November 17, 2010

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Motions to Dismiss
Initial Agency Decision

Name of Case: David M. Widger
Safety & Ecology Corp.

Dates of Filing: June 10, 2010
July 12, 2010
July 22, 2010

Case Numbers: TBH-0097
TBZ-1097
TBZ-2097

This Decision will consider two Motions to Dismiss filed by Safety & Ecology Corp. (SEC), a Department of Energy (DOE) contractor located in upstate New York. SEC seeks dismissal of a Complaint that David M. Widger filed against it on October 19, 2009, under the DOE's Contractor Employee Protection Program, set forth at 10 C.F.R. Part 708. OHA has assigned Mr. Widger's Complaint Case No. TBH-0097 and the present Motions to Dismiss Case Numbers TBZ-1097 and TBZ-2097. For the reasons set forth below, I have determined that SEC's First Motion should be denied and its Second Motion should be granted. Accordingly, I find that Mr. Widger's Complaint should be dismissed.

I. BACKGROUND

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program provides an avenue of relief for contractor employees who experience retaliations as a result of engaging in protected activity. *See* 10 C.F.R. Part 708. Protected activity includes disclosing to a DOE official information that the employee reasonably believes reveals (1) a substantial violation of a law, rule, or regulation; (2) a substantial and specific danger to employees or to public health or safety; or (3) fraud, gross mismanagement, gross waste of funds, or abuse of authority. *Id*. at § 708.5(a). Protected activity also includes filing a Part 708 Complaint. *Id*. at § 708.5(b); *see also Thomas T. Tiller*, Case No. VWA-0018 (1998).

Part 708 sets forth the procedures for considering complaints of retaliation. The DOE's Office of Hearings and Appeals (OHA) investigates complaints, holds hearings, issues

decisions, and considers appeals. 10 C.F.R. Part 708, Subpart C. Remedies authorized under the Part 708 regulations include reinstatement, back pay, transfer preference, and other appropriate relief. *Id*. at §§ 708.36(a)(1)-(5).

B. Factual Background

Washington Group Int'l (WGI) is the prime contractor at the Separations Process Research Unit (SPRU). Memorandum from Regina Neal-Mujahid to Poli A. Marmolejos, January 11, 2010 [Neal-Mujahid Memorandum]. As a sub-contractor to WGI, SEC supports the SPRU at the Knolls Atomic Power Laboratory in upstate New York. *Id*.

In August 2008, Mr. Widger began working for SEC as a Radiological Controls Technician. Report of Investigation at 2-3. He supported the SPRU's Deactivation and Demolition Project. He monitored work packages and tested for contamination. In February 2009, he became the coordinator of the "As Low As Reasonably Achievable" (ALARA) program. As coordinator, he wrote and revised procedures to contain radioactive materials. *Id*.

Mr. Widger filed one Part 708 Complaint on October 19, 2009, and one on November 10, 2009.[1] He alleges that he made 24 protected disclosures, including SEC's failure to comply with a Beryllium Controls Plan and the Respiratory Protection Program, inadequate training, falsification of documents, and inadequate effluent system maintenance and monitoring.

Mr. Widger alleges that as a result of making his protected disclosures, he faced retaliation that included a hostile work environment resulting in his constructive discharge on November 16, 2009.

II. PROCEDURAL HISTORY

On October 19, 2009, Mr. Widger filed a Part 708 Complaint with the Federal Project Director of the SPRU Field Office. WGI and SEC investigated Mr. Widger's concerns and concluded that he had not made a protected disclosure and had not suffered retaliation. *See* Neal-Mujahid Memorandum. On November 10, 2009, Mr. Widger filed his Second Complaint.

In January 2010, the DOE's Environmental Consolidated Business Center sent OHA Mr. Widger's request for an investigation and a hearing. On June 10, 2010, the OHA Investigator issued her Report of Investigation. She concluded that Mr. Widger had not made any protected disclosure. On the same day that the OHA Investigator issued her Report of Investigation, I was assigned the Hearing Officer. Immediately thereafter, I asked the parties to brief the issues of whether Mr. Widger had made a protected

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[1] I refer to Mr. Widger's two filings variously as his First Complaint, his Second Complaint, and together as his Complaint. OHA accepted the Complaints as one case file, TBH-0097.

disclosure regarding a substantial and specific danger to employees or to public health or safety and whether he faced retaliation for doing so. The parties filed their briefs on July 8, 2010, and July 22, 2010, respectively.

On July 12, 2010, and July 22, 2010, SEC filed the two Motions to Dismiss currently at issue.

III. ANALYSIS

A. SEC's First Motion to Dismiss (Case No. TBZ-1097)

SEC first moved to dismiss the pending Part 708 Complaint because after Mr. Widger had filed his Part 708 Complaint, he filed a complaint with the DOE's Office of Inspector General (IG) and the U.S. Equal Employment Opportunity Commission (EEOC). First Motion at 3.

SEC correctly stated that a complainant may not pursue a remedy under Part 708 if, "with respect to the same facts, [the complainant] . . . pursue[s] a remedy under State or other . . . law. . . ." 10 C.F.R. § 708.15(a). If so, the Part 708 complaint will be dismissed. *Id*. at § 708.17(c)(3).

On July 1, 2010, I contacted Mr. Widger to ask him whether he wished to proceed under Part 708 or with the IG. On July 2, 2010, Mr. Widger advised that he intended to proceed under Part 708 and requested that his IG complaint be dismissed. OHA advised the IG of Mr. Widger's request and the IG subsequently dismissed Mr. Widger's pending complaint. Therefore, that portion of SEC's First Motion to Dismiss, which is based on Mr. Widger's having filed with the DOE's IG, is moot.

Regarding Mr. Widger's filing with the EEOC, OHA has previously found that if the "necessary factual prerequisites differ" in the Part 708 complaint and the complaint under State or other law, "the complaints are not based upon the 'same facts' for . . . purposes" of Part 708. *Gilbert J. Hinojos*, Case No. TBZ-0003 (2003) (citations omitted). Under Part 708, a complainant must show that they made a protected disclosure or engaged in protected conduct. Under the EEOC, a complainant must show that they suffered an adverse employment action due to a protected status or the filing of an action with the EEOC. *See* 42 U.S.C. § 2000e, *et seq*. Thus, a Part 708 complaint and an EEOC complaint are not necessarily based on the "same facts" for purposes of Part 708. *Gilbert J. Hinojos*, Case No. TBZ-0003 (2003). Following *Gilbert J. Hinojos*, I find that Mr. Widger's Part 708 Complaint and his EEOC complaint are based on different facts for Part 708 purposes. Therefore, I will deny that portion of the First Motion to Dismiss based on Mr. Widger's filing a complaint with the EEOC.

B. SEC's Second Motion to Dismiss (Case No. TBZ-2097)

In its Second Motion to Dismiss, SEC argues that Mr. Widger cannot prove that he made any protected disclosure because his allegations are "vague and broad in scope," "non-specific," and not "significant or substantial enough to constitute protected disclosures." Second Motion at 4-6. It also argues that his alleged protected disclosures fail because Mr. Widger "outline[d] the alleged concerns and circumstances of employees other than [himself]." *Id.* at 7.

I accept SEC's Second Motion as a Motion to Dismiss for Lack of Jurisdiction. OHA has jurisdiction to conduct a hearing when the employee, among other things, makes a non-frivolous allegation that (i) he or she has made a protected disclosure; and (ii) the protected disclosure was a contributing factor to a retaliation. *Ingram v. Dep't of the Army*, 114 M.S.P.R. 43, 47 (2010) (citation omitted); *see also* 10 C.F.R. § 708.17(c)(4) (stating that a complaint may be dismissed if it is "frivolous or without merit"); *accord David K. Isham*, Case No. TBH-0046 (2007) (holding that if a complaint fails to allege facts which, if established, would constitute a protected disclosure, the complaint may be dismissed).

To allege a protected disclosure, an employee must disclose to a DOE official information that the employee reasonably believes reveals (1) a substantial violation of a law, rule, or regulation; (2) a substantial and specific danger to employees or to public health or safety; or (3) fraud, gross mismanagement, gross waste of funds, or abuse of authority. 10 C.F.R. § 708.5(a). The Hearing Officer evaluates reasonable belief objectively. *See Ingram*, 114 M.S.P.R. at 48 (citation omitted).

For information to qualify as a non-frivolous allegation of a protected disclosure, "an employee must communicate the information either outside the scope of his normal duties *or* outside of normal channels." *Kahn v. Dep't of Justice*, 2010 WL 3489378, at *6 (C.A. Fed. Sept. 7, 2010) (citation omitted) (emphasis added). Outside of normal channels means outside of the chain of command. *Layton v. Merit Sys. Prot. Bd.*, 2010 WL 3516675, at *5 (C.A. Fed. Sept. 9, 2010) (finding that a disclosure was not made outside of normal channels because the "record contains no evidence" that the disclosure was made "to anyone other than his superiors . . . who initially tasked . . . [the] assignment"); *Johnson v. Dep't of Health & Human Serv.*, 93 M.S.P.R. 38, 45 (2002) (finding that a disclosure was made outside of normal channels when made to an Inspector General after being made to supervisors, who ignored it).

To determine whether the employee has presented a non-frivolous allegation, the Hearing Officer evaluates the written record. *Ingram*, 114 M.S.P.R. at 48. The Hearing Officer may consider the documentary evidence but may not weigh evidence to resolve conflicting assertions. (The individual need not prove the truth of the allegations.) *Id.* *Pro se* pleadings are construed liberally. *Id.* at 49 (citation omitted). Doubt should be resolved in favor of finding a non-frivolous allegation. *Id.* at 48 (citation omitted).

1. Mr. Widger's Alleged Protected Disclosures

Mr. Widger alleges that from July 2008 to October 2009, he made protected disclosures regarding the following:[2]

1. Multiple 10 CFR Part 835 Violations – Past, Present, Pending
2. ALARA Program – Non existent, Project Dose Goals
3. Work Planning – Nuclear Safety Non Compliant
4. Procedural Non Compliance – All areas
5. Unqualified Project Personnel – Superintendents, Work Planners – Nuclear Safety
6. Radiological Deficiency Reports (RDR) – Not Being generated
7. Hostile Work Environment – chilling effect-Management[3]
8. Training Inadequate – No ALARA Training Matrix – Unqualified Instructors
9. Beryllium Controls Plan – Not being followed
10. Falsification of Documentation – Work Packages – Radiological Surveys
11. Inadequate radiation, contamination, and airborne radioactivity surveys
12. Inadequate effluent system maintenance and monitoring
13. Waste Shipments – Packaging – Sampling – Containers
14. Waste, Fraud and Abuse
15. Unqualified Perdiem Payout
16. Time Card Fraud
17. White Wash Audit Teams – WV
18. Work Area Safety – several injuries and near miss 480
19. Dosimetry Issue and Control – Bioassay
20. Respiratory Protection Program
21. Inadequate Radiological Survey and Analytical Equipment
22. Inadequate Work Force Confines
23. No Formal Schedule Released
24. No Formal Organizational Chart released

First Complaint at 5. I address each numbered allegation in turn.

a. *Alleged Protected Disclosures #1 and #4*

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[2] This list of 24 disclosures appears in Mr. Widger's First Complaint. In Mr. Widger's Second Complaint, he repeats five alleged protected disclosures from his First Complaint.

In Mr. Widger's Second Complaint, he makes a sixth allegation regarding "discriminatory compensation." Mr. Widger alleges that he has assumed additional responsibilities for which he has "yet to be duly compensated." Second Complaint at 21. Further, he said that some co-workers had been "promoted and hired with commensurate compensation," which he "view[s] . . . as direct discrimination towards [himself]." *Id*. I do not address this allegation because compensating employees at different rates, by itself, violates no law. Mr. Widger has not alleged that SEC based his disparate pay upon his race, religion, sex, national origin, or other protected basis. Even if he had, Part 708 is not the proper forum to address that alleged discrimination. 10 C.F.R. § 708.4(a).

[3] I address this allegation below, in the section under retaliation.

Regarding Allegation #1 – "Multiple 10 CFR Part 835 Violations – Past, Present, Pending" and Allegation #4 – "Procedural Non Compliance – All areas" – Mr. Widger fails to provide enough information for me to evaluate the seriousness of many of the allegations or whether he reasonably believed that they are true. For example, Mr. Widger states that he "notic[ed] many procedural and regulatory violations and [brought] them forward to management's attention." First Complaint at 2. He does not state which violations he noticed, when, and why the conditions constituted violations. He repeats the allegation but again fails to add any specific descriptive information. *Id.* at 3. Mr. Widger states that he disclosed "a fire loading problem . . . that violated procedure and safety," but he did not describe the problem. *Id.* He also states that on August 6, 2009, he spoke with a particular member of management to discuss "RadCon issues that surfaced from above events." *Id*. at 4. But he provides no further detail about the discussion. Therefore, I find that these portions of Allegation #1 and Allegation #4 do not constitute non-frivolous allegations of protected disclosures.

Mr. Widger states that between April 16, 2009, and June 4, 2009, he found "wide spread radiological contamination . . . during a random . . . sampling." *Id*. at 2. But he does not state that he disclosed this issue to management. Therefore, I find that this portion of Allegation #1 and Allegation #4 does not constitute a non-frivolous allegation of a protected disclosure.

Mr. Widger also alleges that in July 2009, he told Stacey Johnson, D&D Manager, that while working in the field, he observed a "non posted asbestos area." *Id*. at 3. But he does not provide contextual details to support a reasonable belief that the area should have been posted. Therefore, I find that this portion of Allegation #1 and Allegation #4 does not constitute a non-frivolous allegation of a protected disclosure.

b. *Alleged Protected Disclosure #2*

Regarding Allegation #2 – "ALARA Program – Non existent, Project Dose Goals" – Mr. Widger states that on August 12, 2009, he e-mailed a particular member of management and "documented what was wrong with the ALARA program and how to fix [it]." Opening Brief at 2. Mr. Widger also states that the ALARA coordinator position is unfilled, and "[n]ot having this position filled deprives the project of expertise needed to reduce overall exposure and to be another set of eyes in planning radiological work." *Id.*

Mr. Widger identifies nothing "wrong" with the ALARA program. Rather, he states that he is "working towards forming our ALARA process and site ALARA dose goals." E-mail from David M. Widger to Larry Hayes, Robert Massengill, Tristan Tritch, and Rich Hazard, August 12, 2009. Next, he does not allege facts to suggest that the position vacancy constitutes a substantial threat to human health or public safety or a significant violation of any law, rule, or regulation. Therefore, I find that Allegation #2 does not constitute a non-frivolous allegation of a protected disclosure.

c. *Alleged Protected Disclosures Nos.* 3, 6, 8-9, 14-16, 19, 21, 23-24

Mr. Widger failed to provide any information to describe these allegations. Therefore, I cannot conclude that they constitute non-frivolous allegations of protected disclosures.[4] *See, e.g.*, *Huffman v. Office of Pers. Mgmt.*, 92 M.S.P.R. 429, 433 (2002) ("An appellant's statements regarding his protected disclosures can be so deficient on their face that [the Hearing Officer] will find that they fail to constitute a non-frivolous allegation of a reasonable belief, and thus require dismissal for lack of jurisdiction.") (citation omitted).

d. *Alleged Protected Disclosure #5*

Regarding Allegation #5 – "Unqualified Project Personnel – Superintendents, Work Planners – Nuclear Safety" – Mr. Widger alleges that in August 2009, an unqualified technician completed a survey. First Complaint at 35-37. He also alleges that on October 8, 2009, contractors installed temporary lighting in a "known . . . contaminated area." Second Complaint at 3. He alleges that the contractors lacked the training and equipment to work in the area, which violated DOE regulations. *Id.*

Approximately two months lapsed between the first alleged violation (August 24, 2009) and when Mr. Widger filed his First Complaint (October 19, 2009). Approximately a month lapsed between the second alleged violation (October 8, 2009) and when Mr. Widger filed his Second Complaint (November 10, 2009). In each case, the space of time suggests that Mr. Widger did not reasonably believe that he witnessed a substantial violation of a law, rule, or regulation or a substantial and specific danger to employees or to public health or safety. If he had, he would not have waited more than a month to report them. Therefore, I cannot conclude that Allegation #5 constitutes a non-frivolous allegation of a protected disclosure.

e. *Alleged Protected Disclosures #10 and #11*

Regarding Allegation #10 – "Falsification of Documentation – Work Packages – Radiological Surveys" – and Allegation #11 – "Inadequate radiation, contamination, and airborne radioactivity surveys" – Mr. Widger alleges that he told management of "inadequacies" in a document entitled, "Radiological Survey Report and Map." First Complaint at 35, 37. He also alleges that the document was edited, which constitutes falsification. *Id.* at 35. He provided two different copies of ostensibly the same document, but failed to explain why they contain inadequacies or why the edits constitute a substantial violation of a law, rule, or regulation. *Id.* at 37-40. Therefore, I find that this portion of Allegation #10 and Allegation #11 does not constitute a non-frivolous allegation of a protected disclosure.
Further, Mr. Widger states that in October 2009, a radiological survey was performed regarding the above-referenced installation of lights in an allegedly contaminated area.

[4] Mr. Widger flooded the record with irrelevant information. Mr. Widger's Complaint consists of 82 pages, much of which does not purport to demonstrate that he made a protected disclosure. For example, Pages 11-14 consist of an excerpt from an ALARA Program Manual from the SPRU. Pages 15-32 consist of the DOE's Occupational ALARA Program Guide. Pages 41-76 consist of materials documenting an unrelated protected disclosure at a separate DOE facility.

Second Complaint at 12. Mr. Widger reviewed the survey as part of his job responsibilities as ALARA Coordinator. Widger Telephone Memorandum, March 1, 2010. He concludes that the "survey did not provide adequate information," but does not explain why. Second Complaint at 12. Therefore, I find that this portion of Allegation #10 and Allegation #11 does not constitute a non-frivolous allegation of a protected disclosure.

Lastly, Mr. Widger states that when he audited the survey, he found that it was performed without an approved radiation work permit. *Id*. at 12-15. Performing a radiological survey without an approved radiation work permit may reasonably constitute a substantial violation of a law, rule, or regulation. Further, in November 2009, he disclosed the omission to SPRU Environmental Safety & Health Manager Frances Alston – a member of management outside of his chain of command. *Id*. Therefore, I find that this portion of Allegation #10 and Allegation #11 constitutes a non-frivolous allegation of a protected disclosure.

f. *Alleged Protected Disclosure #12*

Regarding Allegation #12 – "Inadequate effluent system maintenance and monitoring" – Mr. Widger alleges that a "lack of maintenance and or regulatory compliance on the effluent system could produce a radioactive uncontrolled release to the public." Opening Brief at 4.

Mr. Widger fails to allege how the system lacks maintenance or compliance and how that may produce a radioactive release. Further, he does not allege that he disclosed these problems to management. Therefore, I find that Allegation #12 does not constitute a non-frivolous allegation of a protected disclosure.

g. *Alleged Protected Disclosure #13*

Regarding Allegation #13 – "Waste Shipments – Packaging – Sampling – Containers" – Mr. Widger alleges that the wife of a member of management "knowingly shipped . . . contaminated material and equipment to the SPRU project." *Id*. Also, the equipment "was later determined to have potentially exposed an unsuspecting SPRU workforce" to contamination. *Id*.

For support, Mr. Widger submits a September 2009 shipping label ostensibly from the wife of a member of management. Opening Brief, Attachment 3 at 82. The label does not describe the contents of the package. Nor does it support Mr. Widger's allegation that the workforce was exposed to contamination. Lastly, Mr. Widger does not state that he made this disclosure to management. Therefore, I find that Allegation #13 does not constitute a non-frivolous allegation of a protected disclosure.

h. *Alleged Protected Disclosure #17*

Regarding Allegation #17 – "White Wash Audit Teams – WV" – Mr. Widger alleges that in November 2009, the senior management of the SPRU issued a memorandum affirming its commitment to meeting ALARA standards. Second Complaint at 31-32. Mr. Widger alleges that the memorandum "was and is meant for DOE eyewash" and that management "has failed once again in their duties to protect the health and safety of the workforce and the general public." *Id*. at 30.

Mr. Widger does not describe how, in issuing the memorandum, the SPRU "failed . . . to protect the health and safety of the workforce and the general public." Therefore, I find that Allegation #17 does not constitute a non-frivolous allegation of a protected disclosure.

i. *Alleged Protected Disclosure #18*

Regarding Allegation #18 – "Work Area Safety – several injuries and near miss 480" – Mr. Widger included three photographs in his First Complaint that, he alleges, "reveal unsafe working conditions." First Complaint at 77, 79-81.

The photos show miscellaneous debris. But Mr. Widger does not state who has access to those work areas, if and how those areas are used, and how the debris may cause harm. Without this context, I cannot conclude that the debris poses a substantial violation of a law, rule, or regulation or a substantial and specific danger to employees or to public health or safety. Nor does Mr. Widger state that he disclosed these conditions to management. Lastly, Mr. Widger does not describe the "several injuries and near-miss 480" or whether he disclosed those incidents to management. Therefore, I find that Allegation #18 does not constitute a non-frivolous allegation of a protected disclosure.

j. *Alleged Protected Disclosure #20*

Regarding Allegation #20 – the "Respiratory Protection Program" – Mr. Widger states that "several times," he "brought forward . . . many issues of concern." Opening Brief at 2. First, he cites an e-mail that he sent to management in July 2009. In it, he "presents several potential issues," including the lack of inventory control numbers and his observation that fewer than 10% of respirators were "survey[ed]." E-mail from David M. Widger to Robert Massengill and Richard Hazard, July 21, 2009. Second, he cites an e-mail that he sent in August 2009. In it, he recommended surveying 100% of the respirators because the 10% survey practice uncovered a disproportionate number of defective respirators.[5] E-mail from David M. Widger to Robert Massengill, August 3, 2009.

Mr. Widger does not state or present information to suggest that the lack of inventory control numbers is a substantial violation of a law, rule, or regulation or a substantial and

[5] Mr. Widger also alleges that (i) unprotected workers were exposed to radiation; and (ii) the SPRU failed to meet the procedural requirements of the respiratory protection program. Opening Brief at 2. Because I addressed these issues above, I do not address them again here.

specific danger to employees or to public health or safety. Nor does he state that the rate at which the respirators are surveyed is a substantial violation of a law, rule, or regulation. Therefore, I find that these portions of Allegation #20 do not constitute a non-frivolous allegation of a protected disclosure.

Mr. Widger does present a reasonable belief that the low percentage of respirators surveyed – given the number of defective respirators discovered – is a substantial and specific danger to employees or to public health or safety. A member of management also recommended that until the issues with the defective respirators are addressed, 100% of the respirators should be surveyed. E-mail from Robert Massengill to Rich Hazard and David M. Widger, August 3, 2009. Further, Mr. Widger communicated the information outside of his chain of command because he communicated it to Robert Massengill, Manager of the SPRU Site, who never directly supervised him. Massengill Telephone Memorandum, May 14, 2010. Therefore, Mr. Widger communicated the information outside of normal channels. For this reason, I find that this portion of Allegation #20 constitutes a non-frivolous allegation of a protected disclosure.

k. *Alleged Protected Disclosure #22*

Regarding allegation #22 – "Inadequate Work Force Confines" – Mr. Widger alleges that an unqualified employee was instructed to remove warning signs so that an unsuspecting outside contractor would mow a contaminated area.[6] First Complaint at 33. This event took place several months before he disclosed it by filing his First Complaint in October 2009. *Id*. His failure to disclose it immediately suggests that he did not reasonably believe that he witnessed a substantial violation of a law, rule, or regulation, or a substantial and specific danger to employees or to public health and safety. Therefore, I cannot conclude that this constitutes a non-frivolous allegation of a protected disclosure.

l. *Summary*

In conclusion, I find that Mr. Widger has made the following non-frivolous allegations of protected disclosures:

- In August 2009, Mr. Widger recommended surveying 100% of the incoming respirators because the 10% survey practice uncovered a disproportionate number of defective respirators. The low number of respirators surveyed may constitute a substantial and specific danger to employees or to public health or safety [Allegation #20]; and

- In November 2009, Mr. Widger stated that a recent radiological survey had been performed without a radiation work permit. This may reasonably constitute a

[6] Mr. Widger did not specify what he meant by "inadequate work force confines." Under my reading of the case file, the removal of the warning signs most closely approximates "inadequate work force confines." To the extent that Mr. Widger intended different information to constitute "inadequate work force confines," I find that Mr. Widger has not presented sufficient information to make a non-frivolous allegation of a protected disclosure.

substantial violation of a law, rule, or regulation [Allegation #10 and Allegation #11].

2. The Filing of the Complaint as Protected Conduct

Mr. Widger also alleges that he suffered retaliation for having filed his Part 708 Complaint. The filing of a Part 708 Complaint constitutes protected conduct. 10 C.F.R. § 708.5(b); *see also Thomas T. Tiller*, Case No. VWA-0018 (1998). Therefore, I find that Mr. Widger engaged in protected conduct when he filed his Complaints on October 19, 2009, and November 10, 2009.

3. The Alleged Retaliations

Mr. Widger alleges that he suffered four acts of retaliation as a result of having made protected disclosures or engaged in protected conduct. The alleged retaliation includes that (i) he was constructively discharged; (ii) he was directed to fix the issues that he brought forward; (iii) he was subject to excessive meetings with management; and (iv) he was not adequately compensated. In its Second Motion to Dismiss, SEC argues that Mr. Widger cannot prove that he suffered any retaliation. Second Motion at 11-15.

a. *The Alleged Constructive Discharge*

Mr. Widger alleges that on November 16, 2009, he resigned due to a "hostile working environment." Report of Investigation at 3. I must determine whether he alleges a constructive discharge, which would constitute a non-frivolous allegation of retaliation.

Resignations are presumed voluntary. *Heining v. General Serv. Admin.*, 68 M.S.P.R. 513, 519 (1995). The employee may rebut the presumption of voluntariness if he or she "can establish that the resignation . . . was the product of duress . . . brought on by" the employer. The employee may establish duress "when the . . . employer deliberately takes actions that make working conditions so intolerable for the employee that he or she is driven into an involuntary resignation." *Id.* (citation omitted). The voluntariness of the resignation is "based on whether the totality of the circumstances" supports the conclusion that the employee was "deprived of free choice." *Id.* at 519-20. Circumstances are evaluated objectively, not based on the employee's subjective belief. *Id.* at 520.

Mr. Widger alleges that he faced the following intolerable working conditions:

- A manager stated, "I . . . hate my job and . . . the people I work with !!!";
- A manager "pitted half his work crew against the other half on a daily basis through treatment, conflict, slander and work assignments";
- When he saw a manager one morning, he "said good morning, there was not a reply";
- The contractor failed to resolve his First Complaint;
- His manager did not communicate with him;

- He was instructed to “not do anything unless directed”;
- He received no direction on the ALARA program;
- His management refused to take his input seriously;
- Management limited his computer access; and
- He felt that he was being targeted for termination.

Complaint at 2, 4, 78; Widger Telephone Memorandum, March 1, 2010; Opening Brief at 5-6. I address these allegations in turn.

First, Mr. Widger’s allegations describe an impolite workplace with obvious personality conflicts. But I find that rudeness and personality conflicts, as described in Mr. Widger’s Complaint, without more, do not constitute an allegation of duress that would deprive an employee of free choice regarding his or her continued employment.

Second, when Mr. Widger resigned, his First Complaint had not been resolved. Part 708 complaints commonly take many months to work through the administrative system. He resigned less than a month after he filed the Complaint. No reasonable person would consider a one month delay to resolving an extremely complex Complaint to constitute an allegation of “duress.”

Third, Mr. Widger’s e-mail correspondence discredits his allegation that he suffered the duress of limited access to e-mail. The e-mails included in Exhibit 3 of the Second Motion to Dismiss show that Mr. Widger exchanged e-mails with management on October 27th, 28th, 29th, and 30th, November 2nd, and November 16th. The e-mails attached to Mr. Widger’s Opening Brief show that Mr. Widger also used his e-mail account on October 20th, October 21st, November 3rd, November 4th, November 5th, and November 10th.

Fourth, the above e-mails also discredit Mr. Widger’s allegation that he suffered the duress of being told “not to do anything unless directed” and management indifference to his concerns. In an October 27th e-mail to a member of management, Mr. Widger states, “I have been directed . . . do [sic] do nothing . . . *except what I am given direction by Management to do*.” Exhibit 3, Second Motion (emphasis added). Any given employee may reasonably expect to have management prioritize their work. Moreover, in her reply, the member of management reminded Mr. Widger of certain tasks that he had been assigned. She also stated that his concerns would be “identified through [SEC’s] corrective action process.” *Id*. An e-mail dated November 16th – the day that Mr. Widger resigned – shows that management wanted him “to continue working on” his assignments. *Id*.

Fifth, the record shows that Mr. Widger chose to stop working. In his interview with the OHA investigator, he stated that he resigned on November 16th. Widger Telephone Memorandum, March 1, 2010. Mr. Widger later stated that he “was no longer employed at SPRU” after Tuesday, November 10th. E-mail from David M. Widger to David M. Petrush, October 28, 2010. Although the SPRU did not observe Veterans’ Day on November 11th, Mr. Widger took the 11th off along with Thursday the 12th and

Friday the 13th, and later requested "paid time off" for these days. Exhibit 6, Second Motion. The following Monday, Mr. Widger resigned without notice. Personnel Action Request, November 16, 2009. The above-referenced e-mail from November 16th, asking Mr. Widger to continue working, shows that management had not anticipated his resignation on November 16th.

Lastly, as support for the alleged duress consisting of his fear that management sought to terminate him, Mr. Widger cited an e-mail from a former co-worker, who speculated that management planned to terminate him. E-mail from Robert Massengill to Tristan Tritch, March 13, 2010. The e-mail suggests that other SEC employees also believed that management did not care for Mr. Widger. But that does not contribute to a reasonable objective basis for a constructive discharge. The e-mail does not represent the opinions of management. Nor does it state an imminent employment action.

Considered objectively, the totality of the circumstances suggests that Mr. Widger did not resign under duress. Therefore, I find that Mr. Widger has not made a non-frivolous allegation that he suffered retaliation due to a constructive discharge. In other words, I find that he resigned voluntarily.

b. *Other Alleged Retaliations*

Mr. Widger alleges that he faced the retaliation of (i) "being directed to fix all of the problems that [he] brought forward"; (ii) being "subjected to countless meetings . . . with management" and (iii) not being adequately compensated.[7] Opening Brief at 5.

Mr. Widger's job requirements included meeting with management and addressing the issues that he brought forward. Second Motion at 11. Further, management had stated that by November 13th, it would re-evaluate Mr. Widger's compensation.[8] E-mail from Andrew Henderson to David M. Widger, November 4, 2009. By this time, Mr. Widger had removed himself from the SPRU. Therefore, I find that the above three allegations do not constitute non-frivolous allegations of retaliation.

Because I found that Mr. Widger has not made a non-frivolous allegation of retaliation, I need not conduct the contributing factor analysis or discuss remedies.

IV. CONCLUSION

[7] Mr. Widger also alleges that in February 2009 and June 2009, management retaliated against him by moving him "from the field" to "drafting procedures for the project." Complaint at 2. I do not address this alleged retaliation, however, because it takes place prior to any non-frivolous allegation of a protected disclosure.

[8] SEC argues that it had offered Mr. Widger a pay increase. Second Motion at 11. Mr. Widger denies this. E-mail from David M. Widger to David M. Petrush, October 28, 2010.

I find that Mr. Widger made two non-frivolous allegations of protected disclosures and engaged in protected conduct. However, because Mr. Widger has not made a non-frivolous allegation of retaliation, he is entitled to no remedy. Therefore, I will grant SEC's Second Motion to Dismiss.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Safety & Ecology Corp. on July 12, 2010, Case No. TBZ-1097, is hereby denied.

(2) The Motion to Dismiss filed by Safety & Ecology Corp. on July 22, 2010, Case No. TBZ-2097, is hereby granted.

(3) The Complaint filed by David M. Widger on June 10, 2010, Case No. TBH-0097, under 10 C.F.R. Part 708, is hereby dismissed.

(4) This is an Initial Agency Decision, which shall become a Final Decision of the Department of Energy unless a party files a Notice of Appeal by the fifteenth day after the party's receipt of the Initial Agency Decision, in accordance with 10 C.F.R. § 708.32.

David M. Petrush
Hearing Officer
Office of Hearings and Appeals

Date: November 17, 2010