Department of Energy
Washington, DC 20585

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Mary Vanessa Black	)		
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Filing Date: April 21, 2020	)	Case No.:	WBU-20-0005
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Issued: May 8, 2020

Decision and Order

Mary Vanessa Black (the Appellant), a former employee of UT-Battelle, LLC (UT-Battelle), 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 (DOE) Contractor Employee Protection Program. The Head of Field Element for DOE's Oak Ridge National Laboratory (ORNL) Site Office (Field Element) dismissed the Appellant's complaint on March 6, 2020, for lack of jurisdiction. By letter dated May 4, 2020, UT-Battelle argued that Appellant's appeal should be denied because it was untimely and because the Field Element properly dismissed her complaint for lack of jurisdiction. For the reasons set forth herein, the Appellant's appeal is denied.

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. *See* 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, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The Part 708 regulations prohibit 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). Available relief includes reinstatement, back pay, transfer preference, and such other relief as may be appropriate. *Id.* at § 708.36.

An employee employed at a DOE field facility or site when they suffer 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. 10 C.F.R. § 708.11(b). A DOE office that receives a Part 708 complaint may dismiss it for lack of jurisdiction or for other good cause. 10 C.F.R. § 708.18(a). Such a dismissal is appropriate if:

> (1) The complaint is untimely; or
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> (2) The facts, as alleged in the complaint, do not present issues for which relief can be granted under [Part 708]; or
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> (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
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> (4) The complaint is frivolous or without merit on its face; or
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> (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].

10 C.F.R. § 708.18(c).

An employee 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 . . . ." 10 C.F.R. § 708.19(a).

B. The Complaint

On January 22, 2020, the Appellant submitted a Part 708 complaint (Complaint) to the Head of Field Element for DOE's ORNL Office in which she alleged that UT-Battelle demoted her from a management position and ultimately terminated her employment in retaliation for disclosing concerns related to UT-Battelle changing the health insurance plans that it offered to its employees. Complaint at 2–3. On October 3, 2018, UT-Battelle notified employees that it would discontinue all of its health insurance offerings, except for its high-deductible health plan (HDHP), and enroll all employees in the HDHP beginning in 2020. *Id.* at 2. The Appellant reportedly questioned her direct supervisor and her division director as to UT-Battelle's authority to make this change without DOE approval and argued that the planned transition was detrimental to employees. *Id.*

On January 11, 2019, the Appellant sent an e-mail to the Secretary of Energy (Secretary) asserting that the HDHP in which UT-Battelle intended to enroll employees would adversely affect some employees' financially as a result of cost sharing and could cause them to forego seeking medical care. Complaint Att. 2 at 2–3. The Appellant requested that the Secretary intervene to prevent the change. *Id.* The Appellant stated in her Complaint that UT-Battelle demoted her from a

management position to an individual contributor several weeks after her e-mail to the Secretary. Complaint at 2. On January 14, 2020, UT-Battelle terminated the Appellant's employment for "willful misconduct, failure to follow proper procedure, and [] loss of confidence." Complaint Att. 2 at 7. Appellant alleged in her Complaint that she had always performed adequately in her position, and that she "was dismissed as a result of [her] email about the insurance." Complaint Att. 1 at 2.

C. Dismissal

By letter dated March 6, 2020, the Head of Field Element dismissed the Appellant's Complaint (Dismissal Letter). Dismissal Letter at 1. Among other grounds, the Head of Field Element found that the Appellant's communications concerning UT-Battelle's changes to health insurance offerings were not protected activity under 10 C.F.R. § 708.5. *Id.*[1] The Dismissal Letter did not inform Appellant that she was entitled to appeal the dismissal or direct her attention to the procedures for filing an appeal pursuant to 10 C.F.R. § 708.18. The Appellant acknowledged that she received the Dismissal Letter on March 12, 2020. Appeal at 1.

II. Analysis

An employee who files a Part 708 complaint has the burden of establishing by the preponderance of the evidence that he or she engaged in protected activity, as described in 10 C.F.R. § 708.5, and that the employee's protected activity was a contributing factor in one or more alleged acts of retaliation by the contractor against the employee. 10 C.F.R. § 708.29. If the employee 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 employee's protected activity. *Id.*

The Part 708 regulations do not establish a standard of review for dismissals of complaints pursuant to 10 C.F.R. § 708.18(a). 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).[2] Dismissal under Rule 12(b)(6) is proper only if the petition does not "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). We review the conclusions in the Dismissal Letter *de novo*. *See*

[1] The Dismissal Letter also indicated that the Appellant had not exhausted applicable grievance-arbitration procedures, that the Appellant had not met procedural requirements for filing her Complaint, and that the Appellant had waived her right to file the Complaint pursuant to an agreement with UT-Battelle. Dismissal Letter at 1–2. This decision affirms the dismissal on the basis that the Appellant failed to engage in protected activity under Part 708, and therefore, pursuant to the principle of judicial economy, we will not address the merits of the other bases for the dismissal.

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

Weyrich v. New Republic, 235 F.3d 617, 623 (D.C. Cir. 2001) (reviewing the dismissal of a complaint pursuant to Rule 12(b)(6) *de novo*).

For the reasons set forth below, I find that Appellant has not alleged that she engaged in protected activity and therefore that the Head of Field Element properly dismissed Appellant's Complaint on the basis that it did not present issues for which relief can be granted under Part 708.

A. Appellant's Untimely Appeal is Accepted

Prior to evaluating the appropriateness of the Head of Field Element's dismissal of the Appellant's Complaint, I must address the untimeliness of the Appeal. The Appellant was required to submit her Appeal by the tenth day following her receipt of the Dismissal Letter. 10 C.F.R. § 708.19(a). In her Appeal, the Appellant alleges that she was misinformed of the deadline for filing her Appeal in a conversation with a member of the Employee Concerns Program (ECP) at ORNL, and that she filed her Appeal on the same day that she learned of the discrepancy. Appeal at 1.

While not controlling, OHA has long utilized the Federal Rules of Civil Procedure as a guide in resolving procedural issues that arise during Part 708 proceedings. *See, e.g.*, *Edward G. Gallrein, III*, OHA Case No. WBA-13-0017 at 5 (2014) (rejecting an appellant's claim that an Administrative Judge should not have relied on the Federal Rules of Civil Procedure in resolving a motion to dismiss a Part 708 complaint and reciting prior cases in which OHA has relied on the Federal Rules of Civil Procedure as persuasive precedent in resolving procedural matters). Under the Federal Rules of Civil Procedure, a court may extend the time for a party to act after the expiration of time to complete that act, or to seek relief from a final judgment, order, or proceeding, if the party failed to act due to "excusable neglect." Fed. R. Civ. P. 6(b)(1)(B); 60(b)(1). Whether inaction is "excusable neglect" is an equitable question which courts address by "taking account of all relevant circumstances surrounding the party's omission [including] the danger of prejudice to the [non-moving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993). In *Pioneer*, the U.S. Supreme Court found excusable neglect and allowed the movant to late file proofs in a bankruptcy proceeding in light of the broad equitable powers of courts under Chapter 11 of the Bankruptcy Code to ensure the success of reorganization, and the "peculiar and inconspicuous placement" of an important date in a notice from a lower court to the parties. *Id.* at 389, 398.

In this case, the equities tilt in favor of accepting Appellant's late-filed Appeal. The Dismissal Letter did not notify Appellant of Part 708's accelerated deadline for appealing dismissals, or even indicate that Appellant had a right to appeal. Moreover, Appellant asserts that she received inaccurate information from ORNL's ECP, and that she acted immediately to appeal when she learned of her oversight. Appeal at 1. We perceive the length of the delay as of minimal importance. Delay of approximately one month is not so great that there is a risk of evidence being lost or memories of witnesses deteriorating significantly, and accepting Appellant's Appeal does not prejudice UT-Battelle by expanding Appellant's potential causes of action or creating uncertainty as to the extent of UT-Battelle's potential liability as would be the case if we exercised similar flexibility in accepting an untimely complaint.

Administrative Judges have significant equitable powers under Part 708 to remedy retaliation in furtherance of Part 708's purpose of providing full protection and remedies to whistleblowers. *See, e.g., Daniel L. Holsinger,* OHA Case No. VWA-0005 at 11–12 (1995) (recognizing OHA's ability to order equitable remedies to make wrongfully discharged employees whole under the Part 708 regulations then in effect). Administrative Judges have previously exercised their powers to accept late-filed appeals where appellants attributed the delay to misinformation from a DOE office. *See, e.g., Charles L. Evans*, OHA Case No. TBU-0026 at 2 (2004) (accepting a late-filed appeal of a dismissal where the appellant was "misled by [an] error" in a dismissal letter). In light of the abovementioned considerations, we will accept Appellant's late-filed Appeal.

B. Appellant Has Not Alleged that She Engaged in Protected Activity

Appellant relies solely on communications with individuals in her management chain and her e-mail to the Secretary concerning "a drastic insurance change to be imposed on all employees" to establish that she engaged in protected activity under Part 708. Complaint at 2. Appellant's Complaint does not identify any violation of a law, rule, or regulation by UT-Battelle. 10 C.F.R. § 708.5(a)(1). While the Complaint asserts that UT-Battelle employees will suffer adverse financial effects, and perhaps choose to forego seeking medical care, as a result of the change in health insurance offerings, the Complaint's allusions to potential physical harm to employees as a result of the change in health insurance coverage are too speculative and indirect to constitute a "substantial and specific danger to employees or to public health or safety." 10 C.F.R. § 708.5(a)(2); *see also Fred B. Hua*, OHA Case No. TBU-0078 at 4 (2008) (concluding that a disclosure does not concern a "specific danger" if the harm to be suffered is only indirectly related to the alleged wrongdoing by the contractor and may or may not actually occur). Reading the Complaint in a manner most deferential to the Appellant, one could argue that the Appellant intended to allege that, by limiting its health insurance offerings to a single plan which the Appellant believed would cause employees financial and medical hardship, UT-Battelle risked causing significant loss of human capital and had engaged in gross mismanagement. Accordingly, in determining whether the Complaint alleged facts for which relief can be granted under Part 708, we will assess whether Appellant disclosed information to her employer and to the Secretary which she reasonably believed revealed gross mismanagement. 10 C.F.R. § 708.5(a)(3).

1. Appellant's Alleged Disclosure Did Not Reveal Information

A critical element of a protected disclosure under 10 C.F.R. § 708.5(a) is that the disclosure must "reveal" information. In assessing whether an employee has revealed information, OHA has considered the context in which the employee learned the information and the reasonableness of the employee's belief that he or she was disclosing something hidden and unknown rather than requiring strict ignorance of the information on the part of the recipient of the employee's disclosure. *Compare Jonathan K. Strausbaugh*, OHA Case No. TBH-0073 at 7 (2008) (determining that an employee's disclosure of uncontrolled asbestos in areas accessed by employees revealed information, even if it was already known to some personnel to whom the employee made disclosures, because the employee discovered the safety issue independently, the information was "sensitive information" of the sort that Part 708 is intended to encourage employees to freely disclose, and narrowly construing the word "revealed" in similar situations would undermine the purpose of Part 708) *with Vincent E. Daniel*, OHA Case No. WBH-13-0006

at 7–8 (2013) (finding that an employee did not reveal discrepancies between two electronic databases in light of the fact that his manager had assigned him to reconcile the databases and therefore knew of the information that the employee purported to disclose); *see also Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1349–50 (Fed. Cir. 2000) (holding that a disclosure under the Whistleblower Protection Act is only protected if it "reveal[s] something that was hidden and not known.").

The Complaint indicates that the Appellant learned of the change in health insurance offerings, which she alleges represented gross mismanagement or an abuse of authority, through a mass e-mail from the Director of ORNL to the entire staff. Complaint at 2; *see also* Appeal Ex. 2 at 4–5. Information that a contractor publicly announced is not the "sensitive information" that Part 708 is intended to encourage employees to disclose, nor could an employee's objections to the publicly-announced change in health insurance offerings reveal hidden or unknown information. As the Complaint does not allege that Appellant "revealed" information, the Complaint does not present issues for which relief can be granted under Part 708.

2. Changes in Employee Benefits Do Not Constitute Gross Mismanagement

Assuming that the Appellant's alleged protected disclosures revealed unknown information, they would still not present issues for which relief can be granted under Part 708 because a contractor's decision to change its health insurance offerings is not gross mismanagement even if we accept as true the adverse consequences that Appellant alleges will result from the change. Gross mismanagement is:

> more than *de minimis* wrongdoing or negligence. It does not include management decisions that are merely debatable, nor does it mean action or inaction which constitutes simple negligence or wrongdoing. There must be an element of blatancy. Therefore, gross mismanagement means a management action or inaction that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission.

Fred B. Hua, OHA Case No. TBU-0078 at 2 (2008) (citing *Roger Hardwick*, OHA Case No. VBA-0032 (1999)).

We reject the notion that a contractor's business decision as to the benefits to offer all of its employees can constitute gross mismanagement under Part 708. We have previously held 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*, OHA Case No. WBA-13-0015 at 8 (2014). Inserting OHA into labor disputes over appropriate employee benefit packages would be unworkable, and a significant departure from the purpose of Part 708 to promote safe, lawful, and efficient performance of work pursuant to DOE contracts. However, even if we found that a contractor's decision to change the benefits that it offers to all employees could constitute gross mismanagement, we would still find that Appellant had not made a protected disclosure under Part 708 in this case.

An employee's allegation of gross mismanagement must be based on a reasonable belief. 10 C.F.R. § 708.5(a). The reasonableness of a disclosure is examined from the perspective of a disinterested

party. *Eugene N. Kilmer*, OHA Case. No. TBH-0111 (2011). It is apparent from the Appellant's letter to the Secretary that a disinterested party would recognize that the HDHP UT-Battelle announced it would offer to all employees is beneficial to some employees while potentially disadvantaging others, and therefore is a "merely debatable" management decision which we have concluded does not constitute gross mismanagement. *Fred B. Hua*, OHA Case No. TBU-0078 at 2 (2008). In her letter to the Secretary, the Appellant asserted that the cost-sharing elements of the HDHP that UT-Battelle announced it would offer to all employees would disadvantage employees with "chronic illnesses, dependent children, and low to mid-level salaries," and that she identified with at least one of those categories of disadvantaged employees. Appeal Ex. 2 at 2–3. Appellant's letter acknowledged that "almost half of new hires are choosing the [HDHP]," but dismissed the benefits of the HDHP to those employees on the basis that their personal and professional characteristics were different from those of the employees who would be disadvantaged by the change. *Id.* While Appellant's self-interest in keeping her preferred health insurance coverage led her to discount the advantages of UT-Battelle's chosen health insurance plan to other groups of employees, we conclude that a disinterested party would have recognized that the merits of UT-Battelle's decision were at least debatable and certainly did not rise to the level of gross mismanagement that would impair DOE's ability to accomplish its mission at ORNL.

For the aforementioned reasons, we conclude that the Appellant's communications concerning UT-Battelle's decision to change the health insurance that it offers to employees were not protected activity under Part 708. Accordingly, we find that the Head of Field Element properly concluded that it lacked jurisdiction to process the Complaint because it did not present issues for which relief can be granted under Part 708.

III. Conclusion

The Head of Field Element properly dismissed the Appellant's Complaint for lack of jurisdiction because the Appellant failed to establish that she engaged in protected activity. Because I have concluded that the Head of Field Element's dismissal of the Complaint was appropriate on the basis that the Complaint did not present issues for which relief can be granted under the Part 708 regulations, I need not address the other bases for dismissal set forth in the Dismissal Letter.

It is therefore ordered that:

(1) The Appeal filed by Mary Vanessa Black (Case No. WBU-20-0005) is hereby denied.

(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 thirty (30) days after receiving this decision. 10 C.F.R. § 708.19(d).

Poli A. Marmolejos
Director
Office of Hearings and Appeals