

Case No. VBZ-0003

June 21, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Name of Petitioner: Carl J. Blier

Date of Filing: May 11, 1999

Case Number: VBZ-0003

This determination will consider a request to dismiss filed by Oak Ridge Associated Universities (ORAU) on May 11, 1999. ORAU seeks dismissal of the underlying complaint filed by Carl J. Blier under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. This matter is before me as the investigator assigned to investigate Mr. Blier's complaint.

I. Background

Mr. Blier's Part 708 complaint arises from his employment with ORAU. In his complaint, Mr. Blier alleges that in April 1996 he became aware of possible irregularities regarding the approval of higher cost air-fares by ORAU officials to permit employees to upgrade their airline tickets to first class. Mr. Blier subsequently informed the ORAU Ethics Officer and the DOE Office of the Inspector General (OIG). Mr. Blier alleges that as a result of his disclosure, OIG conducted an audit of travel expenditures at Oak Ridge.

In his complaint, Mr. Blier asserts that, in early 1996, he became the subject of reprisals for making his disclosure to the OIG. Specifically, Mr. Blier claims that his contacts with outside clients were significantly reduced and he was denied an opportunity to participate in a 6 month fellowship with Representative Zach Wamp. He further alleges that in March 1998 his supervisor became very upset with him when he was absent while taking an early lunch and criticized him in front of a co-worker. During a conversation afterwards, Mr. Blier accused the supervisor of trying to reduce his role at work to just "punching a clock." Mr. Blier alleges that the supervisor responded "You know your options." Mr. Blier interpreted that phrase to mean that he could resign and did so. On April 30, 1998, Mr. Blier filed a Part 708 complaint with the DOE's Oak Ridge Operations Office alleging constructive dismissal because of his disclosures concerning possible irregularities regarding air-fares. Subsequently, on August 28, 1998, Mr. Blier filed a complaint under the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973 (RA). In this complaint, Mr. Blier alleged that he had experienced reprisals because of his prior disclosure to ORAU officials that he had an illness.

In its Motion, ORAU asserts that the exact same acts of retaliation form the basis of both the ADA/RA claim and the Part 708 claims. In this regard, ORAU notes that the language describing the alleged reprisals are in some instances identical. ORAU further asserts that Mr. Blier's ADA/RA complaint has been investigated by the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) and that OFCCP found that Mr. Blier had not suffered any discrimination, harassment or retaliation by ORAU.(1) ORAU argues that the Part 708 complaint should be dismissed pursuant to 10 C.F.R. §§ 708.15 and 708.17 because he has pursued another remedy under federal law based upon the

same facts that underlie his Part 708 claim. ORAU asserts that to allow further proceedings under Part 708 would essentially reopen allegations that have been already been subject to a finding by the OFCCP. ORAU argues that the Part 708 regulations indicate that deference should be given to a determination made under other applicable laws when a complainant pursues another remedy based upon the same facts.

II. Analysis

Section 708.15 of the Part 708 regulations states in pertinent part:

(a) You may not file a complaint under this part if, with respect to the same facts, you choose to pursue a remedy under State or other applicable law

. . . .

(c) You are considered to have filed a complaint under State or other applicable law if you file a complaint or other pleading, with respect to the same facts in a proceeding established or mandated by State or other applicable law, whether you file such complaint before, concurrently with, or after you file a complaint under this part.

(d) If you file a complaint under State or other applicable law after filing a complaint under this part, your complaint under this regulation will be dismissed under § 708.17(c)(2).

Section 708.17(c)(2), (3) goes on to state:

(c) Dismissal for lack of jurisdiction or other good cause is appropriate if:

. . . .

(2) The facts, as alleged in your complaint, do not present issues for which relief can be granted under this part; or

(3) You filed a complaint under State or other applicable law with respect to the same facts as a complaint under this part;

I will assume, for purposes of this analysis only, that a complaint under the ADA/RA may be considered as "other applicable law" under Section 708.17(c)(3) and that the facts regarding the reprisals that Mr. Blier alleged in each complaint are identical. However, even with these assumptions, I do not find that Section 708.17(c)(3) mandates that Mr. Blier's complaint be dismissed.

Section 708.17(c)(3) would require dismissal of Mr. Blier's Part 708 complaint if his ADA/RA complaint was based on the same facts. While the alleged reprisals to which he refers are the same in both complaints, the complaints differ significantly as to the cause for the reprisals. In Mr. Blier's ADA/RA complaints, a necessary factual requirement to establish a prima facie case is that he suffered adverse employment consequences because of a physical or psychological condition. See *Stradley v. Lafourche Communications, Inc.*, 869 F. Supp. 442 (E.D. La. 1994) (under the ADA a plaintiff must prove that he suffers from a disability, that he is a qualified individual, and that he suffered adverse employment action because of his disability); *Guterriero v. Schultz*, 557 F. Supp. 511 (D. D.C. 1983) (under RA, elements of a cause of action are: plaintiff possesses a handicap, is qualified for a position and is excluded from the position solely by reason of a handicap). The pleading and underlying facts which would support this type of claim are very different from those which would underlie a complaint filed under Part 708, the DOE contractor employee whistleblower protection program. For Mr. Blier's Part 708 to prevail on his complaint, the alleged reprisals must have been motivated by his disclosures to the Ethics Officer or OIG. See 10 C.F.R. §§ 708.5, 708.5(a) (Part 708 complaint may be filed if individual has been "subject to retaliation for: (a) Disclosing to . . . your employer . . . information that you reasonably and in good faith

believe reveals - . . . (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority"). It is evident that these regulatory schemes are very different in each complaint. Because the factual motivation alleged to have caused ORAU to take adverse action against Mr. Blier differs in the Part 708 and the ADA/RA complaints, I do not find the complaints to be based upon the "same facts" for section 708.17(c)(3) purposes.

With regard to ORAU's arguments as to the preclusive effect of the OFCCP report, I find that the report's investigative findings are not binding upon us for purposes of making a determination on Mr. Blier's Part 708 claim. As an initial matter, the OFCCP report is not an formal adjudication which requires us to apply the doctrine of collateral estoppel. ORAU argues that the provisions of Part 708, such as section 708.17(c)(3), mandate deference to the OFCCP report. However, I believe these provisions at most only mandate deference to State or other law determinations regarding reprisals specifically resulting from a protected disclosure of the type described in section 708.5(a).(2) Nevertheless, any information which OFCCP uncovered which led it to its conclusion that Mr. Blier did not suffer any retaliation from ORAU would be relevant to my investigation and will be considered if submitted. Consequently, ORAU's Motion to Dismiss should be denied.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Oak Ridge Associated Universities on May 11, 1999 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.

Staff Attorney/Investigator

Office of Hearings and Appeals

Date: June 21, 1999

(1) OFCCP issued a report on March 5, 1999, entitled "Notification of Results of Investigation," regarding its investigation of Mr. Blier's ADA/RA complaint.

(2)Section 708.5(a) prohibits retaliation against employees who reasonably and in good faith disclose to officials information relating to: a substantial violation of a law, rule or regulation, a substantial and specific danger to employees or to public health and safety or fraud, gross mismanagement, gross waste of funds or abuse of authority. See 10 C.F.R. § 708.5(a).