Docket 21-7077

IN THE

SUPREME COURT OF THE UNITED STATES

CATHERINE KURKJIAN – PETITIONER

VS.

SECRETARY OF THE ARMY – RESPONDENT

ON PETITION FOR A WRIT OF CERTORARARI TO

US COURT OF APPEALS, FEDERAL CIRCUIRT

PETITION FOR WRIT OF CERTIORARI

Supplemental Information

Aa a pro se petitioner; I respectfully ask that the attached information, in docket number 21-7077, be distributed for the March 25, 2022 review. A major winter storm, a state of emergency, and widespread power outages from January 28 to January 30 resulted in the partly handwritten, patchy petition that was filed on January 31, 2022. I have since discovered that there is a missing page and the petition that was scanned contains repeated pages. Attached is the missing page 9, correct pages 34 & 35, and Appendix I with the cross referenced constitutional and statutory provisions, regulations, and list of authorities.

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March 17, 2022

information she needed to move on with her life. The government refused to provide a response to Kurkjian's 12 Dec 13 letter. The contract was modified (without the contractor's signature) and closed on 23 Dec 13, without a final voucher, a property clearance, or a contractor completion statement, in violation of FAR 4.804.5. Kurkjian continued to seek resolution and to be told what was being said about her. The situation leading up to; and the events of January 9, 2013 in the office of Director Darsch, caused severe emotional distress. The unlawful interference and libelous statements of Dr. Carter and Ms. Evangelos resulted in the destruction of Kurkjian's livelihood, her reputation, and sense of well-being. On Dec 23, 2016, Kurkjian filed a claim to the Contracting Officer that was denied on Feb 7, 2017, with no investigation. The Armed Forces Board of Contract Appeals denied her appeal on Nov 2, 2019. The Decision was based "largely on a memo written by Ms. Evangelos" (that did not exist in 2014 or 2015 when Kurkjian requested the Minutes of the Meeting from Attty Tuttle and an FOIA Request {No. NCD-15-0002}; 14 July 2015). The Board also relied on "hearsay" testimony. Judge Prouty stated:

> 13The point is this witness is reporting
> 14 information which, of course, can be discounted
> 15 appropriately as hearsay, but it is the basis for the
> 16 Government's decision.

Kurkjian appealed to the US Court of Appeals, Federal Circuit to conduct a "whole record" review in accordance with 5 U.S.C. 706. On November 2, 2021, the Appeals Court affirmed that the Board's decision was not unlawful, that conspiring to "just pay the contract and just say the contract was completed" was not "bad faith", and the temporal proximity between the disclosures and the discharge was not evidence of a reprisal. Government documents continue to cite non-compliant inspection criteria, increasing the risk of Salmonella contamination; the man denied an "accommodation" is deceased, and Natick Labs was allowed to breach the contract because of the "ad hoc" rationalization that 95% of the hours being paid would deem the contract "effectively completed" to make all the laws a "non sequitur".

a) Contracting Officer's failure to exercise independent judgement.

Contracting Officer Streeter did not use independent judgement; deemed "bad faith" in Dekatron Corp v United States, 128 Fed. C. 115, 118-119 (2016). The Contracting Officer failed to communicate with Ms. Kurkjian and did not comply with FAR 1.602-2 which states that it is a Contracting Officer's responsibility to ensure that contractors receive impartial, fair, and equitable treatment. CO Streeter did not participate in the decision not to exercise the option, nor could he say that he was even on the phone at the decision-making meeting. CO Streeter testified that there was nothing in the contract file to indicate poor performance or behavioral issues. He conducted no investigation; he did not speak to co-workers. He had not talked to Ms. Kurkjian, never met her, and knew nothing about her exemplary 28-year work history or that the fact that she was deemed a critical part of the CFD mission. There was no termination letter for appointed Contracting Officer Abate, in accordance with FAR 1.603-4, and no appointment form SF 1402 (FAR 1.603-3) for Mr. Streeter. On January 17, 2013, 8 days after her discharge without notice, in reply to the Contractor's request for information, CO Abate wrote: "Mr. Streeter is the new Contracting Officer for the contract.

b) The Contracting Officer and The Contracting Officer Representative (COR) failed to communicate with the Contractor "at all crucial times leading up to the failure to exercise the option."

In Dekatron Corp v. the United States, the failure to communicate with the Contractor "at all crucial times leading up to the Contracting Officer's failure to exercise" the option was evidence of "bad faith." COR Bates refused to communicate with Ms. Kurkjian. Specifically, the Contracting Officer Representative did not respond to inquiries from the Contractor as to the status of her contract and "purposely let the time expire" for notification of the exercise of the option. COR Bates was instructed not to talk to Ms. Kurkjian while Supervisor Carter destroyed her reputation with allegations about her "refusal to do work" and self-proclaimed rumor about her mental state. Contracting Officer Wilson, to whom Supervisor Carter lodged complaints, wrote to the Contractor on December 28, 2012: "What is going on with this purchase order?". She replied that she did not have the requirements to perform, and the Salmonella issues were not resolved. CO Wilson replied: "I will check with Melvin (Supervisor Carter) and see where he stands." There was no more communication from anybody in Contracting. Twelve days later, the Contractor was discharged without notice and coerced into submitting a voucher for hours worked that she did not work (in violation of state and federal law) so that the base year of the contract could be deemed complete, the Agency could close the contract, and the government would be free from liability for the wrongful termination.

DOCKET 21-7077

PETITION FOR WRIT OF CERTORARI

SUPPLEMENTAL APPENDIX I

CONSTITUTIONAL AND STATATORY PROVIISIONS

REGULATIONS

AUTHORITIES

A. Federal Acquisition Regulations

The Board wrote: "To the extent that Mrs. Kurkjian is arguing that she was somehow prejudiced because the government did not issue a "cure notice" or otherwise follow proper procedure (see app. br. at 27-28), this argument is a non sequitur". The responsibilities and proper procedures are as follow:

1.602-2 Responsibilities. Contracting officers are responsible for ensuring performance of all necessary actions for effective contracting , ensuring compliance with the terms of the contract , and safeguarding the interests of the United States in its contractual relationships. In order to perform these responsibilities, contracting officers should be allowed wide latitude to exercise business judgment. Contracting officers shall -

(a) Ensure that the requirements of 1.602-1(b) have been met, and that sufficient funds are available for obligation;

(b) Ensure that contractors receive impartial, fair, and equitable treatment;

(c) Request and consider the advice of specialists in audit, law, engineering, information security , transportation, and other fields, as appropriate; and

(d) Designate and authorize, in writing and in accordance with agency procedures, a contracting officer 's representative (COR) on all contracts and orders other than those that are firm-fixed price, and for firm-fixed-price contracts and orders as appropriate, unless the contracting officer retains and executes the COR duties. See 7.104(e). □COR-

(1) Shall be a Government employee, unless otherwise authorized in agency regulations;

(2) Shall be certified and maintain certification in accordance with the current Office of Management and Budget memorandum on the Federal Acquisition Certification for Contracting Officer Representatives (FAC-COR) guidance, or for DoD, in accordance with the current applicable DoD policy guidance;

(3) Shall be qualified by training and experience commensurate with the responsibilities to be delegated in accordance with agency procedures;

(4) May not be delegated responsibility to perform functions that have been delegated under 42.202 to a contract administration office , but may be assigned some duties at 42.302 by the contracting officer ;

(5) Has no authority to make any commitments or changes that affect price, quality, quantity, delivery, or other terms and conditions of the contract nor in any way direct the contractor or its subcontractors to operate in conflict with the contract terms and conditions;

(6) Shall be nominated either by the requiring activity or in accordance with agency procedures; and

(7) Shall be designated in writing , with copies furnished to the contractor and the contract administration office -

(i) Specifying the extent of the COR's authority to act on behalf of the contracting officer ;

(ii) Identifying the limitations on the COR's authority;

(iii) Specifying the period covered by the designation.

(iv) Stating the authority is not redelegable; and

(v) Stating that the COR may be personally liable for unauthorized acts.

... **1.603-3 Appointment.** Contracting officers shall be appointed in writing on an SF 1402, Certificate of Appointment, which shall state any limitations on the scope of authority to be exercised, other than limitations contained in applicable law or regulation. Appointing officials shall maintain files containing copies of all appointments that have not been terminated.

1.603-4 Termination. Termination of a contracting officer appointment will be by letter, unless the Certificate of Appointment contains other provisions for automatic termination. Terminations may be for reasons such as reassignment, termination of employment, or unsatisfactory performance. No termination shall operate retroactively

4.804-4 Physically Completed Contracts.

(a) Except as provided in paragraph (b) of this section, a contract is considered to be physically completed when

(1)(I) The contractor has completed the required deliveries and the Government has inspected and accepted the supplies;

(ii) The contractor has performed all services and the Government has accepted these services; and

(iii) All option provisions, if any, have expired; or

(2) The Government has given the contractor a notice of complete contract termination.

4.804-5 Procedures for closing out contract files.

(a) The contract administration office is responsible for initiating (automated or manual) administrative closeout of the contract after receiving evidence of its physical completion. At the outset of this process, the contract administration office must review the contract funds status and notify the contracting office of any excess funds the contract administration office might deobligate. When complete, the administrative closeout procedures must ensure that

1) Disposition of classified material is completed;

(2) Final patent report is cleared. If a final patent report is required, the contracting officer may proceed with contract closeout in accordance with the following procedures, or as otherwise prescribed by agency procedures:

(i) Final patent reports should be cleared **within** 60 days of receipt.

(ii) If the final patent report is not received, the contracting officer shall notify the contractor of the contractor's obligations and the Government's rights under the applicable patent rights clause, in accordance with 27.303. If the contractor fails to respond to this notification, the contracting officer may proceed with contract closeout upon consultation with the agency legal counsel responsible for patent matters regarding the contractor's failure to respond.

(3) Final royalty report is cleared;

(4) There is no outstanding value engineering change proposal;

(5) Plant clearance report is received;

(6) Property clearance is received;

(7) All interim or disallowed costs are settled;

(8) Price revision is completed;

(9) Subcontracts are settled by the prime contractor;

(10) Prior year indirect cost rates are settled;

(11) Termination docket is completed;

(12) Contract audit is completed;

(13) Contractor's closing statement is completed;

(14) Contractor's final invoice has been submitted; and

(15) Contract funds review is completed and excess funds deobligated.

42.1303 Stop-work orders.

(a) Stop-work orders may be used, when appropriate, in any negotiated fixedprice or cost-reimbursement supply, research and development, or service contract if stoppage may be required for reasons such as advancement in the state-of-the art, production or engineering breakthroughs, or realignment of programs.

(b) Generally, a stop-work order will be issued only if it is advisable to suspend work pending a decision by the Government and a supplemental agreement providing for the suspension is not feasible. of a stop-work order shall be approved at a level higher than the contracting officer. Stop-work orders shall not be used in place of a termination notice after a decision to terminate has been made.

(c) Stop-work orders should include-

(1) A description of the work to be suspended;

(2) Instructions concerning the contractor's issuance of further orders for materials or services;

(3) Guidance to the contractor on action to be taken on any subcontracts; and

(4) Other suggestions to the contractor for minimizing costs.

(d) Promptly after issuing the stop-work order, the contracting officer should discuss the stop-work order with the contractor and modify the order, if necessary, in light of the discussion.

(e) As soon as feasible after a stop-work order is issued, but before its expiration, the contracting officer shall take appropriate action to-

(I) Terminate the contract;

(2}-Cancel the stop-work order (any cancellation of a stop-work order shall be subject to the same approvals as were required for its issuance); or

complete address of the contracting officer], within 10 days after receipt of this letter. Your failure to present any excuses within this time may be considered as an admission that none exist. Your attention is invited to the respective rights of the Contractor and the Government and the liabilities that may be invoked if a decision is made to terminate for default.

Any assistance given to you on this contract or any acceptance by the Government of delinquent goods or services will be solely for the purpose of mitigating damages, and it is not the intention of the Government to condone any delinquency or to waive any rights the Government has under the contract.

G.2 Authorized changes only by the contracting officer, sup 5252.243-9000 (JAN. 1992)

(a) Except as specified in paragraph (b) herein, no order, statement or conduct of Government personnel who visit the Contractor's facilities, or in any other manner communicate with Contractor personnel during the performance of this contract, shall constitute a change under the "Changes" clause of this contract.

(b) The Contractor shall not comply with any order, direction or request of Government personnel unless issued in writing and signed by the Contracting Officer, or pursuant to specific authority otherwise included in this contract.

(c) The Contracting Officer is the only person authorized to approve changes in any of the requirements of this contract and, notwithstanding provisions contained elsewhere in this contract, said authority remains solely with the Contracting Officer. In the event the contractor effects any change(s) at the direction of anyperson other than the Contracting Officer, that change shall be considered to have been made without authority and no adjustment in price shall be made in the contract (or Delivery Order) to cover any increase in charges incurred as a result thereof.

B. 252.203-7002 Requirements to Inform Employees of Whistleblower Rights

10 U.S §2409. Contractor employees: protection from reprisal for disclosure of certain information (a) Prohibition of Reprisals.-(1) An employee of a contractor, subcontractor, grantee, or subgrantee or personal services contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body described in paragraph (2) information that the employee reasonably believes is evidence of the following:

(A) Gross mismanagement of a Department of Defense contract or grant, a gross waste of Department funds, an abuse of authority relating to a Department contract or grant, or a violation of law, rule, or regulation related to a Department contract (including the competition for or negotiation of a contract) or grant.

(B) Gross mismanagement of a National Aeronautics and Space Administration contract or grant, a gross waste of Administration funds, an abuse of authority relating to an Administration contract or grant, or a violation of law, rule, or regulation related to an Administration contract (including the competition for or negotiation of a contract) or grant.

(C) A substantial and specific danger to public health or safety.

(2) The persons and bodies described in this paragraph are the persons and bodies as follows:

D. Infliction of Emotional Distress

Section 46 of the Restatement (Second) of Torts, states: An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm. (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress: (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or (b) to any other person who is present at the time, if such distress results in bodily harm.

The Restatement makes it clear that one who intentionally causes a third person not to perform a contract or enter into a prospective contract by giving advice acts non-tortiously only if the advice is truthful and honest. Restatement (Second) of Torts. This doctrine is most often used in employment termination cases by claiming that a co-employee or a supervisor intentionally interfered with plaintiff's employment contract with his employer.

So, IIED (Intentional Infliction of Emotional Distress) has four parts: outrageous conduct by the defendant, the intention of causing, or reckless disregard of the probability of causing, emotional distress, actual suffering of severe or extreme emotional distress, and actual and proximate causation of the emotional distress by the defendant's outrageous conduct. The law will not recognize a mere insult or emotional injury without some "plus factor": hence, the outrageous conduct requirement. Importantly, outrageous conduct will be found where the defendant knew the plaintiff to be particularly disposed to harm by the conduct; in other words, the defendant can't plead a defense of having performed similar conduct in front of others with no damage if he knew the conduct would be received differently. The distress suffered must be what a "reasonable person" would undergo given the circumstances, though there is an exception for "eggshell plaintiffs." Furthermore, as the name implies, bodily harm is not a requirement - mental damage alone may be sufficient. Where there is an absence of physical damage, the courts will often look more closely at the outrageous conduct itself, and an action will like where the conduct was sufficient to presume emotional harm. As far as intent goes, willful, wanton or reckless behavior, in deliberate disregard of potential distress, will fulfill the requirement. With the exception of close family members, as evidenced in section (2) (a) above, or those who witness the event (2) (b), transferred intent will usually not be applied. But, in such cases where a third party is damaged, the court may look to familiar foresee ability analyses and the extent of the willful, wanton, or reckless conduct.

E. Title I of American with Disabilities Act (ADA) Title I of the Americans with Disabilities Act of 1990 prohibits private employers, State and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. The retaliation clause prohibits discrimination against an individual because the individual has opposed something unlawful under the ADA or has been involved in some type of complaint activity.

M.G.L. c. 151B §1(17) defines a handicapped person as one who has a physical or mental impairment, a record of such impairment, or is regarded as having an impairment, which substantially limits one or more of the individual's major life activities. accommodation" is defined as "any adjustment or modification to a job (or the way a job is done), employment practice, or work environment that makes it possible for a handicapped individual to perform the essential functions of the position involved and to enjoy equal terms, conditions and benefits of employment

Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap, § II(C); See Ocean Spray Cranberries, Inc. v. MCAD, 441 Mass. 632, 648 n.19 (2004) "The duty to provide a reasonable accommodation is a continuing one." Donohue v. Sodexho-Marriott Services, Inc., 21 MDLR 204, 207, quoting, Ralph v. Lucent Technologies, 139 F.3d 199, 171 (1st Cir. 1998). In particular, an employer is required to engage in an open and ongoing dialogue or "interactive process" with a qualified handicapped individual about providing a reasonable accommodation. Hall, supra, 25 MDLR at 217. This interactive process is intended to identify the precise limitations associated with the employee's disability, and the potential adjustments to the work environment that could overcome those limitations. Hall, 25 MDLR at 217; Mazeikus v. Northwest Airlines, 22 MDLR 63, 68-69 (2000).