**United States Department of Energy**
**Office of Hearings and Appeals**

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| In the Matter of: | UChicago Argonne LLC | ) | |
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| Filing Date: | June 1, 2015 | ) | |
| | | ) | Case No.: WBZ-14-0012 |
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Issued: July 21, 2015

**Motion for Summary Judgment**
**Interlocutory Order**

William Schwartz, Hearing Officer:

This Decision will consider a Motion for Summary Judgment submitted by UChicago Argonne LLC (Argonne), regarding a complaint filed by Jonathan McKay against Argonne, his former employer, under the Department of Energy's (DOE) Contractor Employee Protection Program, set forth at 10 C.F.R. Part 708 (Case No. WBH-14-0012). For the reasons set forth below, I have determined that the Motion should be granted in part and denied in part.

## 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 2, 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 retaliation by a DOE contractor against an employee because the employee has engaged in certain protected activity, including "disclosing to a DOE official … information that [the employee] reasonably believes reveals (1) a substantial violation of a law, rule, or regulation; (2) a substantial and specific danger to employees or to public health

or safety; or (3) fraud, gross mismanagement, gross waste of funds, or abuse of authority." 10 C.F.R. § 708.5(a).

Part 708 sets forth the procedures for considering complaints of retaliation. The DOE's Office of Hearings and Appeals (OHA) is responsible for investigating complaints, holding hearings, and considering appeals. 10 C.F.R. Part 708, Subpart C. According to the Part 708 regulations, a complaint must include a "statement specifically describing the alleged retaliation" and "the disclosure, participation, or refusal that [the complainant believes] gave rise to the retaliation." 10 C.F.R. § 708.12.

## B. Factual Background

Mr. McKay was hired by Argonne in November 2012 as a Commercialization Associate in Argonne's Technology Development and Commercialization Division (TDC). Argonne Motion for Summary Judgment (June 1, 2015) at 4. Mr. McKay's immediate supervisor was Carl Shurboff; Mr. Shurboff's supervisor was the TDC Division Director Greg Morin. *Id.* at 5.

Beginning in December 2013, Mr. McKay sent text messages and e-mails and spoke in person to Mr. Shurboff and Mr. Morin complaining about commitments that Mr. Shurboff was making to potential investors on behalf of Argonne that Mr. McKay believed were unrealistic, if not impossible, to achieve. Declaration of Jonathan McKay (December 8, 2014) (Declaration) at 8-11; McKay Memorandum in Opposition to Summary Judgment (June 12, 2015) at 7-10. Mr. McKay alleges that, because of his attempts to bring this issue to the attention of his superiors, he was issued a letter of reprimand, prevented from travelling for business, subjected to a Performance Improvement Plan (PIP), and ultimately terminated from his position on June 24, 2014. Declaration at 12-16.

## C. Procedural Background

On September 19, 2014, Mr. McKay filed a Part 708 complaint against Argonne with the DOE's Argonne Site Office (ASO). In his complaint, Mr. McKay alleged that Argonne retaliated against him for having made disclosures regarding his supervisor's conduct. On October 17, 2014, Argonne submitted a response to the complaint in which it argued that Mr. McKay's complaint should be dismissed. The ASO denied Argonne's request to dismiss on November 3, 2014, and on November 17, 2014, transmitted the complaint to OHA, together with Mr. McKay's requests that the OHA Director appoint an Attorney-Investigator to examine the allegations set forth in the complaint, and then appoint an Administrative Judge to conduct an administrative hearing in connection with the complaint.

In the course of his investigation, the OHA investigator interviewed the complainant and eight other witnesses, propounded written interrogatories to the parties, and reviewed documents the parties submitted to him. He issued a Report of Investigation (ROI) on February 20, 2015. On the basis of the information he gathered, the investigator concluded that Mr. McKay had disclosed to his superiors and other Argonne officials that Mr. Shurboff had made intentional misrepresentations about the laboratory's capabilities. The investigator also found that the information gathered did not demonstrate that Mr. McKay reasonably believed Mr. Shurboff was

violating any specific law, rule, or regulation or engaging in fraud, gross mismanagement, or abuse of authority when he made those disclosures. ROI at 10. The investigator also stated that if Mr. McKay is able to show that he made protected disclosures, it is likely those disclosures will be deemed to have been a contributing factor in the personnel actions that followed. *Id.* at 11. Finally, the investigator determined that Argonne had not yet met its burden of showing, by clear and convincing evidence, that it would have taken its personnel actions against Mr. McKay in the absence of his alleged protected disclosures. *Id.* at 12-14.

The OHA Director appointed me the Administrative Judge on February 20, 2015, the date the Report of Investigation was issued. I requested briefs from both parties to address the issues on which the Report of Investigation focused and other matters. The parties than undertook extensive discovery, including numerous depositions, at the conclusion of which Argonne filed its Motion for Summary Judgment (Motion), on June 1, 2015. Mr. McKay then filed a Memorandum in Response to the Motion (Response) on June 12, 2015, and Argonne submitted a Reply to the Response (Reply) on June 22, 2015.

## II. ANALYSIS

### A. The Applicable Legal Standards

In order to meet his or her burden under Part 708, a complainant must demonstrate, by a preponderance of the evidence, each of the following elements: (1) he or she made a protected disclosure or engaged in protected activity, as described in 10 C.F.R. § 708.5; (2) he or she was the subject of a retaliation; and (3) the protected disclosure or activity was a contributing factor to the retaliation.[1] 10 C.F.R. § 708.29. Only if the complainant meets this burden does the burden then shift to the contractor to prove, by clear and convincing evidence, that it would have taken the same action absent the protected disclosure or activity. *Id.*

In his complaint, Mr. McKay alleges that he made several protected disclosures regarding Mr. Shurboff's conduct and that Argonne retaliated against him for those disclosures by issuing him a Letter of Reprimand, implementing a travel ban, issuing him a PIP, and terminating his employment. In its Motion, Argonne contends that (1) the complaint is untimely with respect to all alleged retaliations except for Mr. McKay's termination; (2) the complaint does not set forth that Mr. McKay made any disclosure of a violation of law, rule, or regulation nor that he reasonably believed he made any disclosure of fraud, gross mismanagement, or abuse of authority; and (3) Argonne had valid business reasons for taking the personnel actions against Mr. McKay. For those reasons, Argonne requests that its Motion be granted and Mr. McKay's complaint be dismissed.

The Part 708 regulations do not specify procedures or standards for evaluating motions for summary judgment. Accordingly, we look to the Federal Rules of Civil Procedure, which, though they do not govern this proceeding, may be used as a guide. *See Jeffrey S. Derrick,* Case No. WBZ-12-0005 (2012); *Greta Kathy Congable,* Case No. TBH-0110 (2011). Under Rule

[1] The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely than not true when weighed against the evidence opposed to it. *See Joshua Lucero,* Case No. TBH-0039 (2006) (*citing Hopkins v. Price Waterhouse,* 737 F. Supp. 1202, 1206 (D.D.C. 1990).

56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if 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). Interpreting this standard, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247028 (1986) (emphasis in original). Summary judgment may be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial. In such cases, there can be "no genuine issue as to any material fact," since the non-moving party's complete failure of proof concerning an essential, threshold element of his case necessarily renders all other facts immaterial. The moving party is then "entitled to a judgment as a matter of law" because the non-moving party has failed to satisfy his burden of proof on an essential element of his case. *See Mary Ravage*, Case No. TBH-0102 (2011) (*citing Celotex v. Catrett*, 477 U.S. 317 (1986)).

Using the above standards, I find that Argonne's Motion for Summary Judgment should be granted in part and denied in part.

**B. Whether Mr. McKay's Complaint Was Untimely With Respect to Some Alleged Retaliations**

A Part 708 complaint must be filed by the 90th day after the date the complainant knew, or reasonably should have known, of the alleged retaliation. 10 C.F.R. § 708.14(a). In its Motion, Argonne states that Mr. McKay filed his complaint 87 days after his termination, but significantly more than 90 days after the dates of his remaining alleged retaliations. Motion at 22. Argonne argues that the earlier alleged retaliations are therefore time-barred, and that the only alleged retaliation that survives the time bar is Mr. McKay's termination. Argonne then states that the record demonstrates that Mr. McKay was terminated for reasons "unrelated to his alleged protected disclosures." *Id.* Argonne does not attempt to apply its timeliness challenge to the termination as an alleged retaliation, but only to the earlier retaliations that led up to the termination. If I were to rule in Argonne's favor, I would not be able to dismiss the complaint, as Argonne has requested; I would merely be limiting its scope by reducing the number of alleged retaliatory acts to one: the termination.

I have considered Argonne's position concerning the timeliness of Mr. McKay's complaint and will not rule in its favor. Argonne itself contends that the termination arose from Mr. McKay's failure to meet his PIP, *id*. at 23, which was based in turn on concerns documented in the Letter of Reprimand. These earlier alleged retaliations are not isolated, unrelated personnel actions but rather form the factual underpinning for the termination. Consequently, I view these alleged retaliatory actions as inextricably intertwined, and the facts surrounding them require further development at the hearing. Accordingly, I will not dismiss any of them from this proceeding at this time.

## C. Whether Mr. McKay's Allegations Regarding His Disclosures to Mr. Shurboff and Mr. Morin are Sufficient to Support a Part 708 Complaint

To qualify for protection under Part 708, a DOE contractor's disclosure must reveal information that the employee reasonably believes reveals (1) a substantial violation of a law, rule, or regulation; (2) a substantial and specific danger to employees or to public health or safety; or (3) fraud, gross mismanagement, or abuse of authority. 10 C.F.R. § 708.5(a). In his complaint, Mr. McKay refers to two Argonne directives, its employee conduct policy, LMS-POL-51, and the anti-retaliation provisions of its problem resolution procedure, LMS-PROC-283. Complaint at 7-8, 47. The complaint also alludes to "gross mismanagement" in passing. *Id.* at 3. In his declaration, Mr. McKay clarified his complaint by stating that Mr. Shurboff's allegedly intentional misrepresentations to potential investors were both a violation of LMS-POL-51 and evidence of fraud, gross mismanagement, and abuse of authority. Declaration at 1. He asserted that his subsequent disclosures of those misrepresentations to Argonne personnel constitute disclosures protected under Part 708. *Id.* at 1, 7-10.

Argonne argues that the content of Mr. McKay's alleged protected disclosures, as described in his complaint and declaration, do not meet the requirements of Part 708 on two grounds. First, Argonne argues that Mr. McKay has not demonstrated that his disclosures revealed a substantial violation of a law, rule, or regulation. *See* 10 C.F.R. § 708.5(a)(1). Second, it argues that, despite his assertion to the contrary, Mr. McKay did not reasonably believe that his disclosures to Argonne personnel revealed fraud, gross mismanagement, or abuse of authority. Motion at 23-31.

### *1. Whether Mr. McKay's Disclosures Reveal a Substantial Violation of a Law, Rule, or Regulation*

The DOE adopted Part 708 to encourage employees of DOE contractors to come forward with information that they reasonably believe "evidences unsafe, unlawful, fraudulent or wasteful practices." 64 Fed. Reg. 12862 (March 15, 1999). The regulation itself states that its purpose is to protect disclosures of information concerning substantial violations of law. 10 C.F.R. § 708.1. When 10 C.F.R. § 708.5(a)(1) extends the protection of Part 708 to a disclosure that reveals a substantial violation of a law, rule, or regulation, it requires that such disclosure relate to some illegality, *i.e.*, a violation of a government mandate. *Sherrie Walker*, Case No. WBA-13-0015 (2014) at 5. An internal contractor rule, such as a company policy or procedure, may constitute a "law, rule, or regulation" for purposes of Part 708 when it contains mandatory language requiring or prohibiting an action, and therefore may form the basis upon which a disclosure of violation may be alleged. *See Eugene Kilmer*, Case No. TBH-0111 (2011) at 6. We have held, however, that such a rule must contain "a requirement imposed on an individual or entity by an act of the government (such as a federal statute, a DOE order or policy or an executive order or directive)." *Walker* at 5.

In his Response, Mr. McKay identified, for the first time, governmental mandates for each of the two Argonne rules that he has charged Mr. Shurboff and Argonne with violating. Without addressing the parties' procedural challenges surrounding this topic, I find that Mr. McKay has not satisfied the requirement established in *Walker*. Mr. McKay contends that Executive Order

12674, "Principles of Ethical Conduct for Government Officers and Employees," "is directly relevant and related to the standards set forth in LMS-POL-51." Response at 28. Aside from that assertion of a relationship between the Executive Order and the Argonne policy, Mr. McKay has not demonstrated that Argonne's employee conduct policy is the product of any government mandate. Moreover, Executive Order 12674's stated purpose is "to establish fair and exacting standards of ethical conduct for all executive branch employees." It refers to public office, public service, and public trust. On its face, the Executive Order does not apply to private citizens, such as Argonne employees, and though there may be similarities between Executive Order 12674 and LMS-POL-52, Mr. McKay has not made a showing that Argonne developed its own employee conduct policy in response to a government mandate.

Similarly, Mr. McKay contends in his Response that the anti-retaliation provision of LMS-PROC-283 is "directly relevant and related to the standards set forth in Part 708." *Id.* at 30. Again, Mr. McKay offers no support for this statement, and while one can observe similarities between the company policy and Part 708, the record lacks any evidence that demonstrates that Argonne's protections were implemented to respond to a government mandate.

Because Mr. McKay has failed to establish a government mandate underlying LMS-POL-51 and LMS-PROC-283, I conclude that they are not laws, rules, or regulations within the meaning of 10 C.F.R. § 708.5(a)(1). Consequently, I will grant Argonne's Motion for Summary Judgment with respect to this matter and dismiss that portion of Mr. McKay's complaint that alleges disclosures of violations of those contractor directives.

### *2. Whether Mr. McKay Reasonably Believed His Disclosures Revealed Fraud, Gross Mismanagement, or Abuse of Authority*

Argonne also argues that the content of Mr. McKay's alleged protected disclosures do not meet the requirements of Part 708 because Mr. McKay could not reasonably have believed that they revealed fraud, gross mismanagement, or abuse of authority. *See* 10 C.F.R. § 708.5(a)(3). In his complaint, Mr. McKay mentions "gross mismanagement." Complaint at 3. And in his declaration, Mr. McKay alleges that Mr. Shurboff's conduct, which he described as "intentionally deceiving outside investors regarding ANL's ability to research and actually develop new technology" for his own "personal gain and self-preservation," amounted to committing acts of fraud, gross mismanagement, and abuse of authority. Declaration at 1, 6. The OHA investigator noted that, from his limited investigation into this matter, other participants in the December 2013 meeting at which Mr. Shurboff allegedly made his intentionally deceptive representations did not view them in that light. ROI at 10.

At this juncture, I cannot conclude that there is no genuine issue of material fact surrounding Mr. McKay's assertion that he disclosed information he reasonably believed to reveal fraud, gross mismanagement, and abuse of authority. Different observers of Mr. Shurboff's alleged misrepresentations formed different opinions of whatever Mr. Shurboff was communicating during that meeting and, while Mr. McKay's claim of reasonable belief is as yet uncorroborated, the record is not sufficiently developed to permit me to rule on the reasonability of Mr. McKay's belief. Consequently, I will deny Argonne's Motion for Summary Judgment with respect to this element of Mr. McKay's complaint.

**D. Whether Argonne Would Have Taken the Same Actions Against Mr. McKay Notwithstanding His Disclosures**

Argonne also argues that the weight of evidence clearly supports a finding that, even if Mr. McKay made protected disclosures, Argonne had legitimate business reasons to make the personnel decisions it did, unrelated to those disclosures, and thus the actions were not retaliatory. Motion at 23, 33. Argonne's argument invites me to weigh the evidence to reach a factual finding regarding the sufficiency of the reasons for which Argonne disciplined, and ultimately terminated, Mr. McKay. However, I find that Argonne has not produced sufficient evidence at this stage of the proceeding to meet its burden of showing, by clear and convincing evidence, that it would have taken the same actions against Mr. McKay absent any protected disclosures.

Argonne has focused its argument on whether it had sufficient business-related grounds to support its personnel decisions, not on whether it would have taken the same actions had Mr. McKay made no protected disclosures. Even if I were to conclude from the evidence Argonne has provided to date that it had legitimate business reasons for disciplining Mr. McKay, I could not conclude that it would have taken the same actions had Mr. McKay made no protected disclosures, which is the employer's burden. 10 C.F.R. § 708.29. Argonne has not proffered sufficient evidence at this juncture to address its burden. Therefore, I cannot conclude that there is no genuine issue of a material fact regarding whether Argonne would have taken the same personnel actions against Mr. McKay had he not made his alleged protected disclosures. The record clearly needs to be developed further in this regard.

In sum, after considering Argonne's Motion for Summary Judgment and all of the submitted briefs, I cannot determine that no genuine issues exist regarding facts material to the adjudication of Mr. McKay's Part 708 complaint. With respect to Mr. McKay's allegation that his disclosures revealed a substantial violation of a law, rule, or regulation, however, I find that there is no genuine issue of material fact and grant Argonne's Motion to the extent of dismissing that portion of Mr. McKay's complaint. Consequently, Argonne's Motion for Summary Judgment is granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Motion for Summary Judgment filed by UC Argonne LLC, Case No. WBZ-14-0012, is hereby granted to the extent set forth in Paragraph (2) below and denied in all other respects.

(2) Jonathan McKay's claim, as set forth in his September 19, 2014, Complaint and his December 8, 2014, Declaration, that his disclosures to Argonne National Laboratory personnel revealed a substantial violation of a law, rule, or regulation is hereby dismissed.

(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 Administrative Judge on the merits of the complaint.

William M. Schwartz
Administrative Judge
Office of Hearings and Appeals

Date: July 21, 2015