

May 30, 2006

**DECISION AND ORDER**

**OF THE DEPARTMENT OF ENERGY**

**Motion To Dismiss**

Name of Case: Casey Von Bargaen  
Date of Filing: June 15, 2005  
Case Number: TBZ-0034

This Decision concerns a Motion To Dismiss that was filed by Sandia National Laboratories (hereinafter referred to as "SNL" or "the Respondent"). In this Motion, SNL seeks the dismissal of a complaint that was filed by Casey Von Bargaen (hereinafter referred to as "Mr. Von Bargaen" or "the Complainant") under the Department of Energy's (DOE) Contractor Employee Protection Program (or "Whistleblower") regulations found at 10 C.F.R. Part 708. This complaint is currently under investigation by the Office of Hearings and Appeals (OHA) (Case No. TBI-0034).

**I. Background**

The Department of Energy established its Contractor Employee Protection Program 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. Criteria and Procedures for DOE Contractor Employee Protection Program, 57 Fed. Reg. 7533 (1992). Its primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. The Part 708 regulations prohibit discrimination by a DOE contractor against its employee because the employee has engaged in certain protected activity, including when the employee has

(1) Disclosed to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), information that the employee in good faith believes evidences—

(i) A violation of any law, rule, or regulation;

(ii) A substantial and specific danger to employees or public health or safety; or

(iii) Fraud, mismanagement, gross waste of funds, or abuse of authority;

57 Fed. Reg. at 7542 (1992).(1)

The Complainant was an employee of SNL from June 2, 2003 until September 20, 2004. In his complaint, he alleges that he was fired in retaliation for making disclosures to SNL management that

are protected under the Part 708 regulations, and for reporting alleged sexual harassment directed at him by certain female SNL employees.

## **II. SNL's Motion To Dismiss**

In its Motion, SNL argues that the facts, as alleged in the complaint, do not present issues for which relief can be granted under the Part 708 regulations. The Respondent specifically contends that Mr. Von Bargen's allegations of sexual harassment and his associated claims of retaliation must be dismissed because they are not covered by the Part 708 regulations. SNL also claims that the Complainant's safety-related disclosures are not protected under Part 708 because Mr. Von Bargen could not have reasonably believed that they revealed a substantial violation of a law, rule, or regulation, a substantial danger to employees or to public health or safety; or fraud, gross mismanagement, or abuse of authority. Finally, the Respondent states that the complaint must be dismissed because even if the disclosures were protected under Part 708, there is no demonstrable nexus between them and the Complainant's termination.

## **III. Analysis**

Under the Part 708 regulations, dismissal of a complaint for lack of jurisdiction or other good cause is appropriate if (i) the complaint is untimely, or (ii) the facts, as alleged in the complaint, do not present issues for which relief can be granted under Part 708, or (iii) the Complainant filed a complaint under state or other applicable law concerning the same facts that are alleged in the Part 708 complaint, or (iv) the complaint is frivolous on its face, or (v) the complaint has been rendered moot by subsequent events, or (vi) the Respondent has made a formal offer of relief that is equivalent to what could be provided as a remedy under Part 708. 10 C.F.R. § 708.17(c). The OHA has previously stated that dismissal "is the most severe sanction that we may apply," and should be used sparingly. *Boeing Petroleum Services*, 24 DOE ¶ 87,501 at 89,005 (1994). Accordingly, Motions to Dismiss should be granted only if supported by "clear and convincing" evidence. *Fluor Daniel Fernauld*, 27 DOE ¶ 87,532 at 89,163 (1999). For the reasons that follow, I will deny SNL's Motion To Dismiss.

As indicated above, SNL primarily contends that the facts, as alleged in Mr. Von Bargen's complaint, do not present issues for which relief can be granted under Part 708. The Respondent does not claim that any of the other grounds for dismissal under section 708.17(c) are applicable, and indeed, I conclude that they are not. With regard to SNL's argument that all of Mr. Von Bargen's allegations regarding sexual harassment must be dismissed, the Respondent correctly points out that section 708.4 of the "Whistleblower" regulations provides that an employee may not file a claim under Part 708 if that "complaint is based on race, color, religion, sex, age, national origin, or other similar basis." However, assuming, without deciding, that this prohibition also includes claims based on sexual harassment, I find that it would be premature to dismiss these allegations prior to a full investigation into Mr. Von Bargen's complaint. If, for example, an

investigation was to show that sexual harassment did occur, that the Complainant's supervisors knew of this harassment, and that they took no remedial actions in retaliation for Mr. Von Bargen's having made protected disclosures, this would constitute a cause of action for which relief could be granted under Part 708. I will therefore not dismiss the Complainant's allegations of sexual harassment at this time.

Regarding Mr. Von Bargen's allegations of retaliation for making safety-related disclosures, section 708.5 of the "Whistleblower" regulations states that, in order for a disclosure to be protected, the complainant must have reasonably believed that the information disclosed revealed "a substantial violation of a law, rule or regulation; a substantial and specific danger to employees or to public health or safety; or fraud, gross mismanagement, gross waste of funds, or abuse of authority." 10 C.F.R. § 708.5(a)(1) - (3). Therefore, in order to prevail in its Motion to Dismiss on the grounds that the disclosures that Mr. Von Bargen made were not protected, SNL would have to show, by clear and convincing evidence, that the Complainant did not have a reasonable belief that his disclosures revealed a substantial violation of a law, rule or regulation or a substantial and specific danger to employees or to public health or safety. The record in this proceeding, as it currently exists, will not support such a showing.

The alleged disclosures for which Mr. Von Bargen claims Part 708 protection are that the Lock Out-Tag Out (LOTO) procedures for certain 277 volt lighting systems at SNL are inadequate, and that 14 contractor service companies did not have site-specific safety plans on file with SNL. In its Motion, SNL claims that Mr. Von Bargen did not allege violations of rules or regulations in his complaint. SNL Motion at 7, 9. These SNL claims are clearly erroneous. In his complaint, Mr. Von Bargen said that he "told the Facilities ESH Coordinator that 29 C.F.R. § 1910.147 does not allow control devices to be used as a . . . LOTO point (this discussion was related to using light switches as . . . LOTO points for locking out 277 volt lighting systems). . ." He went on to state that the "second safety concern consisted of 14 violations of DOE Order 440.1A pertaining to nonexistent approved site specific safety plans for 14 companies having contracts to perform work at Sandia." Complaint at 1. Whether his belief that substantial violations occurred is reasonable, or whether he reasonably believed that his disclosures revealed substantial and specific dangers to employees or the public can only be decided after a full investigation of all of the available facts. SNL's Motion to Dismiss is therefore denied.

Robert B. Palmer  
Investigator  
Office of Hearings and Appeals

Date: May 30, 2006