

March 26, 2009

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Motion for Summary Judgment

Name of Case: James J. Myers

Date of Filing: March 6, 2009

Case Number: TBZ-0083

This Decision will consider a Motion for Summary Judgment which relates to a pending complaint filed by Mr. James J. Myers (hereinafter referred to as “Mr. Myers” or “the Complainant”) on August 11, 2008, against his former employer, ENVIRO AgScience (hereinafter referred to as “EAS”), a subcontractor at the Department of Energy’s (DOE) Savannah River Site in Aiken, South Carolina, under the DOE’s Contractor Employee Protection Program regulations found at 10 C.F.R. Part 708. *See* Report of Investigation, OHA Case No. TBI-0083 (2009). 1/ EAS seeks dismissal of Mr. Myers’ complaint.

**I. Background**

The Department of Energy established its Contractor Employee Protection Program to safeguard “public and employee health and safety; ensure compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste, and abuse” at DOE’s Government-owned or - leased facilities. Criteria and Procedures for DOE Contractor Employee Protection Program, 64 Fed. Reg. 12862 (March 15, 1999) (interim final rule). 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

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1/ Pursuant to Part 708, an OHA attorney conducted an investigation of the present complaint and issued a Report of Investigation (ROI) on January 9, 2009, in which he concluded that the complainant could not have reasonably believed that he revealed a substantial and specific danger to employees or to public health or safety. I was appointed the Hearing Officer to conduct a hearing on the Complaint. In a letter dated January 21, 2009, I directed the complainant to submit a brief that addressed why the statements that he made to Dr. James Lynn, EAS President, could be properly characterized for purposes of 10 C.F.R. Part 708 as evidence of “a substantial and specific danger to employees or to public health or safety.” I further indicated to the complainant that he was free to submit additional documentary evidence to show that his alleged disclosures fall within the ambit of the Part 708 regulations. I also directed EAS to file a responsive brief and indicated that I would entertain a Motion to Dismiss the Complaint if I determined that Mr. Myers’ brief and documentary evidence did not support a finding that he made at least one protected disclosure. Upon my direction, EAS filed a Motion to Dismiss the subject Complaint. After reviewing EAS’ submissions and the standards governing summary judgment motions, I have recharacterized EAS’ Motion to Dismiss as a Motion for Summary Judgment.

employers. The Part 708 regulations prohibit discrimination by a DOE contractor against its employee because the employee has engaged in certain protected activity, including when the employee has

(a) Disclosed to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at DOE site, your employer, or any higher tier contractor, information that you reasonably believe 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).

EAS is the grounds maintenance sub-contractor at the Savannah River Site in Aiken, South Carolina. On April 30, 2008, EAS hired Mr. Myers as a lawn equipment operator. *See* ROI at 2. As part of his duties, Mr. Myers operated a riding tractor, weed eater, lawn mower, chain saws, and an edger. *Id.* On May 1, 2008, his first day of work, Mr. Myers operated a walk-behind mower. At an employee meeting on May 2, 2008, Dr. Louis Lynn, President of EAS, reviewed the previous day's employee performance and said, "[T]he mower could have [been] run faster . . ." Having run the mower, Mr. Myers responded that it was "unfamiliar" and that he "ran it as fast and safe as [he] could with others and [his] safety in mind." Dr. Lynn replied, "[W]e are all suppose[d] to be professional operations and [I am] paying [you] good money to do the job and if [you can't, I will] get someone who [can] and for less than [I am] paying [you]." *Id.* at 3. On June 13, 2008, EAS suspended Mr. Myers and, on June 20, 2008, they terminated him. *Id.* On August 11, 2008, Mr. Myers filed a Complaint with the Employee Concerns Program of the Office of Civil Rights, Savannah River Operations Office. In his Complaint, Mr. Myers alleges that EAS terminated him because he brought to management's attention a "potential safety concern regarding work-related duties in the use of a certain piece of equipment on May 1, 2008." *Id.* EAS denies that Mr. Myers made a protected disclosure.

## **II. Analysis**

The Part 708 regulations do not include procedures and standards governing motions for summary judgment. I note that the Federal Rules of Civil Procedure provide that such a motion shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). *See also Celotex Corp. v. Cattrett*, 477 U.S. 317, 322 (1986). While the Federal Rules do not govern this proceeding, Rule 56 has been used as a guide in the evaluation of Motions for Summary Judgment filed in a Part

708 proceeding. *See Edward J. Seawalt*, Case No. VBZ-0047 (August 20, 2000) <sup>2/</sup> Prior cases of this office considering Motions for Summary Judgment instruct that such a motion should only be granted if it is supported by “clear and convincing” evidence. *Fluor Daniel Fernald*, Case No. VBZ-0005 (October 4, 1999).

To prevail in a whistleblower complaint, a complainant has the burden of establishing by a preponderance of the evidence that he reasonably believed that he made a protected disclosure. If the employee meets this threshold burden, then he must prove that the disclosure was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. 10 C.F.R. § 708.29. Once the employee has met this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action in the absence of the employee’s disclosure. *Id.* For the reasons discussed below, I find that there is no genuine issue as to any material fact in the case and that the complainant has not made a protected disclosure. Thus, I will grant the motion for summary judgment before me.

In its Motion, EAS asserts that there is no factual or legal basis for the complainant’s allegation, specifically that “none of the purported incidents Mr. Myers identified in his allegations are reasonably characterized as voicing a safety concern or the exercise of protected activity within the scope of Part 708.” *See* EAS Motion to Dismiss at 3. EAS further asserts that Mr. Myers did not describe any present or future danger and that as noted in the ROI, Mr. Myers claimed to have “operated the mower in question only once and only at a safe speed (Mr. Myers operated [the mower] only in first gear, the slowest which he felt safe doing).” *Id.* at 4. Therefore, EAS asserts that there was no actual danger to Mr. Myers, or to anyone else, at any time. *Id.* Finally, EAS asserts that Mr. Myers “retroactively” alleges that “I raised a safety concern” after having a discussion with Dr. Lynn regarding the mower and that Mr. Myers failed to explain or support his assertion of a “safety concern.” *Id.* at 5.

EAS’ assertions are supported by the following facts in the record. First, Mr. Myers admitted that he had been trained by another employee to operate a walk-behind mower and was instructed to only use the gears that he felt comfortable using. ROI at 5. Mr. Myers further admitted that he operated the walk-behind mower in first gear, which was the slowest gear and the gear which he felt safe operating. *See* Complaint. Second, in his discussion with Dr. Lynn, Mr. Myers did not describe a danger, present or future, and admitted that he did not feel that he was in any danger operating the mower. ROI at 5. Rather, Mr. Myers admitted that EAS never instructed, pressured, or threatened him to operate the mower faster than he felt safe doing. In addition, Mr. Myers stated that he understood Dr. Lynn’s comment “to mean that If Mr. Myers could not operate the mower at the speed that Dr. Lynn desired, EAS would remove him from the machine and assign it to an employee who could operate it as fast as Dr. Lynn would have liked.” *Id.* at 6. Further, Mr. Myers admitted that he did not take Mr. Lynn’s comment as a threat that he would suffer adverse employment action if he did not operate the walk-behind mower faster. *Id.* Third, other than recounting the relevant

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<sup>2/</sup> Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, 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>.

conversation he had with Dr. Lynn, Mr. Myer has not explained nor has he provided additional information regarding his allegation of a “safety concern.” In light of this information in the record, there is no genuine issue as to any material fact in this case. I therefore find, as a matter of law, that Mr. Myers could not prove that he had a reasonable belief that his disclosure revealed a substantial and specific danger to employees or to public health or safety. Accordingly, I will grant EAS’ motion. The granting of EAS’ motion requires me to dismiss the underlying complaint.

It is Therefore Ordered That:

- (1) The Motion for Summary Judgment filed by ENVIRO AgScience on March 6, 2009, OHA Case No. TBZ-0083, is hereby granted.
- (2) The Complaint filed by James J. Myers under 10 C.F.R. Part 708 on August 11, 2008, OHA Case No. TBH-0083, is hereby dismissed in its entirety. This Order may be appealed to the Director of OHA.

Kimberly Jenkins-Chapman  
Hearing Officer  
Office of Hearings and Appeals

Date: March 26, 2009