Universities Research Association, Inc.

December 22, 1993

Motion to Dismiss

Name of Movant: Universities Research Association, Inc.

Date of Filing: December 9, 1993

Case Number: LWZ-0023

Universities Research Association, Inc. (URA) is the management and operating contractor for the Department of Energy's (the DOE) Superconducting Super Collider Laboratory (the Laboratory) in Waxahachie, Texas. On February 4, 1993, Dr. Naresh C. Mehta, a former physicist at the Laboratory, filed complaint SSC-93-0001 against URA under 10 C.F.R. Part 708 (the "Whistleblower Regulations"). In his complaint, Mehta alleged that URA had terminated his employment because he had charged URA officials with mismanaging the Laboratory's hypercube computer. 1/

The DOE referred Mehta's complaint to its Office of Contractor Employee Protection (OCEP). After an extensive investigation, OCEP issued a Proposed Disposition on October 15, 1993. In the Proposed Disposition, OCEP found that Mehta had made a good faith disclosure of his concerns about mismanagement of the hypercube. Furthermore, OCEP found that URA had not shown a legitimate business reason for terminating Mehta's employment. OCEP concluded that URA's actions against Mehta were retaliatory and prohibited under the Whistleblower Regulations. Accordingly, OCEP ordered URA to reinstate Mehta, grant him back pay and benefits, pay his legal fees and costs, and expunge information relating to the termination from his personnel record.

URA filed a request for a hearing on the merits of the complaint under § 708.9 of the Whistleblower Regulations. The DOE's Office of Hearings and Appeals scheduled the hearing for January 5, 1994. URA filed the present Motion to Dismiss on December 9, 1993. The grounds of URA's Motion to Dismiss are (1) the Whistleblower Regulations were not in effect for the Laboratory when URA committed the alleged acts of reprisal; and (2) Mehta's complaint was not timely filed. For reasons discussed below, we reject both grounds and will deny the motion.

The term "whistleblowing" has been described as referring to "employees who make disclosures outside of their organizations, [as well as] employees who raise questions about improper practices through their employers' internal channels, or who refuse to carry out illegal instructions." 2/

The current Secretary of Energy, Hazel O'Leary, has established a departmental policy of encouraging whistleblowing. Secretary O'Leary has stated that "I need whistleblowers, the department needs whistleblowers, and our country needs whistleblowers." Concerning employers' reprisals against whistleblowers, she added that, "I commit today to zero tolerance, zero tolerance of reprisals," seeking to "encourage dissent, encourage disagreement...." 3/

The DOE has been given the statutory authority to prescribe rules and regulations deemed necessary or appropriate to protect health, life, and property and to otherwise administer and manage its responsibilities and functions. See, e.g., the Atomic Energy Act of 1954, as amended (42 U.S.C. 2201); the Energy Reorganization Act of 1974, as amended (42 U.S.C. 5814 and 5815); and the Department of Energy Organization Act, as amended (42 U.S.C. 7251, 7254, 7255, and 7256). These statutory grants were the basis for the DOE's Whistleblower Regulations, published in 57 Fed. Reg. 7533 (March 3, 1992), with an effective date of April 2, 1992.

In addition, the DOE amended the Department of Energy Acquisition Regulations (DEAR) (48 C.F.R. Chapter 9) to require that all DOE contracts and subcontracts contain a provision requiring compliance with the Whistleblower Regulations. 57 Fed. Reg. 57638 (December 8, 1992). The DOE described this amendment as "a technical and conforming change to make the DEAR consistent with 10 C.F.R. Part 708."

URA's first argument follows from its reading of 10 C.F.R. § 708.2 (a), which sets out the scope of the Whistleblower Regulations. The section provides that:

For all other complaints [i.e., not relating to health or safety matters], this part is applicable to acts of reprisal occurring after the effective date of this part if the underlying procurement contract ... contains a clause requiring compliance with this part.

URA's argument hinges on the clause, "if the underlying procurement contract ... contains a clause requiring compliance with this part," hereafter referred to as the Compliance Clause. URA contends that the Compliance Clause means that "for complaints of reprisal allegedly arising out of other [i.e., not relating to health or safety] protected disclosures, including mismanagement, Part 708 was not applicable until the contract contained the clause required by DEAR 970.5204-59." URA's contract with the DOE was

modified to conform with the Whistleblower Regulations and to incorporate its protections for contractor employees on March 31, 1993. 4/ Because URA terminated Mehta's employment before the modification was signed, URA contends that the Whistleblower Regulations do not apply in Mehta's case.

URA's interpretation is incorrect. The focus of the Compliance Provision is not when the Whistleblower Regulations are effective, but whether a contractor is subject to the Regulations. Employees of the Laboratory are covered by the protections of the Whisleblower Regulations because the contract between URA and DOE has been modified to incorporate those protections. In a letter transmitted with the modification, Terrell C. Cone, Director of the Department's Contract Administration Office for the Superconducting Super Collider Project, explained the scope of the Whistleblower Regulations:

Once the clause specified at 970.5204-59 and the subject of modification A033 was accepted by Universities Research Association, Inc. and by the DOE Contracting Officer, all cognizant allegations of reprisal after April 2, 1993 (including fraud, mismanagement, etc.,) are covered.

Cone's explanation of the scope of the Whistleblower Regulations is supported by the DOE's Acquisition Letter 92-9, dated December 8, 1992. The Acquisition Letter states that:

With respect to complaints involving other matters, Part 708 is applicable to acts of reprisal occurring on or after April 2, 1992, if the subject contract contains a clause requiring compliance with Part 708....

The Acquisition Letter then explains that certain contracts will not be modified:

Contracting officers shall modify existing contracts and purchase orders which fall within the scope of the clause prescription at DEAR 913.507, 922.7101, and 970.5204, to incorporate the whistleblower protection for Contractor Employees clause not later than March 31, 1993. However, the clause need not be incorporated into contracts and purchase orders that are due to expire by June 30, 1993.

It follows from the discussion in the Acquisition Letter, and from the plain meaning of § 708.2 (a), that URA's reliance on the Compliance Provision is misplaced. The Compliance Provision does not establish an effective date for the Whistleblower Regulations. Rather, it provides for the eventuality that some contracts would not be modified. URA's contract has been modified, and therefore, as with all contractors performing under contracts that have been modified, URA is subject to the provisions of the Whistleblower Regulations as of April 2, 1992.

Furthermore, URA has entered into an agreement with the DOE in which it concedes that Mehta's complaint will be processed pursuant to the Whistleblower Regulations. The agreement, styled a "Mediation Agreement," was executed on September 21, 1993 by Ezra D. Heitowit, Vice- President/Secretary of URA; Norman Landa, attorney for Mehta; and Sandra L. Schneider, Director of OCEP. The agreement provides in part that:

This certifies agreement by senior officials of Universities Research Association, Inc. and Dr. Naresh Mehta to attempt to resolve Complaint No. SSC-93-0001, filed pursuant to Part 708, title 10, Code of Federal Regulations, through mediation.... Both parties have agreed that if attempts to resolve this complaint are unsuccessful, the complaint will be processed further consistent with Part 708, and the Director, OCEP, will issue a Report of Investigation and Proposed Disposition in this case. 5/

URA thus voluntarily agreed to be bound by the Whistleblower Regulations in Mehta's case. It would be manifestly unjust to allow URA to assert that the Whistleblower Regulations are not applicable after OCEP made a determination, pursuant to the Regulations, that URA finds unfavorable. The Mediation Agreement estops any claim by URA that the Whistleblower Regulations are not applicable to Mehta's complaint.

URA's second argument is that Mehta failed to file his complaint within 60 days of the termination of his employment. There is no supporting discussion of this argument in the motion. Apparently, URA attempts to rely on § 708.6 (d) of the Whistleblower Regulations, which provides that:

A complaint filed pursuant to ... this section must be filed within 60 days after the alleged discriminatory act occurred.... In cases where the employee has attempted resolution through internal company grievance procedures ... the 60-day period for filing a complaint shall be tolled during such resolution period and shall not again begin to run until the day following termination of such dispute-resolution efforts.

The "discriminatory act," as defined in § 708.4 of the Whistleblower Regulations, is the termination of Mehta's employment. URA concedes in its motion that Mehta was notified of the termination on October 27, 1992. On November 3, 1992, Steven Brumley, the Laboratory's legal counsel, agreed to arrange at Mehta's request an independent review of the termination. 6/ Douglas P. Kreitz, the Laboratory's personnel director, notified Mehta in a letter dated December 16, 1992, that the review had been completed and that the Laboratory was "proceeding with [Mehta's] termination." 7/ Mehta then filed his complaint on February 4, 1993.

Mehta's request for review constitutes an attempted resolution through internal company grievance procedures as required in §708.6 (d). Thus, the 60-day filing period did not begin running until Mehta knew, or should have known, that the review had been completed. URA has made no attempt to show that Mehta knew or should have known about the completion of the review before Kreitz's letter of December 16, 1992. Mehta filed his complaint on February 4, 1993, which is within 60 days of December 17, 1992, the day after Kreitz's letter. We reject, therefore, URA's assertion that Mehta failed to file a timely complaint.

In conclusion, we find no basis in URA's motion that justifies the dismissal of Mehta's claim. We will therefore deny the motion.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Universities Research Association, Inc. on December 9, 1993, is hereby denied.

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

Thomas L. Wieker

Deputy Director

Office of Hearings and Appeals

Date: December 22, 1993

Notes:

1/ A "hypercube" is a type of computer that uses a large number of parallel processors arranged in a particular manner. It is currently used in certain scientific applications. See Frenkel and Verity, "Is There More Than Hype to Hypercubes?" Business Week, June 8, 1987 at 112.

2/ Westman, Whistleblowing: The Law of Retaliatory Discharge 19 (1991).

3/ Tri-City Herald (Pasco, Wash.), November 7, 1993, at A-3, Col. 4.

4/ Modification A033 to Contract No. DE-AC35-89ER40486. The original contract was dated January 18, 1989.

5/ OCEP Case File, Volume II, Exhibit "E."

6/ OCEP Report of Investigation at 3.

7/ OCEP Report of Investigation, Exhibit 5.