Case No. VWR-0003

September 20, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Reconsideration

Name of Petitioner: Linda D. Gass

Date of Filing: September 3, 1999

Case Number: VWR-0003

This decision will consider a “Motion to Revive Disclosures Dismissed Prior to the Enactment of Revisions to Part 708” Linda D. Gass filed on March 8, 1999. In her Motion, Ms. Gass requests that I reconsider an order issued on March 12, 1999, in which I dismissed in part her Complaint filed under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Lockheed Martin Energy Systems, 27 DOE ¶ 87,510 (1999).

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. 57 Fed. Reg. 7533 (March 3, 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 provide “procedures for processing complaints by employees of DOE contractors alleging retaliation by their employers for disclosure of information concerning danger to public or worker health or safety, substantial violations of law, or gross mismanagement; for participation in Congressional proceedings; or for refusal to participate in dangerous activities.” 10 C.F.R. § 708.1.

Ms. Gass has worked for LMES since March 1982. In her Complaint, Ms. Gass alleged that in 1991 she raised concerns with the DOE and its contractors regarding the environmental site characterization of a proposed industrial park. The Complainant also alleged that she made additional disclosures to LMES officials and the DOE, as well as to other federal agencies, including the Department of Labor (DOL), the Equal Employment Opportunity Commission (EEOC), and the Office of Federal Contract Compliance Programs (OFCCP). Some of the disclosures concerned alleged gender discrimination and alleged violations of the Americans with Disabilities Act (ADA). The Complainant alleged that she suffered retaliation as a result of her disclosures.

At a telephone conference conducted on March 3, 1999, counsel for the Respondent LMES requested that the Complainant identify the specific disclosures that form the basis of her Complaint of reprisal. After a discussion, the Complainant agreed that her allegations were limited to the alleged disclosures regarding the proposed industrial park and five other disclosures. On March 8, 1999, the Respondent moved to strike from consideration the five other disclosures enumerated at the March 3, 1999 pre-hearing conference. I granted the motion in part on March 12, 1999, dismissing the complaint to the extent it was based upon (1)

alleged disclosures stemming from, or relating to, gender discrimination or discrimination in violation of the Americans with Disabilities Act; or (2) alleged disclosures not made to an official of DOE, to a member of Congress, or to the contractor. Lockheed Martin Energy Systems, 27 DOE at 89,078.

On September 3, 1999, Ms. Gass filed the present Motion, in which the Complainant requests that I reconsider the portion of her complaint dismissed on March 12, 1999, in light of revisions to the Part 708 regulations that took effect on April 15, 1999. The Complainant specifically points to the fact that the intervening revisions "expand[ed] coverage of disclosures to include those made to other government officials, . . ." Criteria and Procedures for DOE Contractor Employee Protection Program, 64 Fed. Reg. 12862, 12863 (March 15, 1999).

II. Analysis

Before the revisions of April 15, 1999, the Part 708 regulations prohibited "discrimination" by a DOE contractor against an employee, which the regulations defined as an action taken against an employee "as a result of" certain "protected" acts of the employee. 10 C.F.R. §§ 708.4, 708.5, revised by 64 Fed. Reg. 12862, 12870-71 (March 15, 1999). The revised Part 708 regulations, though calling the prohibited conduct "retaliation" instead of "discrimination," do essentially the same thing. 10 C.F.R. § 708.2. As noted by the Complainant, however, the scope of conduct prohibited by Part 708 was expanded by the recent revisions. Specifically, disclosures to "any other government official who has responsibility for the oversight of the conduct of operations at a DOE site" were added to the list of types of disclosures protected from retaliation. 10 C.F.R. § 708.5.

It is undisputed that the retaliatory conduct alleged by the Complainant occurred prior to April 15, 1999. The issue before me therefore is whether alleged conduct that occurred prior to the revisions to Part 708, and not prohibited prior to the revisions, may now be found to be "retaliatory" based upon the expanded scope of prohibited conduct found in the revised Part 708. The Complainant cites 10 C.F.R. § 708.8, which states that the "procedures in this regulation apply prospectively in any complaint proceeding pending on the effective date of this regulation," and there is no question that Ms. Gass' complaint was pending on April 15, 1999. The Respondent argues that section 708.8 applies only to "procedures," not "substantive law."

The Supreme Court has "frequently noted" that there is a "presumption against retroactive legislation [that] is deeply rooted in our jurisprudence," and the Court applies "this time-honored presumption against retroactive legislation unless Congress has clearly manifested its intent to the contrary." Hughes Aircraft Co. v. United States, 520 U.S. 939, 946 (1997) (citing Landgraf v. USI Film Products, 511 U.S. 244, 265, 268 (1994)). Applying this presumption by analogy to the present case requires an examination of the intent of the DOE, the author of the relevant revisions to Part 708. The regulatory preamble to the revisions is quite helpful in this regard.

It is well established in the law that an agency may apply new procedural rules in pending proceedings as long as their application does not impair the rights of, or otherwise cause injury or prejudice to, a party. DOE will apply the revised procedures to pending cases consistent with the case law.

64 Fed. Reg. 12862, 12865 (citing Landgraf, 511 U.S. at 275; Lindh v. Murphy, 117 S. Ct. 2059, 2063-64 (1997); Natural Resources Defense Council, Inc. v. NRC, 680 F.2d 810, 817 n.17 (D.C. Cir. 1982) (citing Pacific Molasses Co. v. FTC, 356 F.2d 386 (5th Cir. 1966))).

The preamble's reference to "procedural rules" supports the position of the Respondent that the procedural provisions of the revised Part 708 apply to pending cases, while the substantive provisions do not. The case law to which the preamble refers also supports the Respondent's position. The Supreme Court distinguishes between "rules of procedure," which "regulate secondary rather than primary conduct," Landgraf, 511 U.S. at 275, and rules that "speak[] not just to the power of a particular court but to the substantive rights of the parties as well," and which are "therefore subject to the presumption against

retroactivity." Hughes, 520 U.S. at 951.

In the present case, to the extent that 10 C.F.R. § 708.5 defines the scope of employee disclosures that are protected from contractor retaliation, Part 708 clearly regulates the "primary conduct" and affects the "substantive rights" of the parties, and is thus subject to the presumption against retroactivity under well-established case law. Prior to the April 15 revision, the Respondent could not have know that a disclosure to a non-DOE government official would later be protected under Part 708, and it would be unfair to impose adverse consequences on the Respondent based on conduct not then prohibited.

Thus, I find that the drafters of the revisions to Part 708 did not intend to apply the expansion in scope of 10 C.F.R. § 708.5 to cases pending on April 15, 1999. Other than the change in the scope of the regulations, the Complainant cites no other intervening change in the facts or law relevant to the present Complaint that would warrant reconsideration of my March 12, 1999 order. Accordingly, the Motion for Reconsideration will be denied.

It Is Therefore Ordered That:

(1) The Motion for Reconsideration filed by filed by Linda D. Gass, Case No. VWR-0003, is hereby denied.

(2) 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.

Steven Goering

Hearing Officer

Office of Hearings and Appeals

Date: September 20, 1999