

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NEW YORK FIELD OFFICE**

JEFFREY FUDIN,
Appellant,

DOCKET NUMBER
NY-1221-06-0112-W-1

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DATE: August 25, 2006

Ronald G. Dunn, Esq., Albany, New York, for the appellant.

Georgette Gonzales-Snyder, Esq., Syracuse, New York, for the agency.

BEFORE

JoAnn M. Ruggiero
Administrative Judge

INITIAL DECISION

INTRODUCTION

Jeffrey Fudin holds the position of Clinical Pharmacy Specialist (Pain Management), GS-13, at the agency's Stratton Medical Center in Albany, New York. On January 27, 2006, he filed a timely individual-right-of-action (IRA) appeal under the Whistleblower Protection Act (WPA) in connection with two personnel actions: (1) management's decision to deny his request for "authorized absence" (administrative leave) for October 25-27, 2004 to attend the annual conference of the American College of Clinical Pharmacy in Dallas, Texas and (2) management's restriction of his access to the pharmacy at Stratton as of December 10, 2004. *See* Initial Appeal File (IAF), Tab 1.

A copy of the close out letter that the Office of Special Counsel (OSC) issued to the appellant is in the record. *See* IAF, Tab 22, Exhibit A(14).

The Board has jurisdiction over the appeal. *See* 5 U.S.C. § 1221(a); 5 C.F.R. § 1209.2(b)(1).¹ At the appellant's request, I held a hearing. *See* IAF, Tab 16. For the reasons explained below, the appellant's request for corrective action is DENIED.

ANALYSIS AND FINDINGS

Whistleblowing

Whistleblowing is the disclosure of information by an employee (or a former employee or an applicant for employment) that the individual reasonably believes evidences a violation of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. *See* 5 U.S.C. § 2302(b)(8); 5 C.F.R. § 1209.4(b).

¹ The denial of administrative leave may constitute the denial of a benefit under 5 U.S.C. § 2302(a)(2)(A)(ix) *See Arauz v. Department of Justice*, 89 M.S.P.R. 529, 538 (2001) (circumstances under which agency had a general practice of granting such leave). The agency's handbook 5011 Part III Chapter 2 provides that an employee may be given authorized absence without charge to leave when: (1) the activity is considered to be of substantial benefit to the Department of Veterans Affairs in accomplishing its general mission or one of its specific functions, or (2) the activity will clearly enhance the employee's ability to perform the duties of the position presently occupied or may be expected to prospectively occupy, or (3) the basis for excusing the employee is fairly consistent with prevailing practices of other federal establishments in the area concerning the same or similar activities. *See* IAF, Tab 6, Subtab 4g. The handbook also provides that a scientist or other professional, administrative, or technical employee of any kind who desires to attend a professional, technical, or administrative meeting is encouraged to request approved absence for this purpose. *Id.* The denial of "swipe card access" to the pharmacy constitutes a significant change in the appellant's working conditions in that he must now be escorted in the pharmacy and is not permitted to remove medications from the shelves. Therefore, the action is a covered personnel action under the WPA. *See* 5 U.S.C. § 2302(a)(2)(A)(x).

The burdens of proof

In an IRA appeal, the appellant must establish by a preponderance of the evidence² that he engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8) and that such whistleblowing activity was a contributing factor in the subject personnel action. *See Powers v. Department of the Navy*, 97 M.S.P.R. 554, 561-62 (2004).

A disclosure is a contributing factor in a personnel action if it was one of the factors that tended to affect the personnel action in any way. *See Lewis v. Department of Commerce*, 101 M.S.P.R. 6, 11 (2005). An appellant may demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence including—but not limited to—evidence indicating that the official who took the personnel action knew of the disclosure and that the personnel action occurred within such a period of time that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *Id.*; *Wells v. Department of Homeland Security*, 102 M.S.P.R. 36, 41 (2006).

The legislative history of the WPA allows for the possibility that agency officials may be held culpable where they had only constructive knowledge of a protected disclosure. *See Conrad v. Department of Justice*, 99 M.S.P.R. 636, 644 (2005). Constructive knowledge may be established by demonstrating that an individual with actual knowledge of the disclosure influenced the officials who are accused of taking the retaliatory action. *See Wells*, 102 M.S.P.R. at 42.

The Board will consider any relevant evidence on the contributing factor question including the strength or weakness of the agency's reasons for taking the personnel action; whether the whistleblowing was personally directed at the

² "Preponderance of the evidence" is the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. *See* 5 C.F.R. § 1201.56(c)(2).

proposing official or deciding official; and whether those individuals had a desire or motive to retaliate against the appellant. *See Conrad*, 99 M.S.P.R. at 644.

Even if an appellant proves that a protected disclosure was a contributing factor in a personnel action, the Board cannot order corrective action if the agency demonstrates by clear and convincing evidence³ that it would have taken the same personnel action in the absence of the disclosure. *Id.*; 5 U.S.C. § 1221(e)(2).

In determining whether the agency has made that showing, the Board will consider the following factors: the strength of the agency's evidence in support of its action; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence indicating that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *See Conrad*, 99 M.S.P.R. at 644.

Background

The appellant has worked at Stratton since July 1982. *See* Hearing Tape (HT) 1, Side A (Day 1).⁴ In the early 1990's, he became troubled by the alleged misconduct of [REDACTED], M.D., an oncologist at Stratton. The appellant believed that Dr. [REDACTED] put certain patients at risk and that some patients died because of the manner in which drugs were administered to them. The appellant also believed that: some patients were enrolled in research studies without informed consent; some of the patients did not qualify for

³ "Clear and convincing evidence" is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. It is a higher standard than preponderance of the evidence. *See* 5 C.F.R. § 1209.4(d).

⁴ The hearing was held on May 15 and 16, 2006. "Day 1" refers to the May 15th session; "Day 2" refers to the May 16th session.

participation in the studies; and research data were falsified. The appellant made disclosures about Dr. [REDACTED] to two high-ranking Stratton physicians, Lawrence [REDACTED] M.D. and [REDACTED] M.D. See IAF, Tab 1, Exhibit A; HT 1, Side A (Day 1).

Because the appellant believed that he could not properly dispense certain drugs that Dr. [REDACTED] ordered for certain patients, the two men became embroiled in a conflict and, according to the appellant, Dr. [REDACTED] stated that he would “bury” the appellant. See HT 1, Side A (Day 1). As a result of the conflict, the appellant was reassigned from the oncology program to a pain management clinic. *Id.*

In August 1999, the appellant and another Stratton pharmacist, Anthony Mariano, went to the Federal Bureau of Investigation (FBI) in Albany to report the alleged improprieties in Stratton’s research programs. See IAF, Tab 1, Exhibit A.

In December 2001, the appellant was removed from his position. The agency alleged that he prescribed Temazepam without authorization to do so and that he failed to follow an order not to prescribe controlled substances. He appealed the removal action to the Board’s New York Field Office, and the appeal was assigned to me. I found that the agency did not prove its charges and that he did not make out a *prima facie* case of retaliation for whistleblowing activities. I reversed the agency’s decision and directed the agency to reinstate him with back pay and benefits. See *Fudin v. Department of Veterans Affairs*, MSPB Docket No. NY-0752-02-0116-I-1, slip op. at 8 (Initial Decision, May 14, 2002). The agency appealed my decision, but the Board denied the agency’s petition. See *Fudin v. Department of Veterans Affairs*, 94 M.S.P.R. 481 (2003) (Table).

On May 18, 2002—shortly after he received my decision reversing his removal—the appellant sent an e-mail message to Eina Fishman, M.D. who was then the chief of staff at Stratton. In his message, he reminded Dr. Fishman of a

discussion they had had in the past about the possibility of “moving” his position from the Diagnostics and Therapeutics (D&T) Care Line to the Medical Care Line. He stated in part:

Because of my history within the Pharmacy/Therapeutics Careline (sic), possible misconceptions about my professionalism within this careline (sic), and because the majority of my activities have been related to direct patient care, I would like once again to revisit this option.

See IAF, Tab 6, Subtab 4f.

For the realignment to be effected, a pilot project was developed. See HT 4, Side A (Day 1). On November 4, 2004, Jerry Greene, M.D. informed Pharmacy Manager Kerry [REDACTED] that a detail to the Medical Care Line had been approved for the appellant by the executive committee on November 3, 2004. See IAF, Tab 22, Exhibit A(10).

Mr. [REDACTED] and the appellant had been college classmates and had a close friendship in the past. See HT 1, Side A (Day 1) and HT 4, Side A (Day 1). On December 10, 2004, Mr. [REDACTED] issued the appellant a memorandum stating that the detail would be effective December 19, 2004 for a period not to exceed 200 days and that the appellant’s swipe card access to the pharmacy would be suspended for the duration of the detail. See IAF, Tab 6, Subtab 4e.

The realignment eventually became permanent. On July 20, 2005, Lourdes Irizarry, M.D., the chief of staff sent the appellant a memorandum stating that, based on the success of the six-month detail and the appellant’s expertise in chronic pain management, his position would be realigned—effective July 24, 2005—from the D&T Care Line to the Medical Care Line. *Id.*, Subtab 4a.

According to the appellant, Dr. [REDACTED] left Stratton around 1999. See HT 1, Side A (Day 1). Nevertheless, there continued to be extremely serious problems with the cancer research program. The problems came to light in 2002 when a drug company informed the agency that the company was of the view that

one of its cancer drugs was being misused in the program. An investigation by the Food and Drug Administration (FDA) ensued, and the FDA reported that medical records appeared to have been altered. *See* IAF, Tab 1, Exhibit A.

A criminal investigation was commenced and it focused on Paul Kornak, a former researcher at Stratton who allegedly had a criminal record and was hired based on the recommendation of Dr. [REDACTED]. The investigation also focused on James Holland, M.D. who supervised Mr. Kornak. *Id.*

Throughout 2003, there was extensive newspaper coverage of the scandal. Articles in the *Times Union* (an Albany newspaper) and *The Sunday Gazette* (a Schenectady newspaper) contained references to the fact that the appellant and Mr. Mariano had warned agency officials in the 1990's about wrongdoing in the program. *Id.*

On October 3, 2003, the appellant requested approval of authorized absence to attend the annual conference of the ACCP which was being held in early November 2003 at the Hyatt Regency in Atlanta, Georgia. He also requested that the agency pay the fee of \$370 for the conference. Mr. [REDACTED] his supervisor, approved the request. *Id.*, Tab 23, Exhibit E.

On October 29, 2003, a federal grand jury indicted Mr. Kornak. The indictment contained forty-eight counts including a charge that Mr. Kornak caused the death of a patient on June 11, 2001. *Id.*, Tab 1, Exhibit A.

In an article on November 16, 2003, *The Sunday Gazette* reported that the appellant, Mr. Mariano, and Rep. Michael McNulty met with U.S. Attorney Glenn Suddaby. *Id.* In an article on January 22, 2004, the *Times Union* reported that the FBI had begun an investigation. The appellant was quoted as stating that he will not rest until all those involved are held accountable and that he could provide the FBI with names. *Id.*

According to the appellant, he contacted then New York State Assembly Member Ronald Tocci in July 2004 or August 2004. At that time, Mr. Tocci chaired the Assembly's committee on veterans' affairs. The appellant maintains

that Mr. Tocci expressed interest in his (the appellant's) statements and that Mr. Tocci was planning to hold a hearing about patient care at Stratton. *See* HT 1, Side A (Day 1).

In September 2004, the appellant began making arrangements to attend the annual conference of the ACCP at the Hyatt Regency in Dallas the following month. A copy of the program is in the record. The program indicates that, on October 25, 2004, the appellant would be the moderator of a panel discussion for the pain management focus session. The topic was "Applying Balance to Chronic Opioid Use and Urine Toxicology Screening." The program indicates that, on October 26, 2004, the appellant would be a member of a panel on the topic of "Tales From the Front: Doing the Right Thing in the Workplace" and his segment was "Whistleblowing." *See* IAF, Tab 1, Exhibit B.

On September 10, 2004, the appellant sent an e-mail message to Richard Grembocki who was then the acting supervisor for the outpatient pharmacy. In his message, the appellant asked Mr. Grembocki to approve his request for authorized absence. He explained that he needed to purchase his airplane ticket soon; he would be "doing a couple of presentations" at the conference; and he was the chair of the ACCP's Practice and Research Network (PRN) for pain. *See* IAF, Tab 22, Exhibit A(1). Mr. Grembocki responded that he was no longer the leave approving official, but would forward the message to Robert [REDACTED] who was then a new supervisor. *Id.*, Tab 22, Exhibit A(1).

On September 13, 2004, the appellant sent an e-mail to Mr. [REDACTED] and copied it to Mr. [REDACTED]. In this message, the appellant explained that he was holding off making his airplane reservation because he was awaiting approval of his request for authorized absence. He also stated: "I am Chair of the Pain PRN group and am scheduled to run a symposium with that group and to pass the torch to the chair elect." *Id.*, Exhibit A(2).

On September 17, 2004, Mr. [REDACTED] sent the appellant an e-mail stating that he would need to know whether the appellant was receiving any payment for

his presentations and any financial support for his travel. *Id.* The appellant then sent Mr. [REDACTED] an e-mail stating that he was not taking ACCP's honorarium, but ACCP was waiving the conference fee because he was a speaker. The appellant stated that he asked ACCP to consider applying the \$350 honorarium toward reimbursement of his airfare or hotel costs. He also stated that he would not ask Stratton for reimbursement for the conference because there was some money in the pain management training fund of the Albany College of Pharmacy (ACP) which has an affiliation with Stratton and that he would ask ACP to pay the difference from the fund. He further stated that if there was a problem, he would be happy to change these arrangements in order to comply with policy. He added that there would be coverage in the pain clinic for the three days he would be away. *See* IAF, Tab 22, Exhibit A(2).

Mr. [REDACTED] then requested that the Regional Counsel's office give an opinion as to whether authorized absence could be approved. *Id.*, Exhibit A(3). On September 21, 2004, an attorney advised that, given the circumstances, annual leave could be granted, but authorized absence would not be appropriate. *Id.*

On September 27, 2004, Mr. Tocci met with the director of Stratton, Mary Ellen Piche. Ms. Piche has acknowledged that she knew that Mr. Tocci intended to hold a hearing and she met with him. *See* HT 2, Side A (Day 2). As it turned out, the hearing was never held, and when questioned by a newspaper reporter, Mr. Tocci stated that he did not discuss the appellant or any other agency employee when he met with Ms. Piche. *Id.*, Tab 1, Exhibit A.

On September 28, 2004, the appellant sent Mr. [REDACTED] an e-mail stating he had not received a response about the request for authorized absence. *Id.*, Tab 22, Exhibit A(4). Later that day, Mr. [REDACTED] responded. He stated that he consulted with Mr. [REDACTED] they obtained an opinion from the Regional Counsel's office; and that he would approve annual leave, but could not recommend to the care line manager that the request for authorized absence be approved. *Id.* The appellant then contacted the Regional Counsel's office and asked the attorney to tell him

what he had to do to "make this fit" into what is acceptable for authorized absence to be approved and he would do it. *See* IAF, Tab 22, Exhibit A(4).

After speaking with the attorney, the appellant was informed by Mr. [REDACTED] that because he (the appellant) was not attending the conference in his capacity as an employee of the agency, he could use annual leave, but authorized absence would not be granted. *Id.*

In early October 2004, the appellant met with Ms. Piche. They discussed Mr. [REDACTED] decision to deny authorized absence, and Ms. Piche told him that it was her understanding that he (the appellant) had used more hours of authorized absence than the other pharmacists. He replied that many of the hours of authorized absence that he used were for the purpose of assisting other agency facilities with matters involving pain management and that he had not yet been given any authorized absence for the new fiscal year. *See* HT 1, Side B (Day 1), HT 2, Side B (Day 2).

The appellant requested Ms. Piche to reverse Mr. [REDACTED] decision, but she did not do so. *Id.* On October 12, 2004, the attorney from the Regional Counsel's office informed Mr. [REDACTED] that if management considered the appellant's attendance at the conference to be a valid use of authorized absence, it could be granted provided the appellant did not accept any money from the ACCP, the ACP, or any other non-agency source. *See* IAF, Tab 22, Exhibit A(5).

Mr. [REDACTED] did not change his decision, and the appellant took annual leave to attend the conference. *See* HT 1, Side 1 (Day 1).

The denial of authorized absence to attend the conference

Having reviewed the record, I find that the appellant did not prove by a preponderance of the evidence that the decision to deny his request for authorized absence was in retaliation for his having engaged in whistleblowing activity.

The appellant's disclosures were not directed at Mr. [REDACTED] Ms. Piche. He did not accuse them of wrongdoing.

As noted above, numerous newspaper articles in 2003 contained references to the fact that the appellant and Mr. Mariano had told agency officials of wrongdoing involving the research program. It seems to me that if Ms. Piche was retaliating against the appellant, she could have seen to it that his request for authorized absence to attend the November 2003 conference of the ACCP would not be granted. However, she took no such action; the appellant's request for authorized absence to attend that conference was granted by Mr. [REDACTED] See IAF, Tab 23, Exhibit E.

In explaining why he granted the appellant's request in 2003, but denied it in 2004, Mr. [REDACTED] testified that, in 2003, the appellant was more specific in describing how his attendance at the conference could be of benefit to his work for the agency. Mr. [REDACTED] testified that he viewed the appellant's role in the 2004 conference ("passing the torch" to the chair elect of the pain PRN group) as something for the ACCP rather than the agency. Mr. [REDACTED] also testified that he did not see the 2004 conference program until after he made his decision. See HT 3 and 4 (Day 1).

Granted, Mr. [REDACTED] made his decision on September 28, 2004—the day after Mr. Tocci met with Ms. Piche. However, the record indicates that it was on September 28, 2004 that the appellant sent an e-mail message to Mr. [REDACTED] stating that he (the appellant) had not received an answer regarding his request. See IAF, Tab 22, Exhibit A(4). The appellant, therefore, prompted the rendering of a decision at that time. *Id.* Moreover, Mr. [REDACTED] provided unrebutted testimony that, at the time he made his decision, he did not know of the matter involving Mr. Tocci. See HT 3, Side A (Day 1).

There is evidence indicating that Mr. [REDACTED] denied a similar request for authorized absence to a non-whistleblower, David Kupiak. Mr. Kupiak testified that, in 2000, he requested authorized absence to attend the National Hospital Pharmacy conference for the purpose of obtaining continuing education credit, and Mr. [REDACTED] denied the request. Mr. Kupiak testified that, in evaluating a

request for authorized absence, Mr. [REDACTED] focuses on whether the agency will benefit from an employee's attendance at a conference. *See* HT 2, Side B (Day 2).

The denial of swipe card access to the pharmacy

Having reviewed the record, I find that the appellant did not establish by a preponderance of the evidence that the restriction of his access to the pharmacy constituted retaliation for his having engaged in whistleblowing activity.

The agency's handbook M-2, Part VII Chapter 1 provides in part: "Entrance to the pharmacy by other than pharmacy personnel will be permitted only in emergencies and with strict controls." *See* IAF, Tab 26, Exhibit A(16). The handbook also stated that strict accountability of security access must be maintained and keys, cards, and combinations must be changed when employees with security access cease to be employed by the Pharmacy Service. *Id.*

In an attempt to show that he was singled out because of his whistleblowing activity, the appellant presented evidence indicating that other clinical pharmacists such as Colette [REDACTED] Mandy [REDACTED] and Thomas [REDACTED]⁵ have swipe card access to the pharmacy. *See* HT 1, Side B (Day 1) and HT 1, Side A (Day 2). However, the appellant's argument fails for the simple reason that Ms. [REDACTED] Ms. [REDACTED], and Mr. [REDACTED] are all in the D&T Care Line while he (the appellant) is not. *Id.*; IAF, Tab 23, Exhibits B and D.

Mr. [REDACTED] testified that, because the appellant was transferred into the Medical Care Line, his swipe card access had to be eliminated, but if he were to return to the D&T Care Line, his swipe card access would be restored. *See* HT 3, Side A (Day 2).


⁵ Mr. Lodise is a professor at ACP and serves as a "without compensation" employee at Stratton because he supervises ACP students. *See* HT 1, Side A (Day 2).

As noted above, the appellant sought to be placed in the Medical Care Line. He informed Dr. Fishman that he wanted to have his position "moved" into the Medical Care Line. *See* IAF, Tab 6, Subtab 4f.

DECISION

The appellant's request for corrective action is DENIED.

FOR THE BOARD:


JoAnn M. Ruggiero
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on September 29, 2006 unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board

1615 M Street, NW
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (<https://e-appeal.mspb.gov>).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit

717 Madison Place, NW
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, <http://fedcir.gov/contents.html>. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached document was sent as indicated this day to each of the following:

Appellant

U.S. Mail Jeffrey Fudin
 34 Wakefield Court
 Delmar, NY 12054

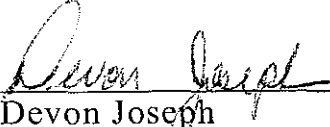
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August 25, 2006


Devon Joseph
Legal Assistant