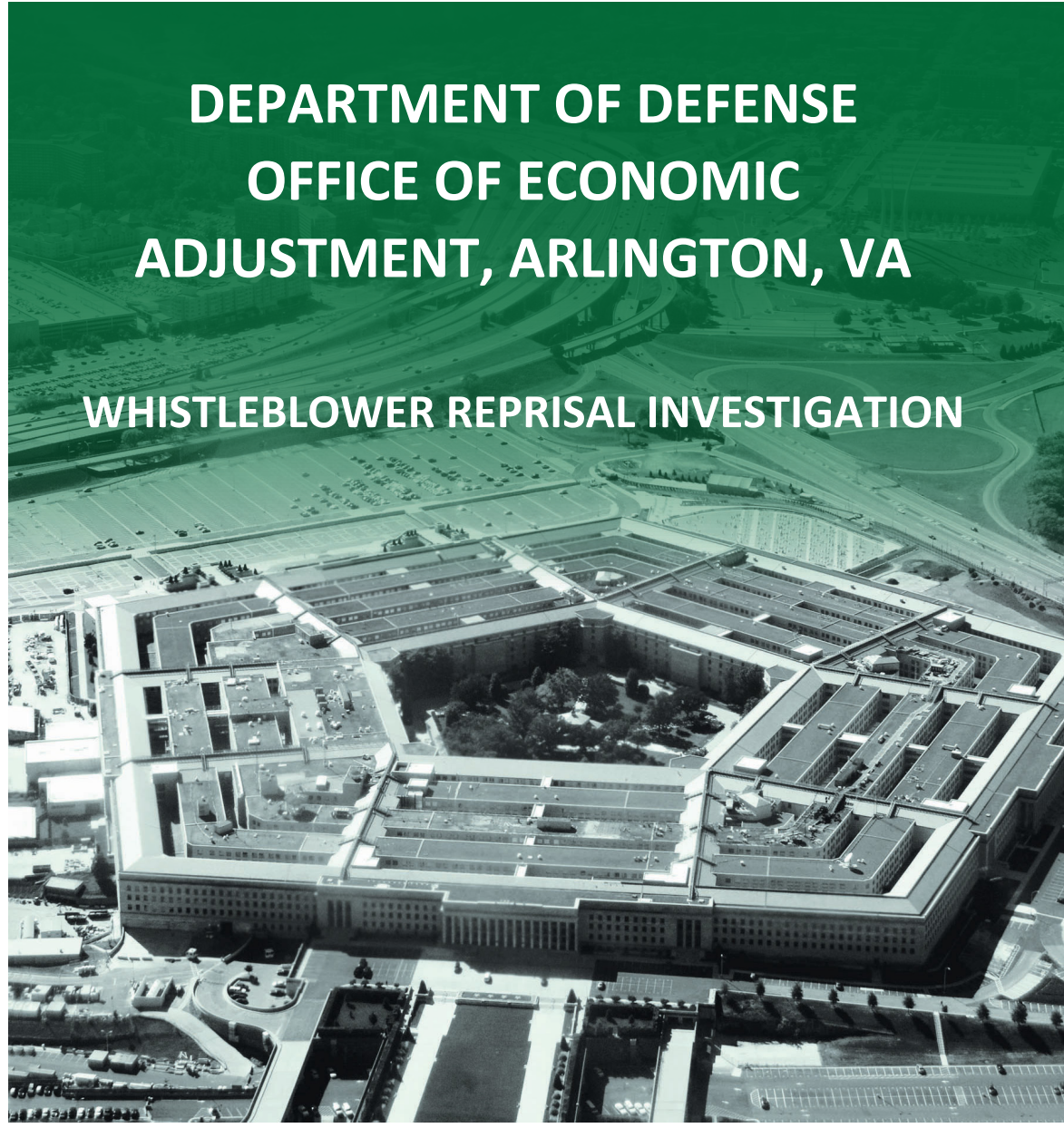


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INSPECTOR GENERAL

U.S. Department of Defense

January 3, 2018



DEPARTMENT OF DEFENSE OFFICE OF ECONOMIC ADJUSTMENT, ARLINGTON, VA

WHISTLEBLOWER REPRISAL INVESTIGATION

INTEGRITY ★ EFFICIENCY ★ ACCOUNTABILITY ★ EXCELLENCE

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WHISTLEBLOWER REPRISAL INVESTIGATION

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DEPARTMENT OF DEFENSE
OFFICE OF ECONOMIC ADJUSTMENT, ARLINGTON, VA

I. EXECUTIVE SUMMARY

We conducted this investigation in response to allegations filed with the Department of Defense (DoD) Hotline by ██████████ (Complainant), sub-contractor, ██████████, DoD Office of Economic Adjustment (OEA), Arlington, VA, that Leidos, Inc., (Leidos) non-selected her for inclusion on a bridge contract in reprisal for her making protected disclosures to company and Government officials. Complainant was a second-tier subcontractor hired by ██████████ under a subcontract issued by the prime contractor, Leidos.

We determined that Complainant made two protected disclosures, one to a company official, and one to a Government official. We also determined that after Complainant's protected disclosures, Leidos took actions against Complainant by non-selecting her for contract continuation. We further determined Leidos had knowledge of Complainant's protected disclosures.

We substantiated the allegation that Leidos non-selected Complainant for continuation on the bridge contract in reprisal for Complainant's protected disclosures, in violation of Title 10, United States Code, Section 2409 (10 U.S.C. 2409), "Contractor employees: protection from reprisal for disclosure of certain information," as amended by Section 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239), and as implemented by Defense Federal Acquisition Regulation Supplement, Subpart 203.9, "Whistleblower Protections for Contractor Employees" (April 28, 2014).

By a letter dated October 5, 2017, we provided Leidos the opportunity to comment on the preliminary report of investigation. We received Leidos' response on October 30, 2017. Leidos disagreed with our conclusions and requested that we revise our report and conclusion consistent with their response. After carefully considering Leidos' response, we amended various sections of the report, but did not alter our original conclusion.¹

We recommend that the Secretary of Defense:

- Consider appropriate action against Leidos for reprising against Complainant.
- Order Leidos to award compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to Complainant in that position if the reprisal had not been taken.

¹ While we have included what we believe is a reasonable synopsis of Leidos' responses, we recognize that any attempt to summarize risks oversimplification and omission. Accordingly, we incorporated its comments where appropriate throughout this report and provided a copy of its full responses to the cognizant management officials together with this report.

II. BACKGROUND

Complainant worked as a [REDACTED] on contract [REDACTED] the Business Enterprise Integration (BEI) Technical Support Services contract for OEA to provide audit support and financial management assistance to the OEA. Leidos was the prime contractor and hired [REDACTED] as a subcontractor on the same contract. [REDACTED], in turn, contracted with [REDACTED] to support a portion of its work under the prime contract. Complainant was the [REDACTED]

Leidos, through its Project Manager (PM), [REDACTED] DoD contractor (Prime), Leidos, OEA, Arlington, VA, provided day-to-day guidance and direction to Complainant in the performance of her duties. [REDACTED] hired Complainant on November 23, 2015, and Complainant worked on the BEI contract from December 7, 2015 until April 15, 2016. The period of performance for the contract between Leidos and [REDACTED] was from April 16, 2014 to April 15, 2015, with a one-year option for April 16, 2015, to April 15, 2016. In addition to Complainant, [REDACTED] employed three additional subcontractors to Leidos under this OEA support contract.

[REDACTED] United States Navy (USN), [REDACTED] OEA, reviewed Complainant's work products in support of the contract. [REDACTED] duties were to provide [REDACTED] between the Secretary of the Navy (SECNAV) and OEA, and to oversee [REDACTED] for OEA. Complainant was the [REDACTED] for OEA.

Although Complainant was an [REDACTED] subcontractor, [REDACTED] was responsible for assigning work and supervising Complainant. Once employed on the contract, Complainant had little contact with [REDACTED] management, with all communications going through [REDACTED] and Leidos. [REDACTED] paid Complainant's salary, but Complainant submitted her time cards for approval through [REDACTED] and Leidos. Additionally, [REDACTED] had the authority to modify Complainant's hours and compensation through contract modifications.

In the response to our evidence request, Leidos asserted that Complainant was not a Leidos employee, but a second-tier subcontractor under [REDACTED]. In response to our tentative conclusion letter, Leidos again asserted Complainant was not a Leidos employee. However, based on a review of the *Darden* factors in this case, we determined that Complainant was a subcontractor covered under the protections of 10 U.S.C. 2409, with Leidos exercising significant control of Complainant's work, hours, pay, location and nature of her work, assignments, and day-to-day direction.² In response to our tentative conclusion letter, Leidos did not challenge our *Darden* factor analysis.

III. SCOPE

This investigation covered the period from November 2015 through April 2016. We interviewed Complainant, [REDACTED] [REDACTED] and Government employees with first-

² The Darden Factor test arises out of *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318 (1992) as a test to determine whether a worker is an independent contractor or an employee.

hand knowledge of the matters. We also reviewed documentary evidence provided by Leidos, Complainant, and witnesses, including personnel records and emails.

IV. STATUTORY AUTHORITY

The Department of Defense Office of Inspector General (DoD OIG) conducts whistleblower reprisal investigations involving employees of Defense contractors under Title 10, United States Code, Section 2409 (10 U.S.C. 2409), “Contractor employees: protection from reprisal for disclosure of certain information,” as amended by Section 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239), and as implemented by Defense Federal Acquisition Regulation Supplement, Subpart 203.9, “Whistleblower Protections for Contractor Employees” (April 28, 2014).

V. FINDINGS OF FACT

According to Complainant, on January 22, 2016, [REDACTED] and Complainant had a conversation concerning an electronic gift [REDACTED] purchased for a friend. [REDACTED] was unfamiliar with the gift, and Complainant explained it was similar to the Apple product Siri.³ Complainant recalled [REDACTED] said words to the effect of, “Now I get it, can I tell you that me and my Siri have a special relationship; these days Siri’s answer to me has been, ‘I can’t possibly perform the act that you are requesting me to do’.” Complainant testified that she perceived [REDACTED] remarks to be sexual in nature and inappropriate, and told [REDACTED] that she was disgusted by [REDACTED] comments.

In a memorandum dated February 1, 2016, Complainant noted that she was in attendance at a meeting with [REDACTED] and an OEA Analyst. Prior to the meeting, [REDACTED] made a comment to the Analyst about another contractor employee of [REDACTED] descent, how the contractor spoke English poorly, and made jokes about her inability to speak English or train other people. Later, the contractor employee’s supervisor, also of [REDACTED] descent, came into the meeting briefly. When he left, [REDACTED] and the Analyst made derogatory comments about how he smelled, relating that as a trait of people from [REDACTED]. That same day, Complainant wrote a Memorandum for Record (MFR) to herself that the remarks were very upsetting and caused her to excuse herself from the meeting for a few minutes. Complainant wrote in the MFR, “I am of [REDACTED] descent, and I thought what do these people say behind my back?”

Complainant testified that on February 11, 2016, she attended a farewell party for a co-worker. Also in attendance was [REDACTED]. During the party, [REDACTED] commented to Complainant words to the effect, “When I was in Japan, the Japanese women just really hated the [REDACTED] it was very common. When they saw the [REDACTED] walk in the room, they

³ Siri is a computer program that works as an intelligent personal assistant and knowledge navigator as part of Apple Inc.’s operating systems. The feature uses a natural language user interface to answer questions, make recommendations, and perform actions by delegating requests to a set of Web services.

leave, I don't know what it is in you [REDACTED] that the Japanese hate.” Complainant viewed his comments as demeaning to [REDACTED]

[REDACTED] testified to us:

And I asked her about that, and specifically, I noticed that – and made the comment that I never understood why the Japanese women really did not like [REDACTED] I said, ‘I have no idea why,’ and I was kind of asking if she (Complainant) could provide any insight into that, and if she experienced that same type of – kind of discrimination and hostility from Japanese women. That was it.

On March 9, 2016, [REDACTED] sent Complainant and the other team members an email requesting updated resumes for possible inclusion in the yet-unreleased follow-on contract. Additionally, [REDACTED] sent Complainant a second email that same day suggesting seven different activities or responsibilities that Complainant should consider adding to her resume.⁴ Leidos confirmed [REDACTED] intent in sending the emails writing,

“... on March 9, 2016, with the period of performance of the existing prime contract coming to a close and when [REDACTED] was collecting resumes for team members for a possible bid on an as-of-yet unreleased follow on procurement, [REDACTED] emailed [REDACTED] and suggested seven different activities or responsibilities that [REDACTED] should consider adding to her resume.”

In response to our tentative conclusion letter, Leidos stated that [REDACTED] was collecting the resumes for the subcontractor, [REDACTED] Leidos stated that [REDACTED] request for resumes was unrelated to the staffing of the bridge contract.

Complainant testified to us that on March 10, 2016, she told [REDACTED] [REDACTED] OEA, that [REDACTED] was creating a hostile work environment, and had made inappropriate sexual and racial comments to her. [REDACTED] also served as the [REDACTED] for the BEI contract. Complainant stated [REDACTED] suggested she document her concerns in an MFR and submit them to her supervisor, [REDACTED]

On March 11, 2016, Complainant verbally told [REDACTED] she intended to leave the contract at the end of the contract period on April 15, 2016. [REDACTED] sent an email to [REDACTED] Principal, [REDACTED] writing, “(Complainant) gave her notice. She will work through April 15th. We need to start looking. Maybe a notice on Linked In?” [REDACTED] acknowledged Complainant was leaving the contract, agreed to advertising for a replacement, and notified [REDACTED] Human Resources that Complainant was leaving the contract. Also, on March 11, 2016, Complainant sent a text message to [REDACTED] [REDACTED] OEA, Arlington, VA, writing “Good morning, gave notice to [REDACTED] this

⁴ The follow-on contract was issued as a small business (8(a)) set aside making Leidos ineligible to bid for the work. Leidos was, however, awarded a six-month bridge contract to support the transition from a traditional to 8(a) contract.

AM, I will work through 4/15 (April 15, 1016). It's been an honor and a pleasure to work with you all." Complainant also informed the OEA office manager that she had given her notice, but would work through the end of the option year on April 15, 2016.

Complainant testified that later that same day, she retracted her intent to leave the contract by verbally informing [REDACTED] and [REDACTED] that she was going to remain with the BEI contract at OEA.

[REDACTED] testified to us that on or about March 11, 2016, after Complainant said she was going to resign, [REDACTED] asked Complainant "if she wanted to stay on after the contract until she got another job ..." but Complainant never indicated to her that she wished to be considered for the bridge contract.

[REDACTED] testified that on March 11, 2016, [REDACTED] informed her that Complainant made allegations against [REDACTED] and the general nature of the allegations. [REDACTED] stated that Complainant "had accused [REDACTED] of a racial comment."

On March 15, 2016, Complainant sent an MFR to [REDACTED] and [REDACTED] alleging that [REDACTED] created a hostile work environment, made inappropriate sexual comments to her, and culturally demeaning remarks to her based on her national origin.⁵ Additionally, Complainant wrote that [REDACTED] was present for some of these incidents and failed to take any action, and that Complainant told [REDACTED] of other problems and that [REDACTED] had "done nothing to alleviate the situation."

[REDACTED] testified to us that he became aware Complainant filed a complaint against him when [REDACTED] notified him that Complainant had submitted a letter (MFR) with concerns about his [REDACTED] behavior. [REDACTED] stated that [REDACTED] asked him to prepare a response to Complainant's allegations, but that he never provided a response to [REDACTED]. [REDACTED] stated that [REDACTED] also showed him a copy of Complainant's March 15, 2016, MFR detailing Complainant's allegations.

[REDACTED] testified to us he was unhappy with Complainant's work performance, and that he communicated this to [REDACTED]. [REDACTED] stated that he might have asked [REDACTED] what options they had for replacing Complainant on the contract, but denied he asked for or directed [REDACTED] to remove Complainant from the contract. [REDACTED] stated that while he was personally glad to not see Complainant back on the contract, he did not formally request Complainant's removal from her contractor position, nor did he play a role in deciding who would be included on the bridge contract.

[REDACTED] testified to us that "[REDACTED] had told me on several occasions that he did not feel comfortable about – with (Complainant)" and "But he didn't – he just did not want

⁵ The MFR that Complainant sent to [REDACTED] and [REDACTED] is dated March 10, 2016, which is the date Complainant began drafting the MFR; however, complainant did not present the MFR to [REDACTED] and [REDACTED] until March 15, 2016. Throughout the testimony, witnesses referred to this document as both the March 10, 2016, MFR, and the March 15, 2016, MFR, although they are referring to the same document. For clarity and consistency in this report, we refer to this document as the March 15, 2016, MFR.

her in the office. He just said, ‘You could have her work from home. I just don’t want her here.’” We asked [REDACTED] if [REDACTED] concerns about Complainant had any bearing on her not being selected to work on the bridge contract. [REDACTED] stated that [REDACTED] concerns and Complainant’s non-selection were related, replying, “Yes. She quit, so we didn’t – at that point didn’t do anything. I mean, we let her stay to the end of the contract.”

On March 17, 2016, Complainant emailed [REDACTED] a copy of her updated resume. This email, and attached resume, was in response to [REDACTED] March 9, 2016, email in which [REDACTED] requested team members’ resumes for the follow-on contract. Complainant modified her resume to reflect the items [REDACTED] identified to her as being important for the bridge contract. The following day, March 18, 2016, Complainant sent a copy of this email and attachment from her work email to her civilian email address.

[REDACTED] testified to us that Complainant did not express interest in the bridge contract until after the new contract was in effect, on or about April 25, 2016, by which time [REDACTED] had already interviewed Complainant’s replacement and offered him the position. Complainant testified to us that [REDACTED] was aware of her intent to remain on the contract over a month earlier, when she rescinded her intent to leave and submitted her updated resume to [REDACTED] via email.⁶ We attempted to clarify this inconsistency with [REDACTED]; however, she declined, through counsel, to be re-interviewed. Complainant’s testimony to us on this matter was consistent and aligned with the documentary evidence. Conversely, [REDACTED] testimony to us conflicted with the evidence. Absent [REDACTED] providing a reasonable explanation for this inconsistency, we found Complainant’s recollection of these events to be more credible.

Complainant stated that on or about March 28, 2016, Leidos added more hours to Complainant’s contract so that she could continue to support the contract through April 15, 2016.⁷

Complainant stated that on or about April 10, 2016, [REDACTED] told all contractors to begin packing up their personal items in boxes, as she was unsure what was going to happen with the bridge contract.

[REDACTED] testified to us that between April 15, 2016, and approximately April 25, 2016, the contract lapsed and all [REDACTED] and Leidos employees (including Complainant) remained away from the work site awaiting issuance of the bridge contract.

On or about April 25, 2016, Leidos was awarded a bridge contract to provide continuity of services as the Government transitioned the contract to an 8(a) Business Development

⁶ We further noted that in Complainant’s April 25, 2016, email to [REDACTED] and [REDACTED]; she referenced sending her updated resume to them in an earlier email. This reinforces Complainant’s position that she had expressed interest in, and took actions to be considered for, the bridge contract and that [REDACTED] was aware of her interest.

⁷ Complainant’s contract was for a fixed number of hours. Leidos added additional billable hours to her contract on March 28, 2016, so that Complainant could perform more work under the contract.

Program contract.⁸ All employees on the previous contract, except for Complainant, returned for the bridge contract and resumed work. That same day, Complainant emailed ██████████ congratulating her on Leidos and ██████████ getting the bridge contract, and asked ██████████ to re-consider her for employment on the bridge contract and enclosed a copy of her resume. Complainant referenced her earlier March 17, 2016, email and resume to ██████████. Complainant wrote, “Forwarding the same CV that I sent to you per your previous request (see below March 9 email).”⁹ That same day, Complainant sent an email to ██████████ Leidos Program Manager, DoD, Office of the Secretary of Defense (OSD), ██████████ asking to be re-considered for the bridge contract. Neither ██████████ nor ██████████ responded to Complainant’s email.

Leidos asserted that Complainant’s April 25, 2016, email to ██████████ and ██████████ was her first indication to Leidos management officials that she wanted to work on the bridge contract, but that ██████████ had already hired a replacement for Complainant by the time she expressed this interest.

In a written response to our notification of investigation, Leidos explained, “The decision not to extend (Complainant’s) contract was a direct result of her quitting.” Leidos listed items they characterized as problems with Complainant’s work, claiming that Complainant refused to share important documents on the shared drive, attend or participate in meetings, to explain her work and answer questions posed by the customer, to share deliverables, cooperate with ██████████ and ██████████ comply with work-related customer requests, and speak to ██████████ for days, and that her behavior made the customer uncomfortable. They concluded with, “Again, however, this did not factor into (Complainant’s) absence from the contract extension. (Complainant’s) absence related solely to her voluntary resignation.”¹⁰

Five employees worked under the Leidos controlled section of the BEI contract. ██████████ was a direct Leidos employee and the remaining four employees were subcontracted by Leidos. Complainant was the only person of this group not continued on the bridge contract.

VI. ANALYSIS

Under 10 U.S.C. 2409, reprisal is proven in a 2-step process. First, a preponderance of the evidence must establish that one or more protected disclosures could have been a contributing factor in a responsible management official’s decision to discharge, demote, or take another unfavorable action against the employee who made the protected disclosures. The

⁸ Title 13, Code of Federal Regulations, Part 124, established the 8(a) Business Development Program as a business assistance program for small disadvantaged businesses. The 8(a) Program offers a broad scope of assistance to firms that are owned and controlled at least 51% by socially and economically disadvantaged individuals.

⁹ A curriculum vitae (CV) is a written overview of a person’s experience and other qualifications for a job opportunity. In this case, CV is synonymous with resume.

¹⁰ Given Leidos’ position that Complainant’s alleged performance deficiencies did not contribute to her non-selection for the bridge contract, we did not further evaluate those claims.

complaint is thus substantiated, unless clear and convincing evidence establishes that the contractor or subcontractor would have discharged, demoted, or taken or failed to take another action with respect to Complainant, absent the protected disclosure(s).

A. Did Complainant make a protected disclosure? Yes

We determined that Complainant made two protected disclosures under 10 U.S.C. § 2409.

March 10, 2016, Disclosure to [REDACTED] – Yes

On March 10, 2016, Complainant told [REDACTED], [REDACTED] that [REDACTED] created a hostile work environment and had made inappropriate sexual and racial comments to her. Complainant's disclosure detailed a suspected violation of regulation related to a DoD contract. Specifically, Complainant's allegation that [REDACTED] created a hostile work environment based on Complainant's status as a [REDACTED] would have violated the Defense Federal Acquisition Regulation (DFAR) 52.222-8, "Equal Opportunity." As [REDACTED], [REDACTED] was a DoD employee responsible for contract oversight or management.

March 14, 2016, Disclosure to [REDACTED] and [REDACTED] – Yes

On March 14, 2016, Complainant sent an email to [REDACTED] and [REDACTED] alleging that [REDACTED] created a hostile work environment, made inappropriate sexual comments toward Complainant, and demeaning remarks to her based on her national origin. Complainant's disclosure detailed a suspected violation of regulation related to a DoD contract. Specifically, Complainant's allegation that [REDACTED] created a hostile work environment based on Complainant's status as a [REDACTED] would have violated the Defense Federal Acquisition Regulation (DFAR) 52.222-26, "Equal Opportunity." As the Program Manager for the contract, [REDACTED] was a management official or other employee of the contractor who had the responsibility to investigate, discover, or address misconduct.

As previously described, a preponderance of the evidence established that Complainant made two protected disclosures that she reasonably believed evidenced violations of regulation related to a DoD contract.

B. Did the contractor or subcontractor discharge, demote, or take or fail to take another action with respect to Complainant? Yes

We determined that Leidos did take or fail to take an action with respect to Complainant.

Non-Continuation on the Bridge Contract – Yes

Between March 17, 2016, when Complainant submitted her resume, and April 15, 2017, when the contract expired, [REDACTED] failed to take action regarding Complainant's request for consideration on the bridge contract. We determined that [REDACTED] failure to take action constituted an action under 10 U.S.C. 2409.

Complainant alleged on or about April 15, 2016, [REDACTED] did not select her for continuation on the bridge contract. Conversely, [REDACTED] testified to us that she made no decision concerning Complainant's employment; rather, Complainant took the action to resign her position over a month prior when she notified Leidos, [REDACTED] and the Government customer that she was resigning her position, and that her last day of work would be April 15, 2016.

During our November 2, 2016, interview, the DoD OIG asked [REDACTED] if Complainant had made known her intention to continue on the bridge contract. [REDACTED] denied Complainant ever indicated to her that she intended to stay on for the bridge contract. Counsel for Leidos wrote to DoD OIG investigators that Complainant did express interest in the bridge contract in her April 25, 2016, email to [REDACTED] and [REDACTED] but that was after the bridge contract was in place and a new person had been hired to replace Complainant.

[REDACTED] testified to us that Complainant resigned her position on March 11, 2016, and that Complainant did not inform [REDACTED] of Complainant's desire to continue on the bridge contract until April 25, 2016. However, [REDACTED] testimony conflicts with documentary evidence collected during the investigation. Subsequent to [REDACTED] November 2, 2016, interview, DoD OIG investigators re-interviewed Complainant and obtained additional documents showing Complainant sent [REDACTED] an updated resume on March 17, 2016. Complainant testified she sent the email and resume to [REDACTED] specifically to be considered for the bridge contract. Complainant explained that on March 9, 2016, [REDACTED] sent her an email suggesting items Complainant should add to her resume to be competitive on the bridge contract.

On February 28, 2017, DoD OIG investigators contacted Leidos to schedule a second interview with [REDACTED] to clarify her previous testimony. Leidos replied to our request stating [REDACTED] declined to provide additional testimony. Consequently, we were unable to resolve the discrepancy between [REDACTED] testimony and the documentary and testimonial evidence presented by Complainant showing that [REDACTED] was aware of Complainant's intent to remain for the bridge contract. Similarly, in Leidos' response to our tentative conclusion letter, it offered no explanation for this discrepancy, despite being aware of the allegation against [REDACTED] and the evidence supporting the allegation.

Further, [REDACTED] denied taking any action with respect to Complainant's employment on the bridge contract; however, the evidence shows that [REDACTED] made herself the point of contact for all the employees seeking employment on the bridge contract by sending out email requesting the employee resumes, suggesting changes to those resumes based on the content of the draft contract proposal, and collecting the updated resumes. [REDACTED] testified to us that she later interviewed and made the job offer to Complainant's replacement on the contract, which further establishes [REDACTED] as the responsible management official making employment decisions on the contract.

In response to our tentative conclusion letter, Leidos attempted to distance itself from [REDACTED] actions stating that "Leidos had no role whatsoever in [REDACTED] efforts to solicit resumes for [REDACTED] for a follow-on contract," and "... Leidos had no role in any hiring decisions regarding [Complainant] on either contract. [REDACTED] was performing the

employee and subcontractor selections duties ... on behalf of her soon-to-be employer [REDACTED] and not Leidos.” However, Leidos offered no explanation for why [REDACTED] a Leidos employee, would have been performing employee and subcontractor selection duties for [REDACTED] while still employed as the project manager for Leidos on the contract Complainant was employed under. Additionally, [REDACTED] performed these duties while using her official Government email assigned as part of that Leidos contract, and during regular working hours she presumably would have been performing tasks relevant to contract between Leidos and the Government.

Even if Leidos’ claims were true, it does not change the analysis that [REDACTED] failed to take an action with respect to Complainant while [REDACTED] was a Leidos employee and while functioning as Complainant’s supervisor.

As previously described, a preponderance of the evidence established that Complainant took actions to be considered for the bridge contract.

C. Could a reasonable person conclude that one or more of the protected disclosures were contributing factors in the contractor or subcontractor’s decision to take or fail to take an action with respect to Complainant? Yes

“Contributing factor” means any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. To determine whether a protected disclosure was a contributing factor in a decision to take or fail to take, or threaten to take or fail to take, any action, our analysis ordinarily weighs the following factors: knowledge of the protected disclosures on the part of the officer or employee involved in the decision and the decision’s proximity in time to the protected disclosure. In most instances, these two factors together suffice to establish that a protected disclosure was a contributing factor. However, if knowledge and timing alone fail to establish that a disclosure was a contributing factor, any other circumstantial evidence may also be considered, such as the strength or weakness of the responsible management official’s stated reasons for the action, whether the protected disclosure was personally directed at the responsible management official, or whether the responsible management official had a desire or motive to retaliate against the complainant.

We determined that Complainant’s protected disclosures were a contributing factor in Leidos’ failure to take actions with respect to Complainant. Discussion of the factors weighed together follows the factor-by-factor analysis below.

Knowledge

March 10, 2016, Disclosure to [REDACTED]

[REDACTED] – Yes. [REDACTED] testified to us that she became aware of Complainant making allegations to [REDACTED] against [REDACTED] on March 11, 2016, when [REDACTED] called [REDACTED] into his office and informed her. Complainant emailed [REDACTED] and [REDACTED] her MFR.

March 14, 2016, Disclosure to [REDACTED] and [REDACTED]

[REDACTED] – Yes. [REDACTED] testified to us that she became aware of Complainant’s allegations against her and [REDACTED] on March 15, 2016, when Complainant emailed [REDACTED] and [REDACTED] her MFR.

Timing of Actions Taken or Withheld

Complainant made her protected disclosure to [REDACTED] and [REDACTED] on March 15, 2016. [REDACTED] received Complainant’s updated resume via email on March 17, 2016, only two days after [REDACTED] became aware of Complainant’s disclosures. [REDACTED] made a decision concerning Complainant’s employment when she received Complainant’s resume on March 17, 2016, or on April 15, 2016, less than a month later. The close timing between [REDACTED] knowledge of Complainant’s disclosure and her failure to take action leads to an inference that the disclosures were a factor in those actions.

Discussion

Based on the factors previously analyzed, a preponderance of the evidence established that Complainant’s protected disclosures were a contributing factor in Leidos’ decision to take or fail to take an action with respect to Complainant.

D. Does clear and convincing evidence indicate that the contractor or subcontractor would have discharged, demoted, or taken another unfavorable action against Complainant absent the protected disclosures? No

Once a preponderance of the evidence establishes that one or more protected disclosures could have contributed to the decision to discharge, demote, or take or fail to take another action with respect to Complainant, the case is substantiated unless clear and convincing evidence establishes that the unfavorable action would have been taken even in the absence of the protected disclosure. For each unfavorable action taken, our analysis weighs together the following factors: the strength of the evidence in support of the stated reasons for taking the unfavorable action; the existence and strength of any motive to retaliate on the part of the company officials who were involved in the decision; and any evidence that they take similar actions against employees who are not whistleblowers, but who are otherwise similarly situated.

We determined that Leidos would not have taken the actions with respect to Complainant absent her protected disclosures. Discussion of the factors weighed together follows in the factor-by-factor analysis.

Leidos’ Stated Reasons for Not Selecting Complainant for the Bridge Contract

[REDACTED] testified to us that she did not take an action with respect to Complainant’s non-selection to the bridge contract. Leidos stated that Complainant’s non-selection to the bridge contract was based solely on her voluntary resignation. [REDACTED] also stated that Complainant’s resignation was the reason she was not included on the bridge contract, but added

that [REDACTED] dissatisfaction with Complainant's performance and demeanor influenced her actions concerning Complainant's employment on the bridge contract.

Leidos provided us with several concerns regarding Complainant's work performance, which might have given them grounds to non-select Complainant for the bridge contract. Leidos alleged that [REDACTED] twice requested Complainant provide training to OEA employees on a civilian pay test Complainant developed, but that Complainant refused each time; that Complainant refused to put dates on a data call submission which resulted in re-work and re-submission of the data call; that Complainant had a poor working relationship with [REDACTED] and she refused to perform tasks he requested of her; that Complainant occasionally refused to talk to [REDACTED], refused to keep [REDACTED] informed about the status of her work, would walk out of meetings or simply refuse to attend, and that Complainant did not document meetings she had with Government employees. However, Leidos asserted to us that none of those items influenced her non-selection to the bridge contract, writing, "Again, however, this did not factor into (Complainant's) absence from the contract extension. (Complainant's) absence related solely to her voluntary resignation." Accordingly, we determined that these alleged performance concerns were not factors in Complainant's non-selection to the bridge contract.

As previously discussed, Complainant immediately reversed her temporary decision to leave the contract, orally notified [REDACTED] and other OEA officials of her decision to stay, and subsequently submitted her resume to [REDACTED] a few days later. In response to our tentative conclusion letter, Leidos claimed Complainant did not rescind her resignation to [REDACTED] or to any other persons; however, it offered no evidence of this, other than [REDACTED] declaration. As explained in the finding of fact section of this report, we found Complainant's testimony to be more credible than that of [REDACTED]. Additionally, although Leidos provided us with a declaration it obtained from [REDACTED] as part of its response to our tentative conclusion letter, we note that Leidos has refused to make [REDACTED] a former Leidos supervisory employee, available to us for a follow-up interview under oath concerning the allegations. The evidence supports that Complainant submitted her resume for inclusion on the contract, that she modified her resume to reflect specific skills sought on the bridge contract, and that [REDACTED] was aware of Complainant's intent to work on the bridge contract.

Further, the record shows that Leidos requested additional hours for Complainant to work on the contract when it added hours on March 28, 2016. Had Leidos actually had concerns about Complainant's performance and conduct, as it claimed, it is unlikely that it would have sought and obtained additional billable hours for Complainant to perform work on the contract.

Finally, in response to our tentative conclusion letter, Leidos claimed that Complainant's non-selection to the bridge contract was an action taken by [REDACTED] and not by Leidos; however, the evidence supports a different conclusion. All actions concerning hiring, selections and employment flowed through [REDACTED] who was a Leidos employee. We found no evidence of any direct communication between [REDACTED] and Complainant subsequent to her hiring. Leidos additionally claimed that [REDACTED] was in no position to effect a reprisal. We disagree. [REDACTED] at that time a Leidos supervisor, was positioned directly between Complainant and [REDACTED] and was positioned to take or not take actions concerning

Complainant. Additionally, [REDACTED] testified to us that [REDACTED] did not want Complainant on the contract and this influenced her decision not to include Complainant on the bridge contract.

We determined that Leidos would not have discharged, demoted, or taken or failed to take another action with respect to Complainant absent her protected disclosures. Discussion of the factors weighed together follows in the factor-by-factor analysis.

Motive

We found that [REDACTED] and Leidos had motive to exclude Complainant from the contract. Complainant made allegations against [REDACTED] who was both the [REDACTED] to OEA, and the functional customer of the Leidos contract. Further, both [REDACTED] and [REDACTED] made [REDACTED] aware that Complainant filed a complaint against him, and shared with him the content of her complaint. [REDACTED] told [REDACTED] that he was displeased with Complainant's performance on the contract, and uncomfortable being around Complainant. Although [REDACTED] denied ever asking [REDACTED] to remove Complainant from the contract, he told investigators that he may have inquired of [REDACTED] about the process to remove Complainant, and that he was personally glad to not see Complainant back on the contract. [REDACTED] testified she was aware of [REDACTED] feeling towards Complainant, and that [REDACTED] opinion of Complainant impacted her decision not to include Complainant on the bridge contract. It is more likely than not that [REDACTED] knowledge of the allegations Complainant filed against [REDACTED] [REDACTED] stated concerns about Complainant, and [REDACTED] desire to preserve the working relationship between Leidos, [REDACTED] and [REDACTED] motivated [REDACTED] to exclude Complainant from the contract.

Additionally, we noted that in Complainant's March 15, 2016, disclosure, Complainant made allegations against [REDACTED]. Specifically, that [REDACTED] was present when [REDACTED] made inappropriate comments and failed to take any action, and that Complainant had disclosed other problems directly to [REDACTED] and that [REDACTED] had "done nothing to alleviate the situation." Complainant sent this disclosure to [REDACTED] [REDACTED] and [REDACTED]. This disclosure cast [REDACTED] in a negative light, and may have provided motivation for [REDACTED] to reprise against Complainant.

Disparate Treatment

The OEA contract managed by [REDACTED] employed Complainant and three other subcontractors. Testimony and records show that [REDACTED] and the three other subcontractors all were hired to perform work on the bridge contract. Complainant was the only one of the team that was not selected for continuation.

VII. DISCUSSION

Weighed together, the evidence analyzed above does not clearly and convincingly establish that Leidos would have discharged, demoted, or taken another unfavorable action against Complainant absent the protected disclosures.

The evidence supports that, although Complainant stated her intent to resign from the contract, she retracted her statement later that same day. The evidence also shows that she notified her co-workers and [REDACTED] that she intended to remain on the contract and took affirmative steps to be hired for the bridge contract by emailing [REDACTED] her resume.

Leidos' claim that Complainant exhibited poor performance throughout her employment lacks supporting evidence. In fact, the evidence suggests that [REDACTED] was supportive of Complainant up to March 11, 2016, when she became aware that Complainant filed her allegations against [REDACTED]. The March 9, 2017, email [REDACTED] sent to Complainant solicited her resume for the bridge contract and by the second email, later that same day, suggested items Complainant should specifically add to her resume. It is unlikely that [REDACTED] would have voluntarily assisted a poorly performing sub-contractor with drafting her resume for the subsequent contract if she did not want Complainant on the contract.

[REDACTED] position that she was unaware of Complainant's intent to remain on the contract is not supported by the evidence. The evidence shows that [REDACTED] was aware of Complainant's disclosures, was aware that Complainant desired to remain on the contract, and was in receipt of Complainant's updated resume. Further, as the Program Manager and main point of contact for the bridge contract, it was [REDACTED] responsibility to take action with respect to Complainant's request to be considered for the contract. When WRI investigators attempted to re-interview [REDACTED] regarding inconsistencies between her testimony and the evidence, Leidos declined to make [REDACTED] available for additional testimony, or to clarify her previous testimony.

[REDACTED] had motive to not include Complainant on the bridge contract as she knew of [REDACTED] discomfort with Complainant, and was aware Complainant made allegations against both her and [REDACTED].

Finally, we note that 10 U.S.C. § 2409(a)(3)(B) prohibits Defense contractors such as Leidos from engaging in reprisal against a whistleblower "even if it is undertaken at the request of a Department or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the Department or Administration official making the request." As discussed, Leidos claimed that it had received complaints about Complainant from [REDACTED] however, the mere existence of complaints from Government officials does not relieve Leidos of its burden to demonstrate by clear and convincing evidence that it would have taken the same actions in the absence of the protected disclosures. Based on the numerous discrepancies identified above, we find that Leidos failed to satisfy this burden of proof.

Weighed together, the evidence analyzed above does not clearly and convincingly establish that Leidos would have discharged, demoted, or taken another unfavorable action against Complainant absent the protected disclosures.

Accordingly, in the absence of clear and convincing evidence to the contrary, we conclude that Leidos non-selected Complainant for continuation on the bridge contract in reprisal for Complainant's protected disclosures.

VIII. CONCLUSION

We conclude that:

Leidos non-selected Complainant for continuation on the bridge contract in reprisal for her protected disclosures.

We recommend that the Secretary of Defense:

- Consider appropriate action against Leidos.
- Order Leidos to award compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to Complainant in that position if the reprisal had not been taken.

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