

United States Department of Energy  
Office of Hearings and Appeals

In the matter of Sun Kim )

Filing Date: April 1, 2013 )

Case No.: WBU-13-0005

Issued: April 8, 2013

**Decision and Order**

Sun Kim, a former employee of Lawrence Berkeley National Laboratory (Berkeley) in Berkeley, California, appeals the dismissal of her whistleblower complaint (the Complaint) filed under 10 C.F.R. Part 708, the DOE Contractor Employee Protection Program. On December 1, 2008, the EE/Diversity Programs Manager at the DOE's Office of Science, Chicago Office (OSC), dismissed the Complaint. As explained below, OSC's dismissal of the Complaint is upheld and Ms. Kim's Appeal is denied.

**I. Background**

The 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. 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 DOE's Contractor Employee Protection Program 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 complainant may appeal such a dismissal to the OHA Director. 10 C.F.R. § 708.18.

Ms. Kim was employed as a "Student Assistant" by Berkeley at its Life Sciences Division. On February 6, 2013, Ms. Kim communicated her concerns about computer security and "suspicious governmental activity" to Berkeley's Research and Institutional Integrity Office.<sup>1</sup> February 28,

<sup>1</sup> Ms. Sun also complained that she had not been compensated for overtime she had worked and that she had been

2013, Letter from Dr. Glenn D. Kubiak, Associate Laboratory Director for Operations/Chief Operating Officer, to Ms. Sun at 2. On February 13, 2013, Berkeley issued a letter to Ms. Kim informing her that it was terminating her employment as a Student Assistant because she was no longer enrolled as a full-time student. On February 27, 2013, Ms. Kim emailed Berkeley inquiring about the status of Berkeley's investigation into her allegations and further alleging that her termination resulted from her allegations. *Id.* at 1. On February 28, 2013, Berkeley responded to Kim's February 27, 2013, email by issuing a letter in which it informed Ms. Kim that her whistleblower complaint was incomplete. *Id.* That letter further informed Ms. Kim of the steps she needed to take in order for the provisions of the California Whistleblower Protection Act to apply. *Id.* at 2. On March 13, 2013, Ms. Kim provided Berkeley with a completed whistleblower complaint. On March 20, 2013, Ms. Kim filed a Part 708 complaint with OSC.

OSC dismissed Ms. Kim's Part 708 Complaint on March 27, 2013. The Dismissal Letter states, in pertinent part:

During the course of [OSC's] review, it was discovered that you were also pursuing a State of California whistleblower complaint through the University of California. As such, and consistent with 10 C.F.R. § 708(c)(3), your complaint sent to the DOE is dismissed due to you also seeking remedy through the state of California whistleblower protection statutes.

Dismissal Letter at 1. On March 29, 2013, Berkeley accepted Ms. Kim's complaint for investigation under its Whistleblower Protection Policy and informed her that Dr. Kubiak would be appointing an investigator shortly. March 29, 2013, Letter from Dr. Kubiak, to Ms. Sun at 1. On April 1, 2013, Ms. Kim filed the present Appeal. Appeal at 1.

## II. Analysis

A person seeking relief under Part 708 "may not file a complaint under this regulation if, with respect to the same facts, [they] choose to pursue a remedy under State or other applicable law, including final and binding grievance-arbitration procedures . . ." 10 C.F. R. § 708.15(a). The Part 708 regulation states: "You are considered to have filed a complaint under State or other applicable law if you file a complaint, or other pleading, with respect to the same facts in a proceeding established or mandated by State or other applicable law, whether you file such complaint before, concurrently with, or after you file a complaint under this regulation." 10 C.F.R. § 708.15(c). "If you file a complaint under State or other applicable law after filing a complaint under this part, your complaint under this regulation will be dismissed under Sec. 708.17(c)(3)." 10 C.F.R. § 708.15(d). 10 C.F.R. § 708.17 provides that the DOE may dismiss a complaint for "lack of jurisdiction or for other good cause . . ." "Dismissal for lack of jurisdiction or other good cause is appropriate if: . . . you filed a complaint under State or other

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sexually harassed. Letter dated February 28, 2013, from Dr. Glenn D. Kubiak, Associate Laboratory Director for Operations/Chief Operating Officer, to Ms. Sun at 2.

applicable law with respect to the same facts alleged in a complaint under this regulation. . . .”  
10 C.F.R. § 708.17(c)(3).

Accordingly, OSC’s decision to dismiss Ms. Kim’s complaint under 10 C.F.R. § 708.17(c)(3), was justified when it became aware that she was simultaneously pursuing a claim under California law. For this reason, I uphold that dismissal.

### **III. Conclusion**

As indicated by the foregoing, I find that the Office of Science, Chicago Office correctly dismissed the Complaint filed by Ms. Kim. As clearly proscribed by the jurisdictional provisions of Part 708, the Complaint cannot be accepted for further consideration at this time.

It Is Therefore Ordered That:

- (1) The Appeal filed by Sun Kim (Case No. WBU-13-0005) is hereby denied.
- (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: April 8, 2013