

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Stacey Kittner)
)
Filing Date: June 15, 2015)
_____)

Case No.: WBU-15-0007

Issued: July 7, 2015

Decision and Order

Stacey Kittner (Ms. Kittner), a former employee of Sandia National Laboratories (Sandia), appeals the dismissal of a whistleblower complaint that she filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. The National Nuclear Security Administration’s (NNSA) Whistleblower Program Manager (the Manager) dismissed the complaint on June 4, 2015. As explained below, NNSA’s dismissal of the Complaint is upheld in some aspects, overturned in another aspect, and the Appeal is remanded to the Manager for further processing in accordance with the instructions set forth below.

I. Regulatory Background

The DOE’s Contractor Employee Protection Program (CEPP) 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 CEPP 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 employee may appeal such a dismissal to the OHA Director. 10 C.F.R. § 708.18. In reviewing cases such as this, we consider all materials in the light most favorable to the party opposing the dismissal. *See Billie Joe Baptist, OHA Case No. TBZ-0080*, at 5 n. 13 (May 7, 2009) (*citing Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)).

II. Procedural Background

In 2009, Ms. Kittner filed an Equal Employment Opportunity (EEO) complaint against her former employer, the Department of Defense (DOD EEO Complaint). Complaint at 2. On August 29, 2011, she accepted a position at Sandia as a senior member of the technical staff. On September 8, 2014, Sandia placed Ms. Kittner on an “Action Plan for Improved Performance” (APIP). Complaint at 5.

On December 18, 2014, Ms. Kittner filed a Charge of Discrimination with the New Mexico Department of Workforce Solutions’ Human Rights Bureau (New Mexico Complaint) and the Federal Equal Employment Opportunity Commission (EEO Complaint), in which she alleged: “I believe I am being discriminated against due to my sex (female) . . . I also believe that I am being retaliated against for filing a civil lawsuit against the DOD regarding sexual harassment . . .” Appeal at Attachment E, Page 6.

On February 16, 2015, Sandia terminated Ms. Kittner.

III. The Complaint

On May 18, 2015, Ms. Kittner filed a Complaint under Part 708 with the Manager. Letter dated June 15, 2015, from Michelle Rodriguez de Varela, NNSA Whistleblower Program Manager to Poli Marmolejos, Director, Office of Hearings and Appeals. In her Complaint, Ms. Kittner alleges that in April 2012, Sandia managers became aware of her EEO actions against her previous employer and began harassing her in retaliation. Complaint at 2-3. She alleges that she brought this alleged retaliation to the attention of her senior managers in April 2012, and to Sandia’s Human Resources Department in June 2012 and September 2014. Ms. Kittner further claims that these allegations were the subject of an ethics investigation conducted by Sandia from March 2013 through May 2013, in which she “participated.” Complaint at 3.

Ms. Kittner also alleges that, on September 17, 2014, she contacted at least three United States Senators to “report . . . violations of Sandia policy in its treatment of her *as well as being instructed to destroy information that supported a year-long government project.*” Complaint at 3, 5 (emphasis supplied). Ms. Kittner contends that as a result of her alleged protected disclosures, Sandia, in 2012, “began a course of escalating hostile acts designed to harass and intimidate [her] and/or decrease her job satisfaction and performance in an attempt to drive her away from her employment” and that eventually led to her wrongful termination. Complaint at 4.

On some unspecified date, Sandia filed a Motion to Dismiss the Part 708 Complaint with the Manager. In its Motion to Dismiss, Sandia argued principally that Ms. Kittner's Complaint should be dismissed because she “is pursuing remedies in other venues under Title VII and other laws.” Sandia’s Motion to Dismiss at 2. In support of this contention, Sandia cited Ms. Kittner’s December 18, 2014, New Mexico Complaint and EEO Complaint, and a February 17, 2015, Evidence Preservation Letter from Ms. Kittner’s counsel indicating that they were representing Ms. Kittner in her claims against Sandia for discrimination, retaliation, and wrongful termination. Sandia’s Motion to Dismiss at 2.

On June 4, 2015, the Manager dismissed the Complaint, finding that NNSA did not have jurisdiction to consider the Complaint under 10 C.F.R. Part 710, stating in pertinent part:

Since [Ms. Kittner] has filed in another forum with respect to the same facts that were filed with this office and 10 CFR §708.15(a) does not allow [her] to pursue a remedy under Part 708 if [she has] an action involving the same facts pending in another forum. [Ms. Kittner] must choose the remedy she wishes to pursue. As [Ms. Kittner] has elected to pursue this matter under other applicable law, [Ms. Kittner's] whistleblower complaint is dismissed per §708.17(c)(3).

Dismissal at 1.¹

On June 15, 2015, Ms. Kittner filed the present Appeal, contending that the Dismissal was erroneous for three reasons:

(1) Sandia committed procedural error [because she] was never given a chance to respond to [its] “Motion to Dismiss” prior to the dismissal; (2) the ECP made clear factual error determining the Complainant had filed with the EEO when she has never filed with the EEO challenging her termination; and (3) [*Gilbert J. Hinojos*, TBZ-0003 (2003) (*Hinojos*)] sets straightforward legal precedent allowing the Complainant to proceed as she has with a prior EEO matter and yet seek relief for other subsequent adverse actions based on Part 708 grounds.

Appeal at 1-2.

IV. Analysis

The CEPP regulations provide that the Manager *may* dismiss a complaint for “lack of jurisdiction or for other good cause . . . either on his or her own initiative or at the request of a party named in your complaint . . .” 10 C.F.R. § 708.17. The CEPP regulations specifically provide that “Dismissal for lack of jurisdiction or other good cause is appropriate if . . . [the Employee] filed a complaint under State or other applicable law with respect to the same facts as alleged in a complaint under this regulation.” 10 C.F.R. § 708.17(c)(3). 10 C.F.R. § 708.4(a) specifically provides that an employee “may not file a complaint . . . based on race, color, religion, sex, age, national origin, or other similar basis” in a Part 708 proceeding.

Ms. Kittner’s Part 708 claim is not based on the same set of facts as the New Mexico or EEO Complaints, which assert that the motivation for Sandia’s actions was sex-based discrimination, and retaliation for her filing of the DOD EEO Complaint. In contrast, Ms. Kittner’s Part 708

¹ Ms. Kittner contends that the Manager violated her procedural rights by granting Sandia’s Motion to Dismiss, without providing her an opportunity to respond to it. Appeal at 1. This assertion is without merit. While section 708.16(a) requires the Manager to provide Sandia with a copy of the Complaint, and allowed Sandia 10 days to “submit any comments it wishes to make regarding the allegations in the Complaint,” the regulations do not provide an obligation upon the Manager to obtain a response from Ms. Kittner before making its jurisdictional ruling. Accordingly, the Manager did not violate Ms. Kittner’s procedural rights as asserted in her Appeal.

Complaint is based upon her allegations that Sandia has retaliated against her for reporting hostile working conditions to Sandia officials and members of Congress, and her reporting to Congress that she was instructed by her supervisors at Sandia to destroy information that supported a year-long government project. Ms. Kittner's Part 708 Complaint is also based upon additional acts of alleged retaliation which occurred subsequent to her Charge of Discrimination filing, including her termination.² Because the facts are not identical in the filings, the Manager's reliance upon Section 708.17(c)(3) is misplaced.

Nevertheless, it is well settled that the CEPP does not cover complaints based upon retaliation for filing EEOC complaints. 10 C.F.R. § 708.4(a); *Gilbert J. Hinojos*, TBZ-0003 (2003) (*Hinojos*) (finding that alleged acts of retaliation based upon retaliation for making EEOC complaints are barred from consideration pursuant to section 708.4). Ms. Kittner's Part 708 Complaint is clearly based upon her assertions that Sandia was retaliating against her for reporting alleged harassment that resulted from her filing the DOD EEO Complaint. Accordingly, that part of the Part 708 Complaint which is based upon her disclosures of alleged retaliation for disclosing alleged retaliation against her for filing the DOD EEO Complaint is barred under 10 C.F.R. § 708.4(a).³

Ms. Kittner's allegation that she was "instructed to destroy information that supported a year-long government project," could conceivably constitute a protected disclosure under 10 C.F.R. § 708.5 if more details had been provided about the alleged disclosure. However, the Complaint did not provide sufficient information for anyone to evaluate whether the protected disclosures come within the ambit of Part 708. Our previous cases have held that once a DOE field element has determined that a complaint filed under Part 708 fails to include all the information required under section 708.12, it should provide the complainant with an opportunity to make all the statements necessary to constitute a good filing and to correct deficiencies before a complaint is dismissed. *Earl Ballard*, Case No. WBU-13-0014 (*Ballard*); *Clint Olson*, Case No. TBU-0027 (2004); *see also* Questions and Answers for DOE Field Elements Concerning Jurisdictional Issues Under 10 C.F.R. Part 708.⁴ Accordingly, we are remanding this matter to the Manager, who should provide Ms. Kittner with an opportunity to show that her alleged reports to Congress

² Ms. Kittner contends that the Manager "made clear factual error determining the Complainant had filed with the EEO when she has never filed with the EEO challenging her termination." Appeal at 1-2.

³ Ms. Kittner contends that "*Hinojos* sets straightforward legal precedent allowing the Complainant to proceed as she has with a prior EEO matter and yet seek relief for other subsequent adverse actions based on Part 708 grounds." However, Ms. Kittner misapplies *Hinojos*. In *Hinojos*, an employee filed a Complaint under Part 708, claiming he had been retaliated against by a contractor for previously filing two EEO complaints. The employee was terminated subsequent to filing his Part 708 Complaint. The OHA Administrative Judge (AJ), citing 10 C.F.R. § 708.4(a), barred those portions of the employee's Complaint that were based upon his assertions that he was retaliated against for filing the two EEO complaints. However, the AJ found that the employee may proceed under Part 708, with that portion of his Complaint based upon his assertion that the contractor retaliated against him for filing the Part 708 Complaint. The key distinction between the facts in *Hinojos* and the facts in the present case being that Mr. Hinojos had filed his Part 708 Complaint prior to his termination, while Ms. Kittner filed her Complaint after being terminated by Sandia.

⁴ The OHA may then consider jurisdictional issues more fully as the facts are developed in the investigation and hearing stages. In making jurisdictional determinations, managers should keep in mind that they are making only a preliminary determination as to whether further processing is warranted. They are not charged at this early stage of the proceeding with making a final assessment about the merit of the overall complaint. *See Olson*.

that Sandia managers instructed her to destroy information relating to a year-long government project, constituted protected disclosures under 10 C.F. R. § 708.5.

V. Conclusion

We have found that the portion of Ms. Kittner's Complaint concerning her contention that she was retaliated against for reporting retaliation to Sandia officials and Congress based upon her previous filing of the DOD EEO Complaint is not within the jurisdiction of the Part 708 regulations. However, because we have found that the Manager did not provide Ms. Kittner with an opportunity to clarify allegations concerning the alleged destruction of documents before dismissing it, we are remanding this matter to the Manager for further processing. On remand, the Manager should provide Ms. Kittner with a reasonable opportunity to supplement those portions of her Complaint that concern her allegations that Sandia managers instructed her to destroy information that supported a year-long government project, and then continue to process her Complaint in accordance with Part 708.

It Is Therefore Ordered That:

(1) The Appeal filed by Stacey Kittner (Case No. WBU-15-0007) is hereby granted, in part as set forth above, remanded to the National Nuclear Security Administration's Whistleblower Program for further processing as set forth in 10 C.F.R. § 708.21, and is denied in all other aspects.

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

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 7, 2015