

Sandia National Laboratories

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motions to Dismiss

Names of Petitioners: Sandia National Laboratories

L & M Technologies, Inc.

Dates of Filing: August 11, 1993

August 17, 1993

Case Numbers: LWZ-0021

LWZ-0022

This determination will consider two Motions to Dismiss filed by Sandia National Laboratories (Sandia) and L & M Technologies, Inc. (L&M) on August 11 and 17, 1993, respectively. In their Motions, Sandia and L&M seek the dismissal of the underlying complaint and hearing request filed by Mr. Ronald A. Sorri (Sorri) under the Department of Energy's Contractor Employee Protection Program. Sorri's present request for a hearing under § 708.9 was filed on June 9, 1993, and it has been assigned Office of Hearings and Appeals (OHA) Case No. LWA-0001. Sorri's is the first hearing request received by the OHA under the DOE's new Contractor Employee Protection Program.

I. Background

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste, and abuse" at DOE's Government- owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. In view of its recognized jurisdiction, the DOE established new administrative procedures to deal with complaints of this nature. The Notice of Proposed Rulemaking for these new administrative procedures was published in the Federal Register on March 13, 1990. 55 Fed Reg. 9326 (March 13, 1990). Interested persons were given the opportunity to submit written comments, and the final rule was published in the Federal Register on March 3, 1992. 57 Fed. Reg. 7533 (March 3, 1992). The new DOE Contractor Employee Protection Program regulations, codified as Part 708 of Title 10 of the Code of Federal Regulations, became effective on April 2, 1992.

The following three provisions of the regulations in Part 708 are relevant to the present Decision. Section 708.6(d) provides, in pertinent part:

A complaint . . . must be filed within 60 days after the alleged discriminatory act occurred or within 60 days after the complainant knew, or reasonably should have known, of the alleged discriminatory act, whichever is later.

Once a complaint has been filed, § 708.8(a)(2) provides that the Director of DOE's Office of Contractor Employee Protection (OCEP) may accept the complaint, unless she determines that the complaint is untimely. The third provision, § 708.15, permits the "Secretary or designee," i.e. the appropriate DOE official depending on the stage of the proceeding, to extend the time frames set forth in Part 708.

Sorri was a Senior Maintenance Technician employed by L&M, a subcontractor at the Microelectronics Development Laboratory (MDL) at Sandia National Laboratories in Albuquerque, New Mexico, from March 1990 until March 1992. During that time, Sorri disclosed safety concerns to management officials of both L&M and Sandia involving the possible release of lethal gases as a result of overpressurized gas cylinders. After communicating his safety concerns on a number of occasions to officials at Sandia, Sorri filed a formal safety complaint with the DOE on February 14, 1991. He alleges that after doing so, L&M and Sandia took the following reprisal actions against him: reassignment and relocation from the MDL to L&M's off-site headquarters, cancellation of requested training, a downgraded performance evaluation, and termination from employment on March 13, 1992.

On July 23, 1992, Sorri filed a complaint with the DOE Albuquerque Field Office (DOE/AL) pursuant to 10 C.F.R. Part 708. After an unsuccessful attempt was made by DOE/AL to reach an informal resolution, Sorri's complaint was forwarded on September 29, 1992, to the DOE's Office of Contractor Employee Protection to institute a formal investigation. The OCEP conducted an on-site

investigation of Sorri's allegations of reprisal and issued a Report of Investigation and a Proposed Disposition on April 30, 1993. The Proposed Disposition, which relied upon the findings in the Report of Investigation, concluded that Sorri's relocation and reassignment, as well as his downgraded performance evaluation, occurred as a result of his protected disclosures. However, the Proposed Disposition also concluded that the cancellation of Sorri's training and his termination were not the result of, or constituted reprisals for, his protected disclosures.

On May 14, 1993, Sorri submitted his request for a hearing pursuant to 10 C.F.R. § 708.9 to OCEP. On June 9, 1993, OCEP transmitted that request, together with the investigative file, to the OHA, and requested that a Hearing Officer be appointed. On June 16, 1993, procedures and a briefing schedule were established for the hearing in this case under § 708.9(b). The hearing is presently set for September 14 and 15, 1993, in Albuquerque, New Mexico.

On August 11, 1993, Sandia filed a Motion to Dismiss the proceeding. In its Motion, Sandia maintains that Sorri's July 23, 1992 complaint was not timely filed. The regulations require an individual to file a complaint under the Contractor Employee Protection Program "within 60 days after the alleged discriminatory act occurred or within 60 days after the complainant knew, or reasonably should have known, of the alleged discriminatory act, whichever is later." 10 C.F.R. § 708.6(d). Sandia asserts that this requirement is jurisdictional in nature, and that the DOE therefore does not have the authority to proceed in any case where the time period for filing a complaint is exceeded. According to Sandia, Sorri filed his complaint too late to challenge an event occurring on March 13, 1992, the date on which Sorri's employment with L&M was terminated. Motion to Dismiss at 1. Sandia states that Sorri would have had to file his complaint by May 30, 1992, in order to meet the 60-day time period, and even if the 60 days was counted from the effective date of the new Part 708 regulations on April 2, 1992, Sorri's complaint, filed on July 23, 1992, is still untimely. *Id.* Finally, Sandia maintains that the discussion of the 60-day filing requirement in the preamble to Part 708 "makes it clear that DOE feels that 60 days is reasonable because investigation of claims filed after 60 days is made more difficult by fading memories." *Id.*; see 57 Fed. Reg. at 7537 (March 3, 1992). On August 17, 1993, L&M filed a similar Motion to Dismiss in which it also claims, for the reasons cited in Sandia's motion, that the Sorri complaint is time barred.

II. Analysis

The DOE regulations governing this proceeding do not expressly provide for the submission of motions to dismiss based upon an allegation that the underlying complaint was untimely. As noted above, under § 708.8(a)(2), the OCEP Director must determine whether to dismiss a DOE Contractor Employee Protection Program complaint on the grounds that it is untimely. While it is true that § 708.6(d) states that a complaint must be filed within 60 days after the alleged discriminatory act occurred, § 708.15 allows "all time frames" set forth in Part 708 to be extended. It is therefore clear that under these regulations, the decision to accept a complaint filed after the 60-day period in § 708.6(d) is within the discretion of the OCEP Director. In the present case, the OCEP Director did not dismiss the complaint as untimely, and there is nothing in the record to suggest that she abused her discretion. As explained below, her decision to accept and investigate Sorri's complaint is consistent with the important Departmental policy objectives behind Part 708. Moreover, there is no evidence in the present record that the investigation was hampered in any way because Sorri may have exceeded the 60-day time period, nor any reason to believe that any party has been prejudiced as a result.

In its Motion, Sandia attempts to avoid this conclusion by characterizing the 60-day time period in § 708.6(d) as jurisdictional. However, there is nothing in Part 708 that would indicate that the 60-day period was meant to be inflexible - i.e. jurisdictional - in nature. Indeed, there are a number of reasons why § 708.6(d) should not be read as barring the investigation of a complaint that is filed more than 60 days after the alleged discriminatory act occurred or should reasonably have been discovered.

First, the DOE Contractor Employee Protection Program is intended to encourage contractor employees to come forward "with information that in good faith they believe evidences unsafe, unlawful, fraudulent, or wasteful practices." 57 Fed. Reg. at 7533 (March 3, 1992). Employees of DOE contractors and subcontractors should be able to disclose safety concerns without fear of employer reprisal, and employees who believe they have been subject to a reprisal should feel they are able to seek protection from the DOE. It is clear from the regulatory history of this new program that the 60-day time limitation for the submission of complaints was never intended as an ironclad technical requirement. Such a technical, not generally understood requirement could dissuade employees from disclosing such important information.

Second, the preamble to Part 708 states that the reason for adopting a time limit for the filing of a complaint of discrimination under this new program was to ensure the investigation of complaints would not be rendered "more difficult as memories grow dimmer with the passage of time." 57 Fed. Reg. at 7537 (March 3, 1992). In the present case, after conducting an investigation, the OCEP Director found that there was sufficient evidence on which to move forward, so there is no evidence at this stage in the proceeding that any delay in the filing of the complaint hampered the investigation. Nor has there been any showing (or even a credible suggestion) by Sandia or L&M that either was prejudiced in its ability to defend itself against Sorri's allegations as a result of any delay which may have occurred.

A motion to dismiss is appropriate only where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact or law on a more complete record. See *M&M Minerals Corporation*, 10 DOE ¶ 84,021 (1982). Since dismissal is the most severe sanction that we may apply, it should be used sparingly, and only to prevent a miscarriage of justice. In this regard, we have determined that the acceptance of Sorri's complaint was a reasonable exercise of discretionary authority under Part 708 by the Director of the Office of Contractor Employee Protection. There is no evidence that the policy underlying the 60-day time limit has been contravened by the acceptance of the complaint, or that either Sandia or L&M was prejudiced by any brief delay which may have occurred between Sorri's termination in March 1992 and the filing of his complaint under the newly promulgated provisions of Part 708 in July of that year. Accordingly, the Motions to Dismiss filed by Sandia National Laboratories and L & M Technologies, Inc. should be denied.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Sandia National Laboratories on August 11, 1993, is hereby denied.

(2) The Motion to Dismiss filed by L & M Technologies, Inc. on August 17, 1993, is hereby denied.

(3) This is an Interlocutory Order of the Department of Energy.

Roger Klurfeld

Assistant Director

Office of Hearings and Appeals

Date: