

# Case No. VWA-0039

February 25, 2000

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Case: Luis P. Silva

Date of Filing: April 27, 1999

Case Number: VWA-0039

This Initial Agency Decision concerns a whistleblower complaint filed by Luis P. Silva, a former employee of the Scientific Ecology Group (SEG) and its successor firm, GTS Duratek (GTS).(1) SEG, and then GTS, were subcontractors to Sandia Corporation at the Radioactive and Mixed Waste Management Facility (RMWMF) where Silva worked before he was laid off by GTS in August 1997. Sandia is a subsidiary of Lockheed Martin Company, the management and operating contractor at DOE's Sandia National Laboratories in Albuquerque, New Mexico. In March 1998, Roy F. Weston, Inc. replaced GTS as Sandia's subcontractor at the RMWMF. Silva alleges that he made protected disclosures concerning health and safety matters, and the contractors took retaliatory actions against him. For the reasons explained below, I have determined that Silva's request for relief should be granted in part because GTS has not met its burden in this case.

## I. Background

### A. The DOE Contractor Employee Protection Program

The Department of Energy (DOE) Contractor Employee Protection Program codified in 10 CFR Part 708 governs this matter. The DOE recently revised the regulations governing this "whistleblower" program. See 64 FR 12862 (March 15, 1999) (Interim Final Rule amending 10 CFR Part 708, effective April 14, 1999). The Interim Final Rule was amended in July 1999 to restore portions inadvertently omitted when the original version was rewritten in plain language.(2)

The whistleblower regulations prohibit a contractor from retaliating against a contractor employee who engages in certain protected conduct. Protected conduct includes disclosing information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation, or a substantial and specific danger to employees or to public health or safety. Protected conduct also includes refusing to participate in an activity that would result in a violation of law, rule or regulation, or cause an employee to have a reasonable fear of serious injury to himself, other employees, or members of the public. If an employee believes that a contractor retaliated against him for protected conduct, the employee can file a complaint. Under the current regulations, the DOE's Office of Hearings and Appeals (OHA) conducts investigations of whistleblower complaints, holds evidentiary hearings, issues initial agency decisions, and considers appeals. The employee must establish, by a preponderance of the evidence, that (1) the employee made a protected disclosure and (2) the disclosure was a contributing factor to an alleged retaliatory act. If the employee makes the required showings, the burden shifts to the contractor to prove, by clear and convincing evidence, that it would have taken the same action in the absence of the protected disclosure. If

the employee prevails, the OHA may order relief including reinstatement, back pay, legal expenses, and costs.

## **B. Procedural History**

On October 2, 1997, Silva filed a Part 708 complaint with the DOE Albuquerque Operations Office. The complaint alleges that Silva made a series of protected disclosures to DOE and contractor officials about health and safety concerns, and that these disclosures were a contributing factor to retaliatory actions by GTS and Sandia that culminated in the issuance by GTS on August 5, 1997 of a “Layoff Notification” letter to Silva. The layoff letter indicated that August 4 was Silva’s last day of work on site, and that the layoff was effective August 18, 1997. Ex. 1 to April 13, 1999 Report of Inquiry and Recommendations (IG Report).

Under the regulations then in force, Silva’s complaint was referred to DOE's Office of the Inspector General (IG) for investigation under Part 708. The IG investigated the allegations in the complaint and the contractors' affirmative defenses. The IG Report found that Silva met his burden of showing by a preponderance of the evidence that he made protected disclosures, which were a contributing factor to the actions of GTS and Sandia which culminated in his layoff in August 1997. The IG further concluded that GTS and Sandia had failed to meet their burden of showing by clear and convincing evidence that they would have taken the same action against Silva in the absence of his protected disclosures. In addition, the IG Report found that a preponderance of the evidence indicates that Silva’s employment termination and prior protected acts contributed to Weston not hiring him when it succeeded GTS as the RMWMF subcontractor, and that “evidence is not clear and convincing that the [employee] would not have been hired [by Weston] regardless of his protected disclosures....” IG Report at 26. Based on these findings, the IG Report recommended that: (1) Silva be reinstated as a Radiation Protection Technician at Sandia’s RMWMF, subject to a final determination that equities support his reinstatement; (2) Silva be awarded back pay and benefits for the period between his employment termination and reinstatement, less any compensation, benefits or pay that he received for services during this period; and (3) Silva be awarded reasonable legal expenses and fees and other direct costs, incident to the complaint and incurred as a result of the termination of his employment. IG Report at 28. Copies of the IG Report were served on the three contractors.

In late April 1999, GTS and Sandia each filed requests for a hearing. On May 3, 1999, the OHA Director appointed Leonard M. Tao as the Hearing Officer. Sandia and Weston filed Motions to Dismiss the complaint, which were denied by Hearing Officer Tao on August 23, 1999. [\*Sandia Corp.; Roy F. Weston, Inc.\*](#), 27 DOE ¶ 87,522 (1999). Tao subsequently withdrew, and the OHA Director appointed me to replace him. The hearing was held October 12, 13 and 14, 1999 in Albuquerque, New Mexico. Fourteen witnesses testified at the hearing, and I admitted 83 written exhibits into the record at the hearing, including the videotaped deposition of a GTS witness who declined to testify in person. I admitted five additional exhibits after the hearing, and closed the record. I permitted the parties to file post-hearing briefs, the last of which was received on December 21, 1999.

## **C. Factual Background**

The following summary is based on the hearing testimony and exhibits, the investigation file and the submissions of the parties.

On December 19, 1994, Silva began working for SEG in a temporary job as a "Casual Field Technician." On March 13, 1995, Silva was promoted to the position of Radiation Protection Technician, a full-time permanent job. Silva received only one written performance evaluation while employed by SEG/GTS, an “Above Standard” rating, in March 1996. IG Report at 3.

The critical events in this case occurred during the period June 1996 through March 1998. The evidence in the record shows that from mid-1996 through the August 1997 layoff, two different series of events were

being played out. The first series of events involved Silva's disclosures to contractor managers and to DOE officials about legitimate health and safety concerns he had about operations at the RMWMF (and in some instances, Silva's refusal to work in conditions which he believed unsafe). These disclosures occurred in September 1996 (Silva reported hydrogen sulfide exposure to contractor management); January 1997 (Silva reported six concerns to Gene E. Runkle, Director of DOE/Albuquerque's Occupational Safety and Health Division: forklift ramp safety; inappropriate waste drum lifting techniques; hydrogen sulfide exposure; forklift tilted and dropped waste container when floor grate bent underneath it; lack of ramp tie-down safety chains; and curbs removed from platform used to provide forklift access to transporters); and July 1997 (Silva reported three concerns to contractor management: radiation exposure; danger during modification of ramp; and lightning storm danger).(3) The contractors do not contest the fact that Silva made these and other disclosures, and that most of them raised legitimate safety concerns. In addition, the record shows that GTS and Sandia took appropriate corrective action in response to Silva's concerns.

The other series of events involved allegations that Silva was harassing a coworker, Vanessa Gasery. It began in June 1996, when Tim Forrester, the SEG and later GTS Project Manager at the Sandia site, accused Silva of making sexually offensive remarks to female coworkers. Joe Albenze, SEG's local Vice President for Human Resources (HR), relayed the accusations to Silva, who denied them. Forrester conducted an informal investigation and determined that no one had been offended. In July 1996, Silva filed an EEO charge, alleging that Forrester harassed him by unfairly accusing Silva of sexual harassment. SEG responded to Silva's EEO charge by telling the Equal Employment Opportunity Commission (EEOC) that Vanessa Gasery had filed a sexual harassment complaint against Silva. This was not true, since Gasery had repeatedly told SEG managers she would not charge Silva with sexual harassment. After several months, in late 1996 or early 1997, the EEOC told Silva about SEG's claim that Gasery had accused him of sexual harassment. Silva believed this information was true, and told some coworkers that Gasery had filed sexual harassment charges against him. Gasery felt that this harmed her reputation in the male-dominated work force at the RMWMF, and in February 1997, she complained to SEG managers that Silva was falsely accusing her of having filed sexual harassment charges against him. During the first quarter of calendar 1997, Westinghouse was engaged in the sale of SEG to GTS, and neither firm took any action to resolve the problem between Vanessa Gasery and Silva. In April 1997, after GTS took over, Gasery wrote a memo to Christine Seibel, the HR support person in the SEG/GTS Tennessee office, demanding that the firm set the record straight with Silva to quell the rumors circulating about her. GTS managers never took any action to address Gasery's problem. Instead of correcting the false impression the EEOC response had given Silva, and telling Silva that Gasery had not filed a sexual harassment complaint against him, GTS put off Silva and Gasery. Silva became angry at Gasery and made intimidating remarks to her. Forrester reported information about Gasery's accusations against Silva to Barbara Botsford (now Boyle), then Sandia's Radioactive and Mixed Waste Department Manager, and told her that GTS management was unlikely to take action to remedy the situation quickly. Gasery told Botsford that her work situation was stressful, and complained that she was frustrated with GTS's failure to resolve the problem with Silva. Ultimately, Botsford had Sandia order Silva's removal from the site, which led GTS to lay off Silva because they had no other work to offer him. Gasery herself quit one day after Silva was fired, and later filed her own EEO charge against GTS for failing to stop Silva from spreading false information about her. Further details about Silva's protected disclosures, where relevant, and details of the various harassment allegations are discussed below.

Silva and the contractors have advanced diametrically opposed interpretations of these events. Silva maintains that Forrester unfairly and falsely accused him of sexually harassing Vanessa Gasery, even though she never filed a sexual harassment complaint against him, in retaliation for his protected disclosures about safety concerns. According to Silva, Forrester reported the false harassment allegations against him, and made negative characterizations of his attitude toward safety, to Botsford. Forrester advised Sandia that GTS corporate management was unwilling to fire Silva because he was the only Hispanic on their staff at the RMWMF, and they feared Silva would file an EEO action against GTS. These reports led Botsford to invoke a clause in their contract with GTS that would allow Sandia to order the removal of a subcontractor employee from the site. Botsford wrote a memo (signed by Scott Shrader,

the authorized Sandia contract representative) to GTS requesting the immediate removal of Silva from the site as of August 4, 1997. GTS had no other work available for Silva on any of its other contracts, and laid him off, effective August 18, 1997.

The contractors contend the record is replete with evidence that shows they are serious about safety in the workplace and that they treated Silva's protected conduct with the appropriate degree of concern. The contractors argue that Silva was laid off because he did harass Gasery, thus creating a hostile work environment for her, and claim that this same action would have been taken against him even if he had not made any protected disclosures.

Silva also contends that after he was laid off in August 1997, and the RMWMF subcontract was awarded to Weston effective in March 1998, Jeff Jarry, a Sandia employee, retaliated against him by influencing Miles Smith, the Weston Project Manager, not to hire him because he had made protected disclosures to DOE rather than raising them at the contractor level. See IG Report at 26. Sandia and Weston maintain that the investigative record underlying these findings in the IG Report is factually inaccurate, and that Silva would not have been hired by Weston even if he had not made his protected disclosures while working for GTS.

## II. Legal Standards Governing This Case

### A. Silva's Burden

I will next consider whether Silva has met his burden under § 708.29 of establishing by a preponderance of the evidence that he made disclosures, as described in § 708.5, and that such disclosures were a contributing factor in one or more alleged acts of retaliation against Silva. See *Ronald Sorri*, 23 DOE ¶ 87,503 (1993). "Preponderance of the evidence" is 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*); 2 McCormick on Evidence §§ 339 at 439 (4th Ed. 1992). Under this standard, the burden of persuasion is allocated roughly equally between both parties. *Grogan v. Garner*, 111 S. Ct. 654, 659 (1991) (holding that the preponderance standard is presumed applicable in disputes between private parties unless particularly important individual interests or rights are at stake). As a result, Silva has the burden of proving by evidence sufficient to "tilt the scales" in his favor that he made a protected disclosure under Part 708. 10 C.F.R. §§ 708.5(a). If Silva does not meet this threshold burden, he has failed to make a *prima facie* case and his claim must therefore be denied. If the complainant meets his burden, he must then prove that the disclosure was a "contributing factor" in the personnel actions taken against him. 10 C.F.R. § 708.9(d); see *Helen Gaidine Oglesbee*, 24 DOE ¶ 87,507 (1994); *Universities Research Association, Inc.*, 23 DOE ¶ 87,506 (1993). This standard of proof is similar to the standard adopted in the Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. § 1221(e)(1), and the 1992 amendment to § 210 (now § 211) of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851. In explaining the "contributing factor" test in the WPA, the Senate floor managers, with the approval/concurrence of the legislation's chief House sponsors, stated: "The words 'a contributing factor' . . . mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." 135 Cong. Rec. H747 (daily ed. March 21, 1989) (Explanatory Statement on Senate Amendment-S.20). See *Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993) (applying "contributing factor" test).

Since the contractors do not contest Silva's claim that he made a series of protected disclosures about legitimate safety and health concerns to contractor managers and DOE officials, I find that he has met the first part of the test under § 708.29. 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." *Ronald Sorri*, 23 DOE at 89,010, citing *McDaid v. Dept. of Hous. and Urban Dev.*, 90 FMSR ¶ 5551 (1990); see also *County v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (*County*). In

addition, “temporal proximity” between a protected disclosure and an alleged reprisal is “sufficient as a matter of law to establish the final required element in a *prima facie* case for retaliatory discharge.” *See County*, 886 F. 2d 147, 148 (8th Cir. 1989).

Applying these standards to the present case, I find that the contractor officials taking the personnel actions involving Silva had actual knowledge of Silva’s disclosures. I find that there was a temporal proximity between Silva’s protected disclosures in January 1997 and July 1997 and the alleged retaliations occurring in 1997 by Forrester and Botsford, which culminated in August 1997, when Silva was ordered to be removed from the RMWMF by Sandia and laid off for “lack of work” by GTS. I also find that there is a temporal proximity between Silva’s protected disclosures in July 1997 and Weston’s refusal to hire him in early 1998.

I therefore find Silva has established a *prima facie* case that his protected disclosures were a contributing factor in the retaliations which he alleges. The burden now shifts to GTS, Sandia and Weston to prove by clear and convincing evidence that they would have taken the same actions absent his protected disclosures. 10 C.F.R. § 708.29.

## **B. The Contractors’ Burden**

The regulations require GTS and Sandia to prove by “clear and convincing” evidence that they would have taken actions that ended Silva’s job on the GTS-Sandia RMWMF subcontract in August 1997 even if he had not disclosed information about health and safety concerns and refused to work in conditions which he considered to be unsafe. In addition, they must prove by clear and convincing evidence that Weston would have refused to hire Silva when it took over the RMWMF subcontract in March 1998 even if he had not disclosed information about health and safety concerns and refused to work in conditions which he considered to be unsafe. “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. In evaluating whether the contractors have met their respective burdens, I will consider the strength of their evidence in support of their decision to take the actions that resulted in the termination of Silva’s job in 1997 and Weston’s refusal to hire him in 1998; the existence and strength of any motive to retaliate on the part of the officials who were involved in the decision to terminate Silva’s job at the RMWMF under the GTS subcontract and not hire him under the Weston subcontract; and any evidence that the contractors take similar actions against employees who are not whistleblowers but who are otherwise similarly situated. For the reasons explained below, I find that GTS has not met its burden with respect to the actions it took that resulted in Silva’s termination in August 1997. By contrast, I find that Sandia has met its burden with respect to its actions leading to Silva’s layoff, and that Sandia and Weston have met their burden with respect to Weston’s refusal to hire Silva after it was awarded the RMWMF subcontract in March 1998.

## **III. Analysis**

### **A. Introduction**

The contractors base their defense on two principal claims. First, GTS argues that Silva made inappropriate sexual remarks in the presence of females, harassed Gasery, and thus created a hostile and disruptive work environment at the RMWMF. Sandia argues that in view of Silva’s negative impact on the work environment, and GTS management’s failure to take corrective action against Silva, it acted properly to order Silva’s removal from the site. Sandia also takes the position that since it did not lay off Silva, its action was not responsible for ending his job with GTS. GTS argues that since it had no other work available for Silva, it had no other choice but to lay him off after Sandia ordered his removal from the site. Thus, GTS also takes the position that its action was not solely responsible for ending Silva’s job. Second, GTS and Sandia contend the record shows they emphasized safety in the workplace, treated Silva’s protected conduct and that of other employees appropriately, and did not retaliate against otherwise

similarly situated employees who reported safety problems, but were not “whistleblowers.” Based on these assertions, they maintain they have shown by clear and convincing evidence that they had no motive to retaliate against Silva for reporting safety concerns, and that the same action would have been taken against him even if he had not engaged in any protected conduct.

GTS submitted extensive evidence through Alex Feldman, its former RMWMF Safety Officer, showing that after Silva’s safety complaints to the DOE in January 1997, and GTS’s acquisition of SEG, it set up a Radioactive and Mixed Waste Safety Committee (RMWSC) and established a process for the reporting and resolution of safety concerns. GTS Exhibit 18. Silva was a charter member on the RMWSC, which also included Sandians, and employees of other contractors. Feldman gave several examples of GTS employees other than Silva who brought personnel safety concerns to the attention of the GTS Safety Committee, including Feldman himself, but were not subjected to retaliation by GTS. Unlike Silva, however, none of those other GTS employees had ever reported safety concerns directly to the DOE. I have considered this evidence, and in my view, while the contractors’ general concern for safety, and their treatment of other similarly situated employees who were not whistleblowers is instructive, [\*Carlos M. Castillo\*](#), 27 DOE ¶ 87,505 at 89,047 (1998), it does not explain away the specific acts of retaliation that GTS committed against Silva.

There is evidence that Forrester and other contractor employees were displeased with Silva’s concerns about safety, including his refusal to work in unsafe conditions, the timing of his complaints, and his bypassing of the “preferred” contractor channels to go directly to DOE. In addition, the evidence shows that Forrester fomented the original sexual harassment allegations against Silva without a reasonable basis, and that SEG later gave false information to the EEOC that Vanessa Gasery had filed a sexual harassment complaint against Silva. These were the first acts of retaliation against Silva. Although GTS filed nearly 80 exhibits during the course of the hearing, it failed to produce, explain or even mention the response SEG filed with the EEOC to Silva’s July 1996 EEO charge. GTS’s failure to submit this document, given what the EEOC told Silva, leads me to presume that it would have been unfavorable to its defense in this case. Moreover, the evidence shows that when Silva learned from the EEOC of SEG’s false claim that Gasery had filed a sexual harassment complaint against him, and told others of this supposed “fact,” GTS failed to set the record straight. This was the second act of retaliation against Silva. Forrester and Christine Seibel, then the “human resources support person” in SEG’s Tennessee office, and others in GTS knew Silva’s belief that Gasery had filed a sexual harassment complaint against him was wrong, but they withheld this information from both Silva and Gasery. Instead, they ignored Gasery’s complaint that Silva was spreading false information about her, allowed the conflict between the two to fester, and took advantage of the situation by using Gasery’s complaints of “harassment” to influence Sandia’s decision to order Silva off the site. This was the final act of retaliation. GTS has failed to show by clear and convincing evidence that these acts would have occurred in the absence of Silva’s protected activity

## **B. Silva’s Reputation Preceded the Acts of Retaliation**

The evidence shows that the contractors were displeased with Silva’s approach to safety before the alleged acts of retaliation occurred. At the hearing, Silva testified that he had raised safety concerns with his SEG supervisors and managers before filing the written concerns with the DOE in January 1997. Tr. at 57-59; 175-176; 233-236. According to Silva, his SEG superiors considered him to be a “whiner,” a “trouble maker, not a team player.” Tr. at 57. This was corroborated by David Schweitzer, a Radiological Control Technician who worked at the RMWMF, who testified that Jack Reust and Percy Gasery of SEG, and Bill Rhodes of Sandia were spreading rumors about Silva. Tr. at 255. Silva felt that the contractors were slow in taking appropriate remedial actions for his pre-January 1997 safety complaints about the ramp, forklifts, and hydrogen sulfide. Tr. at 73; 179-180; 186-187; 233-236. Silva testified that he began keeping a personal “log book” around May 1996, to protect himself from harassment and to avoid blame if coworkers were hurt because they engaged in unsafe practices. Tr. at 241. Thereafter, Silva always carried a small notebook in his pocket in which he noted safety concerns, and this practice was annoying to his coworkers and contractor managers who feared he was engaged in a “tit for tat” process of reporting them for every minor indiscretion. IG Report at 16; Tr. at 686; 901. As a result, some of the technicians asked

not to be assigned to work with Silva. Id.

There is also evidence that Silva's supervisors and coworkers were unhappy with him because he reported safety concerns after the events in question occurred. Tr. at 188; 688-689. In addition, Silva believed the contractor managers were displeased that he bypassed the chain of command by reporting safety concerns directly to DOE in January 1997, instead of going first through the contractors. Alex Feldman, the GTS Safety Officer, thought Silva believed he was talking to the customer and not the regulator when he raised safety issues with DOE, and therefore "may not have recognized that he had short-cycled the GTS and Sandia safety mechanisms" that were in place by going directly to DOE. IG Report at 7; Tr. at 454-455. However, Feldman confirmed that going directly to DOE was not the preferred way of handling safety issues. Tr. at 455.

### **C. The Original Sexual Harassment Accusations—The First Act of Retaliation**

In June 1996, Joe Albenze, SEG's Vice President of Human Resources (the SEG VP) informed Silva about "a complaint . . . received by management regarding inappropriate comments made by [Silva], and received by a female employee of the Company." Ex. 33 to IG Report. It was Forrester who brought Silva's allegedly inappropriate remarks to Albenze's attention. Tr. at 591. Albenze was referring to two separate incidents, described below, where Silva made remarks that Forrester deemed to be inappropriate.

"The yogurt incident" occurred on June 11, 1996 when Silva was eating lunch with two women, Vanessa Gasery and Kathy Babilon. The women were discussing homeopathic remedies. Babilon described an article she had read about the use of yogurt to cure urinary tract infections, and responded to a question from Silva that it was also good for yeast infections. Tr. at 752. Silva made some "distasteful comments about yeast infections," at which point Babilon told him "that's disgusting," and according to her, "that was the end of it." Id.

The "tuna fish incident" supposedly occurred at a training session when someone passed a paper to Silva, and he said, "it smells like tuna fish." Forrester is unsure when it occurred, but he thought it happened in the Waste Assessing Facility. He "perceived a comment regarding tuna fish—the smell of tuna fish on paper—and it was passed through Vanessa's hands." Tr. at 583. Silva has a different and more distinct recollection of the incident. According to Silva, it took place "in a RCRA training class at the Coronado Club in the lower level. I think it was in—may have been in '96." Tr. at 988. Silva recalls that Vanessa Gasery was sitting several rows back from him, and he was sitting in the front row with Forrester to his right. There was another man to Silva's left. "He was popping a can of —of tuna fish with crackers, and he handed me the roll sheet to sign in, and that's when I got it, and I handed it to Tim Forrester, and I may have said, 'oop, I smell like tuna fish', which was—I considered to be a joke." Tr. at 989. Silva claims there were no other women in that front row, and that Vanessa Gasery was sitting "at least five or six rows behind us." Id. Silva denies that he ever intended to make any kind of sexual innuendo with his remark, and denies ever looking back at Vanessa Gasery after he said it. Id.

Albenze told Silva that "they had several charges of sexual harassment against me," and that Kathleen Babilon had filed sexual harassment charges against him. Tr. at 78. In fact, this was not true, and when Babilon learned of the accusation attributed to her, she became upset. Christine Seibel testified that she received an angry telephone call from Babilon "demanding a letter from SEG/Westinghouse that she could have in writing on our letterhead, stating that she did not make any sexual harassment charge, complaint, call or anything to the Human Resources Department or to the Management of our company regarding Mr. Silva." Tr. at 484. Shortly thereafter, Babilon wrote a memo stating that she had nothing to do with filing sexual harassment charges against Silva. Silva Exhibit 2. Her memo explained that "the conversation in which I was supposedly offended occurred on 6/11/96 at lunch. The nature of the comment was to do with yeast infections. While that was probably not an appetizing topic of conversation, I certainly did not find it offensive. I did not find it particularly sexual either—certainly not a sexual harassment complaint." Id. In addition, this memo stated that sometime after June 11, 1996, Forrester approached Babilon and asked, "out of the blue. . . if I had any problems with any of his employees,



specifically pointing out sexual harassment. . . .” Id. The memo went on to state that she told Forrester she had no problems with any of his employees, and concluded by denying ever having made “any complaints formally or informally against [Silva].” Id.

Forrester claims he was motivated to make an example of Silva’s remarks because they were making the transition from a remote facility (the Interim Storage Site) to an office environment (the RMWMF) where more women would be present, and he “was concerned that there was some sort of a cultural—if that’s the right word—problem.” Tr. at 584. According to Forrester, “the technicians and the professionals, whoever were very loose with those kinds of comments and . . . it was going on out there more than I could see.” Tr. at 585. Later, Vanessa Gasery called Albenze from Forrester’s office, Tr. at 546, and told Albenze “the comments were not offensive.” GTS Exhibit 38; Tr. at 547. Albenze, who would have had actual knowledge of the events in question, was not called as a witness at the hearing. Instead, GTS called Christine Seibel, who then worked in SEG’s Tennessee office. Seibel’s testimony was based on long distance conversations about these events, since she was not present in Albuquerque when they occurred. Her testimony relied heavily on contemporaneous notes she and others in Tennessee made of telephone conversations with Albenze, Forrester, and Gasery. Thus, I cannot give her testimony the same weight as testimony from people who were actually present at the RMWMF. Everything Seibel heard from the SEG people in Albuquerque had been influenced by Forrester, who first characterized Silva’s remarks as offensive, and led Gasery to contact Albenze.

Seibel testified that Gasery was adamant about the fact that she did not file a sexual harassment charge against anyone at that time. What she was doing, as she stated it to me, was she was trying to be a good citizen of the company, frankly. She had heard some things that could be considered inappropriate and with a raised consciousness of sexual harassment in the whole country, you know, I mean frankly everybody wants to keep their job, do a good job and have a good working environment. And it is the responsibility of employees, especially Supervisors and Managers to make sure that we maintain that.

Tr. at 473. It is significant that before Gasery called Seibel and said she was “trying to be a good citizen of the company,” Forrester had conducted an “investigation” of the workers at the RMWMF to discern if anyone had been offended by any unnamed employee’s remarks, and nobody (including Gasery) reported they had been offended. Silva Ex. 3. Even though nobody on the scene was offended, and nobody made any charges against Silva, Tr. at 481, Seibel testified that Silva’s remarks were “perceived as inappropriate” by the SEG people in Tennessee and Pittsburgh [at Westinghouse’s corporate office] and “a matter that needed to be dealt with.” Tr. at 475.

On July 15, 1996, reacting to what he felt were false accusations from SEG, Silva filed a discrimination charge with the EEOC. Ex. 26 to IG Report. According to Silva, he later learned from the EEOC during its investigation of his first discrimination charge that SEG claimed “it was Vanessa Gasery who had filed sexual harassment charges against” him. Tr. at 86. That claim was false, since Gasery never filed a sexual harassment complaint against Silva. Tr. at 473. I infer from GTS’s failure to produce the written response SEG filed with the EEOC that the document contained “inaccuracies.” Forrester disclaims any knowledge of it, even though he was the SEG-GTS RMWMF Project Manager, and “already had been named in an EEOC thing.” Tr. at 602. Seibel admitted having read the response. She stated that “I believe her [Vanessa Gasery’s] name is in it, but I am not positive.” Tr. at 736. I observed the demeanor of these witnesses at the hearing, and their professed ignorance of the written response to the EEOC is not credible. Each of them was personally involved in the events, and each had a motive to hide the truth at the hearing. Moreover, they each also had a pecuniary motive, since at the time of the hearing, Forrester was still a GTS employee, and Seibel had been laid off and was hoping to be rehired by GTS. The glaring absence of this critical document undermines the overall credibility of GTS’s claim that it did not retaliate against Silva, and would have fired him regardless of his protected conduct.

## **D. GTS’s Failure to Resolve the Conflict Between Silva and Gasery—The Second Act of Reprisal**



Silva testified that after he was told that Gasery filed a complaint against him, he “did nothing. I carried on as usual. And just tried to keep my—keep from offending anyone there, especially Vanessa Gasery.” Tr. at 76. He indicated that his relationship was good with Gasery before this point, but admitted that it changed after he learned from EEOC that she had filed charges against him. According to Silva, he “did not joke around as much because I feared of getting in trouble with her for anything I did or said might be taken or perceived the wrong way.” Tr. at 88. Silva also admitted telling others about Gasery after he was told she had filed a complaint against him. Tr. at 88-89. However, Silva claims he never confronted Gasery because he feared it would “blow up in our face,” and he didn’t want to “be perceived as being aggressive” or “come off wrong.” Tr. at 89.

Even though Silva claims he was careful to do nothing that would cause problems with Vanessa Gasery, it is clear that her reputation among some of her coworkers suffered when the false information circulated that she had filed a sexual harassment complaint against Silva. While Silva played a role in spreading this false information when he told coworkers about Gasery, he had learned it from the EEOC, and he believed it was true. In late February 1997, Gasery called Seibel to complain about Silva’s accusations, and asked SEG management’s help in stopping the false information circulating about her. Tr. at 517.

On March 21, 1997, Silva filed a second EEOC charge against SEG, claiming that he was harassed by management after having filed the earlier charge. Exhibit 29 to IG Report. This second EEOC charge made SEG management uncertain about how to handle the growing tension between Silva and Vanessa Gasery. Seibel testified that in March 1997, she called Nep Sanchez, the EEOC investigator and discussed the Silva case with him, seeking guidance from the EEOC about what would happen if SEG took disciplinary action against Silva. GTS Exhibit 48. According to Seibel’s notes of that conversation, Sanchez advised SEG to have Gasery “put it in writing, talk to others [and] document,” write a memo to Silva telling him to stop talking to others immediately, and warn Silva that he faced further disciplinary action up to termination. Id.

On April 5, 1997, approximately one month after she first complained to SEG management about Silva, Gasery faxed a “Written Statement Regarding False Accusations” to Seibel. GTS Exhibit 49. In this memo, which is quoted extensively below, Gasery gave a clear picture of the problem:

#### Background

Since January of 1997, S.E.G. employee Luis Silva, has been and may be continuing to make accusations about me. Luis is telling people at Sandia National Laboratories, New Mexico that I meaning Vanessa Gasery, filed Sexual Harassment charges against him. Furthermore, he has told people that he knows this for a “fact.” Luis’s accusations upset me because they are not true. Furthermore, I am puzzled by Luis confidence with regards to his statement. I do not understand how he could come to such a strong conclusion without *what he considers proof* (i.e., discussions with or documentation from an attorney, discussions with or documentation from S.E.G. etc.) I would hope that S.E.G. never stated or documented that I filed Sexual Harassment charges against Luis, because this would be a false statement. Moreover, this would disappoint me greatly, because during a phone conversation with Joe Albenze in the presence of Tim Forrester, in the summer of 1996, I stated several times that I was not filing Sexual Harassment against Luis. Additionally, as I made clear during my discussion with Joe Albenze, I was only providing information regarding Luis out of concern for S.E.G.’s credibility and the contract at Sandia National Laboratories. Listed below are names of individuals who have stated to me, that they were present during one of Luis’s conversations where by he has made the statement:

Doug Perry

Eric Staab

Dave Schweitzer

Conclusion

I feel my reputation and character have been damaged by the accusations made by Luis Silva. I am stressed by this ordeal and I am working in what I consider to be an hostile environment.

I need to share my feelings regarding how S.E.G. is handling this matter. I truly do not believe that S.E.G. Human Resources has my interest at heart. I was told this matter must be handled carefully because I understand that Luis has filed charges with the US Equal Employment Opportunity Commission (EEOC).

#### Request for action

I feel closure of this matter would create a more pleasant work environment and relieve unwarranted stress. Keeping in mind that the matter is serious, I am requesting action for closure. The action shall included by is not limited to the following:

1. Sending a human resources representative to Sandia National Laboratories to investigate and address my situation.
2. Disciplining Luis in accordance with company procedures and policies, if it is proven he made the false accusations.
3. Investigating the handling process used when recording/reporting the Luis issue with Joe Albenze during the summer of 1996.
4. Dealing with S.E.G. employees in accordance with company procedure and policies, if it is proven they made false accusations or misrepresented issues. Keeping in mind Federal, State and Local Laws.
5. Providing me with documentation regarding the Sexual Harassment matter specific to Luis and myself. This includes any documentation of which my name is mentioned and documentation distributed internally or externally of S.E.G.

Finally, timely and proper closure is critical and would be greatly appreciated.

#### GTS Exhibit 49.

The record indicates that neither SEG nor GTS ever took action to resolve the matters described in Gasery's memo to Seibel. During the period February - March 1997, when Westinghouse was engaged in the sale of SEG's RMWMF business operation to GTS, neither firm focused any attention on the travails of Gasery and Silva. Tr. at 517-18. Although Seibel visited the Sandia site in April 1997, she did not talk to Silva on that trip, and she did not interview the three people named in Gasery's memo (Perry, Staab and Schweitzer). Tr. at 519; 801.

The ownership transition was complete by April 1997. Seibel, GTS Duratek's CEO Bob Prince, and Vice President Don Neely visited the RMWMF in early June 1997. One of the things they looked into was the apparent problem between Gasery and Silva. Seibel testified that Prince was "not comfortable with charging ahead on anything on this until we had an opportunity to talk with both parties." Tr. at 521-522. According to Seibel, this trio met with Vanessa Gasery, and heard her "going through some of the things that she had already expressed to me verbally over the phone on February 28th and then also writing in the Memo [GTS Exhibit 49]. . . ." Tr. at 522. Neely and Prince also met with Silva to "give him an opportunity to talk about his side of the story." Tr. at 523. They gave him a memo originally entitled "Disciplinary Action," which Neely changed to "Counseling Action." Exhibit 33 to IG Report. The memo states, in pertinent part, that:

Previously, a complaint was received by management regarding inappropriate comments made by you, and received by a female employee of the Company. On June 17, 1996 you were counseled by SEG's Vice President of Human Resources concerning the fact that any type of harassment, both direct and indirect, on the job site is unacceptable conduct and should cease immediately. This counseling was documented and you received a copy of that documentation.

Regretfully, SEG, now GTS Duratek management has received an additional complaint that continued harassment exists in the workplace. Please be advised of the severity of this type of misconduct as indicated by this formal written warning. Should there be any reported incidents in the future of this nature, disciplinary action, up to and including termination of employment may be imposed immediately.

Exhibit 33 to IG Report.

The June 1997 “Counseling Action” memo shows that Prince and Neely, the new GTS managers, viewed the “false accusations” harassment reported by Gasery in 1997 as a continuation of Silva’s so-called sexual harassment alleged in June 1996. Seibel and Forrester both knew that was not true, but they did nothing to stop their new GTS managers from getting the wrong impression. Tr. at 736. Addressing the questions raised in Gasery’s April 1997 memo, and giving her the help she demanded would have required SEG/GTS to admit they had told the EEOC that Gasery filed a sexual harassment complaint against Silva, when she had not done so and was adamant about not wanting to do it. Instead of resolving the conflict, GTS took advantage of it, and played Gasery and Silva off against each other. In the end, GTS’s inaction drove Gasery to resign. GTS’s failure to address Gasery’s complaint created a situation that formed the basis for Forrester’s telling Sandia’s Botsford that Silva was “harassing Gasery,” and led Botsford to order Silva off the site.

The timing of these events is further evidence of retaliation by GTS against Silva for his protected conduct. Forrester and Seibel certainly knew how easy it would have been to make peace between Gasery and Silva, simply by telling Silva that Gasery had not filed a complaint against him. Their critical failure to correct the misunderstanding between Silva and Gasery happened soon after January 1997, when Silva had reported safety concerns to Gene Runkle and touched off a full-blown DOE safety investigation. See Exhibit 31 to IG Report; GTS Exhibit 10. As noted above, Alex Feldman admitted that in his view, going directly to the DOE was not the preferred way of reporting safety concerns for GTS employees. IG Report at 7; Tr. at 454- 455.

GTS management’s negative attitude toward Silva’s safety practices and disclosures was also evident in June 1997, when Don Neely and Forrester met with Silva to discuss several concerns between him and management. Among other things, they criticized Silva for his judgment about the “level of detail” in safety matters, citing his wiping water off drums of radioactive waste as “being too meticulous.” Tr. at 217; GTS Exhibit 53 (Forrester’s notes of “6-3-97 Discussion with Luis”). They also cited Silva’s complaints to Forrester about people wasting time forming a “lottery ticket group” as an example of Silva’s continued inability to get along with co-workers. Id. In this same meeting, Silva also complained to Neely that Forrester lost his temper and “blew up” at him. Id.; Tr. at 85.

The evidence shows that GTS “sacrificed” Vanessa Gasery, ignoring the complaints that she articulated so clearly in her April 5, 1997 memo to Seibel, in order to get rid of Silva. Gasery’s letter of resignation, GTS Exhibit 55, shows that she was unhappy with GTS because they ignored her complaint. Eventually, Gasery filed her own EEOC charge against GTS, alleging that the firm had done nothing in response to her complaints. Gasery Deposition Exhibit 1.(4)

Although the evidence shows that GTS retaliated against him for his protected conduct, Silva was not blameless. There is evidence that Silva made nasty remarks to Vanessa Gasery, after he was told she had accused him of sexual harassment. According to Gasery, Silva muttered the “n word” to her under his breath on at least one occasion, and also called her “stupid,” and a “bitch” when others could not overhear. Gasery Deposition at 14. Silva denies making these remarks. One witness, Carla Rellergert, testified about seeing Gasery looking upset after she and Silva walked past each other at the RMWMF. Tr. at 765. I cannot condone Silva’s hurtful comments to Gasery, if they did occur. But in my view, by refusing to end the misunderstanding that it created between Silva and Gasery, and letting it fester instead, GTS placed Silva in a position where he was bound to fail. This was an act of retaliation against Silva. See [Ronald Sorri](#), 23 DOE at 89,014 (retaliation includes putting whistleblower in a position where he was bound to fail). GTS’s actions fueled Silva’s anger toward Gasery, who he believed had wrongly accused him of

sexual harassment. GTS must bear the consequences of its actions, which drove Silva to lose control of his temper and make hostile remarks to Vanessa Gasery. Even though Silva's words sound bad in the retelling, they were ancillary to the main thrust of Gasery's 1997 memo, her 1998 EEOC charge against GTS, and her 1999 deposition in connection with this case, which was her frustration with GTS's failure to do anything to stop Silva from "falsely accusing" her of filing a sexual harassment complaint.

## **E. Silva's Termination—The Final Reprisal**

Silva's termination was the inevitable result of the conflict that GTS diabolically nurtured between Silva and Gasery. The dénouement played out in a series of meetings with Sandia program manager Barbara Botsford. One meeting took place in late July 1997 between Forrester and Botsford. GTS's corporate office in Maryland had given Gasery a few weeks' medical leave of absence to recover from stress, and she was due to return to work shortly. Forrester testified that he gave Botsford a report about the ongoing problems between Silva and Gasery, which he characterized as being based on "a non-substantiated set of accusations from Vanessa" that GTS was investigating. He told her of the pending EEOC charges filed by Silva, and opined that GTS's home office was unlikely to act quickly. Tr. at 607-610; IG Report at 17.

The second meeting took place in a chance encounter between Botsford and Vanessa Gasery after Gasery returned from medical leave. Botsford described Gasery as looking "visibly shaken. She was not her normal self." Tr. at 863. Gasery told Botsford that "it was Mr. Silva who was causing her the stress," and mentioned Silva's nasty remarks. Id. Botsford accepted Gasery's side of the story without hearing from Silva, based on training she had received that "if a person believes they are being harassed, they are being harassed." Tr. at 882. According to Botsford, Gasery did not tell her that what she perceived as harassment initially was the fact that it was being claimed that she filed a sexual harassment complaint against Silva. Tr. at 887. Botsford was also aware that Gasery was frustrated by the lack of action by GTS. Tr. at 896.

After her impromptu meeting with Gasery, Botsford summoned Forrester. Forrester gave her "a lot of detail that I had never had before, explained to me on a— both sides, you know, what was happening in the case, in the situation, and he explained to me that he felt his hands were tied because it was now a corporate issue for their corporation." Tr. at 866. Botsford demanded that Forrester do something to resolve the problem with his employees, but realized that "it was my right under the contract to take some steps to resolve the issue of a hostile work environment." Tr. at 867. Botsford next called Gary Romero in Sandia Purchasing, asked what her options were, and was told under the terms of the GTS contract she could remove any person. Id. Then, according to Botsford,

I walked over to Sandia Legal, and I asked them if there was anything I should consider and what would they advise me if I wanted to remove someone from the contract, and the Sandia attorney just said—she asked me do you have—and I told her—I was intending to remove Mr. Silva because in my estimation, he was the one that was creating a hostile work environment, and he—she asked me do you have reason to believe he's a whistle-blower, and I asked her in response, it's not nice to answer a question with a question, but I asked her how would I know because I did not—I do not understand—I have never read the Whistle-Blower Protection Act, and I did not at that time have an understanding of how this type of process occurs.

And she—so, I asked her on how could I know, and her answer to me was, well, you wouldn't, and, so, I thought okay. I mean I wouldn't know. This is really not real relevant to that anyway. Whistle-blower was not what I was worried about. I was worried about Ms. Gasery's work environment, and . . . safety is so important at that facility, if you've got people that are nervous around each other, you're very likely to have a safety incident. You'd have people making mistakes when they're over-stressed.

Tr. at 867-868. Botsford also testified that Sandia has never provided her with any training concerning whistleblower protection, and that she has never provided training to any of her employees or contractors concerning whistleblower protection. Tr. at 898.

After consulting with Sandia's lawyer, Botsford drafted the letter ordering GTS to remove Silva from the Sandia site. Exhibit 45 to IG Report. Sandia delivered it to Forrester on August 4, 1997. Botsford claims the letter did not ask GTS to terminate Silva. Tr. at 870. She testified that it was her impression that GTS "thought they had work. They had contracts elsewhere. So, I assumed that he would be transferred some place else, but that really wasn't my concern, either." Id. Botsford also denied that the fact Silva had raised safety concerns entered her mind when writing the letter. "I think when—it might have been something that I thought of when—when Ms. Gallegos [the Sandia attorney] mentioned something about whistle-blower, but that was not why I was taking this action." Tr. at 871.

Botsford knew Silva had raised safety concerns with the DOE, and she also knew he "had a tendency not to report safety concerns on the day that he observed them." Botsford attributed this to Silva's "comfort level. He preferred to do it after the fact." Tr. at 901. Botsford also acknowledged that Forrester told her Silva would not do work if he observed something he felt was unsafe. Tr. at 904; Exhibit 5 to IG Report.(5) Botsford also heard, from Forrester and others, "everyone was concerned that if they did anything, they would be reported for some minor indiscretion in a day or two by Mr. Silva." Tr. at 901.

When Forrester received Sandia's memo ordering Silva off the contract, he faxed it to Seibel. She and Diane Leviski, GTS's Vice President for Human Resources, made a search to see if GTS had any jobs available for him on any of its other contracts. No other work was available for Silva, and GTS corporate managers Neely and Prince agreed they had no other choice but to lay him off. Since Sandia had requested Silva's removal from their contract, and GTS had nothing else available, they decided to give "lack of work" as the reason for the layoff. Tr. at 526-535. The layoff letter was then faxed to Forrester.(6)

Based on the foregoing discussion, I find that GTS has failed to prove by clear and convincing evidence that it would have laid off Silva for his "harassment" of Vanessa Gasery, even if he had not engaged in conduct protected under Part 708. The evidence shows that Forrester was unhappy with Silva's attitude toward safety, and that he engineered the original sexual harassment allegations against Silva, even though Forrester's own investigation showed there was no reasonable basis for the allegations. Although GTS introduced extensive evidence showing that it took no retaliatory action against other employees who reported safety concerns through contractor chain of command, only Silva reported safety concerns directly to DOE, and only Silva was subjected to retaliation. GTS's entire defense is defeated by its failure to end the conflict between Silva and Gasery simply by telling them both that Gasery never filed a sexual harassment complaint against Silva, and its failure to explain why it subjected Silva (and Vanessa Gasery) to such callous treatment. GTS has not convinced me that its "harassment" allegation against Silva was not a mere pretext for getting rid of him. In the end, GTS's actions pushed both Silva and Gasery over the edge. By August 5, 1997, they both were gone from GTS.

With respect to Sandia, I find that the firm has met its burden of proving by clear and convincing evidence that it would have ordered Silva off the GTS RMWMF subcontract, even if he had not engaged in protected conduct. It is a close call, but Sandia convinced me that Botsford acted in reliance on the information she received from Forrester. Botsford worked ten miles away, and she was not intimately familiar with the day-to-day interactions among the workers at the RMWMF. Forrester, not Botsford, was the animating force who launched the series of events that led to Silva's dismissal. However, I am troubled by Botsford's testimony about her statement recounting her interaction with Sandia's lawyer who asked her whether Silva was a whistleblower. Botsford declaimed any and all knowledge of the law on whistleblower protection. Ignorance of the law is not a defense, and Botsford's conduct at that critical juncture in this case borders on the negligent, even if it was not retaliation. Assuming Botsford's statements are truthful, Sandia should take steps to remedy the situation by giving Botsford and the rest of its own employees and its subcontractor workforce training in the law on whistleblower protection. The Sandia lawyer who advised Botsford on the Silva matter should have explained the applicable Federal statutes and regulations to her, including Part 708, and insisted that Botsford look into the situation to make sure any retaliation issues were resolved before ordering Silva off the contract. Nevertheless, I am persuaded that even if she had made a reasonable effort to look further into the allegations against Silva, Botsford would not have been able to discover that Forrester's characterization of Silva's alleged

harassment of Gasery was not true. Sandia has therefore convinced me that it would have taken the same action against Silva in the absence of his protected conduct.

## **F. Weston's Failure to Hire Silva**

In addition to the allegations in the original complaint, the IG Report also found that when Weston was preparing to take over the RMWMF subcontract from GTS, Jeff Jarry of Sandia influenced the new Weston project manager, Miles Smith, to stop Weston from hiring Silva, in retaliation for protected disclosures Silva made before being laid off by GTS. The IG Report also attributed a comment to Smith, that after questioning several of his then-current employees about Silva, and learning that Silva would raise safety concerns with the DOE instead of working with the contractor staff to resolve them, Smith told the investigator "I wouldn't want anyone on my team like that." IG Report at 24. Based on the hearing testimony of Jarry, Doug Perry and Smith, I am convinced the IG investigator misinterpreted the facts, and that there is no basis for these findings in the IG Report.

Silva submitted a resume to Weston for a job as a Radiological Control Technician before Weston took over the RMWMF subcontract from GTS in March 1998. According to Silva, his friend Doug Perry, who worked for Weston, called him on March 9, 1998, and said that Smith showed Silva's resume to Jarry, and Jarry "put the kibosh on your resume." Tr. at 97; IG Report at 23. At the hearing, Perry initially denied having said that Jarry told Smith not to hire Silva. Tr. at 286. However, Perry asked to be recalled to the witness stand the next day because after reflecting on the events of March 1998, he thought it was possible that he might have told Silva something about Jarry telling Smith not to hire Silva. Tr. at 636-637. When asked what the reason might have been for making the statement, Perry testified that if he did say something to Silva, "it was . . . as a friend to try to cheer him up, I guess." Tr. at 638. Perry conceded that no one ever told him that Jarry had told Smith not to hire Silva, and he had never witnessed any such interchange between Jarry and Smith. Tr. at 637. The IG investigator relied on Silva's recollection of the phone call from Perry, but he never interviewed Perry. I believed Perry's hearing testimony, especially in view of his willingness to come back to correct his possibly erroneous recollection of a telephone message he may have left for Silva.

Jarry also denied that he ever told Smith not to hire Silva for the RMWMF contract. Tr. at 914. The only time Silva's name ever came up between Jarry and Smith was when Smith was reviewing resumes for a different contract, after the RMWMF staffing was complete. Tr. at 925. On that occasion, Smith showed Jarry Silva's resume, and asked if he knew Silva. According to Jarry, he said "Yeah, he used to work at the site," and handed the resume back to Smith. Tr. at 913-914.

Moreover, Smith testified that Weston never would have hired Silva under any circumstances because Silva lacked the minimum qualification and level of experience which Smith had established for the job. Tr. at 954. Smith culled Silva's resume from a pile of resumes he had received in response to an ad for a technician job on the RMWMF contract because Silva did not have the requisite Radiological Control Technician certification or an equivalent certification. Tr. at 940. Smith also denied that Jarry had ever told him not to hire Silva, and denied having any knowledge at the time that Silva had made safety complaints to the DOE. Tr. at 941.

Finally, Smith explained that the statement attributed to him in the IG Report was taken out of context, and gave the wrong impression. According to Smith, after the interview was completed, the investigator asked him a hypothetical question about whether he would hire someone like Silva. Smith testified that the investigator told him during the course of the interview that Silva had safety issues, whistleblower complaints, and alluded "to other issues that I in all honesty took to be sexual harassment." Tr. at 965. Smith says that his answer was "if these things are true . . . particularly the sexual harassment . . . I wouldn't want somebody like that on my team." Tr. at 966. Smith maintained that he did not have any personal knowledge of whether any of those issues were true, he was not represented by counsel during the interview, and that he really had no capacity to be able to answer that hypothetical. Id.

Based on the foregoing discussion, I find that Sandia and Weston have met their burden of proving by clear and convincing evidence that they took no actions in retaliation against Silva for his protected conduct, and that Weston would not have hired him in any event.

## IV. Remedy

Since I have found that (1) Silva has met his burden under § 708.29 of proving by a preponderance of the evidence that he engaged in protected conduct, (2) Silva's conduct was a contributing factor to acts of retaliation against him by GTS, and (3) GTS failed to meet its burden of proving by clear and convincing evidence that it would have taken the same actions against Silva even if he had not engaged in protected conduct, I will order appropriate relief. 10 CFR § 708.36. Having found that Silva's layoff effective August 18, 1997 was the result of retaliation by GTS, I will order GTS to treat Silva as if he were reinstated from August 18, 1997 through the end of the GTS contract in March 1998, and to give Silva back pay for that period, including salary and all lost benefits (and interest on that amount), less any money that Silva earned from other employment during that period. Since the evidence shows that Silva would not have been hired by Weston, he is not eligible for reinstatement, and the back pay will terminate on the date the contract ended. I will also order GTS to pay Silva his reasonable legal expenses, including attorney fees, and the costs of bringing this action.

Although there is some evidence of Silva's earnings after he was laid off by GTS, that evidence is incomplete. I will direct Silva's attorney to submit a report showing the amount of Silva's monthly earnings after the layoff, the amount of back pay and benefits claimed for each month in the period noted above, including the proper termination date for the GTS RMWMF contract, and the amount of attorney fees and costs claimed, including the basis and justification for those legal expenses. See *Sorri*, 23 DOE at 89,016-89,021 (back pay and interest); *Ronald A. Sorri*, 24 DOE ¶ 87,508 (1994) (supplemental order on costs and attorney fees). This report should be submitted no later than 30 days after Silva's attorney receives this decision, and a copy shall be served on GTS's attorney. GTS will have 10 days after receiving the report to submit its comments, if any. I will then issue a supplemental order setting forth the amount of back pay and lost benefits (including interest), costs, and legal expenses awarded to Silva. I also encourage the parties to enter into settlement negotiations to resolve all issues related to remedies and any other issues remaining in this case.

It Is Therefore Ordered That:

- (1) The complaint for relief under 10 C.F.R. Part 708 submitted by Luis P. Silva, OHA Case No. VWA-0039, is hereby granted with respect to GTS Duratek, as set forth in paragraphs (2), (3) and (4) below. The complaint for relief against Sandia Corporation and Roy F. Weston, Inc. is denied.
- (2) Silva's attorney shall submit a detailed report as described in the remedy section of this decision, showing the amount of Silva's back pay and lost benefits claimed for the period noted above, including the proper termination date for the GTS RMWMF contract, the amount of Silva's earnings from other sources during that period, and the amount of attorney fees and costs claimed, including the basis and justification for those legal expenses. The report shall be due 30 days after receipt of this decision, and shall be served on the attorney for GTS.
- (3) GTS shall be permitted to submit its comments, if any, on the report described in paragraph (2) above. The comments shall be due 10 days after receipt of the report.
- (4) This is an initial agency decision, which shall become the final decision of the Department of Energy granting the complaint in part unless, within 15 days of the issuance of a Supplemental Order with regard to remedy in this case, a notice of appeal is filed with the Office of Hearings and Appeals Director, requesting review of the initial agency decision.

Thomas O. Mann



Hearing Officer

Office of Hearings and Appeals

Date: February 25, 2000

- (1) Westinghouse owned SEG before it was sold to GTS Duratek in March 1997.
- (2) A Final Rule, which made a few minor changes from the interim version, was published on February 9, 2000. 65 FR 6314 (effective March 10, 2000). A technical correction was published on February 24, 2000. 65 FR 9201. Since the Final Rule is not yet effective, it has not played any role in this case.
- (3) Silva raised additional safety concerns with DOE after he was laid off by GTS. Hearing Transcript (Tr.) at 172.
- (4) Gasery's EEO claim against GTS was settled. Silva's counsel requested a copy of the settlement agreement during discovery to see if it paid Gasery a large sum of money in exchange for her agreement to testify against Silva in this proceeding. GTS's counsel claimed the document was confidential and privileged. After an *in camera* inspection of the document, I ruled that its terms were confidential and the document was therefore privileged. While I did not order production of the document, I informed Silva's counsel that the dollar amount of the settlement seemed appropriate, and that the agreement contained no mention whatsoever of Silva or this case.
- (5) Silva's rebuttal testimony about the so-called "light bulb incident" Forrester related to Botsford as an example of Silva's refusal to work in unsafe conditions is further evidence of how Forrester distorted the facts in order to undermine Silva's reputation with Botsford. Tr. 980-982.
- (6) After the letter had been sent, Jim Snoddy, the GTS Field Service Safety Officer, brought up the fact that Silva had raised safety concerns, but by that time, according to Seibel, it was too late to consider the implications because the decision had already been made. Tr. at 536-538.