

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Sabine Lauer)
)
Filing Date: September 6, 2013)
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Case No.: WBU-13-0013

Issued: September 19, 2013

Decision and Order

Sabine Lauer, a former employee of Los Alamos National Security LLC (LANS) in Los Alamos, New Mexico, appeals the dismissal of her whistleblower complaint (the Complaint) filed under 10 C.F.R. Part 708, the DOE Contractor Employee Protection Program. On August 1, 2013, the National Nuclear Security Administration's (NNSA) Employee Concerns Program Manager dismissed the Complaint. As explained below, NNSA's dismissal of the Complaint is upheld and Ms. Lauer'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. Lauer was employed as a scientist by LANS. She alleges in her Complaint that she communicated a serious of workplace concerns to the DOE Office of Inspector General (IG) and the Occupational Safety and Health Administration (OSHA) beginning in 2003 and continuing through February 2012.¹ Complaint at 1-2. On March 5, 2013, LANS provided Ms. Lauer with notice that her employment would be terminated effective April 4, 2013, pursuant to an impending Reduction-in-Force (RIF). In response, Ms. Lauer filed a grievance with LANS's Complaint Resolution Program on March 21, 2013. On April 4, 2013, LANS terminated Ms. Lauer's employment. On April 19, 2013, Ms. Lauer signed a contract entitled: "Separation Agreement Waiver and Release of Claims" (the Separation Agreement). The Separation Agreement provides in pertinent part:

Employee, . . . waives and releases Employer, the United States Department of Energy and the National Nuclear Security Administration, . . . from any causes of action or claims, whether known or unknown, that arise out of Employee's termination of employment with Employer. Employee also waives and releases any causes of action or claims that arise out of Employee's employment with Employer, up to and including the effective date of this Separation Agreement. This waiver and release of claims includes, but is not limited to . . . any . . . applicable federal, state or local laws. . . . Employee waives the right to obtain any personal legal or equitable relief in, or as a result of, any administrative proceeding, or as the result of any judicial proceeding brought on the employee's behalf.

Separation Agreement at 1-2. The Separation Agreement further provided that LANS would pay Ms. Lauer \$28,933.74 as consideration for releasing any claim against it arising out of her employment with LANS. Separation Agreement at 1. LANS ratified the Separation Agreement on April 30, 2013, and paid Ms. Lauer the \$28,933.74. On May 3, 2013, LANS dismissed Ms. Lauer's grievance.

Ms. Lauer filed a whistleblower complaint against LANS under 10 C.F.R. Part 708, on May 31, 2013, alleging that she had made protected disclosures in 2003, 2007, 2008, and 2012, and was terminated by LANS in retaliation for making these disclosures. On July 18, 2013, LANS filed a response (the Response) to the Complaint with the NNSA. Citing the Separation Agreement, the Response contended that Ms. Lauer had released LANS from any claim that arose out of her employment and had waived her right to obtain any personal or equitable relief as a result of any administrative proceeding, including those under Part 708. Response at 1.

On August 1, 2013, the NNSA dismissed the Complaint filed by Ms. Lauer, finding that Ms. Lauer had released LANS from any claims arising out of her employment, and waived her right to seek any personal or equitable relief, by signing the Separation Agreement.

¹ Ms. Lauer also contends that she made a protected disclosure, on June 14, 2013, under Part 708, when she informed the IG that LANS had "dropped [her] Grievance for [her] termination and failed to answer [her] congressional inquiry truthfully and failed to provide details for [her] inquires." Complaint at 2. However, Ms. Lauer was no longer an "employee" as set forth in 10 C.F.R. § 708.2, so her alleged report cannot be considered a protected disclosure under 10 C.F.R. Part 708. 10 C.F.R. § 708.2 ("*Employee* means a person employed by a contractor, and any person previously employed by a contractor if that person's complaint alleges that employment was terminated for conduct described in § 708.5 of this subpart.").

Ms. Lauer filed the present Appeal on September 6, 2013. In her Appeal, Ms. Lauer claims that Paragraph 4(a) of the Separation Agreement provides an exception from the waiver and release she provided by signing the Separation Agreement and accepting the consideration from LANS. Paragraph 4 of the Separation Agreement, entitled “Claims Not Waived” sets forth six specific exemptions to the release and waiver provided by Ms. Lauer. Paragraph 4(a) exempts “Any rights or claims that ‘may arise’. . . after the effective date of this agreement.” Separation Agreement at 2.

II. Analysis

The regulations at 10 C.F.R. § 708.17 provide 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: The issues presented in [the] complaint have been rendered moot by subsequent events or substantially resolved.” 10 C.F.R. § 708.17(c)(5). By signing the Separation Agreement subsequent to the occurrence of the events which form the basis of Ms. Lauer’s whistleblower complaint (i.e. her alleged protected disclosures and LANS’ alleged retaliation), she resolved, and rendered moot, the issues presented by her whistleblower complaint.

Ms. Lauer’s contention that Paragraph 4(a) of the Separation Agreement exempts her present claim from the release and waiver she executed is without merit. Ms. Lauer contends that because LANS did not dismiss her March 21, 2013, grievance (which she contends included some whistleblower “elements”) until May 3, 2013, several days after the effective date of the Separation Agreement (April 30, 2013), her whistleblower claims arose after the effective date of the agreement. It is clear, however, that since the alleged protected disclosures and the alleged retaliation (her termination) both occurred prior to the date Ms. Lauer signed the Separation Agreement, her rights or claims arose prior to the effective date of the Separation Agreement. Accordingly, these matters have been settled and are therefore rendered moot by the Separation Agreement.

Accordingly, NNSA’s decision to dismiss the Complaint under 10 C.F.R. § 708.17(c)(5), was justified because the issues presented in the Complaint were rendered moot by subsequent events and resolved. For this reason, dismissal of Ms. Lauer’s whistleblower complaint is upheld.

III. Conclusion

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

It Is Therefore Ordered That:

(1) The Appeal filed by Sabine Lauer (Case No. WBU-13-0013) 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: September 19, 2013