

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

In the Matter of:	Jeffrey S. Derrick)	
)	
Filing Date:	September 24, 2012)	
)	Case No.: WBZ-12-0005
)	

Issued: October 2, 2012

**Motion to Dismiss
Interlocutory Order**

Richard A. Cronin, Jr., Hearing Officer:

This Decision will consider a Motion to Dismiss submitted by Shaw AREVA MOX Services, LLC (Shaw), regarding a complaint submitted by Jeffrey S. Derrick under the Department of Energy's (DOE) Contractor Employee Protection Program, set forth at 10 C.F.R. Part 708. For the reasons set forth below, I have determined that the Motion should be denied.

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 2, 1992). Its primary purpose is to encourage contractor employees to disclose information that 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 retaliation by a DOE contractor against an employee because the employee has engaged in certain protected activity, including "disclosing to a DOE official ... information that [the employee] reasonably believes reveals (1) a substantial violation of a law, rule, or regulation; (2) a substantial and specific danger to employees or to public health or safety; or (3) fraud, gross mismanagement, gross waste of funds, or abuse of authority." 10 C.F.R. § 708.5(a).

Part 708 sets forth the procedures for considering complaints of retaliation. The DOE's Office of Hearings and Appeals (OHA) is responsible for investigating complaints, holding hearings, and considering appeals. 10 C.F.R. Part 708, Subpart C. According to the Part 708 regulations, a complaint must include a "statement specifically describing the alleged retaliation" and "the disclosure, participation, or refusal that [the complainant believes] gave rise to the retaliation." 10 C.F.R. § 708.12.

B. Factual Background

Derrick was hired by Shaw in October 2011 as a Mechanical Site Superintendent as part of Shaw's effort in designing, licensing, building, and operating the Mixed-Oxide Fuel Fabrication Facility (MFFF) located at the DOE's Savannah River site. Complaint filed by Jeffrey S. Derrick (Complaint) with Michelle Rodriguez de Varela, Whistleblower Complaint Manager, National Nuclear Security Administration (NNSA), (April 12, 2012) at 1; Letter (enclosing Shaw's response to the Complaint) from Timothy P. Matthews, Counsel, Shaw, to Michelle Rodriguez de Varela, NNSA (June 4, 2012) at 1 n.1. Derrick's immediate supervisor was Tim W. Sheppard (Sheppard), Area Superintendent, Shaw. Shaw Response (Response) to Complaint (June 4, 2012) at 1.

Beginning in December 2011, Derrick sent E-mails to Sheppard and other Shaw officials complaining about the tolerances and installation of pipes and pipe supports in the MFFF. Derrick also alleges that he sent E-mails in March 2012 to DOE Officials and the Vice President for Construction at the MFFF outlining his concerns with "installation practice" regarding the installation of pipes at the MFFF. Derrick alleges that, because of his attempts to bring this issue to the attention of his superiors, other Shaw officials, and the DOE, he was terminated from his position on March 21, 2012. Complaint at 3; Response at 11.

C. Procedural Background

On April 12, 2012, Derrick filed a Part 708 complaint with the Whistleblower Complaint Manager. Upon receiving a copy of the Complaint, Shaw filed a response in which it argued that Derrick's complaint should be dismissed because the facts alleged in the Complaint would not support an action under Part 708. Response at 11. On June 22, 2012, the Whistleblower Complaint Manager forwarded Derrick's complaint for a hearing to OHA.¹ I was appointed by the OHA Director to be the Hearing Officer in this matter.

After reviewing the Complaint and Response, I requested briefs from both parties on the issue of the sufficiency of Derrick's complaint to support an action under Part 708. Letter from Richard A. Cronin, Jr., Hearing Officer, OHA to Jeffrey S. Derrick, Complainant, and Timothy P. Matthews, Counsel, Shaw (June 27, 2012). After both parties submitted briefs, Derrick requested permission to file an amended brief. Pursuant to an agreement by the parties, Derrick filed an

¹ In her transmittal letter OHA, the Whistleblower Complaint Manager did not respond to Shaw's request for dismissal as contained in its Response. The letter also contained a June 22, 2012, E-mail from Derrick requesting an OHA hearing without an investigation. Memorandum from Michelle Rodriguez de Varela, Whistleblower Complaint Manager, NNSA to Poli A. Marmolejos, Director, Office of Hearings and Appeals (June 22, 2012).

Amended Brief on July 25, 2012. Shaw submitted a response to the Amended Complaint on August 6, 2012.

II. ANALYSIS

A. The Applicable Legal Standards

Under Part 708, a contractor employee may not be subject to retaliation for disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, the employee's employer, or any higher tier contractor, information that the employee *reasonably believes* reveals: (1) a substantial violation of a law, rule, or regulation; (2) a substantial and specific danger to employees or to public health or safety; or (3) fraud, gross mismanagement, gross waste of funds, or abuse of authority. 10 C.F.R. § 705(a).

The Part 708 regulations do not specify procedures or standards for motions to dismiss. Accordingly, we look to the Federal Rules of Civil Procedure, which, though they do not govern this proceeding, may be used as a guide. *See, e.g., Hansford F. Johnson*, Case No. TBZ-0104 (November 24, 2010); *Billy Joe Baptist*, Case No. TBH-0080 (May 7, 2009); *Edward J. Seawalt*, Case No. VBZ-0047 (August 20, 2000) (applying standards of Fed. R. Civ. P. 56 to Motion for Summary Judgment).² At this preliminary point of the case, the Motions to Dismiss are most analogous to what would, under the Federal Rules, be a motion to dismiss for “failure to state a claim upon which relief can be granted” Fed. R. Civ. P. 12(b)(6). The Supreme Court has held that, to survive a Rule 12(b)(6) motion to dismiss, a complaint must plead “only enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). While the complaint “does not need detailed factual allegations, . . . [f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all of the complaint's allegations are true (even if doubtful in fact).” *Id.* at 555 (citations omitted).

In addition, prior cases of this office instruct that such a motion should be granted only where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact on a more complete record. *Curtis Broaddus*, Case No. TBH-0030 (2006); *Henry T. Greene*, Case No. TBU-0010 (2003) (decision of OHA Director characterizing this standard as “well-settled”); *see also David K. Isham*, Case No. TBH-0046 (2007) (complaint may be dismissed where it fails to allege facts which, if established, would constitute a protected disclosure); *accord Ingram v. Dep't of the Army*, 114 M.S.P.R. 43, 47 (2010) (finding Merit Systems Protection Board jurisdiction under federal Whistleblower Protection Act where complaint makes non-frivolous allegation that he engaged in whistleblowing activity by making a protected disclosure, and the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action).

² Decisions issued by OHA are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

Using the above standards, I find that Shaw's Motion to Dismiss should be denied.

B. Whether Derrick's Allegations Regarding his Disclosure Contained in the Complaint and Response are Sufficient to Support a Part 708 Complaint

In his complaint, Derrick alleges that he made protected disclosures in four E-mails: (1) December 21, 2011, E-mail message from Jeffrey Derrick to Timothy Sheppard, Derrick's supervisor; (2) February 22, 2012, E-mail from Derrick to Ed Najmola (Najmola), Vice President of Construction, Shaw; (3) March 15, 2012, E-mail from Derrick to Najmola (3/15 E-mail); and (4) March 19, 2012, E-mail from Derrick to Ed Najmola, Vice President of Construction, Shaw, copies of which were sent to Kevin Buchanon, DOE/NNSA Engineer, Timothy Sheppard, Derrick's supervisor, and Charles Schmidt, Sheppard's supervisor (3/19 E-mail). Derrick alleges that his disclosures concerned pipe "installation practice." July 25, 2012, Amended Brief at 1. Derrick asserts that his concerns with installation practice refer to conflicting "notes" and "specs" regarding pipe installation and the non-existence of piping tolerances. *Id.* He also alleges that his disclosures alleged gross mismanagement regarding Shaw's decision to continue to install piping notwithstanding the alleged problems in installation practice. *Id.*

I. Applicability of *Kilmer* and *Huffman* to Derrick's Part 708 Complaint

As the initial argument in its briefs, Shaw cites *Eugene M. Kilmer*, Case No. TBH-0111 (April 28, 2011) (*Kilmer*). In *Kilmer*, we cited *Huffman v. Office of Personnel Mgmt.*, 263 F.3d 1341, 1349-50 (Fed. Cir. 2001) for the proposition that where an individual reveals information that is already known to the wrongdoer, it cannot be a "disclosure" since the definition of "disclose" means to "reveal something that was hidden and not known." *Kilmer* at 9. Consequently, Shaw argues that the complaint should be dismissed because Derrick's alleged disclosures concern pipe and pipe support location issues raised in a December 1, 2011, report entitled "MOX NNSA Construction and Startup Team Daily Activity Report" (NNSA Report), of which Shaw's management already had notice prior to Derrick's alleged disclosures. Response Attachment at 5.

After examining the NNSA Report and the alleged disclosures contained in the 3/19 E-mail (that also contains a copy of the 3/15 E-mail), I cannot find, based on the information currently before me, that Derrick's disclosures are identical to the issues raised in the NNSA Report. The 3/19 E-mail describes problems with "inaccurate" databases, tracking tables, packages, and "material and coordination." 3/15 E-mail (attached to 3/19 E-mail). None of these problems are explicitly mentioned in the NNSA Report nor, without additional information, can I conclude that Derrick's concerns are subsumed under the issues raised in the NNSA Report. For the sole purpose of deciding this Motion, I cannot find that Derrick's disclosures are identical to the issues raised in the NNSA Report and thus, *Huffman* and *Kilmer* do not operate as a bar to Derrick's complaint at this stage of the proceeding.³

³ In making this finding, I limit my opinion to apply only in deciding the Motion before me. If this matter goes to a hearing, Shaw may offer additional evidence as to the issue of whether Derrick's alleged disclosures were already known to Shaw management and DOE and whether *Huffman* and *Kilmer* apply to Derrick's complaint.

2. *Whether Derrick's Alleged Disclosures Adequately Describe a Gross Waste of Funds or Gross Mismanagement*

Shaw also argues that the content of Derrick's alleged protected disclosures, as described in his complaint and briefs, do not meet the requirements of Part 708, i.e., they do not sufficiently describe gross mismanagement or a gross waste of funds. *See* 10 C.F.R. § 708.5. For Part 708 purposes, "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. Similarly, a "gross waste of funds" constitutes a more-than-debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government. *Fred Hua*, Case No. TBU-0078 at 2-3 (May 2, 2008) (*Hua*).

After reviewing the disclosures referenced by Derrick in his complaint and supporting briefs, I find that one alleged disclosure, Derrick's 3/19 E-mail, contains sufficient factual allegations, assuming that Derrick reasonably believed that the allegations in the 3/19 E-mail were true, to conclude that the message is complaining about a gross waste of funds and is thus potentially protected under Part 708. Specifically, the pertinent portion of the E-mail states:

Beginning 26 March 2012, I will no longer direct installation of supports (unless directed by Ed or Kelly) in my area (BMP) without piping packages being a precursor to all support packages. At the direction of Tim and myself, last few weeks we have chosen to install with random and no U bolt location but this decision was ours without support from management. This will help with some of the issues but not all. We need constructive answers on how to proceed with issues we have described. This has not been formally addressed by Ed, Steve, or Charlie. This issue has been brought to everyone's attention including engineering. Design and Engineering have established installation guide lines based on piping location. I have sent numerous emails to the proper and qualified persons for an answer. I want an answer and I want that answer to be confirmed, and agreed with all involved. 90% of all packages are built, support packages, then piping packages, with a time lag time of weeks. This is making installation difficult, time consuming, inaccurate, and virtually impossible (check the data base. I have multiple copies). I have been trying to address this issue for months. We cannot continue to install without the proper and the correct way design has intended. Piping has to come first, and in such a way, it allows for the tolerance to be confirmed. To date, as I have advised, this is not happening. Your cooperation is needed to resolve the issue. I have contacted Kevin for his help in resolving this ongoing issue. Ed has emails of this concern. Estimated cut out of already installed conservatively is 50%.

We all need to reach a resolution, and we need to reach it promptly.

3/19 E-mail. The 3/19 E-mail also contained a copy of Derrick's 3/15 E-mail. The 3/15 E-mail states in pertinent part:

I have, on many occasions, tried to address the improper installations of supports. This will be costly and time consuming. You have to address this problem. This issue could result in 50% rework. This too, was addressed months ago in unanswered emails. We can not [sic] continue to ignore this issue.

3/15 E-mail.

Assuming that Derrick is correct, as required by an analysis of his complaint for the purposes of a Motion to Dismiss, with regard to his allegation about the pipe supports that would have to be replaced on a project such as the MFFF, I find that the message alleges sufficient information about waste (a 50 percent replacement of all pipe supports for 80 miles of pipe⁴) to be considered as a “gross” waste of funds as required under Part 708. Thus, I find that Derrick’s March 19, 2012, E-mail, contains sufficient factual allegations, if true, that could refer to a gross waste of funds and thus support a Part 708 complaint. Consequently, I must reject Shaw’s argument that none of Derrick’s alleged disclosures alleges a cause of action, by law, under Part 708.⁵

3. Whether Shaw Would Have Terminated Derrick Notwithstanding his Disclosures

Shaw also argues that the weight of evidence clearly supports a finding that, even if Derrick made a protected disclosure, Shaw would have terminated him from his position notwithstanding his protected disclosure. Shaw’s argument invites me to weigh the evidence to reach a factual finding regarding the sufficiency of the reasons for which Shaw terminated Derrick. However, I find such an evaluation inappropriate in the consideration of a Motion to Dismiss since the gravamen of such a motion is the legal sufficiency of Derrick’s Part 708 complaint. *See supra*. Both parties assert that Derrick was terminated a few days after the March 19, 2012, E-mail. Consequently, I find that Derrick’s complaint alleges sufficient temporal proximity between the alleged protected disclosure and Derrick’s termination such that a *rebuttable* presumption can be made that the alleged disclosure was a substantial factor in the termination. *See, e.g., Curtis Hall*, Case No. TBA-0042 (February 13, 2008). Therefore, I conclude that Derrick has alleged sufficient facts to indicating a claim that his alleged protected disclosures were a factor in his termination.

In sum, after considering Derrick’s complaint and all of the submitted briefs, I find that Derrick’s Part 708 complaint, on its face, alleges sufficient facts to support a Part 708 complaint. Consequently, Shaw’s Motion to Dismiss is denied.

⁴ *See* Response at 1 (MFFF encompassing 80 miles of piping).

⁵ In making this finding, I offer no opinion as to whether any of Derrick’s alleged disclosures, including the 3/15 E-mail or the 3/19 E-mail, are sufficient with regard to the determination of the final merits of his Part 708 cause of action. To prevail in a Part 708 action, Derrick, at the hearing, must show by a preponderance of the evidence that he made a protected disclosure as described under 10 C.F.R. §708.5, and that the disclosure was a contributing factor in one or more alleged acts of retaliation against him by Shaw. If Derrick makes this showing, the burden shifts to the contractor, Shaw, to prove by clear and convincing evidence that it would have taken the same action without the Derrick’s disclosure. *See* 10 C.F.R. § 708.29.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Shaw AREVA MOX Services, LLC, Case No. WBZ-12-0005, is hereby denied.

(2) This is an Interlocutory Order of the Department of Energy. This order may be appealed to the Director of OHA upon issuance of a decision by the Hearing Officer on the merits of the complaint.

Richard A. Cronin, Jr.
Hearing Officer
Office of Hearings and Appeals

Date: October 2, 2012