

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

In the Matter Ronald A. Walli)		
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Filing Date: September 1, 2017)	Case No.:	WBU-17-0009
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Issued: September 29, 2017

Decision and Order

Ronald A. Walli, a former employee of UT Battelle, LLC (“UT-Battelle”), appeals the dismissal of a whistleblower complaint that he filed under the Department of Energy’s (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Mr. Walli resigned from UT-Battelle, the management and operations contractor for Oak Ridge National Laboratory (ORNL), on March 13, 2017. He filed this Complaint with the DOE’s ORNL Site Office on July 10, 2017. The Manager of the ORNL Site Office dismissed his Complaint on August 7, 2017. He appealed that dismissal on September 1, 2017. As explained below, we will grant the Appeal.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE’s Contractor Employee Protection Program was established to safeguard “public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse” at DOE’s government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to report unsafe, illegal, fraudulent, or wasteful practices and to protect those “whistleblowers” from reprisals by their employers. The regulations governing the program are set forth at Title 10 Part 708 of the Code of Federal Regulations.

The Part 708 regulations provide, in pertinent part, that a DOE contractor may not discharge or take some other reprisal action against an 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).

The DOE office initially receiving a Part 708 complaint may dismiss it to lack of jurisdiction or for other good cause. 10 C.F.R. § 708.17(a). Such a dismissal is appropriate under any of the following circumstances: (1) the complaint is untimely; (2) the facts, as alleged in the complaint, do not present issues for which relief can be granted under Part 708; (3) the employee filed a complaint under State or other applicable law with respect to the same facts as alleged in the Part 708 complaint; (4) the complaint is frivolous or without merit on its face; (5) the issues presented in the complaint have been rendered moot by subsequent events or substantially resolved; or (6) the employer has made a formal offer to provide the remedy that was requested in the complaint or a remedy that DOE considers to be equivalent to what could be provided as a remedy under Part 708. 10 C.F.R. § 708.17(c). The employee may appeal such a dismissal to the Director of the Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.18(a).

B. Complaint

Mr. Walli is a former media relations specialist at ORNL. Part 708 Complaint of Ronald Walli (July 10, 2017) (“Complaint”), Attachment 3, at 1. On March 13, 2017, he resigned from UT-Battelle after receiving the option to resign in lieu of termination. Complaint at 1; UT-Battelle’s Response to Complaint (July 21, 2017) (“Response”) at 5. Following his resignation, Mr. Walli filed complaints with the DOE’s Office of Inspector General (IG) and the DOE’s Employee Concerns Program (ECP). Complaint at 1. He also filed a discrimination complaint with the Equal Employment Opportunity Commission (EEOC). *Id.*

Subsequently, on July 10, 2017, he filed this Part 708 Complaint with the ORNL Site Office. In his Complaint, Mr. Walli states that in November 2016, he was asked to draft a press release regarding a new, more efficient biomass conversion process developed by ORNL researchers. Complaint, Attachment 3, at 1. He alleges that ORNL decided not to issue the press release after receiving pressure from Vertimass, a company that licenses from ORNL a previously-developed biomass conversion technology. *Id.* Mr. Walli indicates that the decision to withdraw the press release was improper and that he raised questions about the decision to ORNL management. *See id.* at 1-2. In particular, he states that he repeatedly made inquiries through email, and at least once during a conversation with an ORNL manager, about the status of management discussions on the handling of the press release. *Id.* at 1-2. He argues that UT-Battelle forced him to resign because of statements he made regarding the incident. *Id.* at 2.

C. UT-Battelle’s Response

The ORNL Site Office forwarded Mr. Walli’s Complaint to UT-Battelle, which responded to the Complaint on July 21, 2017. In its Response, UT-Battelle contended that the Complaint is without merit.¹ Response at 6-7. Importantly, for the purposes of this Appeal, UT-Battelle asserted that the Complaint should be dismissed for two procedural reasons. First, UT-Battelle argued that the Complaint should be dismissed, pursuant to 10 C.F.R. § 708.17(c)(3), because it is based on the “same facts” as the complaints Mr. Walli filed with the IG, the Employee Concerns Program, and

¹ UT-Battelle asserts that Mr. Walli was asked to resign due to his own insubordinate, inappropriate, and unprofessional conduct and that the incident regarding the press release had no bearing on the decision by UT-Battelle management to recommend his termination. Response at 2, 7.

the EEOC. *Id.* at 8. As stated above, dismissal of a Part 708 complaint is appropriate if the employee files a complaint in another forum based on the same facts. 10 C.F.R. § 708.17(c)(3). Second, UT-Battelle argued that the Complaint is untimely because Mr. Walli missed the 90-day filing deadline established by 10 C.F.R. § 708.14(a). Response at 5-6. Under section 704.14(a), 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.”

D. Dismissal

On August 7, 2017, the Manager of the ORNL Site Office (“Site Office Manager”) dismissed the Complaint. Letter from Johnny O. Moore, Manager, ORNL Site Office, to Ronald A. Walli (August 7, 2017) (“Dismissal Letter”). In the Dismissal Letter, the Site Office Manager cited the same procedural deficiencies raised by UT-Battelle in its Response. First, the Site Office Manager found that that the Equal Employment Opportunity (EEO) complaint filed by Mr. Walli is based on the same facts as his Part 708 Complaint and that dismissal was necessary pursuant to 10 C.F.R. § 708.17(c)(3). *Id.* Second, the Site Office Manager found that the Complaint was untimely under the 90-day filing deadline established by 10 C.F.R. § 708.14(a). *Id.*

With respect to the timeliness issue, Part 708 allows the time period for filing a complaint to be tolled in certain circumstances, including: (1) during the time an employee pursues an internal company grievance-arbitration procedure; and (2) during the time spent resolving jurisdictional issues related to a complaint the employee files under State or other applicable law. 10 C.F.R. § 708.14(b)-(c). In the Dismissal Letter, the Site Office Manager found that neither of these reasons for extending the deadline applied. Dismissal Letter at 1. The Site Office Manager also observed that Part 708 allows him the discretion to accept untimely complaints if good cause is shown. *Id.*; see 10 C.F.R. § 708.14(d) (providing discretion to accept untimely complaints). However, the Site Office Manager concluded that he could not exercise that discretion because Mr. Walli had filed an EEO claim and was therefore barred from pursuing a Part 708 complaint. *Id.*

E. Appeal

Mr. Walli filed this Appeal on September 1, 2017.² Appeal from Ronald A. Walli to Poli Marmolejos, Director, OHA (September 1, 2017). In his Appeal, Mr. Walli asserts that his discrimination complaint is not based on the same facts as his Part 708 Complaint because discrimination is not a matter covered by Part 708.³ *Id.* at 1. He also contends that he pursued an

² The ORNL Site Office used an incorrect address when sending Mr. Walli its Dismissal Letter of August 7, 2017. On August 22, 2017, the ORNL Site Office resent the letter to Mr. Walli’s correct address. Letter from Johnny O. Moore to Ronald A. Walli (August 22, 2017). U.S. Postal Service records indicate that he received it on August 24, 2017. Accordingly, Mr. Walli met the 10-day deadline for filing an appeal established by 10 C.F.R. § 708.18(a).

³ The materials in the record offer different, and possibly conflicting, facts regarding whether Mr. Walli filed a discrimination complaint with the EEOC, the Tennessee Human Rights Commission, or both. In any event, this ambiguity does not affect our analysis. For purposes of this Decision, we will assume he filed one complaint and describe it as his “EEO complaint.”

internal company grievance-arbitration procedure when he filed his ECP complaint and that his deadline for filing his Part 708 Complaint should therefore have been extended. *Id.*

II. Analysis

We first address whether the Site Office Manager should have dismissed Mr. Walli's Part 708 Complaint because Mr. Walli also filed an EEO complaint. Section 708.17(c)(3) states that dismissal of a Part 708 complaint is appropriate "if [the employee] filed a complaint under State or other applicable law with respect to the same facts" 10 C.F.R. § 708.17(c)(3). Interpreting this language, we have found that a Part 708 complaint should be dismissed if an individual files a whistleblower complaint in another forum based on the same alleged retaliatory act. *Sandra Black*, OHA Case No. WBA-15-0009 (2015) at 5. However, we have reached a different conclusion when, rather than filing a whistleblower complaint in another forum, the individual files an EEO complaint. In that circumstance, we have consistently found that the Part 708 complaint should not be dismissed. *Gilbert J. Hinojos*, Case No. TBZ-0003 (2003) ("*Hinojos*") at 7; *Leslie D. Cumiford*, OHA Case No. TBU-0081 (2008) ("*Cumiford*") at 5-6; *David M. Widger*, OHA Case No. TBH-0097 (2010) ("*Widger*") at 5-6.

Our reason for this interpretation is that Part 708 complaints and EEO complaints are based on different elements that require individuals to establish different facts. *Widger* at 6. Part 708 complainants must demonstrate that they made a protected disclosure or engaged in certain conduct protected by Part 708 and that their employer took some retaliatory action. *Id.* Individuals filing EEO complaints must show that they suffered an adverse employment action due to a protected status or for engaging in conduct protected by the EEO laws.⁴ *Id.* Indeed, Part 708 creates a separation between whistleblower matters and EEO matters by prohibiting Part 708 complaints based on race, color, religion, sex, age, national origin, or other similar basis. 10 C.F.R. § 708.4(a). Thus, a Part 708 complaint and an EEO complaint "should not be considered to be based upon 'the same facts' for the purposes of 10 C.F.R. § 708.17(c)(3)." *Cumiford* at 6; *Widger* at 6; *see also Hinojos* at 7 ("Because the necessary factual prerequisites differ in the Part 708 and EEOC complaints, I find the complaints are not based upon the 'same facts' for section 708.15(c)(3) purposes.")

Mr. Walli's EEO complaint would require him to show that UT-Battelle discriminated against him by forcing his resignation due to his membership in a protected class. His Part 708 claim is that he was forced to resign because he raised questions about UT-Battelle's handling of a sensitive press release. Mr. Walli's EEO complaint, therefore, is not based on the same facts as his Part 708 Complaint. Accordingly, the Site Office Manager should not have dismissed the Part 708 Complaint on these grounds.

We next consider the question of timeliness. Mr. Walli resigned on March 13, 2017. He filed this Complaint on July 10, 2017. Because Part 708 establishes a 90-day filing deadline in 10 C.F.R.

⁴ Although an individual can allege retaliation in both forums, claims of EEO retaliation and retaliation under Part 708 require a showing of different facts. EEO retaliation claims generally involve assertions that an employer retaliated against an employee for filing an EEO claim or for engaging in certain activities to assure a workplace free of discrimination. Protected activity under Part 708 does not include filing an EEO claim or making disclosures regarding discrimination. *See Hinojos* at 4 (dismissing a Part 708 complaint alleging discharge for filing an EEO claim).

§ 708.14(a), his Complaint appears to be untimely. Mr. Walli contends that his ECP complaint qualifies as an “internal company grievance-arbitration procedure” and that the Site Office Manager therefore should have extended the filing deadline for his Complaint pursuant to 10 C.F.R. § 708.14(b).⁵ However, Mr. Walli’s ECP complaint was neither filed internally nor resolved pursuant to a grievance-arbitration procedure. It was not internal because he filed it with the DOE rather than his employer, UT-Battelle. Moreover, a grievance-arbitration procedure refers to “negotiated grievance procedures available to bargaining unit employees, and similar procedures leading to determinations under binding arbitration pursuant to a bargaining agreement.” *Darryl H. Shadel*, OHA Case No. VBU-0050 (2000) at 5; *John Smallman*, OHA Case No. WBU-17-0007 (2017) (“*Smallman*”) at 4. The DOE’s Employee Concerns Program provides an avenue for employees to raise certain concerns and have them investigated; it is not a binding arbitration procedure negotiated by unions on behalf of bargaining unit employees.

Although we have found no reason why the filing deadline should be tolled in this case, the Site Office Manager did have the discretion to accept Mr. Walli’s Complaint, despite its untimeliness. Part 708 informs complainants that if they do not file within the 90-day window, the DOE official receiving the complaint “will give you an opportunity to show any good reason you may have for not filing within that period, and that official may, in his or her discretion, accept your complaint for processing.” 10 C.F.R. § 708.14(d). This provision requires that the employee be given an opportunity to provide a reason for the late filing before the complaint is dismissed. In the instant matter, the ORNL Site Office did not ask Mr. Walli to provide any reasons for the late filing. Memorandum of Telephone Conversation between Gregory Krauss, Attorney-Advisor, OHA, and Michele Branton, Deputy Manager, ORNL Site Office (September 22, 2017). We therefore will remand this Complaint to the ORNL Site Office so that Mr. Walli can receive that opportunity.

In addition, the ORNL Site Office informed us that it has not provided Mr. Walli with a copy of UT-Battelle’s Response. Email from Michele Branton to Gregory Krauss (September 18, 2017). In a recent decision, *Charles K. MacLeod*, WBU-16-0005 (August 3, 2016) (“*MacLeod*”), we found that the DOE official deciding whether to accept a Part 708 complaint should provide the complainant with a copy of the employer’s response and give the complainant an opportunity to reply to it, prior to making a jurisdictional determination. *MacLeod* at 3; *see also Smallman* at 4. On remand, the Site Office Manager should ensure that Mr. Walli receives a copy of the Response, and provide him with an opportunity to reply in writing.

As a final matter, the ORNL Site Office should take into account the following two items when processing the Complaint. First, the ORNL Site Office should ensure that it, as well as UT-Battelle, receives a complete copy of the Complaint that Mr. Walli intended to file.⁶ Second, the ORNL Site Office, if necessary, should review whether Mr. Walli has alleged facts which could constitute a disclosure protected by Part 708. Mr. Walli has suggested that he raised questions about the

⁵ He indicates that he filed his employee concern on April 26, 2017, and that DOE dismissed his concern on June 30, 2017. Appeal at 1. Tolling the filing deadline during this time period would extend the deadline by 65 days, making his Complaint timely.

⁶ When he filed his Complaint, Mr. Walli provided three electronic attachments that the ORNL Site Office was unable to open. Email from Michele Branton, ORNL Site Office, to Gregory Krauss, OHA (September 15, 2017).

handling of the press release, but it is unclear what he claims to have said or if he is contending that he reported improper conduct. The ORNL Site Office may wish to ask Mr. Walli to describe, with greater specificity, his alleged protected disclosures. *See* 10 C.F.R. § 708.12(a)(2) (requiring Part 708 complaints to contain a statement “specifically describing” the alleged protected disclosure); *Stacey Kittner*, OHA Case No. WBU-15-0017 (2015) at 8-9 (noting that DOE field elements should provide complainants an opportunity to make all statements necessary to constitute a good filing before dismissing a complaint).

III. Conclusion

We are remanding this matter to the ORNL Site Office so that it can provide Mr. Walli with a copy of UT-Battelle’s Response and a chance to reply. The ORNL Site Office should also ask Mr. Walli, as part of his reply, to describe any reasons why he did not file his complaint within the 90-day period established by 10 C.F.R. § 708.14(a). After the ORNL Site Office receives Mr. Walli’s reply, it should again review whether dismissal is appropriate for any of the reasons outlined in 10 C.F.R. § 708.17(c).

It is Therefore Ordered That:

- (1) The Appeal filed by Robert A. Walli (Case No. WBU-17-0009) is hereby granted and remanded to the Oak Ridge National Laboratory Site Office for further processing as set forth above and in the provisions of Part 708.
- (2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.18(d).

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: September 29, 2017