In the Matter of **DR. ADOUDA ADJIRI,** **Complainant** **v.** **EMORY UNIVERSITY,** **Respondent**	**Date issued: August 12, 1997** **CASE NO. 97-ERA-36**

APPEARANCES:

DR. ADOUDA ADJIRI, Pro Se
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Apartment 40-D
Decatur, Georgia 30030
For the Complainant

BURTON F. DODD
MAUREEN J. HERNANDEZ
Fisher & Phillips
1500 Resurgens Plaza
945 East Paces Ferry Road
Atlanta, Georgia 30326
For the Respondent

BEFORE: JAMES W. KERR, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER DISMISSING THE COMPLAINT

This proceeding arises under the Energy Reorganization Act of 1974("ERA"), 42 U.S.C. § 5851 (1988 and Supp. IV 1992) and the regulations promulgated thereunder at 29 C.F.R. Part 24 which are employee protective provisions of the ERA or of the Atomic Energy Act of 1954 as amended, 42 U.S.C. § 2011, et seq. The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees at facilities licensed by the Nuclear

Regulatory Commission("NRC") who are allegedly discharged or otherwise discriminated against with regard to their terms and conditions of employment for taking any action relating to the fulfillment of safety or other requirements established by the NRC. This claim is brought by Dr. Adouda Adjiri, Complainant, against her former employer, Emory University, Respondent. A hearing was held in Atlanta, Georgia on June 5, 1997 and June 6, 1997. Both parties were afforded a full opportunity to adduce testimony, offer evidence and submit post-hearing briefs. The following exhibits were received into evidence:

1) Complainant's Exhibits Nos. 2-4, 8, 10, 12-13; and

2) Respondent's Exhibits Nos. 2, 21-25.[1]

Issues

The issues in this proceeding are:

1. Whether Complainant engaged in activities subject to protection under ERA?

2. Whether Respondent terminated Complainant in violation of ERA because she engaged in activities subject to protection under the statute?

Summary of the Evidence

Adouda Adjiri

Complainant testified that she began working for Respondent in November of 1993 as a post-doc in the Biology Department. Complainant has an earned doctorate degree in genetics and physiology. Complainant moved to the Pathology Department in January of 1996 and began working with Dr. Austin in his lab in the VA Medical Center. In January 1996, Complainant noticed certain safety concerns. First, Complainant found that there were no labels on the pipettes, which are tools used to measure the amount of liquid needed for experiments. Complainant explained that the pipette used for radioactivity did not have a label to designate it as such. Complainant complained to her co-worker, Dr. Zhao, about the pipettes and the need to keep them behind a shield because of the radioactivity. Complainant indicated that Dr. Zhao informed

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[1] The following abbreviations will be used in citations to the record: D - Complainant's Exhibit, R - Respondent's Exhibit, and TR - Transcript of Proceedings.

her there were not enough pipettes to set aside a set just for radioactivity. Furthermore, Complainant indicated that there was no container for the radioactive liquid waste, phosphorous or sulfur. When Complainant asked Dr. Zhao where she should dispose of her radioactive liquid waste, she claims he said in the sink. Complainant also explained that at one point she asked Dr. Zhao where to dispose of the phosphorous waste, but he told her to put it in a cardboard box. When Complainant indicated to him that the cardboard box did not shield from radiation, she claims he became angry. Complainant also noted that Dr. Zhao insulted her once when she did not follow his procedure for a gel shift experiment. Complainant reported the incident to her supervisor, Dr. Austin, and informed him about the cardboard box. Complainant claims that Dr. Zhao told her she was “nothing”. TR pp. 28-36, 43.

Complainant then decided to speak with Margaret Williams, the program assistant at the VA, about the insulting remarks and her safety concerns. Complainant was then brought to Patricia Bidgood and recounted the problems with radioactivity. Complainant testified that Ms. Bidgood immediately called the Radiation Safety Office in order to set up an inspection of the lab. The next morning Mr. Phillip and Mr. Davis came to the lab with a Geiger counter to perform their inspection. Complainant admitted that she had not informed Drs. Austin or Zhao that she had requested the inspection. Complainant did note that Dr. Austin was angry with her. Complainant indicated that Messrs. Phillips and Davis put labels on the pipettes and informed Dr. Zhao to keep them behind the shield. Complainant contends that the inspectors saw the cardboard bow which contained phosphorous and did not have a shield and left. Later, Complainant notes that Mr. Davis returned for the cardboard box. Additionally, the Geiger counters were calibrated. Complainant argues that the inspectors found that the second Geiger counter could not be used anymore. Complainant admitted that the complaints she had about safety were resolved in February 1996. TR pp. 36-40, 56.

After the February 1996 inspection, Complainant noted that Dr. Zhao put restrictions on her work in the lab. Complainant explained that Dr. Zhao told her that it was not necessary to turn on a UV light. Furthermore, Complainant contends that she was not allowed to touch anything in the lab without problems. Complainant contends that Dr. Zhao turned off the printer. Complainant admitted that at one point she put a barrier between her bench and Dr. Zhao’s bench to keep him from harassing her. Complainant contends that Dr. Zhao was not happy with the changes that she brought to the lab. However, Complainant admitted that she did not follow the protocol that was shown to her by Dr. Zhao because she had her own protocol. Additionally, Complainant contends that when she attended a meeting in Taos, New Mexico with Dr. Austin she

had to spend five nights with Dr. Austin in the same hotel suite. TR pp. 40, 44-48.

On April 11, 1996, Complainant admitted that she had a confrontation with Dr. Zhao and called 911 while on April 12th she went to the VA police department. The dispute was over the ordering of materials and the playing of a radio in the lab. Complainant explained that on April 11th she turned on the radio in the lab and was told by Dr. Zhao to turn it off. Complainant admitted that when she initially turned the radio on it was on too loud. Complainant contends she turned the radio off and then later tried to turn it on, but Dr. Zhao took the radio from her bench. Complainant also admitted that when she did not want to hear Dr. Zhao insulting her she would put her fingers in her ears. After this incident, Complainant received a phone call from Dr. Austin who asked her to come to his office to discuss the confrontation with Dr. Zhao. Complainant admitted that she hung up the phone on Dr. Austin and refused to go to his office. Instead, Complainant called 911. Complainant testified that in the spring of 1996 she decided to stop communicating with Dr. Zhao because the insults did not stop. Complainant admitted that at one point she did state that she could not be a friend with such a person as Dr. Zhao. TR pp. 74-76, 78-79, 82, 85, 90.

In June of 1996, Complainant attended a meeting in Tony Laracuente's office which was attended by Dr. Zhao, Dr. Austin, and someone from the VA employment relations office. Complainant wanted Dr. Zhao and Jipu Lu sanctioned, but denied that she asked to be put in charge of the lab. On July 10, 1996, Complainant testified that she did have a confrontation with another co-worker, Jipu Lu. After the confrontation, Complainant never returned to work in the lab because she claims it was unsafe after the physical assault. Complainant noted that she informed her boss that she was "grieving" because of the confrontation. TR pp. 86-87, 54-55.

On July 22, 1996, Complainant was informed by Carol McMurtray of her termination. Complainant noted that she had an appointment with Ms. McMurtray on July 22nd and was surprised with the termination decision. Complainant testified that she did not take the termination notice from Ms. McMurtray, but the notice was sent to her by certified mail. Complainant admitted that she did not make any complaints to any federal or state agencies about safety violations occurring in the lab until after she was fired. Complainant admitted that she did not make a complaint to the Nuclear Regulatory Commission until after she was discharged. On July 24, 1996, Complainant filed a formal grievance. Complainant testified that in her grievance there was no mention of any retaliation due to safety related complaints. Furthermore, when she was interviewed by John Bryan in connection with the grievance

following the discharge, Complainant admitted that she did not tell him about feeling retaliated against because of the safety complaints. TR pp. 41, 48-50, 57, 59-60, 570.

Thomas R. Phillips, III

Mr. Phillips testified at the hearing that he is a health physicist and the Radiation Safety Officer for the VA Medical Center. In February or March of 1996, Mr. Phillips was instructed by Ms. Bidgood to inspect the lab. Mr. Phillips noted that Ms. Bidgood informed him that a researcher in the lab had expressed a concern, but he could not recall if he was told who exactly made the complaint. Mr. Phillips was accompanied by James Davis, the assistant Radiation Safety Officer. Mr. Phillips indicated that he was told to check the pipettes that were outside the radiation work area and the radioactive waste container. Mr. Phillips also surveyed the lab for any other radiation safety problems. Mr. Phillips informed the lab that the pipettes should be kept in the area marked off with the radioactive tape. Mr. Phillips did inspect the lab with a Geiger counter and only found contamination in the clean area where the pipettes were located and in the radiation marked-off area which would be expected. Mr. Phillips recalled that the phosphorous waste was being put on the floor under the counter, but he did tell the lab that the box should be put back enough so that the whole lid portion was completely under the counter. Mr. Phillips testified that there was a cardboard box behind plexiglass with a radioactive symbol printed on it which was used to store radioactive waste. Mr. Phillips did find that the plexiglass was adequate to shield from radiations coming from the cardboard box. Mr. Phillips added that the cardboard box would shield some fraction of the radiations, but the plexiglass shield was like a secondary barrier. Mr. Phillips also informed the lab to add some paper to a bench and gave someone labels to put on the doors of the lab. Mr. Phillips testified that he could not recall whether he saw a container for any liquid waste in the lab. TR pp. 104-113, 116, 119-120, 123.

Mr. Phillips testified that after the inspection Complainant did come to him to discuss the results. Mr. Phillips informed her of the corrective action that had been taken and noted that Complainant did seem satisfied. After this initial complaint, there were no other radiation safety complaints that were received. Mr. Phillips noted that Dr. Austin never complained to him about the inspection in the lab or the report of the radiation concerns made by Complainant. Mr. Phillips indicated that he did not inform anyone at Employer’s Department of Pathology about Complainant’s report of radiation safety concerns. TR pp. 126-127, 133.

James H. Davis

Mr. Davis testified that he is the assistant Radiation Safety Officer at the VA Medical Center. In early March 1996, Mr. Davis assisted his boss, Mr. Phillips, in the inspection of a lab. Mr. Davis indicated that a Geiger counter was calibrated, but he could not recall a counter being “dead”. The only thing that he could recall being concerned about with the inspection of the lab was a pipette that was lying outside the area set aside for radioactive materials and the position of the shields in front of the waste containers. Mr. Davis explained that there was also a quarterly audit in April of 1996 when he examined the record book of the lab which contained all of the use of radioactive material, orders, receipts, disposals, and survey records. Mr. Davis testified that one of the findings of the audit had to do with the wipe surveys. Mr. Davis noted that the blanks were not being placed in the analyzer properly and the results were not being recorded properly in disintegrations per minute. Mr. Davis also recommended a certain protocol on the liquid scintillation analyzer. Another deficiency was the contamination control with the liquid scintillation analyzer. Mr. Davis spoke to Complainant and Dr. Zhao separately informing them how to use the first position in the liquid scintillation analyzer setup so that the results would be correct. Further, Mr. Davis informed Complainant and Dr. Zhao that a survey was not completed until the spot where the activity was high was decontaminated and re-surveyed. TR pp. 144-147, 150-156.

Mr. Davis recalled that in the lab there were two containers which contained sulphur and phosphorous separately. Mr. Davis testified that the container with sulphur was nearly full. Thus, he later removed the sulphur waste. Mr. Davis also recalled there being a plexiglass shielding in the lab. Mr. Davis testified that essentially all of the waste is in a cardboard box or plastic bag. It does not make a difference what the waste is in as long as it has shielding in front of the box or bag. Mr. Davis noted that he did not investigate any other radiation safety concerns by Complainant other than the one investigated in March of 1996. Mr. Davis admitted that he did do three other audits, but the audits are required. Mr. Davis indicated that Dr. Austin never complained to him about the inspection or about Complainant's report of radiation safety concerns. Mr. Davis added that he never informed anyone at Employer's Department of Pathology about Complainant's radiation safety concerns. TR pp. 156-158, 163-164.

Carol McMurtray

Ms. McMurtray testified that she has been Employer's business manager in the Department of Pathology for three years. Ms.

McMurtray noted that Ed Shires is her non-medical supervisor while Dr. John Bryan is her medical supervisor. Ms. McMurtray noted that Complainant began working in Dr. Austin’s lab as a research specialist in January of 1996. Ms. McMurtray testified that Employer did not have a contract of employment with Complainant that specified that she would be employed for any particular time. Ms. McMurtray was involved in Complainant’s initial employment with the department because she reviewed her paperwork and submitted it to human resources. Ms. McMurtray testified that the only hesitancy she had in approving Complainant's hiring was that she was previously a post-doc which is a person who creates their own experiments and works independently in the lab whereas the position of research specialist required the person to report to other people in the lab and had much less independence in terms of creating protocols and exercising experiments. Ms. McMurtray explained that Complainant was an employee of Employer whose position was funded by the funds that came from the VA center. TR pp. 167-172.

Ms. McMurtray testified that a scarce resources contract is a contract developed through the VA that provides VA money to pay for a worker of Employer. Ms. McMurtray noted that Complainant's supervisor in the lab was Dr. Austin. In regard to the contract, the VA hospital maintains an interest in making sure that the research protocols and the promises made in the contract are being carried out because it is the funding of the VA which is being used. Ms. McMurtray noted that Tony Laracuente, the Research Administrator at the VA, was the one who monitored the progress in the laboratories. Ms. McMurtray testified that Mr. Laracuente was concerned about the protocols in Dr. Austin's lab which were not proceeding as quickly as they might need to be in the spring of 1996. Ms. McMurtray noted that she kept in contact with Mr. Laracuente about twice a month about the concerns with Dr. Austin's lab. Ms. McMurtray explained that Mr. Laracuente's concerns involved the personality differences between the members of the lab. Ms. McMurtray asked Mr. Laracuente to talk to Dr. Austin directly about trying to do some counseling with the members of the lab, but that was not successful. Ms. McMurtray was informed about the results of a meeting that Mr. Laracuente called in June of 1996. Ms. McMurtray testified that she was informed that Complainant felt she had been aggressed by Jipu Lu, a co-worker, and felt she could no longer work under the circumstances. Ms. McMurtray was also aware that Dr. Zhao made it clear if things were not resolved after he got back from a vacation that he would start looking for another job. After the meeting, Ms. McMurtray was under the assumption that there was to be an effort on the part of every lab member to try to get along on a more professional basis. TR pp. 173-174, 177-182.

In July of 1996, Ms. McMurtray testified that there was an altercation between Complainant and Ms. Lu regarding a document that Claimant wanted to copy. Ms. McMurtray was informed by Dr. Austin that Complainant had not returned to work after she was asked to cool down from the altercation. Thus, Ms. McMurtray made the decision to terminate Complainant's employment. Ms. McMurtray testified that the people who provided her with the information that influenced her decision to terminate were Dr. Austin and the other workers in the lab. Further, the decision to terminate was endorsed by the human resources division and the dean's office. Ms. McMurtray testified that she did not know that Complainant had made some safety concerns about radioactive material in the past nor was she aware that Complainant had caused an investigation of the lab. On July 23, 1996, Ms. McMurtray informed Complainant about the termination and handed her the termination notice which she refused to take. Ms. McMurtray noted that the reasons for the discharge were the inability to get along with other co-workers, insubordination related to not being willing to communicate with the supervisor, Dr. Austin, and job abandonment. The insubordination referred to Complainant's refusal to talk to Dr. Austin when asked to come to his office while the failure to get along with other co-workers referred to reports that Complainant had been putting her fingers in her ears when other workers in the lab talked to her and the fact that she put up a cardboard barrier as well as the failure to interact appropriately. Ms. McMurtray noted that she was not contacted from anyone in the Radiation Safety Office about anything concerning Dr. Austin's lab. TR pp. 184-188.

When Complainant was informed of the termination, Ms. McMurtray testified that she did not make any complaints of being retaliated against for making safety concerns nor did the letter that Complainant brought with her on July 23rd contain any mention of being retaliated against for making safety concerns. Ms. McMurtray explained that there were two separate notices of termination, but one had job abandonment crossed out because someone in human resources crossed it out in order to allow Complainant to receive unemployment benefits. Ms. McMurtray did receive a call from someone in human resources who asked if it was all right to strike out job abandonment so that Complainant could collect unemployment benefits. Ms. McMurtray agreed with this decision. TR pp. 188-189, 196, 198.

Ms. McMurtray testified that when Complainant applied for the position in the Pathology Department she knew that Complainant's visa would expire in October of 1996. Ms. McMurtray added that she believed Complainant was handling the visa situation on her own because she would have to do the extension of her visa personally. TR pp. 213, 215.

John A. Bryan

Mr. Bryan testified that he is currently the acting Chairman with the Department of Pathology and Laboratory Medicine at the university and held that position during Complainant's employment. Mr. Bryan first met Complainant during the hearing held in connection with her filing of a grievance in August of 1996. Mr. Bryan testified that there were three parts to the grievance. First, Complainant felt she has been insulted and verbally treated aggressively by Dr. Zhao. Second, Complainant complained of alleged sexual harassment by Dr. Austin. Third, Complainant alleged that Ms. Lu, a co-worker, also insulted her and was physically aggressive towards her. Ms. Bryan noted that the grievance was filed after Complainant's termination. Mr. Bryan's responsibility was to review the grievance, interview all the parties concerned, and arrive at a conclusion. Mr. Bryan noted that had he found that the decision by Ms. McMurtray to terminate Complainant was inappropriate he could have countermanded the decision, but that was not the case here. Mr. Bryan interviewed Dr. Austin, Dr. Zhao, and Ms. Lu as well as Complainant. Mr. Bryan noted that Complainant never mentioned feeling that she had been discharged over complaints she had made in the past about radiation safety. Mr. Bryan admitted that Dr. Austin did bring up the issue of radiation safety for the first time at the interview he had with him about the grievance. TR pp. 227-231.

Mr. Bryan noted that Complainant submitted two letters at the same time she submitted her grievance which also did not contain any reference to alleged reprisals for complaining about radiation safety concerns. In regard to her grievance, Mr. Bryan concluded that any situation that needed to be addressed and corrected about the safety concerns was properly handled and taken care of. Furthermore, Mr. Bryan found no evidence to substantiate the sexual or other abuse complaints. As to Complainant's request that she be returned to her position, Mr. Bryan explained that there were three serious problems. First, there was a problem with her inability to communicate effectively with the co-workers in the lab. Second, there was her inability to communicate with Dr. Austin about the lab matters and her work. Third, there was the issue of job abandonment. Mr. Bryan informed Complainant that any one of the infractions alone would have been sufficient grounds for disciplinary action and possible dismissal, but when taken together they constituted a situation in the lab which could no longer be tolerated. Thus, Mr. Bryan denied the grievance. TR pp. 232-234.

Weiguo Zhao

Dr. Zhao testified that he currently works in Dr. Austin's lab at the VA Medical Center as a Specialist 2. Dr. Zhao has worked in the lab since May 1, 1993. Dr. Zhao noted that he has five years of medical school training in China and received a bachelor of medicine which is equivalent to a doctor of medicine in the United States. Dr. Zhao also went to graduate school and received a masters of medicine. Dr. Zhao explained that he is a researcher. Dr. Zhao first met Complainant in December of 1995 when Dr. Austin brought her to the lab because she was applying for a position within the lab. Dr. Zhao informed Dr. Austin that he believed Complainant was the best of the candidates for the position because of her yeast experience which would be the subject of the next project Dr. Austin's lab would be involved in. TR pp. 244, 246-250.

Dr. Zhao explained that he had a good relationship with Complainant at the beginning because he was giving her a lot of help. When asked about Complainant's laboratory skills, Dr. Zhao noted that her skill was poor because she did not know how to make a non-leaking agarose gel or how to assemble the mini-protein gel. Dr. Zhao added that the gel electrophoresis was the basic thing in the lab. When Dr. Zhao assisted Complainant in various projects, he noted that she was impatient and not happy. At the end of January 1996, Dr. Zhao testified that the lab was near completion with a project, but there were just two figures that needed to be completed. Thus, Dr. Austin asked Complainant and Dr. Zhao to assist in the completion of the cis-element paper by completing two figures, the DP1 and DP7 figure. Dr. Zhao added that one figure was given to him while the other was given to Complainant. Dr. Zhao testified that he gave Complainant instructions on how to handle the figure, but he noted that she refused to follow the instructions. Dr. Zhao indicated that he at one point told Complainant that she needed to re-label a probe, but she refused to listen to him. Dr. Zhao stated that he decided to change the isotope that was being used in order to make a better picture. Dr. Zhao thus went ahead and completed both figures with the new isotope which was successful and used in a published article. When Complainant found out that he had done her part, Dr. Zhao testified that she was very angry. TR pp. 252-259, 299.

In early 1996, Dr. Zhao indicated that two radiation safety officers visited the lab. Dr. Zhao believed that the reason the officers came to the lab was because Complainant complained that she was exposed. Dr. Zhao testified that he told her that there was no danger. Dr. Zhao noted that the officers did not find any contamination in the lab. TR pp. 282, 284-285.

After the incident with the figures, Dr. Zhao testified that his relationship with Complainant deteriorated. Dr. Zhao noted that Complainant even put up a cardboard screen for two weeks and would block her ears with her fingers when he tried to communicate to her. Dr. Zhao added that Complainant also tried to blame him for everything. On April 11, 1996, Dr. Zhao described an incident where Complainant was playing a computer game and then turned on the radio while Dr. Zhao was doing an experiment with DNA. So, Dr. Zhao told Complainant to turn off the radio. Complainant did turn the radio off, but did turn the radio back on when she took it to her desk and continued to play the computer game. Dr. Zhao admitted that he was very angry and unplugged the radio and put it in the cupboard. Dr. Zhao testified that Complainant was furious and left the lab for about four hours. When she returned, Dr. Zhao claimed she sat in her chair and continued to play the computer game for about a half hour. At the end of the day, Dr. Zhao typed a letter to Dr. Austin about the incident. TR pp. 259-264.

Dr. Zhao testified that in the time Complainant was with the lab she did not produce any useful materials. After the April 11th incident, Dr. Zhao noted that the situation within the lab became more difficult. Dr. Zhao explained one incident regarding RNA extractions and culture cells. Dr. Zhao noted that it generally takes two weeks to culture cells. But, Dr. Zhao indicated that Complainant put the culture she had grown for two weeks in a glass centrifuge which broke. Dr. Zhao commented that Complainant should have used plastic tubes and saved some cells. Thus, two weeks were wasted because Complainant had to grow the culture all over again. Dr. Zhao added that Complainant wasted another two weeks because she did not have any RNA in the next culture. On June 20, 1996, Dr. Zhao wrote a letter to Dr. Austin about Complainant’s inability to perform her work in the lab. In the letter, Dr. Zhao informed Dr. Austin about the RNA extraction cultures and also discussed chimeric plasmids. Dr. Zhao testified that he finished all three parts of the experiment in two months while Complainant only finished one part. Furthermore, Dr. Zhao produced almost one hundred plasmids while Complainant only did two. TR pp. 266-273, 278.

At the end of June 1996, Dr. Zhao attended a meeting in Mr. Laracuente’s office that was also attended by Complainant, Dr. Austin and Pam Moseley from the university human resources department. Dr. Zhao noted that Complainant interrupted him several times when he was trying to explain the problems in the lab. Dr. Zhao admitted that he told Mr. Laracuente that he did not want to work in the lab if Complainant was also working in the lab. The reasons behind Dr. Zhao’s decision to not work with Complainant anymore were her poor productivity and the dislike between the two. Before Dr. Zhao left for his vacation in China, he gave Ms. Lu

instructions to redo an experiment and not let Complainant see a paper about the experiment because there was a contradiction in the paper. Dr. Zhao explained that he did not want Complainant to use the contradiction in the paper as a weapon against him. TR pp. 274-276, 279-281, 348-349.

Jipu Lu

Ms. Lu testified that she began working as a lab technician at Dr. Austin's lab in October of 1995. Ms. Lu indicated that she has a bachelor's degree in chemistry from China. She also received a master's degree of science from Georgia State University. On July 10, 1996, Ms. Lu recalled an altercation she had with Complainant. The subject of the altercation was a paper that Dr. Zhao had given her to check the result of an experiment in the paper. Ms. Lu noted that Complainant attempted to take the paper from her twice. Ms. Lu had put the paper on her desk, but covered it with a notebook and went to the tissue room. Ms. Lu observed Complainant taking the paper from her desk and asked her to return the paper which she did. Ms. Lu then put the paper in her desk drawer. When Ms. Lu returned to the lab, she saw Complainant going to the copy machine with the paper in her hand. Ms. Lu then told Complainant that the paper was for Dr. Zhao who did not want Complainant to copy it. Ms. Lu again asked for the paper back, but Complainant told her that Dr. Austin had authorized her to copy the paper. Ms. Lu then told Complainant that she could get a copy from the library or from Dr. Austin. But, Complainant did not return the paper. Thus, Ms. Lu admitted that she reached out and took the paper from Complainant's hand and proceeded to go back to the lab. Ms. Lu explained that Complainant was angry and shouting insults to her. TR pp. 368-376.

After the incident, Ms. Lu testified that Complainant called Dr. Austin who then came to the lab. Ms. Lu noted that Complainant apologized to her. Ms. Lu later went to see Mr. Laracuente about the incident. Ms. Lu indicated that she was told to write down exactly what happened. When Ms. Lu went home, she received a phone call from Dr. Austin and informed him some more about the incident. Ms. Lu testified that Complainant never returned to the lab after the altercation. TR pp. 379-386.

Garth E. Austin

Dr. Austin testified that he is an employee of the VA Medical Center and is a faculty member at the university. Dr. Austin received his medical degree from the University of British Columbia and also a PhD in molecular biology. Dr. Austin noted that his laboratory at the VA has never been closed down for any safety

difficulties. At the VA, Dr. Austin is the Chief of Clinical Pathology. As the chief, Dr. Austin is the medical supervisor of the clinical laboratory while Mr. Laracuente is the administrative officer. Dr. Austin testified that there is a merit funding for research which provides one with support for research activities. If the grant is lost, then the lab will be given to somebody else. The grant also supports the salaries of the staff in the lab. In 1996, Dr. Austin explained that he was in about the second year of a three and a half year grant. In January of 1996, Dr. Austin testified that there was a fight between Complainant and Dr. Zhao. Dr. Austin talked to both and told them to try to work together. Dr. Austin noted that Dr. Zhao said he would try to do his best while Complainant said she would be civil, but she would never like Dr. Zhao. In the spring of 1996, Dr. Austin indicated that there were personnel problems leading to hostility and poor working relationships which affected the productivity in the lab. Dr. Austin stated that the biggest lack of productivity involved Complainant's work. Dr. Austin added that Complainant did not produce any useful information used in any publications. TR pp. 392-394, 396-397, 399-403, 408-409.

In January of 1996, Dr. Austin talked to Complainant about her complaint of the danger of being irradiated because she felt there was inadequate shielding. The next morning Dr. Austin received a call that the radiation safety team was coming to inspect the lab. Dr. Austin testified that after the Radiation Safety officers came in the beginning of the year the only other times that they ever communicated any problems to him were at the yearly audits in which there was some problems with the proper reporting of wipes. Dr. Austin testified that he was not angry after the inspection was made on the lab. TR pp. 456-458, 460, 436-437.

Dr. Austin went to both Ms. McMurtray and Mr. Laracuente to inform them of the problems in the lab and lack of productivity. The first time Dr. Austin talked with them was in April 1996 after two altercations in the lab. Dr. Austin described that there were two fights between Dr. Zhao and Complainant. After the first fight, Dr. Austin telephoned Complainant and told her to come see him, but she said no and hung up the phone. After the second fight, Dr. Austin again asked Complainant to come see him because he believed he needed to help her find another job, but Complainant never came to his office. Dr. Austin testified that Complainant accused him of sexual harassment after a trip to New Mexico. There was a claim filed in federal court against Dr. Austin, but it has been dismissed. Dr. Austin noted that Complainant never accused him of mistreating her because she made safety related complaints. After the fight, Dr. Austin began to keep records of anything else that happened in the lab and spoke to personnel in the administrative office, primarily Mr. Laracuente and Ms. McMurtray.

Dr. Austin prepared various reports of contact when any incident occurred in the lab. TR pp. 405-408, 410-411, 434, 441.

On June 1996, Dr. Austin attended a meeting that was called by Mr. Laracuente. The meeting was also attended by Complainant, Dr. Zhao, and someone from the VA office. Dr. Austin noted that the meeting was directed toward trying to resolve the conflict between Complainant and Dr. Zhao, but the meeting was not successful. Dr. Austin explained that Dr. Zhao became upset and said he could not work in the lab unless Complainant was gone. Dr. Austin testified that Complainant replied that she wanted both Dr. Zhao and himself to be "censured". Dr. Austin noted that he basically stopped going to the laboratory from about May 1996 on because it was so stressful that he could not physically take it anymore. TR pp. 412, 414-417.

On July 10, 1996, there was an altercation between Complainant and Jipu Lu. Dr. Austin noted that when he got to the door of the lab he heard an argument going on between Complainant and Ms. Lu. Dr. Austin noted that Complainant told him on the telephone that she had been physically accosted by Ms. Lu. Dr. Austin added that Ms. Lu admitted that she had been trying to get an article back from Complainant. Dr. Austin admitted that he suggested that Complainant copy the article. Dr. Austin did observe a red mark on Complainant's arm. After this incident, Dr. Austin told Complainant to take the next two days off to calm down. Dr. Austin indicated that he did not send Ms. Lu home because she had left the lab crying. Dr. Austin testified that Complainant never returned to work. Dr. Austin received a message from Complainant when he arrived to work on Monday saying that she was on strike and would not return until the lab was made satisfactory for her. Dr. Austin also received a letter from Complainant indicating that she would not be working until things were corrected in the lab. The letter also indicated that if Dr. Austin wanted to contact her he could do it through Carol Mahoney, an administrative worker at the Pathology Department. Dr. Austin admitted that he believed he had some role in the altercation in July of 1996 because he did not know that Dr. Zhao had instructed Ms. Lu not to share the article with Complainant. Dr. Austin added that Complainant did come to his office one day in a rage and was verbally threatening. TR pp. 417-426.

Dr. Austin testified that none of the radiation badges in his lab ever registered any exposure to radioactive materials in 1996. Dr. Austin indicated that he was not aware of any improper disposal of radioactive waste in his lab. As for Complainant's work in the lab, Dr. Austin noted that none of her work was ever used in any published material. Dr. Austin explained that on one paper Complainant's name does appear, but the original paper that

contained one of Complainant's figures had to be re-done. Thus, Complainant's figure was not ultimately used in the paper that was submitted for publication. When comparing the productivity of Complainant and Dr. Zhao, Dr. Austin testified that Dr. Zhao's productivity was greater. Dr. Austin added that the productivity of Ms. Lu was even greater than Complainant's or Dr. Zhao's. Dr. Austin explained that Complainant took a long time to get set up to do an experiment. TR pp. 437, 439-441, 479, 490.

Antonio Laracuente

Mr. Laracuente testified that he has been the Administrative Officer for Research and Development at the VA Medical Center since October of 1994. Mr. Laracuente is basically the head of operations for the research program. Mr. Laracuente indicated that Patricia Bidgood informed him of Complainant's reports of radiation safety concerns. Mr. Laracuente understood that everything was satisfactory in the lab after the inspection of the safety concerns. Mr. Laracuente was not aware of any additional radiation safety complaints made by Complainant to his office. In June of 1996, Mr. Laracuente called a meeting with Complainant, Dr. Zhao, Dr. Austin, and Pamela Moseley, the Employee Relations Specialist at the VA center. Mr. Laracuente called the meeting because he was concerned about the problems in the lab concerning the performance of the contract between Employer and the VA and the problems with the interactions of the workers in the lab. Mr. Laracuente was concerned that Dr. Austin needed to enhance the performance in the lab so that the grant was not put in any jeopardy. At the meeting, Mr. Laracuente testified that no resolution was reached. Mr. Laracuente admitted that Dr. Zhao told him that it was "either her or me" meaning that he would not work with Complainant anymore. After the meeting, Mr. Laracuente concluded that there were irreconcilable differences between Complainant and Dr. Zhao which would indicate that he would have to find a way to get the two to work together in order to gain the performance of the contract. TR pp. 506-511, 516.

On July 10, 1996, Mr. Laracuente noted that Ms. Lu came to his office to report an incident between her and Complainant. Ms. Lu explained that there was some grabbing and insults. Mr. Laracuente advised Ms. Lu to write a report of contact on the incident which was received the next day. Mr. Laracuente spoke to Ms. McMurtray to tell her that they needed to come to some resolution about the situation in the lab because the contract was not being performed. Mr. Larcuente also had concerns about the interpersonal relationships of the personnel in the lab. Mr. Laracuente explained that the contract he was talking about was a scarce medical contract for the services of one FTE, Complainant. Thus, Mr. Larcuente was basically indicating that Complainant was the one

who was not performing since she was the only one in that contract. Mr. Laracuente indicated that he did not inform Ms. McMurtray or anyone else at the pathology department about Complainant's radiation safety concerns. In July of 1996, Complainant did come to see Mr. Laracuente and informed him she was on strike. Mr. Larcuente informed Ms. McMurtray on July 22, 1996 that Complainant had not been present in the lab for the past week. TR pp. 511-512, 517, 521-522, 524, 526, 530.

Patricia F. Bidgood

Ms. Bidgood testified that she has been the program analyst for the VA Medical Center for ten years. As the program analyst, she is responsible for maintaining the budget of each of the grants or proposals. Ms. Bidgood noted that Complainant was hired on a scarce medical collaboration. In the beginning of 1996, Complainant met with Ms. Bidgood with some concerns about the lab. Ms. Bidgood indicated that Complainant was concerned about improper practices with the pipettes. Ms. Bidgood immediately called the Radiation Safety Officer and asked him to inspect the lab. When Ms. Bidgood called the radiation safety office after a couple of days, she was informed by Mr. Phillips that everything had been resolved. Ms. Bidgood testified that Complainant did not make any other safety complaints to her. TR pp. 536-539.

In March of 1996, Ms. Bidgood had another meeting with Complainant concerning Dr. Austin's ability to refund some expenses from a trip they had taken. Ms. Bidgood testified that on the trip to New Mexico Complainant informed her that Dr. Austin's wife had been present until the first week and left thereafter. At that point, Complainant was sharing a suit with Dr. Austin alone. Ms. Bidgood immediately asked Complainant whether Dr. Austin had treated her in an inappropriate manner. Ms. Bidgood testified that initially Complainant told her that Dr. Austin had not bothered her in any form. Then, in April 1996, Complainant returned to inform Ms. Bidgood that she had filed charges against Dr. Austin for harassment. Ms. Bidgood indicated that she told Complainant that she had previously informed her in March that there had been no problems in New Mexico. Ms. Bidgood noted that Complainant became very angry and stormed out of her office. In May 1996, Complainant returned to her office to inform Ms. Bidgood again that she was going to court with Dr. Austin for sexual harassment. Ms. Bidgood again asked Complainant that she had not stated at their first meeting that there was any harassment and was wondering why she had changed her story. Once again, Ms. Bidgood noted that Complainant stormed out of her office. TR pp. 539-540, 542-546.

Discussion and Conclusions of Law

Under the ERA's employee protection provision under which this case is brought:

> (1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or person acting pursuant to a request of the employee)--
>
> (A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);
>
> (B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;
>
> (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;
>
> (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
>
> (E) testified or is about to testify in any such proceeding or;
>
> (F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

42 U.S.C. 5851(a)(1988).

To establish a prima facie case of retaliatory discharge under the whistleblower provision invoked here, a complainant must show that: (1) the complainant engaged in protected activity; (2) the employer was aware of that protected activity; and (3) the employer took some adverse action against the complainant. The complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. Dartey v. Zack Co. of Chicago, 82-ERA-2 (1983). In this case, there is no issue of the fact that Respondent did take some adverse action, termination, against Complainant. The presence or absence of a retaliatory motive is provable by circumstantial evidence even if witnesses testify that they did not perceive such a motive. See Ellis Fischel State Cancer Hosp. v. Marshall, 629 F.2d 563, 566(8th Cir. 1980), cert. denied, 450 U.S. 1040(1981). Circumstantial evidence may raise the inference that a protected activity was the likely reason for an adverse action. Schweiss v. Chrysler Motor Corp., 987 F.2d 548, 549(8th Cir. 1993).

If the employee establishes a prima facie case, the employer has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, nondiscriminatory reasons. The employer bears only a burden of producing evidence at this point. The ultimate burden of persuasion remains with the employee. If the employer rebuts successfully the employee's prima facie case, the employee still has the opportunity to prove that the proffered reason was not the real reason for the employment decision. The employee may succeed in this either by directly persuading the court that a discriminatory reason more likely motivated the employer or by showing indirectly that the employer's proferred explanation is unworthy of credence. The trier of fact may then conclude that the employer's proferred reason for its conduct is a pretext and rule that the employee had proved actionable retaliation for protected activity. However, the trier of fact may conclude that the employer was not motivated, in whole or in part, by the employee's protected conduct and rule that the employee has failed to establish his case by a preponderance of the evidence. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248(1981).

In this case, this Court finds that it need not decide whether or not Complainant engaged in protected activity because there is no evidence that she was discriminated against for any of the safety concerns she voiced in January 1996. The evidence indicates that Complainant was terminated because of her inability to get along with other co-workers, her insubordination in not being willing to communicate with the supervisor, and job abandonment. Mr. Bryan, who conducted the investigation of Complainant's grievance, testified that any of the reasons above alone would have

been sufficient grounds for disciplinary action and possible dismissal, but when taken together constituted a situation in the lab which could no longer be tolerated.

Complainant has failed to make a prima facie case of discriminatory treatment. This Court finds that Respondent has shown by clear and convincing evidence that Complainant was not discriminated against for engaging in any alleged protected activity. Respondent had ample valid and legitimate reasons for the termination. Complainant herself admitted to putting up a barrier between her work bench and Dr. Zhao's bench as well as putting her fingers in her ears when her co-workers tried to communicate with her. Furthermore, Complainant admitted to hanging up the phone on Dr. Austin and refusing to go to his office to discuss the problems in the lab. Additionally, there were two separate altercations which both involved Complainant and two of her co-workers. In regard to the safety complaints made in January of 1996, Complainant admitted that her concerns were resolved in February 1996. Complainant also admitted that she did not make any complaints to any federal or state agencies about safety violations in the lab until after she was terminated. This Court also finds it interesting that when she filed her grievance, she admitted that she did not mention being discriminated against because of her safety related complaints.

Complainant also testified that she made her safety complaints in January 1996, which were all resolved by February. However, Complainant was not terminated until July 22, 1996, almost six months after the safety complaints. In those six months, there were two altercations as well as the putting up of a cardboard barrier and Complainant's action of putting her fingers in her ears. Further, Complainant admitted that she hung up the phone on Dr. Austin at one point when he wanted to discuss the situation in the lab. Complainant also admitted that she did not follow the protocol shown to her by Dr. Zhao because she had her own protocol. Complainant additionally testified that she decided to stop communicating with Dr. Zhao at one point because the insults did not stop. This Court finds that all of these incidents show that Complainant was not in any way discriminated against because of her safety concerns, but was terminated because of her own actions of refusing to get along with her co-workers and supervisor. This Court therefore also finds that Complainant failed to establish any nexus between the safety concerns and termination.

Accordingly, the Court finds that Complainant was terminated as a result of legitimate and valid reasons in no way connected to her safety complaints. Furthermore, there is no evidence that Respondent in any way retaliated or discriminated against Complainant for having engaged in any alleged activity.

Complainant has not established a prima facie case. Therefore, this complaint must be dismissed.

RECOMMENDED ORDER

It is, therefore, ORDERED, ADJUDGED and DECREED that the complaint of Dr. Adouda Adjiri is hereby DISMISSED.

_____

JAMES W. KERR, JR.
Administrative Law Judge

JWK/lp

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for final decision to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. See 61 Fed. Reg. 19978 and 19982(1996).