United States Department of Energy
Office of Hearings and Appeals

In the Matter of: Krisna Johnson)
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Filing Date: June 7, 2022) Case No.: WBH-22-0002
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Issued: September 1, 2022

Motion For Summary Judgement
Initial Agency Decision

Steven L. Fine, Administrative Judge:

This Decision considers a Motion for Summary Judgement filed by Savannah River Nuclear Solutions, LLC (SRNS) on August 15, 2022 (the Motion) concerning the Complaint(Complaint) filed by Ms. Krisna Johnson against SRNS under the Department of Energy's (DOE) Contractor Employee Protection Program and its governing regulations set forth at Part 708 of Title 10 of the Code of Federal Regulations (Part 708). For the reasons set forth below, the Motion is granted.

I. Background

A. The Contractor Employee Protection Program

DOE's Contractor Employee Protection Program 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. *See* Criteria and Procedures for DOE Contractor Employee Protection Program, 57 Fed. Reg. 7,533 (Mar. 3, 1992). Its primary purpose is 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 Part 708 regulations prohibit DOE contractors from retaliating against an employee because that employee has engaged in protected conduct, such as disclosing information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation, a substantial and specific danger to employees or to public health or safety, or fraud, gross mismanagement, gross waste of funds, or abuse of authority. 10 C.F.R. § 708.5(a). Protected conduct also includes participating in the Part 708 process. *Id.* § 708.5(b). Available relief includes reinstatement, back pay, transfer preference, and such other relief as may be appropriate. *Id.* § 708.36.

Employees of DOE contractors who believe they have been retaliated against in violation of the Part 708 regulations may file a whistleblower complaint with DOE and may be entitled to an investigation by the Office of Hearings and Appeals (OHA), followed by an appearance before an OHA Administrative Judge, and an opportunity for review of the Administrative Judge's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.22, 708.28, 708.32.

While the Part 708 regulations do not establish a standard of review for motions for summary judgment, OHA has consistently resolved such motions in a manner consistent with the Federal Rules of Civil Procedure. *See, e.g.*, *Edward G. Gallrein, III*, OHA Case No. WBA-13-0017 at 5 (2014). Rule 56(a) of the Federal Rules provides for "summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(a). In considering whether the moving party has met its burden under the Federal Rules, the trier of fact is to draw all inferences from the facts in a light most favorable to the non-moving party. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). However, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986).

B. Procedural Background

Ms. Johnson filed the present Complaint on November 16, 2021. SRNS responded to the Complaint on December 6, 2021. On March 14, 2022, Ms. Johnson informed DOE's Employee Concerns Program (ECP) that she wanted to proceed with an investigation and hearing on her complaint. The OHA received Ms. Johnson's Complaint on March 16, 2022, and the OHA Director appointed an OHA attorney (the Investigator) to investigate the allegations set forth in the Complaint. The Investigator issued a Report of Investigation (ROI) concerning the Complaint on May 26, 2022. The OHA Director then appointed me as the Administrative Judge in this case.

On June 7, 2022, SRNS filed a motion to dismiss. On July 19, 2022, I issued an Interlocutory Decision (the ID) granting SRNS's motion in part. *In the Matter of Krisna Johnson*, OHA Case No. WBH-22-0002 (July 19, 2022) (the ID). In the ID, I dismissed several of Ms. Johnson's allegations of retaliation because they were time-barred under 10 C.F.R. § 708.15(a).[1] *Id.*at 7. However, I found that Ms. Johnson had engaged in *per se* protected conduct under 10 C.F.R.

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[1] In the ID, I further found that genuine issues of material fact may exist concerning Ms. Johnson's allegations that she made protected disclosures concerning SRNS's implementation of its COVID-19 protocols and that she reported to her managers that a colleague who was assigned to train her was chasing down animals with a company vehicle. I found that it was possible that, with further explanation and development of these issues through discovery, she might be able to meet her burden on these issues and therefore concluded that it was not appropriate at that time to dismiss those parts of Ms. Johnson's Complaint based on these allegations. Ms. Johnson did not avail herself of the opportunity to conduct discovery and therefore did not further explain or develop these issues through that process. However, as one of her hearing exhibits submitted on August 24, 2022, Ms. Johnson has submitted a photograph of a Email she wrote to Willie Bell on June 25, 2021, in which she reports her concerns about COVID-19 safety alleges that a colleague had chased deer with a company vehicle. These alleged protected disclosures, however, do not affect my analysis, since I have found that SRNS has met its burden of showing that it would have issued the second CA in the absence of Ms. Johnson's protected activity.

§ 708.5(b), by filing her complaint under 10 C.F.R. Part 708 on November 16, 2021. ID at 5. I further found that one alleged act of retaliation, the second Corrective Action[2] (CA) that SRNS issued to Ms. Johnson on December 16, 2021, was not time-barred. ID at 7. I further concluded, in pertinent part:

> Because SRNS issued the second CA to Ms. Johnson one month after Ms. Johnson filed her Complaint, there exists temporal proximity between her protected conduct and issuance of the second CA. If Ms. Johnson can show that the second CA affected her compensation, terms, conditions, or privileges of employment, and that the individual or individuals who made the decision to issue the second CA to her had actual or constructive knowledge of her Complaint, she may be able to meet her initial burden of proof and therefore shift the burden to SRNS to prove by clear and convincing evidence that it would have issued the second CA to Ms. Johnson regardless of whether she had filed the Complaint.

ID at 7 (footnotes omitted). I further found that "a genuine issue of material fact exists as to whether the CA has had an impact upon the compensation, terms, conditions, or privileges of Ms. Johnson's employment." ID at 7, n.6.

On July 26, 2022, I issued an order scheduling the hearing for this case for September 6-9, 2022. In that order, I allowed the parties to engage in discovery, pursuant to 10 C.F.R. § 708.28(b)(1). I further stated in pertinent part: "There is no need for the parties to include me in the discovery process, unless there is an unresolvable issue, and no need for parties to enter their discovery correspondence into the record, unless a formal dispute arises. Any Motions to Compel Discovery must be filed by the close of business on August 5, 2022. Discovery must be concluded by August 12, 2022." July 26, 2022, Order at 2. (emphasis removed).

On July 27, 2022, SRNS served Ms. Johnson with Requests for Production, Interrogatories, and Request for Admission (RFAs). Motion Ex. A at 7; Motion Ex. B at 8; Motion Ex. C at 5. Ms. Johnson failed to respond to or answer any of SRNS's Requests for Production or Interrogatories. Motion at 2. Ms. Johnson's only response to SRNS's discovery requests came on July 27, 2022, when she objected to six of SRNS's 12 RFAs. Motion Ex. D at 1. Ms. Johnson failed to admit or deny the other six RFAs. Motion Ex. D at 1. Ms. Johnson did not serve SRNS with any discovery requests.

II. Analysis

On August 15, 2022, SRNS filed the present motion in which it asserts that it issued the second CA to Ms. Johnson for cause, and without regard to Ms. Johnson's filing of her Part 708

[2] The terms "Corrective Action" and "Corrective Contact" have been used interchangeably by the parties in this proceeding. In this decision, I use the term "Corrective Action" which I have abbreviated as "CA."

Complaint.[3] It is well settled that several factors may be considered in determining whether an employer has shown, by clear and convincing evidence, that it would have taken the alleged act of retaliation against an employee in the absence of that employee's protected conduct. Among those factors are the strength of the employer's reasons for the personnel action other than the protected conduct, the strength of any motive to retaliate for the protected conduct, and whether the employer has treated the employee more strictly than other employees who were similarly situated but had not engaged in protected conduct. *Anthony T. Rivera*, OHA Case No. WBA-17-0010 at 24 (citing *Kalil v. Dep't of Agric.*, 479 F.3d 821, 824 (Fed. Cir. 2007)).

As discussed below, the record contains strong evidence that Ms. Johnson had serious attendance and tardiness issues which greatly detracted from her effectiveness as an employee. Moreover, the action taken by SRNS, the issuance of the second CA, was clearly a measured response, which was inconsistent with a retaliatory intent, and clearly in line with SRNS's treatment of other employees with similar attendance and tardiness issues.

SRNS contends in the Motion that it issued the second CA to her to address her attendance and tardiness issues, and that Ms. Johnson has admitted that fact.[4] On August 22, 2022, Ms. Johnson responded to the Motion, stating:

> I would like to object to the motion for summary judgment. The questions that were ask in the discovery were not only about protected and unrelated matters, such as me having COVID, it is direct proof of retaliation. The retaliation that because I used the COVID Hotline more than the management deemed necessary (which is protected and determined by medical and the war room) that I was a bad employee who deserved whatever I got because I was never there. They added into my attendance when it had nothing to do with the lack of investigation of my mistreatment.

Employee's Response to Motion for Summary Judgment.[5] (errors in the original).

A. Ms. Johnson Admitted that SRNS Issued the CA to Address Ms. Johnson's Attendance and Tardiness Issues

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[3] If a contractor can prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, judgment must be entered in its favor regardless of the employee's ability to establish a *prima facie* case. 10 C.F.R. § 708.29.

[4] The Motion also contends that the decision to issue the second CA was made during a Disciplinary Panel Meeting (DPM) meeting that occurred before the Individual filed her Complaint on that same that day and therefore could not have been motivated by the Individual's Complaint. I find that genuine issues of material fact exist concerning when SRNS made the decision to issue the second CA and whether SRNS had constructive knowledge of the Complaint when it did so. While Ms. Johnson could shift the burden of proof to SRNS by showing that the SRNS officials who decided to issue the second CA to her knew of her Complaint when making that decision, SRNS has met that burden by showing, by clear and convincing evidence, that it would have issued the CA in the absence of the Complaint.

[5] I have quoted Ms. Johnson's response in its entirety.

Among the six RFAs that Ms. Johnson failed to respond to was RFA No. 6, which states: "Admit that [the second CA] was issued to address attendance and tardiness issues, of which, you had already been coached and mentored about." Motion Ex. C at 3.

In the present Motion, SRNS, citing Federal Rule of Civil Procedure 36, Requests for Admission (Rule 36), contends that Ms. Johnson, by failing to admit, deny, or object to RFA No. 6, admitted that SRNS had issued the CA to address her attendance and tardiness issues. Motion at 5. Rule 36 provides, in pertinent part, that "[a] matter is admitted unless . . . the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney." FRCP 36(a)(3). Rule 36 further provides: "A matter admitted under this rule is conclusively established . . . ." FRCP 36(b).

While I am not bound by the Federal Rules of Civil Procedure, I find that the rule established by Rule 36 is an appropriate one in the context of the present proceeding. The Part 708 regulations recognize that discovery is an important component of meaningful administrative proceedings and due process. Accordingly, Part 708 provides Administrative Judges with the discretion to "order discovery at the request of a party, based on a showing that the requested discovery is designed to produce evidence regarding a matter, not privileged, that is relevant to the subject matter of the complaint." 10 C.F.R. § 708.28(b)(1). Part 708 specifically permits the use of requests for admission. 10 C.F.R. § 708.28(b)(2). The discovery process would be rendered meaningless if parties were not required to respond to appropriate requests, without showing that there existed a good reason for failing to respond. Without appropriate and meaningful consequences for a parties' failure to respond to a request for admission, there would be no point in allowing for their use. Accordingly, it is appropriate and fair that the precedent of Rule 36 be followed and that I find that Ms. Johnson's failure to admit, deny, or object to RFA No. 6 constitutes an admission which conclusively establishes that the second CA was issued to Ms. Johnson to address her attendance and tardiness issues, and that she had been previously coached and mentored for those same issues.

B. The Record Supports SRNS's Contention that Its Decision to Issue the December 16, 2021, Corrective Action to Ms. Johnson Was Not Motivated by Retaliatory Intent.

In addition to Ms. Johnson's admission that SRNS issued the second CA because of her attendance and tardiness issues, SRNS has submitted evidence showing that Ms. Johnson had a notable history of attendance and tardiness issues for which she had been previously (1) counseled in August 2020, when SRNS issued an Informational Contact (IC) to her,[6] and (2) disciplined on March 26, 2021, when SRNS had issued the first CA to her.[7] Hearing Ex. B at 1-2.

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[6] The August 2020, IC was issued after Ms. Johnson had only been employed for two weeks, and among other issues, discussed two occasions during her first two weeks of employment when Ms. Johnson failed to report on time. Hearing Ex. B at 5.

[7] The March 26, 2021, CA states, in pertinent part:

> This corrective contact is being given to you due to issues with communication regarding absences and your inability to manage your vacation and time off without pay. Since your hire on 8/10/20 your recorded Regular hours worked are 54.7% of your total hours. You used all of your FY21

Moreover, the record clearly shows that SRNS was contemplating disciplinary action against Ms. Johnson prior to her filing of the Complaint. Ms. Johnson's disciplinary file indicates that, on November 11, 2021, Ms. Johnson was invited to attend the DPM on November 16, 2021, for the purpose of allowing her to present her case regarding her "insubordination, excessive excused/unexcused absences/tardiness, conduct unbecoming an M&O Contractor employee, and inappropriate or improper actions or gestures that could cause an adverse reaction on the part of other employees." Hearing Ex. B at 16. One month after the DPM and the filing of the Complaint, which occurred later that day, SRNS issued the second CA, in which it stated:

> Inconsistent communication regarding your absences and inability to effectively manage your vacation and time off without pay continues to be unacceptable. Since you received a corrective contact in March 2021 for the same issue, you have taken 78.2 hours of time off without pay and 61.06 of vacation personal time. This corrective contact serves as written notification to inform you that use of time off without pay and taking time off that has not been pre-authorized will be considered an unauthorized absence and is in violation of the SRNS Rules of Conduct, 5B, Procedure 1-4, section 5.1, J, which states "Unauthorized absence and/or excessive excused/unexcused absences from work assignment may warrant disciplinary action, up to and including termination of employment."

Hearing Ex. B at 20.

SRNS has also submitted attendance records from Ms. Johnson's workgroup corroborating its assertions that Ms. Johnson had a poor attendance record, and a spreadsheet showing that, from January 26, 2017, through March 29, 2022, SRNS had issued corrective actions for attendance issues to at least 13 employees and had terminated four employees for excessive absenteeism. SRNS also submitted an email from July 2021, indicating that Ms. Johnson had contacted the manager on duty by telephone to inform him that she was going to be a couple of hours late since she was attending a dinner party for her birthday. Ex. C; Ex. K; Ex. L. In addition, SRNS submitted copies of the applicable portions of its Human Resources Manual showing that it did not deviate from its established procedures in issuing the second CA to Ms. Johnson. Ex. D: Ex. E; Ex. F; and Ex. G.

> accrued and un-accrued vacation (160 Hours) by 11/19/20 and have taken 100.7 hours of Excused Time Off Without Pay . . . On multiple occasions in the past year your management team has discussed with you the importance of timely communications regarding absences. On 2/8 and 3/9 when you were being paid by SRNS for quarantined time off, your shift operations manager (SOM) had to call you multiple times to reach you to tell you that medical had declared you fit for duty and that you were expected to report to work. In both cases you did not report when cleared and chose to tell your SOM that you would take time off without pay. Time off without pay is only allowed if requested and approved per the 5B Human Resources Manual, Procedure 3-14 Company Paid Absences and Leave of Absences, Section 5.8 Other Absences (Nonexempt and SOP). During your Training Information contact discussion in January, you were told that time off must be Requested and not told to management. Although we know you cannot predict emergencies, it is expected that you will schedule all appointments on your time off and arrange for any dependent care needs ahead of time and make every effort to be at work when healthy to do so.

Hearing Ex. B at 2.

On the other hand, Ms. Johnson, who did not take the opportunity to conduct discovery, has not submitted any evidence, other than her own allegations, challenging the factual basis upon which the second CA is based, showing that she had received disparate treatment for absences and tardiness, or otherwise indicating that SRNS was treating her any differently than other employees with similar attendance and tardiness issues.

Accordingly, there is clear and convincing evidence in the record indicating that SRNS would have issued the second CA to Ms. Johnson in the absence of her Complaint.

III. Conclusion

The record shows that there is clear and convincing evidence that Savannah River Nuclear Solutions, LLC, would have issued the December 16, 2021, Corrective Action to Ms. Johnson in the absence of her protected conduct. Accordingly, I find that SRNS's Motion for Summary Judgement is granted.[8] Because judgment has been rendered in SRNS's favor, Ms. Johnson's Complaint is denied, SRNS's Motion for an In-Person Hearing is mooted, and the hearing scheduled for September 6, 2022, through September 9, 2022, is cancelled.

It Is Therefore Ordered That:

(1) The Motion for Summary Judgment filed by Savannah River Nuclear Solutions, LLC, is granted.

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[8] During a Pre-hearing Conference held on August 30, 2021, Ms. Johnson claimed that the DPM was held in retaliation for protected disclosures she made during a meeting with SRNS Investigator William Carter in July of 2021. She further claimed that she had previously alleged that she had made these protected disclosures. However, she had not specifically raised this allegation previously. The allegation is not included in the Complaint, in which Mr. Carter is only mentioned twice. The only mention of Mr. Carter states: "I reported all claims to Willie Bell again and was told that I would have an anonymous meeting with investigator Bill Carter." Complaint at 3. No discussion of any disclosures made to Mr. Carter appears in the ROI. On June 8, 2022, I wrote the parties a letter in which I directed Ms. Johnson to provide "[a] list of each protected disclosure that she claims has resulted in SRNS taking a retaliatory action against her," requiring that any alleged disclosures "be described with specificity," and to include "the date on which the alleged protected disclosure was made, and the name of each individual to whom the alleged protected disclosure was made." June 8, 2022, Letter from Steven L. Fine, Administrative Judge to R. Jackson Cooper, Counsel for SRNS and Krisna Johnson at 2. Ms. Johnson responded to this request on June 24, 2022, however, her response did not include a list of protected disclosures as I directed. Ms. Johnson did, however, argue that her claims should not be time-barred under 10 C.F.R. § 708.15(a), stating, in pertinent part:

> Additionally, I went through the process and proper channels to report the mistreatment. I spoke with William Carter in the Office of General Counsel in June 2021. I reported all actions and he did not come back with his findings until October 2021. These situations all pushed back the filing of the 708.

Ms. Johnson's June 24, 2022, Response at 1. Accordingly, the record does not support Ms. Johnson's eleventh-hour assertion that she had previously alleged specific disclosures to Mr. Carter. Most importantly, assuming for the purpose of argument that Ms. Johnson did make these alleged protected disclosures to Mr. Carter, that the members of the DMP were aware of those disclosures, and that the DMP meeting resulted in the issuance of the second CA, as alleged by Ms. Johnson, those facts would not change my conclusions, since the end result of the DMP meeting was the issuance of the second CA which I have found would have been issued in the absence of protected conduct.

(2) The Complaint filed by Krisna Johnson under 10 C.F.R. Part 708 is hereby denied.

(3) This is an Initial Agency Decision, which shall become 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, in accordance with 10 C.F.R. § 708.32.

Steven L. Fine
Administrative Judge
Office of Hearings and Appeals