Case No. VBH-0023

March 31, 2000

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Case: Stephanie A. Ashburn

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This Initial Agency Decision concerns a whistleblower complaint filed by Stephanie A. Ashburn, a former fellow of the Oak Ridge Institute for Science and Education (ORISE). As explained below, Ashburn's complaint is denied.

This case arises under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708, the "whistleblower" regulations. The whistleblower regulations prohibit a contractor from retaliating against a contractor employee who engages in protected conduct. Protected conduct includes disclosing information that the employee 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.

If a contractor retaliates against an employee for making a protected disclosure, the employee can file a complaint. The employee must establish by a preponderance of the evidence that 1) the employee made a protected disclosure; and 2) the disclosure was a contributing factor to an alleged retaliatory act. If the employee makes the required showings, 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 protected disclosure. If the employee prevails, the Office of Hearings and Appeals (OHA) may order employment-related relief such as reinstatement and back pay.

Background

ORISE, Ashburn's employer, performed work at the Department of Energy's site in Oak Ridge, Tennessee. As an ORISE fellow, Ashburn was assigned to a team working on the Environmental Compliance and Management Program (ECAMP). Although the people who worked on the ECAMP were based at a DOE site, the ECAMP was funded by the Department of the Air Force. LMER received a contract with the Air Force for the ECAMP, and performed work at Oak Ridge under the DOE's "Work for Others" program. LMER also entered into subcontracts with several entities, including ORISE, to supply personnel for the ECAMP.

Ashburn, an attorney, was granted a one-year fellowship by ORISE in October 1994. The terms of the fellowship are set out in a letter to Ashburn dated September 29, 1994, which states that the fellowship "will be under the direction of [the Supervisor] in the Environmental Sciences Division.... The appointment may be extended ... subject to satisfactory performance and the continued availability of funds."

Ashburn's appointment was extended several times. The last extension was announced in a letter dated November 26, 1996, which stated that her "appointment ... has been extended for up to one year beginning October 1, 1996."

Ashburn's whistleblower case concerns certain activities of her supervisor on the ECAMP team, who was an employee of LMER. In her complaint, Ashburn states that the supervisor often expressed frustration with what she perceived as LMER's "inability to support her and the Air Force sponsor's work." In August 1996, Ashburn attended a meeting with the supervisor and a representative of the Air Force. During the meeting, Ashburn was asked whether she was willing to support the supervisor's attempt to take the ECAMP contract to either a different contractor or a new firm to be formed by the supervisor.

Also in August, the supervisor began negotiating with consulting firm "A" for positions for her and others on the ECAMP team. She told Ashburn that she had arranged a salary for Ashburn with the management of "A." In September, the Air Force placed an announcement in the *Commerce Business Daily*, soliciting bids for the ECAMP contract. The announcement stated that consulting firm "A" "is the only known source with the expertise and is capable of providing services for this specialized effort." The announcement was soon withdrawn, for reasons not stated in the record, and the supervisor began negotiating with other consulting firms to hire the ECAMP staff and obtain the ECAMP contract.

In November 1996, Ashburn disclosed to LMER management that her supervisor was attempting to manipulate LMER's subcontracts involving some of the ECAMP staff. For the purposes of this Decision, I will assume, without making a finding, that Ashburn's disclosures involved abuse of authority by the supervisor, and meet the regulatory definition of a protected disclosure. *See* 10 C.F.R. § 708.5(a). Two other subcontractor employees who worked on the ECAMP, Matthew J. Rooks and Alizabeth Aramowicz Smith, filed whistleblower complaints based on facts similar to those alleged in Ashburn's complaint. *See Matthew J. Rooks*, Case No. VBH-0024, 27 DOE ¶ _____ (March 1, 2000).

Meanwhile, LMER received a letter from the Air Force, dated August 26, 1997, stating that funding for the ECAMP contract would end on September 30, 1997. This was the same day that Ashburn's fellowship was due to terminate. Ashburn received a letter in October 1997, notifying her that her fellowship had been officially terminated as of September 30, 1997. According to the letter, the termination was based on notification ORISE had received that the ECAMP project would not continue past that date.

The new contract for the ECAMP project was awarded to consulting firm "B." The supervisor, meanwhile, had resigned from LMER and accepted a position with consulting firm "B," where she worked on the ECAMP.

On November 5, 1997, Ashburn filed the present complaint against LMER. In a supplement to the complaint, dated October 4, 1999, Ashburn listed retaliatory acts which she alleges were committed by LMER.

Analysis

The Part 708 regulations provide that the employee who files a complaint has the burden of establishing by a preponderance of the evidence that her whistleblowing was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. 10 C.F.R. § 708.29. Retaliation is defined as "an 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 whistleblowing]."

Ashburn's central claim is that the loss of her fellowship was retaliation for her whistleblowing. There is no dispute that the termination of her fellowship was a negative action with respect to her employment, and could be found to be retaliation if it was the result of a protected disclosure. 10 C.F.R. § 708.2

(definition of “retaliation”). Ashburn must show, however, not only that the termination occurred, but that her disclosure was a contributing factor to the termination.

A contributing factor is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Luis P. Silva*, 27 DOE ¶ _____ (Case No. VWA-0039, February 25, 2000), citing *135 Cong. Rec. H747* (daily ed. March 21, 1989) (Explanatory Statement on Senate Amendment-S.20); *see also Marano v. Department of Justice*, 2 F.3d 1137 (Fed. Cir. 1993) (applying the "contributing factor" test in a case under the Whistleblower Protection Act, 5 U.S.C. § 1201).

The record is clear that the termination of Ashburn’s fellowship was caused by LMER’s loss of the ECAMP contract. Linda McCamant, ORISE’s group manager for research participation programs, was responsible for administering Ashburn’s fellowship. McCamant filed an affidavit in this proceeding, stating the termination of Ashburn’s fellowship was based on ORISE’s loss of funding from the ECAMP. McCamant states that “ORISE has no policy whereby Ms. Ashburn’s appointment could have been extended - or she be paid for - the equivalent time period that she had been on leave without pay. When her appointment ended, the basis for ORISE’s ability to pay her also ended.”

The record also suggests that the decisive factor in the placement of the ECAMP contract was the supervisor herself. Thus, when the supervisor was apparently about to accept a position with consulting firm “A,” the Air Force announced its intent in the *Commerce Business Daily* to award the ECAMP contract to the same firm. When the supervisor accepted a position with consulting firm “B,” the Air Force awarded the ECAMP to that firm.

Moreover, the record indicates that the supervisor’s decision to leave LMER for a new contractor was motivated by a long-standing dissatisfaction with LMER management that predated any disclosure by Ashburn. Ashburn notes in her complaint that when the supervisor first interviewed her in 1994, she expressed frustration with LMER’s lack of support for the ECAMP. In March 1996, according to Ashburn, the supervisor met with Air Force personnel to express her dissatisfaction with her management and to discuss moving the ECAMP contract to another firm. In September 1996, the supervisor began negotiating for a position with consulting firm “A.” It was only in November 1996, after the supervisor had taken steps to ensure that the ECAMP contract would be placed with another firm, that Ashburn made her first disclosure.

The timing of the supervisor’s departure from LMER also appears to be unrelated to Ashburn’s disclosure. Ashburn states in her complaint that in September 1996, the supervisor asked her to find out when she, the supervisor, would be eligible for retirement benefits from LMER. Ashburn called the LMER benefits office and found that the supervisor would be eligible on October 8, 1997. According to Ashburn, the supervisor set up her voice mail and e- mail accounts with consulting firm “B” in mid-September 1997, but did not officially resign from LMER until October 9, 1997, one day after she qualified for retirement benefits.

In summary, there is ample evidence in the record to conclude that the termination of Ashburn’s employment was due to LMER’s loss of the ECAMP contract, that the supervisor herself was the key factor in awarding the ECAMP contract, that LMER lost the ECAMP contract because the supervisor would be working for another firm, and that the supervisor had determined to leave LMER before Ashburn made a protected disclosure. Consequently, I find that Ashburn has failed to establish that her disclosure was a contributing factor to her termination.

Ashburn alleges a number of other retaliations. Most of them involve what she calls “threats.” In these allegations, she appears to rely on the definition of retaliation at 10 C.F.R. § 708.2, to include “an action (including intimidation, threats ... 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)....” Ashburn has not convincingly shown that the statements she cites are actual threats of a negative personnel action, and include such trivialities

as being directed to attend a meeting where she, a woman in her twenties, was among older men who were managers. Ashburn also alleges that LMER's decision to move Rooks and Smith to off-site offices in January 1997 "served to isolate and punish me ... and interfered with my ability to adequately perform my job, as I was unable to readily work with my colleagues." However, since Ashburn went on leave without pay in January 1997 and did not return until mid-August 1997, about a month before her fellowship was terminated, it is clear that the absence of Rooks and Smith could have had no more than a minimal impact on Ashburn's job performance. I find that these allegations fail to meet the regulatory definition of retaliation, and they will accordingly be given no further consideration.

Ashburn also alleges that an LMER manager threatened her "not to accept any positions with contractors," and claims he told her that if she accepted a position with a contractor "he would not approve the required paperwork, thereby rendering the position moot." Ashburn's own statement to the investigator, however, shows that this allegation is without merit.

The manager in question is the person to whom Ashburn disclosed the supervisor's attempts to move the ECAMP contract. In her statement to the investigator, Ashburn describes how the manager was angry at the supervisor, and told Ashburn and Smith that he would protect their current positions by not approving any paperwork authorizing new LMER subcontractors for the ECAMP. While it is clear that the manager refused to meddle with LMER's existing subcontracts, Ashburn has provided no evidence that the manager made any attempt to interfere with an attempt to seek or accept a job with another employer. Thus, there is no basis on which to find that the manager threatened Ashburn or that the manager's statement constitutes retaliation within the meaning of the regulations.

Conclusion

Ashburn has failed to show that the protected disclosure she made was a contributing factor to an retaliatory action. Given the supervisor's determination to take the ECAMP contract elsewhere, the loss of Ashburn's fellowship appears to have been an inevitability before she made a disclosure. Consequently Ashburn has failed to establish by a preponderance of the evidence that her disclosure was a contributing factor to an alleged retaliation. Accordingly, her complaint will be denied. *Richard W. Gallegos*, 26 DOE ¶ 87,502 (1996).

It Is Therefore Ordered That:

(1) The complaint filed under 10 C.F.R. Part 708 by Stephanie A. Ashburn, OHA Case No. VBH-0023, is hereby denied.

(2) This is an Initial Agency Decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after the party's receipt of the Initial Agency Decision.

Warren M. Gray

Hearing Officer

Office of Hearings and Appeals

Date: March 31, 2000