

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Earl M. Ballard)
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Filing Date: April 3, 2014)
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Case No.: WBU-14-0007

Issued: August 6, 2014

Decision and Order

Earl M. Ballard, a former employee of Enercon Federal Services, Inc. (EFS) in Portsmouth, Ohio, appeals the dismissal of a Complaint that he filed under the Department of Energy’s (DOE) Contractor Employee Protection Program set forth at 10 C.F.R. Part 708. The DOE’s Portsmouth/Paducah Project Office’s (PPPO) Employee Concerns Program Manager dismissed the Complaint on March 6, 2014. For the reasons set forth below, we find that PPPO erred in dismissing Mr. Ballard’s complaint.

I. Background

A. Regulatory Background

The DOE’s Contractor Employee Protection Program was established to safeguard public and employee health and safety, ensure 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 purposes are 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 the DOE’s Contractor Employee Protection Program are set forth at Title 10 Part 708 of the Code of Federal Regulations.

Under Part 708, the DOE office initially receiving a Complaint may dismiss the Complaint for lack of jurisdiction or other good cause. 10 C.F.R. § 708.17. Such a dismissal is appropriate under any of the following circumstances: (i) the Complaint is untimely, (ii) the facts, as alleged in the Complaint, do not present issues for which relief can be granted under Part 708, (iii) the employee filed a complaint under State or other applicable law with respect to the same facts as alleged in the Part 708 Complaint, (iv) the Complaint is frivolous or without merit on its face, (v) the issues presented in the Complaint have been rendered moot by subsequent events or substantially resolved, or (vi) 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 reviewing cases such as this, we consider all materials in the light most favorable to 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)).

B. Factual and Procedural Background

Mr. Ballard was employed as a technician by EFS at the Portsmouth Gaseous Diffusion Site until May 21, 2013, when he was terminated for “falsifying readings on Daily Background and Source Check Sheet records for radiation measurement instruments.” Appeal at 3. On June 26, 2013, Mr. Ballard filed a Part 708 Complaint with the PPPO’s Employee Concerns Manager. On July 25, 2013, PPPO dismissed this Complaint, finding that he had not specifically alleged that he had made a protected disclosure under 10 C.F.R. § 708.12. July 25, 2013, Dismissal Letter at 2. Instead of appealing PPPO’s dismissal of his original Complaint to OHA, Mr. Ballard attempted to correct the deficiency in his original Complaint by filing a second Complaint with PPPO on August 16, 2013. In this Complaint, Mr. Ballard contended that a management official had directed him to make the changes in the source check sheets. Mr. Ballard further stated that he met with a DOE Office of Inspector General (IG) investigator and allegedly disclosed details pertaining to the corrections made to one entry on a source check sheet, discussed the allegations of falsification of documents, and made full disclosure of the facts of Mr. Ballard’s involvement in the matter. Attachment to Second Complaint at 1-2.

On September 12, 2013, PPPO dismissed Mr. Ballard’s second Complaint, finding that since it had “reviewed and dismissed this complaint previously, [it was] unable to process another complaint for the same issue.” September 12, 2013, Dismissal Letter at 1. Mr. Ballard appealed the dismissal of his second Complaint to the Office of Hearings and Appeals.

In a Decision and Order dated September 30, 2013, we granted Mr. Ballard’s Appeal, and remanded the matter to PPPO for further processing. *Earl M. Ballard*, Case No. WBU-13-0014 (2013). In that Decision, we concluded that PPPO erred in dismissing Mr. Ballard’s first Complaint without permitting him an opportunity to correct the deficiency that it had identified with respect to that Complaint. We further concluded that PPPO erred in dismissing the second Complaint because the Part 708 regulations do not provide regulatory authority for a field element to dismiss a timely-filed complaint because a previous complaint based upon the same facts had been filed. In reaching these conclusions, we observed that Mr. Ballard’s communications with the IG may have constituted a protected disclosure.

On remand, PPPO dismissed Mr. Ballard’s second Complaint again. In a letter to Mr. Ballard dated March 6, 2014, PPPO cited the following reasons for this action. First, PPPO determined that Mr. Ballard had “not proven [his] alleged disclosure was a contributing factor in [his] termination from EFS” March 6, 2014, dismissal letter. PPPO explained that Mr. Ballard did not disclose to EFS that he had falsified documents, nor was EFS aware of his alleged disclosure to the IG or of an investigation into Mr. Ballard’s conduct by Fluor B&W Portsmouth (FBP), a higher-tier contractor, until EFS was notified by FBP on May 10, 2013. According to PPPO, EFS took no action until FBP informed EFS in a letter dated May 20, 2013, that FBP was

exercising its contractual right to remove Mr. Ballard from performing services under the FBP contract with EFS. Since Mr. Ballard was hired through a subcontract between EFS and FBP, and his assignment was terminated by FBP, PPPO concluded that his “employment with EFS was likewise terminated.” *Id.* PPPO therefore reasoned that Mr. Ballard’s Complaint against EFS should be dismissed because there is no evidence to show that it retaliated against him for making the alleged disclosure.

Second, PPPO determined that the protections conferred by the Part 708 regulations were “not intended to protect individuals from an admission of their own wrong doing in an investigation into that wrongful conduct.” *Id.* It interpreted the Part 708 regulations as being applicable “when an employee steps forward to disclose a wrongful act independent of any compulsion.” *Id.* In such a case, PPPO continued, if the employee personally engaged in the wrongful act, but did so under instruction from management, disclosing that act could constitute a protected disclosure. However, PPPO found that the alleged disclosure occurred during an investigation into the conduct of Mr. Ballard and others, in which Mr. Ballard “admitted to altering a report, albeit due to the alleged direction of supervision.” *Id.* PPPO concluded that this is not the type of situation that warrants Part 708 protection.

In his Appeal, Mr. Ballard contends that EFS terminated him because of his disclosure, and not because of FBP’s exercise of its contractual right to remove Mr. Ballard from the project for which he was hired. In support of this contention, he quotes the letter in which EFS informed him of his dismissal as saying that this action “is based upon [a] finding that you engaged in falsifying readings on Daily Background and Source Check Sheet records for radiation measurement instruments.” Appeal at 4. Mr. Ballard further denied that he had engaged in falsification, arguing that falsification requires an intent to deceive, and that any intent on his part was negated by the fact that he was instructed to alter the documents by a superior. *Id.* Mr. Ballard also disputes PPPO’s conclusion that the Part 708 regulations do not apply to his conduct, citing 10 C.F.R. § 708.4(b). That regulation provides that a contractor employee may not file a complaint against his or her employer if it involves misconduct that the employee, acting without direction from the employer, deliberately caused, or in which he or she knowingly participated. Mr. Ballard argues that since he was directed by management to act as he did, his complaint does not involve such misconduct, and is therefore permissible under the Part 708 regulations.

II. Analysis

At the outset, we note that PPPO did not specify in its March 6, 2014, letter which of the six grounds for dismissal specified in 10 C.F.R. § 708.17 it found to be applicable to Mr. Ballard’s Complaint. However, it appears from the justifications provided by PPPO that it found Mr. Ballard’s Complaint to be frivolous or without merit on its face, and that it did not present issues for which relief can be granted under Part 708. For the reasons set forth below, we find that neither of these grounds is applicable to Mr. Ballard’s Complaint.

PPPO’s first justification for dismissing Mr. Ballard’s Complaint is that he had not proven that his alleged disclosure was a contributing factor in his termination from EFS, and that he was fired by EFS because his assignment was terminated by FBP. As an initial matter, there is

nothing in the Part 708 regulations that requires a Complainant to demonstrate a nexus between his alleged protected activity and an adverse employment action at this preliminary stage of the complaint process. The regulations do provide that, in order to prevail, a Complainant must demonstrate, by a preponderance of the evidence, that his or her protected activity was a contributing factor to one or more alleged acts of retaliation. 10 C.F.R. § 708.29. However, any determination that Mr. Ballard would be unable to meet this burden would be premature without further development of the record at the investigative or hearing stage. It is undisputed that EFS knew of Mr. Ballard's alleged protected disclosure when the company fired him. Moreover, taking as true the factual representations in Mr. Ballard's Appeal, EFS's termination letter did not cite FBP's termination of Mr. Ballard's assignment as a reason for EFS's action.

Furthermore, even if EFS dismissed Mr. Ballard because his assignment was terminated by FBP, that does not necessarily mean that Mr. Ballard's Complaint against EFS should be dismissed. This is because we have previously held that contractors and subcontractors can be held jointly and severally liable for damages arising from retaliatory actions. *See, e.g., Jimmie L. Russell*, Case No. VBH-0017 (2000). *See also Jagdish C. Laul*, Case No. VBA-0010 (2001) (legal distinctions between DOE contractor and subcontractor should not be viewed as a bar to liability where the subcontractor, acting under the influence of the contractor, carries out a retaliation against a whistleblower complainant). Therefore, if FBP terminated Mr. Ballard's assignment in retaliation for making a protected disclosure, EFS can also be held liable, even if it acted without retaliatory intent. For these reasons, we conclude that Mr. Ballard's Complaint is not frivolous or without merit on its face.

PPPO also determined that Part 708 does not apply in circumstances such as those surrounding Mr. Ballard's Complaint. Specifically, PPPO concluded that Part 708 applies when an employee steps forward to disclose a wrongful act independent of any compulsion, and not when that disclosure occurs in the midst of an investigation into the employee's actions. That interpretation is not explicitly supported by the text of the Part 708 regulations. Section 708.5 specifically describes the complaints that are not covered under the Part 708 regulations.³ Nowhere does that section mention disclosures that are made under some form of compulsion. Under PPPO's interpretation, a disclosure made by an employee testifying before Congress under subpoena would not be eligible for protection from retaliation under Part 708. Such a result would clearly be inconsistent with the purposes of the Part 708 regulations. The regulation does exclude complaints involving misconduct that the employee, acting without direction from the employer, deliberately caused, or in which he or she knowingly participated. However, Mr. Ballard claims that he was instructed to alter the readings in question by management. He is alleging that he

³ That section states that an employee may not file a Complaint if it (i) is based on race, color, religion, sex, age, national origin, or other similar basis, (ii) involves misconduct that the employee, acting without direction from his or her employer, deliberately caused, or in which he or she knowingly participated, (iii) is based on the same facts for which the employee has chosen to pursue a remedy available under state or other federal law, (iv) is based on the same facts in which the employee, in the course of a covered disclosure or participation, improperly disclosed Restricted Data, national security information, or any other classified or sensitive information in violation of any Executive Order, statute, or regulation, or (v) deals with "terms and conditions of employment" within the meaning of the National Labor Relations Act, except as provided in 10 C.F.R. § 708.5.

made a protected disclosure, and that he was terminated for making that disclosure. Mr. Ballard's Complaint therefore appears to present issues for which relief can be granted in Part 708. We will therefore grant Mr. Ballard's Appeal.

It Is Therefore Ordered That:

- (1) The Appeal filed by Earl M. Ballard (Case No. WBU-14-0007) is hereby granted.
- (2) This matter is remanded to the Portsmouth/Paducah Project Office Employee Concerns Program for further processing as set forth in 10 C.F.R. § 708.21.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: August 6, 2014