

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 04 April 2017

CASE NO: 2016-ERA-12

In the Matter of:

PATRICIA BOOKER,
Complainant

v.

EXELON GENERATION COMPANY, LLC
Respondent

ORDER GRANTING MOTION FOR SUMMARY DISPOSITION

Respondent, Exelon Generation Company, LLC, moves for summary dismissal of the complaint filed by Complainant, Patricia Booker, *Pro Se*, under the employee protection provisions of Section 211 of the Energy Reorganization Act of 1974 (ERA). Respondent's motion asserts that the evidentiary record accompanying its motion demonstrates the absence of genuine issues of material fact and that Complainant's complaint cannot prevail as a matter of law.

Section 211 provides that no employer may discriminate against any employee with respect to his compensation, terms, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*). Complainant's complaint asserts that she was harassed by management and had her facility access revoked because she complained to management about her manager filing non-complying documents and because she filed a complaint with the Nuclear Regulatory Commission (NRC).

In order to prove a violation of the ERA, Complainant must demonstrate by a preponderance of evidence that she engaged in protected activity under the ERA, that Respondent knew about this activity and took adverse action against her, and that her protected activity was a contributing factor in the adverse action Respondent took. *Kester v. Carolina Power & Light Co.*, ARB No. 02 007, ALJ No. 2000 ERA 31 (ARB Sept. 30, 2003).

PROCEDURAL HISTORY

Complainant filed her complaint with the Department of Labor (DOL) on June 25, 2014, alleging that Respondent discriminated against her contrary to the employee protection

provisions of Section 211 of the Energy Reorganization Act of 1974 (ERA). On September 28, 2014, Complainant filed a second complaint with the DOL arguing continuing retaliation. By letter dated July 10, 2016, the Department of Labor's Occupational Health and Safety Administration (OSHA) dismissed Complainant's complaints, finding that the preponderance of the evidence does not support her allegations that her protected activity was a contributing factor in any adverse employment actions. On July 16, 2016, Complainant filed an objection to the OSHA findings and requested a hearing before the Office of Administrative Law Judges.

Respondent filed a *Motion for Summary Decision* on February 9, 2017. Complainant filed her *Complainant Response Motion For Summary Judgement* on February 24, 2017. Respondent filed a *Respondent's Reply To Complainant's Response To Respondent's Motion For Summary Decision* on March 3, 2017.

STANDARD FOR SUMMARY DECISION

29 C.F.R. § 18.72 governs the disposition of a motion for summary decision. By its terms, summary decision is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by citing to particular parts of materials in the record, including depositions, electronic stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers or other materials; or by showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

FINDINGS OF FACT

Respondent owns and operates nuclear power plants in Illinois, New Jersey, Pennsylvania, New York and Maryland with corporate offices in Kennett Square, Pennsylvania and Warrenville, Illinois. Respondent operates its nuclear power plants pursuant to operating licenses issued by the NRC.

At all times relevant hereto, Complainant was employed by Respondent as a Maintenance Planning Administrative Coordinator at Peach Bottom Atomic Plant, located in Delta, Pennsylvania. (CR at 16)¹. She began her employment at Peach Bottom as a temporary clerical employee in 1984. Two years later she assumed a permanent full time position as a Junior Stenographer, doing secretarial work. Over the years the title of her position changed to Secretary and then to Administrative Coordinator. (RX 3 at 27-29)². Her duties were regular secretarial, that is, filing, answer phones, reports, performance indicators, payroll, expenses, trips, work order packages and all duties requested. (*Id.* at 33). Her supervisor from 2009 to April, 2014 was Thomas Powell, Planning Manager, Maintenance. (*Id.* at 32). In April, 2014, Powell was transferred to a position of project planning, overseeing employees responsible for

¹ References to Complainant's Response are marked as CR__; Complainant's Exhibits are marked CX__; Respondent's Exhibits are marked as RX __.

² Complainant objects to admissibility of RX 3 because it is not complete. Complainant's objection is overruled. Respondent is not required to offer the full transcript of Claimant's deposition.

completing a multimillion dollar initiative to upgrade plant systems and equipment. (RX 4). John Connelly assumed Powell's former title and duties and became Complainant's supervisor in April, 2014. Complainant worked for Connelly until October 2014. (*Id.* at 33).

Hostile Work Environment

Complainant asserts that she was subject to a hostile environment as a consequence of her taking part in protected activity. Specifically, Complainant believes that she was subjected to a hostile environment because she reported the back-dating of work orders. The Administrative Review Board in *Hoffman v. Netjets Aviation, Inc.*, ARB No. 09-021, ALJ No. 2007-AIR-007, slip op. at 12 (ARB Mar. 24, 2011), set out the elements that a hostile work complaint is required to prove. The Complainant must show: 1) protected activity; 2) intentional harassment related to that activity; 3) harassment sufficiently severe or persuasive so as to alter the conditions of employment and to create an abusive working environment; and 4) harassment that would have affected a reasonable person and did detrimentally affect the complainant. *Hoffman* explained that the “[c]ircumstances germane to gauging a work environment include the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee’s work performance.”

There is no dispute that Complainant engaged in protected activity. In September, 2013, she reported the back-dating of safety-related procedure documents (CR Undisputed fact d). The backdating of documents occurred when worker verification signatures were discovered to be missing many weeks after the work was completed and consequently signatures were added to the date the work was completed without a notation in the record that verification was not initially signed off. (RX 7). Complainant brought the back-dating safety issue to the attention of various persons including Respondent’s Nuclear Oversight (“NOS”), the Maintenance Planning Manager, the Maintenance Director and the Plant Manager. (RX 8 Ans. 5). An IR is a process through which personnel at Respondent’s facilities can identify and gain alignment for resolution of identified issues. (RX 9 1.1). Complainant initiated an Issue Report (“IR”) regarding the back-dating of documents. According to Complainant, the issuance of an IR is not that unusual, and all employees are supposed to write an IR when they recognize an issue that needs to be resolved. (RX 3 at 151). She has been writing IRs since 2007 when it became part of her job. Complainant has issued a number of IRs: 20 of them in 2012, 12 in 2013 and 19 in 2014. (RX 12). Complainant’s IR on back-dating was classified as a level 4, the lowest level of significance, and one of 14,830 IRs initiated in 2013 at Peach Bottom. (RX 11). Complainant apparently saw no reaction to her back-dating IR, and on January 14, 2014, she contacted NOS employee Mathew Miller to determine the status of her IR on back-dating. (RX 8 Ans 4; EX 3 at 155). Miller took Complainant’s IR seriously. (CR Undisputed facts e.). He reviewed the IR and discovered that the IR had been inadvertently closed with no actions taken that addressed the concern in the IR. Miller issued an Assignment Report on January 15, 2014, reporting that the IR was inadvertently closed. Miller discovered that the IR was addressed to Powell who “mistakenly” created the needed action under a different IR while reviewing multiple IRs. Miller discussed the matter with Powell who reopened the IR. Miller’s Assignment Report states that the IR was re-opened and appropriate actions were included in assignment. (RX 13).

Complainant asserts that she tried to discuss the back-dating IR with Powell, her supervisor, after initiating the IR but was “immediately shut down with the comment of ‘the person should have brought it to us instead of taking to NOS.’” Complainant also discussed the issue with Charles Breidenbaugh, Maintenance Director, in January, 2014, after the IR was reopened, and also brought the matter to the attention of the plant manager, Pat Nevin, on February 4, 2014, and then to the Peach Bottom Vice-President on February 6, 2014. (CR at 18i, 19n). All of Complainant’s complaints about the back-dating of the work orders constituted protected activity.

Complainant sent three emails on February 1, 2014, complaining of specific instances of retaliation. Two emails were addressed to Laura Rush, Senior Human Resources Generalist. One complaint she raised was a loss of access to Powell’s email which she considers “chilling” since access was standard for all administrative coordinators. (RX 15). Her second email to Laura Rush complained that binders which she used for “booking” still had tabs on them which she found to be unusual and in retaliation for reporting a fellow employee for a procedure violation. (RX 17). The third email was to Charles Breidenbaugh, Powell’s supervisor, complaining that responsibilities were taken from her and that the reassignment felt like retaliation. (RX 16).

Powell submitted a Witness Statement. His Statement addressed the email access. It stated that it was not a job requirement for administrative assistants to have access to their supervisor’s email and in fact he was one of the few that provided access. The Statement explained that he removed Complainant’s access to his email account and calendar because he suspected that she had been reading email that was intended for him alone. His statement provided reasons for his suspicions. (RX 57). Complainant does not deny that she was reading confidential email. Rather, she argues that Powell has not provided any documentation proving that she accessed confidential email. (CR at 31). In any event Complainant has not shown how lack of access to Powell’s email constitutes a hostile work environment.

Complainant’s complaint over reassignment of work relates to duties involving response to overtime requests by other employees. Powell’s Statement proffers that the decision on assignment of duties involving these overtime requests was outside his responsibilities. Breidenbaugh, Powell’s superior, sent an email on February 1, 2014, on which Complainant was copied, stating that overtime expenses were off track and offering a plan for getting overtime back on track through a protocol for submission and approval. (RX 58). The protocol divided administrative responsibilities among three administrative coordinators. Complainant was not one of the coordinators. Complainant does not explain how the failure to be assigned responsibilities here was a punitive act or constituted a hostile environment, and such is not self-evident.

Complainant also contends that she was subject to a hostile environment on September 25, 2014, during an interaction with Connelly because he “hollered” at her. On that day, Complainant approached Connelly to express concern about an individual that she witnessed fall asleep at a quality control meeting which was attended by Connelly, two of Connelly’s superiors, three maintenance supervisors, Complainant, and the individual who was the subject of Complainant’s complaint. Connelly told Complainant he would look into it. In a Witness

Statement Connelly prepared for the OSHA investigator who was investigating Complainant's discrimination case, Connelly asserts that he interviewed everyone including the people sitting next to the individual, but that no one saw him being inattentive. "I called security, site access, and HR in a conference call. Based on my interviews we decided no further action was required." Connelly's assessment saw nothing that made the individual unfit for duty. (RX 5)³. Later the same day, Connelly discussed his investigation with Complainant, explaining that he saw no reason to pull the person's badge. At which time, Complainant started to bring up past instances where the individual was inattentive. According to Connelly, "I made a gesture with my hand and said 'Just stop right there. We're not talking about the past; we're just talking about this specific issue and I want to stay there.'" Connelly's statement continued that Complainant then left his office and a little while later he received a call from HR informing that Complainant was accusing him of yelling at her. Connelly's statement asserts that he does not believe that he yelled at Complainant and checked with persons who sit outside his office who said that they did not hear him raise his voice. (RX 5). Complainant raised this matter the next day by a certified letter dated September 26, 2014, to the CEO of Respondent. (CX 3) Complainant testified by deposition in this summary decision proceeding. When questioned about seeing the person sleeping, she testified that she did not observe him sleeping, but rather being inattentive. (RX 3 at 87).

Brian Zukauckas, Manager, Site Human Resources, investigated Complainant's complaint of Connelly hollering at her. (RX 29)⁴. His Investigation Final Report dated November 6, 2014 concluded that: Complainant recanted her allegation that Connelly hollered, stating that it wasn't fair for her to claim he was loud due to her sensitive hearing. According to Zukauckas, Complainant then raised a new allegation to him that Connelly's behavior of rolling back his chair and raising his hands in the air was intimidating/threatening. Zukauckas' investigative report concluded that Complainant's allegation that Connelly was disrespectful to her was not substantiated, and her allegation that Connelly was very aggressive with her during the September 25, 2014 interaction was unsubstantiated; but rather, Connelly was direct in nature but not aggressive in an attempt to refocus Complainant's attention to that day's inattentiveness instead of any past concerns. (RX 29). Complainant disputes Zukauckas' finding in his investigation report that she recanted her allegation that Connelly hollered at her, although she does agree that she told Zukauckas that she had sensitive hearing. (CR at 23y).

Complainant raised another concern of intimidation by Connelly about a week later. She reports that on October 3, 2014, Connelly came into her cubicle within a foot of her chair and put his arm up on the riser behind her. She recounts being terrified by Connelly being close to her

³ Complainant objects to consideration of RX 5, Witness Statement of John Connelly, because RX 5 is not signed nor dated. Respondent under cover of a letter dated March 3, 2017, resubmitted Witness Statement of John Connelly signed and dated March 22, 2016. Complainant's objection is overruled.

⁴ Complainant objects to consideration of RX 29, Code of Business Conduct Investigations Final Report by Brian Zukauckas, "as a true and factual account of event." Complainant's objection is overruled. Zukauckas filed a Declaration stating that the report was generated pursuant to a regularly conducted activity whenever a formal investigation is conducted as a result of a significant complaint of misconduct lodged by an employee. As such it is a business record exception to hearsay rule under the OALJ Rule of Evidence, 29 C.F.R. 18.803. The investigative findings are relevant as one basis for the findings of Susan Techau and Dr. Barbara Pohlman. Complainant's disagreement with Zukauckas' finding that she recanted her allegation of Connelly hollering at her is noted at p. 5 herein.

with no one around in light of her complaints about the September 25, 2014 incident, her complaints about Connelly in a letter to Respondent's CEO, and an email she wrote to A. Kirk Peterson, Employee Concerns Investigator, complaining about Connelly. CX 3, 20). Connelly's recollection of the October 3, 2014 interaction differs remarkably. His Witness Statement to OSHA states that he requested Complainant to please find him if he received a call from an exchange student from Australia staying at his house as his wife was on a business trip and the student knew to call him only in an emergency. (RX 5). His statement continued that Complainant said she would, then proceeded to shut her cubicle down, get up and leave her cubicle. About five minutes later, Connelly received a call from Zukauckas instructing him not to enter Complainant's work area any more, without explanation. He was told by Zukauckas that any direct communications with Complainant would have to be from outside of her cubicle. On October 7, 2014, Complainant emailed Connelly with a request that two sheets that he had to sign every day – her time sheet and qualification sheet – be moved outside her office. Connelly responded the same day giving her permission to move the sheets and purchase the items she needed such as mail slots. (RX 5).

Zukauckas investigated the matter. His report is critical of Complainant's actions here. He reported that her allegation of feeling threatened by Connelly was unsubstantiated. He agreed that Connelly stood at the entrance to her cubicle with his arm leaned on top of the opening and asked her to page him if a woman with an Australian accent called as this would be his foreign exchange student and his wife was out of town. Complainant does not dispute Connelly's recollection, and Zukauckas found no evidence of intimidating/threatening behavior (verbal, physical or otherwise). Zukauckas' investigation established that Complainant raised the concern immediately to Human Resources by requesting that in the future Connelly speak to her from outside her cubicle rather than inside, and in response, action was taken by HR and the item was closed out with her directly in a matter of minutes. Zukauckas was particularly critical of Complainant continuing to pursue the matter after he thought he had resolved it, as approximately 15-20 minutes after HR addressed her concern, she approached Manager Site Security, Phil Simmons, and complained to him about Connelly. Zukauckas concluded that Complainant was not forthright in her exchange with Simmons as she did not admit to having already reached out to HR although Simmons asked her twice if she had contacted HR, nor was she forthright about the matter being resolved. (RX 22, 30)⁵. Simmons prepared a statement of his involvement in the matter. His statement corroborated Zukauckas's report. In addition, he related that Complainant expressed concerned that the matter was a security issue and Security should be involved. Simmons met with Complainant the next work day and advised her that he had met with HR to discuss her complaint and that there was no security issue. (RX 30).

Complainant has not made a *prima facie* case of showing discriminatory harassment either severe or minor. There is no showing of harassment by Respondent or its personnel but rather reasoned attempts to resolve problems raised by Complainant. Neither the interactions

⁵ Complainant objects to consideration of RX 30, a statement by Simmons, because it is not signed nor dated. Respondent submitted a Declaration of Philip E. Simmons attached as RX 30A to *Respondent's Reply to Complainant's Response to Respondent's Motion for Summary Decision*. The declaration declares under oath that Philip E. Simmons is the author of the typewritten statement at RX 26, and that it is true and correct upon his knowledge and information. Complainant's objection to RX 30 is overruled.

between Complainant and Connelly on September 25, 2014, nor the interaction involving a requested notification of a call from an exchange student from Australia were events that would have been threatening to a reasonable person. Zukauckas' investigation that Connelly's behavior of rolling back his chair and raising his hands was not aggressive and not disrespectful is accepted. Even if Zukauckas' investigation is not credited, the complaints by Complainant of Connelly's behavior of rolling back his chair and raising his hands in the air or speaking to her from inside her cubicle would not be sufficiently threatening to constitute a hostile work environment. Complainant may actually believe that the actions of Respondent subjected her to a hostile work environment. However, her believe is not the gauge. Her burden is to prove such harassment that would have detrimentally affected a reasonable person. She has not shown that here. In *Williams v. Manson & Hanger Corp*, ARB No. 98-030, ALJ No. 1997-ERA-14 (Nov. 13, 2002) the Board emphasized that a Complainant must establish intentional harassment related to protected activity and show that that hostility would have detrimentally affected a reasonable person and actually did detrimentally affect the complainant.

Loss of Access Authorization

Complainant complains that her unaccompanied access authorization (UAA) was withdrawn and thus her employment with Respondent terminated because she filed complaints with the NRC. Without a UAA, Complainant was unable to work within the protected area of Peach Bottom, where she was assigned. To prevail on her complaint that Respondent violated Section 211 of the ERA when her UAA was withdrawn, Complainant must show that 1) she engaged in activity the ERA protects; (2) Respondent subjected her to an unfavorable personnel action; and (3) the protected activity was in fact a "contributing factor in the unfavorable personnel action." 42 U.S.C.A. § 5851(b)(3)(C). *Bobresky v. J. Givoo Consultants, Inc.*, ARB No. 13-001, ALJ No. 2008-ERA-3 (ARB Aug. 29, 2014).

Complainant complained to the NRC about the back-dating of maintenance work orders on February 7, 2014. She filed another complaint on the same day with the NRC alleging retaliation from Respondent for her back-dating complaints. (EX 8 Ans. 5). These two complaints to the NRC constitute protected activity under § 211.⁶

Respondent's Security Access and Access Authorization department notified Connelly by email dated September 2, 2014, that the annual Behavior Observation Program Supervisory Review ("BOP") for his subordinates was due. (RX 21). Connelly performed Complainant's review on September 8, 2014. His BOP of Complainant reported two changes in Complainant's behavior. One behavior change the review reported was her "talking to herself a lot lately" as she will sit at her desk talking out loud to no one. (RX 22). Connelly prepared a statement for this proceeding wherein he stated that Complainant spent a lot of time talking to herself out loud

⁶The NRC subsequently notified Respondent by letter dated October 29, 2015, that its Office of Investigations had initiated an investigation to determine whether an Administrative Coordinator in the Maintenance Planning Group was subjected to discrimination for raising safety concerns and based on documentary and testimonial evidence developed during the investigation, concluded that there was insufficient evidence developed to substantiate that the individual had been discriminated against. (RX 14).

which was distracting to others. He stated that he did not believe her behavior was normal and was not a behavior he saw or heard when she started working for him. He specified that she was definitely not praying, as the statements he heard were similar to: "I'm not going to take this anymore, "somebody's going to pay for this", and "this needs to change; it needs to change now." (RX 5). Although Complainant asserts that Connelly did not have sufficient knowledge of her behavior to form a reasonable opinion in the BOP as he supervised her for less than 365 days, she does not disagree with his description of her behavior. Instead, she responds that her behavior - talking to self, or humming out loud - had not changed and was not different than her peers. (CR at 20v). The second behavior change Connelly noted in Complainant's BOP was that she was going out of her way to avoid contact with certain individuals, as she would change her route on purpose so she didn't have to engage the person. This behavioral change was described by Powell, her prior supervisor, in a statement prepared by him on March 22, 2016:

...I believe Complainant wanted to insulate herself from me. I do not know why she had a change in behavior or what had transpired that she would have wanted to avoid me. I struggled with her change in behavior. I tried to examine events, our day-to-day interactions to understand why, and I could not [come] up with a trigger. There was an obvious change to the point where she would not come into my office. She would stand at the door. Before, it was not common for her to leave "while you were out" notes on my desk. But later she started sticking those notes to my office door. Her avoidance of me continued after John Connelly became manager, and she even avoided exchanging normal pleasantries with me. It came to the point where she even referred to me as the "person who used to sit in that chair." Other people that used to work for me told me she referred to me that way.

RX 57.

Kevin Concannon, is the Senior Authorization Reviewer of Connelly's BOP reviews. (RX 22). Upon review of Connelly's BOP review of Complainant, Concannon sent a copy of the BOP review to Susan Techau, Manager of Fitness for Duty/Access and In-Processing in the Access Authorization Group. (RX 31)⁷. He also contacted Respondent's Medical Review Officer (MRO), Dr. Barbara Pohlman. (RX 59). Dr. Pohlman, as the MRO, has the responsibility to review information regarding Respondent's employees with regard to their fitness for duty and their eligibility for Unescorted Access Authorization (UAA). She also has responsibilities under the BOP program, specifically if an MRO has a concern that an individual may have an impairment that could affect safe operation of the plant, the MRO is responsible for making a recommendation that the individual's UAA should be denied or placed on hold. Dr. Pohlman ordered that, based on the information in Complainant's BOP, Complainant be evaluated by Respondent's Employee Assistance Program (EAP) by September 25, 2014. She did not recommend that Complainant's UAA be withdrawn at that time. (RXs 23, 59). Consequently, Concannon notified EAP on September 15, 2014, of the mandatory referral (RX

⁷ Complainant objects to the consideration of RX 31 on the basis of Susan Techau's qualifications to make determination of fitness for mental illness. Complainant's objection is overruled as Techau did not make a determination of Complainant's mental state. When she placed Complainant's UAA on hold she was relying on the recommendation of Dr. Pohlman who in turn relied on the recommendation of Dr. Kunkle.

24), and notified Connelly on the same date of the referral. Connelly scheduled a meeting for the next day with Complainant and Laura Rush to discuss the BOP evaluation and to inform Complainant that she was required to complete the EAP referral. (RXs 26, 27)⁸. Connelly intended to hold the meeting at 9:00 am on September 26, 2014. However, before he could contact Complainant, he received an email from Complainant, informing him that she would be meeting with the NRC at 9:00 that morning. (RX 27, 28). Connelly postponed the meeting with Complainant until 3:00 that afternoon. Connelly and Rush met with Complainant at 3:00. Connelly explained the change in behavior observations he reported on the BOP, and informed Complainant that she was required to complete an EAP referral. Complainant responded that she was not surprised by Connelly's instructions because she had had a meeting with the NRC that morning. Connelly advised Complainant that the EAP referral had nothing to do with her NRC meeting as he had completed his supervisor review the previous week and he had been informed of the mandatory EAP referral the day before the meeting. (RX 27). Complainant does not dispute Connelly's and Rush's recollection of the meeting or the meeting's scheduling except to assert that in the meeting "Connelly did not tell me what the observations were as clearly denoted in referenced Respondent Exhibit 26." Complainant also replied that she had been informed by a qualified psychologist, Dr. Mary Lou Kunkle, that talking to herself was not abnormal. (CR at 22y, z).

A telephonic meeting was held on October 7, 2014, as a consequence of the BOP assessment of Complainant by Connelly. Attending the meeting besides Connelly, were Zakauckas, Rush and Matt Smith from HR, Techau, Barbara Stevens, Director, Occupational Health and Regulatory Medical Services, and corporate legal counsel. The concerns discussed besides the BOP assessment, were the issues surrounding the exchange student and the inattentive person. A Declaration of Susan C. Techau states that she is "reviewing official" as the term is used in regulations issued by NRC. (RX 31). In response to the information presented during the conference, Techau authorized Complainant's UAA be placed on Administrative Hold while Complainant continued her sessions with EAP. Connelly states that although he provided input, he had no role in the decision to put her access on hold, including making no recommendation. (RX 5). Without the UAA, Complainant would be unable to work within the protected area of Peach Bottom, where she was assigned. Ms. Techau's Declaration avers that she was not aware that Complainant had made allegations of retaliation for raising safety and/or procedural concerns to Respondent, NRC or other government agencies until well after she placed Complainant's UAA on Temporary Hold, and continued the Temporary Hold in place. (RX 31).

Complainant continued her EAP sessions. On October 16, 2014, Beth Aaron, Management Consultant for EAP wrote to Bob Pilkey, Peach Bottom site nurse, Concannon and Dr. Stevens that Complainant was assessed by Dr. Mary Lou Kunkle, Psychologist, on October 14 and 16, 2014, who recommended that Complainant remain off work and attend outpatient

⁸ Complainant objects to consideration of RX 26, one page of notes of John Connelly, because RX 26 is not signed nor dated. Respondent submitted a Declaration of John E. Connelly attached to *Respondent's Reply to Complainant's Response to Respondent's Motion for Summary Decision*. The declaration declares under oath that John E. Connelly is the author of the typewritten statement at RX 26, and that it is true and correct upon his knowledge and information. Complainant's objection is to RX 26 is overruled.

counseling twice a week for three weeks, and that Dr. Kunkle would reassess for return to work in three weeks. (RX 33)⁹. Pilkey, relayed the information to Concannon, by email dated October 21, 2014. Pilkey considered it to be necessary to interview Complainant, in light of the chronic nature of her mental health, to ensure that she be given a proper diagnosis and the appropriate treatment necessary to get well. (RX 34, 35). Based on Pilkey's email, Concannon updated Complainant's UAA to a Temporary Hold on October 21, 2014, as a temporary measure pending outcome of consultations with EAP. (RX 31, 35). Concannon's Declaration dated February 8, 2017, states that he updated Complainant's status to Temporary Hold based solely on information concerning Complainant's behavior, the concerns of Pilkey, the requirements of NRC regulations, and Respondent's procedures implementing those regulations. Concannon's Declaration states further that when he was involved in these decisions he had no knowledge that Complainant had contacted the NRC, raised concerns about nuclear safety, or was engaged in any other protected activities. (RX 35).

A November 3, 2014 status report from EAP to Pilkey, Concannon and Dr. Pohlman informed that Complainant continued to attend outpatient counseling with Dr. Kunkle, who did not feel that Complainant was able to return to work and recommended that she remain off work for the following month and be reassessed the first week of December. (RX 37)¹⁰. A December 13, 2014 status report from EAP to Pilkey, Concannon and Dr. Pohlman recommended that Complainant be returned to work with nuclear access starting December 9, 2014, with accommodations for a three month period, providing that Complainant be able to report to a female manager, her desk be moved near the female manager, and she continue with outpatient counseling upon return to work. (RX 38)¹¹. Status reports from EAP dated January 15, 2015, and February 6, 2015, to Pilkey, Concannon and Dr. Pohlman continued to recommend that Complainant be able to return to work but only with the aforesaid accommodations. The February 6, 2015 report also stated that Dr. Kunkle recommended that her counseling be placed on hold but be resumed upon her return to work. (RX 41)¹².

⁹ Complainant objects to RX 33, a memo from Beth Aaron to Bob Pilkey, Respondent Site Nurse, providing a status report of Dr. Kunkle's assessment of Complainant. Complainant objects that the memo is inadmissible as it is not authenticated by Dr. Kunkle but rather is an opinion of the liaison, Pilkey. Complainant's characterization of the memo as an opinion by Aaron is incorrect. It is not an opinion memo. The memo is her report of Dr. Kunkle's recommendation. According to Pilkey's declaration at RX 61, Aaron is required to provide him with written reports shortly after Complainant's EAP treatment sessions. The memo is an exception to the hearsay rule under § 18.803(a)(6) as a business record of reports made in the regular course of treatment. Importantly, there is no denial by Complainant that this is the course of treatment pursued by Dr. Kunkle.

¹⁰ Complainant objects to RX 37, a memo from Beth Aaron to Pilkey, Concannon and Dr. Pohlman, providing a status report of Dr. Kunkle's assessment of Complainant. Complainant objects that the memo is inadmissible as it is not authenticated by Dr. Kunkle but rather is an opinion of the liaison, Pilkey. Complainant's objection is overruled for reasons set forth at footnote 5.

¹¹ Complainant objects to RX 38, a memo from Beth Aaron to Pilkey, Concannon and Dr. Pohlman, providing a status report of Dr. Kunkle's assessment of Complainant. Complainant objects that the memo is inadmissible as it is not authenticated by Dr. Kunkle but rather is an opinion of the liaison, Pilkey. Complainant's objection is overruled for reasons set forth at footnote 5.

¹² Complainant objects to RX 41, a memo from Beth Aaron to Pilkey, Concannon and Dr. Pohlman, providing a status report of Dr. Kunkle's assessment of Complainant. Complainant objects that the memo is inadmissible as it is not authenticated by Dr. Kunkle but rather is an opinion of the liaison, Pilkey. Complainant's objection is overruled for reasons set forth at footnote 5.

Dr. Pohlman rejected the recommendation from EAP in a letter dated February 27, 2015 to Techau. Dr. Pohlman initially noted Complainant's prior emotional issues: She stated that Complainant:

has had long standing emotional and interpersonal issues but has been sufficiently stable to maintain productivity in the workplace for most of her working career. She did have a medical leave of absence for emotional issues 9-8-10 through 11-8-10 and remained in counseling through mid January 2011. Upon her return to work in November 2010, she remained stable for nearly four years.

Dr. Pohlman's letter then noted Connelly's report of Complainant's changes in her social interactions in his BOP analysis, resulting in a mandatory EAP Evaluation and mental health counseling, advising that Complainant should remain out of the workplace. Dr. Pohlman reasoned that despite being out of the workplace and working with a professional therapist, Complainant appears "unable to achieve her prior level of functioning" in that her therapist recommended that she would be able to return to work only if she could report to a specific female manager and have her desk moved in order to be physically near this specific female manager. Dr. Pohlman found these restrictions to be unacceptable in a secure nuclear environment. She reasoned that it would be impossible to guarantee that a specific manager would be physically nearby at all times and that these conditions show Complainant to be not emotionally stable to return to work, and thus not compatible with the NRC standard of being trustworthy and reliable in a highly regulated workplace. Dr. Pohlman offered hope that additional treatment for Complainant's long standing emotional and interpersonal issues would allow her to achieve her prior level of function. (RX 40). Consequently, Zukauckas wrote to Complainant on February 27, 2015, informing her that Respondent's Medical Review Officer did not accept Dr. Kunkle's recommendation that she return to work because the proposed accommodations of specific supervisor gender or specific supervisor were unacceptable. The letter also stated that Complainant would continue on Short Term Disability until its expiration on April 15, 2015, unless she returned to work before then. (RX 43).

On April 15, 2015, Complainant's short term disability expired and her application for long term disability was approved effective April 15, 2015. Complainant was informed by letter dated January 27, 2016, from Rush that she would be removed from Respondent's payroll on April 15, 2016, if she was unable to return to work, in accord with Respondent's practice of terminating employment after 12 months of LTD leave of absence. (RX 27, 45). Rush's letter also advised that Respondent considers and offers reasonable job modifications or adjustments to qualified employees who are able to work but with medical restrictions, and encouraged Complainant to notify Occupational Health Services of ability to work and to discuss any reasonable modifications that will allow her to perform. The letter included a form for Complainant to fill out if she believed she met the criteria. (RX 45).

Complainant replied to Rush's letter on March 28, 2016, by requesting return-to-work from long term disability, and complaining that Respondent should have permitted her to return to work as she was declared fit by a licensed professional, and cautioning that Respondent's preventing her access could be considered a violation of ADA and NRC regulations. She also asserted that Respondent's MRO was not qualified to make a determination of fitness for mental

illness or as to reasonableness of an accommodation. Complainant also argued that when Respondent denied her requested accommodation they had a legal obligation under the ADA to discuss alternative accommodations to perform essential duties, and she attached a list of accommodations recommended for PTSD. She stated that she has always been available and willing to discuss accommodations but Respondent's personnel have refused to have discussions with her. (RX 46). Zukaukas responded on April 25, 2016, stating that Occupational Health Services had not received any information that she had been released from Long Term Disability coverage and had not received any updated medical information regarding her condition or her ability to return to work. He instructed Complainant to contact Pamela Waldron, Lead Nursing Supervisor, with any updated medical information regarding her ability to be released medically to be return to work. (RS 47). On May 5, 2016, Complainant telephoned Waldron, stating that she seeks to return to work based on the information and recommendations provided by EAP in December 2014, that is, she be permitted to report to a female manager and her cubicle assignment be moved. Waldron signed a Declaration dated February 8, 2017 wherein she states that Complainant had confirmed during the telephone conversation that nothing had changed with regard to her medical or mental health condition and that she had not seen anyone about her condition since February 2015, and took no medication to treat the condition. Waldron's Declaration also stated that, in her role as case manager, she told Complainant that she needed Complainant to provide her with medical documentation that could substantiate her ability to return to work. (RX 48). Complainant also replied to Zukauckas' April 25, 2016 letter which requested updated medical information by stating that there was no update to her medical information, but rather, she had previously submitted appropriate medical information and release to return to work. Complainant again requested that Respondent make arrangements for her return to work as soon as possible. (RX 49).

Matthew D. Smith, Respondent's Director of Human Resources, signed a Declaration on February 8, 2017. His declaration informed that Respondent's employment practice regarding Long Term Disability is that employees on Long Term Disability leave shall be terminated after one year of LTD benefits. Specific to Complainant, Smith's declaration informed that Complainant was approved for LTD benefits on April 15, 2015; that she was informed by letter dated January 27, 2016 from Human Resources that her employment would terminate on April 16, 2016, and instructed Complainant to contact OHS if she believed she was able to return to work; and Complainant was not cleared to return to work and consequently her employment was terminated.

CONCLUSIONS OF LAW

Complainant's argument that her protected activity caused or contributed to Respondent's withdrawal of her UAA is not supported by the record. Rather, the record shows that the UAA was placed on temporary hold by Dr. Barbara Pohlman, Respondent's MRO, the person responsible for reviewing information on Respondent's employees with regard to their fitness for duty and their eligibility for UAA, and the person responsible under the BOP program for determining if the BOP review reveals an impairment that could affect safe operation of the plant. The record shows that the persons responsible for withdrawal of Complainant's UAA were not only authorized but were required by regulation to do so as her actions called into question her emotional or mental condition.

10 C.F.R. § 73.56(a) provides that Respondent, as a nuclear power plant licensee, is required to establish, implement and maintain an access authorization program that provides “high assurance” that individuals who are granted unescorted access are deemed trustworthy and reliable such as they do not constitute an unreasonable risk to public health. Section 73.56(f)(1) requires that the access authorization programs must include a BOP that is designed to detect behaviors or activities that may constitute an unreasonable risk, including detection of illegal drug use, alcohol/legal drug abuse, fatigue, physical or mental illness and other unusual, questionable or aberrant behavior¹³. All individuals who have been granted unescorted access must be subject to an annual supervisor review wherein the individual’s immediate supervisor must report any changes in individual’s behavior that could call into question trustworthiness and reliability. Section 73.56(i)(1)(iv). Respondent adopted its own rules to implement the NRC access authorization program. Respondent rule SY-103-500 § 3.7 provides that under the BOP, the Medical Review Officer is responsible for reviewing supervisor reviews and if the MRO has a concern that an individual has an impairment that could affect safe operation of the plant, the MRO is responsible for making a recommendation that an individual’s UAA should be denied or placed on hold. Once the MRO identifies a potential impairment, the MRO is authorized to refer the individual to the Employee Assistance Program (“EAP”) and must review the documentation provided by EAP to determine whether the individual is sufficiently “trustworthy and reliable” to maintain UAA. SY-103-513, § 3.3.

Here, Connelly was mandated to perform a behavior observation review of Complainant in September 2014, and he was required to report any change of behavior that he detected in his review. Complainant’s behavior of “talking to herself a lot lately” and going out of her way to avoid contact with certain individuals are behaviors that Connelly found to be changes in behavior and thus were required to be reported in Complainant’s BOP. Concannon reviewed Connelly’s BOP of the changes in Complainant’s behavior in his role as the Senior Access Authorization Reviewer. As required by regulation, Concannon sent Complainant’s review form to Susan C. Techau, the “reviewing official” under 10 C.F.R. § 73.56(f)(3), and the MRO, Dr. Barbara Pohlman. As required by SY-103-513, § 3.3, Dr. Pohlman recommended that Complainant complete a mandatory EAP. Techau authorized Complainant’s UAA be placed on Administrative Hold while Complainant continued her sessions with EAP. The EAP Psychologist, Dr. Kunkle, recommended Complainant undergo counseling and be off work. In light of Dr. Kunkle’s recommendation, Complainant’s UAA was placed on Temporary Hold. As the reviewing official, Techau was mandated by § 73.56(h)(1)(i) to determine whether Complainant was sufficiently “trustworthy and reliable” to maintain her UAA. SY-103-513, § 3.3.

Further, there is no showing that Complainant’s protected activity contributed to Dr. Pohlman’s decision to reject Dr. Kunkle’s recommendation in December 2014 and again in February 2015, that Complainant be returned to work with the provision that she report to a

¹³ Aberrant behavior is defined by § 2.1 of SY-103-513 as behavior or performance indicators (including deteriorating performance over time) occurring which deviate from the norms of behavior which have been established by society and/or the Company; or isolated conduct or action which is a significant departure from the prior behavior of the individual.

female manager and her desk be moved near the female manager. Dr. Pohlman's declaration states that she did not become aware of Complainant's allegations of being the subject of retaliation for raising concerns with Respondent and with the NRC until after she had made her recommendations. Her explanation that she did not lift the Temporary Hold because the requested restrictions signified that Complainant's mental health had not stabilized sufficiently to be considered trustworthy and reliable to work in protected areas of a nuclear power plant is in accord with her responsibilities as the MRO. Section 3.3 of rule SY-103-513, provides that the MRO must review the documentation provided by EAP – here the report by Dr. Kunkle - to determine whether the individual is sufficiently “trustworthy and reliable” to maintain UAA.

Complainant consequently went on short term disability. The short term disability expired and she went on long term disability. As previously explained, Complainant's employment was terminated as she did not return to work within 12 months of going on long term disability, in accord with Respondent's practice. During this time Complainant did not seek to return to work without the restrictions imposed by Dr. Kunkle.

Complainant offers two arguments to cast doubt on Dr. Pohlman's recommendation. Complainant asserts that Dr. Pohlman is not qualified to make a determination or recommendation on her fitness for duty. She references 10 C.F.R. § 26.189(a) as support. Section 26.189(a) provides generally that a clinical psychologist is the type of professional qualified to determine the fitness of an individual who may have experienced mental illness, significant emotional stress, or cognitive or psychological impairment. However, Dr. Pohlman did not determine Complainant's fitness in consideration of her mental or emotional state. That determination was made by Dr. Kunkle when she reported that Complainant was fit to return to her job only if she could report to a female supervisor and move her desk near the female supervisor. Dr. Pohlman just applied Dr. Kunkle's determination to Complainant's job with Respondent. Dr. Pohlman made the determination that Complainant's emotional stability, as diagnosed by Dr. Kunkle, would preclude Complainant from being trustworthy and reliable. Dr. Pullman added an additional practical reason for precluding Complainant's return. She questioned whether it would be possible to guarantee that a specific female manager would be physically nearby at all times.

Complainant also asserts, as evidence that she is being discriminated against for whistleblower activity, the fact that she lost her UAA under a BOP on two previous occasions but in both instances she regained her UAA even though her return to work was permitted with accommodation. She references a situation in 2010 where she self-referred as unfit because of mental illness but was permitted to return on a four hour work day for four weeks. Dr. Pohlman addressed Complainant's earlier loss of UAA because of mental health problems and reported that her recommendations here are consistent with her recommendation in 2010. Dr. Pohlman related that in September 2010, Complainant's UAA was placed on hold because she was receiving mental health treatment for anxiety, and that on or about October 2010, Complainant's treating psychologist recommended that she return to work on reduced hours, starting three days a week then at four days a week. Dr. Pohlman informed that she, in turn, recommended Complainant be evaluated under the EAP program, and recommended that Complainant receive an unrestrictive return to work recommendation from her provider before she could return to

work, and that when her return to work without restriction was recommended in November 2010 Dr. Pohlman concurred and recommended that Complainant's UAA be reinstated.

Accordingly, it is determined that Respondent has shown that there is no genuine dispute as to any material fact regarding Complainant's mental health and the decisions made by Respondent's MRO and its reviewing official as a result thereof. Complainant has not established a *prima facie* case that her protected activity caused or contributed to the loss of her UAA, and or the refusal to reinstate her UAA and ultimately her employment with Respondent. Respondent is entitled to a decision as a matter of law. Respondent's Motion to Dismiss is granted.

THOMAS M. BURKE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

The date of the postmark, facsimile transmittal, or e-filing will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110.