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January 6, 2011

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Motion for Summary Judgment
Initial Agency Decision

Petitioners:	Mary Ravage Medcor, Inc.
Dates of Filings:	June 9, 2010 November 12, 2010
Case Numbers:	TBH-0102 TBZ-0102

This Decision will consider a Motion for Summary Judgment filed by Medcor, Inc. (Medcor), a subcontractor providing medical services at the Department of Energy's (DOE) Hanford Site, in connection with the pending Complaint of Retaliation filed by Mary Ravage against Medcor under the DOE's Contractor Employee Protection Program and its governing regulations set forth at 10 C.F.R. Part 708. The Office of Hearings and Appeals (OHA) assigned the hearing component of Ms. Ravage's Part 708 Complaint proceeding, Case No. TBH-0102, and Medcor's Motion for Summary Judgment, Case No. TBZ-0102. For the reasons set forth below, I have determined that Medcor's Motion should be granted and that Ms. Ravage's Complaint of Retaliation should be dismissed.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation; a substantial and specific danger to employees or to the public health or safety; or, fraud, gross mismanagement, gross waste of funds, or abuse of authority. *See* 10 C.F.R. § 708.5(a)(1)-(3). Available relief includes reinstatement, back pay, transfer preference, and such other relief as may be appropriate. *Id.* at § 708.36. Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to an investigation by an investigator from the Office of Hearings and Appeals (OHA), an independent fact-finding and a hearing by an OHA Hearing Officer, and an opportunity for review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. § 708.21, 708.32.

B. Procedural History

Ms. Ravage filed her Part 708 Complaint on January 21, 2010,[1] with the DOE's Office of River Protection (ORP). In her Complaint, Ms. Ravage alleged that she had made protected disclosures and, as a result of her so doing, Medcor engaged in a series of retaliatory actions against her, including terminating her on January 6, 2010.

Medcor filed responses to the Part 708 Complaint on March 4, 2010, and on May 14, 2010, contesting that Ms. Ravage had made any disclosure protected under Part 708, and arguing that Ms. Ravage's termination was not retaliatory since the decision to terminate her was made for valid business reasons unrelated to her alleged protected disclosures. ORP's Employee Concerns Manager transmitted the Complaint to OHA for an investigation followed by a hearing, when informal resolution of the Complaint proved unsuccessful. OHA received Ms. Ravage's Complaint on June 9, 2010.

On June 9, 2010, the OHA Director appointed an Investigator (OHA Investigator) who conducted an investigation into the allegations contained in Ms. Ravage's Complaint. On September 8, 2010, the OHA Investigator issued the Report of Investigation (ROI) in this case. In the ROI, the OHA Investigator concluded that Ms. Ravage was alleging a single protected disclosure. With regard to that one disclosure, the OHA Investigator found that Ms. Ravage had not demonstrated, by a preponderance of the evidence, that she had made a protected disclosure that was a contributing factor to the decision to terminate her. Immediately after the ROI was issued, the OHA Director appointed me the Hearing Officer in this case. On November 12, 2010, Medcor filed the present motion, claiming that, as a matter of law, Ms. Ravage has not met, and cannot meet, her burden of proving that she made a protected disclosure.

C. Factual Overview

[1] The Complaint is dated January 20, 2010. The Report of Investigation indicates that the Complaint was filed on January 21, 2010. The Memorandum transferring the Complaint from the ORP to this office for investigation and hearing indicates that the ORP received the Complaint on April 28, 2010.

Ms. Ravage began working for Medcor as a registered nurse on June 15, 2009. Transcript of November 4, 2010, Deposition (hereinafter Tr.) at 17. Ms. Ravage asserts that, four months into her employment tenure, on October 8, 2009, she arrived at work and found a co-worker, Kristine Welsh, "crying in a fetal position." *Id.* According to Ms. Ravage, Welsh informed her that she had been "struck in anger" the previous evening by XXXXX, a co-worker of both Ravage and Welsh. *Id.* Ms. Ravage contends that she found Welsh's allegation credible because she too had been struck by XXXXX during the previous week. *Id.* Ms. Ravage verbally reported Welsh's allegations to Medcor's Director of Operations, Cindi McCormack, that evening. Ms. Ravage asserts that she also reported being struck by Welsh during her October 8, 2009, conversation with McCormack. Tr. at 32. McCormack, however, claims she has no recollection of being informed by Ms. Ravage during the October 8, 2009, conversation that XXXXX had struck Ms. Ravage. Welsh subsequently informed McCormack that, on October 7, 2009, XXXXX had "slapped my left arm pretty hard."[2] October 12, 2009, email from Welsh to McCormack.[3]

On October 28, 2009, XXXXX was promoted to Lead Nurse, a position for which Ms. Ravage had also applied. On October 29, 2009, Ms. Ravage was promoted from a part-time nursing position to a full-time nursing position.

On November 1, 2009, Ms. Ravage sent an e-mail to McCormack reiterating the concerns that she had verbally expressed. Ms. Ravage's November 1, 2009, written account does not assert that she was ever struck by XXXXX. It does, however, accuse XXXXX of speaking to her with "an angry voice and with a mean face." November 1, 2009, e-mail from Ms. Ravage to McCormack.

On November 11, 2009, Medcor issued a written warning to Ms. Ravage. The November 11, 2009, written warning alleged that Ms. Ravage had signed an inaccurately completed laboratory form. Medcor issued a second written warning to Ms. Ravage on December 3, 2009. The second written warning was issued by Medcor after Ms. Ravage allegedly faxed a form containing confidential patient information to non-authorized personnel. On December 8, 2009, two members of Medcor's supervisory team met with Ms. Ravage to discuss a number of Medcor's concerns. During this meeting, the supervisors informed Ms. Ravage that future problems could result in disciplinary action including termination, and provided Ms. Ravage with a corrective action plan.

On January 6, 2010, Medcor asked Ms. Ravage to resign. She refused to resign, and Medcor terminated her employment. Tr. at 19.

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[2] Welsh subsequently described the incident as "an assault, being physically slapped in anger on the left arm by another nurse." October 26, 2009, letter from Welsh to Ted Feiganbaum.

[3] Medcor's Human Resources (HR) Director, Julia Philippova, conducted an in-house investigation of Welsh's allegations. In response to the HR's inquiries, the two other persons present when Welsh was allegedly slapped in the arm, XXXXX and Geri Bauer, both denied that XXXXX had slapped or hit Welsh. November 18, 2009, letter from Philippova to Welsh. The HR Director closed her investigation after the other alleged eyewitnesses did not corroborate Welsh's allegations.

On January 21, 2010, Ms. Ravage filed her Complaint. The Complaint does not specifically identify any protected disclosures, stating only that "Medcor had been given copious warning[s] that there were issues in their Richland operation and the response was to try and reign in the squeaky wheel." Complaint at 4. However, the Complaint alleges that XXXXX systematically harassed and undermined Ravage in retaliation for her reporting Welsh's allegation to McCormack.[4] Complaint at 1. The Complaint also alleges that XXXXX had struck Ms. Ravage approximately a week before the alleged incident involving Welsh.[5]

On November 12, 2010, Medcor submitted the present motion contending that Ms. Ravage has not met her burden of proof and that summary judgment should accordingly be entered in its favor. Medcor's Motion for Summary Judgment (Motion) at 5. Specifically, the Motion asserts that Ms. Ravage's report of an alleged arm-slapping incident does not constitute a protected disclosure under 10 C.F.R. § 708.5. *Id.* Ms. Ravage filed a Cross-Motion for Partial Summary Judgment on November 12, 2010, and submitted a supplemental response to Medcor's Motion on November 22, 2010. Ms. Ravage's Cross-Motion requests a ruling that her report of an alleged arm-slapping incident constitutes a protected disclosure. Supplemental Response at 1. Ms. Ravage asserts that her October 8, 2009, disclosure meets two of the criteria for protected disclosures set forth at § 708.5. Specifically, Ms. Ravage asserts that her disclosure communicated a reasonable belief that "XXXXX posed a substantial and significant danger to employees" under §708.5(a) (2) and that the reported incident "was a violation of law" under §708.5(a) (1). *Id.*

II. The Legal Standards

As noted above, the regulations set forth at 10 C.F.R. Part 708 provide an administrative mechanism for resolving whistleblower complaints filed by employees of DOE contractors. The regulations specifically describe the respective burdens imposed on the Complainant and the contractor with regard to their allegations and defenses, and prescribe the criteria for reviewing and analyzing the allegations and defenses advanced.

A. The Complainant's Burden

It is the burden of the Complainant under Part 708 to establish, by a preponderance of the evidence, that he or she made a protected disclosure, participated in a proceeding, or refused to

[4] Ravage's Complaint also contends that she had complained to McCormack that XXXXX was constantly harassing her. The Complaint further alleges that Ravage had informed McCormack and Medcor's CEO that she considered XXXXX a threat to her safety. Compliant at 7. The Complaint also asserted that Ravage had reported to Medcor's CEO that Medcor's chain of commend was badly broken. *Id.* The Complaint does not, however, indicate that any of these complaints on her part contributed to Medcor's January 4, 2010, decision to terminate her.

[5] Ravage's husband, Dr. Chris Ravage, M.D., wrote Bennet W. Petersen, Medcor's Chief Operating Officer, on December 22, 2009, to express his concerns about his wife's relationship with XXXXX, who was now her supervisor. Dr. Ravage accused XXXXX of acting in an abusive manner towards Ms. Ravage and asserted that XXXXX had hip-checked Ms. Ravage during the same week that XXXXX had allegedly slapped Welsh. December 22, 2009, email from Dr. Ravage to Petersen at 2. This is the first instance where the claim that XXXXX struck Ms. Ravage appears in writing. Dr. Ravage accused XXXXX of having a vendetta against Ms. Ravage which he attributed to two causes, stating: "XXXXX has a personality disorder" and that Ms. Ravage "was able to back up another nurse's complaint that [XXXXX] had struck her in anger." *Id.*

participate as described in 10 C.F.R. § 708.5, and that such act was a contributing factor to a retaliatory action. 10 C.F.R. § 708.29. The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not when weighed against the evidence opposed to it. *See Joshua Lucero*, Case No. TBH-0039 (2007), *citing Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990).

Under 10 C.F.R. Part 708, proving, by a preponderance of evidence, that one has made a protected disclosure is an essential element of a Complainant's case. If Ms. Ravage cannot meet this threshold showing, then judgment cannot be awarded in her favor in the present proceeding.

Section 708.5 sets forth the applicable definition of protected disclosure. Under § 708.5:

> If you are an employee of a contractor, you may file a complaint against your employer alleging that you have been subject to retaliation for: (a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your employer, or any higher tier contractor, information that you *reasonably* believe reveals-- (1) A *substantial* violation of a law, rule, or regulation; [or] (2) A *substantial and specific* danger to employees or to public health or safety[.]

10 C.F.R. § 708.5(a)(1) and (2) (emphasis supplied).

Although Medcor has captioned its motion as a Motion to Dismiss, it is more accurately characterized as a Motion for Summary Judgment. Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Summary judgment may be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. A moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. *Celotex v. Catrett*, 106 S. Ct. 2548, 2552-2553 (1986). The Supreme Court has further articulated the following test: "If the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574, 597 (1986) (*Matsushita*).

III. Analysis

A. Whether Ms. Ravage has disclosed information that she reasonably believed reveals a substantial violation of a law, rule, or regulation

Citing Washington State law, Ms. Ravage asserts that "the incident that was reported was a violation of law, and therefore was a [protected disclosure]." Ms. Ravage is correct that intentionally slapping a fellow employee could violate state law depending on the circumstances and severity of the hitting. However, reporting a reasonable belief of a violation of a law, rule or regulation does not suffice to qualify an individual for protection under 10 C.F.R. Part 708. Under Part 708, a protected disclosure must communicate a reasonable belief of a *substantial* violation of a law, rule or regulation in order to receive protection. 10 C.F.R. § 708.5(a)(1). In the present case, the victim contemporaneously described the alleged incident as an intentional hard arm slap. While such an arm slap may have resulted in a technical violation of the law, it certainly did not constitute a sufficiently *substantial* violation of law to constitute a protected disclosure under § 708.5(a) (1).

Ms. Ravage contends that "Medcor downplayed the violence involved." Ravage's November 12, 2010, submission at 1. She further states: "It is our contention that the assault was violent, not isolated, and XXXXX showed a consistent pattern of aggressive, abusive behavior." Supplemental Submission at 1. However, Welsh's own actions, as well as her contemporaneous description of the alleged incident, indicate that she did not believe that a substantial violation of law had occurred. There is no evidence in the record that Welsh ever contacted law enforcement authorities to report this alleged incident. Furthermore, it is suspect that she did not immediately report the incident to Medcor officials. In fact, it was not until McCormack contacted her on October 9, 2009, two days after the alleged incident's occurrence, that she first mentioned the incident to Medcor's management. Affidavit of Cindi D. McCormack at 1. At McCormack's request, Welsh provided a written description of the alleged incident, in which she stated that XXXXX "slapped my left arm pretty hard." October 12, 2009, e-mail from Welsh to McCormack. Thus, I do not accept that Ms. Ravage could have reasonably believed that a substantial violation of law had occurred based upon her October 8, 2009, conversation with Welsh concerning the alleged incident.

Since the record does not contain any reliable evidence supporting her contention that she reasonably believed that a substantial violation of law had occurred, no reasonable trier of fact could find in her favor on this issue. *Matsushita,* 475 U.S. at 597. Accordingly, I am granting summary judgment in favor of Medcor on the issue of whether Ms. Ravage has disclosed information that she reasonably believed reveals a substantial violation of a law, rule, or regulation.

B. Whether Ms. Ravage has disclosed information that she reasonably believed revealed a substantial and specific danger to employees or to public health or safety.

Ms. Ravage asserts that it was her "reasonable belief that XXXXX posed a substantial and significant danger to employees." Ravage's November 12, 2010, submission at 1. Medcor asserts that: "Even if the incident Ms. Ravage disclosed did occur, her reporting of this second-hand information does not rise to the level of a protected disclosure, because Ms. Ravage could not have reasonably believed that this 'arm slap,' which she did not witness, revealed a substantial and specific danger to employees or to public health or safety." Medcor's Motion at 1.

Ms. Ravage's Supplemental Response to Medcor's Motion essentially concedes the issue. Ms. Ravage states: "I agree with [Counsel for Medcor's] statement that 'no reasonable person would believe that a simple isolated slap on the arm . . . poses . . . a danger. . . . It is our contention that the assault was violent, not isolated, and XXXXX showed a consistent pattern of aggressive abusive behavior." Supplemental Response at 1. As discussed above, the alleged victim described the reported incident as a single, hard slap to the arm. No rational trier of fact could conclude that even a particularly vigorous arm-slapper poses a substantial and specific danger to employees or to public health or safety.

After conceding that an arm-slapping nurse does not pose a substantial and specific danger to employees or to public health or safety, Ms. Ravage now attempts to re-characterize her alleged October 8, 2009, disclosure by asserting that she had reported a pattern of aggressive, violent, and abusive behavior, as well as, an alleged incident in which XXXXX hip-checked Ms. Ravage, to McCormack during their conversation.

1. Ms. Ravage's Claim that She Reported a Hip-Checking Incident to McCormack on October 8, 2009.

Ms. Ravage claims that she was hip-checked by XXXXX, and reported the alleged hip-checking incident to McCormack during their October 8, 2009, conversation. However, this claim is simply not credible. There is no evidence in the record, including her November 4, 2010, deposition testimony, supporting her contention that she was hip-checked by XXXXX. Those accounts of the alleged hip-checking incident provided by Ms. Ravage are not consistent. While her Supplemental Submission states that she had received "a hip check like in a hockey game, and not a simple brushing aside," her initial deposition testimony indicates only that XXXXX had struck Ms. Ravage with her elbow while brushing her aside.[6] Tr. at 37-38.

Moreover, although the record contains a number of communications from Ms. Ravage to Medcor officials complaining about XXXXX between October 8, 2009, and December 22, 2009, (when her husband made the allegation in an email to Petersen; *see* note 5, *supra*) none of these communications indicate that XXXXX had struck Ms. Ravage.[7] At her deposition, Medcor's counsel challenged Ms. Ravage to identify any document in the record other than her January 21, 2010, Compliant, in which she asserted that she had been struck by XXXXX. Ms. Ravage could not do so. Tr. at 40-42, 46.

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[6] She subsequently, in response to a clearly leading question posed by her advocate, amended her testimony by indicating that she was both elbowed and hip-checked. *Id.* at 75.

[7] On November 1, 2009, Ms. Ravage sent an e-mail to McCormack complaining that XXXXX had spoken to her "in an angry voice and with a mean face." November 1, 2009, email from Ms. Ravage to McCormack. In this e-mail, Ms. Ravage related her account of the conversation that she had with Welsh on October 8, 2009. *Id.* However, the November 1, 2009, e-mail does not contain any discussion whatsoever of the alleged hip-checking incident. On December 7, 2009, Ms. Ravage sent McCormack an e-mail complaining about XXXXX's aggressiveness. She complained that XXXXX had spoken to her in a "harsh voice" with "an aggressive face." She further stated that XXXXX had wrongly accused her on several occasions and indicated her concern that XXXXX had a vendetta against her. Ms. Ravage accused XXXXX of having a "history of violence against co-workers," and stated that she was worried about her safety. December 7, 2009, e-mail from Ms. Ravage to McCormack.

Furthermore, there is no evidence in the record that Ms. Ravage reported the alleged hip-checking incident to McCormack during their October 8, 2009, conversation. During her deposition testimony, Ms. Ravage admitted that she does not know if she informed McCormack of this incident during their October 8, 2009, conversation. Tr. at 35. A sworn affidavit signed by McCormack indicates that "at no time did . . . Mary Ravage inform me that Ms. Ravage had been struck by XXXXX." November 12, 2010, Affidavit of Cindi D. McCormack at ¶ 6.

Considering all the evidence in the light most favorable to the non-moving party, Ms. Ravage, I find that Ms. Ravage will not meet her evidentiary burden regarding an alleged hip-checking incident.

2. Ms. Ravage's Claim that she Reported a Pattern of Aggressive, Violent, and Abusive Behavior to McCormack on October 8, 2009.

As discussed above, Ms. Ravage has on several occasions accused XXXXX of aggressive and abusive behavior in her correspondence with Medcor and other officials. However, Ms. Ravage has repeatedly indicated that this alleged pattern of abuse and aggressiveness was motivated by, and began occurring after, Ms. Ravage's alleged October 9, 2009, disclosures. In her Complaint, Ms. Ravage states that "very shortly after" she reported the alleged arm-slapping incident to McCormack, "XXXXX began systematically harassing and undermining [Ms. Ravage]." Complaint at 1. During her deposition testimony, Ms. Ravage stated that XXXXX had started being aggressive to her at some point after Medcor's investigation of the alleged arm-slapping incident had been concluded.[8] Tr. at 16.

While Ms. Ravage claims that she had reported a pattern of abusive, violent, and aggressive behavior on the part of XXXXX during her October 9, 2009, conversation with McCormack, the evidence in the record does not support that claim. In fact, the evidence undercuts it.

Since the record does not contain any reliable evidence supporting Ms. Ravage's contention that she has disclosed information that she reasonably believed revealed a substantial and specific danger to employees or to public health or safety, no reasonable trier of fact could find in her favor on this issue. *Matsushita*, 475 U.S. at 597. Simply put, no rational trier of fact could conclude that a nurse who may have committed simple battery at most presented a substantial and specific danger to employees or to public health or safety. Accordingly, I am granting summary judgment in favor of Medcor on the issue of whether Ms. Ravage has disclosed information that she reasonably believed revealed a substantial and specific danger to employees or to public health or safety.

After reviewing the record as a whole, I find that the record could not lead a rational trier of fact to conclude that Ms. Ravage made a protected disclosure under 10 C.F.R. § 708.5(a) on October 8, 2009. Ms. Ravage does not claim that she has made any other protected disclosures. Tr. at 13. Accordingly, I find that that no rational trier of fact could issue a judgment in favor of Ravage's Complaint under 10 C.F.R. Part 708.

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[8] If XXXXX had in fact started a pattern of abusive behavior prior to the alleged disclosure, it would undercut Ms. Ravage's contention that such alleged abusive behavior was motivated by that protected disclosure.

Summary

As fully discussed above, I have found that the sole disclosure contained in Ms. Ravage's Complaint does not constitute a protected disclosure. Accordingly, I find that Medcor's Motion for Summary Judgment should be granted, and that Ms. Ravage's Cross-Motion and Complaint should be dismissed.

It Is Therefore Ordered That:

(1) The Motion for Summary Judgment filed by Medcor, Inc. on November 12, 2010, Case No. TBZ-0102, be and hereby is granted as set forth in paragraph (3) below.

(2) The Cross-Motion for Partial Summary Judgment filed by Mary Ravage on November 12, 2010, Case No. TBZ-0102, be and hereby is denied.

(3) The Complaint filed by Mary Ravage against Medcor, Inc. on January 21, 2010, Case No. TBH-0102, be and hereby is dismissed.

(3) This is an Initial Agency Decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the 15th day after receipt of the decision in accordance with 10 C.F.R. § 708.32.

Steven L. Fine
Hearing Officer
Office of Hearings and Appeals

Date: January 6, 2011