United States Department of Energy
Office of Hearings and Appeals

In the Matter of Charles W. Trask III	)	
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Filing Date: March 2, 2015	)	Case No.: WBU-15-0003
	)	
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Issued: April 2, 2015

Decision and Order

Charles W. Trask III, a former employee of Los Alamos National Security, LLC (LANS),[1] appeals the dismissal of a whistleblower complaint (the Complaint) that he filed under 10 C.F.R. Part 708, the Department of Energy's (DOE) Contractor Employee Protection Program. The Whistleblower Program Manager for the Employee Concerns Program of the National Nuclear Security Administration (NNSA) dismissed Mr. Trask's Complaint on February 19, 2015. As explained below, we will deny the Appeal.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established 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, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to report unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from reprisals by their employers. The regulations governing the program are set forth at Title 10 Part 708 of the Code of Federal Regulations.

Under Part 708, DOE contractor employees may file claims with the DOE alleging that they have been subject to retaliation for disclosing to a government official a "(1) a substantial violation of a law, rule, or regulation; (2) a substantial or specific danger to employees or to public health or safety; or (3) [f]raud, gross mismanagement, gross waste of funds, or abuse of authority." 10 C.F.R. § 708.5(a). The term "retaliation" is defined as

[1] LANS is the management and operations contractor for Los Alamos National Laboratory (LANL) or (Laboratory).

> an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to employment (e.g. discharge, demotion or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment) as a result of the employee's disclosure of information . . . .

10 C.F.R. § 708.2. The DOE office receiving a Complaint may dismiss it for lack of jurisdiction or other good cause. 10 C.F.R. § 708.17. The complainant may appeal such a dismissal to the Director of the Office of Hearings and Appeals. 10 C.F.R. § 708.18.

B. Procedural History

Mr. Trask filed this Part 708 Complaint on December 22, 2014. Complaint at 4. In his Complaint, he claims that LANS retaliated against him for raising legal and safety issues regarding a pedestrian walkway and two manholes in a parking lot area at the Laboratory. The Whistleblower Program Manager for the NNSA's Employee Concerns Program originally determined that the Complaint had not been filed within the time frame required by 10 C.F.R. § 708.14. E-mail from Michelle Rodríguez de Varela to Timothy Butler dated December 23, 2014. She therefore requested that Mr. Trask provide an explanation for the late filing, pursuant to 10 C.F.R. § 708.14(d). *Id*. Mr. Trask complied with the request by providing a written explanation for the late filing. Justification of Timeline dated December 26, 2014.

On February 19, 2015, the Whistleblower Program Manager dismissed the Complaint on the grounds of lack of jurisdiction. Letter Dismissing Complaint (Dismissal Letter) at 1. She first found that the Part 708 Complaint was timely filed and that, by reporting his safety concerns, Mr. Trask had made a disclosure protected by Part 708. *Id*. However, she determined that the Complaint had failed to allege an act constituting retaliation as required by the Part 708 regulations and therefore dismissed it on the grounds of lack of jurisdiction. *Id*. On March 2, 2014, Mr. Trask filed this Appeal.

C. Factual Background

Mr. Trask, an engineer, began working for LANS in September 2002. Complaint at 1. At LANS, he was responsible for reviewing plans for traffic-related infrastructure at the Laboratory site. *Id*. He served in an engineering group led by Gary Blauert, whose team provided engineering services to a division led by Andrew Erickson, the Facilities Operations Director at the Laboratory. Brief by LANL (LANL Brief) at 1. Mr. Trask retired from LANS on July 10, 2014. Complaint at 1.

Mr. Trask contends in the Complaint that on June 17, 2014, he observed that a pedestrian walkway had been constructed to connect two parking lots on the Laboratory site. *Id*. Previously, as part of a team developing a master plan for the parking lots, he had recommended that the walkway not be installed due to an elevation difference between the lots. *Id*. Upon seeing the walkway, Mr. Trask used a specialized tool for checking the slopes of surfaces and determined that the ramp was too steep to comply with the requirements of the Americans with Disabilities Act (ADA). *Id*. at 1-2. Mr. Trask also observed that a manhole due to be paved was not adjusted

to the correct elevation and that another manhole that he believed could not handle regular traffic had been exposed to traffic due to the removal of protective bollards, or posts. *Id*. at 1.

Early that afternoon, he reported his concerns about the walkway in an e-mail to safety@lanl.gov, a Laboratory safety reporting mechanism, and to Cheryl Cabbil, the Laboratory's Associate Director for Nuclear High Hazards Operations. Butler Brief at 3; LANL Brief at Attachment 1-1. He copied the e-mail to Mr. Erickson, Mr. Blauert, and others. LANL Brief at Attachment 1-1. Shortly thereafter, he sent a second e-mail to safety@lanl.gov reporting his concerns about the manholes and requesting that his previous safety report be amended to include the manhole issues. LANL Brief at Attachment 3-11.

According to Mr. Trask's Complaint, Mr. Blauert came to his office at 5 p.m. that day. Complaint at 2. Mr. Blauert told Mr. Trask that he should not have copied Ms. Cabbil on the safety report and that, by doing so, he had broken the "chain of command." *Id*. Mr. Trask expressed surprise, saying said that he knew of no rule prohibiting the reporting of safety concerns to anyone and that he "refused to be intimidated." *Id*.

Mr. Trask, Mr. Blauert, Mr. Erickson and Mr. Erickson's deputy met at 7:30 a.m. the next day, June 18, 2014. *Id*. At the meeting, Mr. Trask explained in greater detail the safety concerns he had reported. Mr. Trask claims that Mr. Erickson proceeded to tell him that he was "a disgrace to his organization," that he was "extremely disappointed" in him, that he was "not a team player" and that he was "acting like a 'Lone Wolf.'" *Id*. Mr. Trask was "terrified" that Mr. Erickson was going to fire him on the spot. *Id*. Toward the end of the meeting, Mr. Erickson told Mr. Trask, "You're dismissed." *Id*. For a moment, Mr. Trask thought that Mr. Erickson was firing him, but then he realized that Mr. Erickson was ending the meeting. *Id*. Mr. Trask walked out of the office shaking and spent the rest of the day "in a daze." *Id*. He registered blood pressure that was unusually high for him at his annual physical that evening. *Id*. at 3.

On the same morning as the meeting, Mr. Erickson asked Mr. Blauert to ask another engineer to examine the issue Mr. Trask had raised regarding the walkway.[2] *Id*.; Butler Brief at Exhibit (Ex.) F. Mr. Blauert directed Natalie Romero-Trujillo, another engineer at the Laboratory, to conduct the review. Complaint at 3. Ms. Romero-Trujillo along with David Carr, an architect, and Lisa-Jo Dunham, an ADA specialist at the Laboratory, inspected the walkway. Butler Brief at Ex. F. On June 19, 2014, Ms. Dunham submitted a report concluding that because handicap spaces existed close to the relevant office buildings, the walkway was not a handicap access route and did not need to comply with ADA requirements. LANL Brief at Attachment 4-4. Nonetheless, she recommended other measures to improve the safety of the walkway. *Id*. *See id*. at Attachment 4. In an e-mail on June 20, 2014, Mr. Trask disputed the report's findings, including Ms. Dunham's interpretation of the applicability of the ADA. Butler Brief at Ex. G.

[2] As far as the manhole that Mr. Trask had determined was not finished at the proper height, it appears that, immediately after he noticed the issue on June 17, 2014, his colleagues accepted his recommendation to raise the elevation. Complaint at 1. As to the manhole that he believed was not sturdy enough for regular traffic, it is unclear how the issue was resolved. However, a June 17, 2014, e-mail from one of Mr. Trask's colleagues suggests that plans were made to add posts to protect the manhole from traffic. LANL Brief at Attachment 3-11.

On June 25, 2014, Mr. Trask notified LANS management that he would retire from the Laboratory in about two weeks. LANL Brief at Attachment 2-1. On July 10, 2014, his last day, he filed a complaint with an internal LANS dispute resolution program. LANL Brief at Attachment 3-4. In that complaint, he alleged retaliation for reporting safety concerns as well as discrimination on various grounds. *Id*. at Attachment 3-5 to 3-8. On the complaint form, he described his departure from the Laboratory as "constructive discharge." *Id*. at Attachment 3-2. On September 30, 2014, LANS issued a final denial of his complaint. *Id*. at Attachment 3-16. As noted above, Mr. Trask filed a Part 708 Complaint on December 22, 2014.

D. The Part 708 Complaint

In his Part 708 Complaint, Mr. Trask alleges that he made a disclosure protected by Part 708 when he reported, on June 17, 2014, his safety concerns and a potential violation of the ADA.[3] Complaint at 1-3. He states that LANS management retaliated against him by "berating" him for reporting his safety concerns and by failing to address those concerns. *Id*. at 4. Further, he states that Mr. Blauert and Mr. Erickson "have shifted" his job responsibilities to Ms. Romero-Trujillo. *Id*.

Finally, he contends that LANS management made his working conditions so difficult that he was forced to resign. He writes: "I have no doubt that I will continue to be stripped of my duties and responsibilities, not have my professional engineering expertise utilized, and may ultimately be blamed for safety issues which I have brought to management's attention . . . ." *Id*. Regarding his departure from the Laboratory, he explains, "The atmosphere is so toxic that I can no longer work at the Lab." *Id*.

D. Appeal

In his Appeal, Mr. Trask attempts to provide more specific information about the acts of retaliation against him. He restates his contention that LANS stripped him of some unspecified job responsibilities, transferring them to Ms. Romero-Trujillo. He cites a June 20, 2014, e-mail from Mr. Blauert to him and others to support this contention. Butler Brief at Ex. F. Mr. Trask also argues that, with his duties taken away, he "found continued employment at LANS impracticable and intolerable" such that he "reasonably felt he had no choice but to resign and commence his retirement." *Id*. at 4-5. In short, he claims, he suffered "exclusion, bullying, intimidation, and demotion of duties" at the hands of LANS management. *Id*. at 6.

II. Analysis

Under Part 708, there are six grounds on which a DOE office may dismiss a complaint for lack of jurisdiction. A dismissal for lack of jurisdiction is appropriate if (1) the complaint is untimely, (2) the facts, as alleged in the complaint, do not present issues for which relief can be granted under Part 708, (3) the employee filed a complaint under State or other applicable law with

[3] We will treat Mr. Trask's two e-mails on June 17, 2014 regarding safety issues as a single disclosure. In this regard, we note that Mr. Trask's reported concern that the walkway failed to satisfy ADA requirements might also be considered a protected disclosure of a "substantial violation of a law, rule, or regulation." 10 C.F.R. § 708.5(a)(1).

respect to the same facts as alleged in the Part 708 Complaint, (4) the complaint is frivolous or without merit on its face, (5) the issues presented in the complaint have been rendered moot by subsequent events or substantially resolved, or (6) the employer has made a formal offer to provide the remedy that was requested in the complaint or a remedy that DOE considers to be equivalent to what could be provided as a remedy under Part 708. 10 C.F.R. § 708.17(c).

In dismissing the Complaint, the Dismissal Letter cited 10 C.F.R. § 708.17(c)(6), the provision regarding the formal offer of a remedy by the employer. Dismissal Letter at 1. We assume that, consistent with the finding in the Dismissal Letter that the Complaint failed to allege an act of retaliation, the letter meant to cite either 10 C.F.R. § 708.17(c)(2) or § 708.17(c)(4). Under these provisions, respectively, a DOE office may dismiss a complaint for not presenting issues for which relief can be granted, or for being frivolous or without merit on its face.

As an initial matter, we observe that the Part 708 regulations require that a complaint include a statement "specifically describing" the alleged retaliation as well as the disclosure or other protected activity that "gave rise to the retaliation." 10 C.F.R. § 708.12. Mr. Trask's Complaint includes a statement that specifically describes his reporting of safety concerns regarding the walkway and manholes. We find, as did the Dismissal Letter, that his Complaint alleges that he made the type of disclosure protected by Part 708. The question before us is whether his Complaint includes a statement specifically describing an alleged act of retaliation.

Mr. Trask's Complaint alleges four actions or decisions by LANS management in response to his alleged protected disclosure: rebuking him, failing to implement his safety recommendations, stripping him of job responsibilities, and constructively discharging him. We evaluate each one below. Given that we are at a preliminary stage of the complaint process, we will consider all materials in the light most favorable to Mr. Trask, the party opposing the dismissal. *See Billie Joe Baptist*, Case No. TBZ-0080, at 5 n. 13 (May 7, 2009) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)).

A. Rebuke by LANS Management

Mr. Trask alleges that Mr. Erickson and Mr. Blauert retaliated against him by rebuking him. Under Part 708, retaliation may involve "intimidation, threats, restraint, [or] coercion" with respect to employment. 10 C.F.R. § 708.2. Although Mr. Trask contends that these rebukes were harsh and unwelcome, we find no allegation that, in these conversations, either manager threatened, intimidated, restrained, or coerced him in a way that invoked Mr. Trask's employment status or job responsibilities at LANS.

According to Mr. Trask's account of his conversations with Mr. Erickson and Mr. Blauert, both managers were upset that Mr. Trask had reported his safety concerns directly to Ms. Cabbil. However, they never urged him to quit; nor did they threaten to fire him, take away his job responsibilities, cut his pay or do anything similar with respect to the terms, conditions or privileges of his employment. In fact, Mr. Erickson tasked Mr. Blauert with asking another engineer to conduct an evaluation of the walkway. This action suggests LANS management took Mr. Trask's assertions seriously.

Mr. Trask does contend that he was "terrified" of being fired and that he momentarily thought he had been dismissed. However, his own fears are not a basis for asserting that LANS took some action against him with respect to his employment.

B. Inaction on Safety Recommendations

Mr. Trask further faults LANS management for failing to accept and implement his safety recommendations. If Mr. Trask is alleging that a disagreement over the proper interpretation of the ADA constitutes retaliation, he is mistaken. The mere disagreement by management with an employee's viewpoint and recommendations does not, in and of itself, constitute retaliation under Part 708. Failing to do as Mr. Trask requested does not represent a reprisal but merely an instance in which Mr. Trask did not get his way.

C. Stripping Him of Job Responsibilities

Mr. Trask states in his Complaint that Mr. Erickson and Mr. Blauert "have shifted" his job responsibilities to Ms. Romero-Trujillo and that he fears they will shift away more job responsibilities in the future. He does not state whether LANS management shifted any job responsibilities away from him in the period between his alleged protected disclosure, on June 17, 2014, and the date he announced his resignation, June 25, 2014.

In his internal grievance, Mr. Trask offers more detail. He states that,"[f]or the past several years, Mr. Erickson and Mr. Blauert have been systematically stripping me of my duties . . . ." LANL Brief at Attachment 3-8. His internal grievance clarifies that the stripping of job responsibilities referred to in his Complaint took place prior to June 17, 2014. For the purposes of this Complaint, any loss of job responsibilities during that period is irrelevant.

Mr. Trask further contends in his Appeal that Mr. Blauert, in a June 20, 2014 e-mail, notified him that his job responsibilities had been transferred to Ms. Romero-Trujillo. The e-mail, sent by Mr. Blauert to Mr. Trask and other LANS employees, states that "Natalie Romero-Trujillo – Traffic Engineer, Lisa Jo Dunham – ADA Facility Coordinator and David Carrr – Architect" met to assess the pedestrian walkway in response to Mr. Trask's reporting of his safety concerns. Butler Brief at Ex. F. Mr. Trask argues that by describing Ms. Romero-Trujillo as a "Traffic Engineer" Mr. Blauert announced that Mr. Trask had been stripped of that role himself. However, Mr. Trask's own internal grievance acknowledges that Ms. Romero-Trujillo had been providing engineering expertise in traffic matters for years. Even considering this e-mail in a light most favorable to Mr. Trask, it could not possibly be read to imply anything except that Ms. Romero-Trujillo, like Mr. Trask, handled traffic-related engineering issues. In fact, the e-mail may demonstrate that LANS management took Mr. Trask's concerns seriously enough to conduct an examination of the walkway and that his expertise continued to be valued.

Altogether, we find that Mr. Trask has provided no specific facts to support the conclusion that he was stripped of job responsibilities between June 17, 2014 and June 25, 2015. Although it is possible that LANS management did intend to shift responsibilities away from him, it appears that Mr. Trask resigned before any responsibilities were, in fact, shifted.

D. Constructive Discharge

Mr. Trask's last contention, perhaps the central argument in his Complaint, is that LANS management retaliated against him by forcing him to resign. As he states in his Complaint, the environment became so "toxic" that he could no longer work at the Laboratory. In other words, as he specified in his internal grievance, Mr. Trask contends that he was constructively discharged.

The standard we use in evaluating constructive discharge claims is the one we adopted in *Richard L. Urie*, Case No. TBH-0063 (2008)). In *Urie*, an industrial hygienist left his position at the same Laboratory as Mr. Trask and subsequently filed a Part 708 complaint. *Urie* at 2. The Hearing Officer in *Urie* applied the standard articulated in *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004). Under this standard, a whistleblower seeking to establish constructive discharge must prove that his or her working conditions became so intolerable that a reasonable person in the employee's position would have felt compelled to resign. *Urie* at 11.

As observed above, the facts Mr. Trask alleges do not support a claim that LANS management retaliated against him by rebuking him, by failing to act on his safety concerns, or by stripping him of job responsibilities. Nor do the facts he alleges, together, support a claim that LANS retaliated by constructively discharging him. Courts generally allow constructive discharge claims only in circumstances in which plaintiffs encounter extreme difficulties or astonishingly poor treatment. The Fifth Circuit Court of Appeals has found, for example, that a constructive discharge claim "requires a greater severity or pervasiveness of harassment than the minimum required to prove a hostile work environment." *Landgraf v. USI Film Products*, 968 F.2d 427, 430 (5th Cir.1992). To advance a constructive discharge claim, Mr. Trask would need to assert far more hardship than he claims he endured. *See Stephens v. C.I.T. Group/Equip. Fin.*, Inc., 955 F.2d 1023, 1025–28 (5th Cir. 1992) (affirming a constructive discharge verdict for an age discrimination plaintiff who was officially demoted, given a $10,000 reduction in salary, and repeatedly asked when he planned to quit).

More specifically, one harsh rebuke for being a "disgrace" or a "lone wolf" is not sufficient to make a reasonable person feel compelled to resign. *See Goldsmith v. Baltimore*, 987 F.2d 1064, 1072 (4th Cir. 1993)(incidents involving "raised voices" and "flaring tempers" did not rise to the level of constructive discharge). Losing favor or influence with supervisors, or damage to one's pride, likewise, does not compel resignation. Mr. Trask decided to leave his job only eight days after reporting his safety concerns. Little more than a single contentious week of work is a fragile basis for asserting that his working conditions had become intolerable. *See E.E.O.C. v. Kohl's Dept. Stores, Inc.*, 774 F.3d 127, 134 (1st Cir. 2014) ("[A]n employee is obliged not to assume the worst, and not to jump to conclusions too [quickly]." (internal quotation marks omitted)); *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1411-1412 (9th Cir. 1996) ("[A] single isolated incident is insufficient as a matter of law to support a finding of constructive discharge."). It is possible that, had Mr. Trask remained another week, his circumstances would have improved.

Although Mr. Trask may have personally felt compelled to resign, the standard used to evaluate constructive discharge claims is a "reasonable employee" standard which cannot be triggered by

an employee's subjective beliefs. *Roman v. Potter*, 604 F. 3d 34, 42 (1st Cir. 2010). Facts not disputed by Mr. Trask also cast doubt on whether he did, in fact, feel compelled to leave the Laboratory. In his Complaint, he states his belief that, had he stayed at LANL, he would "continue to be stripped" of his duties and responsibilities. Although this statement supports his contention that his working conditions were difficult, it also indicates a belief that continuing to work at the Laboratory was an option, albeit one that may have left him in a diminished role. *See Exum v. U.S. Olympic Comm.*, 389 F.3d 1130, 1135 (10th Cir. 2004) ("Working conditions must be so severe that the plaintiff simply had no choice but to quit."). In fact, a chronology provided by Mr. Trask demonstrates that actions taken by LANS management in response to his reporting of safety issues were not the only or the immediate reason for his resignation. Mr. Trask states that he applied for a new job with the City of Farmington on June 12, 2014, prior to reporting his safety concerns. Justification of Timeline at 2. He received a conditional offer of employment on June 25, 2014, the date he announced his resignation. *Id*. His decision to submit his resignation that same day indicates that the job offer, not an "intolerable" working environment, precipitated his decision to leave LANL.

In sum, we find that Mr. Trask's Complaint fails to allege facts that could constitute retaliation by means of constructive discharge. We have also found that the facts he alleges do not support a retaliation claim based on any other theory. We therefore find that, pursuant to 10 C.F.R. § 708.17(c) (2) and 10 C.F.R. § 708.17(c)(4), the facts alleged in his Complaint do not present issues for which relief can be granted and that his Complaint lacks merit on its face. As a consequence, DOE has no jurisdiction over his Complaint and we must deny his Appeal. 10 C.F.R. § 708.18(d).

III. Conclusion

As stated above, the facts alleged in Mr. Trask's Complaint do not present issues for which relief can be granted under Part 708, and the Complaint lacks merit on its face. His Appeal of the dismissal of his Complaint must therefore be denied.

It is Therefore Ordered That:

(1) The Appeal filed by Charles W. Trask III (Case No. WBU-15-0003) is hereby denied.

(2) This Appeal 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. 10 C.F.R. § 708.18(d).

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: April 2, 2015