Department of Energy
Washington, DC 20585

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DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Decision of the Director

Name of Petitioner:	Gordon Michaels
Dates of Filing:	May 2, 2011 May 20, 2011
Case Numbers:	TBU-0117 TBU-0118

Gordon Michaels appeals the dismissal of his whistleblower complaint filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. Two offices having jurisdiction over the complaint, the DOE's National Nuclear Security Administration Service Center (NNSA/SC) and the DOE's Oak Ridge Office (ORO), dismissed the complaint, on April 12, 2011, and May 10, 2011, respectively. As explained below, we affirm the dismissals of the complaint, and deny the appeals therefrom.

I. Background

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 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. The complainant may appeal such a dismissal to the OHA Director. 10 C.F.R. § 708.18.

Michaels was an employee of UT-Battelle, LLC, the firm that manages and operates the DOE's Oak Ridge National Laboratory (ORNL), until he retired on January 31, 2009. Beginning on May 1, 2009, Michaels began working, under a "purchase order/contract," for Honeywell Federal Manufacturing & Technologies, LLC (Honeywell), the firm that manages and operates the DOE NNSA's Kansas City Plant (KCP). Purchase Order/Contract between Honeywell and Gordon Michaels (May 1, 2009) (Contract).

Though Michaels contracted with Honeywell, based in Kansas City, Missouri, a Statement of Work (SOW) incorporated by reference into the contract required Michaels to maintain a "remote business office," and stated that "[m]ain office accommodations" would be provided by ORNL, located in Oak Ridge, Tennessee, "for day to day activities." Id. at 3; Statement of Work, Gordon Michaels, Technology Specialist (March 30, 2009). Michaels alleges that, in July 2010, UT-Battelle revoked his access to the ORNL site in retaliation for actions, protected under Part 708, that he took while employed by ORNL prior to January 31, 2009.

On November 19, 2010, Michaels filed a Part 708 complaint with the Deputy Director of the DOE Office of Civil Rights and Diversity at DOE Headquarters, who referred the matter to the two DOE offices having jurisdiction over the complaint, NNSA/SC and ORO. As indicated above, both offices dismissed the complaint, NNSA/SC as to Honeywell, and ORO as to UT-Battelle, and in doing so both cited as a basis for dismissal that Michaels is not an "employee" as that term is defined in the Part 708 regulations. Letter from Michelle Rodriguez de Varela, Whistleblower Program Manager, NNSA/SC, to Billie P. Garde, Clifford & Garde, LLP (April 12, 2011); Letter from Rufus H. Smith, Employee Concerns Manager, ORO, to Billie P. Garde, Clifford & Garde, LLP (May 10, 2011).[1] In his appeal, the complainant contends that the protections of Part 708 do not "only apply to employees of contractors." For the reasons set forth below, we disagree.

II. Analysis

The Part 708 regulations provide that complaints may be filed by "an employee of a contractor, . . ." 10 C.F.R. § 708.5. The regulations define "employee" as "a person employed by a contractor, and any person previously employed by a contractor if that person's complaint alleges that employment was terminated for conduct described in § 708.5 of this subpart." 10 C.F.R. § 708.2. We find below that Michaels is not an employee, as that term is defined in Part 708, of either Honeywell or UT-Battelle.

A. The Complainant is not an Employee of Honeywell

Michaels contends that he should be considered a "covered employee" under Part 708 based upon the circumstances of his current work for Honeywell. Appeal at 4. Though acknowledging that he is, "by the terms of his contract with Honeywell FM&T, an independent contractor to" Honeywell, the complainant contends he is "protected under 10 CFR Section 708 from retaliation by an entity which, although not his direct or immediate employer, is nonetheless a covered employer." Appeal at 2, 3.

The complainant is correct that DOE contractors, such as Honeywell and UT-Battelle, are subject to the provisions of Part 708, and in this sense are "covered employers" under those provisions. This clearly does not mean, however, that *any person* is entitled to file a Part 708 complaint against a DOE contractor. The regulations, very specifically, only afford that right to "employees" of DOE

[1] Both offices also cite a lack of temporal proximity between Michaels's alleged protected conduct and the alleged retaliation. *Id.* We need not, however, address this issue, which bears on the merits of the complaint, as we find the complaint does not meet the threshold jurisdictional requirements of Part 708, as explained below.

contractors. 10 C.F.R. § 708.5. The issue, then, is whether the complainant is an "employee" of Honeywell, as that term is used in Part 708.

The definition of "employee" set forth in section 708.2 is of little help in resolving this issue, as it merely provides, as noted above, that an employee is a "person employed . . . or previously employed by a contractor . . . ." 10 C.F.R. § 708.2: Faced with interpreting the term "employee" in a statute with a similar definition, the Supreme Court adopted "a common law test for determining who qualifies as an 'employee' . . . ." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (finding that the Employee Retirement Income Security Act's "nominal definition of 'employee' as 'any individual employed by an employer,' is completely circular and explains nothing"). Given the somewhat similarly circular definition of "employer" in Part 708, we find that it is appropriate to apply the *Darden* test here.[2]

The Court set forth that test as follows:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323-24.

UT-Battelle and Honeywell filed a response to the present appeal, in which they cite certain provisions of the contract between Michaels and Honeywell, including those stating that Michaels shall not be an "employee" of Honeywell, and that he "shall not be entitled to nor" claim "any benefits or rights accorded to employees" of Honeywell. Joint Response of UT-Battelle and Honeywell FM&T to Jurisdictional Appeal of Gordon Michaels (May 13, 2011) (Joint Response) at 6 (quoting Contract at 6).

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[2] The Department of Labor, under whistleblower authority analogous to the DOE's under Part 708, has applied the Court's analysis in *Darden* to interpret the term "employee" as used in the whistleblower protection provisions of various statutes, including the Energy Reorganization Act (ERA), which protects "any employee" from retaliation by a licensees of the Nuclear Regulatory Commission, or by a contractor or subcontractor of such a licensee. 42 U.S.C. § 5851; *see, e.g., Demski v. Indiana Michigan Power Company,* No. 02-084, 2004 WL 785547 (2004); *Kesterson v. Y-12 Nuclear Weapons Plant, et al.,* No. 96-173, 1997 WS 180394 (1997); *Boschuk v. J & L Testing, Inc.,* No. 97-020, 1997 WL 591351 (1997); *Varnadore v. Oak Ridge Nat'l Lab. And Lockheed Martin Energy Sys.*, Nos. 1992-CAA-2 and 5, 1993-CAA-2 and 3, 1995-ERA-1, 1996 WL 363346 (1996).

First, that the contract in question explicitly states that Michaels's work was "not as an employee" of Honeywell is but one factor to be considered, and is not dispositive of the issue before us. The Court in *Darden* stated that, because "the common-law test contains 'no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden,* 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America,* 390 U.S. 254, 258 (1968)). Other relevant terms of the contract, however, read in light of the factors set forth in *Darden*, also support a conclusion that Michaels is not an employee of Honeywell under the common-law definition of that term.

Here, Honeywell contracted for the work of a technology specialist, a highly skilled technical employee, for a period of limited duration, specified as one year, with the option of renewal, but not to exceed two years. *Id.* at 2, 4. The work was to be performed primarily at a remote location, away from the direct and day-to-day supervision of Honeywell. SOW at 2. There is no language in the agreement that specifies Michaels's work schedule, or a minimum number of hours of work required. Rather, the agreement sets only a maximum number of hours allowed to be billed per year. SOW at 3. As noted above, the contract explicitly disclaims any entitlement by Michaels to "benefits or rights accorded to employees" of Honeywell. Contract at 6. It provides no pay for sick leave, vacation, holidays, or overtime. *Id.;* Terms and Conditions of Purchase, Time and Material or Labor Hour Purchase Order/Contract (incorporated by reference into Contract) at 2. As to the tax treatment of the hired party, the Contract provides that Michaels "shall be solely responsible for any legal obligations relating to, but not limited to, provision of employee benefits and compliance with state and federal laws including the Internal Revenue Code." Contract at 6.

There are, on the other hand, limited indicia of an employer-employee relationship between Honeywell and Michaels. Specifically, the statement of work provides that Honeywell may assign unspecified "[o]ther duties within the intent of this scope of work . . . ." SOW at 2. In addition, the statement of work anticipates that Honeywell is to furnish certain information necessary to the accomplishment of Michaels's work. SOW at 3. And while the statement of work states that "no equipment will be provided" by Honeywell, *id.*, Honeywell acknowledges that it paid for work space at ORNL through an "administrative transfer of funds" between Honeywell and UT-Battelle. Joint Response at 3. However, on balance, considering all of the relevant factors set forth in *Darden,* we cannot find that the complainant has demonstrated that he is an "employee" of Honeywell, as that term is used in Part 708.

B. The Complainant is not an Employee of UT-Battelle

There is no dispute in this case that the complainant was *previously* employed by UT-Battelle. As we note above, the definition of "employee" under Part 708 includes "any person previously employed by a contractor if that person's complaint alleges that employment was terminated for conduct described in § 708.5 of this subpart." 10 C.F.R. § 708.2. However, because Michaels retired from UT-Battelle and does not allege that the company terminated his employment, he clearly does not meet the definition of "employee," by virtue of being a former employee of UT-Battelle, under the wording of section 708.2.[3]

[3] The complainant cites a prior decision of our office in which we found that "continuation of past retaliation by

As for the fact that, more recently, Michaels was allowed to use ORNL facilities, this certainly would not, under a *Darden* analysis, make Michaels an employee of UT-Battelle. There is no evidence of any contractual relationship between the complainant and UT-Battelle, such as exists between Michaels and Honeywell. The Court in *Darden* is clear that, to be considered "an employee under the general common law of agency," one must be first be a "hired party," and Michaels was not "hired" by UT-Battelle at any time after he retired on January 31, 2009.

In sum, while we agree with the complainant that both Honeywell and UT-Battelle are "covered employers" under Part 708, we cannot find that Michaels is an employee of either contractor. On this critical issue, the complainant offers nothing that would lead us to a different conclusion. In a reply to the Joint Response, the complainant notes that the Contract incorporated by reference a provision of the Department of Energy Acquisition Regulations requiring that "the Contractor shall comply with the requirements of 'DOE Contractor Employee Protection Program' at 10 CFR part 708 for work performed on behalf of DOE directly related to activities at DOE-owned or-leased sites." 48 C.F.R. § 952.203-70; Reply to Joint Response of UT-Battelle and Honeywell FM&T to Jurisdictional Appeal of Gordon Michaels (May 26, 2011) (Reply) at 9. However, this standard contractual provision merely provides that the contractor, in this case Michaels, is bound by the terms of Part 708, just as Honeywell is similarly bound by the terms of its management and operating contract with the DOE. In no way does this provision bolster the complainant's claim to treatment as an "employee" under those regulations.

The complainant also argues that "excluding an entire class of employees, *i.e.,* independent contractors, only leaves a gaping hole in the balloon of protection DOE has adopted to identify waste, fraud and abuse and protect those who reveal it." Reply at 2. However, had the DOE intended to extend the protections of Part 708 to independent contractors, it could have done so by simply using a term broader than "employee." For example, the regulations governing the DOE's chronic beryllium disease prevention program explicitly apply to any "current DOE employee, DOE contractor employee, or other worker at a DOE facility" and define "worker" as "a person who performs work for or on behalf of DOE, including a DOE employee, an independent contractor, a DOE contractor or subcontractor employee, or any other person who performs work at a DOE facility." 10 C.F.R. §§ 850.2, 850.3. By contrast, policy arguments notwithstanding, the language of the Part 708 is clear in providing protection only to employees and certain former employees of DOE contractors, not to independent contractors.

III. Conclusion

As explained above, the complainant has not demonstrated, or even alleged facts that would demonstrate, that he is an employee, under Part 708, of either Honeywell or UT-Battelle. We

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a subsequent DOE contractor would be actionable under Part 708." *Harry T. Greene*, Case No. TBU-0010 (2003). The complainant incorrectly describes *Greene* as a "case of a DOE contract employee bringing a claim against a former employer, ..." Reply to Joint Response of UT-Battelle and Honeywell FM&T to Jurisdictional Appeal of Gordon Michaels (Reply) at 15. In fact, the complainant in *Greene*, though having previously worked for a DOE contractor, filed his complaint against his current employer, also a DOE contractor.

therefore find that NNSA/SC and ORO correctly dismissed the complaint filed by Gordon Michaels. Accordingly, the present Appeals should be denied.

It Is Therefore Ordered That:

(1) The Appeals filed by Gordon Michaels, Case Nos. TBU-0117 and TBU-0118, are hereby denied.

(2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review within 30 days after receiving this decision. 10 C.F.R. § 708.18(d).

for Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date:

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