Case No. VBZ-0057

November 1, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motions to Dismiss

Name of Petitioner: Janet K. Benson

Date of Filings: April 6, 2000

August 7, 2000

Case Numbers: VBZ-0057

VBZ-0058

This determination considers Motions to Dismiss(1) filed by Lawrence Livermore National Laboratory (Laboratory)(2) under the Department of Energy's (DOE's) Contractor Employee Protection Program, 10 C.F.R. Part 708. In these Motions, the Laboratory contends that the claims asserted by Janet Benson in OHA Case No. VWA-0044 are defective as a matter of law and should not be determined on the merits.(3)

The Laboratory makes the following arguments in support of these Motions:

> (1) The Laboratory cannot be held liable for any acts of reprisal that occurred prior to September 23, 1994, the date it agreed to comply with Part 708 (OHA Case No. VBZ-0057);
>
> (2) Because the United States District Court for the Northern District of California entered summary judgment in favor of the Laboratory on claims filed by Ms. Benson under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et. seq. (Title VII), and the Americans with Disabilities Act, 42 U.S.C. §§ 12203 et. seq. (ADA), the doctrine of collateral estoppel precludes Ms. Benson from litigating her claims under Part 708 (OHA Case No.VBZ-0057); and
>
> (3) Ms. Benson's claims concerning protected activities involving Building 415 must be dismissed because these claims were not filed timely or filed in the form that is required by the regulations (OHA Case No. VBZ-0058).

For the reasons detailed below, the Laboratory's Motions will be granted in part and denied in part.

I. THE CONTRACTOR EMPLOYEE PROTECTION PROGRAM

The Contractor Employee Protection Program was designed to protect the employees of DOE contractors who have made good faith disclosures about health, safety or management problems or who have refused to participate in work-related illegal or dangerous activities from acts of reprisal by their employers. See 57 Fed. Reg. 7533 (March 3, 1992).(4)

Part 708 prohibits a covered DOE contractor from discharging, demoting, reducing in pay, coercing, restraining, threatening, intimidating, or otherwise discriminating against an employee because he or she has engaged in activities that are protected under the regulations. 10 C.F.R. § 708.5. Part 708 protects an employee of a DOE contractor who engages in one of three different types of activities. Section 708.5(a)(1) protects an employee of a DOE contractor who discloses information to a DOE official, a member of Congress, or to the contractor (including any higher tier contractor) that the employee believes evidences (a) a violation of any law, rule or regulation, (b) a substantial and specific danger to employees or public health or safety, or (c) fraud, mismanagement, gross waste of funds or abuse of authority.

Section 708.5(a)(2) protects an employee who participates in a congressional proceeding or in a proceeding under Part 708.

Section 708.5(a)(3) protects an employee who refuses to participate in an activity when the employee's participation would constitute a violation of a Federal health or safety law, and, under certain circumstances, when the employee has a reasonable apprehension of serious injury to himself or others and the employee is not required to participate because of the nature of his or her employment responsibilities.

Section 708.9 sets forth the burden of proof for the employee and the employer. In order to prevail under Part 708, an employee must establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. § 708.9(d). If the complainant meets this burden, under Part 708 the burden shifts to the contractor "to prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure. . . ." 10 C.F.R. § 708.9(d). See Ronald Sorri, 23 DOE ¶ 87,503 (1993), citing McCormick on Evidence § 340 at 442 (4th ed. 1992).

The scope of Part 708 is limited. Section 708.5(b) provides that Part 708 will protect an employee of a DOE contractor only if the employee's actions relate to work performed by the contractor for DOE. Moreover, Part 708 does not protect contractor employees from acts of reprisal that result from discrimination on the basis of race, color, religion, sex, age, national origin, or other related reason. 10 C.F.R. § 708.2(b). Additionally, under § 708.2(a), for matters that do not involve health or safety, a contractor is not required to comply with the provisions of Part 708 unless it has signed a contract with DOE in which it has agreed to comply with the DOE Contractor Employee Protection Program. Mehta v. Universities Research Association, 24 DOE ¶ 87,514 (1995).

II. BACKGROUND

On August 4, 1986, the Laboratory hired Ms. Benson to work as a Senior Human Resources Specialist in the Personnel Operations Division of the Human Resources Department. In September of 1989, Ms. Benson transferred to the Education Program Division of the Human Resources Department (Education Division). OIG Exhibit 8.(5) After her transfer to the Education Division, Ms. Benson's office was located in the Almond Avenue School Office. OIG Report.

In 1991, Ms. Benson, working with the Director of the Education Division, obtained a grant from the National Science Foundation (NSF) to fund the National Physics Educational Program Collaboration (NPEPC Program). The NPEPC Program was designed to help retain and increase the number of minority students who were majoring in physics. The Laboratory and the California State University at Hayward (CSUH) jointly administered the NPEPC Program. Ms. Benson was appointed to serve as a "co-principal investigator" of the Program. OIG Report; OIG Exhibit 8.

On May 3, 1994, Ms. Benson filed a Part 708 complaint with DOE's Office of Contractor Employee Protection (OCEP).(6) In this complaint, Ms. Benson indicated that she had made disclosures about possible fraud and mismanagement in the administration of the NPEPC Program, and also alleged that the

Laboratory had retaliated against her for making these protected disclosures by removing her from the position of co-principal investigator of the program.(7) OIG Exhibit 1. At the time that Ms. Benson filed this complaint, the Laboratory had not yet agreed to comply with the provisions of Part 708. OIG Exhibit 3.

On July 13, 1994, Sandra Schneider, the Director of OCEP, sent a letter and a copy of Ms. Benson's Part 708 complaint to Robert W. Kuckuck, Ph.D., a Special Assistant to the President of the University of California. In this letter, Ms. Schneider asked the University to agree to be subject to the provisions of Part 708 in Ms. Benson's case. OIG Exhibit 3.

On September 1, 1994, Dr. Kuckuck indicated that the University would not agree to be subject to the provisions of Part 708 until the contract between the University and DOE had been amended, and that after the amendment of the contract, the University would not agree to the retroactive application of Part 708. OIG Exhibit 4. Soon thereafter, OCEP dismissed Ms. Benson's Part 708 complaint on the grounds that the Laboratory was not subject to the provisions of Part 708. OIG Report.

On September 23, 1994, the Laboratory modified its contract with DOE and agreed to comply with the provisions of Part 708. OIG Exhibit 61.

On or about October 12, 1994, Ms. Benson filed a second complaint under Part 708 with OCEP. In this complaint, Ms. Benson re-alleged the matters that she had raised in the complaint that had been filed in May of 1994, and also claimed that the Laboratory had retaliated against her by re- assigning and demoting her on September 23, 1994, and giving her an unsatisfactory performance appraisal on September 27, 1994.(8) OIG Report; OIG Exhibit 5.

In February of 1995, the Education Division moved from the Almond Avenue School Office to Building 415. Building 415 had been remodeled, and new carpeting was installed. Ms. Benson had a history of allergy problems and had a severe allergic reaction to the new carpets in Building 415. Because of her allergies, Ms. Benson told numerous Laboratory and DOE officials that she was unable to move into the building. For a substantial period of time, the Laboratory's medical staff restricted Ms. Benson from entering Building 415, and the Education Division permitted Ms. Benson to work in an office in a nearby trailer. OIG Report.

On November 29, 1995, at the Laboratory's request, Ms. Benson was evaluated by Abba Terr, M.D., an outside allergist. On December 27, 1995, Dr. Terr issued a report in which he concluded that Ms. Benson would not be able to enter Building 415 without becoming subjectively ill. This conclusion was based on Ms. Benson's severe reaction to Building 415, and Dr. Terr's inability to find objective evidence that Ms. Benson had a medical condition. OIG Exhibit 40.

On June 26, 1995, the management of the Education Division informed Ms. Benson that she was "released from work" and not expected to return because the Education Department was unable to reasonably accommodate her medical restrictions. Whether this action was with or without pay is unclear. OIG Exhibit 34. The management of the Education Division expressed concern that Ms. Benson's health would be at risk if she worked in Building 415 or any place else in the Laboratory, and that the Laboratory would be liable if Ms. Benson became seriously ill. OIG Exhibit 14.

Almost immediately, Ms. Benson reported her release from work to OCEP and to Mark Barnes, the official who served as the Part 708 Coordinator for the DOE Operations Office at Oakland. Ms. Benson told Mr. Barnes that she believed that she was being terminated because she was a whistleblower. In July of 1995, in an effort to investigate Ms. Benson's allegations, Mr. Barnes met with the management of the Education Division and other Laboratory officials. During this meeting, Mr. Barnes commented that Ms. Benson had filed a whistleblower complaint with DOE. OIG Exhibit 71.

By letter dated July 27, 1995, the management of the Laboratory informed Ms. Benson that she had not been terminated, but had been placed on leave with pay. Ms. Benson was also informed that if the

Laboratory was not able to reasonably accommodate her medical restrictions, it was possible that she could be medically separated from the Laboratory. OIG Exhibit 36.

On July 28, 1995, Ms. Benson filed a lawsuit in United States District Court for the Northern District of California in which she complained that she had been discriminated against because of her race. Employer's Post-Hearing Brief.

By letter dated August 25, 1995, the management of the Laboratory informed Ms. Benson that she would be on leave without pay until September 17, 1995, when she was scheduled to see a Laboratory physician to determine whether it would be necessary to continue the restriction from entering Building 415. Ms. Benson was again informed that if the Laboratory was not able to reasonably accommodate her medical restrictions, it was possible that she could be medically separated from the Laboratory. OIG Exhibit 37.

On September 10, 1995, Ms. Benson wrote a letter to Hazel O'Leary, the Secretary of DOE, stating that she was a whistleblower, and that the Laboratory had retaliated against her for making protected disclosures by requiring her to work in an environment that contained chemicals and toxins to which she was allergic. Ms. Benson also stated that the Laboratory had released her from her work assignments, placed her on leave, and strongly suggested that she leave on disability or the Laboratory could medically separate her from her employment. Ms. Benson expressed concern that she would lose her job because she was unable to work in this environment. Ms. Benson asked Secretary O'Leary to intercede on her behalf, and to prevent the Laboratory from putting forth any further acts of retaliation. OIG Exhibit 7.

On January 31, 1996, the management of the Education Division asked the Laboratory's Human Resources Department to medically separate Ms. Benson on the grounds that she was permanently restricted from entering Building 415 and no longer able to perform the essential assigned functions of her job. OIG Exhibit 44.

In March of 1996, the Laboratory terminated Ms. Benson's employment based on her "inability to perform essential, assigned functions fully" because of her medical condition. OIG Exhibit 49.

On March 6, 1996, Ms. Benson filed a lawsuit in state court in which she alleged that the Laboratory had terminated her employment in violation of the ADA. The Laboratory removed this action to Federal court, and these claims were subsequently consolidated with the Title VII action Ms. Benson filed and that was pending in the United States District Court for the Northern District of California. Employer's Post-Hearing Brief.

On July 25, 1996, Sandra Schneider, the Director of OCEP, wrote a letter to the Director of the Laboratory in which she stated that OCEP would be investigating the Part 708 complaint that had been filed by Ms. Benson. Ms. Schneider indicated that OCEP's investigation would focus on Ms. Benson's 1993 disclosures about possible fraud and mismanagement by the Laboratory in the administration of the NPEPC Program and Ms. Benson's refusal to participate in these activities, and the Laboratory's alleged acts of reprisal against Ms. Benson for making these protected disclosures. Employer's Post-Hearing Brief, Exhibit A.

Ms. Schneider specifically informed the Laboratory that the following matters would be investigated:

(1) The propriety of the Laboratory's reassignment of Ms. Benson on September 23, 1994;

(2)The propriety of the performance appraisal that was given to Ms. Benson on or about September 26, 1994;

(3) Whether the Laboratory intentionally exposed Ms. Benson to various chemicals to which she was allergic when they re-assigned her to new office space;

(4)The propriety of the Laboratory's refusal to provide reasonable accommodation regarding Ms. Benson's allergies; and

(5) The propriety of the Laboratory's termination of Ms. Benson's employment based on health reasons in early 1996.

Id.

In this letter, Ms. Schneider also stated that "[i]t is possible that information gathered during the investigative process may result in the identification of additional issues to be investigated." Id.

On October 14, 1997, the United States District Court for the Northern District of California entered summary judgment in favor of the Laboratory on the claims filed by Ms. Benson under Title VII and the ADA, and vacated the proceedings. Employer's Post-Hearing Brief, Exhibit C.

On April 13, 1999, the Office of the Inspector General(9) issued the OIG Report in response to Ms. Benson's complaint under Part 708. The OIG Report reflects the comprehensive investigation conducted by OCEP and the Office of the Inspector General, and concludes that Ms. Benson's request for relief should be denied. The Office of the Inspector General sent copies of the OIG Report to Ms. Benson and the Laboratory. Ms. Benson's letter to Secretary O'Leary was appended as an exhibit to the OIG Report.

Subsequently, under 10 C.F.R. § 708.9, Ms. Benson requested that the Office of Hearings and Appeals (OHA) convene a hearing to adjudicate the issues that had been raised in her Part 708 complaint. In response to this request, a hearing was held before the undersigned Hearing Officer. During the hearing, both the Laboratory and Ms. Benson presented evidence concerning Ms. Benson's inability to enter Building 415, and the statements that Ms. Benson made to Laboratory management and DOE officials concerning her inability to enter the building because of her allergies. Both parties also introduced evidence of the circumstances surrounding Ms. Benson's termination for medical reasons.

After the hearing, both counsel filed post-hearing submissions. Because these submissions did not address several significant legal issues, counsel were asked to brief the following issues:

(1) Whether Ms. Benson engaged in protected activity under § 708.5(a)(3) by refusing to work in Building 415, and whether the Laboratory retaliated against Ms. Benson for engaging in this activity;

(2) Whether Ms. Benson made disclosures that were protected under § 708.5(a)(1) when she informed several DOE officials and Laboratory employees that she believed it was unsafe for her to enter certain buildings at the Laboratory, and whether the Laboratory retaliated against Ms. Benson for making these statements; and

(3) Whether Ms. Benson is precluded from raising these claims because she failed to file a formal complaint under § 708.6, and failed to raise these issues at an earlier time.

In her supplemental submission, Ms. Benson alleged that she had engaged in protected activity under § 708.5(a)(3) by refusing to work in Building 415, and had made protected disclosures under § 708.5(a)(1) by informing several DOE and Laboratory employees that it was unsafe for her to enter certain buildings at the Laboratory. Ms. Benson also argued that OHA has jurisdiction to adjudicate these claims. In its supplemental submission, the Laboratory argued that these claims must be dismissed because they were not filed on time or in the form required by the regulations.

III. ANALYSIS

A. Liability For Events that Occurred Prior to September 23, 1994

The Laboratory contends that many of Ms. Benson's claims under Part 708 are invalid because the alleged

protected disclosures and many of the alleged acts of retaliation occurred before September 23, 1994, the date that the Laboratory agreed to be bound by the provisions of Part 708. The Laboratory argues that Ms. Benson is seeking to make Part 708 retroactively effective by attempting to hold it legally responsible for "protected activities" that were not legally protected when they occurred and acts of reprisal committed by the Laboratory before the date that it agreed to be bound by the provisions of Part 708. For the reasons detailed below, I have determined that the Laboratory is partially correct.

Under § 708.2, Part 708 did not automatically become applicable to all DOE contractors on the date that the regulations became effective. Rather, after the effective date of the regulations, Part 708 only became applicable "to complaints of reprisal . . . that stem from disclosures, participation, or refusals involving health and safety matters, if the underlying procurement contract . . . contain[ed] a clause requiring compliance with all applicable safety and health regulations and requirements of DOE (48 CFR 970.5204-2)." For complaints of reprisal that did not involve health and safety matters, Part 708 was "applicable to acts of reprisal . . . **if the underlying procurement contract . . . contain[ed] a clause requiring compliance with this part**." 10 C.F.R. § 708.2. (Emphasis added.)

Ms. Benson's statements about the NPEPC program did not involve matters of health and safety. Part 708 may thus only be invoked to protect Ms. Benson for making these statements if the procurement contract between DOE and the Laboratory contained a clause requiring compliance with Part 708 at the time that the Laboratory engaged in the alleged acts of reprisal. As the Laboratory did not sign such a contract until September 23, 1994, Ms. Benson may not seek redress under Part 708 for acts of reprisal that the Laboratory committed prior to the date. Mehta v. Universities Research Ass'n, 24 DOE ¶ 87,514 (1995). However, under the plain language of Section 708.2, the Laboratory is legally responsible for acts of reprisal that it committed after September 23, 1994, the date it agreed to comply with the provisions of Part 708, and the date that the employee engaged in the protected conduct that precipitated the act of reprisal is irrelevant. See Richard W. Gallegos, 26 DOE ¶ 87,502 (1996); See also Caminetti v. United States, 242 U.S. 470, 485 (1917)("the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms.")

The Laboratory argues that this construction of Part 708 imposes retroactive liability upon it because the Laboratory would be liable for acts of reprisal committed against Ms. Benson for engaging in protected activities before the Laboratory agreed to be bound by the regulations. This argument must be rejected. The Laboratory is only liable under Part 708 for actions that were taken after the regulations became effective and the Laboratory agreed to comply with the regulations. In other words, the Laboratory did not become liable under Part 708 until it had actual knowledge of its contractual and regulatory obligations, and could prospectively avoid liability by complying with the regulations. It is clear that this construction of Part 708 does not impose retroactive liability on the Laboratory.

As the Supreme Court recognized in Landgraf v. USI Film Products, 511 U.S. 244 (1994):

> While statutory retroactivity has long been disfavored, deciding when a statute operates "retroactively" is not always a simple or mechanical task. . . . A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

Id., at 268-269.

The Court further explains that, in order to determine whether a statute imposes retroactive liability, it is necessary to ascertain whether the statute:

> would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.

Id., at 280.

Here, holding the Laboratory responsible for the acts of reprisal it committed against Ms. Benson after September 23, 1994 would not impair the rights that the Laboratory possessed when it acted, increase its liability for past conduct or impose new obligations for transactions that have been completed.

As this construction of Part 708 does not impose retroactive liability upon the Laboratory, I hold that the Laboratory is responsible for acts of reprisal committed after September 23, 1994, even if such acts were committed in response to activities that occurred before September 23, 1994. I also hold that OHA has jurisdiction to adjudicate the following matters that involve protected activities that occurred before the Laboratory agreed to comply with Part 708:

> 1)Whether Ms. Benson's disclosures about the NPEPC program were a contributing factor in the Laboratory's decision in September of 1994 to assign Ms. Benson to work in the Laboratory's Apprenticeship Program;
>
> 2)Whether Ms. Benson's disclosures about the NPEPC program were a contributing factor in the "less than satisfactory" performance appraisal that Ms, Benson received on September 27, 1994; and
>
> 3)Whether Ms. Benson's disclosures about the NPEPC program were a contributing factor in the Laboratory's decision to terminate Ms. Benson's employment because she was unable to enter Building 415.

B. Collateral Estoppel

The Laboratory also contends that the doctrine of collateral estoppel mandates the dismissal of Ms. Benson's claims under Part 708. More specifically, the Laboratory alleges that Ms. Benson should be estopped from litigating her claims under Part 708 because the United States District Court for the Northern District of California entered summary judgment in favor of the Laboratory on Ms. Benson's claims that the Laboratory violated Title VII and the ADA by changing her work assignments and terminating her employment in February of 1996. Benson v. Lawrence Livermore National Laboratory, No. C95-2746 FMS (October 14, 1997).(10) This argument lacks merit.

In general, collateral estoppel bars re-litigation of issues in a subsequent proceeding when: (1) the party against whom the doctrine is asserted was a party to the earlier proceeding; (2) the issue was actually litigated and decided on the merits; (3) the issues are identical; and (4) the party against whom the earlier decision is asserted had a "full and fair" opportunity to litigate the claim or issue. Duncan v. Clements, 744 F.2d 48 (8th Cir. 1984).

Here, collateral estoppel will not bar Ms. Benson's claims under Part 708 for several reasons. First, Ms. Benson's did not file a claim under Part 708 in the United States District Court for the Northern District of California. As a result, Ms. Benson's claims under Part 708 were not actually litigated and decided in that proceeding.

Second, Ms. Benson is not precluded from litigating her Part 708 claims because the District Court did not decide any of the issues that must be determined in this proceeding. In terms of Ms. Benson's claims under the ADA, the Court granted summary judgment for the Laboratory because it found that Ms. Benson's ADA claim failed "as a matter of law because she does not have a ?disability' as defined by the statute." Memorandum Opinion at 10.(11) Clearly, the District Court's finding that Ms. Benson does not have a disability as that term is defined in the ADA is irrelevant to the issues that must be determined in a

Part 708 proceeding, and will not preclude Ms. Benson from pursuing her claims in this forum.

In terms of the Title VII claims, the District Court entered summary judgment in favor of the Laboratory because it found that the Laboratory offered a legitimate non-discriminatory reason for changing Ms. Benson's work assignments and for terminating her employment at the Laboratory, and also found that Ms. Benson had failed to produce evidence that the Laboratory's explanation was a pretext for discriminatory or retaliatory behavior.(12) The Laboratory contends that Ms. Benson is precluded from contesting the legitimacy of the Laboratory's proffered reasons for changing her work assignments or for terminating her employment because these matters were conclusively determined by the Federal Court's grant of summary judgment in favor of the Laboratory. The Laboratory's argument is not persuasive.

An action under Title VII is very different from an action under Part 708. Title VII and Part 708 protect different interests. Title VII makes it unlawful for an employer to discriminate against any employee on the basis of race, color, religion, sex or national origin, or to retaliate against an employee who has engaged in activity that is protected under that statute. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et. seq. On the other hand, Part 708 prohibits a DOE contractor from retaliating against an employee who "blows the whistle" about problems at the workplace.

Moreover, Part 708 and Title VII use different standards and varying burdens of proof to evaluate the propriety of an employer's actions. To prevail in a proceeding under Part 708, an employee must establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. § 708.9(d). Under Part 708, if the employee meets this burden, then the government contractor must prove by "clear and convincing evidence" that the same personnel action would have been taken absent the complainant's disclosure. 10 C.F.R. § 708.9(d). Under Title VII, after an employee has made a prima facie case of disparate treatment or retaliatory action, the burden shifts to the employer to articulate a legitimate non- retaliatory motive for its action. See Fisher v. Vassar College, 114 F.3rd 1332 (2d Cir. 1997). The standards imposed upon the employer as well as the employer's burden of proof in a Title VII suit is much less demanding than the contractor's burden of proof under part 708.(13) Accordingly, the issues determined by the United States District Court for the Northern District of California were not the same as the issues that must be determined in this action, and Ms. Benson is not precluded from disputing the Laboratory's proffered reasons for changing Ms. Benson's work assignments or for terminating her employment.

Finally, as Ms. Benson had not exhausted the administrative procedures set forth in Part 708 at the time that her case was pending in Federal court, she could not yet have filed her claims under Part 708 in the United States District Court. Ms. Benson therefore did not have a "full and fair opportunity" to litigate her claims under Part 708 in the earlier proceeding. For all of these reasons, the doctrine of collateral estoppel will not preclude Ms. Benson from litigating her claims under Part 708. See also Carl J. Blier, 27 DOE ¶ 87,514 (1999).

C. Ms. Benson's Claims Concerning Building 415

The Laboratory argues that OHA does not have jurisdiction to determine Ms. Benson's claims concerning Building 415. Here, the Laboratory contends that Ms. Benson failed to properly allege that she was discharged because she had made protected disclosures about the NPEPC program, and not because of her inability to enter Building 415. The Laboratory also requests the dismissal of Ms. Benson's claims that she engaged in protected activities under Sections 708.5(a)(1) and 708.5(a)(3) when she complained about, and refused to enter, Building 415 because these claims were not raised until after the hearing was held, and not filed in the form required by the regulations.

1. Ms. Benson's claim of retaliatory termination

OHA has jurisdiction to adjudicate Ms. Benson's claim that she was terminated in retaliation for making protected disclosures about the NPEPC program. First, Ms. Benson has alleged that, from the time that she first made disclosures about the NPEPC program, the Laboratory has continuously attempted to violate her rights under Part 708. Courts have long held that a plaintiff's time to file a complaint is extended when a defendant has continuously attempted to violate rights that are protected by federal law. See Schlei & Grossman, Employment Discrimination Law. Second, as set forth in the Factual Background, OCEP treated Ms. Benson's claim of retaliatory termination as if it had been properly filed, and OCEP's determination concerning such matters is entitled to "great deference." See Udall v. Tallman, 380 U.S. 1 (1965). Third, the Laboratory will not be prejudiced if Ms. Benson's claim of retaliatory termination is decided on the merits. As set forth in the Factual Background, the Laboratory had long been aware that Ms. Benson was claiming that she was terminated in retaliation for making protected disclosures. On July 25, 1996, the Director of OCEP told the Laboratory that Ms. Benson's claims of retaliatory termination were being investigated, and, after the completion of the investigation, the Laboratory was fully informed of the results of this investigation.

2. Ms. Benson's claims of protected activity

The Laboratory requests the dismissal of Ms. Benson's claims that she engaged in protected activities under Sections 708.5(a)(1) and 708.5(3) when she complained about, and refused to enter, Building 415 because these claims were not raised until after the hearing was held, and not filed in the form required by the regulations. The Laboratory's argument concerning Ms. Benson's claim that she made protected statements about Building 415 under Section 708.5(a)(1) is not persuasive. The Laboratory will not be prejudiced if the claim under Section 708.5(a)(1) is adjudicated on the merits. The Laboratory was well aware that Ms. Benson had complained to Laboratory and DOE officials that she had been unable to enter Building 415 because of her health. The Laboratory also knew that Ms. Benson had claimed that her "medical separation" was an act of reprisal by the Laboratory for making protected disclosures. During the hearing, the Laboratory presented substantial evidence concerning these issues. The fact that Ms. Benson is now contending that her statements about Building 415 are themselves protected disclosures does not prejudice the Laboratory or require it to present any additional evidence.(14) Accordingly, Ms. Benson's statements about Building 415 will be treated as protected disclosures under Section 708.5(a)(1).(15)

However, because the evidence required to prove a prima facie case under Section 708.5(a)(3) is very different from the evidence required to prove a prima facie case under Section 708.5(a)(1), the Laboratory will be prejudiced if it is not allowed to present any additional evidence or make legal arguments to rebut Ms. Benson's claim that she engaged in protected activity under Section 708.5(a)(3) by refusing to enter Building 415. Thus, the record in this case will be reopened for the limited purpose of permitting the Laboratory to supplement the record by presenting its defenses to Ms. Benson's claim that her refusal to enter Building 415 was a protected activity under Section 708.5(a)(3) that contributed to the Laboratory's decision to terminate her employment.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Lawrence Livermore National Laboratory on April 6, 2000, in Case No. VBZ-0057 is granted in part and denied in part as set forth in Paragraphs (3) and (4) below. In all other respects, this Motions is denied.

(2) The Motion to Dismiss filed by Lawrence Livermore National Laboratory on August 7, 2000, in Case No. VBZ-0058 is granted in part and denied in part as set forth in Paragraphs (5) and (6) below. In all other respects, this Motions is denied.

(3) As the Laboratory cannot be held liable for any acts of reprisal that occurred prior to September 23, 1994, all claims based on acts of reprisal that occurred before this date must be dismissed.

(4) Janet Benson is not "collaterally estopped" from litigating her claims under Part 708 because the

United States District Court for the Northern District of California entered summary judgment in favor of the Laboratory on claims that she filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et. seq. (Title VII), and the Americans with Disabilities Act, 42 U.S.C. §§ 12203 et. seq. (the ADA).

(5) OHA has jurisdiction to determine Ms. Benson's claims that she was terminated in retaliation for making protected disclosures about the National Physics Educational Program Collaboration;

(6) Although OHA has jurisdiction to determine Ms. Benson's claims that she made protected disclosures about Building 415 under Section 708.5(a)(1) and engaged in protected activity under Section 708.5(a)(3) when she refused to enter Building 415, the record in this case will be reopened for the limited purpose of permitting the Laboratory to supplement the record and present a complete defense to Ms. Benson's claim under Section 708.5(a)(3).

(7) This is an Interlocutory Order of the Department of Energy.

Linda Lazarus

Hearing Officer

Office of Hearings and Appeals

Date: November 1, 2000

(1)Notwithstanding the fact that the Laboratory made these arguments in post-hearing submissions, they are properly treated as motions to dismiss because the Laboratory requested the dismissal of Ms. Benson's claims as a matter of law. The arguments contained in the post-hearing submission filed on April 6, 2000, are designated as Case No. VBZ-0057. The arguments contained in the post-hearing submission filed on August 7, 2000, are designated as Case No. VBZ-0058.

(2)The Laboratory is a facility of the University of California. Any reference to the Laboratory in this decision is intended to refer to the University of California and the Regents of the University of California.

(3)Ms. Benson has alleged that the Laboratory violated the provisions of Part 708 by instituting adverse actions against her because she made protected disclosures about the Laboratory's involvement in the administration of the National Physics Education Program Collaboration (NPEPC Program). Ms. Benson also alleges that the Laboratory violated Part 708 when it terminated her employment because she refused to work in an office that endangered her health. Ms. Benson further contends that the reasons proffered by the Laboratory for the adverse actions taken against her are pretextual, and also asserts that she is the only person who has been "medically separated" from the Laboratory because of allergies in the last twenty years.

(4)On April 14, 1999, an "Interim Final Rule" that revised the procedures and criteria for Part 708 became effective. 64 Fed. Reg. 12,862 (March 15, 1999). As Ms. Benson's complaint was filed before the effective date of the Interim Final Rule, this matter must be adjudicated in accordance with the substantive standards set forth in the original version of Part 708. See Linda D. Gass, 27 DOE ¶ 87,525 (1999). Accordingly, unless otherwise indicated, all references to Part 708 or the regulations contained in Part 708, refer to the provisions of Part 708 that were in effect before April 14, 1999.

(5)On April 13, 1999, the Office of the Inspector General issued a Report of Inquiry and Recommendations in response to Ms. Benson's Part 708 complaint (OIG Report). The exhibits appended to the OIG Report are referred to as "OIG Exhibits."

(6)Ms. Benson sent a copy of this complaint to Mark Barnes, a DOE official who served as the Contractor Industrial Relations Specialist and Part 708 Coordinator for the DOE Operations Office in Oakland. OIG

Exhibit 1.

(7)Ms. Benson also made other allegations in this complaint.

(8)Ms. Benson also made other allegations in this complaint.

(9)While this investigation was pending, the Office of the Inspector General became responsible for conducting investigations under Part 708.

(10)Ms. Benson also filed claims under the California Fair Housing and Employment Act (FEHA) in the District Court. However, except for two footnotes which indicated that California courts generally rely upon federal interpretations of the ADA and Title VII to interpret analogous provisions of the FEHA, the District Court did not address the claims that Ms. Benson had filed under FEHA. Employer's Post-Hearing Brief, Exhibit C.

(11)In entering summary judgment for the Laboratory on the ADA claims, the District Court failed to address the issues of whether Ms. Benson was qualified to perform the essential functions of her job, or whether the Laboratory terminated her because of her disability. Memorandum Opinion at 6-10.

(12) It appears that the Court was unable to determine whether Ms. Benson had made a prima facie case of disparate treatment under Title VII. The Court also found that Ms. Benson could not show a causal link between the filing of her EEOC complaint on March 15, 1994, and her discharge on March 22, 1996. Memorandum Opinion at 10-14.

(13)Our cases make it clear that the contractor in a Part 708 proceeding has a much heavier burden of proof than the employee. We have held that this burden of proof may be met if a contractor demonstrates that it treated similarly situated employees in the same manner as the employee who made the protected disclosure, and that it followed its own internal procedures when taking adverse actions against an employee who made protected disclosures. See Linda D. Gass, 27 DOE ¶ 87,523 (1999) (Granting petitioner's motion for discovery of layoff procedures and information regarding employees who were situated similarly to the employee who had made protected disclosures).

(14)The Laboratory has argued that Ms. Benson's statements about her inability to enter Building 415 do not rise to the level of a protected disclosure under the regulations because §708.5(a)(1)(ii) requires that a protected disclosures involve "substantial and specific danger to employees or public health and safety," and Ms. Benson only complained about her own health. This argument is without merit. Part 708 is remedial in nature, and should not be construed in an overly technical manner to the detriment of the individuals who that the regulations were designed to protect. See Sandia National Laboratories, 23 DOE ¶ 87,501 (1993) (Sandia).

(15)The Laboratory claims that it has been prejudiced by allowing Ms. Benson to go forward on this issue because Ms. Benson's original complaint under Part 708 did not arise from protected disclosures involving matters of health and safety. This argument is not persuasive. The Laboratory was aware of the general nature of this claim, and employees filing complaints under Part 708 must not be held to the strictest standard of technical pleading. See Sandia.