

Case No. VWZ-0010

May 12, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Name of Petitioner: West Valley Nuclear Services Co., Inc.

Date of Filing: April 27, 1999

Case Number: VWZ-0010

This decision considers a "Motion to Dismiss" filed by West Valley Nuclear Services, Inc. (West Valley) on April 27, 1999. In its Motion, West Valley seeks the dismissal of a Complaint filed by John L. Gretencord (Gretencord) under the Department of Energy's (DOE) Contractor Employee Protection Program, which is codified at 10 C.F.R. Part 708. Mr. Gretencord requested a hearing on his Complaint under 10 C.F.R. Part 708 on March 19, 1999, and it has been assigned Office of Hearings and Appeals (OHA) Case No. VWA-0033. The present Motion has been assigned Case No. VWZ-0010.

I. Background

The Department of Energy established its Contractor Employee Protection Program 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 or leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). The criteria and procedures for Part 708 were amended in an Interim Final Rule effective April 14, 1999. 64 F. R. 12862. The Interim Final Rule provides that its amended procedures will apply to any proceeding pending on April 14, 1999. Part 708's 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 discrimination by a DOE contractor against an employee on the basis of certain activities by the employee, including certain disclosures by the employee to "a DOE official, a member of Congress, any other government official who has responsibility or oversight of the conduct of operations at a DOE site, [an] employer or any higher tier contractor, . . ." 10 C.F.R. § 708.5(a).

Gretencord was employed by West Valley as a Senior Quality Control/Quality Assurance Engineer from January 15, 1990 to March 18, 1997. On March 26, 1997, Gretencord filed a complaint under 10 C.F.R. Part 708 with the DOE Office of Inspector General's Office of Inspections (IG). In this complaint, Gretencord alleged that he was retaliated against for disclosures of possible safety violations, fraud and mismanagement.

After conducting an investigation of Gretencord's allegations, the IG issued a Report of Investigation (the Report) on February 11, 1999. The Report found that: "[A] preponderance of the available evidence supports a finding that during his employment and work in quality assurance, [Gretencord] disclosed various concerns to [West Valley] officials and to DOE about possible safety violations and incidents of possible rule infractions." Report at 5. However, the Report further found that: "[A] preponderance of the

available evidence does not indicate that the substance of [Gretencord's] 'good faith' concerns contributed to actions that were taken against him." *Id.* at 6. The Report further states: "It is the conclusion of this inquiry, based upon information obtained through interviews of [West Valley] employees and supporting documents, that the evidence is clear and convincing that [Gretencord] was terminated for reasons other than his protected disclosures." *Id.* at 8. On March 8, 1999, DOE received Gretencord's request for a hearing.

On April 1, 1999, I ordered Mr. Gretencord to submit a written statement specifically listing: (1) the protected disclosures that he is alleging resulted in retaliatory acts against him, (2) the retaliatory acts allegedly conducted against him, and (3) the remedies he is requesting. OHA received Gretencord's response to this order on April 16, 1999. On April 27, 1999, OHA received the present Motion to Dismiss. West Valley's Motion to Dismiss contends that Gretencord has failed to (1) state a claim for which relief can be granted, and (2) comply with my order. OHA received Gretencord's Rebuttal of West Valley's Motion to Dismiss on May 7, 1999.

II. Analysis

A. Whether Gretencord Failed to Comply with My Order of April 1, 1999

West Valley contends that Mr. Gretencord has refused to comply with my order because he has failed to specifically describe any protected disclosures or retaliatory actions. Attorney's Affidavit in Support of Motion to Dismiss at 2. West Valley correctly notes that 10 C.F.R. § 708.28(b)(5) allows the Hearing Officer to "dismiss a claim . . . and make adverse findings upon the failure of a party . . . to comply with a lawful order of the Hearing Officer." However, it is well settled that a Motion to Dismiss in a 10 C.F.R. Part 708 proceeding is appropriately granted only where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact or law on a more complete record. *Lockheed Martin Energy Systems, Inc.*, 27 DOE ¶ 87,510 (1999); *EG&G Rocky Flats*, 26 DOE ¶ 82,502 (1997)(*EG&G*). The OHA considers dismissal "the most severe sanction that we may apply," and will rarely use it. *Boeing Petroleum Services*, 24 DOE ¶ 87,501 at 89,005 (1994). Moreover, this Office has found that, in order to further the purposes of the whistleblower protection program, which include encouraging employees to come forth with protected disclosures, it is important not to hold parties to proceedings under 10 C.F.R. Part 708 to the strictest standards of technical pleading. *EG&G, supra*; *Westinghouse Hanford Company*, 24 DOE ¶ 87,502 at 89,011 (1994) (*Westinghouse*). Accordingly, in ruling on the motion before me, I must balance West Valley's right to have sufficient notice of and respond to Gretencord's whistleblower allegations against the necessity of providing Gretencord with a fair opportunity to make his case.

Gretencord's response to the first portion of my April 1, 1999 Order was vague, poorly organized and difficult to follow. Instead of specifically listing each and every protected disclosure, as I had expected when issuing the order, Gretencord attempts to incorporate his original complaint by reference. However, I had previously informed Gretencord that merely referring to his previous submission to the IG would not suffice to meet the requirements of my order. The 46 page hand-written Complaint that Gretencord had filed with the IG was too long and too general in scope for the purposes of the present proceeding. By failing to provide a sufficient response to my order, Gretencord has waived his opportunity to provide the trier of fact with his itemization of protected disclosures. Accordingly, I am granting, in part, West Valley's Motion to Dismiss. Specifically, I am dismissing all allegations of protected disclosure that are not among the 15 alleged protected disclosures that I found in my review of the Report of Investigation. Since many of these alleged protected disclosures are well documented and clearly articulated in the Report, they provide West Valley with sufficient notice of Gretencord's allegations of protected disclosures. Specifically, the Report and its accompanying documentation contain the following protected disclosure allegations:

Protected Disclosure Allegation No. 1

Mr. David Crouthamel indicates that Gretencord "wrote several requests for corrective action (RCA) and non-conformance reports (NR) . . . [i]ncluding one report 93-N-117, which involved the labeling of electrical junction boxes in the 'tank farm.'" Exhibit 5 to Report of Investigation. Several other references to this protected disclosure are contained in the Report and its accompanying documentation.

Protected Disclosure Allegation No. 2

Gretencord alleges to several West Valley employees that an engineer had "penciled" down electrical leads with a knife to get them to fit a small terminal. Exhibit 7 to Report of Investigation.

Protected Disclosure Allegation No. 3

Mr. Dave Dempster indicates that Gretencord made a disclosure involving a faulty fire hydrant and sprinkler system with an incorrectly installed valve. Exhibit 8 to Report of Investigation.

Protected Disclosure Allegation No. 4

Gretencord reports alleged violation of the National Electrical Code in the Natural Gas Treatment Building to Dave Dempster. *Id.*

Protected Disclosure Allegation No. 5

Gretencord expresses concerns about alleged vitrification training deficiencies. Exhibit 9 to Report of Investigation.

Protected Disclosure Allegation No. 6

Gretencord expresses concern about installation of a camera in the vitrification facility, as reported to Mr. Timothy Jackson on February 20, 1997. Exhibit 10 to Report of Investigation.

Protected Disclosure Allegation No. 7

Timothy Jackson indicates that during April 1993, Gretencord expressed a concern about the allegedly improper calibration of torque wrenches. *Id.*

Protected Disclosure Allegation No. 8

Timothy Jackson indicates that Gretencord filed a Quality Clarification Report on January 1, 1993. *Id.*

Protected Disclosure Allegation No. 9

Gretencord reports to Timothy Jackson his concern about the replacement of crane bolts with a different grade of bolt than required. *Id.*

Protected Disclosure Allegation No. 10

Timothy Jackson reports that Gretencord made a formal Employee Concerns Disclosure to him on July 25-26, 1995. *Id.*

Protected Disclosure Allegation No. 11

Gretencord files an Employee Concern about an engineer drinking alcohol at lunch. Exhibit 15 to Report of Investigation.

Protected Disclosure Allegation No. 12

Gretencord alleges time sheet fraud. *Id.*

Protected Disclosure Allegation No. 13

Mr. John Volpe reports that in 1995-96 Gretencord alleged that records pertaining to the purchase of defective punches had been falsified. Exhibit 16 to Report of Investigation.

Protected Disclosure Allegation No. 14

Mr. Volpe recalls that in late 1996, Gretencord disclosed a concern about radiation exposure recordings. *Id.*

Protected Disclosure Allegation No. 15

Memo to file from D.L. Dempster, dated 2-21-97, indicates that Gretencord planned to take an Employee Concern to DOE.

These factual disputes should be resolved through further development of the record. Therefore, Gretencord will be afforded an opportunity to develop these allegations during discovery. However, since Gretencord's other allegations of protected disclosures are too vague and not documented well enough to enable West Valley to formulate its defense they are dismissed with prejudice.

Gretencord's response to the second portion of my order, which required him to specifically list "the retaliatory acts allegedly conducted against him," is much clearer. Gretencord clearly alleges that he was threatened, slapped, screamed at, personally and professionally discredited, cursed, unfairly reviewed, denied appropriate pay raises, suspended and then fired in retaliation for his protected disclosures. Gretencord's Response at pages 1 and 2. These allegations provide a sufficient basis for further development during discovery. Accordingly, I reject West Valley's claim that Gretencord failed to respond to the second portion of my order.

Similarly, I conclude that Gretencord has provided an adequate response to the third portion of my order, which required him to specifically list "the remedies he is requesting." Gretencord's Response requests that all personally derogatory statements be removed from his personnel records, and further requests compensation for lost wages, compensation for lost benefits, compensation for lost earnings potential and compensation for relocation expenses. *Id.* at 2. Accordingly, I reject West Valley's claim that Gretencord failed to respond to the third portion of my order.

B. Whether Gretencord Has Failed to State a Claim for Which Relief Can Be Granted.

West Valley also contends that Gretencord has failed to state a claim for which relief can be granted. I disagree. Under the DOE's Whistleblower Protection Regulations:

The employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. 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 without the employee's disclosure, participation, or refusal.

10 C.F.R. § 708.29. Gretencord claims and the IG found that he made a number of protected disclosures. The Report of Investigation cites more than enough evidence to create several disputed issues of fact concerning protected disclosures.

Moreover, Gretencord alleges numerous retaliatory acts. The record shows that a number of negative personal actions occurred during Gretencord's tenure with West Valley. These negative personal actions include several letters of remand, poor performance evaluations and a suspension and eventually an involuntary termination.

In most Whistleblower cases, it is difficult or impossible for a complainant to find a "smoking gun" that proves an employer's retaliatory intent. Therefore, Congress and the Courts, recognizing this difficulty, have found that a protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personal action." *Ronald A. Sorri*, 23 DOE ¶ 87,503 (1993) citing *McDaid v. Department of Hous. and Urban Dev.*, 90 FMSR ¶ 5551 (1990); see also *County v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (*County*). In addition, the Courts have found that "temporal proximity" between a protected disclosure and an alleged reprisal is "sufficient as a matter of law to establish the final required element in a prima facie case for retaliatory discharge." *County*, 886 F. 2d at 148 (8th Cir. 1989).

Applying the above principles to the present case, I find that since the record contains evidence supporting an inference that Gretencord made numerous protected disclosures during his tenure at West Valley, and since a large number of negative personal actions also occurred during this time period, the closeness between the protected disclosures and the negative personnel actions is sufficient to establish a *prima facie* case. I therefore find that West Valley has not shown that Gretencord has failed to state a claim for which relief can be granted. Accordingly, this aspect of West Valley's motion shall be denied.

III. Conclusion

For the reasons set forth above, I have granted in part the Motion to Dismiss filed by West Valley Nuclear Services Co., Inc. on April 27, 1999. The Motion, is however, denied in all other aspects.

It Is Therefore Ordered That:

- (1) The Motion to Dismiss filed by West Valley Nuclear Services Co., Inc., on April 27, 1999, Case No. VWZ-0010, is granted in part as set forth in Paragraph 2 below. In all other respects, the Motion is denied.
- (2) To the extent that the present Complaint, on which a hearing has been requested in Case No. VWA-0033, is based upon alleged protected disclosures that are not among the 15 alleged protected disclosures enumerated above, it is dismissed with prejudice.
- (3) This is an Interlocutory Order of the Department of Energy.

Steven L. Fine

Hearing Officer

Office of Hearings and Appeals

Date: May 12, 1999