



Department of Energy

Washington, DC 20585

United States Department of Energy Office of Hearings and Appeals

In the Matter of Michelle B. Bryant)
)
Filing Date: June 8, 2017) Case No.: WBU-17-0006
)
_____)

Issued: February 1, 2018

Decision and Order

Michelle B. Bryant (the Appellant), an employee of Sandia National Laboratories (SNL), appeals the dismissal of a whistleblower complaint she filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program.¹ The National Nuclear Security Administration’s (NNSA) Employee Concerns Program Manager (the ECP Manager) dismissed the complaint on May 17, 2017. As explained below, we will grant the Appeal 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 the 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 evidences unsafe, illegal, fraudulent, or wasteful practices, and to protect those “whistleblowers” from consequential

¹ The OHA reviews jurisdictional appeals under Part 708 based upon the pleadings and other information submitted by the Appellant. See 10 C.F.R. § 708.18(b) (appeal must include a copy of the notice of dismissal, and state the reasons why the Appellant thinks the dismissal was erroneous).

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.

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 for 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

In early 2016, the Department of Energy Inspector General's office referred an anonymous complaint to SNL's Ethics Department. Complaint at 1; Sandia's Response to Complaint (Response). Separately, a SNL subcontractor employee reported similar concerns to the Ethics Department. *Id.* The two complaints alleged that a SNL Team Lead, K. Carla Sena (formerly Carla Serrano), was improperly using her authority as a Sandia Delegated Representative (SDR) for SNL's escort contract, and that she had a financial interest in the subcontractor, ISLS. Response at Exhibit A. SNL conducted an investigation of these allegations, in coordination with the DOE's IG's office. *Id.* Ms. Bryant, an Administrative Staff Associate in SNL's Facilities Business Operations organization, was contacted and interviewed by the Sandia Ethics investigator. She asserts that she and "5 to 7 others" anonymously reported an allegation of fraud and abuse to the Ethics investigator in March 2015 and the DOE IG in June 2016, although Sandia has no information suggesting that Ms. Bryant was the initial reporting party to the DOE IG. Response at 3. Ms. Bryant asserts that after reporting to Ethics in March 2015, unknown vehicles began to follow her to and from work. *Id.* She further asserts that she feared the threat of physical harm due to Ms. Sena's "adverse comments about having [her] husband killed because of his knowledge of some information that would 'cost Carla her job.'" Complaint at 1. In addition, Ms. Bryant asserts that various actions and ongoing retaliation were taken against her, including being threatened with termination of employment, being singled out by staff members, and her computer being sabotaged, leaving her unable to complete assigned tasks. Complaint at 2.

Despite its investigation, SNL was unable to fully substantiate the allegation that Ms. Sena had a financial interest in ISLS or any other Sandia subcontractor, based on available evidence and

resources. Response at 3. However, Sandia identified a number of improper accounting practices on the part of the subcontractor, and an associated lack of oversight. *Id.* As a consequence of these findings, Ms. Sena was removed as the SDR for the contract, the contract was not renewed, and a complete audit of the ISLS contract was conducted. *Id.* As an indirect result of the investigation, Ms. Bryant was moved in July 2016 from Ms. Sena's supervision to report directly to the organization manager, Frank Villareal, because it was revealed during the investigation that Ms. Sena and Ms. Bryant had interpersonal conflicts. *Id.* They also had an existing business relationship before Ms. Bryant was hired, creating a personal conflict of interest. *Id.*

C. Sandia's Response

The ECP Manager forwarded Ms. Bryant's Complaint to Sandia on April 7, 2017. In its April 24, 2017 Response, Sandia contends that Ms. Bryant's Complaint should be dismissed pursuant to 10 C.F.R. § 708.17(a) for lack of jurisdiction or other good cause. Response at 1. Sandia further asserts that Ms. Bryant has not identified a protected disclosure because she was not the individual who initially reported the concerns described in her Complaint.² *Id.* Additionally, Sandia contends that Ms. Bryant's alleged acts of retaliation do not meet the definition of prohibited retaliation in 10 C.F.R. § 708.2, and most occurred more than 90 days before the Complaint was filed. *Id.* Finally, Sandia contends that Ms. Bryant cannot establish that her disclosures were a contributing factor in any alleged actions, because her management was unaware of them, and because Sandia had legitimate, non-retaliatory business reasons for its employment actions. *Id.*

D. Dismissal

On May 17, 2017, the ECP Manager dismissed the Complaint. Letter from Michelle Rodríguez, NNSA, to Michelle B. Bryant (May 17, 2017). In the Dismissal letter, the Manager cited some of the same procedural deficiencies raised by Sandia in its Response. First, the ECP Manager found that Ms. Bryant's allegations concerned actions that were more than 90 days old. *See* 10 C.F.R. § 708.14 (an individual must file a complaint by the 90th day after the date she knows or reasonably should have known of the alleged retaliation). Ms. Bryant's allegations were dismissed for lack of jurisdiction pursuant to 10 C.F.R. § 708.17(c)(1), on the basis that they were untimely. *Id.* The Manager referenced specific allegations denoted by the following dates (month and year) in paragraph 5 of Ms. Bryant's complaint: 9/14, 10/14 (two allegations on this date), 6/16 and 12/16. *Id.*

Second, the ECP Manager found that Ms. Bryant's remaining allegations (referenced in the complaint as having occurred in 2/15, 1/16, 2/17 and 3/17) "are associated with negative interactions with co-workers, entity boxes, criticism, computer virus, physical work location, non-specified 'mistreatment,' your supervisor directing a communication method." *Id.* She further found that these allegations did not constitute retaliation as defined in 10 C.F.R. § 708.2, as they do not constitute discharge, demotion, or other similar negative action taken against Ms. Bryant by Sandia. *Id.* Finally, the Manager concluded that the facts did not present issues for which relief can be granted, and she therefore dismissed the Complaint pursuant to 10 C.F.R. § 708.17(c)(2). *Id.*

² As stated below, if Ms. Bryant's Complaint is accepted, she must prove all elements of a Part 708 claim.

E. Appeal

Ms. Bryant filed this Appeal on June 8, 2017. Appeal from Michelle B. Bryant to OHA Filings (June 8, 2017). In her Appeal, Ms. Bryant asserts that she reported to SNL's Ethics Department that Ms. Sena engaged in fraud and abuse by granting "New Mexico Express Movers, LLC and ISLS, LLC two separate [contracts] for SNL Moves and SNL Escort Contract." Appeal at 1. She asserts that both companies were created and owned by Ms. Sena, and that she reported the fraud and abuse to the Ethics Department in March 2015 and to the DOE IG in June 2016. *Id.* Ms. Bryant further asserts that after she reported the fraud and abuse to Ethics, she feared for her life and feared that she would lose her job. *Id.* She asserts that unknown vehicles followed her to and from work as well as followed her to doctor's appointments, and that she feared physical harm due to Ms. Sena's adverse comments "about having [her husband] killed because of his knowledge of some information that would 'cost Carla her job.'" *Id.* Ms. Bryant asserts that since reporting the fraud and abuse in March 2015, retaliation has been ongoing, including Sandia subjecting her to a "hostile and harassing work environment," providing false comments in her performance review, and sabotaging her computer by inserting a virus into the computer which left her unable to complete her assigned tasks. *Id.* Ms. Bryant asserts that she contacted the Sandia Ethics Department and the DOE IG for assistance with her retaliation claims; however, she states that she did not become aware of the NNSA Employee Concerns Program until March 23, 2017, at which time she states that she immediately filed a whistleblower claim. *Id.*

II. Analysis

We will first address whether the ECP Manager properly dismissed certain allegations in Ms. Bryant's complaint for being untimely, and thus for lack of jurisdiction. Section 708.14 states that complaints must be filed "by the 90th day after the date [complainant] knew, or reasonably should have known of the alleged retaliation." Ms. Bryant filed her complaint on April 3, 2017. Thus, based on this filing date, only reports of retaliation on or after January 3, 2017, are considered to be timely. In her complaint, Ms. Bryant alleges a number of actions that were taken against her and identifies them by the month and year. A number of these alleged actions -- reported as taking place on 9/14, 10/14, 6/16 and 12/16 -- occurred prior to January 3, 2017, some more than two years prior to that date.

However, as stated earlier, Ms. Bryant alleges that she was not aware of the NNSA Employee Concerns Program, and thus did not file her Complaint earlier. Part 708 informs complainants that if they do not file within the 90-day window, the DOE official receiving the complaint "will give 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, it is unclear whether Ms. Bryant was given an opportunity to show why she did not file her Complaint within the 90-day window. We therefore will remand this Complaint to Sandia Field Office (SFO) so that Ms. Bryant can receive that opportunity. On remand, SFO need only consider whether Ms. Bryant's 12/16 allegation which relates to Ms. Bryant's 2016 performance evaluation was timely and thus should

have been accepted for processing under the regulations.³ We have determined that Ms. Bryant's other allegations referenced on 9/14, 10/14 and 6/16 are vague and generally refer to perceived negative communications in the workplace. *See* Complaint at 3. Therefore, these allegations need not be remanded to determine timeliness.

Next, Ms. Bryant's remaining allegations outlined in the Dismissal Letter reference actions in 2/15, 1/16, 2/17 and 3/17. As an initial matter, the alleged actions described in 2/15 and 1/16 occurred more than 90 days before Ms. Bryant's Complaint was filed. As determined with the allegations stated above, these allegations are vague and unspecific, and therefore need not be remanded to determine their timeliness. However, with respect to the alleged actions described in 2/17 and 3/17, we will consider whether these alleged actions should have been accepted for processing, pursuant to the regulations. The Part 708 regulations define "retaliation" as "an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to employment (e.g., discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment) as a result of the employee's disclosure of information, participation in proceedings, or refusal to participate in activities" protected under Part 708. 10 C.F.R. § 708.2. In interpreting this provision, we recognize that Part 708 "is not intended to permit DOE to manage the day-to-day decisions and human resource management of a DOE contractor." *Sherrie Walker*, Case No. WBA-13-0015 (2014).⁴ Moreover, an act that is "trivial" . . . does not rise to an act of retaliation under Part 708." *Mark D. Siciliano*, Case No. TBH-0098 (2010) (finding that a contractor's failure to invite complainant to an event was not a "negative action" within the meaning of Part 708). Nevertheless, under Part 708, acts of retaliation are not limited to formal employment actions such as a discharge or a demotion. Actions that negatively affect the "terms, conditions or privileges of employment" can qualify as retaliation. 10 C.F.R. § 708.2.

In the instant case, with respect to the allegations that may be considered timely, Ms. Bryant alleges two actions that were taken by Sandia in response to her filing a Part 708 Complaint. She first alleges that the retaliatory action which occurred in 3/17 involved Ms. Sena accusing her of insubordination. This allegation describes a negative interaction and perhaps a communication issue. We agree with the Manager that this action does not meet the definition of retaliation for the purposes of Part 708 as it does not constitute a discharge, demotion or other similar negative action taken against Ms. Bryant by Sandia, or negatively affect the "terms, conditions or privileges of employment." Accordingly, this allegation was properly dismissed.

Next, Ms. Bryant describes an alleged retaliation which occurred in 2/17 as follows:

Tampering with entity boxes, removing documents I processed, and criticizing work completed, installing a possible virus on my computer. Complaining to new manager about disrespecting her. Sandia not abiding by my terms of real back to work after being removed from work for the 2nd time under [Ms. Sena's] command. Not physically placing me away from [Ms. Sena], new Manager insisting I have to

³ The OHA will not make a determination on the timeliness of Ms. Bryant's allegations.

⁴ Decisions by OHA are available on OHA's web site at <http://energy.gov/oha>.

work with her after doctor's note stated no contact at all with [Ms. Sena]. Sandia refusing to transfer me to a different department after strict directions given by both primary care physicians.

Complaint at 2. Taken on its face, the aspects of this allegation that concern computer tampering and failure to relocate Ms. Bryant away from Ms. Sena appear to relate to Ms. Bryant's work conditions. These alleged acts may be actions that negatively affect the conditions of her employment, and could constitute retaliation. Accordingly, we do not agree with the ECP Manager's determination that the facts of Ms. Bryant's complaint do not present issues for which relief can be granted and should be dismissed pursuant to 10 C.F.R. § 708.17(c)(2).

Ms. Bryant must prove all the elements of a Part 708 claim. To show that she made a protected disclosure, for instance, she may need to establish that she reasonably believes that she revealed "fraud, gross mismanagement, gross waste of funds, or abuse of authority." 10 C.F.R. § 708.5(a)(3). However, we do not believe that her complaint should be dismissed, at this juncture, on the grounds that she failed to allege an act of retaliation. *See Clint Olson*, Case No. TBU-0027 (2004) (noting that jurisdictional issues may be considered more fully as the facts are developed in the investigation and hearing stages). We, therefore, will grant Ms. Bryant's appeal in part and remand this matter to SFO to address the identified portions of Ms. Bryant's 2/17 allegation of retaliation, and to give Ms. Bryant the opportunity to provide a reason for her late filing with respect to her 12/16 allegation regarding her performance evaluation.

It Is Therefore Ordered That:

- (1) The Appeal filed by Michelle B. Bryant (Case No. WBU-17-0006) is hereby granted in part and denied in part.
- (2) This matter is remanded to Sandia Field Office for further processing as set forth in Subpart B of Part 708 as well as 10 C.F.R. § 708.21.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: February 1, 2018