable argues that her new position held very little work, and that it diminished her potential for promotion in comparison to her former position. Given the broad protection Part 708 is intended to provide to whistleblowers in order to encourage the reporting of unsafe, unhealthy or wasteful business practices, we believe that significantly reduced workload or work responsibilities, as well as diminished opportunities for promotion, can constitute negative actions "with respect to the employee's . . . terms, conditions or privileges of employment," and might, under some circumstances, constitute retaliation under Part 708.

In this case, the record shows that in her former administrative position, Ms. Congable performed work beyond that which she was assigned, including assisting at interviews, providing insight to the investigators she supported and asking questions on her own; assisting with discovery production; and editing the office's reports. Complainant's Response to Request for Information Regarding Complainant's Transfer (Case No. TBH-0110) at Attachments A (Performance Management Form completed by supervisor) and B (co-workers' feedback of Ms. Congable as requested by supervisor). In her new position, Ms. Congable alleges that she has no meaningful work for 80 to 85% of her workday. Deposition of Greta Kathy Congable (attachment to Complainant's Response to Request for Information Regarding Complainant's Transfer (Case No. TBH-0110)) (Deposition) at 78. When assessing a Motion for Summary Judgment, we are instructed to draw inferences in favor of the non-moving party, in this case, Ms. Congable. Even if we assume that her statement is correct, however, we must also consider whether her stated lack of work in her new position, in reality, supports her claim of retaliation. In her Deposition, Ms. Congable explains that her lack of work eliminated any promotional opportunities in her new position. Deposition at 80. For this reason, the only issue is whether her transfer diminished her potential for future promotion.

Ms. Congable expressed her opinion at her Deposition that her new position holds less promotion potential than her former position, because she will never become a subject matter expert as she was in her former position. Deposition at 80-81.[6] In the declaration he provided during the investigation stage, however, her supervisor at her former position stated that he had researched the possibility of a promotion for Ms. Congable from PASA to DASA (Distinguished ASA) in approximately September 2008, and learned that her job position would not justify such a promotion. Declaration of Chris Padilla (Case No. TBI-0110). He also stated that he had received a request from a co-worker that Ms. Congable be considered for a promotion to Member of Laboratory Staff (MLS) when she received her bachelor's degree in May 2010. As she did not receive her degree at that time, he took no action. *Id.* In an e-mail she wrote on June 29, 2010, Ms. Congable stated, "I was told that to be considered for promotion within Corporate Investigations it would be necessary for me . . . to obtain my college degree." Attachment B to Declaration of Alice Eldridge (Case No. TBI-0110). As of her deposition in 2011, Ms. Congable has not yet received her degree. Deposition at 81. Even accepting the evidence in a light most favorable to Ms. Congable, I find that she had no potential for promotion in her former position prior to the transfer, as she lacked a necessary prerequisite, her college degree. Under those circumstances, she cannot assert that her advancement opportunities were diminished as the result of her transfer. Therefore, while it is possible to establish retaliation under Part 708 by demonstrating reduced promotion potential, Ms. Congable is unable to do so in this case.

III. CONCLUSION

After reviewing the evidence in the record at the time of the Hearing Officer's grant of summary judgment, I conclude that none of Ms. Congable's three alleged negative consequences of her transfer constitutes retaliation in this case under Part 708, for various reasons. Her allegation of security clearance downgrade is not cognizable under Part 708. Her allegation of lack of work is not an independent form of retaliation, but rather a factual underpinning of her third allegation, reduction of promotion potential, which I have determined to be an allegation that cannot stand under the facts already in evidence. No additional discovery would yield relevant information in this proceeding, as there remains no genuine issue of material fact regarding Ms. Congable's allegations of retaliation. Because no further discovery is warranted, I conclude that there has been adequate time for discovery. Under those circumstances, Ms. Congable has failed to make a showing sufficient to establish the existence of an element essential to her case, and on which she bears the burden of proof, specifically retaliation, and summary judgment is appropriate.

It Is Therefore Ordered That:

(1) The Appeal filed by Greta Kathy Congable on September 26, 2011 (Case No. TBA-0110), of the Initial Agency Decision (IAD) issued on September 8, 2011, under 10 C.F.R. Part 708 is hereby denied.

(2) This Appeal Decision shall become a Final Decision of the Department of Energy unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this Decision. 10 C.F.R. § 708.35.

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[6] There is no evidence that Ms. Congable was a subject matter expert at her former position.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 4, 2012