United States Department of Energy
Office of Hearings and Appeals

In the Matter of Dalena Tripplet	)		
	)		
Filing Date: June 12, 2023	)	Case No.:	WBH-23-0003
	)		
_____	)		

Issued: April 16, 2024

_____

Initial Agency Decision

_____

This decision considers a complaint (Complaint) filed by filed by Dalena Tripplet on June 12, 2023, against Hanford Mission Integration Solutions, LLC (HMIS) under the Department of Energy's (DOE) Contractor Employee Protection Program and its governing regulations set forth at Part 708 of Title 10 of the Code of Federal Regulations (Part 708). Ms. Tripplet alleges that HMIS terminated her employment in retaliation for making protected disclosures under Part 708. For the reasons set forth below, I find that Ms. Tripplet is not entitled to relief.

I. Background

A. The DOE Contractor Employee Protection Program

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. Criteria and Procedures for DOE Contractor Employee Protection Program, 57 Fed. Reg. 7,533 (Mar. 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, unlawful, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. *Id.*

Part 708 prohibits DOE contractors from retaliating against an employee because that employee has engaged in protected activity, such as disclosing 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 public health or safety, or fraud, gross mismanagement, gross waste of funds, or abuse of authority. 10 C.F.R. § 708.5(a). Employees are also protected from retaliation for refusing to participate in an activity, policy, or practice if the employee believes that doing so would violate a Federal health or safety law or cause the employee to have a reasonable fear of serious injury to themselves or others, provided that the employee first asks the contractor to correct the violation or remove the danger. *Id.* at §§ 708.5(c), 708.7(a). 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 retaliated against in violation of Part 708 may file a whistleblower complaint with DOE. *Id.* at § 708.11. Complaints are investigated by an investigator with the Office of Hearings and Appeals (OHA), followed by a hearing conducted by an OHA Administrative Judge, and an opportunity for review of the Administrative Judge's Initial Agency Decision by the OHA Director. *Id.* at §§ 708.22, 708.25, 708.32.

B. Procedural History

Ms. Tripplet filed the Complaint on June 12, 2023. Ex. H at 8. In the Complaint, Ms. Tripplet alleged that she engaged in activity protected under Part 708 when she disclosed to a coworker, Benjamin Culver, her supervisor, Owen Peters, and a senior manager, Paul Vandervert, that she believed that she was "being harassed and bullied" by Sue Dey, an HMIS-contracted instructor, and that Ms. Dey "was trying to intimidate [her]." *Id.* at 5–6, 8. Ms. Tripplet alleged that she had been "wrongly retaliated against and terminated" for her disclosures. *Id.* at 6.

An OHA investigator conducted an investigation concerning the matters alleged in the Complaint and, on December 11, 2023, issued a report of investigation (ROI). Ex. G at 1. The ROI indicated that Ms. Tripplet alleged to the investigator that her disclosures concerning Ms. Dey's alleged creation of a hostile work environment revealed both a substantial and specific danger to employees based on the impact of Ms. Dey's behavior on her health and a substantial violation of a law, rule, or regulation against such conduct. *Id.* at 11–12. Ms. Tripplet also raised an allegation not stated in the Complaint that she had disclosed a substantial violation of a law, rule, or regulation when she told Mr. Peters that Ms. Dey had used unauthorized instructional materials in teaching the first aid course. *Id.* at 12–13.

On December 11, 2023, the OHA Director appointed me as the Administrative Judge for this case. I held a hearing concerning this matter March 11–12, 2024. Ms. Tripplet offered eight exhibits (Exs. A–H) and HMIS offered eleven exhibits (Exs. 1–11), all of which were received into the record.[1] Ten witnesses, including Ms. Tripplet, testified at the hearing. Hearing Transcript, OHA Case No. WBH-23-0003 (Tr.) at 3, 176. I invited the parties to submit written closing arguments on or before April 8, 2024, and, upon receipt of each party's closing arguments (Tripplet Closing Brief and HMIS Closing Brief), closed the record.

C. Factual Background

DOE contracted with HMIS to provide numerous services at the Hanford Site. Ex. G at 1; Ex. H at 84. Among these services, HMIS manages the Hazardous Materials Management and Emergency Response (HAMMER) training facility, which develops and delivers safety and emergency response training to personnel at the Hanford Site as well as to a variety of federal, state, and local customers. *See* Tr. at 228 (reflecting testimony of the HAMMER Director at the

[1] Ms. Tripplet objected to the admission of several of HMIS's exhibits. I overruled those objections on the record at the hearing for the reasons set forth in the hearing transcript. Tr. at 6.

hearing). In November 2021, HMIS hired Ms. Tripplet as an Activity Manager at HAMMER. Ex. H at 93–94. Prior to being hired as an Activity Manager, Ms. Tripplet had worked at HAMMER under HMIS and a predecessor contractor since 2014. *Id.* at 97.

As an Activity Manager, Ms. Tripplet was responsible for the Emergency Response Program. Ex. G at 3; Tr. at 117. The Emergency Response Program included trainings in first aid, bloodborne pathogens, and fire watch. Ex. G at 3; Tr. at 114. As Activity Manager, Ms. Tripplet's duties included developing and implementing course materials, overseeing course instructors, and ensuring that classrooms and equipment were maintained. Ex. G at 3; Ex. H at 99–100, 105. Although Ms. Tripplet was responsible for overseeing the various classes in her portfolio, she was not the supervisor of record for any of the course instructors. Ex. G at 3. The course instructors during the period relevant to this decision were Sue Dey, Sharon Burns, Dennis Humphreys, and Emmitt Jackson. *Id.*; Tr. at 118. Ms. Tripplet and the course instructors reported to Mr. Peters, HMIS's Industrial Safety Training Program Manager who was responsible for overseeing several Activity Managers in addition to Ms. Tripplet. Ex. G at 3; Ex. H at 94, Tr. at 66–67, 117. Mr. Peters reported to Mr. Vandervert, the Director of HAMMER. Ex. G at 7; Tr. at 72, 227–28.

HAMMER first aid classes are taught pursuant to guidelines and using training materials developed by Health and Safety Institute (HSI), an organization that provides training programs to business clients. Tr. at 18–19 (reflecting Ms. Burns' testimony at the hearing concerning HSI); Ex. 1 at 10. HSI has published a Training Center Administrative Manual (TCAM) containing "standards and guidelines . . . for quality assurance and performance improvement of HSI, its approved Training Centers, authorized Instructors, and Instructor Trainers." Ex. 1 at 10. All instructors of HSI courses must be associated with an HSI-certified training center that operates pursuant to the TCAM. Tr. at 18. Additionally, HSI publishes an instructor guide describing how HSI-certified first aid classes are to be taught, including but not limited to specifying course duration, instructional materials, and content. Ex. C. HAMMER bloodborne pathogen classes are taught pursuant to a HAMMER-developed curriculum and are not certified by HSI. Tr. at 16–17, 71.

In approximately March 2022, Ms. Tripplet and Ms. Dey experienced a disagreement regarding the appropriate length of time in which to teach "refresher" first aid classes for students who had previously completed the course. *Id.* at 130; Ex. G at 4. According to Ms. Tripplet, Ms. Dey communicated her disagreement with the duration of the classes in a "forceful, direct, bullying style." Ex. G at 4. Ms. Tripplet perceived that "it was hostile from March 20 on, working with [Ms. Dey], because she did not want to . . . follow the required changes." Tr. at 131. Ms. Tripplet alleged at the hearing that she disclosed her perception that "[it was] becoming a hostile environment" to Mr. Peters in March 2022. *Id.* However, Mr. Peters denied recollection of Ms. Tripplet having made such a claim until late 2022. *Id.* at 88–89 (reflecting Mr. Peters' testimony that he recalled Ms. Tripplet saying that "she was having difficulty working with [Ms. Dey]" in approximately March 2022 but that he did not recall Ms. Tripplet alleging that Ms. Dey was bullying her or subjecting her to a hostile work environment until late 2022); *see also* Ex. D at 1 (reflecting notes prepared by Ms. Tripplet in which she indicated that her "problems" with Ms. Dey began in October 2022). In light of Mr. Peters' denial that Ms. Tripplet disclosed the presence of a hostile work environment at this time, Ms. Tripplet's own notes indicating that her troubles with Ms. Dey began in earnest in October 2022, and the fact that March 2022 was the first

documented occasion on which Ms. Tripplet and Ms. Dey engaged in conflict, I find that Ms. Tripplet likely disclosed conflict with Ms. Dey to Mr. Peters but not the presence of a hostile work environment at this time.

In approximately June or July of 2022, Mr. Peters directed Ms. Tripplet to teach first aid classes. Tr. at 67–68. Ms. Tripplet was teaching bloodborne pathogens and fire watch classes at this time, but she had "stepped away" from first aid classes to allow other instructors to familiarize themselves with the latest HSI training materials. *Id.* at 118–19. Mr. Peters directed Ms. Tripplet to return to teaching first aid because he believed that she had been out of the classroom for "too long" in her role as an Activity Manager and that it was important for her "to get back into the classroom so she could teach the material that she was expected to evaluate." *Id.* at 67–68.

At some point in 2022, Ms. Tripplet asked Ms. Burns and Ms. Dey to assist her in updating the bloodborne pathogens class. *Id.* at 121. For the updates, Ms. Tripplet planned to "spice up the slides, and throw in a new hands-on activity." *Id.* On October 12, 2022, Ms. Dey requested a copy of HMIS's exposure control plan in connection with this project. Ex. H at 208. In response to this request, Ms. Tripplet sent Ms. Dey an e-mail indicating that "[w]e train employees on OSHA requirements and safety, not policies and procedures" and Ms. Tripplet noted that she "[o]nly need[ed] the slides revamped." *Id.* at 207. Later that day, Ms. Dey replied to Ms. Tripplet, indicating that she believed that the exposure control plan was relevant to the learning objectives of the bloodborne pathogens course and saying, "I feel like your response to my request . . . was pretty aggressive and dismissive" and that she would prefer not to participate in updating the course materials "if this is the response I get when asking questions pertinent to the program." *Id.* Mr. Peters perceived that Ms. Tripplet's and Ms. Dey's relationship began to significantly deteriorate following their disagreement regarding the updates to the bloodborne pathogens class. Tr. at 83.

Approximately one week later, Ms. Dey reported to Mr. Peters that she had discovered two "live" epinephrine auto injectors (EpiPens) in the classroom in which she was teaching a first aid class, one of which was a display EpiPen that had been used as a visual aid by other instructors in teaching first aid classes.[2] Ex. 3 at 1; Tr. at 76. Ms. Dey perceived that accidental injection from an EpiPen posed a risk of "tissue damage" or "a possible cardiac emergency," which she believed to be "a serious safety concern." Ex. 3 at 1. When Ms. Tripplet learned that Ms. Dey had disclosed the concern to Mr. Peters rather than herself, she became upset and felt that Ms. Dey was attempting to undermine her. Ex. G at 5; Tr. at 47 (reflecting Ms. Burns' opinion that Ms. Tripplet was unhappy with Ms. Dey for having made the disclosure to Mr. Peters); Tr. at 316 (reflecting Ms. Tripplet's testimony that she perceived that Ms. Dey was "after [her] personally"). On November 2, 2022, Ms. Tripplet called a meeting with the Emergency Response Program instructors wherein she directed them to raise issues related to the Emergency Response Program with her in the future. Tr. at 47, 127; Ex. E at 1.

[2] Ms. Burns, Ms. Tripplet, and Mr. Peters were all aware of the presence of an EpiPen containing an injector and medication in the classroom that had been used as a visual aid in first aid classes for years prior to Ms. Dey's disclosure. Tr. at 37–39, 74, 123–24.

Mr. Peters ordered that the display EpiPen be discharged to resolve the safety risk identified by Ms. Dey. Tr. at 74; *see also* Tr. at 74–75 (reflecting Mr. Peters' testimony that Ms. Dey's account to him of being at risk of accidental injection "kind of freaked me out"). Pursuant to Mr. Peters' determination, Ms. Tripplet had the display EpiPen in the first aid classroom discharged, removed the needle, and labeled it "Training Use Only." Ex. E at 3–4.

On or about November 7, 2022, Ms. Tripplet observed a first aid class being taught by Ms. Dey. Tr. at 136, 152. According to Ms. Tripplet, Ms. Dey used a PowerPoint presentation that had not been produced or approved by HSI. *Id.* at 136. Shortly after having observed the class, Ms. Tripplet disclosed to Mr. Peters that she had observed Ms. Dey using training materials she had not previously seen, and which were not HSI training materials.[3] *Id.* at 136, 64–65. Mr. Peters directed Ms. Tripplet "to look into it, and if you need me to, I'll direct her not to use it as well." *Id.* at 90.

In approximately late November 2022, Ms. Tripplet held a meeting with the Emergency Response Program instructors, which Mr. Peters attended. *Id.* at 77. Mr. Peters perceived that the meeting was "combative," and that Ms. Dey in particular "had a lot to say" about changes to instructional materials being discussed during the meeting. *Id.*

On November 30, 2022, Ms. Dey contacted Ms. Tripplet after learning that she had been removed from nine upcoming classes she was scheduled to teach.[4] Ex. H at 248. In her response, Ms. Tripplet told Ms. Dey that she had asked the HMIS administrative staffer responsible for scheduling to "put [Ms. Tripplet] in place of either you or [Ms. Burns] on the days that I am and here and there is a [bloodborne pathogens] class . . . because I am trying little changes to see if it works. If there was a First Aid class on the same day, I decided to teach the entire day." *Id.*

In November or December 2022, Ms. Burns returned CPR mannequins to a classroom while Ms. Dey was teaching a first aid class and observed Ms. Dey showing a video of lifeguards performing CPR which Ms. Burns believed was not an HSI-authorized training video. Tr. at 24–26; Ex. G at 6. Ms. Burns perceived that the video "was graphic" and believed that it depicted the death of the person receiving CPR, but admitted at the hearing that she did not watch the entire video. Tr. at 24, 28–29, 45–46; *but see* Ex. 2 (reflecting a video of lifeguards successfully providing aid to a person in distress); Tr. at 192 (reflecting the testimony of Mr. Culver, then an HMIS Activity Manager, that he attended a first aid class taught by Ms. Dey in which she showed a video of lifeguards successfully aiding a person on a beach who went into cardiac arrest). Ms. Burns believed that showing an unauthorized training video could potentially result in HMIS's loss of HSI certification of its training center if HSI became aware that its procedures were not being followed. Tr. at 26–28. Ms. Burns communicated her concerns to Ms. Tripplet. *Id.* at 29–30, 136.

[3] During the hearing, Mr. Peters provided inconsistent dates for this alleged disclosure, ranging from September 2022 to early 2023. Tr. at 71, 82, 90, 96–97. In light of the inconsistency of Mr. Peters' account of when the disclosure occurred, I have credited Ms. Tripplet's account of the date of her first disclosure. Ms. Tripplet may have raised this disclosure to Mr. Peters again in connection with a subsequent disclosure concerning Ms. Dey's use of unauthorized instructional materials. *See infra* p. 6.

[4] Ms. Dey's e-mail to Ms. Tripplet references being removed from ten classes. Ex. H at 248. However, HMIS's investigation of the matter concluded that Ms. Dey was removed from nine classes. Ex. 6 at 4.

Ms. Tripplet subsequently disclosed to Mr. Peters that she believed that Ms. Dey was using unapproved training materials for first aid classes. *Id.* at 82, 136. According to Ms. Tripplet, she communicated to Mr. Peters that she did not "know what video [Ms. Dey] was showing," but that she was "going off [Ms. Burns'] experience" and that "[i]f it's very disturbing [] it should not be shown." *Id.* at 166.

On December 19, 2022, Ms. Dey contacted Ms. Tripplet after learning that Ms. Tripplet had scheduled Ms. Burns to teach one of the classes that had been removed from Ms. Dey's schedule to allow Ms. Tripplet to teach. Ex. H at 251. Ms. Dey expressed dissatisfaction that Ms. Tripplet had not offered to return the course to her. *Id.* at 249–50. Ms. Tripplet indicated that she was no longer able to teach the course and that she offered it to Ms. Burns because she "didn't think of [Ms. Dey] first." *Id.* On December 21, 2022, Ms. Dey communicated to Mr. Vandervert that she believed that Ms. Tripplet had removed her from courses she was scheduled to teach in retaliation for her disclosure concerning the EpiPens. Tr. at 228.

Mr. Vandervert referred Ms. Dey's concerns to HMIS's Workforce Relations (WR) office on December 27, 2022, and WR initiated an investigation of the matter. Ex. 6 at 1. WR investigators interviewed witnesses and collected documents relevant to Ms. Dey's allegations. *Id.* at 1–2. Notably, the WR investigation revealed that from November 2022 to February 2023, Ms. Dey was the only contracted instructor to have had scheduled classes rescinded or reassigned despite having been scheduled for a comparable number of courses to Ms. Burns and significantly fewer classes than Mr. Jackson. *Id.* at 3–4.

Ms. Tripplet disclosed to Mr. Peters in December 2022 or January 2023 that she believed that Ms. Dey's behavior towards her constituted a hostile work environment. Tr. at 89. Mr. Peters directed her to tell Mr. Vandervert of her concerns. *Id.* at 146.

In January 2023, Ms. Tripplet shared with Mr. Culver, an HMIS Activity Manager for the Hoisting and Rigging Program, her perception that she was experiencing a hostile work environment. *Id.* at 187–88. She also asked Mr. Culver, who was scheduled to participate in a first aid refresher class taught by Ms. Dey, to "keep an eye [out] and see what materials [Ms. Dey was] using . . . ." *Id.* at 149, 81, 90–91. Mr. Culver attended the training and observed Ms. Dey using a PowerPoint presentation. *Id.* at 195–96. Mr. Culver perceived that Ms. Dey taught the class according to the information provided in the HSI-issued student guide and that the PowerPoint presentation was akin to an instructor's "cue card . . . if she had 3x5 cards in her pocket, it would have been virtually the same." *Id.* Mr. Culver shared his impression of Ms. Dey's class with Ms. Tripplet. *Id.* at 196; *see also id.* at 195–96 (citing Ms. Dey's use of a picture of a bumblebee on screen when discussing anaphylactic shock as an example of an instructional cue).

On January 30, 2023, Ms. Tripplet sent an e-mail to the course instructors indicating that she was considering switching from teaching CPR with each student assigned their own practice mannequin to pairing students and requiring them to share a mannequin. Ex. H at 247. Ms. Tripplet requested that the course instructors share their thoughts on the proposed change. *Id.* Ms. Dey responded as follows: "I like the way we have it set up now. I feel it's more beneficial to have one person per mannequin." *Id.* Ms. Tripplet forwarded Ms. Dey's response to Mr. Peters, characterizing it as "ridiculous" and "[v]ery combative!" *Id.*

In February 2023, Ms. Tripplet met with Mr. Vandervert. Tr. at 230; *see also* Ex. H at 330 (reflecting an e-mail from Mr. Vandervert to the HMIS investigators concerning a meeting with Ms. Tripplet). Ms. Tripplet disclosed to Mr. Vandervert that she believed she was being subjected to a hostile work environment, and cited as examples "that one of her teammates was keeping his door shut, and that she was getting what she described as side-eye[] from different individuals on that team . . . ." Tr. at 230. Mr. Vandervert denied that Ms. Tripplet shared any concerns related to Ms. Dey's use of unauthorized training materials during the meeting. *Id.*

In March 2023, following the completion of the WR investigation, HMIS convened a disciplinary review board (DRB) to determine what action, if any, to take concerning Ms. Tripplet. Ex. 10 (reflecting a report prepared by the DRB). Following review of the matter, the DRB recommended termination of Ms. Tripplet's employment. *Id.* at 5. On March 16, 2023, HMIS terminated Ms. Tripplet's employment and issued her a letter describing the grounds for termination. Ex. 11. In the letter, HMIS indicated that it had terminated Ms. Tripplet's employment for retaliating against Ms. Dey for her disclosure concerning the EpiPens by removing Ms. Dey from nine courses, reassigning at least one of the courses to another subcontracted instructor, and engaging "in a series of other retaliatory acts unbecoming of a Program Manager." *Id.* at 1.

D. Standard of Review

The complainant bears the initial burden of proof to establish, by a preponderance of the evidence, that he or she engaged in protected activity under Part 708 and that the protected activity "was a contributing factor in one or more alleged acts of retaliation against the complainant by the contractor." 10 C.F.R. § 708.29. If the complainant meets this test, the burden then shifts to the contractor "to prove by clear and convincing evidence that it would have taken the same action without the complainant's disclosure, participation, or refusal."[5] *Id.*

A complainant may demonstrate that his or her protected activity was a contributing factor in an act of retaliation through direct or circumstantial evidence. A complainant can demonstrate that a protected disclosure was a contributing factor to an alleged act of retaliation though circumstantial evidence by showing "that the official taking the action knew (or had 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,* OHA Case No. LWA-0001 at 3–4 (1993) (quoting 135 Cong. Rec. H749 (Mar. 21, 1989)); *see also Dr. Shou-Yuan Zhang*, OHA Case No. WBH-17-0011 at 13 (2019) (summarizing OHA decisions concerning the period of time within which a reasonable person could conclude that a disclosure was a contributing factor in a personnel action and noting that such period is usually less than one year).[6]

In evaluating whether a contractor would have taken an adverse action against a complainant, regardless of the complainant's protected disclosures, OHA considers, among other things: "(1)

[5] The clear and convincing evidence standard requires a party to demonstrate that a conclusion is highly probable, which is a heavier burden of proof than the preponderance of the evidence standard but a lighter burden than the beyond a reasonable doubt standard. *Koszola v. FDIC*, 393 F.3d 1294, 1300 (D.C. Cir. 2005) (citing *Addington v. Texas*, 441 U.S. 418, 425 (1979)).

[6] Decisions issued by OHA are available on the OHA website located at http://www.energy.gov/OHA.

the strength of the [contractor's] reason for the personnel action excluding the whistleblowing, (2) the strength of any motive to retaliate for the whistleblowing, and (3) any evidence of similar action against similarly situated employees." *Dean P. Dennis*, OHA Case No. TBH-0072 at 5 (2009) (quoting *Kalil v. Dep't of Agriculture*, 479 F.3d 821, 824 (Fed. Cir. 2007)) (listing factors considered in cases interpreting the Whistleblower Protection Act); *see also Carr v. Soc. Sec. Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999) (adopting the three-factor test to determine whether an employer would have taken a personnel action but for an employee's disclosure under the Whistleblower Protection Act).

II. Analysis

A. Ms. Tripplet's Alleged Protected Disclosures

Ms. Tripplet's alleged disclosures to Mr. Peters, her direct supervisor, and Mr. Vandervert, to whom Mr. Peters reported, were made to appropriate individuals pursuant to Part 708 because Mr. Peters and Mr. Vandervert were in Ms. Tripplet's chain of command. *See Douglas L. Cartledge*, OHA Case No. TBH-0096 at 5–7 (2010) (concluding that a complainant's disclosure to a manager is a disclosure to "the employer" under Part 708). However, Mr. Culver had no managerial responsibilities at the time of Ms. Tripplet's alleged disclosures to him and had no formal responsibilities for receiving disclosures related to complaints of a hostile work environment or improper modifications to Emergency Response Program training materials. Tr. at 207–08. Sharing information concerning safety issues or potential violations of laws with co-workers who have no responsibility for the subject matter of the disclosures does not constitute a protected disclosure under Part 708. *Cartledge*, OHA Case No. TBH-0096 at 7; *see also* Tr. at 207 (reflecting Mr. Culver's testimony at the hearing that he and Ms. Tripplet were "peers" at the time of her alleged disclosures). Thus, Ms. Tripplet's alleged disclosures to Mr. Culver are not protected under Part 708 and I will not consider them below.[7]

1. Disclosures Concerning the Alleged Creation of a Hostile Work Environment

Ms. Tripplet alleges that her disclosures to Mr. Peters and Mr. Vandervert concerning the behavior of Ms. Dey and other personnel towards her revealed a hostile work environment that constituted a substantial violation of a law, rule, or regulation and a substantial and specific danger to employees. Ex. G at 11–12; Ex. H at 5.

[7] Ms. Tripplet alleged during the hearing that she made protected disclosures to the HMIS investigators who investigated her actions related to Ms. Dey. Tr. at 149, 62. Ms. Tripplet did not make this allegation in the Complaint or during OHA's investigation of the Complaint. Ex. G at 15 (indicating that "[t]here is nothing to suggest, nor does Ms. Tripplet assert, that she made a disclosure of any kind to [the HMIS investigators]"); Ex. H at 8 (alleging in the Complaint that she made her disclosures to Mr. Vandervert, Mr. Peters, and Mr. Culver). Accordingly, I will not consider any alleged disclosures by Ms. Tripplet to the HMIS investigators herein. Even had Ms. Tripplet made disclosures to the HMIS investigators as she alleged, it would not have affected my analysis concerning whether the substance of the disclosures was protected under 10 C.F.R. § 708.5.

a. Substantial Violation of a Law, Rule, or Regulation

Ms. Tripplet alleged in the Complaint that her disclosures revealed behavior by Ms. Dey that constituted "a hostile work environment," harassment, and bullying. Ex. H at 5. However, it is not apparent what law, rule, or regulation Ms. Tripplet believed that Ms. Dey's conduct violated. The Complaint, ROI, and closing brief from Ms. Tripplet make no mention of any specific law, rule, or regulation that Ms. Dey's conduct might have violated. *Id.* at 5–10; Ex. G at 11–12; Tripplet Closing Brief at 3–4, 15–19.

Although not directly alleged by Ms. Tripplet, record evidence establishes that HMIS policies prohibit harassment and bullying. Ex. H at 307–08, 316. Noncompliance with an employer's policies could form the basis for a protected disclosure if a "government mandate [] is violated by [] non-compliance with [a contractor's] own internal corporate procedures." *Sherrie Walker*, OHA Case No. WBA-13-0015 at 5 (2014). Ms. Tripplet has not alleged the existence of any government mandate that HMIS's policies are intended to implement, and therefore Ms. Tripplet has not established that she reasonably believed that the policies in question constituted laws, rules, or regulations. However, even if Ms. Tripplet had cited Ms. Dey's conduct and the alleged hostile work environment as having violated these policies and established that the purpose of the policies was to implement a government mandate, I would nevertheless conclude that she failed to establish a protected disclosure under 10 C.F.R. § 708.5(a)(1).

With respect to bullying, HMIS's policies prohibit "[f]ighting, assaulting, bullying, or other threatening and intentionally disruptive verbal or physical misconduct. This includes disorderly conduct, such as the use of abusive, humiliating, or threatening language . . . ." Ex. H at 308. While Ms. Tripplet may have perceived that the numerous instances in which Ms. Dey disagreed with her threatened her standing in the Emergency Response Program, no reasonable person could have believed that these professional disagreements constituted a threat to Ms. Tripplet's personal safety, or that they rose to the level of abusive or humiliating. Accordingly, I find that any belief on Ms. Tripplet's part that she was subjected to bullying by Ms. Dey was unreasonable and unprotected under Part 708.

Turning to Ms. Tripplet's allegations concerning harassment or the creation of a hostile work environment, a hostile work environment is one in which "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21 (1993) (reciting the standard for establishing a hostile work environment under Title VII of the Civil Rights Act) (citations omitted); *see also Yolanda Parker*, OHA Case No. WBH-17-0008 at 9, 19 (2018) (applying the standard enumerated in *Harris* in considering whether a complainant was subjected to a hostile work environment under Part 708). A critical element of establishing the presence of a hostile work environment is a showing that the derogatory conduct forming the basis of the claim is discriminatory. *See Harris*, 510 U.S. at 21 (indicating that the creation of a hostile work environment is unlawful because of Title VII's prohibition against "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.") (citations omitted); *see also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (indicating that "Title VII does not prohibit all verbal or physical

harassment in the workplace; it is directed only at *discriminat[ion]*") (emphasis in original); *Parker*, OHA Case No. WBH-17-0008 at 19 (considering whether any of the actions alleged to constitute a hostile work environment were discriminatory based on the complainant's status as a whistleblower).

Ms. Tripplet could not have reasonably believed that Ms. Dey was subjecting her to a hostile work environment based on her status as a whistleblower before she made her initial disclosure to Mr. Peters on November 7, 2022, following Ms. Dey's October 2022 complaint concerning the EpiPens. Nor has Ms. Tripplet advanced any other theory as to how Ms. Dey's actions might have been motivated by discriminatory animus that could form the basis of a disclosure of a violation of a law, rule, or regulation. Ms. Tripplet suggested in the Complaint and her hearing testimony that Ms. Dey disdained her and other instructors because they lacked Ms. Dey's credentials and knowledge as a nurse. Ex. H at 5; Tr. at 128, 44. However, professional credentials or lack thereof do not make a person part of a protected class. If Ms. Tripplet believed that Ms. Dey was being hostile towards her because Ms. Dey believed that her knowledge and credentials as a nurse made her a superior employee who should not have to take direction from Ms. Tripplet, or for any other reason rooted in non-discriminatory personal animus, it was unreasonable for Ms. Tripplet to believe that Ms. Dey's conduct was illegal because she has not identified any source of law informing her belief. If Ms. Tripplet believed that Ms. Dey's conduct was rooted in an unlawful bias, she has alleged insufficient facts supporting that belief for me to conclude that she reasonably believed that she was subjected to a hostile work environment. In either case, Ms. Tripplet has not brought forth facts to demonstrate that she reasonably believed that she was disclosing a substantial violation of a law, rule, or regulation related to Ms. Dey's conduct.

Even if Ms. Tripplet had reasonably believed that Ms. Dey harbored discriminatory animus towards her, she still could not have reasonably believed that the conduct she disclosed was sufficiently severe or pervasive to alter the terms and conditions of her employment. The e-mail communications cited by Ms. Tripplet as evidence of Ms. Dey's misconduct show that Ms. Dey expressed firm disagreement with Ms. Tripplet on multiple issues but not the intimidation, ridicule, or insult indicative of a hostile work environment. *See Harris*, 510 U.S. at 21. Ms. Tripplet's allegations concerning an employee closing his door or giving her "side eye" are, at most, mere "petty insults" or "vindictive behavior" that are not severe enough to establish a hostile work environment. *See Brooks v. Grundmann*, 748 F.3d 1273, 1278–79 (D.C. Cir. 2014) (holding that experiencing some unprofessional conduct is part of the "ordinary tribulations" of the workplace and is not actionable as a hostile work environment). Moreover, the record contains meager evidence to support the frequency of the conduct by Ms. Dey of which Ms. Tripplet complained. In light of the minimal offense that a reasonable person would have taken from the comments by Ms. Dey which are in evidence, and the lack of evidence that Ms. Dey and Ms. Tripplet had negative interactions on a daily or weekly basis, I conclude that Ms. Tripplet's belief that she disclosed a hostile work environment was unreasonable and therefore not protected pursuant to 10 C.F.R. § 708.5(a)(1).

b. Substantial and Specific Danger to Employees

Ms. Tripplet alleged that she disclosed to Mr. Vandervert that the hostile work environment created by Ms. Dey's conduct caused her to feel ill and unsafe at work. *See* Ex. G at 11 (summarizing

information conveyed by Ms. Tripplet to the OHA investigator). OHA assesses whether a disclosure concerns a danger that is sufficiently "substantial and specific" to be protected under Part 708 by considering: "(1) the likelihood of harm resulting from the danger; (2) when the alleged harm may occur; and (3) the nature of the harm – potential consequences." *Dennis Rehmeier*, OHA Case No. TBU-0114 at 4 (2011) (citing *Chambers v. Dep't of Interior*, 515 F.3d 1362, 1369 (Fed. Cir. 2008)). Ms. Tripplet did not allege that Ms. Dey threatened her with physical violence, nor has she provided any details concerning the illness she alleged that she suffered based on Ms. Dey's conduct or provided evidence that the illness was likely to reoccur. Ms. Tripplet's allusions to physical illness are too vague to assess the nature of the potential harm or whether it was likely to occur. Even had Ms. Tripplet more clearly defined the potential harm, it is unlikely that the effects of stress or discomfort that Ms. Tripplet might have experienced as a result of her interactions with Ms. Dey would be sufficiently substantial to form the basis for a protected disclosure under 10 C.F.R. § 708.5(a)(2). *See Mary Ravage*, OHA Case No. TBH-0102 at 8 (2010) (finding that any injury from a simple battery could not be so substantial as to constitute the basis for a protected disclosure under 10 C.F.R. § 708.5(a)(2)). Accordingly, I find that Ms. Tripplet's belief that Ms. Dey's conduct posed the risk of a substantial and specific danger to employees or public health and safety was unreasonable and her disclosures based on those beliefs were not protected under 10 C.F.R. § 708.5(a)(2).

2. Disclosure Concerning Modification of Course Materials

Ms. Tripplet alleges that her disclosures concerning Ms. Dey's use of course materials other than those provided by HSI concerned a substantial violation of a law, rule, or regulation and a substantial and specific danger to employees. Tripplet Closing Brief at 25–27.

a. Substantial Violation of a Law, Rule, or Regulation

At the hearing, Ms. Tripplet alleged that her disclosures related to Ms. Dey's use of unapproved course materials implicated 10 C.F.R. Part 851 (Part 851). Tr. at 142. In her closing brief, Ms. Tripplet cited to the following provision of Part 851:

> (a) The worker safety and health requirements in this part govern the conduct of contractor activities at DOE sites.
> (b) This part establishes the:
> (1) Requirements for a worker safety and health program that reduces or prevents occupational injuries, illnesses, and accidental losses by providing DOE contractors and their workers with safe and healthful workplaces at DOE sites; and
> (2) Procedures for investigating whether a violation of a requirement of this part has occurred, for determining the nature and extent of any such violation, and for imposing an appropriate remedy.

Tripplet Closing Brief at 26 (citing 10 C.F.R. § 851.1). Ms. Tripplet also submitted as an exhibit DOE Order 426.2, which establishes training criteria for certain contractor personnel employed at nuclear facilities. Ex. A. In her hearing testimony, Ms. Tripplet asserted that she believed that Ms. Dey's use of unapproved training materials could result in HSI decertifying HAMMER's training center. Tr. at 139; *see also* Tr. at 25 (reflecting Ms. Burns' opinion that Ms. Dey's use of

unapproved materials was "potentially putting . . . the certification of the training center in jeopardy").

Ms. Tripplet has not established how Part 851 and DOE Order 426.2 are related to her concerns regarding potential loss of HSI certification. Ms. Tripplet has not identified anything in Part 851 or DOE Order 426.2 specifically requiring that first aid or CPR training be conducted by HMIS pursuant to HSI's curriculum. In the event that HSI decertified the HAMMER training center, there is no information in the record to establish that employees could not receive first aid and CPR training through an internally-developed curriculum, like that used in the bloodborne pathogens course, an external curriculum from an organization other than HSI, or an alternative HSI-certified training provider to fulfill regulatory training requirements. Absent a demonstration that HSI certification was required for the HAMMER training center under Part 851 or DOE Order 426.2, there is no basis to conclude that Ms. Tripplet's disclosures concerning Ms. Dey's alleged non-adherence to HSI training standards constituted a protected disclosure because HSI's standards are not a law, rule, or regulation. *See Sherrie Walker*, OHA Case No. WBA-13-0005 at 5 (2014) (holding that noncompliance with policies or procedures which are not government mandated cannot form the basis for a disclosure under 10 C.F.R. § 708.5(a)(1)).

Even if Ms. Tripplet had established that HSI certification was required by regulation or DOE order, she has not established that she reasonably believed that Ms. Dey's actions constituted a substantial violation of HSI's standards. HSI's TCAM provides that non-HSI training materials "may be used to supplement HSI programs at the discretion of the Training Center Director." Ex. C at 16. Thus, Ms. Tripplet could have authorized Ms. Dey to use the non-HSI training materials at her discretion, provided that Ms. Dey did so in compliance with the TCAM, such as by not shortening courses and clearly differentiating the supplemental materials from HSI training materials. *Id.* (listing requirements for use of supplemental training materials). However, rather than considering whether the materials used by Ms. Dey might have been appropriate as supplemental instructional materials, consulting HSI, or even attempting to view the video she learned of from Ms. Burns, Ms. Tripplet disclosed to Mr. Peters that she believed that Ms. Dey was placing the training center's HSI certification at risk. In light of the temporal proximity between Ms. Tripplet's disclosures and Ms. Dey's complaint regarding the EpiPens, I find it likely that Ms. Tripplet's disclosure to Mr. Peters was motivated by her conflict with Ms. Dey rather than a genuine, informed belief that Ms. Dey was placing the training center's HSI certification at risk.

Regardless of Ms. Tripplet's ability to approve Ms. Dey's use of the supplemental materials, there is insufficient evidence in the record to establish that Ms. Tripplet reasonably believed that Ms. Dey's use of the materials constituted a substantial violation of HSI's standards. Ms. Tripplet claimed that she personally observed Ms. Dey's use of slides that were not HSI approved. Tr. at 163–64. However, Mr. Culver testified, based on his observation of Ms. Dey using the slides in a class, that they were "like cue cards" for Ms. Dey as the instructor and cited as examples Ms. Dey's use of a picture of a bumblebee on screen when discussing anaphylactic shock. *Id.* at 195–96. Given the specificity of Mr. Culver's recollection of the slides, and the lack of specific information provided by Ms. Tripplet to indicate that the slides contained additional information, I credit Mr. Culver's account of the content of the slides. As to the video, Ms. Tripplet never personally viewed it before making her disclosure concerning Ms. Dey's use of unauthorized training materials and relied on Ms. Burns' account of having viewed it in forming her opinion. *Id.* at 136, 66–67.

By her own admission, Ms. Tripplet has never contacted HSI to request approval for the use of supplemental instructional materials.[8] *Id.* at 165. Nor has she articulated any other source of information by which she might have formed the opinion that HSI would have been so opposed to the use of Ms. Dey's supplemental materials as to potentially revoke the training center's certification. In the absence of facts informing Ms. Tripplet's belief that Ms. Dey's use of slides as instructional cue cards and an unapproved video of which Ms. Tripplet had no first-hand knowledge were so substantial as to place the training center's HSI certification at risk of revocation, I find that her belief was too speculative to constitute a reasonable belief.

As the HSI standards are not a law, rule, or regulation, and in any case, I find that there is insufficient evidence to establish that Ms. Tripplet reasonably believed that Ms. Dey's use of the non-HSI slides and video were substantial violations of HSI's standards, I find that Ms. Tripplet's alleged disclosures concerning Ms. Dey's use of unapproved training materials were not protected disclosures under 10 C.F.R. § 708.5(a)(1).

b. Substantial and Specific Danger to Employees

Ms. Tripplet testified that Ms. Dey's use of unapproved materials posed a substantial and specific danger to employees, citing as an example the possibility that students who viewed the video shown by Ms. Dey could be "scare[d] [] to the point where they don't want to assist" someone in need of CPR. Tr. at 168. Ms. Tripplet did not allege this disclosure in the Complaint, and the ROI does not indicate that she did so during OHA's investigation of the Complaint. Ex. H at 5–9; Ex. G at 13 (evaluating Ms. Tripplet's allegation that she disclosed a substantial violation of a law, rule, or regulation and indicating that, in her disclosures to Mr. Peters, Ms. Tripplet merely stated that "Ms. Dey was using her own course materials in teaching . . . [without] additional detail regarding what was changed, how it was changed, or the impact it may have had on the course").[9] As Ms. Tripplet has only definitively raised this alleged disclosure for the first time at the hearing, I find that I lack jurisdiction to consider to consider the alleged disclosure. *See Alison Marschman*, OHA Case No. WBA-13-0011 at 6–7 (2014) (determining that "alleged protected activity[] that is

[8] In March 2023, Mr. Culver assumed the role of Industrial Safety Training Program Manager, previously held by Mr. Peters. Tr. at 181. In that capacity, Mr. Culver directed members of the Emergency Response Program to ask HSI to confirm that HAMMER could use "icebreaker" videos shown by Ms. Dey in her first aid classes which were not provided by HSI, which HSI indicated was permissible. *Id.* at 193. Ms. Tripplet argues that her "belief that [Ms.] Dey show[ed] unauthorized material must have been reasonable [because] [Mr.] Culver . . . contacted HSI to see if [icebreaker] clips shown by [Ms.] Dey were okay with HSI." Tripplet Closing Brief at 25. Ms. Tripplet may be right about the reasonableness of her belief that the videos were unauthorized, but at the same time, Mr. Culver's behavior also demonstrates that she did not reasonably believe the unauthorized material was a *substantial* violation in light of the fact that it could have been easily and readily resolved. Rather than leaping to the conclusion that the use of a video not provided by HSI was a substantial violation of HSI's policies that placed HAMMER's HSI certification at risk without even reviewing the video, as Ms. Tripplet did with the information provided to her by Ms. Burns, Mr. Culver sought additional information to make an informed decision on what non-HSI materials Ms. Dey could use in her classes consistent with the provisions of the TCAM. To the extent that Mr. Culver's actions are relevant to this matter, it is to show the unreasonableness of Ms. Tripplet's belief that she was disclosing a substantial violation.

[9] The ROI makes reference to Mr. Peters and Mr. Vandervert having inferred that changes to course materials could present a safety issue, depending on the nature of the changes. Ex. G at 7. However, there is no indication that Ms. Tripplet alleged that this was the case in her disclosures.

. . . raised for the first time in hearing testimony[] should not be considered by the Administrative Judge").

Even had Ms. Tripplet raised this alleged disclosure in the Complaint or during OHA's investigation, I would still find it meritless. OHA assesses whether a complainant's disclosure of a danger is sufficiently "substantial and specific" to be protected under Part 708 by considering: "(1) the likelihood of harm resulting from the danger; (2) when the alleged harm may occur; and (3) the nature of the harm -- potential consequences." *Dennis Rehmeier*, OHA Case No. TBU-114 at 4 (2011) (citing *Chambers v. Dep't of Interior*, 515 F.3d 1362, 1369 (Fed. Cir. 2008)). While the nature of the harm arising from a person being unwilling to provide CPR in an emergency situation is potentially significant, the occurrence of the harm would depend on the subjective emotional response of a student to the video and would require for that response to persist for an indefinite length of time until that student encountered a situation in which he or she might need to perform CPR. OHA has previously rejected assertions that such speculative, remote harms constitute a disclosure of a substantial and specific danger to employees. *See Edward G. Gallrein, III*, OHA Case No. WBA-13-0017 at 7–8 (2014) (determining that a disclosure of potential harm to students participating in a training exercise based on the students' hypothetical medical or psychological conditions was too speculative to constitute a protected disclosure).

Moreover, Ms. Tripplet had not even observed the video in question when she made her disclosure, relying entirely on second-hand information from Ms. Burns who herself had not fully viewed the video. Any belief Ms. Tripplet had concerning potential harm resulting from Ms. Dey showing the video in a class could not have been a reasonable one in light of the remoteness of the potential harm and the incomplete, second-hand information Ms. Tripplet possessed when she made the disclosure. Accordingly, I find that Ms. Tripplet's disclosure of potential harm resulting from Ms. Dey showing an unapproved video would not have been protected under 10 C.F.R. § 708.5(a)(2) even had she alleged it in the Complaint or during OHA's investigation.

As Ms. Tripplet failed to establish that she made a protected disclosure under Part 708, she has not met her burden to demonstrate that such a disclosure was a contributing factor in one or more acts of alleged retaliation by HMIS. *Id.* § 708.29. Therefore, the burden of proof does not shift to HMIS, and I will not consider whether HMIS would have terminated Ms. Tripplet's employment regardless of her alleged disclosures.

III. Conclusion

For the aforementioned reasons, I determined that Ms. Tripplet has not established that her alleged disclosures were protected conduct under Part 708. Thus, she cannot demonstrate that one or more protected acts contributed to the alleged acts of retaliation by HMIS.

It Is Therefore Ordered That:

(1) The Complaint filed by Ms. Dalena Tripplet on June 12, 2023, OHA Case No. WBH-23-0003 is hereby: DENIED.

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

Phillip Harmonick
Administrative Judge
Office of Hearings and Appeals