

September 18, 2008

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Leslie D. Cumiford

Date of Filing: September 3, 2008

Case Number: TBU-0081

Leslie D. Cumiford (“the Complainant”), appeals the dismissal of her complaint of retaliation filed under 10 C.F.R. Part 708, the Department of Energy (“DOE”) Contractor Employee Protection Program. The complaint was filed on October 10, 2006, and was dismissed on August 12, 2008. As explained below, the dismissal of the complaint should be affirmed, and the appeal denied.

I. BACKGROUND

The Complainant was an employee of Sandia National Laboratories (“Sandia”) in Albuquerque, New Mexico, from 1995 until July 14, 2006, when Sandia terminated the Complainant’s employment.

The Complainant filed a Part 708 complaint with the Whistleblower Program Manager (“the Manager”) at the National Nuclear Security Administration Service Center in Albuquerque, New Mexico (“NNSA”). The complaint stated that Sandia terminated the Complainant’s employment in retaliation for making protected disclosures. Complaint at 2. Specifically, the Complainant alleged that her employment was terminated because she raised concerns in a letter to the DOE Inspector General (“IG”) regarding practices at Sandia. *Id.* According to the Complainant, she raised concerns to the DOE IG regarding “procurement irregularities and a conflict of interest” on the part of a Sandia director. *Id.* According to the Part 708 complaint, she also alleged in her letter to the DOE IG that she was exposed to significant amounts of arsenic in the workplace in retaliation for appearing as a witness on behalf of a co-worker in a discrimination and retaliation case against another Sandia director. *Id.*

The Complainant further requested that the Manager hold the complaint in abeyance while the Complainant pursued a claim for “EEO (Equal Employment Opportunity) Retaliation” with the State of New Mexico Department of Labor, Human Rights Division (“NMHRD”). Complaint at 1. The Complainant stated that she was “informed that both complaints cannot be simultaneously pursued.” Complaint at 1. She added, “otherwise, at this time I am not pursuing any other avenues for remedy under State or other applicable law.” *Id.* Following an

investigation by NMHRD, the Complainant filed a claim in State of New Mexico District Court, Bernalillo County (“New Mexico state court”) in March 2008. Appeal at 1.

The Manager took no action on the Part 708 complaint until August 12, 2008, when she dismissed the complaint for “lack of jurisdiction.” As a basis for the dismissal, the Manager stated that the Complainant “filed a complaint in another forum with respect to the same facts alleged in [her Part] 708 Complaint.” Therefore, the Manager dismissed the complaint, pursuant to Section 708.17(c)(3).

On September 3, 2008, the complainant filed an appeal of the dismissal by the Manager with the Office of Hearings and Appeals. 10 C.F.R. § 708.18.

II. ANALYSIS

Section 708.17 provides, in relevant part, that “dismissal for lack of jurisdiction or other good cause is appropriate if ... [the complainant] filed a complaint under State or other applicable law with respect to the same facts as alleged in a complaint filed under [Part 708].” 10 C.F.R. § 708.17 (c) (3); *see also*, Gary S. Vander Boegh, 29 DOE ¶ 87,010 (2006). We have reviewed the complaint and the Manager’s dismissal. Based on the information contained in the complaint and other information gathered in this proceeding, we find no error in the Manager’s determination that the Complainant’s Part 708 complaint was based on the same facts as alleged in her filing in New Mexico state court and, therefore, should be dismissed.

In her appeal, the Complainant maintains that she believed the prohibition on pursuing a Part 708 claim while pursuing a claim alleging the same facts in another forum applied only to “State investigations” and not “legal cases.” Appeal at 1. The Complainant further states that, in July 2008, she instructed her attorney to withdraw the claim pending in New Mexico state court, but he failed to carry out her instructions. After dismissing her attorney, the Complainant filed a motion to dismiss the state claim on August 25, 2008. *Id.* However, the record does not indicate that the state claim has been dismissed as of the date of the appeal.

The Complainant’s argument on appeal that she was unaware that she could not simultaneously pursue a Part 708 case and a State claim is unpersuasive. When she filed her complaint with the Manager, the Complainant signed an affirmation which stated, *inter alia*, that she had “not pursued a remedy available under State or other applicable law.” *See* Complainant’s Affirmation, dated October 10, 2006. The Complainant gives no reason as to how she could have misinterpreted this plain language. Further, as noted above, the Complainant expressly stated in her complaint that she knew she could not pursue two claims simultaneously. Her current assertion that she believed that prohibition applied only to “State investigations,” and not other legal proceedings, is disingenuous.

However, as noted above, Section 708.17(c)(3) only precludes a filing under State or other applicable law “with respect to the same facts alleged in the [Part 708] complaint....” 10 C.F.R. § 708.17(c)(3). Therefore, in order to give the instant appeal thorough consideration, we have reviewed the state claim currently pending in New Mexico state court in order to ascertain whether the claims allege the same facts as set forth in the Part 708 Complaint. *See* E-mail from

Michele Rodriguez de Varela, NNSA, to Diane DeMoura, OHA, September 4, 2008 (attaching copy of the Complainant's filing in New Mexico state court). The Complainant refers to her state filing as a claim for "EEO Retaliation and Wrongful Termination." See Appeal at 1; Complaint at 1. In past Part 708 cases, we have found that, because the factual prerequisites in Part 708 cases and EEO claims differ, they should not be considered to be based upon "the same facts" for the purposes of 10 C.F.R. § 708.17(c)(3). See *Gilbert J. Hinojos*, 28 DOE ¶ 87,037 (2003), citing *Carl J. Blier*, 27 DOE ¶ 87,514 (1999) (Americans with Disabilities Act and Rehabilitation Act (ADA/RA) complaints do not bar Part 708 complaint since ADA/RA complaints require different factual motivation for employer's adverse personnel action), and *Lucy B. Smith*, 27 DOE ¶ 87,520 (1999) (Age Discrimination in Employment Act (ADEA) complaint does not bar Part 708 complaint since ADEA complaint requires different factual motivation for employer's adverse personnel action). Therefore, in this case, if the Complainant's state claim is an EEO claim – that is, a claim alleging that she was retaliated against based on race, religion, sex, national origin or other similar basis – her Part 708 claim should not be dismissed under 10 C.F.R. § 708.17(c)(3).

Although the Complainant refers to the New Mexico state court filing as a claim for "EEO Retaliation and Wrongful Termination," the claim is not based on EEO grounds. Rather, the filing is, in fact, virtually identical to her Part 708 complaint, alleging retaliation and wrongful termination on the same grounds as those cited in her Part 708 complaint. The Complainant has alleged no facts or circumstances that relate to EEO matters in the state filing. Given that the New Mexico state court proceeding, alleging the same facts as the Part 708 complaint, is currently pending, the Part 708 complaint was properly dismissed under 10 C.F.R. § 708.17(c)(3). Accordingly, we find that the determination of the Manager should be sustained, and the instant appeal should be denied.

It Is Therefore Ordered That:

- (1) The Appeal filed by Dr. Leslie D. Cumiford, Case No. TBU-0081, is hereby denied.
- (2) This Decision shall become a Final Agency Decision unless a party files a Petition for Secretarial Review with the Office of Hearings and Appeals within 30 days after receiving this decision, pursuant to 10 C.F.R. § 708.19.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: September 18, 2008