May 22, 2002

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Janet K. Benson

Date of Filing: June 2, 1999

Case Number: VWA-0044

This Initial Agency Decision concerns a whistleblower complaint filed in 1994 by Janet K. Benson (the Complainant) against Lawrence Livermore National Laboratory (LLNL) and the Regents of the University of California (UC) under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708 (Part 708). At all times relevant to this proceeding, UC managed and operated LLNL for the United States government under a contract between the Regents of UC and the DOE. It is the Complainant's contention that during her employment with LLNL she engaged in activity protected by Part 708 and, as a consequence, suffered repeated reprisals by LLNL. (1) As discussed below, I have determined that the Complainant is not entitled to relief.

# 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 (GOCO) facilities." 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at 10 C.F.R. Part 708.(2) The regulations offer employees of DOE contractors and subcontractors a mechanism for resolution of whistleblower complaints by providing for independent fact-finding, a hearing before a Hearing Officer from the Office of Hearings and Appeals (OHA), and an opportunity for review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

The substantive regulations pertinent to this case provide, in relevant part, that a DOE contractor may not discharge or otherwise discriminate against an employee because that employee has disclosed to a DOE official or to a DOE contractor information that the employee in good faith believes evidences a violation of law, rule, or regulation; a substantial and specific danger to public health or safety; or fraud, mismanagement, gross waste of funds, or abuse of authority. 10 C.F.R. § 708.5(a)(1)(i)-(iii). In addition, the regulations prohibit DOE contractors from engaging in acts of reprisal against an employee who, among other things, refuses to participate in an activity, policy, or practice when such participation causes the employee to have a reasonable apprehension of serious injury or serious impairment of health and safety resulting from participation in the activity, policy, or practice. 10 C.F.R. § 708.5(a)(3)(i)(B)(1).

The original Part 708 regulations were not self-executing. Rather, the DOE stated that the provisions of

Part 708 would become operative after they were incorporated into each prime contract that the DOE maintained to operate its GOCO facilities. In the case of health and safety disclosures, incorporation into the GOCO contracts was immediate, since all existing contracts required contractors to adhere to health and safety requirements that the DOE promulgated. *See Richard W. Gallegos* (Case No. VWA-0004), 26 DOE ¶ 87,502 (1996). However, in situations where the disclosures concerned waste, fraud and abuse, the Part 708 protections became operative only after the Part was incorporated by reference into the specific contract. *Id.*

# B. Overview

This case began almost eight years ago when the Complainant first raised concerns to the DOE about possible waste, fraud, and abuse by LLNL. As detailed more fully below, the record in this case is quite substantial. The DOE's Inspector General's Office conducted a three-year investigation into the Complainant's allegations after which it issued a comprehensive report and several hundred pages of exhibits. Then, a Hearing Officer from the DOE's Office of Hearings and Appeals conducted a five-day administrative hearing in the matter during which 14 witnesses testified, some of them several times. The hearing testimony is memorialized in a 1400-page transcript (hereinafter cited as "Tr."). During the pendency of the case, each party also filed six lengthy legal briefs and hundreds of pages of documentary evidence.

# C. Procedural Chronology

On May 3, 1994, the Complainant filed a Part 708 complaint with the DOE's Office of Contractor Employee Protection (OCEP). At the time of the filing, however, the contract between UC and DOE that governed UC's management and operation of LLNL did not contain a clause requiring UC to be subject to the Part 708 regulations. In July 1994, the Director of OCEP asked UC if it would voluntarily agree to be bound by the provisions of Part 708 with regard to the complaint filed by the Complainant. UC refused. Soon thereafter, OCEP dismissed the Complainant's complaint for lack of jurisdiction.

On September 23, 1994, the contract between UC and the DOE was modified to provide that UC would comply with the provisions of Part 708 prospectively. Shortly thereafter in October 1994, the Complainant refiled her Part 708 complaint, reiterating the charges set forth in the complaint that OCEP had dismissed, and alleging new acts of reprisal by LLNL against her.

Almost one year later, in September 1995, the Complainant wrote a letter to the Secretary of Energy in which she restated the charges set forth in her pending Part 708 complaint and requested the Secretary's assistance in shielding her from future reprisals.

In July 1996 the OCEP Director informed the parties that her office would commence an investigation into the issues raised by the Complainant in her Part 708 complaint. OCEP conducted an exhaustive investigation, interviewing 24 witnesses and gathering documentary evidence over a three-year period. On April 13, 1999, the DOE's Office of Inspector General (3) issued a 40-page Report of Inquiry and Recommendations (Report of Inquiry or ROI) with 74 exhibits appended. The Report of Inquiry found that the Complainant had failed to meet her evidentiary burden and, for this reason, determined that her request for relief pursuant to Part 708 should be denied.

On June 2, 1999, the Complainant requested that the Office of Hearings and Appeals convene a hearing to adjudicate the issues that she had raised in her Part 708 Complaint. (4) On June 7, 1999, the OHA Director appointed Linda Lazarus as Hearing Officer in this matter. LLNL filed a pre- hearing statement in the case on January 7, 2000; the Complainant tendered her pre-hearing statement on January 11, 2000. Hearing Officer Lazarus conducted a three-day administrative hearing in the case on February 1, 2, and 3, 2000. She subsequently requested that the parties submit briefs. Accordingly, LLNL and the Complainant submitted their post-hearing briefs on April 12, 2000 and April 17, 2000, respectively. LLNL also tendered

a Reply Brief on May 15, 2000, and the Complainant submitted a Reply Brief on May 16, 2000.

On July 11, 2000, Hearing Officer Lazarus requested that the parties file briefs addressing three additional issues not previously raised in the case. Accordingly, the Complainant tendered a Supplemental Brief on August 1, 2000, and LLNL filed a Supplemental Brief on August 7, 2000. LLNL then filed a Reply Brief on August 11, 2000, and the Complainant filed a Reply Brief on August 14, 2000.

On November 1, 2000, Hearing Officer Lazarus issued an Interlocutory Order concerning two Motions to Dismiss that LLNL had incorporated into its briefs. In the Order, Hearing Officer Lazarus granted LLNL's Motion to Dismiss insofar as it related to the Complainant's claims of reprisal that allegedly occurred prior to the date LLNL had agreed contractually to comply with Part 708. However, Hearing Officer Lazarus denied other portions of LLNL's Motions to Dismiss. Specifically, she found that the Complainant was not barred by the doctrine of collateral estoppel from litigating her claims under Part 708 even though the United States District Court for the Northern District of California had entered summary judgment in favor of LLNL on claims based on the same facts filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and the ADA. She also held that OHA has jurisdiction to decide whether LLNL terminated the Complainant on March 22, 1996 in retaliation for making disclosures before September 23, 1994. Finally, Hearing Officer Lazarus determined that OHA has jurisdiction to consider the Complainant's claims that she made protected disclosures about an LLNL building and engaged in protected activity under 10 C.F.R. § 708.5(a)(3) when she refused to enter that building. Because the Complainant never specifically articulated her allegations under 10 C.F.R. § 708.5(a)(3) until the administrative hearing in 2000, Hearing Officer Lazarus decided that LLNL should be allowed to present a defense to the claims being raised under 10 C.F.R. § 708.5(a)(3).

On November 24, 2000, LLNL filed an appeal to the OHA Director of that portion of the November 1, 2000 Interlocutory Order that held that the Complainant could proceed with a new claim of reprisal based on her refusal to enter the building in question, Building 415. The OHA Director rejected the appeal on December 11, 2000, finding that the legal arguments advanced by LLNL in its appeal must wait for review on their merits until the Hearing Officer issues her Initial Agency Decision in the case.

Subsequently, the parties conducted discovery on the issue of damages. On March 21 and 22, 2001, Hearing Officer Lazarus conducted a supplemental hearing in the case, after which she requested the submission of post-hearing briefs. Hearing Officer Lazarus received the transcripts of the two-day supplemental hearing on April 18 and 26, 2001. LLNL and the Complainant both filed legal briefs on May 18, 2001. (5)

On February 12, 2002, the OHA Director transferred this case from Hearing Officer Lazarus to me and delegated me the responsibility for rendering an Initial Agency Decision in the matter.

# II. Legal Standards Governing This Case

The regulations set forth at 10 C.F.R. Part 708 specifically describe the respective burdens imposed on the Complainant and the contractor with regard to their allegations and defenses and prescribe the criteria for reviewing and analyzing the allegations and defenses advanced.

## A. The Complainant's Burden

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 in § 708.5, and that such act was a contributing factor to one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29. See Ronald Sorri, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)). The term "preponderance of the evidence" means proof sufficient

to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. See Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (Hopkins); McCormick on Evidence § 339 at 439 (4th Ed. 1992).

## B. The Contractor's Burden

If the Complainant meets her burden as set forth above, the burden then shifts to LLNL to prove by "clear and convincing" evidence that the company would have taken the same actions about which the Complainant is complaining even if she had not made protected disclosures and/or engaged in protected activity. 10 C.F.R. § 708.29. "Clear and convincing" evidence requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt." See Hopkins, 737 F. Supp. at 1204 n.3.

# III. Findings of Fact

The Complainant began her employment with LLNL as a Senior Human Resources Specialist in August 1986. Tr. at 69. According to the Complainant, her tenure at LLNL from 1987 to 1989 was a difficult one. During this time, she filed several internal grievances against her employer alleging race discrimination and contesting substandard performance evaluations. After the Complainant experienced problems working with one supervisor in 1987, LLNL transferred her to work for a second supervisor. *Id.* at 204. The second supervisor subsequently complained about the Complainant's performance, including her failure to meet deadlines. LLNL Ex. 3.

In September 1989, the Complainant was reassigned, at her own request, to work in LLNL's Education Program Division (Education Program) under the supervision of Dr. Manuel Perry, a biochemist who served as the Director of the Education Program. At the time, the Education Program was housed in a school building leased from the school district, commonly referred to as "The Almond School." During the first three to five months of the Complainant's tenure in the Education Program, Dr. Perry reports that the Complainant's performance was satisfactory. Tr. at 373. Because Dr. Perry had observed during that time that the Complainant's data analysis skills were weak, he sought other opportunities for her. *Id.* To this end, Dr. Perry appointed the Complainant as project coordinator for PROJECT STAR, a DOE summer education program that placed minority students from community colleges in research laboratories at LLNL. Ex. 10 to ROI. According to Dr. Perry, during the first year of PROJECT STAR, DOE personnel and a community college professor voiced their respective concerns regarding their difficulty working with the Complainant and her poor communication skills. Tr. at 374. Dr. Perry testified that during the second year of PROJECT STAR, tension mounted between the Complainant and the community college professor. *Id.* at 376. Dr. Perry finally resorted to counseling the Complainant about her poor performance on the project. *Id.* at 376. Ultimately, the community college decided not to continue its relationship with LLNL but found another laboratory in which to place its students. *Id.* at 379.

With the loss of PROJECT STAR to another laboratory, the Complainant had little work to do. In late 1990 or early 1991, Dr. Perry approved a proposal submitted by the Complainant to seek funding from the National Science Foundation (NSF) for a three-year program that would provide minority undergraduate students with the opportunity to work with laboratory researchers during the summer (The National Physics Education Program Collaboration (NPEPC)). Ex. 10 to the ROI at 2. Because restrictions prevented NSF from funding another federally funded, non-educational institution, such as LLNL, LLNL sought a collaborator. To this end, LLNL entered into a partnership with California State University, Hayward (CSU-H), an educational institution not affiliated with the federal government. Under the terms of the partnership, CSU-H was the recipient of NSF funds for NPEPC, and was responsible for the fiscal and logistical requirements of the program such as management, bookkeeping, student transportation, and dormitory facilities. For its part, LLNL handled all student activities, including the assignment of projects and mentors for each student, and the development of a system to evaluate the students. The Complainant

and Dr. Charlie Harper, the head of the Physics Department at CSU-H, were designated as the co-project investigators (co-PIs) for NPEPC.

In 1991, NSF approved funding for the first two years of NPEPC. Funding for the third year was conditional upon performance, and subject to review by NSF. Midway through the first year of the NPEPC, problems arose between the Complainant and Dr. Harper. Dr. Perry describes these problems between the co-PIs as "communication issues." Tr. at 303.

Sometime in early 1993, Dr. Harper suggested that the third year of NPEPC be modified to include a college course on laboratory research techniques because, in his opinion, some of the program participants lacked the requisite background or experience in scientific research or laboratory safety. *Id.* at 384. The Complainant objected to the modification, opining that the class was remedial in nature and demeaning to the students. The Complainant complained to Dr. Perry that Dr. Harper was trying "to steal her program." *Id.* at 388. She further claimed that she believed at the time that the suggested modification violated LLNL and NSF rules and regulations, and would result in the fraudulent diversion of funds to CSU-H. The Complainant first memorialized several concerns in this regard in a February 1993 memorandum to Dr. Perry. Ex. 58 to ROI. In her memorandum, the Complainant objected to the proposed changes on the basis that the changes would trigger the cancellation of NPEPC. *Id.* She further advised that she would not participate in something "unethical." *Id.*

As time went on, Dr. Perry stated that the problems between the Complainant and Dr. Harper escalated to such a level that the institutional relationship between LLNL and CSU-H was being jeopardized. Dr. Harper told Dr. Perry that he "can't work with that woman," referring to the Complainant. Ex. 10 to ROI at 4. Eventually Dr. Harper informed Dr. Perry that he would withdraw from participating further in NPEPC. Dr. Perry decided that he did not want to risk losing Dr. Harper as the program entered its third year, so he removed the Complainant as co-PI. Dr. Perry testified that the decision to remove the Complainant from NPEPC was his alone. He testified further that he based his decision solely on the fact that he perceived that NPEPC was at risk, in light of Dr. Harper's comments that he could not work with the Complainant and "wanted out of the program.(6)

On July 27, 1993, Perry replaced the Complainant with Eileen Vergino, a geophysicist. Tr. at 627. (7) LLNL had hired Ms. Vergino in early July 1993 as the Deputy Manager of LLNL's Education Program. According to Ms. Vergino, she did not know at the time of her appointment as co-PI that the Complainant had accused Dr. Perry of fraud, waste and abuse with regard to NPEPC. Tr. at 630. All Dr. Perry told her was that she was replacing the Complainant because of the "animus" between Dr. Harper and the Complainant.

In the early fall of 1993, Ms. Vergino essentially took over the Education Program because Dr. Perry announced his intention to retire. Perry retired in November 1993 at which time Vergino became Director of the Education Program.

In September 1993, the Complainant wrote to Ms. Vergino complaining about her removal as co-PI of NPEPC. Ex. 63 to the ROI. (8) Ms. Vergino responded by enumerating all the responsibilities the Complainant still had for many of the day-to-day administration of NPEPC. Ex. 64 to the ROI.

During the latter part of 1993, performance issues with the Complainant began to surface. According to Ms. Vergino, the Complainant was not completing her work on time, was only sporadically attending staff meetings, and was frequently not in the office during regular working hours. Tr. at 638-642.

On December 21, 1993, the Complainant wrote to the NSF complaining that she had been unjustly removed as co-PI from NPEPC, and that LLNL and CSU-H had engaged in fraud and mishandled federal funds. Ex. 1 to the ROI. NSF responded by informing the Complainant that her removal was proper and within CSU-H's discretion. Ex. 1 to ROI at 34. The Complainant continued to write to NSF in January and February 1994 requesting an investigation into her allegations. Finally, in February 1994, the Inspector General's (IG) Office at the NSF wrote to the Complainant reaffirming that her removal from NPEPC was

proper. With regard to the Complainant's allegations of fraud and mishandling of federal funds, the NSF's IG reminded the Complainant that she had told the IG that she "had no knowledge, or reason to believe, that actual fraud or criminal diversion of grant funds had occurred." *Id.* at 41-42.

In February 1994, Vergino asked the Complainant and another employee to account for time because of complaints that both were not working regular hours. Lab Ex. 11. In response, the Complainant could only account for 11 hours in a two month work period covering 160 hours. Tr. at 649; Lab Ex. 49.

In April 1994, Vergino hired Linda Dibble as Senior Administrator to handle all personnel issues in the Education Program. Tr. at 645-46. According to Dibble, within two weeks after she was hired, Vergino sought her assistance in dealing with personnel issues relating to the Complainant. *Id.* at 433. Specifically, Vergino was concerned that the Complainant seemed unproductive, appeared to be coming in late and leaving early, and was not participating in staff meetings. *Id.* at 650-51.

The next month, May 1994, the Complainant filed her first Part 708 complaint. As noted in Section I.C. above, the DOE subsequently dismissed the complaint for lack of jurisdiction.

From May through September 1994, personnel issues regarding the Complainant mounted. First, LLNL asked the Complainant to account for absenteeism not reflected on her time cards. Then, the Complainant's supervisor, Glenn Young, expressed dismay that the Complainant had failed to complete an assignment of finding mentors for students participating in NPEPC. In August 1994, Mr. Young provided a marginal performance appraisal for the Complainant. Mr. Young opined in a memorandum that the Complainant should be placed under a highly structured work environment with detailed tasking, reporting requirements, and frequent meetings. LLNL Ex. 23.

In the meantime, LLNL learned that the lease on The Almond School, the building that housed the Education Program, would be expiring. Accordingly, LLNL needed to find a new location for the program. A building outside LLNL's security perimeter, Building 415, was selected. However, the building required some remodeling and repainting.

In mid-September 1994, the Complainant was assigned to a new full-time position working for Mr. Young in LLNL's Apprentice Program, a program designed as an affirmative action outreach effort to train underprivileged youth, women, and minorities in the trades. Mr. Young provided a detailed job description to the Complainant. LLNL Ex. 26. Even though the responsibilities assigned to the Complainant appeared to be complementary to her previous experience in recruiting and placing students, and in affirmative action compliance, the Complainant objected to the assignment on the grounds that she was unfamiliar with these areas. Tr. at 268.

In late September 1994, the Complainant received her performance appraisal for the period 1993- 1994. It was "less than satisfactory." The appraisal cited the Complainant's failure to take initiative and the constant follow-up required by those who gave her assignments as reasons for her rating. Ex. 30 to the ROI.

On October 12, 1994, the Complainant filed her second Part 708 Complaint. In her complaint, she reiterated the allegations set forth in her first complaint and added that she has been demoted, reassigned and given unsatisfactory performance appraisals in retaliation for challenging the modification of the grant funding the NPEPC. Ex. 5 to the ROI.

By December 1994, plans were underway to move the Education Program to Building 415. Linda Dibble advised the staff in early December that carpet was being installed in the building on December 5, 1994, after which time the staff could visit their new offices. LLNL Ex. 28. The Complainant immediately responded that she would wait until after the holidays to see her office so that the fumes from the new carpeting could dissipate. *Id.* In late January 1995, the Complainant purportedly told Ms. Dibble that she had "life-threatening" reactions to "new carpet, paint fumes, windows painted close[d], and . . . asbestos." Complainant's Ex. 24. In early February, the Complainant spoke with Mr. Young about her concern

regarding the new carpet smell. *Id.* at 25. That concern was relayed from Mr. Young through his supervisor to Ms. Dibble. *Id.*

Immediately thereafter, Linda Dibble requested that LLNL's Hazards Control Department conduct an industrial hygiene "walk through" of Building 415 for guidance on addressing this issue. The Hazards Control Department instructed Dibble to "bake" the building by (1) closing all the windows and turning up the heat for two days and then (2) opening up all the windows to allow the new carpet smell to dissipate into the air. Dibble followed these instructions. Next, Dibble asked LLNL's Health Services Department (HSD) to evaluate the Complainant for purposes of determining whether she could occupy Building 415.

On February 14, 1995, Dr. Scott from LLNL's HSD evaluated the Complainant and determined that she could not work for the short term in Building 415 for health reasons. LLNL Ex. 42. Dr. Scott instructed the Complainant to consult her allergist, Dr. Kaufman, and bring a note from him stating how long it would be before she could enter Building 415. Also, Dr. Scott requested that Dr. Kaufman provide a list of chemicals to which the Complainant is sensitive so LLNL could test for them. Id. Dr. Scott also asked that the Complainant report to HSD on February 21, 1995, prior to going to work.

On February 21, 1995, the Education Program moved to Building 415. The Complainant was slated to occupy a second floor office in Building 415 with her colleagues from the Education Program. On that same day, the Complainant reported to HSD as previously instructed with a note from Dr. Kaufman stating that the Complainant was suffering from acute respiratory problems aggravated by "formaldehyde out-gassing" from the carpeting in her present area. LLNL Ex. 42.(9) At the time Dr. Kaufman wrote the note, he was unaware that the Complainant had never entered Building 415 where the new carpeting had been laid, and that no formaldehyde was used in the manufacture of the carpet installed in the offices in Building 415. *See* Tr. at 1169; LLNL Ex. 60. Dr. Scott then consulted with Ed Ochi of LLNL's Industrial Hazards Division about the Complainant's situation. Scott and Ochi decided that the Complainant could try to work in the first floor of Building 415 in an area that has not been repainted or carpeted. Dibble set up a temporary office for the Complainant on the first floor of Building 415 in furtherance of HSD's suggestion. Based on the information contained in Dr. Kaufman's February 16, 1995 letter, Dr. Scott issued a restriction barring the Complainant from working on the second floor only of Building 415 from February 21 to 28, 1995. Dr. Scott noted on the work restriction that he would re-evaluate the Complainant's situation in one week.

After the Complainant had presented Dr. Kaufman's note to Dr. Scott on February 21, 1995, she then proceeded to the first floor office in Building 415. After one hour, she felt ill and went home. She did not report to work the following two days, either. When the Complainant returned to work on February 24, she was placed in a Trailer 3156 which was located down the street from Building 415.

On February 28, 1995, the Complainant returned to HSD and told Dr. Scott that the previous day she had felt ill after entering another LLNL building, Building 571. Without explanation, Dr. Scott decided that the Complainant should not enter Building 415 for another four weeks but did not restrict the Complainant from entering Building 571. Accordingly, Dr. Scott executed a Work Assignment Restriction prohibiting the Complainant from entering Building 415 only from February 28 to March 28, 1995. LLNL Ex. 39.

On March 28, 1995, the Complainant met with Dr. Scott and reported that she was receiving weekly treatment from her allergist, and was experiencing no problems working in Trailer 3156. Dr. Scott extended the Complainant's work restriction in Building 415 another month, until April 25, 1995.

During this time, the Complainant was working with Glenn Young on the Apprentice Program. On March 31, 1995, Young requested that the Complainant relocate to Building 571 and assume the daily operation of the Apprentice Program. Complainant's Ex. 32. Three days later, the Complainant returned to HSD and asked Dr. Scott to revise her work restriction to include Building 571. Even though the Complainant had not entered Building 571 since she claimed that she felt ill when she entered that building in February 1995, Dr. Scott revised the Work Assignment Restriction to cover both Buildings 415 and 571.

Toward the end of March 1995, Dibble asked LLNL's Hazards Control department to perform an industrial hygiene evaluation of, among other places, Buildings 415 and 571. The evaluation concluded that any airborne contaminants present in the two buildings were at levels acceptable to the published workplace guidelines and standards. Ex. 60 to the ROI.

On April 12, 1995, Dr. Peter Lichty, M.D., examined the Complainant to determine whether her current health complaints arose out of, or were caused or aggravated by, her employment with LLNL. Dr. Lichty memorialized his findings in a Report dated April 28, 1995. In his Report, Dr. Lichty first pointed out that there are important environmental factors in the Complainant's home such as water damage, and mold and mushroom growth in the carpet of her home that might be contributing to the Complainant's symptoms. Dr. Lichty opined that the Complainant is beset with strong underlying anxiety and would benefit from anxiety medications on an empirical basis to see if anxiety is magnifying her underlying allergic symptoms.

On April 25, 1995, the Complainant visited HSD and expressed concern that if she were to enter Buildings 415 or 571, she would have problems. Dr. Scott agreed to extend her restrictions for another month until May 25, 1995 based only on the Complainant's articulated fears.

In the meantime, the Complainant's performance issues remained a concern for her supervisors. In April 1995, Mr. Young expressed dismay that the Complainant was having trouble completing her assignments without a step-by-step description of every task. LLNL Ex. 32. In May 1995, Young told Barry Goldman, the Team Leader of Student Programs in the Education Program, that the working relationship between the Complainant and him was not going well. Young told Goldman that part of the difficulty working with the Complainant was that she worked in an isolated location and he could not determine what she was doing. Because of performance issues, the Complainant was removed from Young's supervision and the Apprentice Program.(10) Tr. at 731. Goldman decided to assume direct supervision over the Complainant in May 1995.

On May 18, 1995, Goldman requested that the Complainant enter Building 415 for ten minutes to participate in a departmental review program. Complainant Ex. 40. Goldman claimed he could not move the location of the meeting because it involved the entire Education Program. Id. The Complainant refused to enter the building. Tr. at 786-87.

On May 25, 1995, the Complainant returned to HSD and told Dr. Scott that she was still reluctant to work in Buildings 415 and 571. This time, however, Dr. Scott decided that the Complainant could work in these two buildings "as tolerated" from May 25 to June 23, 1995. Scott stated that he had been in both buildings recently and knew from personal experience that the new carpet odor was gradually disappearing. He agreed to evaluate the Complainant again in one month.

The Complainant's work restrictions expired on June 23, 1995. At this point, Goldman determined that he could no longer accommodate the Complainant's desire to remain alone in the trailer because of programmatic needs. Goldman informed the Complainant that she must report to her office in Building 415 on June 26, 1995, unless she provided medical documentation outlining the restrictions LLNL needed to accommodate. LLNL Ex. 32. On June 26, 1995, the Complainant submitted a hand-written note from her allergist stating that the Complainant tests intolerant to petroleum products, paints, lacquers, varnishes, formaldehyde products, organic dusts, glue products, and fibers of many kinds, especially organic in origin. Ex. 33 to the ROI.

At this point, Goldman decided that LLNL could no longer accommodate the Complainant because of the universal nature of her restrictions. Goldman decided that LLNL would be liable if it required her to work in any environment at the facility. In addition, he decided he could no longer tolerate a situation in which an employee could not enter the building where all the program work was done. Tr. at 790-91. Goldman consulted with Vergino and a decision was made to send the Complainant home. *Id.* at 805-06. After she called LLNL's Affirmative Action Program and the DOE, the Complainant was subsequently placed on

paid administrative leave pending a review of her medical status and disability eligibility *Id.* at 679.

On August 3, 1995, the Complainant's allergist sent a medical note to LLNL stating that the Complainant "could function in an ordinary environment, [but] needed to avoid "a chamber heavily laden with vapors of formaldehyde coming from large yardage of new and never before aerated carpet." Ex. 38 to the ROI. The note further stated that all that the Complainant required was "clear, ambient room air." Id.

The Complainant returned to LLNL on August 9, 1995 after a six week hiatus. She and Dr. Scott went to Building 415 but the Complainant fell ill and went home. As a consequence, Dr. Scott issued another work restriction prohibiting the Complainant from working in Building 415 until September 17, 1995.

Following this incident, Gloria Kwei, the Manager of LLNL's Human Resources Department wrote the Complainant a letter informing her that she would be on unpaid leave until September 17. In the letter, Kwei stated that Trailer 3156 was no longer available to the Education Program and that the program no longer had assignments that could be performed outside Building 415. Kwei further stated that if the Complainant's work restrictions became permanent, a job search of other parts of LLNL would be performed and if no alternative assignment was found, the Complainant would be medically separated from her employment. Ex. 37 to the ROI.

On September 10, 1995, the Complainant wrote to the Secretary of Energy complaining that in July 22, 1993 she was fraudulently and illegally removed from her position as the Project Director for an education project funded by NSF. The Complainant further stated that LLNL had demanded that she work in an environment containing chemicals and toxins to which she is allergic. Ex. 7 to the ROI.

On September 17, 1995 the Complainant's work restriction expired again and she again entered Building 415 with Dr. Scott. The Complainant complained of not feeling well and she went home. Dr. Scott issued another work restriction for Building 415 until November 6, 1995. Ex. 39 to the ROI.

On November 20, 1995, LLNL decided to obtain an outside medical evaluation as to the Complainant's ability to work. The Complainant was subsequently evaluated by Dr. Abba Terr, an allergy and immunology specialist. Dr. Terr issued a report on December 27, 1995. Tr. at 294, Ex. 40 to the ROI. Dr. Terr did not find any objective evidence of a medical condition, but concluded that based on the Complainant's subjective beliefs, there was no reason to believe she could enter Building 415 without becoming "subjectively ill." Id.

Sometime in January 1996, Dr. Richard Watts, Dr. Scott's successor, met with the Complainant to discuss her return to work. Exs. 41 and 48 to the ROI. During this meeting the Complainant agreed that she should be permanently restricted from working in Building 415. Accordingly, Dr. Watts issued a permanent restriction prohibiting the Complainant from working in Building 415 and 571. *Id.* At this point, LLNL prepared the paperwork to medically separate the Complainant in view of her inability to perform the essential assigned functions of her position. Ex. 44 to the ROI.

Before separating the Complainant, Gene Dent, LLNL's Rehabilitation Representative, tried to contact the Complainant via certified mail and telephone in order to discuss vocational rehabilitation. Records show that the Complainant received the certified mail letter and signed for the same. Ex. 47 to the ROI. The Complainant never responded to the letter. At the hearing, the Complainant explained that she never contacted Mr. Dent because she "didn't feel [she] needed to be rehabilitated." Tr. at 1383.

On February 22, 1996, Robert Perko of LLNL's Staff Relations sent the Complainant a "Notice of Medical Separation" via certified mail. Ex. 48 to the ROI. In his letter to the Complainant, Perko stated that the Complainant had five calendar days to respond either orally or in writing to LLNL if she believed the action was improper. The Complainant did not respond.

On March 22, 1996, LLNL sent a second certified letter to the Complainant advising her that she was being medically terminated effective March 22, 1996. The letter informed the Complainant that her

separation was due to her inability to perform the essential functions of her job because of her health. The letter also advised that she could appeal the separation if she believed LLNL's policies or procedures had been improperly applied. The Complainant did not appeal.

# IV. Analysis

## A. The Complainant's Disclosures Regarding the NPEPC

The Part 708 regulations state in pertinent part that "a DOE contractor . . . may not discharge or in any manner demote, reduce in pay, coerce, restrain, threaten, intimidate, or otherwise discriminate against any employee because the employee . . has (1) [d]isclosed to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), information that the employee in good faith believes evidences - (i) [a] violation of any law, rule, or regulation; (ii) [a] substantial and specific danger to employees or public health or safety; or (iii) [f]raud, mismanagement, gross waste of funds, of abuse or authority." 10 C.F.R. § 708.5(a)(1)(i),(ii),(iii).

As an initial matter, the disclosures that the Complainant made only to the NSF do not qualify as protected disclosures because NSF is not an official of the DOE, a member of Congress, or a DOE contractor. The other disclosures that the Complainant made regarding the NPEPC are the following: the Complainant's oral statements to Dr. Perry between January and July 1993; the Complainant's statements contained in a Memorandum dated February 1993 to Dr. Perry; the Complainant's statements contained in her May 1994 Whistleblower Complaint; the Complainant's statements contained in her October 1994 Whistleblower Complaint; and the Complainant's statements contained in her letter to the Secretary of Energy in September 1995.

The evidence in the record indicates that beginning in February 1994 the Complainant did not have a good faith belief that LLNL had engaged in fraud, waste, and abuse with regard to the NPEPC. In the letter from the NSF Inspector General to the Complainant explaining why that agency declined to take any action against LLNL based on the Complainant's allegations, the Inspector General recounted that the Complainant had told the NSF "she had no knowledge, or reason to believe, that actual fraud or criminal diversion of grant funds had occurred" with respect to NPEPC. *See* Ex. 1 to the ROI at 41-42. Hence, in view of the Complainant's admission to the NSF in February 1994, any disclosure that she made subsequent to that time regarding alleged fraud, waste, and abuse by LLNL with regard to the NPEPC will be rejected as having been made in bad faith. In addition, the Complainant admitted that as early as August 1993, she had knowledge that NSF had approved her removal as co-PI so her contention that LLNL was somehow violating NSF's rules or regulations because LLNL removed her from her position without NSF's permission is devoid of merit.

Accordingly, I find that the Complainant's statements about LLNL's alleged fraud, mismanagement and violation of rules as set forth in her Part 708 Complainants filed in May and October 1994, and in her 1995 letter to the Secretary of Energy are not protected disclosures because they were not made in good faith.

With respect to the Complainant's oral statements to Dr. Perry between January 1993 and July 1993 as well as the statements contained in her February 1993 memorandum, however, I find that these statements were protected under Part 708. At the time the Complainant made these statements, she had no knowledge that LLNL intended to seek NSF's approval to effectuate the changes about which the complainant expressed concern or that NSF would approve all the changes LLNL would request to the NPEPC. Therefore, the record indicates that between January and July 1993, the Complainant had a good faith belief that LLNL was (1) violating NSF and its own rules; (2) engaging in fraudulent activity; and (3) mismanaging the NPEPC grant money.

Having found that some of the Complainant's disclosures regarding the NPEPC were protected under Part 708, I will next examine whether any of the protected disclosures were a contributing factor to any of the alleged reprisals at issue in this case.

# B. Contributing Factor

A protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action.

*Charles Barry DeLoach*, 26 DOE ¶ 87,509 at 89,053-54 (1997), quoting *Ronald Sorri*, 23 DOE ¶ 87,503 at 89,010 (1993); *Ronny J. Escamilla*, 26 DOE ¶ 87,508 at 89,046 (1996). In addition, "temporal proximity" between a protected disclosure and an alleged act of reprisal is "sufficient as a matter of law to establish the final required element in a prima facie case for retaliatory discharge." *County v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). In the present case, the Complainant claims that a series of retaliatory actions occurred to her, culminating with her medical termination in March 1996. The alleged retaliatory actions are analyzed below.(11)

## 1. Whether the Complainant's disclosures regarding the NPEPC Were a Contributing Factor to LLNL's Decision to Reassign the Complainant on September 23, 1994 to LLNL's Apprentice Program

The Complainant claims that LLNL's assignment of her to the Apprentice Program on September 23, 1994 was a demotion even though LLNL did not change her job classification or reduce her salary. Tr. at 156. It is the Complainant's contention that LLNL reassigned her to the Apprentice Program in retaliation for the disclosures that she had previously made regarding the NPEPC.

According to the record, it was Eileen Vergino who made the decision to assign the Complainant to the Apprentice Program. Tr. at 653. Ms. Vergino explained that Glenn Young had approached her with a request for assistance with the Apprentice Program. *Id.* At the time, Ms. Vergino was trying to create a situation where the Complainant could succeed because it was clear from the Complainant's previous work assignments that she was not succeeding in the workplace. *Id.*

After carefully reviewing the entire record, I find that there is no evidence showing that Ms. Vergino had either actual or constructive knowledge that the Complainant had made disclosures that LLNL had committed fraud, waste or mismanagement with regard to the NPEPC. Ms. Vergino testified that when she assumed her job at LLNL in July 1993, she had no knowledge of the reason why the Complainant had been removed as co-PI of the NPEPC, other than the "animus" that existed between Dr. Harper and her. Tr. at 630-631.(12) Further, Ms. Vergino testified that she had no knowledge that the Complainant had filed a Part 708 complaint until July 1995 when a DOE employee mentioned that fact during a meeting. Tr. at 681-683. Ms. Dibble was also present at the same July 1995 meeting. Ms. Dibble corroborated Ms. Vergino's statement that Ms. Vergino had expressed surprise at the meeting upon learning that the Complainant had previously filed a whistleblower complaint. Ms. Dibble testified that she, too, only acquired knowledge about the Complainant's disclosures at that July 1995 meeting. Tr. at 556. Finally, I note that in the memorandum that the Complainant wrote to Ms. Vergino on September 17, 1993 informing Ms. Vergino that she had been removed as the co-PI of NPEPC "without being given a valid reason," the Complainant did not mention her belief that her removal as co-PI constituted fraud and mismanagement. *See* Complainant's Ex. 63.

In the end, I find that the Complainant has not established the first element in a prima facie case that her disclosures regarding the NPEPC were a contributing factor to her reassignment to the Apprentice Programs.

Even assuming arguendo that the Complainant had met her evidentiary burden, I would have concluded that LLNL had provided clear and convincing evidence that it would have reassigned the Complainant in the absence of any of her disclosures. It is clear from the record that the Complainant was having difficulty meeting performance expectations and providing deliverables in her previous assignments. In an August 1994 performance appraisal, Glenn Young set forth concrete suggestions for assisting the Complainant in improving her performance, including his opinion that the Complainant should be placed under a highly structured work environment with detailing tasking, reporting requirements, and frequent meetings. LLNL Ex. 23. The memorandum that Mr. Young provided to the Complainant on September 13, 1994, appears to address the concerns he had articulated in the August 1994 performance appraisal. In addition to setting forth the Complainant's new job description, the September 13, 1994 memorandum also states:

> that "we will establish weekly communications and meet as often as necessary to maximize our effort and to maintain focus. Your timely input is important to my task of submitting a weekly status report of the LLNL Apprentice Program activities and projects. The overall goal for this assignment is to maximize the education effort in the LLNL Education Program, LLNL Apprenticeship Programs, and the AADPs to address duplication and to share resources. Attending staff meeting[s] of all three programs may be necessary."

LLNL Ex. 26. The clear and convincing evidence is that the Complainant's reassignment to the Apprentice Program was designed to provide her with an opportunity to utilize her extensive experience in recruiting and placing students and overseeing affirmative action compliance in a structured environment. It is also clear from the evidence that the Complainant was required to attend staff meetings and provide weekly reports on her assignments in an effort to improve the her performance, not as any retaliation for past disclosures she had made regarding the NPEPC.

## 2. Whether the Complainant's disclosures regarding the NPEPC Were a Contributing Factor to LLNL's Decision to the "less than satisfactory" Performance Appraisal that the Complainant Received on September 27, 1994

On or about September 27, 1994, the Complainant was given a performance appraisal for the prior year. Ex. 30 to the ROI. The appraisal indicated that the Complainant's performance was "less than satisfactory." *Id.* According to the Complainant, the performance appraisal was unfounded. Ex. 5 to ROI. The Complainant alleges that her performance rating was given in retaliation for her having made the disclosures about the NPEPC.

There is no evidence in the record to support the Complainant's contention. For the reasons set forth in Section IV.A. above, I find that the supervisor who completed the appraisal, Ms. Vergino, had neither constructive nor actual knowledge of the Complainant's previous disclosures regarding the NPEPC.(13) For this reason, I find that the Complainant has not met the first element of her prima facie case to establish the requisite nexus between any of her protected disclosures and the "less than satisfactory" performance appraisal that she received.

In addition, even had the Complainant met her burden of proving that her disclosures were a contributing factor to her September 1994 performance rating, the evidence in the record is overwhelming that LLNL would have provided the same rating to the Complainant in the absence of her disclosures. Between September 17, 1993, and May 3, 1994, Ms. Vergino and the Complainant exchanged seven memoranda regarding the Complainant's job description, poor job performance, and time and attendance problems. See Exs. 63, 64, 65, 66, 67, 68, and 69 to ROI. In addition, the performance appraisal in question highlighted the Complainant's performance problems, including her consistent failure to meet deadlines, her failure to complete assigned tasks, and the constant follow-up required after delegating assignments to her. By way of example, Vergino related that the Complainant had failed to complete her assignment of recruiting teachers for the Summer Research Internship Program. In this regard, the record shows that the

Complainant was informed at a meeting held on June 8, 1994, that she was to recruit mentors for the program in question. *See* LLNL Ex. 22. Notes from that meeting indicate that the Complainant resisted performing this assignment, insisting instead that it was not "her program" and that her supervisor should be responsible for completing the task. *Id.* The performance appraisal also reflects that the Complainant missed a deadline for the Internship Program for "Mission Valley ROP." In the appraisal, Vergino also recounts that the Complainant refused to cooperate, failed to demonstrate the initiative required by her position, and resisted suggestions to attend staff meetings until assigned to do so. At the hearing, Ms. Vergino reaffirmed under oath the litany of problems she had memorialized in the 1994 performance appraisal. Tr. at 637-651.

Moreover, the record reflects that Vergino and Dibble met with the Complainant on July 8, 1994 to discuss her work assignments and performance expectations. LLNL Ex. 18. During the meeting, the Complainant was informed that she was required to report about her work activities on a routine basis. The Complainant responded, "I will only report what I feel like." *Id.*

Finally, Glenn Young provided appraisal input into the Complainant's performance on August 18, 1994. LLNL Ex. 23. Young stated in a memorandum that he assumed that someone with the Complainant's length of service would be able to represent LLNL on most any assignment in the private sector. According to Young, the Complainant failed to meet LLNL's expectations in this regard. Young explained that the Complainant had previously made representations without checking first with an LLNL partner, thereby causing confusion and anxiety in the community organization and the LLNL partner. Young also related that the Complainant failed to inform him of her activities, as requested. In addition, Young stated that the Complainant tendered a summary of a particular program three months late. Moreover, according to Young, the summary in question did not even cover the topics the Complaint was to address. *Id.*

Given the facts outlined above, LLNL appears to have been completely justified in giving the Complainant a less-than-satisfactory performance evaluation in September 1994. In fact, in view of the circumstances, the Complainant should not have been surprised at her rating for the period in question.

## 3. Whether the Complainant's Disclosures about the NPEPC or her filing of a Part 708 Complaint in October 1994 Were Contributing Factors in LLNL's Decision to Assign the Complainant to Work in Building 415

In a letter September 10, 1995, the Complainant informed the Secretary of Energy that she was a whistleblower because she had made disclosures about the NPEPC. Ex. 7 to ROI. The Complainant alleged further that LLNL was demanding that she work in "environments containing chemicals and toxins to which she is allergic." The Complainant explained that she was being required to work in Building 415 "even if it kills me . . ." *Id.*

The facts surrounding the Education Program's move to Building 415 and LLNL's multiple attempts to accommodate the Complainant are set forth in detail in the Findings of Facts above. As previously stated, the entire Education Program moved to Building 415 in February 1995 because the lease on The Almond School expired. Upon learning of the Complainant's possible sensitivity to new carpet, LLNL consulted its Hazards Control Department which conducted an industrial hygiene walk- through of Building 415. Upon the recommendation of the Hazards Control Department, Linda Dibble "baked" Building 415 for two days to eradicate the new carpet odor. Beginning in February 1995, LLNL's HSD monitored the Complainant, issuing several temporary work restrictions preventing her from entering Building 415 and later Building 571. LLNL also placed the Complainant in a temporary alternate worksite, Trailer 3156, beginning in February 1995. In May 1995, LLNL's Hazards Control Department conducted an industrial hygiene evaluation of Building 415 and concluded that any airborne contaminants present in the building were at acceptable levels.

The record reflects that Barry Goldman requested that the Complainant enter Building 415 for ten minutes

on May 18, 1995 to participate in a departmental review. Goldman explained that he could not move the location of the meeting because everyone in the Education Programs were participants. The Complainant has presented no evidence that Goldman had actual or constructive knowledge of the disclosures that she made regarding the NPEPC. According to the record, in May 1995 Goldman did not know that the Complainant had filed a whistleblower complaint. He only learned about her complaint filing in July 1995. Accordingly, the Complainant has not met her burden of establishing a nexus between any of her disclosures about NPEPC and the request in question.

Goldman next requested that the Complainant move to Building 415 after her work restrictions expired on June 23, 1995. As noted immediately above, there is no evidence in the record that Goldman had any actual or constructive knowledge of the Complainant's disclosures concerning the NPEPC until July 1995. Finally, it is well documented that the Education Program's move to Building 415 occurred because LLNL lost its lease on The Almond School Building. Building 415 was selected because it met LLNL's specifications that the Education Program reside outside the security perimeter to ease the ingress and egress of students without security clearances. Given the facts of this case, I find that no reasonable person could conclude that LLNL decided to move its entire Education Program to Building 415 solely to retaliate against the Complainant for her past "protected activity." The record demonstrates conclusively that LLNL's move to Building 415 had absolutely nothing to do with the Complainant, her alleged disclosures, or any other Part 708 activity she may have engaged in.

For all the reasons set forth above, I find that the Complainant's disclosures were not a contributing factor to LLNL's decision to move the Education Program to Building 415, Goldman's May 1995 request that the Complainant enter Building 415 for ten minutes, or Goldman's June 1995 request that the Complainant move permanently to Building 415. (14)

## 4. Whether the Complainant's Disclosures about the NPEPC or her filing of a Part 708 Complaint in October 1994 or her September 1995 Letter to the Secretary of Energy Were Contributing Factors in LLNL's Decision to Medically Separate the Complainant in March 1996

The Complainant argues that LLNL's decision to medically separate her was a ruse. May 16, 2000 Reply Brief at 22. It is her contention that LLNL removed her from her position in retaliation for her having made disclosures about the NPEPC and having filed Part 708 Complaints with the DOE. *See* Ex. 9 to the ROI.

As previously stated, the circumstances surrounding the Complainant's medical separation date back to February 1995 when the Education Program moved from The Almond School to Building 415. Ex. 8 to the ROI. The Complainant asserts that, in spite of her attempts to work in Building 415, she could not do so because of her allergies. The Health Services Department (HSD) at LLNL medically restricted the Complainant from working in Building 415 several times between February 1995 and June 23, 1995. From June 26, 1995 to August 9, 1995, LLNL released the Complainant from her duties and placed her on administrative leave with pay. LLNL's HSD extended the Complainant's work restrictions in Building 415 until November 1995, although it appears she was placed on leave without pay beginning on August 9, 1995.

While the Complainant was on administrative leave, Ms. Kwei, LLNL's Human Resources Department Manager, wrote two letters to the Complainant regarding her employment status. In the first letter dated July 27, 1995, Ms. Kwei explained that the Complainant was sent home because her treating physician, Dr. Kaufman, had described her allergies as so extensive and comprehensive that there was nowhere at LLNL where she could be placed without concern that she would be exposed to something that would trigger an allergic reaction. Ms. Kwei then advised the Complainant that Dr. Kaufman should consult with LLNL's HSD to address with greater specificity the restrictions Dr. Kaufman has proposed for the Complainant. Ms. Kwei's wrote a second letter to the Complainant on August 25, 1995. Between the two letters, Dr.

Kaufman had authorized the Complainant to return to any assignment in "customary, standard environs, devoid of exposure to heavy volumes of odors and gasses from sources listed." When the Complainant returned to work on August 9, 1995, however, she became ill after entering Building 415. Therefore, HSD issued another temporary work restriction prohibiting the Complainant from entering the building. In her second letter to the Complainant, Ms. Kwei advised the Complainant that she will be on leave without pay until September 17, 1995, because Ms. Vergino had decided that there were no assignments that she can perform outside Building 415 and that Trailer 3156 was no longer available. Ms. Kwei further advised that the Complainant should return to HSD for an evaluation of whether the work restrictions could be removed or would be continued. If the latter is the opinion of HSD, advised Ms. Kwei, LLNL will conduct an "accommodation review," which will include an exploration of alternative assignments at LLNL, and possible medical separation.

The record suggests that Mr. Goldman, with the concurrence of Ms. Vergino and the HSD, was the one who decided that the Complainant could no longer perform work outside Building 415. Tr. at 805-806. Both Goldman and Vergino had knowledge of the Complainant's past disclosures by July 1995.

Ms. Dibble and Ms. Kwei were two others who were administratively involved in the decision to medically separate the Complainant. Ms. Kwei did not testify so it is not clear whether she had knowledge of the Complainant's past disclosures. Ms. Dibble, however, knew about the Complainants disclosures by July 1995.

Notwithstanding the fact that some of the individuals involved in the decision to medically separate the Complainant from her job had actual knowledge of the Complainant's Part 708 filing, I find that there is no credible evidence of any nexus between the Complainant's protected disclosures and her termination.

Even if the Complainant had established by a preponderance of evidence that a relationship existed between her medical separation and her disclosures, there is clear and convincing evidence that LLNL medically separated the Complainant because her inability to work in Building 415 prevented her from performing the essential functions of her job. The Education Program was a team-intensive effort that required face-to-face interaction between employees in the groups, and between the employees and students in staff meetings, training programs, student workshops and program reviews. The record shows that the Education Program had no employees who telecommuted and no employees who did not have offices in Building 415. (15) The evidence indicates that due to the nature of the Complainant's job, she needed to be in proximity to her work files and support staff and to participate in staff meetings. She also needed to collaborate with her coworkers. Tr. at 498. In addition, testimonial evidence indicates that even if the Complainant did not need to perform her duties in Building 415, she was not suited to work in an isolated environment because of her past performance issues and attendance problems. *Id.* at 664-665.

There is also clear and convincing evidence that LLNL made extensive efforts to accommodate the Complainant prior to her termination. LLNL's HSD monitored the Complainant's health and issued multiple work restrictions to her. LLNL consulted their Hazards Control Division on two occasions and evaluated the work environment in Building in question. LLNL arranged for the Complainant to be evaluated by Dr. Terr in November 1995. It was Dr. Terr's opinion that the Complainant could never work in Building 415 without becoming "subjectively ill." Ex. 40 to the ROI.

Sometime in January 1996, Dr. Watts of LLNL's HSD met with the Complainant to discuss her ability to return to work. *See* LLNL Ex. 54; Tr. at 294-296. According to Dr. Watts' testimony, he obtained the Complainant's agreement that a permanent work restriction was appropriate given her circumstances. Tr. at 953-955. On January 29, 1996, Dr. Watts issued a permanent work restriction prohibiting the Complainant from entering Buildings 415 and 571. Ex. 41 to ROI. The reason stated on the work restriction is the following:

> Exposure to any of the following odorant compounds: paints, lacquers, varnishes, formalin, formaldehyde, glue products, pesticides, is likely to produce subjective symptoms that may

> preclude this employee from continued function in the workplace and therefore are to be avoided.

*Id.* On January 31, Ms. Vergino sent a memorandum to Robert Perko recommending that the Complainant be medically separated from her employment because of her permanent exclusion from Building 415. Ex. 44 to ROI. In accordance with LLNL's policies, LLNL requested that Gene Dent conduct a vocational rehabilitation review of the Complainant. Ex. 45 to ROI. On February 8, 1996, Dent sent the Complainant a certified letter requesting that she contact him to discuss vocational rehabilitation. The Complainant did not respond to the letter. On February 22, 1996, Perko sent a second certified letter to the Complainant informing her that she was being medically separated effective March 22, 1996. Ex. 49 to ROI. The letter informed the Complainant that she could appeal her medical separation. The Complainant did not appeal.

Finally, the record demonstrates that LLNL followed its policy and procedures regarding Medical Separation when it medically terminated the Complainant. *See* Ex. 56 to the ROI. Section K.VI. of LLNL's Personnel and Policies and Procedures Manual provided that "employees that become unable to perform the essential assigned functions fully, due to handicaps or other medical conditions, may be separated from employment." *Id.* LLNL's Manual also describes the vocational rehabilitation services provided to employees who cannot provide the essential functions of their positions, and the special consideration these employees enjoy for other opportunities at LLNL.

In the end, I find that LLNL has presented clear and convincing evidence that it would have medically discharged the Complainant in 1996 even had she not made disclosures about NPEPC in 1994 and 1995 or sent her letter to the Secretary of Energy in 1995. LLNL clearly had a legitimate business reason for medically separating the Complainant when, after providing accommodations to the Complainant for many months, it became clear that the Complainant could not work in Building 415 for the foreseeable future. In addition, LLNL followed its policies and procedures for Medical Separation when it determined that the Complainant could no longer perform her essential, assigned functions fully. Moreover, LLNL extended the Complainant the opportunity to explore other employment options at LLNL before her medical termination but the Complainant rebuffed LLNL's overtures.

# B. Alleged Reprisals Stemming from the Complainant's Alleged Refusal to Participate

In July 2000, Hearing Officer Lazarus decided that two other possible protected disclosures or activities should be considered in this case and requested that the parties submit legal briefs addressing these issues.(16) Hearing Officer Lazarus also conducted a two-day supplemental hearing in the case that focused on the following issues:

> Whether the Complainant engaged in protected activity under Section 708.5(a)(3) by refusing to work in Building 415, and whether the Laboratory retaliated against the Complainant for engaging in this activity;
>
> Whether the Complainant made disclosures that were protected under Section 708 (a)(1) when she informed several DOE officials and Laboratory employees that she believed it was unsafe for her to enter certain buildings at the Laboratory, and whether the Laboratory retaliated against the Complainant for making these statements

## 1.Whether the Complainant engaged in protected activity under Section 708.5(a)(3) by refusing to work in Building 415, and whether the Laboratory retaliated against the Complainant for engaging in this activity?

Section 708.5(a)(3) of the original Part 708 regulations provided in relevant part that :

(a) A DOE contractor covered by this part may not discharge . . . any employee because the employee . . .

(3) refused to participate in an activity, policy, or practice when -

(i) such participation-

(B) causes the employee to have a reasonable apprehension of serious injury to the employee, other employees, or the public due to such participation, and the activity, policy, or practice causing the employee's apprehension of such injury -

(1) is of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a *bona fide* danger of an accident, injury or serious impairment of health or safety resulting from participating in the activity, policy or practice; and

(2) The employee is not required to participate in such dangerous activity, policy, or practice because of the nature of his or her employment responsibilities;

(3) The employee, before refusing to participate in an activity, policy, or practice has sought from the contractor and has been unable to obtain a correction of the violation or dangerous activity, policy, or practice; and

(4) The employee, within 30 days following such refusal, disclosures to an official of DOE, a member of Congress, or the contractor, information regarding the violation or dangerous activity, policy or practice, and explaining why he has refused to participate in the activity.

**a. Applicability of § 708.5(a)(3) to the Facts in this Case**

As an initial matter, I find that the regulatory provision cited above is inapplicable to the facts of this case. There is nothing in the preamble or the regulatory history to Part 708 that suggests the regulations were designed to protect employees with pre-existing disabilities or medical conditions who refuse to perform the job for which they were hired when their disability or medical condition becomes incompatible with a work environment that is considered safe and healthy under workplace guidelines. Rather, the regulations were designed to protect employees who had a reasonable belief that there was a bona fide danger inherent in the work site itself that may cause an accident, injury, or serious impairment of health and safety. While the Complainant appears to argue that the "dangerous condition" in Building 415 was the remodeled building with new carpets and paint, the evidence demonstrates that there was nothing inherently dangerous in Building 415 from an environmental standpoint. LLNL's Hazards Control Department conducted an industrial hygiene evaluation of the subject building in May 1995, two months after the new carpet had been installed in that building. The evaluation revealed that any airborne contaminants present in the building in question were at acceptable levels according to the published workplace guidelines and standards. There is no evidence in the record that any other employees working in Building 415 experienced health problems, including Ms. Vergino who testified that she suffers from asthma.

Even assuming arguendo that Part 708 is construed broadly to encompass the Complainant's situation, I find the Complainant's allegations to be devoid of merit for the following reasons.

**b. Reasonableness of the Complainant's Apprehension**

There are conflicting medical opinions in the record whether the Complainant suffered from allergies, whether her perceived allergies constituted a condition or a disease, whether her condition or disease had a subjective or objective basis, or whether the root problem stemmed from a multiple chemical sensitivity.

For purposes of this Decision, I find that the Complainant thought she suffered from some allergic condition that made it difficult or impossible for her to work in Building 415 while that building was undergoing renovation and while there remained a residue of paint or new carpet smell in the air. In my opinion, there is some question whether the Complainant's concerns about the alleged danger Building 415 posed to her health and safety were reasonable, or even made in good faith.

First, the Complainant's concerns about the danger Building 415 allegedly posed to her health and safety were initially based on her self-reported past exposure to new carpeting and paint fumes not in Building 415, but elsewhere. The record indicates that the Complainant was not candid with her physician, Dr. Kaufman, in mid-February 1996 when she asked him to provide a written statement to LLNL about the health ramifications of her entering Building 415. On February 16, 1995, the Complainant's physician, Dr. Kaufman, wrote a letter stating as follows:

> [The Complainant] is suffering with some acute respiratory problems made worse by the formaldehyde out-gassing from the carpeting in her present area. Can you please accommodate her needs by moving her work place to an area devoid of such noxious fumes?

LLNL Ex. 43. At the time Dr. Kaufman wrote the letter, he did not know that the Complainant had never entered Building 415, or that the new carpet in Building 415 did not contain formaldehyde. Tr. at 1159. At the hearing, Dr. Kaufman testified that he erroneously assumed formaldehyde out- gassing was the source of the Complainant's problem because the Complainant had told him "she'd been exposed to a room that [sp] there was a lot of new carpeting being put down." Tr. at 1110-1111. According to Dr. Kaufman, had he known on February 16, 1995 that the Complainant had not been exposed to new carpet, he would have looked for another cause of her illness. *Id.* at 1113. Dr. Kaufman stated that there was no question that she was ill, however, because when he examined the Complainant prior to writing the February 16, 1995 letter, he noted that the Complainant was "having a lot of difficulty getting over her underlying physical respiratory troubles . . . some nasal congestion, throat irritation, nasal discharge" *Id.* at 1110-1111.

It is clear from the record that the Complainant's symptoms as described by Dr. Kaufman were totally unrelated to any environmental element in Building 415 because at the time Dr. Kaufman saw the Complainant in mid February 1995, she had never been in Building 415. It is also clear to me that the Complainant was acting in bad faith when she misrepresented to her physician that she had experienced allergic symptoms from inhaling paint and carpet fumes when she either stated or implied that she had entered Building 415. Based on the record, it appears that LLNL provided accommodations to the Complainant based on the misinformation that the Complainant had communicated to Dr. Kaufman.

To be sure, the Complainant entered Building 415 on three occasions, February 21, 1995, August 9, 1995, and September 17, 1995, and repeatedly felt ill on each of those occasions. After the Complainant's first reported illness on February 21, 1995, the Complainant contacted Dr. Kaufman's office and on the advice of an office nurse stayed off work the next two days. It is significant, in my opinion, that no one examined the Complainant to determine whether anything in the workplace was causing or contributing to her pre-existing medical condition.

Then, in April 1995, LLNL asked Dr. Lichty to evaluate the Complainant to determine whether her current health complaints arose out of, or were caused or aggravated by, her employment with LLNL. Dr. Litchy concluded that while the Complainant has a life-long history of allergies, and daily fluctuating symptoms, there is insufficient objective evidence to confirm that an industrial illness or injury has occurred. Dr. Lichty also suggested that the Complainant is beset with strong underlying anxiety and would benefit from anxiety medications on an empirical basis to see if anxiety is magnifying her underlying allergic symptoms. It appears from the record that there is no objective evidence to support the Complainant's belief that something "dangerous" in Building 415 was negatively impacting her health and safety.

Further, Dr. Scott issued many of the temporary work restrictions to the Complainant based solely on the strength of the fears that Complainant voiced about entering Building 415, not on the fact that any

dangerous situation existed.

In August 1995, Dr. Kaufman wrote to Dr. Scott in an attempt "to provide some guidance to the Laboratory in determining how best to proceed in arranging [the Complainant's] work environment." In that letter, Dr. Kaufman noted that "all it took for [the Complainant] to recover from the noxious out gassing of some new carpeting when she became ill last spring was simply to enable her to achieve cessation of exposure to the out gassing of the new carpet, for as your company is aware, she had no respiratory problems when transferred to a new locale, i.e,. Trailer 3156." There could have been no objective evidence that out gassing from the carpet caused the Complainant's symptoms because no formaldehyde had been used to manufacture the carpet. Moreover, Dr. Kaufman testified that he was never able to determine that the source of the Complainant's problems was Building 415. Tr. at 1094.

Dr. Terr examined the Complainant in November 1995. He testified that he believes the pattern of symptoms exhibited by the Complainant is consistent with what many people experience under a state of anxiety. *Id.* at 1018. Dr. Terr further opined that the fact the Complainant entered Building 415 more than nine months after the carpet had been aired out and she still had problems indicates that her subjective belief that the building was making her sick would never be shaken. *Id.* at 1034. Terr concluded that while the Complainant actually believed that Building 415 was making her sick, her belief was unreasonable. *Id.* at 1077. According to Dr. Terr, there was simply no way of correcting this "irrational" situation.

On the basis of the foregoing, I find that the Complainant has not convinced me that a reasonable person, under the circumstances then confronting the Complainant, would have concluded that there was a *bona fide* danger of serious impairment of her health or safety resulting from her entering Building 415.

**c. The Complainant Was Hired to Work in an Ordinary Office Environment**

Under Section 708.5(a)(3)(i)(B)(2), an employee cannot bring a claim under Part 708 if the employee is required to participate in such dangerous activity, policy, or practice because of the nature of his or her employment responsibilities. This provision was intended to apply to situations where an employee was hired for the very purpose of working in dangerous conditions, such as cleaning up hazardous waste. In this case, the Complainant was hired to work in an ordinary work environment. LLNL has demonstrated that the exposure to airborne contaminants in Building 415 was not reasonably anticipated to approach or exceed published workplace standards and guidelines. Ex. 60 to the ROI. Hence, Building 415 can be accurately characterized as an "ordinary" office environment devoid of any health or safety hazards. Even though the Complainant believes that an ordinary work environment is "dangerous to her health and safety" because she thinks she is allergic to something in the workplace, her job responsibilities require her to work in that environment.

The Complainant also questions whether she needed to work in Building 415 to fulfill her work responsibilities. As discussed earlier in this Decision, however, LLNL has proven that it was essential for the Complainant to work in Building 415 with all the other Education Program employees. She needed to attend staff meetings, program reviews, and student workshops in that building. Moreover, the support staff was located in Building 415. Finally, the Complainant's poor performance and time and attendance irregularities required that she be under close supervision in Building 415. In the end, it seems reasonable under the circumstances that LLNL has the prerogative to determine what constitutes an "essential function" of employment at LLNL. In this case, it was an essential function of the Complainant's job that she work in Building 415 in close proximity to her colleagues in the Education Program.

Finally, it is clear to me from the record that the Complainant's focus during the time she refused to enter Building 415 was not on exposing a dangerous work environment but on obtaining an accommodation from LLNL to work alone in a trailer or alone at home. While LLNL attempted to accommodate the complainant by allowing her to work in Trailer 3156 until that situation not longer was feasible, it now appears based on the U.S. District Court's Decision that LLNL did not even have a legal obligation to accommodate the Complainant. *See* Order from the United States District Court for the Northern District

of California dated October 14, 1997 in the matter of *Benson v. Lawrence Livermore National Laboratory*.

Based on all the foregoing considerations, I find that the Complainant has failed to meet her burden of proving a claim under 10 C.F.R. § 708.5(a)(3).

### 2. Whether the Complainant made disclosures that were protected under Section 708 (a)(1) when she informed several DOE officials and Laboratory employees that she believed it was unsafe for her to enter certain buildings at the Laboratory, and whether the Laboratory retaliated against the Complainant for making these statements

The Complainant did not specifically articulate in any of her pleadings which of her statements regarding the safety of Building 415 rise to the level of "protected disclosures" under Part 708. Based on my review of the record, there are possibly two instances when the Complainant appears to have made disclosures that rise to the level of protected disclosures under Part 708. The first occurred in late January 1995 when the Complainant purportedly told Ms. Dibble that she had "life-threatening" reactions to "new carpet, paint fumes, windows painted close[d], and . . . asbestos." These statements were made in response to Dibble's announcement that the Education Department would be moving to Building 415. The second time when the Complainant stated her belief(17) that her entry into Building 415 would constitute a substantial and specific danger to her as an employee occurred when the Complainant wrote a letter to the Secretary of Energy dated September 10, 1995. In the letter, the Complainant claimed that LLNL had demanded that she work in an environment containing chemicals and toxins to which she is allergic and that LLNL was insisting that she work in Building 415 "even if it kills me." Ex. 7 to ROI.

Even though the managers who made the decision to medically separate the Complainant had actual knowledge that the Complainant had written to the Energy Secretary at the time they terminated the Complainant, there is no temporal proximity between the letter to the Secretary of Energy and the Complainant's termination. Moreover, even if I were to consider the Complainant's termination as part of an ongoing serious of reprisals, I could not conclude that the Complainant had met her burden in this case. Under the facts of this case, it is simply unreasonable for me to infer a nexus between any of the Complainant's protected disclosures and any act of reprisal claimed by the Complainant. Hence, it is my determination that the Complainant's disclosures in January and September 1995 regarding her belief that Building 415 was unsafe for her to work in were not a contributing factor in LLNL's decision to medically separate her from her employment in March 1996.

Assuming arguendo that the Complainant had established the requisite nexus between her disclosures and her termination, I would have found, for the reasons discussed in other parts of this Decision, that LLNL has provided clear and convincing evidence that the Complainant would have medically separated her anyway. LLNL has demonstrated clearly and convincingly that the Complainant, an employee with a history of performance and time and attendance problems, needed to work in Building 415 with her colleagues, and could not be accommodated elsewhere on site. Moreover, the Complainant bears some responsibility for her medical termination. She never responded to efforts by LLNL's vocational rehabilitation counselor to assist her in finding another assignment at LLNL. Had she done so, she may not have been medically separated from her employment.

It should also be noted that the Complainant was medically restricted from working in Building 415 for over a year before she was terminated. While the Complainant would have preferred to work at home or in Trailer 3156, for the reasons discussed earlier in this Decision, neither of these options were viable.

# V. Summary

In conclusion, after carefully considering the voluminous record before me, I find that the Complainant has failed to meet her evidentiary burden in this case. Specifically, she has not proven by a preponderance of evidence that any of her Part 708 disclosures or activities were contributing factors to any of the alleged reprisals taken by LLNL against her, including her termination. Accordingly, it is my determination that the Complainant is not entitled to any relief.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Janet K. Benson under 10 C.F.R. Part 708, OHA Case No. VWA-0044, be and hereby is denied.

(2) This is an Initial Agency Decision that shall become the Final Decision of the Department of Energy denying the complaint, unless a party files a notice of appeal within fifteen days after receipt of this Initial Agency Decision.

Ann S. Augustyn
Hearing Officer
Office of Hearings and Appeals

Date: May 22, 2002

(1) For purposes of this Decision, all references to LLNL will include UC and UC Regents.

(2) The DOE amended 10 C.F.R. 708 in an Interim Final Rule effective April 14, 1999. 64 Fed. Reg. 12,862 (March 15, 1999). The revised regulations provide that the procedures in the new Part 708 apply prospectively in any complaint pending on the effective date of the revisions, *i.e*, April 14, 1999. However, the substantive changes reflected in the revised regulations will not be applied in this case because to do so would affect the substantive rights of the parties. Therefore, this case will be adjudicated in accordance with the substantive standards set forth in the original version of Part 708. *See Linda D. Gass*, 27 DOE ¶ 87,525 (1999).

(3) During the pendency of the investigation, OCEP was abolished and its functions transferred to the Office of Inspections in the DOE's Office of Inspector General.

(4) The Complainant also utilized other fora to voice her complaints against LLNL and her supervisors for their actions. She first filed an internal grievance against her LLNL supervisor on February 7, 1994, alleging race discrimination. Complaint's Ex. 51; Ex. 1 to the ROI at 9. LLNL's Staff Relations Office denied the grievance on February 11, 1994. *Id.*; Ex. 1 to the ROI at 15. The Complainant appealed the denial to UC on February 18, 1994. *Ex. 1 to ROI at 16.* UC denied the appeal on March 1, 1994. *Id. at 17.*

Within two weeks, the Complainant filed a race discrimination complaint against LLNL with the Equal Employment Opportunity Commission (EEOC). *Id.* Before the EEOC had ruled on the Complainant's complaint, the Complainant also filed internal complaints on May 5, 1994, September 21, 1994, and October 12, 1994. *Id.* On May 5, 1995, the EEOC issued a determination finding no merit to the Complainant's complaint. LLNL's April 12, 2000 Post-Hearing Brief at 28, Ex. 55 to the ROI.

On July 28, 1995, the Complainant filed a Complaint for Employment Discrimination with the United States District Court for the Northern District of California, alleging wrongful termination by LLNL, race discrimination, and failure to accommodate her disability. *Id.* On March 6, 1996, the Complainant filed a complaint in State Court alleging, *inter alia*, discrimination based on physical disability and unlawful discrimination in violation of the Americans with Disabilities Act (ADA). LLNL removed the State Court action to federal court. The two actions were subsequently consolidated in the United States District Court for the Northern District of California. The District Court awarded summary judgment in favor on LLNL on October 14, 1997, finding that the Complainant's "ADA claim fails as a matter of law because she does not have a ?disability' as defined by the statute." *See* Attachment 3 to LLNL's April 12, 2000 Post

Hearing Brief.

(5) On August 28, 2001, Hearing Officer Lazarus convened a telephone conference call with the parties at which she sought permission to appoint a technical advisor on the issue of multiple chemical sensitivity. See Record of Telephone Conversation among Hearing Officer Lazarus; Aileen Anderson, Counsel for Janet Benson, and Gabriella Odell, Counsel for LLNL (August 28, 2001). The Complainant raised no objection to Hearing Officer Lazarus' request but LLNL objected to any consultation between Hearing Officer Lazarus and the technical advisor identified by the Hearing Officer. See Letter from Aileen Anderson, Counsel for Janet Benson to the Hearing Officer (August 29, 2001); Letter from Gabriella Odell, Counsel for LLNL to Hearing Officer Lazarus (August 29, 2001). Hearing Officer Lazarus raised the matter again on September 21, 2001 in a transcribed telephone status call. See Transcript of September 21, 2001 Status Teleconference (September 2001 Tr.). Ultimately, Hearing Officer Lazarus decided to rest on the record without consulting with a technical advisor. September 2001 Tr. at 8-9.

(6) "In a Memorandum dated June 21, 1993, the NSF Program Director for the Research Careers for Minority Scholars Program, Dr. William E. McHenry, stated that the co-PIs of the NPEPC "have not coordinated their activities to the extent necessary to institutionalize the activities of this project." Ex. 54 to the ROI at 8. According to Dr. McHenry's Memorandum, because of the poor communications between the parties involved in the project, the co-PIs were told to address the issue of leadership in the project before NSF would consider funding for the third year of the program. *Id.* The Provost and Vice President for Academic Affairs at CSU-H and the LLNL Director of Education each recommended replacing the Complainant as co-PI. *Id.*

(7) On August 21, 1993, the NSF approved the modifications to the NPEPC that had been requested by the two institutions, including the replacement of the Complainant as co-PI with Ms. Vergino. Ex. 54 to the ROI at 6.

(8) The Complainant testified that she learned "four to six weeks after July 23, 1993," that NSF had approved the modification to the NPEPC. Tr. at 233.

(9) On the date that Dr. Kaufman wrote the letter, the Complainant was still working in The Almond School building, an old building that did not have new carpeting.

(10) When Young submitted input into the Complainant's performance appraisal for the period September 1994 to June 1995, he rated her as "marginal." Complainant's Ex. 45.

(11) In the Interlocutory Order issued on November 1, 2000 in this case, Hearing Officer Lazarus held that no acts of reprisal that allegedly occurred prior to September 23, 1994, would be adjudicated. The rationale for this ruling is that LLNL cannot be held retroactively liable for acts of reprisal occurring before September 23, 1994, the date it agreed to become contractually bound by Part 708. Since Hearing Officer Lazarus did not specifically enumerate the alleged acts of reprisal that cannot be considered as a matter of law in this case, I am setting them forth below to clarify the record. The purported acts of reprisals that will not be considered in this Decision are the following: (1) LLNL's removal of the Complainant as co-PI for the NPEPC; (2) LLNL's alleged denial of the Complainant's request for a transfer or reassignment sometime between 1993 and July 1993; (3) LLNL's alleged assignment of clerical duties to the Complainant at sometime prior to September 23, 1994; (4) LLNL's alleged harassment of the Complainant at any time prior to September 23, 1994; and (5) LLNL's alleged disparate treatment of the Complainant with regard to time and attendance records that allegedly occurred prior to September 23, 1994.

(12) The Complainant argues in one of her briefs that Ms. Vergino had knowledge of her past disclosures because she was in regular contact with two people in LLNL's Human Resources Department who knew about the Complainant's Part 708 filing. May 16, 2000 Brief at 17. Those two persons are identified as Mr. Smith and Mr. Cain. However, the Complainant did not produce either Mr. Smith or Mr. Cain to support her position on this matter. Nor did the Complainant elicit testimony at the hearing from Ms. Vergino indicating that she had acquired knowledge from Messrs. Smith or Cain about the disclosures at the time

she decided to reassign the Complainant to the Apprentice Program. Moreover, to the extent the Complainant implies in her brief that Mr. Young had knowledge of her past disclosures and somehow orchestrated her assignment to the Apprentice Program by suggesting the Complainant's reassignment to his program, I find that there is no evidence to support this implication. The Complainant did not call Mr. Young as a witness so there is no evidence on this matter.

(13) To the extent that either Ms. Dibble or Mr. Young had input into the performance appraisal in question, I find nothing in the record to suggest that either of them had actual or constructive knowledge of the disclosures in question.

(14) To the extent the Complainant is arguing that LLNL failed to accommodate her allergies because she had made disclosures about the NPEPC, I find no merit to this contention. The record documents the numerous attempts that LLNL took to provide accommodations for the Complainant in accordance with Section M.IV. of its Personnel Policies and Procedures Manual. *See* Ex. 56 to the ROI.

(15) The Complainant pointed out that Glenn Young had his office in Building 571. However, LLNL explained that Mr. Young was a full time employee who worked part-time for the Education Program and part time for another LLNL organization that housed his office.

(16) Hearing Officer Lazarus also asked the parties to address a third matter, i.e., whether the Complainant was time- barred from raising the two issues because she had failed to raise them in the preceding six years that her complaint had been pending. On November 1, 2000, the Hearing Officer, over the objections of LLNL, ruled that OHA could entertain the two new issues, finding that the Complainant was not time-barred from raising the issues at this late date.

(17) It is difficult for me to determine from the record whether the Complainant made these statements in good faith. Even though there appears to be no objective evidence to support the Complainant's fear that something in the environment in Building 415 would make her gravely ill, for purposes of this Decision I have concluded that the Complainant subjectively believed that she would become ill if she entered Building 415. I need not address whether the Complainant's subjective belief was reasonable under the circumstances. The original version of the Part 708 regulations only required that a disclosure be made in good faith.