

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Aisha Thomas)

Filing Date: August 8, 2025)

Case No.: WBU-25-0001)

Issued: August 22, 2025

Decision and Order

Aisha Thomas (Appellant), a former employee of Brookhaven Science Associates, LLC (BSA),¹ appealed the dismissal of a complaint that she filed under Part 708 of Title 10 of the Code of Federal Regulations (Part 708), the Department of Energy’s (DOE) Contractor Employee Protection Program. The Acting Manager for DOE’s Brookhaven Site Office (BSO) dismissed Appellant’s complaint on July 21, 2025, for lack of jurisdiction and other good cause pursuant to 10 C.F.R. § 708.18(c). On August 18, 2025, BSA submitted a response to the appeal in which it argued that Appellant’s appeal should be denied. For the reasons set forth herein, Appellant’s appeal is granted in part.

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. Criteria and Procedures for DOE Contractor Employee Protection Program, 57 Fed. Reg. 7,533 (Mar. 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, unlawful, fraudulent, or wasteful practices and to protect those “whistleblowers” from consequential reprisals by their employers. *Id.*

Part 708 prohibits DOE contractors from retaliating against an employee because that employee has engaged in protected activity, such as disclosing 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 public health or safety, or fraud, gross mismanagement, gross waste of funds, or abuse of authority. 10 C.F.R. § 708.5(a). Employees are also protected from retaliation

¹ BSA “manages and operates Brookhaven National Laboratory [] for DOE.” Dismissal Letter at 1 (Jul. 21, 2025).

for refusing to participate in an activity, policy, or practice if the employee believes that doing so would violate a Federal health or safety law or cause the employee to have a reasonable fear of serious injury to themselves or others, provided that the employee first asks the contractor to correct the violation or remove the danger. *Id.* §§ 708.5(c), 708.7(a). Available relief includes reinstatement, back pay, transfer preference, and such other relief as may be appropriate. *Id.* § 708.36.

An employee employed at a DOE field facility or site who alleges that he or she suffered retaliation for engaging in protected activity may file a Part 708 complaint with the Head of Field Element at the DOE field element with jurisdiction over the contract. *Id.* § 708.11(b). The Head of Field Element may dismiss a complaint for lack of jurisdiction or for other good cause. *Id.* § 708.18(a). Such a dismissal is appropriate if:

- (1) The complaint is untimely; or
- (2) The facts, as alleged in the complaint, do not present issues for which relief can be granted under [Part 708]; or
- (3) The complainant filed a complaint under State or other applicable law with respect to the same facts as alleged in a complaint under [Part 708]; or
- (4) The complaint is frivolous or without merit on its face; or
- (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 requested in the complaint or a remedy that DOE considers to be equivalent to what could be provided as a remedy under [Part 708].

Id. § 708.18(c).

A complainant may appeal dismissal of his or her Part 708 complaint by the Head of Field Element to the Director of the Office of Hearings and Appeals (OHA) “by the 10th day after receipt of the notice of dismissal” *Id.* § 708.19(a).

B. The Complaint

On May 13, 2025, Appellant submitted a Part 708 complaint (Complaint) to DOE’s Employee Concerns Program (ECP), which forwarded the Complaint to the Head of Field Element for DOE’s BSO. *See* Complaint at 33 (including a copy of the e-mail by which Appellant submitted her Complaint). In her e-mail transmitting the Complaint, Appellant addressed the submission to the “DOE [ECP]” and requested “full review by the [ECP].” *Id.* Appellant copied DOE’s Office of Inspector General (OIG) on the submission and requested that her Complaint be “referr[ed] to the [OIG] for systemic oversight where appropriate” *Id.* Appellant styled the Complaint as “DOE-ECP Formal Complaint Submission” and addressed the Complaint to the ECP. *Id.* at 1. Under a

section of the Complaint concerning “[r]egulations and [p]olicies [i]mplicated” by the Complaint, Appellant cited to Part 708, the Americans with Disabilities Act (ADA), numerous Brookhaven National Laboratory (BNL) policies and requirements, and “DOE OIG Oversight – Semiannual Reports and Compliance Expectations.” *Id.* at 5.

In the Complaint, Appellant alleged that she “raised multiple internal concerns involving employee accountability, compliance with policy, and organizational governance” and that BSA retaliated against her by subjecting her “to repeated scrutiny, HR questioning, and two major and lengthy investigations, one of which ultimately resulted in disciplinary action and termination” of Appellant’s employment. *Id.* at 4. The Complaint provided five issues which formed the basis for the Complaint:

Issue 1

Issue 1, which Appellant styled “Termination Without Due Process Following Protected Activity,” alleged that BSA terminated Appellant’s employment without first conducting a fact-finding interview after Appellant engaged in “a series of protected activities including ADA accommodation requests, submitting formal inquiries and complaints regarding policy alignment, and heightened scrutiny [sic] of [her] daily actions since returning from medical leave.” *Id.* at 6. Appellant specifically alleged that she disclosed “procedural concerns” related to a BSA investigation of her conduct, having been subjected to a “hostile work environment,” factual inaccuracies in a counseling letter issued to her by BSA, failure by BSA to comply with the requirements of the ADA, and BSA non-compliance with its own “guidance and policy” related to performance reviews. *Id.*; *see also id.* at 8–9 (citing the ADA and various BNL policies that were the bases for her alleged disclosures). The Complaint alleged that Appellant’s employment was wrongfully terminated, in violation of BNL policies, in retaliation for her alleged disclosures while staff under her supervision “who had documented performance or behavioral issues were shielded from discipline” *Id.* at 6–8.

Issue 2

Issue 2, which Appellant styled “Failure to Engage in the Interactive Process and Retaliatory Handling of [ADA] Requests,” alleged that BSA “denied the majority of [Appellant’s reasonable accommodation] requests without conducting an individualized assessment” and did not engage “in a good faith interactive process.” *Id.* at 10. Appellant noted that BSA terminated her employment shortly following these alleged actions. *Id.* at 12.

Issue 3

Appellant characterized Issue 3 as “Failure to Acknowledge Rebuttals and Misuse of Performance Documentation.” *Id.* at 14. In this section of the Complaint, Appellant alleged that “[d]espite submitting formal rebuttals and a written complaint raising procedural and factual concerns [concerning a counseling letter and performance review], BSA failed to respond” or take any other action consistent with BNL and DOE policies. *Id.*; *see also id.* at 15–16 (identifying DOE and BNL policies allegedly violated by BSA). Appellant alleged that these actions were inconsistent with the treatment of other employees. *Id.* at 15.

Issue 4

In Issue 4, which Appellant labeled “Systemic Retaliation, Double Standards, and Inconsistent Discipline,” Appellant alleged that she was improperly subjected to an investigation for attempting to hold employees under her management accountable, and that she was subjected to retaliation for disclosing defects in the investigation while the employees in question were not disciplined. *Id.* at 17–18.

Issue 5

Issue 5, which Appellant styled as “Misuse of Investigative Tools, Resource Waste, and Flawed Methodology,” alleged that BSA’s HR-led investigative processes were procedurally defective, wasted resources due to lack of proper scope or exercise of investigatory discretion, and were used in a retaliatory manner against her because she was a disfavored employee. *Id.* at 19–20.

C. Dismissal

BSO collected a response to the Complaint from BSA on June 23, 2025, and a reply from Appellant on July 2, 2025. Dismissal Letter at 2 (Jul. 21, 2025) (Dismissal). The Head of Field Element subsequently issued the Dismissal, dated July 21, 2025, dismissing the Complaint on several grounds. Dismissal at 3–7. First, the Head of Field Element concluded that the Complaint was untimely with respect to all alleged acts of retaliation, except for the termination of Appellant’s employment, because the Complaint was not filed by the ninetieth day after Appellant knew, or reasonably should have known, of the alleged retaliation. *Id.* at 3; *see also* 10 C.F.R. § 708.15(a) (establishing the statute of limitations for filing a Part 708 complaint); 10 C.F.R. § 708.18(c)(1) (indicating that a complaint may be dismissed if it is untimely). Second, the Dismissal stated that Issues 1, 2, and 3 were dismissed for lack of jurisdiction because those allegations “seemingly involve[d] alleged disability discrimination and retaliation” Dismissal at 3; *see also* 10 C.F.R. § 708.4(a) (indicating that Part 708 does not cover complaints based on membership in a protected class); 10 C.F.R. § 708.18(c)(2) (indicating that a complaint may be dismissed for failing to allege facts upon which relief can be granted). Additionally, the Dismissal determined that Appellant had filed a complaint with OIG pursuant to 48 C.F.R. Part 3 based on the same set of facts and therefore that the Complaint must be dismissed for lack of jurisdiction. Dismissal at 4; *see also* 10 C.F.R. § 708.16(a) (providing that an employee may not file a complaint under Part 708 if he or she also filed a complaint under “State or other applicable law”); 10 C.F.R. § 708.18(c)(3) (providing for dismissal if “[t]he complainant filed a complaint under State or other applicable law with respect to the same facts as alleged in a complaint under [Part 708]”). Finally, the Dismissal concluded that Issues 3, 4, and 5 as alleged in the Complaint did not present issues for which relief can be granted under Part 708 because the facts as alleged by Appellant did not establish that she reasonably believed that her disclosures revealed information that was previously unknown, or that they met one of the bases for a protected disclosure enumerated under 10 C.F.R. § 708.5(a)(1)–(3). Dismissal at 4–7; *see also* 10 C.F.R. § 708.18(c)(2).

D. Appeal

On August 8, 2025, Appellant submitted the Appeal.² In the Appeal, Appellant argued that the Head of Field Element failed to provide her with an opportunity to show good cause for filing the Complaint more than ninety days after the pre-termination acts of alleged retaliation and therefore that the Appeal should be granted as to the dismissal of those alleged acts of retaliation. Appeal at 1–3. She argued that Part 708 and OHA precedent allow for complaints to be based on non-compliance with the ADA. *Id.* at 3–4. Further, she asserted that the Head of Field Element had wrongfully concluded that she filed a complaint with the OIG pursuant to 48 C.F.R. Part 3 and that the dismissal of her Complaint pursuant to 10 C.F.R. § 708.18(c)(3) should be reversed. *Id.* at 4–5. Finally, she argued that she had pled sufficient facts to show that she reasonably believed that she had revealed substantial violations of law, rules, or regulations, gross mismanagement, gross waste of funds, and abuses of authority pursuant to 10 C.F.R. § 708.5(a) and that the Head of Field Element’s dismissal of those alleged protected disclosures was based on a misapplication of the pleading standard for Part 708 complaints. *Id.* at 5–8.

E. Response

On August 18, 2025, BSA submitted a response to the Appeal. Response Brief (Aug. 18, 2025) (Response). Therein, BSA asserted that the issues raised in Appellant’s Complaint are “more aptly addressed by the Equal [Employment] Opportunity Commission” and indicated that BSA “support[ed] the conclusions stated in the [Dismissal].” Response at 1.

F. Standard of Review

A complainant who files a Part 708 complaint has the burden of establishing by a preponderance of the evidence that he or she engaged in protected activity, as described in 10 C.F.R. § 708.5, and that the complainant’s protected activity was a contributing factor in one or more alleged acts of retaliation by the contractor against the complainant. 10 C.F.R. § 708.29. If the complainant meets that burden, the burden then shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the complainant’s protected activity. *Id.*

In deciding appeals of dismissals for lack of jurisdiction or other good cause, OHA “will review findings of fact for clear error and conclusions of law *de novo*.” 10 C.F.R. § 708.19(c). The Part 708 regulations do not specify the standard a Head of Field Element is to apply in considering whether to dismiss a complaint pursuant to 10 C.F.R. § 708.18(c). OHA utilizes Rule 12(b)(6) of the Federal Rules of Civil Procedure, which concerns dismissals for failure to state a claim upon which relief can be granted, as persuasive precedent when considering dismissals pursuant to 10 C.F.R. § 708.18(c)(2) in which “the facts, as alleged in the complaint, do not present issues for which relief can be granted under [Part 708].” *See Erik DeBenedictis*, OHA Case No. WBU-20-0003 at 4 (2019) (identifying prior cases in which OHA relied upon Rule 12(b)(6) to evaluate whether a complaint should be dismissed for failing to present issues for which relief can be granted under Part 708).³ Dismissal under Rule 12(b)(6) is proper only if the complaint does not

² Appellant did not receive the Dismissal until July 30, 2025. E-mail from BSO to OHA (Aug. 11, 2025). Accordingly, Appellant’s Appeal was timely submitted by the tenth day after receipt of the Dismissal as required by 10 C.F.R. § 708.19(a).

³ Decisions issued by OHA are available on the OHA website located at <http://www.energy.gov/OHA>.

“state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In assessing whether a claim is plausible, the adjudicator must accept all statements of fact in the complaint as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

II. Analysis

A. Appellant Did Not File a Complaint with OIG Pursuant to 48 C.F.R. Part 3

A complaint may be dismissed if a complainant filed “a complaint under State or other applicable law with respect to the same facts as alleged in a [Part 708] complaint” 10 C.F.R. § 708.18(c)(3). The Head of Field Element concluded that Appellant filed her Complaint with OIG pursuant to 48 C.F.R. Part 3 based on the facts that Appellant copied OIG on the initial submission of her Complaint, indicated in the Complaint that she wished for the Complaint to be referred to OIG, and indicated in a form submitted to the ECP that she filed the Complaint with OIG on May 13, 2025. Dismissal at 4; *see also* 48 C.F.R. § 3.904-2(a) (indicating that complaints to OIG will be investigated pursuant to the Enhancement of Contractor Protection from Reprisal for Disclosure of Certain Information program codified at 41 U.S.C. § 4712). However, the facts demonstrate that Appellant neither intended to nor did in fact file her Complaint with OIG pursuant to 48 C.F.R. Part 3.

Both the e-mail through which Appellant submitted her Complaint and the text of the Complaint itself clearly indicated that the Complaint was being made to the ECP pursuant to Part 708. Complaint at 2 (indicating that the Complaint was being made to DOE’s “Employee Concerns Program” pursuant to “the Department of Energy’s Contractor Employee Protection Program”); *Id.* at 33 (showing that the subject line of the e-mail transmitting the Complaint was “Formal Submission – DOE-ECP Complaint” and that the email itself was addressed to the ECP and referenced Part 708). Neither the Complaint nor the e-mail transmitting it makes any mention of 48 C.F.R. Part 3 or 41 U.S.C. § 4712. Additionally, although Appellant copied OIG on her submission of the Complaint, she stated in the Complaint that she was requesting referral of her Complaint to OIG for “systemic” review of BSA regulatory compliance in coordination with ECP. *Id.* at 24.

Based on the foregoing, we find that Appellant did not submit her Complaint to OIG pursuant to 48 C.F.R. Part 3 as determined by the Head of Field Element. Therefore, dismissal of the Complaint pursuant to 10 C.F.R. § 708.18(c)(3) is inappropriate in this case.

B. Complainant’s ADA-related Allegations are Not Covered under Part 708

Complaints “based on race, color, religion, sex, age, national origin, or *other similar basis*,” are not covered under Part 708. 10 C.F.R. § 708.4(a) (emphasis added). OHA has previously concluded that claims of retaliation based on disclosures of violations of the ADA are not covered under Part 708 because disability is a “similar basis” to the other claims based on membership in a protected class which are not covered under Part 708. *Lockheed Martin Ener. Sys., Inc.*, OHA Case No. VWZ-0009 at 2 (1999). In this case, Appellant claims that she disclosed that BSA violated the ADA by, among other things, denying her reasonable accommodations. Because these claims are premised on her having a physical or mental limitation – *i.e.*, a disability – and disability

is an “other similar basis” which may not form the basis for a Part 708 complaint, Appellant’s alleged disclosures related to BSA’s non-compliance with the ADA are not protected disclosures under Part 708. *Id.* (indicating that “disclosures of allegations of discrimination in violation of the [ADA] . . . fall outside the intended scope of Part 708”).

In her Appeal, Appellant cited to two OHA cases which she believed demonstrated that her disclosures based on BSA’s alleged non-compliance with the ADA and subsequent retaliation were covered under Part 708. In the first, *Ronald Walli*, OHA Case No. WBU-17-0009 (2017), OHA reversed the dismissal of a Part 708 complaint by a site office after the site office concluded that the Part 708 complaint was based on the same facts as an Equal Employment Opportunity (EEO) complaint filed by the complainant. OHA Case No. WBU-17-0009 at 3. However, in that case, OHA concluded that the complainant’s Part 708 complaint, which pertained to alleged retaliation for concerns complainant disclosed about a DOE contractor not publishing a press release after being pressured by another business entity, did *not* concern EEO matters at all and was not based on the same facts as his EEO complaint. *Id.* at 2, 4. As the Part 708 complaint in *Walli* did not pertain to membership in a protected class, it is not relevant to Appellant’s claims related to the ADA.

The second case cited by Appellant, *Gilbert J. Hinojos*, OHA Case No. TBA-0003 (2005), involved a complainant who initially filed a Part 708 complaint related to an EEO complaint, was terminated after filing his Part 708 complaint, and then amended his Part 708 complaint to allege retaliation for filing the initial Part 708 complaint. TBA-0003 at 2. The Part 708 complaint in that proceeding, as amended, thus concerned the complainant’s “participati[on] in a . . . proceeding conducted under [Part 708]” and *not* membership in a protected class. *Id.* at 3; 10 C.F.R. § 708.5(b) (indicating that participation in a Part 708 proceeding is protected activity for the purpose of filing a Part 708 complaint). Therefore, it does not establish that Appellant may base a protected disclosure on BSA’s alleged non-compliance with the ADA.

As indicated above, OHA precedent establishes that disability is an “other similar basis” under § 708.4(a) and therefore that a complaint may not be based on this status. The entirety of Issue 2, and part of Issue 1, are based on Appellant’s ADA claims. Accordingly, we conclude that the Dismissal properly dismissed Issue 2, and part of Issue 1, pursuant to 10 C.F.R. § 708.18(c)(2). However, the Complaint also alleged in Issue 1 that Appellant “submitt[ed] formal . . . complaints regarding policy alignment,” indicated that Appellant believed that BSA violated policies and procedures related to investigations and performance reviews, and cited to BNL policies and procedures that she believed had been violated. Complaint at 6, 8–9. These allegations were not based on the ADA, and accordingly the Dismissal improperly dismissed these allegations under 10 C.F.R. § 708.18(c)(2). Likewise, Issue 3 makes no mention of the ADA, and the allegations therein are not explicitly premised on Appellant’s disability status or disclosure of alleged violations of the ADA by BSA. Complaint at 14–16. Accordingly, the Dismissal improperly concluded that some of those allegations should be dismissed pursuant to 10 C.F.R. § 708.18(c)(2).

C. The Complaint Alleged Issues for which Relief Can be Granted Under Part 708

In the Dismissal, the Head of Field Element construed Issues 3, 4, and 5 in Appellant's Complaint as alleging disclosures of substantial violations of laws, rules, or regulations, fraud, gross mismanagement, gross waste of funds, and abuse of authority. Dismissal at 5. We address in turn the Dismissal's determinations that the Complaint failed to allege facts with respect to each alleged disclosure that presented issues for which relief can be granted under Part 708.

1. Substantial Violation of Law, Rule, or Regulation

The Dismissal asserts that the Complaint alleged that Appellant disclosed violations of law, rule, or regulation related to her "personal disagreement with BSA's reasons for terminating [her] from employment." *Id.* at 6. This is an overly restrictive reading of Appellant's alleged disclosures in the Complaint. In fact, the Complaint alleged that Appellant filed several complaints with BSA related to its investigative processes and its non-adherence to performance management policies. Complaint at 6, 8–9, 14, 16–21. The Complaint cited numerous BNL policies and standards Complainant alleged were violated by BSA's actions. *Id.* at 5, 8–9, 16, 18–21. A contractor's failure to adhere to its own procedures could constitute a violation of a law, rule, or regulation if the contractor's procedure "exist[s] to implement governmental requirements or to ensure employee or public safety" *Sherrie Walker*, OHA Case No. WBA-13-0015 at 5 (2014).⁴ To be sure, the Complaint is ambiguous as to the extent to which these alleged rule violations are intertwined with Appellant's ADA-related allegations, which were properly dismissed in the Dismissal, and whether the BNL policies in question implement governmental requirements or were reasonably believed to do so by Appellant. However, OHA will construe complaints liberally in considering whether they should be dismissed, particularly when they are submitted by *pro se* complainants. *Clint Olson*, OHA Case No. TBU-0027 at 5 (2004); *see also Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (indicating that a complaint filed by a *pro se* party "is to be liberally construed" and "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers") (internal quotations and citations omitted). Accordingly, we find that Appellant alleged sufficient facts that the dismissal of her alleged disclosures of laws, rules, and regulations related to BSA's non-compliance with its investigatory and performance management policies must be reversed.

2. Fraud

Fraud, under Part 708, is the "knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." *Eugene N. Kilmer*, OHA Case No. TBH-0111 at 11 (2011) (adopting the definition of "fraud" from the ninth edition of Black's Law Dictionary); *see also Richard Lusby*, OHA Case No. WBU-16-0004 at 4 (2016) (indicating that OHA applies

⁴ A contractor's "personnel policy" cannot form the basis for a disclosure of a violation of a law, rule, or regulation under Part 708. *Dennis Rehmeier*, OHA Case No. TBU-0114 at 5 (2011) (finding that a contractor policy setting requirements, such as years of experience, for candidates to be hired to positions was a personnel policy and therefore could not form the basis for a disclosure of a law, rule, or regulation). In this case, it appears highly probable that BSA's performance management policy is a personnel policy governing how BSA manages its own workforce and therefore cannot form the basis for a disclosure of a violation of a law, rule, or regulation. However, considering that the Dismissal did not rely on this basis for dismissing Appellant's alleged disclosures of substantial violations of laws, rules, or regulations, and Appellant has had no opportunity to present arguments on this issue, this Decision will defer such a finding for a later stage in this proceeding.

the definition of fraud set forth in *Eugene N. Kilmer* in Part 708 cases). Nothing in Issues 3, 4, or 5 appears to allege that Appellant disclosed fraud and the Appeal does not assert any theory under which the Complaint might be construed to have done so. Accordingly, if Appellant intended to allege in her Complaint that she disclosed fraud, she has not pled any facts to support such an allegation and we find that the Dismissal properly concluded that any such claim should be dismissed pursuant to 10 C.F.R. § 708.18(c)(2).

3. Gross Mismanagement

Gross mismanagement is “a management action or inaction that creates a substantial risk of significant adverse impact upon the agency’s ability to accomplish its mission.” *Richard Lusby*, OHA Case No. WBU-16-0004 at 4. Accepting as true all of the factual allegations in the Complaint, it is plain that no reasonable person could believe that BSA’s failure to abide by policies related to conducting internal investigations of employees, managing employee performance, and so on could have a significant adverse impact on DOE’s ability to accomplish its mission because the policies cited in the Complaint are too indirectly related to DOE’s mission. See DEP’T OF ENERGY, *Mission*, <https://www.energy.gov/mission> (last visited Aug. 13, 2025) (indicating that DOE’s mission “is to ensure America’s security and prosperity by addressing its energy, environmental and nuclear challenges through transformative science and technology solutions”); see also *Francis v. Dep’t of the Air Force*, 2011 MSPB LEXIS 6371 at 8 (M.S.P.B. 2011) (finding that a complainant failed to demonstrate a reasonable belief that she disclosed gross mismanagement related to failure by the Air Force to perform and document required training for contract specialists because, although management’s actions “could constitute poor performance and possibly even negligence,” “[i]t is not the mission of the agency to train [c]ontract [s]pecialists – it is the mission of the agency to fight wars through the air” and complainant’s allegations were too removed from that mission to allege gross mismanagement); cf. *Coons v. Sec’y of the U.S. Dep’t of the Treasury*, 383 F.3d 879, 889–90 (9th Cir. 2004) (finding that the Merit Systems Protection Board (MSPB) abused its discretion and acted contrary to law in finding that disclosures by a complainant that officials of the IRS, “whose mission is to collect taxes,” interfered with processing of tax returns and abetted the fraudulent issuance of refunds to wealthy taxpayers did not disclose gross mismanagement or another form of protected disclosure under the Whistleblower Protection Act). Accordingly, the Dismissal properly concluded that the Complaint did not allege facts to support that Appellant disclosed gross mismanagement and that her allegations of gross mismanagement should be dismissed pursuant to 10 C.F.R. § 708.18(c)(2).

4. Gross Waste of Funds

A gross waste of funds is “a more-than-debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government.” *Edward G. Gallrein, III*, OHA Case No. WBA-13-0007 at 8 (2014). OHA has repeatedly dismissed Part 708 complaints for failing to allege a reasonable belief that a complainant disclosed a gross waste of funds where the complaints failed to provide any estimate of the scale of the waste or detail as to why the expenditure was grossly in excess of the benefit to be realized. See *Cassandra B. Stark*, OHA Case No. WBU-13-0003 at 4–5 (2013) (dismissing complainant’s alleged disclosure of a gross waste of funds on the basis that her failure to allege “the scale of the expenditures involved” or “the amount of waste that she claim[ed] resulted from [the] alleged actions” precluded her from reasonably

believing that she had disclosed a gross waste of funds); *Fred Hua*, OHA Case No. TBU-0078 at 3 (2008) (dismissing complainant's alleged disclosure of a gross waste of funds based on his "vague and inadequate" factual allegations as to the nature of the waste). In her Appeal, Appellant makes the conclusory statement that she alleged "documented facts [] that a reasonable disinterested observer could plausibly conclude reveal . . . gross waste of funds" Appeal at 6. However, the Appeal does not identify any allegations in the Complaint that are related to the quantification of the waste she alleged resulted from BSA's investigations and upon review of the Complaint no such allegations appear to be present. Accordingly, we conclude that, even accepting as true Appellant's allegations that BSA wasted resources in its investigative actions, Appellant has not alleged sufficient facts to conclude that she reasonably believed she had disclosed a gross waste of funds. Thus, the Dismissal properly concluded that the allegations of gross waste of funds in the Complaint should be dismissed pursuant to 10 C.F.R. § 708.18(c)(2).

5. *Abuse of Authority*

Abuse of authority under Part 708 is "the arbitrary or capricious exercise of power by an official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to other preferred persons." *Sherrie Walker*, OHA Case No. WBA-13-0015 at 7 (quoting *Thomas L. Townsend*, OHA Case No. TBU-0082 (2008)). The Dismissal concluded that Appellant was "not inappropriately singled out for discipline by management, and thus there was no abuse of authority by BSA." Dismissal at 7. However, the Complaint alleged that Appellant was singled out for multiple resource-intensive investigations, which were initiated based on alleged animus and not conducted in accordance with BNL policies. Complaint at 6, 15, 17. An allegation that investigations are being initiated arbitrarily and in violation of applicable rules and procedures can form the basis for a disclosure of an abuse of authority. *See Stover v. Dep't of the Interior*, 63 M.S.P.R. 46, 48–49 (M.S.P.B. 1994).⁵ While it may prove true, as the Dismissal concluded, that Appellant was not arbitrarily singled out for investigations inconsistent with BSA's policies and procedures, this is a factual conclusion that runs counter to the pleadings in the Complaint which must be accepted as true. Considering the liberal pleading standard applicable to *pro se* complainants at this stage of a Part 708 proceeding, Appellant alleged sufficient facts that the dismissal of her alleged disclosures of abuses of authority related to BSA's investigative actions must be reversed.

D. The Alleged Disclosures Appear to Have Revealed Information

In order for a disclosure to be protected conduct under Part 708, it must reveal information. 10 C.F.R. § 708.5(a) (protecting only those disclosures a complainant "reasonably believes reveal[]" information). OHA applies this standard liberally in light of the purpose of Part 708 in encouraging disclosure of unlawful or unsafe conditions, and the fact that the recipient of a disclosure is aware of the information disclosed will not invalidate a disclosure based on reasonable belief. *Jonathan K. Strausbaugh*, OHA Case No. TBH-0073 at 7–8 (2008). However, OHA has found the absence

⁵ The MSPB found that complainant's allegations also could constitute a disclosure of gross mismanagement. *Stover*, M.S.P.R. at 49. Appellant's claimed disclosure of gross mismanagement based on BSA's investigative activities is distinguishable from the complainant's disclosure in *Stover* because investigatory activity is not central to DOE's or BSA's mission, while the complainant in *Stover* worked for the U.S. Park Police, for which unbiased and procedurally sound investigative activity is presumably central to its law enforcement mission.

of such a reasonable belief where an employee merely parrots generally known information he or she received from management back to management. *Mary Vanessa Black*, WBU-20-0005 at 5–6 (2020) (finding no protected disclosure where the employee’s purported disclosure restated information about a change in health insurance coverage transmitted by the contractor in a mass e-mail to employees); *Vincent E. Daniel*, OHA Case No. WBH-13-0006 at 7–8 (2013) (finding no protected disclosure where the employee’s purported disclosure was that there were discrepancies between two electronic databases when his manager had previously assigned him to reconcile the same discrepancies in the same databases). The facts of this case are clearly distinct from those in which OHA has previously found a lack of reasonable belief on the part of a complainant that he or she was revealing information. There is no basis to infer from the Complaint that any recipient of Appellant’s disclosures was aware of any of the details of the performance management or investigatory issues Appellant disclosed in her internal complaints, much less that Appellant’s belief that she was disclosing violations of laws, rules, or regulations or abuses of authority was unreasonable. Accordingly, we find that the Dismissal improperly concluded that the Appellant failed to allege that she reasonably believed herself to have revealed information pursuant to 10 C.F.R. § 708.5(a).

E. The Head of Field Element Did Not Provide Appellant with an Opportunity to Show Good Cause for Not Filing the Complaint Within 90 Days of All Alleged Acts of Retaliation

A Part 708 complaint “must be filed by the 90th day after the date the employee knew, or reasonably should have known, of the alleged retaliation.” 10 C.F.R. § 708.15(a). The Dismissal concluded that the Complaint was only timely as to BSA’s termination of the Appellant’s employment, which occurred on February 13, 2025, and that all preceding alleged acts of retaliation by BSA were known to Appellant prior to her termination and occurred more than ninety days before she filed the Complaint. Dismissal at 3. In the Appeal, Appellant asserts that the Dismissal wrongfully dismissed the pre-termination acts of alleged retaliation because the Head of Field Element did not give her an opportunity to show good cause for failing to file the Complaint within ninety days of those alleged acts of retaliation. Appeal at 2;⁶ *see also* 10 C.F.R. § 708.15(d) (indicating that the Head of Field Element must “give the complainant an opportunity to show any good reason . . . for not filing within [the 90-day] period”).

Pursuant to 10 C.F.R. § 708.15(d), the Head of Field Element must give the complainant an opportunity to show good cause for an untimely filing and may exercise discretion to accept an untimely complaint where good cause has been shown. There is no indication in the Dismissal that Appellant was advised of the untimeliness of the Complaint as to the pre-termination acts of alleged retaliation or offered an opportunity to show good cause for her untimely filing prior to the issuance of the Dismissal. As Appellant asserts in the Appeal, OHA precedent supports reversing dismissal of complaints as untimely where a complainant has not received an opportunity to show good cause. *Michelle B. Bryant*, OHA Case No. WBU-17-0006 at 4 (2018) (reversing a dismissal because complainant did not receive an opportunity to show good cause for a late-filed complaint prior to the dismissal thereof). Thus, we will reverse the dismissal of the pre-termination acts of

⁶ Although the Appeal cited to 10 C.F.R. § 708.14, which addresses requirements for exhausting union grievance-arbitration procedures, we construe the Appeal to mean § 708.15.

alleged retaliation and allow Appellant an opportunity to present information to the Head of Field Element for him to determine whether there was good cause for the untimeliness of her Complaint as to the alleged pre-termination acts of retaliation.

III. Conclusion

The Head of Field Element properly dismissed Appellant's ADA-related disclosures for lack of jurisdiction and her alleged disclosures of fraud, gross mismanagement, and gross waste of funds for failure to state a claim upon which relief can be granted. However, because we have concluded that some bases for the Dismissal must be reversed for the reasons set forth above, we will grant the appeal in part and remand the matter to BSO for further processing.

It is therefore ordered that:

- (1) The Appeal filed by Aisha Thomas (Case No. WBU-25-0001) is hereby: GRANTED as to the following bases:
 - (a) Dismissal of all alleged acts of retaliation prior to February 13, 2025, pursuant to 10 C.F.R. § 708.18(c)(1);
 - (b) Dismissal of the alleged disclosures of substantial violations of laws, rules, or regulations based on BSA's alleged non-compliance with investigatory and performance management policies pursuant to 10 C.F.R. § 708.18(c)(2);
 - (c) Dismissal of the alleged disclosures of abuses of authority related to BSA's alleged arbitrary pursuit of investigations, or pursuit of investigations based on favoritism, pursuant to 10 C.F.R. § 708.18(c)(2); and,
 - (d) Dismissal of the Complaint for filing a complaint under state or other applicable law with respect to the same facts as alleged in the complaint pursuant to 10 C.F.R. § 708.18(c)(3).
- (2) The Appeal is hereby: DENIED in all other respects.
- (3) This matter is remanded to the Brookhaven Site Office for consideration of the timeliness of the alleged pre-termination acts of retaliation pursuant to 10 C.F.R. § 708.15(d) and further processing pursuant to 10 C.F.R. § 708.21(a).

Poli A. Marmolejos
Director
Office of Hearings and Appeals