November 21, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Motion for Summary Judgment

Name of Case: Battelle Energy Alliance, LLC

Date of Filing: September 6, 2007

Case Number: TBZ-0047

This decision concerns a Motion for Summary Judgment filed by Battelle Energy Alliance, LLC ("BEA," "the contractor," or "Respondent") on September 6, 2007. The motion relates to five pending complaints filed by one of its employees, Dennis Patterson ("Mr. Patterson" or "the complainant"), under the Department of Energy (DOE) Contractor Employee Protection Regulations codified at 10 CFR Part 708.[1] In the motion under consideration, BEA requests that I dismiss two of the five Part 708 complaints. [2]

## I. Procedural Background

The complainant was formerly the Manager of Employee Concerns and Business Ethics of BEA, the management and operations contractor of the DOE Idaho National Laboratory (INL). He filed five complaints under Part 708 alleging that he had engaged in protected activity and that BEA retaliated against him for that activity by, among other things, demoting him to a non-managerial job in the Engineering Design and Drafting Services group of INL. After I scheduled the hearing on the five complaints, BEA filed this Motion for Summary Judgment which pertains only to the first and second complaints. Patterson filed a Response and BEA then filed a Reply to the Response. [3] *See* Complainant's Response to BEA Motion for Summary Judgment (September 11, 2007) (Response); BEA Reply to Response to Motion for Summary Judgment (September 13, 2007) (Reply).

---

[1] The purpose of the Department of Energy Contractor Employee Protection Program 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 provide procedures for processing complaints by employees of DOE contractors alleging retaliation by their employers. 65 Fed. Reg. 6319 (2000).

[2] Mr. Patterson's complaints were consolidated and assigned one case number, Case No. TBH-0047. The hearing on Mr. Patterson's complaints is scheduled for November 27, 2007, in Idaho Falls, Idaho.

[3] Complainant contends that he did not have all documents and information necessary to respond to BEA's Motion for Summary Judgment because BEA had not yet responded to his discovery requests. Response at 8.

## I. The Contractor's Motion for Summary Judgment

In its Motion, the contractor argues that two of Mr. Patterson's complaints should be dismissed for the following reasons:

1. Five of the six alleged retaliations in the First Complaint are time-barred by the 90 day limitation in Part 708;

2. Mr. Patterson filed a complaint with the Idaho Human Rights Commission (IHRC) and the Equal Employment Opportunity Commission (EEOC) with respect to the same facts alleged in his Part 708 complaint; and

3. The 2006 security investigations and the merit increase awarded to the complainant on March 14, 2006, are not retaliations under Part 708.[4]

Motion for Summary Judgment at 8.

The Part 708 regulations do not include any procedures governing summary judgment motions. However, the Federal Rules of Civil Procedure provide guidance on this matter. *See Edward J. Seawalt*, Case No. VBZ-0047, 28 DOE ¶ 87,005 (2000). In that regard, federal courts have stated that summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). S*ee also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To determine which facts are material, a court must look to the substantive law on which each claim rests. *Heartland Regional Medical Center v. Leavitt*, No. 00-2802 (RMU), 2007 WL 2471727, at *2 (D.D.C. Sept. 4, 2007) (citing *Anderson v. Liberty Lobby, Inc*. 477 U.S. 242, 248 (1986)). A genuine issue is one whose resolution could establish an element of a claim or defense and, therefore, affect the outcome of the action. *Celotex*, 477 U.S. at 322; *Anderson*, 477 U.S. at 248. Thus, in order to prevail on the instant motion, BEA must show that Mr. Patterson failed to make a showing sufficient to establish the existence of an element essential to his case, and on which Mr. Patterson bears the burden of proof at the hearing. *Celotex*, 477 U.S. at 322.

This office has previously held that a motion for summary judgment should only be granted if it is supported by "clear and convincing" evidence. *Edward J. Seawalt*, 28 DOE at 89,044. *See also Fluor Daniel Fernald*, Case No. VBZ-0005, 27 DOE ¶ 87,532 at 89,163 (1999) (motion to dismiss should only be granted where there are clear and convincing grounds for dismissal); *Boeing Petroleum Services*, 24 DOE ¶ 87,501 at

[4] In the First Complaint, Mr. Patterson's sixth allegation of retaliation is that the percentage merit increase he received in March 2006 is lower than his previous increases. In the Second Complaint, Mr. Patterson alleges two retaliatory actions--two investigations by BEA, one for misuse of government property and another for bias during an investigation.

89,005 (1994) (describing dismissal as "the most severe sanction that we may apply" and thus to be used sparingly). For the reasons discussed below, I will grant the motion for summary judgment in part.

## A. Whether Five of the Six Alleged Retaliations are Time-barred by Part 708

BEA argues that five of the six allegations of retaliation in the complaint should be barred from further consideration by the time requirements of Part 708 which states that "You [the complainant] must file your complaint by the 90th day after the date you knew, or reasonably should have known, of the alleged retaliation." 10 C.F.R. § 708.14 (a). The five allegations at issue are: (1) a comment by Mark Olsen, General Counsel of BEA, on July 27, 2005; (2) an August 12, 2005, memorandum from Juan Alvarez, Deputy Laboratory Director, that contained criticism of Mr. Patterson's behavior during the investigation of the Mitchell incident; (3) an investigation into the effectiveness of the investigation function of the Ethics Office that was requested by Art Clark, Deputy Laboratory Director for Operations, INL in October 2005 and completed on February 10, 2006; (4) a change in Mr. Patterson's job classification on February 24, 2006; and (5) a performance evaluation on February 24, 2006, that was less favorable than previous evaluations. Because Mr. Patterson filed his complaint on June 1, 2006, any alleged retaliatory events pertinent to his complaint should have occurred no later than March 4, 2006.[5] However, the five items of alleged retaliation noted above occurred prior to March 4, 2006, i.e., more than 90 days before Mr. Patterson's complaint was filed.

In his Response, Mr. Patterson counters that all of the alleged retaliatory events are timely "because [he] did not know or have reason to know that BEA's actions were retaliatory until [he] learned of the lower merit increase." [6] Complainant's Response at 8. Mr. Patterson states that when he suggested to his immediate manager in February 2006 that the lower performance evaluation appeared to be retaliatory, the manager agreed to reconsider and then raised the rating. Mr. Patterson then submits that he could not discern any evidence of retaliation until he received a lower merit increase almost two weeks later. Response at 10-11. At that time he concluded that the five events under discussion were sequential elements of BEA's retaliation against him for making protective disclosures. Response at 9.

Our previous cases require that I consider the totality of the circumstances during this period in order to determine whether he knew or should have known that retaliation occurred. The critical inquiry at this juncture is at what point a reasonable person would recognize the five events at issue as Part 708 retaliation. We have stated in the past that the complainant should be allowed sufficient time to recognize that a personnel action taken by management was indeed retaliatory in nature. *See Franklin Tucker*, Case No. TBH-0023, 29 DOE ¶ 87,021 at 89,089-90 (2007); *Steven F. Collier*, Case No. VBH-

[5] The sixth allegation of retaliation, a lower merit increase, occurred within the 90-day regulatory window.
[6] Mr. Patterson received a 4.05% merit increase in March 2006. His average merit increase for the previous five years was 5.22% according to Mr. Patterson (but 4.73% according to BEA). Motion for Summary Judgment at 10, fn 60; Reply in Support of Motion for Summary Judgment at 18-19, 21-23.

0084, 28 DOE ¶ 87,036 at 89,257 (2003); *Gary S. Vander Boegh*, Case No. TBH-0007, 28 DOE ¶ 87,040 at 89,283-84 (2003) (certain personnel actions, while not regarded as neutral in their impact by the complainant, were not so overtly punitive in nature that a reasonable person "should have known" that they were Part 708 retaliations at the time that they took place). However, the complainant is not required to have any actual or official corroborative evidence of motive in order to file a complaint under Part 708. *See Delbert F. Bunch*, Case No. TBU-0068, 29 DOE ¶ 87,026 at 89,135 (2007).

I conclude that Mr. Patterson recognized or should have recognized retaliation prior to March 2006, and base this conclusion on his own pleadings. In November 2005, Mr. Patterson mentioned to the BEA investigators that he suspected he was being retaliated against for making a protected disclosure. Complaint at 1 ("On November 2, 2005, I reported concerns that I had been the victim of intimidation and retaliation…"). In February 2006, upon receiving a 2005 performance appraisal that was two levels lower than his ratings for the past seven years, Mr. Patterson told his immediate manager "you know what this looks like don't you." Complaint at 5; Response at 9. It is clear from the record that Patterson had more than a mild suspicion of retaliation against him as early as November 2005, and I find that at this time, he "knew or reasonably should have known, of the alleged retaliation." 10 C.F.R. § 708.13. As explained above, Mr. Patterson first recognized retaliation seven months prior to filing his complaint. [7] Accordingly, the first five allegations of the complaint are dismissed pursuant to 10 C.F.R. § 708.14 (a).

**B. Whether Mr. Patterson's Part 708 Complaint Is Based on the Same Facts as his Idaho Human Rights Commission and Equal Employment Opportunity Commission Complaint**

Patterson filed a complaint with the Idaho Human Relations Commissions (IHRC) and the Equal Employment Opportunity Commission (EEOC) on March 14, 2006. Mr. Patterson alleges that he was discriminated against on the basis of race and retaliation between July 17, 2005, and February 24, 2006. *See* Supplemental Declaration of Katherine L. Moriarty In Support of BEA's Motion for Summary judgment, IHRC Complaint (March 14, 2006). He alleges violations of Title VII of the Civil Rights Act of 1964 and Title 67, Chapter 59 of the Idaho Code. According to Mr. Patterson, during 2005 he communicated ethical and discrimination concerns to BEA senior management and as a result became the subject of discrimination and retaliation. He withdrew the complaint prior to any action by the IHRC or the EEOC. Response at 12.

BEA argues that the "core facts" in both complaints are the same – that Mr. Patterson made protected disclosures relating to his investigation of the site access revocation incident and as a result suffered adverse personnel actions. BEA contends that even though the alleged disclosures in the IHRC complaint differ from those in the DOE complaint, they "fall within the same retaliatory stream" as that engendered by the

[7] Moreover, he was the Manager of Employee Concerns for many years and can reasonably be expected to be more familiar than the average employee with the Part 708 process and the many faces of retaliation in the workplace.

revocation disclosures and which culminated in the same alleged adverse personnel actions. Motion for Summary Judgment at 25.

In order to prevail in his IHRC/EEOC complaint, Mr. Patterson must prove that he was discriminated against based on his race and also because he reported racial discrimination to the contractor. However, because "the pleading and underlying facts that would support this type of claim are different from those that would underlie a complaint filed under Part 708 . . . ," I find that the complaints are based on different facts, and Mr. Patterson's Part 708 complaint may proceed. *See Lucy B. Smith*, Case No. VWZ-0012, 27 DOE ¶ 87,520 (1999) (finding that age discrimination complaint filed with EEOC and South Carolina Human Affairs Commission did not preclude Ms. Smith from proceeding with her Part 708 complaint because the complaints were not based on the same facts). Mr. Patterson's Part 708 claim alleges retaliation for making a protected disclosure that differs from the protected conduct in the IHRC/EEOC case. Different facts are required to establish a prima facie case in the two complaints. In order to prevail on his Part 708 claim, Mr. Patterson must prove that his demotion and lower salary increase were the negative consequences of making protected disclosures to BEA management. Part 708 does not contain a cause of action for racial discrimination. I, therefore, find that Mr. Patterson's Part 708 complaint is not based on the same facts as his IHRC/EEOC complaint.

**C. Whether the Merit Increase and Security Investigations Are Retaliatory Actions**

BEA argues that neither the merit increase nor the 2006 security investigations can be considered retaliation under Part 708.[8] Motion for Summary Judgment at 27-31. BEA contends that an employment action is not retaliation unless it results in a materially adverse change in employment conditions comparable to a termination of employment, a demotion evidenced by decrease in wages or other negative action with respect to the compensation, terms, condition or privileges of employment. According to BEA, there was no tangible negative effect on the terms and conditions of the complainant's employment because the merit increase was actually a positive effect, since it increased the complainant's salary. As for the investigations, BEA maintains that the complainant has failed to state a cause of action for which relief can be granted because there is no relief available under Part 708 to require BEA to cease and desist from conducting an investigation. Further, conducting an investigation into alleged irregularity is the duty of a government contractor. Motion for Summary Judgment at 27-31.

The complainant argues that the lower merit increase and the two security investigations in question are indeed materially adverse changes in his employment conditions. Response at 18-23. Patterson thought that the first investigation would be a routine inquiry into the Mitchell incident, but he learned from the contractor's response to his IHRC/EEOC complaint that his own actions were the focus of the investigation. Response at 3. Mr. Patterson contends that an investigator confirmed that BEA was

[8] BEA investigated Mr. Patterson in June 2006 for misuse of government time and equipment in connection with his IHRC/EEOC complaint, and in July 2006 for alleged bias during an Employee Concerns investigation. Response at 19-23.

actually investigating Mr. Patterson for preparing a Part 708 complaint, corresponding with the IHRC, and corresponding with a community organization. Response at 6. As regards the second investigation, the manner in which BEA conducted the inquiry into his alleged misconduct during an Employee Concerns investigation caused him great concern because it was different from any previous investigation into his duties. As an employee concerns manager, he himself had been the subject of investigations into how he handled cases in the past. Typically, his manager would review the case file and then discuss with Mr. Patterson how the investigation was conducted. However, in the investigations at issue, security personnel performed the investigations and they did not ask to see his files.

**1. The Merit Increase is not Retaliation under Part 708**

I find that the 2006 merit increase is not a retaliation because it did not result in a materially adverse change in Mr. Patterson's employment conditions comparable to the examples cited in Part 708.2. It is true that Mr. Patterson's 4.05% increase in March 2006 was lower than his previous five year average (either 5.22% according to Patterson or 4.73% according to BEA). Response at 18. However, even assuming arguendo that his previous five year average increase is 5.22%, I cannot find under the specific facts of this case that a reduction to 4.05% is a materially adverse change in the conditions of his employment. It is important to note that Mr. Patterson received the highest percentage merit increase of the nine employees who reported to his immediate manager. There may be situations where a reduction in salary increase indicates a materially adverse change in a complainant's employment conditions. However, this case does not present such a scenario. The difference in the 2006 increase compared to the historical average increase is minimal, and Patterson received the highest percentage merit increase of all employees reporting to his immediate manager. Because I cannot discern a negative effect on his employment, I find that the 2006 merit increase is not Part 708 "retaliation."

**2. The Security Investigations May be Retaliation under Part 708**

Based on the record I conclude that a reasonable person could consider the two security investigations to be retaliatory actions. It is well within the realm of possibility for an employer to use an investigation as an act of retaliation against an employee. *See Bernard Cowan*, Case No. VBH-0061, 28 DOE ¶ 87,023 at 89,171 (2002) (finding that while a report was not an adverse personnel action, the use of that report to penalize a complainant could constitute adverse action). This was certainly not the first time that Patterson's actions as the manager of Employee Concerns had been investigated, but the two investigations in question seemed to follow a different procedure and have a different focus. The investigations arguably resulted in a materially adverse change in his employment conditions—he was the subject of two investigations within a short period of time after filing whistleblower and civil rights claims, and both were subject to more rigorous examination than past inquiries. The investigations are more than the type of trivial annoyances common to all workplaces, and could reasonably be considered deterrents to filing a Part 708 complaint. *See Burlington Northern and Santa Fe Railway Co. v. White*, 126 S.Ct. 2405, 2415 (2006) (stating that a materially adverse action is one that may dissuade a reasonable worker from filing a complaint against an employer).

Given these facts, the investigations could be considered acts of retaliation. Thus, at this stage in the proceeding, there is not clear and convincing evidence that the investigations were not retaliatory.[9] Accordingly, this part of the motion is denied.

## II. Conclusion

For the reasons stated above, I conclude that Mr. Patterson's first Part 708 complaint will be dismissed in its entirety because (1) the first five allegations of retaliation are time-barred by the 90-day rule of Part 708.14 and (2) the 2006 merit increase, the sixth and final allegation, does not constitute a negative personnel action under Part 708.2. In light of this finding, that portion of the Motion for Summary Judgment will be granted. As regards Mr. Patterson's second Part 708 complaint (the two security investigations), I am not persuaded by the contractor's arguments and will therefore entertain the issues in that complaint at the hearing.

It Is Therefore ORDERED That:

(1) The Motion for Summary Judgment filed by Battelle Energy Alliance on September 6, 2007, OHA Case No. TBZ-0047, be and hereby is granted in part as set forth in Paragraph 2 below, and denied in all other respects.

(2) The First Complaint filed by Dennis Patterson under 10 C.F.R. Part 708 on June 1, 2006, be and hereby is dismissed in its entirety.

(3) This is an Interlocutory Order of the Department of Energy. This Order may be appealed to the Director of OHA upon issuance of a decision by the Hearing Officer on the merits of the complaint.

Valerie Vance Adeyeye
Hearing Officer
Office of Hearings and Appeals

Date: November 21, 2007

[9] BEA argues that Mr. Patterson's claim must fail because Part 708 cannot order a contractor to discontinue investigations. However, the complaint does not request a remedy of a ban on future BEA investigations.