Department of Energy
Washington, DC 20585

United States Department of Energy
Office of Hearings and Appeals

In the Matter of John Smallman	)		
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Filing Date: April 28, 2017	)	Case Nos.:	WBZ3-17-0007
	)		WBH-17-0007
	)		

Issued: August 23, 2018

Motion for Summary Judgement
Initial Agency Decision

This Decision considers a motion for summary judgement, OHA Case No. WBZ3-17-0007, filed by Lawrence Livermore National Security (LLNS) on July 26, 2018 (the Motion) concerning the Complaint of Retaliation (Complaint) filed by Mr. Smallman against LLNS under the DOE's Contractor Employee Protection Program and its governing regulations set forth at 10 C.F.R. Part 708. For the reasons set forth below, I will grant the Motion.

I. Background

A. The DOE Contractor Employee Protection Program

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 (Mar. 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The regulations governing DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708, of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation; a substantial and specific danger to employees or to the public health or safety; or fraud, gross mismanagement, gross waste of funds, or abuse of authority. *See* 10 C.F.R.

§ 708.5(a).[1] Available relief includes reinstatement, back pay, transfer preference, and such other relief as may be appropriate. *Id.* at § 708.36.

Employees of DOE contractors who believe they have been retaliated against in violation of the Part 708 regulations may file a whistleblower complaint with DOE and are entitled to an investigation by an investigator assigned by the Office of Hearings and Appeals (OHA), followed by a hearing by an OHA Administrative Judge, and an opportunity for review of the Administrative Judge's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

An employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure, as described in 10 C.F.R. § 708.5, and that the disclosure was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. Once the employee has met that burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure. 10 C.F.R. § 708.29.

B. Standard of Review

The Part 708 regulations do not establish a standard of review for procedural motions. OHA has consistently resolved such motions in a manner consistent with the Federal Rules of Civil Procedure (Federal Rules). *See, e.g.*, *Edward G. Gallrein, III*, OHA Case No. WBA-13-0017 at 5 (2014).[2] Rule 56(a) of the Federal Rules provides for "summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(a).

In considering whether the moving party has met its burden under the Federal Rules, a judge is to draw all inferences from the facts in a light most favorable to the non-moving party. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). However, "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, 247–48 (1986).

C. Procedural History

Mr. Smallman filed a complaint (Complaint) under Part 708 with DOE's Livermore Field Office on April 28, 2017. In the Complaint, Mr. Smallman asserted that he made protected disclosures concerning violations of Executive Order 12333 and the Foreign Intelligence Surveillance Act

[1] The regulations provide the same protection to employees who participate in a Congressional proceeding or an administrative proceeding under Part 708, and to those who refuse to participate in an activity, policy, or practice that they believe could (1) constitute a violation of a federal health or safety law or (2) cause the employee to have a reasonable fear of serious injury to himself or herself, other employees, or members of the public. 10 C.F.R. § 708.5(b), (c).

[2] Decisions issued by OHA are available on the OHA website located at http://www.energy.gov/OHA.

(FISA) by LLNS employees in connection with an internal investigation, and that LLNS retaliated against him when it:

(1) suspended him from work on August 02, 2016;
(2) placed him on a Performance Improvement Plan on August 02, 2016;
(3) removed his alternative work schedule on August 02, 2016;
(4) issued him a performance rating of "marginal" in October 2016;
(5) denied him a raise on January 24, 2017; and,
(6) denied him a bonus on February 23, 2017.

On June 27, 2017, the National Nuclear Security Administration's (NNSA) Whistleblower Protection Program dismissed the Complaint for lack of jurisdiction, determining that Mr. Smallman failed to exhaust applicable grievance-arbitration procedures. Mr. Smallman filed an appeal with OHA, which reversed the NNSA's determination. The NNSA subsequently accepted Mr. Smallman's Complaint as timely filed, and forwarded the Complaint to OHA to conduct an investigation.

An OHA investigator issued her Report of Investigation on April 30, 2018. The investigator found that Mr. Smallman filed his Complaint more than ninety (90) days after the last act of alleged retaliation by LLNS. ROI at 12–13. Accordingly, the investigator recommended that the Administrative Judge assigned to this matter provide Mr. Smallman with an opportunity to show cause as to why he did not file his Complaint within the Part 708 90-day deadline in a timely manner. *Id.* at 13; 10 C.F.R. § 708.14(d).

Upon issuance of the Report of Investigation, the OHA Director appointed me as the Administrative Judge to preside over a hearing in this case. On May 10, 2018, I issued an Order to Show Cause directing Mr. Smallman to establish why his Complaint should not be dismissed as untimely pursuant to 10 C.F.R. § 708.14(d). Mr. Smallman submitted a response to that Order on May 30, 2018, and LLNS submitted a reply to that response on June 08, 2018.

On June 14, 2018, I issued an Interlocutory Order in which I determined that Mr. Smallman's Complaint was timely as to LLNS's denial of a bonus to Mr. Smallman, but untimely as to all of the other acts of retaliation alleged in the Complaint. *John Smallman*, OHA Case No. WBZ-17-0007 at 7 (2018). Therefore, I sustained Mr. Smallman's Complaint with respect to LLNS's denying him a bonus, and dismissed, as untimely filed, the Complaint as to all of the other alleged acts of retaliation. *Id.*

On July 26, 2018, LLNS submitted the Motion. Mr. Smallman submitted a response to the Motion on August 10, 2018 (Response). I authorized LLNS to submit a reply to Mr. Smallman's response, which LLNS submitted on August 16, 2018 (Reply).

II. Analysis

The sole remaining issue in this matter is whether there is a question of material fact as to whether LLNS's decision not to award a bonus to Mr. Smallman was an act of retaliation for his claimed protected disclosures under Part 708. *Id.* Mr. Smallman asserted in his Complaint that LLNS's

decision to deny him a bonus was part of pattern of conduct that collectively amounted to a hostile work environment. However, the acts of discrimination alleged by Mr. Smallman were easily identifiable employment actions which occurred on three (3) isolated occasions between August 2016 and January 2017, and did not amount to an environment "permeated with discriminatory intimidation, ridicule, and insult[] that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *John Smallman*, OHA Case No. WBZ-17-0007 at 6–7 (2018) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). Having rejected Mr. Smallman's hostile work environment theory in my June 14, 2018, Interlocutory Order, I determined that I would evaluate LLNS's denial of a bonus to Mr. Smallman as a discrete act of alleged retaliation.

To establish that LLNS retaliated against him in denying him a bonus, Mr. Smallman must prove that LLNS's denial of the bonus was an independent act of retaliation and not merely a consequence of an earlier retaliatory act. *See Del. St. Coll. v. Ricks*, 449 U.S. 250, 257–58 (1980) (denying relief under Title VII of the Civil Rights Act where a plaintiff's employment was automatically terminated by contract one year after being denied tenure, and the plaintiff's claim was untimely as measured from the date of denial of tenure). LLNS's policy for awarding bonuses at the time of the alleged retaliation against Mr. Smallman provided that employees with a marginal performance rating were ineligible for bonuses. ROI, Att. 16 at 12, 24; *see also* ROI, Att. 17 at 2. However, Mr. Smallman's Complaint asserted that "all other employees received a bonus" and that "LLNS did not subject employees similarly situated to [Mr.] Smallman to similar actions." ROI, Att. 8 at 2, 12.

If, as Mr. Smallman asserted in his Complaint, LLNS exercised discretion in awarding bonuses to employees irrespective of their performance rating, then demonstrating that LLNS paid a bonus to other employees with marginal performance ratings would show that bonuses were not merely effects of earlier performance rating decisions and would provide indirect evidence of LLNS's retaliatory intent. However, Mr. Smallman cannot succeed in his claim, as a matter of law, if LLNS's decision to deny him a bonus was merely a "delayed, but inevitable, consequence" of the marginal performance rating. 449 U.S. at 257–58.

A. There is No Genuine Dispute that LLNS Did Not Pay Bonuses to Employees with Marginal Performance Ratings

In the Motion, LLNS asserted that "no employee rated as marginal or unsatisfactory or subject to corrective action has received the strategic performance bonus since its inception." Motion at 5. In support of this assertion, LLNS offered the declaration of Ms. Ronda Green (Green Declaration), Division Leader for the Compensation Division in LLNS's Strategic Human Resources Management Directorate, who represented that she had personal knowledge of the policies and procedures for awarding bonuses, and that she prepared lists of employees eligible for bonuses as part of her duties. Green Declaration at ¶¶ 2–3, 5–6, 10. Ms. Green further stated that she personally generated the final list of LLNS employees eligible to receive bonuses in 2017 pursuant to LLNS's policies, and that no employees with marginal performance ratings received bonuses. *Id.* at ¶¶ 17, 20.

Mr. Smallman's response to the Motion listed four (4) factual assertions by LLNS that Mr. Smallman considers disputed, and seventeen (17) factual assertions that Mr. Smallman considers undisputed material facts. Response at 1–7. None of the factual assertions listed by Mr. Smallman as disputed or undisputed pertain to whether or not LLNS paid bonuses to employees with marginal performance ratings. Furthermore, in direct contradiction to the assertion in his Complaint that he was treated differently from similarly-situated employees, Mr. Smallman's Response states that:

> "the denial of the bonus came only as a result of the PIP (issued in August 2016) and the rating of 'marginal' (in October 2016). The denial of the bonus is *not some independent action* with no relatedness to anything else. It stems only from other actions, which came as a direct result of the culmination of protected disclosures and actions that are closer in time."

Response at 16 (emphasis added).

In cases where a party fails to address another party's assertion of fact, the presiding judge may "consider the fact undisputed for purposes of the motion." Fed. R. Civ. Pro. 56(e)(2). As Mr. Smallman has not addressed LLNS's assertion that no employee rated as marginal has ever received a bonus, I consider LLNS's assertion undisputed.

B. LLNS is Entitled to Judgement as a Matter of Law Because the Parties Agree that Bonus Payments were Inevitable Consequences of Earlier Decisions

Having abandoned his claim that LLNS paid bonuses to other employees with marginal performance ratings, Mr. Smallman must offer some evidence that his protected disclosures contributed to LLNS's decision to deny him a bonus, and that the denial of a bonus was not an inevitable consequence of Mr. Smallman's marginal performance rating. Mr. Smallman argues that "[t]o the extent that [Ms.] Green made any 'decision,' her decision came only as the result of the actions taken by [Mr. Smallman's manager] – a PIP and a performance rating of 'marginal.'" Response at 14. This argument is unavailing.

OHA deems employers' assignments of adverse employment ratings to whistleblowers to be independently actionable acts of retaliation, and may order adjustments to adverse employment ratings assigned in retaliation for protected disclosures. *See Fredrick Abbot*, OHA Case No. TBU-0062 at 4 (2007). However, Mr. Smallman "may not use time-barred [] acts to help establish a prima facie case . . . ." *See Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1437 (11th Cir. 1998) (Age Discrimination in Employment Act of 1967 case). I dismissed Mr. Smallman's Complaint as it concerned the marginal performance rating because Mr. Smallman filed the Complaint more than ninety (90) days after LLNS assigned him the marginal performance rating. *John Smallman*, OHA Case No. WBZ-17-0007 at 7 (2018). Therefore, Mr. Smallman may not rely on the marginal performance rating to establish his *prima facie* case with respect to LLNS's decision not to pay him a bonus. *See Bishop v. New Jersey*, 84 Fed. Appx. 220, 224–25 (3d Cir. 2004) (determining that the statute of limitations to challenge a list of employees eligible for promotions under Title VII of the Civil Rights Act began to run on the date that the list was promulgated, and that promotions made using the list were merely inevitable consequences of the allegedly discriminatory prior act).

Nevertheless, Mr. Smallman's Response argues repeatedly that the marginal performance rating was an act of retaliation which led to the denial of a bonus to him because "[t]he causal chain cannot be broken merely by the presence and automatic actions of Ronda Green." Response at 11–14. Assuming that I entirely credit this assertion, LLNS is entitled to judgement as a matter of law because LLNS promulgated a generally-applicable policy denying bonuses to employees with marginal performance ratings and offered the Greene Declaration as evidence that it applied that policy uniformly to all employees with marginal performance ratings. ROI Att. 16 at 12; Greene Declaration at ¶¶ 17, 20. Mr. Smallman himself asserts that LLNS's decision not to pay him a bonus was not an independent action. Response at 16. Accordingly, LLNS has asserted uncontested facts showing that its denial of a bonus to Mr. Smallman was a "delayed, but inevitable, consequence of the" marginal performance rating and therefore that the denial of a bonus was not an independent act of retaliation. *Ricks*, 449 U.S. at 257–58.

III. Conclusion

The parties do not dispute that LLNS's decision to deny Mr. Smallman a bonus was the inevitable consequence of his October 2016 performance rating of marginal. However, this alleged retaliation is not actionable in itself due to untimeliness. Thus, it cannot support a finding that LLNS's failure to award Mr. Smallman a bonus was retaliatory. Further, LLNS's determination that Mr. Smallman was ineligible for a bonus was merely an effect of its decision to assign him a marginal performance rating, and not an independently actionable act of retaliation.

It Is Therefore Ordered That:

(1) The Motion for Summary Judgement filed by Lawrence Livermore National Security (LLNS) on July 26, 2018, OHA Case No. WBZ3-17-0007, is hereby granted.

(2) The Complaint filed by John Smallman on April 28, 2017, OHA Case No. WBH-17-0007, is hereby denied.

(3) This is an initial agency decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the 15th day after receipt of the decision in accordance with 10 C.F.R. § 708.32.

Richard A. Cronin, Jr.
Administrative Judge
Office of Hearings and Appeals