

AUG 05 1993

Dockets No. 50-282; 50-306
Licenses No. DPR-42; DPR-60
EA 93-192

Northern States Power Company
ATTN: Mr. D. D. Antony
Vice President, Nuclear
Generation
414 Nicollet Mall
Minneapolis, MN 55401

Dear Mr. Antony:

SUBJECT: U. S. Department of Labor Case No. 93-ERA-12

This refers to the results of a hearing conducted on February 24 through 26, 1993, by an Administrative Law Judge (ALJ) of the U. S. Department of Labor (DOL) into a complaint filed on November 5, 1992, by an individual formerly employed by Burns International Security Service at the Prairie Island Nuclear Generating Plant. The ALJ concluded in a Recommended Decision and Order, dated June 24, 1993, (copy enclosed) that Burns International Security Service wrongfully discharged the Complainant in retaliation for whistleblowing activities, in violation of the employee protection provision of the Energy Reorganization Act of 1974, as amended. Therefore, the ALJ ordered Burns International Security Service to reinstate the complainant and pay back wages and other sums to the individual.

Based on a review of the Recommended Decision and Order, an apparent violation of 10 CFR 50.7, "Employee Protection," was identified and is being considered for escalated enforcement action in accordance with the "General Statement of Policy and Procedure for NRC Enforcement Actions" (Enforcement Policy), 10 CFR Part 2, Appendix C. Accordingly, no Notice of Violation is presently being issued for these findings. In addition, please be advised that the number and characterization of apparent violations may change as a result of further NRC review.

As discussed on July 29, 1993, with Mr. E. Watzl of your staff, you will be afforded the opportunity to attend an enforcement conference regarding this matter. If necessary, a member of my staff will contact your staff to schedule an enforcement conference. Since we understand that the Secretary of Labor will review the ALJ's Recommended Decision and Order on its merits, we are especially interested in hearing: (1) any actions you have taken or plan to take to minimize any potential chilling effect arising from the circumstances related to the employee that might inhibit or prevent your employees or employees of your contractors from raising safety concerns; and (2) the actions you have taken to

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assess the extent to which workers at the Prairie Island Plant may harbor reservations about raising safety concerns and the actions you have taken or plan to take to eliminate or minimize any such reservations. We also request that you provide us a copy of any investigation reports you may have regarding the termination of the individual. You will be advised by separate correspondence of the results of our deliberations on this matter. No response regarding the apparent violation is required at this time.

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice," a copy of this letter and its enclosure will be placed in the NRC Public Document Room.

Sincerely,

Original signed by W. L. Eorney

Edward G. Greenman, Director
Division of Reactor Projects

Enclosure: As stated

cc w/enclosure:

E. L. Watzl, Site Manager,
Prairie Island Site
M. Wadley, Plant Manager
OC/LFDCB
Resident Inspector, RIII Prairie
Island
Resident Inspector, RIII Monticello
J. W. Ferman, Ph.D.,
Nuclear Engineer, MPCA
State Liaison Officer, State
of Minnesota
State Liaison Officer, State
of Wisconsin
Prairie Island, LPM, NRR

bcc w/enclosure:

J. Lieberman, OE
J. Goldberg, OGC
J. Partlow, NRR
D. Funk, RIII
E. Pawlik, OI, RIII

RIII
CO 8/4/93
Orsini

RIII
BCM 8/4/93
McCabe

RIII
Shaffer
8/4/93

RIII
BB
Berson
8/5

DOE
Lieberman

RIII
RWP
DeFayette
8/4/93

RIII
Cah
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8/5/93

RIII
WLS
Greenman
8/5/93

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DATE: June 24, 1993

CASE NO.: 93-ERA-12

In the Matter of:

SUSAN YULE,

Complainant

v.

BURNS INTERNATIONAL SECURITY SERVICE,

Respondent

Appearances:

Carolyn J. Trevis, Esq.
Krause & Rollins
310 Groveland Avenue
Minneapolis, Minnesota 55403
For Complainant

Mark G. Schroeder, Esq.
Briggs and Morgan
2200 First National Bank Building
Saint Paul, Minnesota 55101
For Respondent

Before David A. Clarke, Jr.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the employee protection provision of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851, and its implementing regulations, found at 29 C.F.R. Part 24.

PROCEDURAL HISTORY

Susan Yule, Complainant, was employed by Burns International Security Service (hereinafter "Burns"), Respondent, as an armed security officer, at the Prairie Island Nuclear Generating Plant, in Welch, Minnesota. (T. at 112; RX-10.) Respondent is under

contract to provide security services to Northern States Power Company (hereinafter "NSP"), the plant licensee. (T. at 397.) Burns terminated Ms. Yule's employment on September 3, 1992. (T. at 220; CX-17.)

On September 8, 1992, Ms. Yule filed charges against Burns with the National Labor Relations Board. The charges were dismissed on October 30, 1992. (T. at 302.)

On November 5, 1992, Ms. Yule filed a complaint with the U.S. Department of Labor (hereinafter "DOL"), claiming entitlement to protection under the whistleblower provision of the Energy Reorganization Act. (T. at 223, 302; CX-18.) After investigating the complaint, DOL's Wage and Hour Division determined, on December 4, 1992, that Burns had demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected activity by Complainant. Thereafter, DOL notified Ms. Yule that it would take no further action in the matter. On December 11, 1992, Ms. Yule filed an appeal with the Office of Administrative Law Judges. A formal hearing on the record was held in St. Paul, Minnesota, on February 24 through 26, 1993. Post-Hearing briefs with findings of fact, conclusions of law, and proposed orders were received from Respondent on May 21, 1993, and from Complainant on May 24, 1993.

STATUTE OF LIMITATIONS

In its prehearing brief filed on February 23, 1993, Burns asserted that the complaint filed on November 5, 1992, is barred by the statute of limitations. (Resp. Prehearing Brief at 4.)

On September 3, 1992, when Ms. Yule's employment at the Prairie Island Nuclear Generating Plant was terminated, the applicable law required that a complaint filed under the Employee Protection provision of the Energy Reorganization Act of 1974, as amended, be filed within 30 days of the date of the alleged retaliatory personnel action:

Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor . . . alleging such discharge or discrimination.

42 U.S.C. § 5851(b)(1). Burns asserts that Ms. Yule's complaint was untimely because it was filed more than 30 days after the termination of her employment. (Resp. Prehearing Brief at 6.)

On October 24, 1992, the Comprehensive National Energy Policy Act was enacted, enlarging the time within which a complaint must be filed from 30 days to 180 days. Pub. L. No. 102-486, § 2902, 106 Stat. 2776, 3123-25, 138 Cong. Rec. H12150-51 (daily ed. Oct. 5, 1992). Ms. Yule asserts that the "language of the Act and the legislative history" indicate that Congress intended to apply the 180 day enlargement "to all claims filed on or after October 24, 1992, whether previously barred or not." (Cl. Prehearing Brief at 4 (emphasis omitted).)

Generally, a newly enacted statute of limitations will not revive a claim that had been previously barred, unless the legislature intended for the new period to be applied retroactively. Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1527 (7th Cir. 1990), citing Davis v. Valley Distributing Co., 522 F.2d 827, 830 (9th Cir. 1975), cert. denied, 429 U.S. 1090, 97 S. Ct. 1099 (1977). The issue of whether Congress intended for the 30-day or the 180-day filing period to apply is a question of first impression, in that neither the Secretary of Labor nor the courts have previously decided this issue in the context of the employee protection provision of the Federal whistleblower statutes.^{1/} However, the issue need not be decided at this time because the charge Ms. Yule filed with the National Labor Relations Board operated to toll the 30-day filing period.

The Federal doctrine of equitable tolling of a statute of limitations may be invoked in employment discrimination cases when an aggrieved employee files a timely complaint in the wrong forum. School Dist. of Allentown v. Marshall, 657 F.2d 16, 19-20 (3d Cir. 1981) (construing the Toxic Substances Control Act); Dean Dartey, No. 82-ERA-21, at 6, n.1 (Sec'y Apr. 25, 1983); accord Clara Lastre, No. 87-ERA-42, at 2 (Sec'y Mar. 31, 1988); Kevin A. Garn, No. 88-ERA-21, at 7-8 (Sec'y Sep. 25, 1990); Ralph Harrison, No. 91-ERA-21, at 4 (Sec'y Oct. 6, 1992).

On September 8, 1992, Complainant filed a formal charge against Burns, alleging:

Since January 1, 1992 the above named employer has discriminated against me and is continuing to discriminated [sic] against me on the basis of my union

^{1/} Since the Secretary has found the Federal whistleblower protection statutes to be analogous to the Federal civil rights statutes, see Dean Dartey, supra, at 6-9, the case of Davis v. Valley Distributing Co., supra, may have precedential value, in that the circuit court found that a provision of the March 2, 1972 amendment (which was similar to the language of the Comprehensive National Energy Policy Act), enlarging the period for filing complaints under Title VII of the Civil Rights Act from 90 to 180 days, applied to an employee who filed a claim 135 days after his employment was terminated. 522 F.2d at 829.

involvement and activities, by Supv. harassment, disciplinary actions, and has suppressed my concerns with the Nuclear Regulatory Agencies concerning safeguarded information and activities to the extent of my being suspended from the site and denied access to my employment on August 26, 1992, up to termination of employment, notified 9/3/92.

A statute of limitations may be equitably tolled when "the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum." School Dist. of Allentown v. Marshall, 657 F.2d 16, 19-20 (3d Cir. 1981); Kevin A. Garn, No. 88-ERA-21, at 4 (Sec'y Sep. 25, 1990); Clara Lastre, No. 87-ERA-42, at 3 (Sec'y Mar. 31, 1988); Ralph Harrison, No. 91-ERA-21, at 4 (Sec'y Oct. 6, 1992). The Employee Protection provision of the Energy Reorganization Act, as amended, provides in pertinent part that:

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 any person acting pursuant to a request of the employee):

(A) notified his employer of an alleged violation of this Act or the Atomic Energy Act of 1952 (42 U.S.C. 2011 et seq.);

(B) refused to engage in any practice made unlawful by this Act or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer

42 U.S.C. § 5851(a) (as amended by the Comprehensive National Energy Policy Act, Pub. L. No. 102-486, § 2902, 106 Stat. 2776, 3123-25). In her complaint to the National Labor Relations Board, Ms. Yule complained that her employer discriminated against her and ultimately discharged her because she expressed concerns relating to nuclear regulatory affairs, thus raising the precise statutory claim required under the act. Therefore, I find that Ms. Yule's complaint, filed with the National Labor Relations Board on September 8, 1992, was sufficient to toll the 30-day filing period. Accordingly, the complaint was filed in a timely manner, albeit in the wrong forum, and is not barred by the statute of limitations.

STATEMENT OF THE CASE

Susan Yule began full-time employment as an armed security guard at the Prairie Island Nuclear Generating Plant in September of 1987. (T. at 112.) She worked for CPP Pinkerton and then for American Protection Service, both of which contracted to provide security services at the facility. (T. at 113.) Burns International Security Service (Burns), subsequently became the security service provider at the Prairie Island facility, assuming the contract on January 1, 1992. (T. at 133, 396; RX-10.) As a security officer, Ms. Yule's duties included plant protection, armed responder^{2/}, medical responder and plant access control. (T. at 114.)

In addition to her employment as a security officer, Ms. Yule was involved in union activities. She was a member of the Executive Board of the Minnesota Security Guards' Association and a member of the United Plant Guard Workers of America. (T. at 49, 115-16.) In February 1992 she became president of the union. (T. at 116.) She held that position through at least September 1992, when Burns terminated her employment. (T. at 217.) As a union officer she was often involved in labor disputes between union members and management. (T. at 325, 496-97.)

Ms. Yule began raising plant safety concerns, intertwined with union issues, with NSP and the Nuclear Regulatory Commission (hereinafter "NRC") before being employed by Burns. (T. at 118-19, 245, 282.) Sometime around late 1990 or early 1991, Ms. Yule contacted NSP and alleged that her employer was violating NRC Fitness For Duty guidelines, which pertained to drug and alcohol use and fatigue. (T. at 118, 125, 131, 281-83.) She reported that a fellow security officer was being threatened with loss of his job because of a possible drug and alcohol violation. (T. at 127.) As a result of this contact, Ms. Yule received an Employee Counseling Record marked Supervisor's Discussion and dated December 20, 1990, stating that she had not followed protocol regarding chain of command and that she must direct any questions regarding Fitness of Duty matters to her lieutenant only. (CX-1.)

Ms. Yule also reported to the NRC that security officers were being sent from the Prairie Island facility to the Westcott Plant, a gas facility which was owned by NSP. (T. at 118-19, 123.) She claimed that by transferring the security officers to the non-nuclear facility, personnel were performing gas safety related duties without benefit of sufficient training and that staffing requirements at the nuclear facility were being degraded. (T. at 119-20.) She presented her allegations to Paul Hartman, the site resident NRC inspector, who put her in contact with Donald Funk, the NRC official responsible for security

^{2/} An armed responder is a security officer who carries a firearm.

matters at the Prairie Island facility. (T. at 120-21.) As a result of the allegations, NRC launched a formal investigation, which ultimately resulted in American Protection Service's withdrawal of its nuclear security officers from the gas facility. (T. at 122-24.) As a result of this incident, Ms. Yule was disciplined by her employer. (T. at 124-125.) She received an Employee Counseling Record dated February 26, 1991, and marked Final Written Warning, stating that she had jumped the chain of command by going directly to NSP to discuss the Westcott Security Project. (CX-2.) The report stated that her actions amounted to gross misconduct, behavior unbecoming a security officer, and insubordination, which are terminable offenses. (CX-2.) The report also stated that due to the special nature of the Westcott Project Ms. Yule would not be terminated. (CX-2.) Ms. Yule signed the report indicating that she had read and understood the report. (CX-2.) It was also signed by Victoria Majeski, a shift lieutenant, and Robert Bethea, the Prairie Island Site Security Manager.^{3/} (T. at 131, 133; CX-2.)

Burns began providing security services at the Prairie Island facility on January 1, 1992. (T. at 133, 396; RX-10.) In February 1992, Ms. Yule reported an alleged violation involving the posting of an unarmed guard at an armed guard's station. (T. at 147.) On February 19, 1992, at the shift briefing for the 4:00 p.m. shift, Lt. Majeski assigned Ms. Yule to a containment air lock where personnel would be entering the nuclear reactor building. (T. at 64-66, 147-48, 154, 342.) In order to first obtain a sidearm, Ms. Yule went to the vehicle trap area (a secured gate where trucks enter and exit the plant) to relieve another security guard and obtain her weapon. (T. at 148-50.) The guard at the gate was scheduled to go off duty, and it was expected that Ms. Yule would take the guard's weapon and proceed to the containment entry area. (T. at 148-49, 151.) However, when Ms. Yule arrived at the gate she found traffic lined up. (T. at 148-49, 151.) She called Lt. Majeski for directions and was told to remain at the vehicle trap area to admit the vehicles. (T. at 148, 152.)

Lt. Majeski then consulted with David Hutchison, the NSP Security Shift Supervisor, who authorized Lt. Majeski to post a watchperson, Ron Brinkman, at the containment entry area.^{4/} (T. at 152-53, 303-04, 320, 343.) Learning this and believing that NRC regulations require that the post be staffed by an armed guard, Ms. Yule asked Lt. Majeski why the position was being staffed with an unarmed guard. (T. at 66-67, 155-56, 247-51, 310-13, 321, 344, 357-58, 506.) Not being satisfied with the

^{3/} These incidents occurred before Burns employed Ms. Yule. Burns later employed these same individuals, (T. at 136, 245-46), who supervised Complainant during various other times when she engaged in protected activity.

^{4/} A "watchperson" is an unarmed guard, whereas a "security officer" carries a firearm. (T. at 153, 320.)

Lieutenant's answer, Ms. Yule took the matter to David Hutchson directly. (T. at 155-56, 506.)

Later that evening Ms. Yule had two heated discussions with Lt. Majeski concerning overtime assignments for union workers and use of telephones for personal calls. (T. at 70-71, 157-58, 251-53, 326, 345, 506-07.) After the completion of Ms. Yule's shift, Lt. Majeski overheard Ms. Yule saying "She's been a bitch lately." (T. at 52-53, 159-60, 260, 327-28, 345-46.) Lt. Majeski telephoned Robert Bethea, the Burns Site Security Manager, and reported that "We are having a problem with Officer Yule." (T. at 326.) He in turn discussed the incident with Larry Jones, the Burns Division Support Services Manager. (T. at 403, 445-48.)

After receiving advice from Mr. Bethea, Lt. Majeski verbally warned Ms. Yule and documented the incident. (T. at 327, 356.) On the following day, February 20, 1992, Lt. Majeski summoned Ms. Yule and showed her a Report of Counseling that admonished her for questioning a supervisor's decisions regarding the assignment of staff, questioning NSP policies on posting security officers, using the telephone, and uttering derogatory remarks about her supervisor. (T. at 61-62, 253, 327, 350-52; CX-6.) Lt. Majeski told Ms. Yule that she was being reprimanded on the advice of two NSP supervisors. (T. at 63-64, 87.) Ms. Yule signed the report "under protest." (CX-6.)

Despite the warning, Ms. Yule continued to discuss the matter with co-workers, who went to Lt. Majeski and complained. (T. at 253, 328-30, 345, 348-49.) The Lieutenant reported the complaints to Mr. Bethea. (T. at 253, 328-30, 345, 348-49.) The next day, February 21, 1992, Mr. Bethea reprimanded Ms. Yule. (T. at 165, 329-30.) The second Report of Counseling characterized Ms. Yule's conduct as insubordination toward her supervisor, questioning her supervisor's decisions, and conversing with other crew members about her supervisor's lack of authority. (CX-7.) Ms. Yule signed this report "under protest." (T. at 330; CX-7.) Mr. Bethea told Ms. Yule that she was not to question posting orders and that she was not to discuss the matter with anyone, including fellow crew members. (T. at 165-66, 330.) In addition, he extended her probation period thirty days. (T. at 167, 332; CX-7.)

Ms. Yule spoke to John Oelkers, the NSP on-site quality control person, about the incident, reporting that Mr. Bethea had threatened to terminate her employment. (T. at 170-71.)

On February 23, 1992, Bill Kappes, a quality control person from NSP's corporate headquarters, conducted an investigation at the guardhouse. (T. at 170.) Shortly afterwards, Mr. Hutchson approached Harvey Borgschatz, a security officer and union steward/president, screaming and yelling. (T. at 45-47, 89-91.) He complained that if Ms. Yule persisted in questioning the

decision to replace an armed officer with an unarmed officer, there would be problems. (T. at 45-46, 89-91.) Harvey Borgschatz advised Ms. Yule that Mr. Hutchison was "really hot and mad and threatened that you are going to be down the road." (T. at 172.)

On February 24, 1992, Mr. Bethea again summoned Ms. Yule and disciplined her a third time. (T. at 39, 168-69, 256, 331.) Mr. Bethea told her that on the advice to two NSP security shift supervisors, he was writing her up for continuing the conduct for which she had been disciplined five days earlier. (T. at 173-74.) At that meeting, Mr. Bethea showed Ms. Yule a document, which she had signed when she was hired by Burns, that identified a number of offenses Burns considered "constituting sufficient cause for immediate termination." (CX-3; T. at 174, 260-61, 333-34, 514.) Mr. Bethea told her that she would be fired for insubordinate conduct directed toward a supervisor if she continued to discuss the matter further. (T. at 41-42, 174, 262, 332-33; CX-3.) Mr. Bethea gave Ms. Yule a Report of Counseling, dated February 24, 1992, marked Written Reprimand. (T. 40, 177-78, 331.) It listed the events occurring during the prior days and cited her for "Questionable performance." (CX-8.) She signed the document "under protest." (CX-8.)

In a letter to Mr. Bethea dated February 26, 1993, Ms. Yule grieved the three reprimands. (T. at 184-85, 257; CX-10.) In the letter she stated "I am not the only employee who had questioned overtime, posting of security personnel, or who receives phone calls, and gossips. I am the only employee to be reprimanded for these things and feel it is not for just cause." (CX-10.)

During the same time period, Ms. Yule again contacted the NRC. On February 21, 1992, she sent a letter to Donald Funk at the NRC, raising several collective bargaining issues and in general terms complaining of low morale. (T. at 180-83, 265-68; CX-9.) During her last two years, Ms. Yule contacted the NRC at "various times" and in response received two letters, which were placed in the public record with her identity concealed. (T. at 221-23.)

At some point in time, Ms. Yule was told that Rolly Conklin, the NSP Superintendent of Security, had labeled her a "troublemaker." (T. at 305-06.) In March 1992, at her first meeting with Frank Evitch, Rolly Conklin's replacement, he told her, "There are sure a lot of people around here that are concerned about you. Your name always comes up in our meetings." (T. at 307.)

In March 1992, Ms. Yule met with two NRC inspectors from the Chicago Office, Mr. Madeda and Ms. Christopher, during their audit of the Prairie Island facility, and discussed her concerns regarding staffing, morale, working too many hours, lack of

training for the new video capture system, and lack of regularly scheduled training. (T. at 186-89, 266-69.)

On March 10 or 11, 1992, Ms. Yule went to Bill Peschek, NSP Security Shift Supervisor, to ask for a copy of a plant memorandum, and was asked, "who are you going to write up now" or "who are you going to blame now?" (T. at 307-308.) While discussing the matter, Ms. Yule noticed that Lt. Majeski was outside in the hallway trying to listen. (T. at 307.) The next night three guards met with Ms. Yule and informed her that they were upset with her because she had broken the spirit of David Hutchison and had displayed favoritism in a dispute between two guards. (T. at 254-55, 354-56.)

On March 14, 1992, Lt. Majeski gave Ms. Yule her performance evaluation. (T. at 192; CX-11.) The Lieutenant rated Ms. Yule "satisfactory" in all categories except "initiative" and "job interest," where she rated her "marginal." (CX-11.) Lt. Majeski told Ms. Yule that she had become a better officer since the February 1992 incident. (T. at 193.)

In June 1992, during a labor negotiation session recess, Larry Jones told Ms. Yule that she was to cease speaking to or contacting Mr. Christopher, the NSP coordinator, concerning the Fitness For Duty guidelines.^{5/} (T. at 198-99.)

In early July 1992 Ms. Yule again met with NRC inspectors to allege violations. (T. at 195-96, 269.) She told them of her concerns about training, personnel assignments, and disciplining co-workers in violation of the Fitness For Duty guidelines. (T. at 196, 198, 273-74.) Sometime later, Ms. Yule overheard Lt. Majeski tell Larry Jones that Ms. Yule was meeting with or talking to NRC personnel. (T. at 191-92, 197, 271-73, 353.)

In July or August of 1992, a trainee guard told Steve Vold, a security guard, that Lt. Majeski had walked away from the badge issue area while on duty, leaving it unattended for about a minute. (T. at 73-75.) The badge issue area is the point where entry is made into the protected area of the plant and is staffed at all times. (T. at 76, 199, 278-79; RX-15 at p. 2.) Being afraid to raise the issue directly with management, Steve Vold reported the incident to Ms. Yule, who was the union president. (T. at 76-77, 199, 280.) Ms. Yule investigated the incident by speaking to Roger Krig, Ms. McRoberts, and Gloria Boldt, guards who were on duty when the incident occurred. (T. at 199, 275-76.) On August 10, 1992, she reported the incident to Frank Evitch, the NSP Superintendent of Security. (T. at 200, 278.) After Ms. Yule's employment was terminated, Jim Belanger, an NRC

^{5/} Robert Bethea's employment at Burns was terminated on June 27, 1992, and Larry Jones, the Burns Division Support Services Manager, assumed the additional duties of interim Site Manager. (T. at 374, 403.)

Senior Physical Security Inspector, investigated the incident. (T. at 338; RX-15.)

Also in August 1992, during a meeting attended by supervisors, managers, NSP personnel, and security officers, David Hutchison stated that Ms. Yule had been complaining to Frank Evitch about low morale. (T. at 100-01.)

On August 24, 1992, Edward Schweibinz, an NRC inspector on a routine inspection of the Prairie Island facility, asked the guard on duty about his knowledge of the SAS Door 120. (T. at 366, 405-06; RX-5.) SAS Door 120 is a Secondary Alarm Station (SAS) secured by an electromagnetic locking device. (T. at 365; RX-13) The guard responded that he did not know anything about the door. (RX-5.) Later that day the inspector expressed concern to Tommy Diericks, the NSP Security Shift Supervisor, that the guard did not adequately understand the operation of the security door. (T. at 406; RX-5, RX-10.) Tommy Diericks immediately reported to Mr. Jones, whereupon a plan was developed to train all guards on the operation of the door by reissuing the June 11, 1992 memorandum describing the locking device and briefing each guard on its operation. (T. at 403, 406-07; CX-13.) In addition, Mr. Jones decided to implement a new "Read and Sign" policy to document the training, whereby each shift lieutenant would have their guards sign the memorandum. (T. at 86, 93-94, 102, 391, 366, 390-92, 407-08, 411, 449-50, 452; RX-5.)

On August 25, 1992, at a fifteen minute shift briefing, Lt. Stephen Bangasser re-circulated the June 11, 1992 memorandum concerning SAS Door 120. (T. at 203, 205, 287, 292-93, 362.) He explained that an NRC inspector had questioned a guard about the door. He read portions of the memorandum to the guards, instructed them on the operation of the door, and afforded them an opportunity to ask questions. (T. at 203-205, 292-93, 309, 367-68; RX-4, RX-6 at p. 1.) He told them to read the memorandum again during the course of the shift, ask any additional questions, and sign it under the statement saying they had read the memorandum.^{6/} (T. at 205, 209-10, 367-68; RX-6.)

Following the briefing, Lt. Bangasser placed the memorandum in the Central Alarm Station, where the guards would have access to it. Halfway through the shift he moved it to the badge issue area. (T. at 369.) Realizing that Ms. Yule had not yet signed the memorandum, Lt. Bangasser asked her whether she had had an

^{6/} Prior to recirculating the memorandum he wrote the following at the top: I have read the information regarding the Door 120 Electromagnet and have had my questions answered pertaining to its operation and purpose. (T. at 215, 368-69; RX-4, RX-13.)

opportunity to read it; she replied that she had. (T. at 370; RX-6 at p. 1.) He asked her whether she had any questions on the use of the door, and she asked if the door was a fail-safe device and why it was placed at that specific location. (T. at 370; RX-6 at p. 1.) After answering her questions, (T. at 371; RX-6 at pp. 1-2), he asked her if she understood how to use the device, and she replied that she did. (T. at 207, 209, 288, 371, 391; RX-6 at p. 2.) He asked her to sign the memorandum; she refused. (T. at 207-08, 289, 371-74; RX-6 at p. 2.) Ms. Yule told Lt. Bangasser that she would not sign the memorandum because training on security equipment was to be performed in a training setting, at the training center, not on shift, that her signature would signify that there was no need for formal training, and that informal training could take its place. (T. at 372, 389-90, 452-53; RX-4, RX-6 at p. 2. Contra T. at 208, 210-11, 291-92, 308-10.)

On August 25, 1992, near the end of the shift, Lt. Bangasser called Ms. Yule aside for an informal meeting. (T. at 372; RX-4, RX-6 at p. 3.) Lt. Bangasser had never had an employee refuse a directive before, so he made it clear to her that she was required to sign the memo. (T. at 373-74.) He told her that he had given her a "job assignment" and that by refusing to sign the memorandum she would be insubordinate. (T. at 372-73; RX-4, RX-6 at p. 3.) She again refused. (T. at 210-11, 290, 293-94, 372-73; RX-6, pp. 2-3.) She said that she had signed similar documents in the past and they had been later brought up and used against her. (RX-6 at p. 3.) Ms. Yule told Lt. Bangasser that she did not want to see training conducted on the shift and that she believed this was an important issue. (T. at 373-74.) Lt. Bangasser advised Ms. Yule that it would be advantageous to find a different means for voicing her opinion on training. (T. at 374; RX-4.) She told Lt. Bangasser, "I prefer to be written up than to sign this document." (T. at 373; RX-10 at pp. 13, 18. Contra T. at 290.) Ms. Yule denies that Lt. Bangasser ever gave her a direct order to sign the memorandum. (T. at 413.)

Lt. Bangasser then wrote a memorandum to Mr. Jones documenting the incident. (T. at 374-75, 412-13; RX-4.) He also met with Mr. Jones and discussed the matter. (T. at 374-76, 411-12, 452-53.) Mr. Jones reported the incident to Frank Evitch, who told him to take care of it. (T. at 413.)

When Lt. Bangasser arrived for duty on August 25, 1992, he found that Mr. Jones had left detailed instructions for him. (T. at 376-77, 414-15.) On August 26, 1992, at 12:05 a.m., after the shift briefing, he called Ms. Yule aside. She again refused to sign the memorandum. (T. at 211, 293, 377, 415, 514; RX-6 at p. 3.) He then told her that he was scheduling a disciplinary meeting. (T. at 211, 293-94, 378.) He telephoned Mr. Jones and reported that Ms. Yule still refused to sign the memorandum. (T. at 378, 415; RX-6 at pp. 3-4.) Lt. Bangasser testified that he offered Ms. Yule a last opportunity to sign the memorandum at the

meeting. Ms. Yule claims she was not afforded this fourth opportunity, and that she would have signed the memorandum had she known the consequences of her refusal. (T. at 380, 507-08.) Lt. Bangasser, on the other hand, testified that he discussed with Ms. Yule that her failure to sign the memorandum as directed was not acceptable and was insubordination, which would not be tolerated. (T. at 377.) At Mr. Jones' instructions, Lt. Bangasser informed Ms. Yule that she was decertified as a security officer; that she was suspended from duty for insubordination; and that she was to leave the plant and not return, pending investigation. (T. at 213, 294-95, 379-81, 415-16; RX-6 at p. 3.) Lt. Bangasser then wrote a report of the incident, which was forwarded to Mr. Jones on the morning of August 26. (T. at 383, 417; RX-6.)

Ms. Yule telephoned Mr. Jones later that morning and asked to be advised of her suspension in writing. (T. at 217, 379, 418-19; RX-10.) Ms. Yule received written verification by certified mail dated August 27, 1992. (T. at 295, 420-21; CX-14, RX-10.) The letter stated that the matter would be investigated; that there would be a meeting; and that the specifics to be discussed at the meeting would include both the SAS Door incident and her "previous warnings and reprimand for insubordination." (T. at 295-96, 421-22; CX-14, RX-10.)

On September 2, 1992, at approximately 10:00 a.m., Mr. Jones met with Ms. Yule. (T. at 96-97, 107, 217-19, 296, 425, 467-68; RX-10, RX-14.) Mr. Jones asked Ms. Yule questions about her refusal to sign the SAS Door memorandum. (T. at 98-99, 218, 299, 426, 430-32; CX-15, RX-10 at pp. 8-11, RX-14.) He also asked whether the charges of insubordination relating to the February 20 through 22, 1992 incident were true. (T. at 99, 107-09, 218-19, 298-99, 427-28, 433-34, 448, 456, 458, 469-70; RX-10 at pp. 2, 8-11; RX-14.)

In response, Ms. Yule stated that she had refused to sign the memorandum but that she was not aware that her refusal could be used against her. (RX-10 at pp. 8-11.) Moreover, she stated that she had not been insubordinate by questioning Lt. Majeski's deviance from a Section Work Instruction. (RX-10 at pp. 8-11.) Additionally, Ms. Yule submitted a written statement, asserting that she had never been required to sign-off on memorandums such as this in the past and that she was not aware that she had been given a "direct order" to sign the memorandum or that her past insubordination charges would be used against her. (CX-15; RX-10.)

After the meeting, Mr. Jones compiled a Report of Investigation, which provided a comprehensive account of the SAS Door 120 incident. (RX-10.) Additionally, the report contained a detailed account of the February 1992 incident, including copies of the reports of counselling and statements from an interview with Lt. Majeski. (RX-10 at pp. 6, 8, 28-30.) Also in

the investigative report, Mr. Jones reported having been contacted by NSP Site Security Superintendent Rolly Conklin and advised that Ms. Yule was disrupting the entire security force and that he wanted her removed from the site. (RX-10 at p. 8.)

On the morning of September 3, 1992, Mr. Jones sent the Report of Investigation to his superior, Gary Snavely, and to Guy Thomas, the Burns Labor Relations Manager for the Nuclear Utilities Division. (T. at 434-36, 448, 491-92; RX-10.) Mr. Snavely, the Burns Vice President of Operations for the Utilities Business Unit, had the authority to terminate Ms. Yule's employment. (T. at 437-38.) Mr. Jones recommended that her employment be terminated. (T. at 438-39, 493-94.) Mr. Snavely subsequently terminated Ms. Yule's employment.

On September 3, 1992, Mr. Jones told Ms. Yule that her employment with Burns was terminated for insubordination. (T. at 220, 300-01, 440.) He sent her written notice by certified mail on September 8, 1992. (T. at 220, 300, 440-41; CX-17.)

APPLICABLE LAW

In Federal whistleblower cases, the employee bears the ultimate burden of proving that intentional discrimination has occurred. Dean Dartey, No. 82-ERA-2, at 6-7 (Sec'y, Apr. 23, 1983) (citing Texas Dept of Community Affairs v. Burdine, 450 U.S. 248, 254, 101 S. Ct. 1089, 1094 (1981)). In such cases, the employee must initially present a prima facie case showing by a preponderance of the evidence that (1) she or he engaged in protected activity, (2) the employer was aware of such activity, and (3) the employer took adverse action against the employee. Dean Dartey, at 7; see also McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803, 93 S. Ct. 1817, 1824 (1972). In addition, the employee must show that (4) the protected behavior "was a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C. § 5851(b)(3)(A) (as amended by the Comprehensive National Energy Policy Act, Pub. L. No. 102-486, § 2902, 106 Stat. 2776, 3123-25, 138 Cong. Rec. H12150-51 (daily ed. Oct. 5, 1992)); Dean Dartey, at 7-8; accord Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 288, 97 S. Ct. 568, 576 (1977). By establishing a prima facie case, the employee is entitled to a presumption of discriminatory treatment, because employer's "acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Texas Dept of Community Affairs, 450 U.S. at 254-55, 101 S. Ct. at 1094.

Protected activity includes such conduct as notifying an employer of an alleged violation of the Energy Reorganization Act of 1974 or the Atomic Energy Act, 42 U.S.C. § 5851(a)(1)(A) (as amended by the Comprehensive National Energy Policy Act, supra; refusing to engage in any practice made illegal by these acts

when the employee has identified the alleged illegality to the employer, § 5851(a)(1)(B) (as amended, supra); or in any manner assisting or participating in or causing to be commenced a proceeding for the administration or enforcement of any requirement under these acts, see § 5851(a)(1)(D),(F) (as amended, supra). NRC regulations provide that:

(1) The protected activities include but are not limited to:

(i) Providing the Commission information about possible violations of requirements imposed under either of the above statutes;

(ii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements; or

(iii) Testifying in any Commission proceeding.

(2) These Activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

10 C.F.R. § 50.7(a)(2), quoted in Kansas Gas & Elec. Co. v. Brock, 780 F.2d 1505, 1512 (10th Cir. 1985), cert. denied, 478 U.S. 1011, 106 S. Ct. 3311 (1986). "The regulations make it clear that a formal proceeding is not required in order to invoke the protection of the Act." Kansas Gas & Elec. Co., 780 F.2d at 1512. Moreover, the fact that an employee may be mistaken as to whether the employer's actions actually violated the above mentioned statutes is not dispositive of the issue of whether the employee engaged in protected activity, since "internal complaints regarding safety or quality problems," Mackowiak v. University Nuclear Sys., Inc., 735 F.2d 1159, 1162 (9th Cir. 1984), as well as "possible violations," Kansas Gas & Elec. Co., 780 F.2d at 1512, are considered protected activity.

In order to rebut the presumption of retaliatory action, the employer must articulate a legitimate, nondiscriminatory reason for the adverse action. Dean Dartey, supra, at 8; see also Texas Dept of Community Affairs, supra, 450 U.S. at 254, 101 S. Ct. at 1093. Significantly, the employer bears only a burden of producing evidence at this point; the ultimate burden of persuasion that intentional discrimination occurred rests with the employee. Dean Dartey, supra, at 8. If the employer carries this burden of production, the presumption raised by the prima facie case is rebutted. Texas Dept of Community Affairs, 450 U.S. at 256, 101 S. Ct. at 1094-95. In addition, the factual issues of the case should be framed with sufficient clarity at

this point so as to indicate whether this is a case of "pretext" or "dual motives." See id., 450 U.S. at 256, 101 S. Ct. at 1094-95.

In a "pretext" case, if the employer has successfully rebutted the employee's prima facie case, the employee still has the opportunity to demonstrate that the proffered reason for the adverse action was not the true reason. Dean Dartey, at 8; see also Texas Dept of Community Affairs, at 257. Thus, the employee must prove pretext, either directly, by showing that a discriminatory reason more likely than not motivated the employer, or indirectly, by showing that the employer's explanation is unworthy of credence. Dean Dartey, at 8; see also Texas Dept of Community Affairs, at 257. If the employee establishes, by a preponderance of the evidence, that the employer's proffered reason for its conduct was a pretext, then the employee has proved actionable retaliation for protected activity. Dean Dartey, at 8.

In a "dual motive" case, if the employee establishes, by a preponderance of the evidence, that the protected activity was a motivating or contributing factor in the employer's decision to take adverse action, then the employer may still avoid liability by establishing that it would have reached the same decision even in the absence of the protected activity. 42 U.S.C. § 5851(b)(3)(D) (as amended by the Comprehensive National Energy Policy Act, supra; Dean Dartey, at 9; accord Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 288, 97 S. Ct. 568, 576 (1977); Mackowiak v. University Nuclear Sys., Inc., 735 F.2d 1159, 1163-64 (9th Cir. 1984); Pogue v. United States Dept of Labor, 940 F.2d 1287, 1290 (9th Cir. 1991). The employer bears the burden of establishing this affirmative defense by clear and convincing evidence. 42 U.S.C. § 5851(b)(3)(D) (as amended, supra); cf. Dean Dartey, at 9. In addition, the employer bears the risk that the influence of legal and illegal motives cannot be separated. Pogue v. United States Dept of Labor, 940 F.2d 1287, 1291 (9th Cir. 1991).

DISCUSSION

The first issue to be decided is whether Ms. Yule engaged in protected activity. I note at the outset that since the purpose of the whistleblower provision of the Energy Reorganization Act is for "employees and union officials" to help assure that employers do not violate the Atomic Energy Act, S. Rep. No. 848, 95th Cong., 2nd Sess., at 29 (1978), reprinted in 1978 U.S.C.C.A.N. 7303, 7304, quoted in Kansas Gas & Elec. Co. v. Brock, 780 F.2d 1505, 1512 (10th Cir. 1985), cert. denied, 478 U.S. 1011, 106 S. Ct. 3311 (1986), Ms. Yule's role as union president, ostensibly seeking to secure benefits for members of the collective bargaining unit, does not adversely impact upon the analysis of whether she engaged in protected activity.

On February 19, 1992, when Ms. Yule complained to Lt. Majeski about the posting of an unarmed guard at the containment entry area, she alleged that Burns was violating NSP rules for the physical protection of the nuclear power plant. Since the plant rules were based on NRC safety and protection requirements, which were promulgated under the authority of the Atomic Energy Act, Ms. Yule's allegation that NSP rules were being violated amounted to an allegation that the requirements of the Atomic Energy Act were being violated. In fact, the incident was later investigated by the NRC. (RX-15.)

When Ms. Yule sent her February 21, 1992 letter to Donald Funk at NRC, she complained that morale in the guard force had declined as a whole, because of actions taken by Burns. (T. at 266-68; CX-9.) She testified that she believed that the NRC required licensees and subcontractors to maintain morale at a certain level and that the NRC later summoned the NSP Superintendent of Security to appear in Chicago to discuss morale. (T. at 266-67). Since the low or poor morale of a nuclear plant's security force can impact on plant safety and protection, Ms. Yule's letter provided information to the NRC about possible violations.

When Ms. Yule met with NRC inspectors in March and July of 1992 to discuss her concerns about staffing, morale, working too many hours, training, and violations of Fitness For Duty guidelines, she was both providing information to the NRC about possible violations and requesting that the NRC institute action against her employer for the enforcement of nuclear power plant safety and protection rules.

On August 10, 1992, when Ms. Yule reported to Frank Evitch, the NSP Superintendent of Security, that Lt. Majeski had left the badge issue area unattended, she was attempting to have the regulations concerning plant security and protection enforced. This incident was later investigated by the NRC. (RX-15.) In each of the incidents listed above, Ms. Yule engaged in protected activity.

Ms. Yule's recollection of her statements of August 25, 1992, differs from that of the other witnesses, in that only she recalls telling Lt. Bangasser and Mr. Jones that by recirculating the memorandum, Burns was "trying to do a cover-up to the NRC" and "trying to hide something from the NRC." (T. at 207-08, 210-12, 291-92, 309-10, 389-90, 426.) In addition, she claims to have told Lt. Bangasser that it looked to her that Burns and NSP were just trying to save money and not give training. (T. at 212.) Because Lt. Bangasser wrote two reports contemporaneously with the events of August 25, 1992, I deem the reports more reliable than Ms. Yule's memory. Also, taking the demeanor of the witnesses into consideration, I afford greater weight to Lt. Bangasser's testimony when resolving factual conflicts concerning

Ms. Yule's statements at that time. I find that Ms. Yule did not mention an NRC cover-up when refusing to sign the memorandum. I also credit Lt. Bangasser's testimony that he directed Ms. Yule to sign the memorandum and cautioned her that refusal to sign was not an option and would be an act of insubordination, which would not be tolerated.

Ms. Yule gave Lt. Bangasser two reasons for her refusal to sign the memorandum. Her statement that she had signed similar documents in the past and that they were later used against her, (RX-6 at p. 3), was not protected conduct, in that her fear that her signature or initials on a memorandum could be used against her in some future manner was not an allegation of a violation of the Energy Reorganization Act or the Atomic Energy Act. Moreover, Ms. Yule's statement that training on the operation of security equipment should be held in a formal training setting rather than informally on shift, (T. at 372-74; RX-4, RX-6 at pp. 2-3), and her statement that her signature on the SAS Door 120 memorandum would indicate that there was no need for formal training and that informal training would take its place, (RX-6 at 2), were not protected conduct, in that her opinion regarding location and characterization of training sessions was not an allegation of a violation of the Energy Reorganization Act or the Atomic Energy Act.

The evidence indicates that Burns' management was aware of several instances of Ms. Yule's protected activity. Ms. Yule's February 19, 1992 complaint about the posting of an unarmed guard at the containment entry area was made directly to Lt. Majeski, the Burns shift lieutenant. Lt. Majeski then notified her supervisor, Robert Bethea, the Burns Site Security Manager, who in turn notified his supervisor, Larry Jones, the Burns Division Support Services Manager. In addition, just before Ms. Yule's termination, Mr. Jones reported the watchperson incident to Gary Snavely, the Burns Vice President of Operations for the Utilities Business Unit, and Guy Thomas, the Burns Labor Relations Manager for the Nuclear Utilities Division, through his Report of Investigation, dated September 3, 1992, which listed the incident among the "items of significance," and to which was attached copies of the original reprimands. (RX-10 at p. 6.)

There is also evidence that Burns was aware that Ms. Yule went to John Oelkers, NSP's on-site quality control person, to complain of her threatened termination over the watchperson incident, because Lt. Majeski and Mr. Bethea both separately stated, when reprimanding Ms. Yule, that they were following the advice of NSP security shift supervisors. Moreover, at the June 1992 labor negotiations session, Mr. Jones' instruction to Ms. Yule to cease speaking to Mr. Christopher, NSP coordinator, about Fitness For Duty guidelines, indicates that Burns was aware of Ms. Yule's allegation that Burns was violating the Fitness For Duty requirements.

There is no evidence that Burns was aware of Ms. Yule's February 21, 1992 letter to Donald Funk at the NRC. However, in regard to her two other contacts with the NRC, the March 1992 and the July 1992 meetings with NRC inspectors, Lt. Majeski's remarks to Mr. Jones that Ms. Yule was meeting with the NRC or talking to the NRC, coupled with the behavior Lt. Majeski exhibited by attempting to eavesdrop on Ms. Yule's March 1992 meeting with Bill Peschek, NSP Security Shift Supervisor, lead me to conclude that Burns was aware that she was in communication with the NRC.

On August 25, 1992, when Lt. Bangasser reported Ms. Yule's refusal to sign the door memorandum to Mr. Jones, he also told Mr. Jones that he had checked the Documentation Book to determine whether there was a continuing problem, which was "normal procedure," and that there were no records of previous problems in this area. (T. at 376.) Mr. Jones, however, immediately recalled the watchperson incident, which had occurred six months earlier, and went to an alternative source to locate the documents. (T. at 376.) In addition, in his letter to Ms. Yule notifying her of the meeting concerning her suspension from duty, Mr. Jones stated that the specifics of her "previous warnings and reprimand for insubordination" were to be discussed. (CX-14.) Furthermore, in his Report of Investigation, dated September 3, 1992, which was forwarded to Gary Snavelly and Guy Thomas, participants in the decision to terminate Ms. Yule's employment, Mr. Jones included a description of the watchperson "insubordination" incident, the reports written by Lt. Majeski and Mr. Bethea, an interview with Lt. Majeski, and the statement that NSP wanted Ms. Yule removed from the plant. (RX-10.) These facts lead me to infer that Ms. Yule's protected activities were a contributing factor in Mr. Jones' recommendation and Mr. Snavelly's decision to terminate Ms. Yule's employment. Therefore, since Burns' decision to terminate Ms. Yule's employment was based in part on her protected activity, I find that Ms. Yule established a prima facie case and is presumed to have been discharged, at least in part, for retaliatory purposes.

In order to rebut this presumption, Burns must present a legitimate, nondiscriminatory reason for terminating Ms. Yule's employment. Burns asserted that it discharged Ms. Yule because on at least four separate occasions during the evening of August 24 and the early morning hours of August 25 and 26, 1992, Ms. Yule refused to sign the SAS Door 120 training memorandum, signifying that she had read the document and had had her questions answered concerning the door's operation, despite having been ordered to do so by Lt. Bangasser. Burns also stated that Ms. Yule knew that insubordination was a ground for termination, in accordance with the Grounds of Dismissal Policy she had signed on December 10, 1992.

In support of these assertions, Burns produced evidence showing that at the shift briefing on August 25, during the shift on August 25, in an informal meeting at the end of the shift on

August 25, and immediately before being suspended on August 26, 1992, Lt. Bangasser had directed Ms. Yule to sign the training memorandum. Moreover, during one such occasion, Lt. Bangasser told Ms. Yule that signing the memorandum was a job assignment, that he was required to obtain her signature, and that refusal would not be permitted. Additionally, before having the guards sign the memorandum, Lt. Bangasser wrote at the top of the memorandum, "I have read the information regarding the Door 120 Electromagnet and have had my questions answered pertaining to its operation and purpose." (T. at 215, 368-69; RX-4, RX-13.)

The evidence reflects that Ms. Yule had read the memorandum and understood the operation of SAS Door 120 yet refused to sign the memorandum. Moreover, on one occasion, she said to Lt. Bangasser, "I prefer to be written up than to sign this document." (T. at 373; RX-10 at pp. 13, 18. Contra T. at 290.)

Burns also presented evidence showing that when Ms. Yule's employment with Burns began in December 1991, she signed a document that identified offenses which constituted sufficient cause for immediate termination and that offense number 15 was "Insubordinate conduct directed toward a supervisor." (T. at 210, 247, 261; CX-3.)

Mr. Thomas described the importance of having guards follow orders promptly and without objection:

Our organization, because of what we do, and the fact that we provide nuclear security at operating and generating plants, is a paramilitary organization. We are set up along the lines of a military organization. Each unit has responsibility. The primary responsibility is to, in the event of emergencies, to respond. And each unit, within our nuclear organization at each nuclear facility, has what is called a "response team." That response team, in the event of an emergency, be it an intruder or whatever, that response team has to react immediately at the direction of that supervisor, to prevent any type of emergency from increasing at a nuclear plant. For that particular reason, unlike other environment [sic] where a crisis of this nature doesn't exist, our employees have to respond to the supervisor's direction as they are given [sic].

(T. at 483-84.) Mr. Jones provided supporting testimony:

Discipline is very strict, and it is a requirement that supervisors have the full knowledge and understanding that their people are going to be where they are supposed to be, in the event of an emergency, just by them saying "Go," without question. They need to know that those people will be there when they need them.

(T. at 398.)

To show that Burns has terminated employees for acts of insubordination, Mr. Thomas testified about five employees who disobeyed orders and were fired: On October 19, 1988, Burns terminated the employment of J. Anuszewicz, a nuclear security officer at the Millstone Nuclear Plant in Waterford, Connecticut, because he refused to attend a fire suppression training class that was scheduled to begin at the end of his shift. (T. at 487; RX-16.) On December 7, 1989, Burns terminated the employment of K. Daggett, who worked at the River Bend Nuclear Plant in Louisiana, because he disobeyed an order to leave the plant when, at the end of his shift, he insisted that he was going eat his lunch in the plant cafeteria. (T. at 487-88; RX-16.) On February 18, 1992, Burns terminated the employment of Larry Mingle, who worked at the Crystal River Nuclear Plant in Crystal River, Florida, because he refused to go to the second floor of a two and a half story building, on grounds that it was unsafe. (T. at 488-89; RX-16.) On October 4, 1991, Burns terminated the employment of John Deshautelles, who worked at the River Bend plant, because he continued to argue with another employee after being ordered to stop. (T. at 490; RX-16.) On October 26, 1990, Burns terminated the employment of Charlene Pasquale, a watchperson at the Millstone Nuclear Plant. (T. at 489-90; RX-16.) She had won an arbitration decision against Burns, and the arbitrator ordered that she be reinstated with partial back pay.^{7/} (T. at 501.) When she returned to work, Burns insisted that she sign a reinstatement agreement, which changed the form of the arbitration award. (T. at 501.) She refused to sign the agreement, and Burns again terminated her employment. (T. at 489-90, 501; RX-16.) She grieved this second dismissal, and the arbitrator ruled in her favor, ordering that she be reinstated. (T. at 498, 501.)

In response to the examples of discharge provided by Burns, Ms. Yule testified about information told to her by Richard Boreland, the union president at the Quad Cities, Illinois facility, where Burns also provides security services. (T. at 511-12.) She testified that according to Mr. Boreland, approximately twelve to fifteen employees were currently refusing to sign a document that the licensee required for its files, and that to date, Burns had not discharged any of the employees. (T. at 512.) Because Ms. Yule's knowledge of this incident was based on secondhand information from a witness who was not called to testify at the hearing, and because the circumstances surrounding the refusals are not fully known, I afford no weight to this testimony. (T. at 511-13, 515.)

Furthermore, I find that Burns has articulated a legitimate, nondiscriminatory reason for discharging an

^{7/} The reason for her termination is not in the record.

employee. Accordingly, Burns has rebutted Ms. Yule's prima facie case. Therefore, the burden shifts to Ms. Yule to prove that the reason offered by Burns was a pretext for retaliatory motives. The evidence suggests that the reason was a pretext.

In February 1992, when Ms. Yule questioned the posting of a watchperson at the containment entry area, Lt. Majeski reprimanded her, (T. at 61-62, 253, 327, 350-52; CX-6), complained about Ms. Yule receiving a phone call from her daughter, and became acrimonious when asked about overtime for union workers, (T. at 70-71, 157-58, 251-53, 326, 345, 506-07). At the same time, Mr. Bethea reprimanded Ms. Yule, extended her probation period, (T. at 39, 165, 168-69, 256, 329-31; CX-7, CX-8), and threatened to terminate her employment if she continued in this conduct, (T. at 41-42, 174, 262, 332-33; CX-3).

In March 1992, when Ms. Yule was discussing a matter with Mr. Peschek in his office, she observed Lt. Majeski eavesdropping. (T. at 307.) At a later time, Ms. Yule overheard Lt. Majeski tell Mr. Jones that Ms. Yule was meeting with or talking to NRC personnel. (T. at 191-92, 197, 271-73, 353.) In June 1992, Mr. Jones told Ms. Yule to cease speaking to Mr. Christopher about Fitness for Duty Guidelines. (T. at 198-99.) Thus, not only was Burns angered because Ms. Yule was alleging violations, it was apprehensive because Ms. Yule was concerning herself with these matters on an ongoing or continuing basis.

In February 1992, Mr. Hutchson angrily approached Harvey Borgschatz, another security officer, and told Mr. Borgschatz to tell Ms. Yule to back off, leave him alone, just do her job, and not ask any questions. (T. at 45-46, 90-91.) Further, Mr. Hutchson said that Ms. Yule was questioning a decision that had been made, which was upsetting to the other officers, and that there would be problems if Ms. Yule did not back off. (T. at 90-91.) At approximately the same time, Lt. Majeski reprimanded Ms. Yule on the recommendation of two NSP supervisors. (T. at 63-64, 87.) Also, in his Report of Investigation, Mr. Jones reported that Mr. Conklin "advised that YULE was disrupting the entire security force and that he wanted her removed from the site." (RX-10 at p. 8.) At a later point in time, coworkers told Ms. Yule that Mr. Conklin had labeled her a "troublemaker." (T. at 305-06.) In March 1992, when Mr. Conklin left Prairie Island, his replacement, Mr. Evitch, told Ms. Yule, "There are sure a lot of people around here that are concerned about you. Your name always comes up in our meetings." (T. at 307.) In March 1992, when Ms. Yule requested a copy of a plant memorandum, Mr. Peschek commented that Ms. Yule was probably going to write-up someone. (T. at 307-08.) In August 1992, in a quality control meeting, Mr. Hutchson stated that the source of his information was Ms. Yule "jumping on Frank Evitch's . . . desk," complaining that people were discouraged. (T. at 101.)

These remarks concerning Ms. Yule by NSP personnel show that they were also upset with Ms. Yule's activities. Additionally, while Burns asserts that NSP had no responsibility for Burns' decisions concerning its personnel and that NSP had no authority to manage Burns' employees or to give direct orders to Burns' employees, (Resp. Proposed Findings of Fact at 2), the record indicates that NSP oversaw the security program and assured that the security plan was implemented correctly, (T. at 475-76), and that Burns was in frequent communication with NSP concerning Ms. Yule.

The record is replete with enmity directed toward Ms. Yule by Burns because of her union and protected activities, and the pressure placed on Burns by its client NSP, who was also aware of her protected activities, to "remove" Ms. Yule. Thus, in light of Burns' animus toward Ms. Yule, because discharge seems too harsh an action for failing to sign a training memorandum, and because Burns has not shown that any other employee was discharged for failing to sign a training memorandum, I find that Burns more likely terminated Ms. Yule's employment in retaliation, in large part, for her protected activities and the likelihood that she would continue to engage in protected activity at the Prairie Island Nuclear Generating Plant. Despite Burns' contention that it was justified in firing Ms. Yule for insubordination for refusing to sign the SAS Door memorandum, it appears that Burns fired Ms. Yule for a combination of reasons, including her questioning of plant security procedures and her complaints to and discussions with NRC personnel. Her act of insubordination in refusing to sign the SAS door memorandum was too insignificant, in and of itself, to warrant the discharge of a trained and experienced security officer. I agree with Complainant that "the penalty of discharge for an isolated incident of failing to sign a memo makes sense only if we add Yule's prior February reprimands related to her NRC report and her continued complaints of NRC violations." (Cl's. Post-Hearing Brief at 20.)

The sequence of events leading to the firing and the failure of Burns to demonstrate that it had previously fired an employee for refusing to sign a memorandum reflects Burns' true motivation. I find that the reason given by Burns for its decision to terminate Ms. Yule's employment was a pretext.

Burns argues that it would have terminated Ms. Yule's employment for insubordination based upon her failure to sign the SAS Door 120 memorandum on August 24-26, even in the absence of any alleged protected activity. (Resp. Post-Hearing Brief at 16.) Thus, Burns asserts the affirmative defense of dual motives, and consequently the burden shifts to Burns to prove by clear and convincing evidence that it would have reached the same decision even in the absence of the protected activity. 42 U.S.C. § 5851(b)(3)(D) (as amended by the Comprehensive National

Energy Policy Act, supra; Dean Dartey, at 9; accord Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 288, 97 S. Ct. 568, 576 (1977); Mackowiak v. University Nuclear Sys., Inc., 735 F.2d 1159, 1163-64 (9th Cir. 1984); Pogue v. United States Dept of Labor, 940 F.2d 1287, 1290 (9th Cir. 1991). Additionally, Burns bears the risk that the influence of legal and illegal motives cannot be separated. Pogue v. United States Dept of Labor, 940 F.2d 1287, 1291 (9th Cir. 1991).

The examples of fired employees cited by Burns are dissimilar to the incident involving Ms. Yule, and therefore are not persuasive. The only example of discharge for refusal to sign a document was that of Ms. Pasquale, who refused to sign a reinstatement agreement when returning to work under an arbitration order. Interestingly, in that example the arbitrator ruled that the termination of Ms. Pasquale for her refusal to sign the reinstatement agreement was improper, overturning the dismissal and ordering the employee back to work.

Thus, while Burns has shown that it discharged employees who refused to obey the direct order of a superior, Burns has not shown that it discharged employees who refused to sign training memoranda or similar documents or that it discharged employees who committed a minor act of insubordinate conduct. In fact, the record shows that when Mr. Bethea disciplined Ms. Yule on February 21, 1992, he characterized the reason as "Insubordinate conduct towards Lieutenant Majeski," yet he extended her probationary period, rather than terminate her employment. (CX-7.) Therefore, it appears that Burns recognized that there were degrees of insubordinate conduct and that minor acts of insubordination did not warrant termination of employment.

Since Burns has not shown that it has discharged any other employee for refusing to sign a training document, and having determined that Burns does not always discharge its employees who commit "insubordination," I conclude that Burns has not proven that it would have terminated Ms. Yule's employment even if she had not engaged in protected activity. Accordingly, I find that Burns wrongfully discharged Ms. Yule in retaliation for her whistleblowing activities, in violation of the employee protection provision of the Energy Reorganization Act of 1974, as amended.

RELIEF

Ms. Yule requests the following relief:

- * Reinstatement to her former position with full back pay, seniority, and benefits; or
- * Compensatory damages in lieu of reinstatement;

- * Attorney fees and costs, upon application to the Secretary.

The Federal employee protection provision requires that affirmative action be taken to abate the violation, including reinstatement of the complainant to her or his former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment. 29 C.F.R. § 24.6(b)(2). In addition, Federal regulations provide that the Secretary of Labor may, where appropriate, order the employer to provide compensatory damages to the complainant. § 24.6(b)(2).

Compensatory damages are designed to recompense for the mental and physical anguish suffered as a result of a wrongful job termination together with the potential damage to her or his personal and professional reputation. Ms. Yule had presented no evidence to show that such an award is warranted in this case.

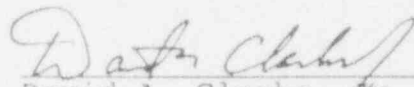
Federal regulations also require that, at the request of the complainant, a sum equal to the aggregate amount of all costs and expenses (including attorney and expert witness fees) reasonably incurred by the complainant in connection with bringing the complaint, as determined by the Secretary, be assessed against the employer. 29 C.F.R. § 24.6(b)(3). Accordingly, Ms. Yule is directed to present an itemized list of all costs and expenses that she reasonably incurred bringing and maintaining the complaint in this proceeding.

ORDER

Wherefore, it is ORDERED that:

1. Burns International Security Services shall reinstate Ms. Yule to her former position of Security Officer, at the Prairie Island Nuclear Generating Plant;
2. Burns shall provide back pay, including overtime, with interest, to Ms. Yule, from August 26, 1992, to the date of reinstatement. Monies earned by Ms. Yule during this time period shall offset back pay owed to her by Burns;
3. Burns shall reimburse Ms. Yule for any fringe benefits that were included in her salary before termination and that were borne out of pocket during the period of termination. In all respects, Burns shall make Ms. Yule whole, including restoration of retirement benefits, if any;
4. Interest shall be paid at a rate equal to the coupon issue yield (as determined by the Secretary of the Treasury) of the average accepted auction price at the last auction of fifty-two week U.S. Treasury bills. 28 U.S.C. § 1961(a);

5. Burns shall not take any adverse actions against Ms. Yule, including but not limited to: termination of employment, demotion or involuntary transfer, without good cause shown; and
6. Burns shall place a copy of the Decision and Order in Ms. Yule's personnel file and distribute a copy to all persons who exercise supervisory control over her.



David A. Clarke, Jr.
Administrative Law Judge

DAC/cal

SERVICE SHEET

Case Name: SUSAN YULE

Case No.: 93-ERA-0012

Title of Document: RECOMMENDED DECISION AND ORDER

Dated: June 24, 1993

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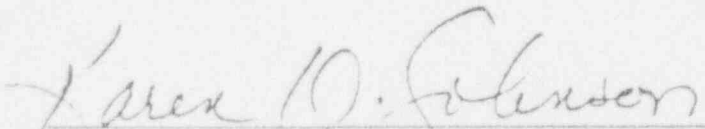
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