

**United States Department of Energy  
Office of Hearings and Appeals**

In the Matter of Charles Dalton	)	
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Filing Date: July 13, 2016	)	Case No.: WBU-16-0007
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Issued: August 12, 2016

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**Decision and Order**

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Mr. Charles Dalton, an employee of BWX Technologies, Inc. (BWXT), appeals the dismissal of a Complaint that he filed under the Department of Energy’s (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Mr. Dalton alleges that BWXT harassed and threatened him because he made certain disclosures to the Nuclear Regulatory Commission (NRC) and the DOE’s Office of Inspector General (IG). He filed this Complaint with the DOE’s Idaho Operations Office (IOO) on June 18, 2016. After the IOO dismissed his Complaint on June 22, 2016, he filed an appeal of that dismissal on July 13, 2016. As explained below, we will grant the Appeal.

**I. Background**

**A. The DOE Contractor Employee Protection Program**

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 purpose is to encourage contractor employees to report unsafe, illegal, fraudulent, or wasteful practices and to protect those “whistleblowers” from reprisals by their employers. The regulations governing the program are set forth at Title 10 Part 708 of the Code of Federal Regulations.

The Part 708 regulations provide, in pertinent part, that a DOE contractor may not discharge or take some other reprisal action against an employee because that employee has disclosed, to a DOE official or to a DOE contractor, 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 the public health or safety; or, fraud, gross mismanagement, gross waste of funds, or abuse of authority. *See* 10 C.F.R. § 708.5(a).

Under Part 708, the DOE office or field element initially receiving a Complaint may dismiss the Complaint due to lack of jurisdiction or for other good cause. 10 C.F.R. § 708.17(a). Such a dismissal is appropriate under any of the following circumstances: (i) the Complaint is untimely, (ii) the facts, as alleged in the Complaint, do not present issues for which relief can be granted under Part 708, (iii) the employee filed a complaint under State or other applicable law with respect to the same facts as alleged in the Part 708 Complaint, (iv) the Complaint is frivolous or without merit on its face, (v) the issues presented in the Complaint have been rendered moot by subsequent events or substantially resolved, or (vi) the employer has made a formal offer to provide the remedy that was requested in the Complaint or a remedy that DOE considers to be equivalent to what could be provided as a remedy under Part 708. 10 C.F.R. § 708.17(c). The complainant may appeal a dismissal due to lack of jurisdiction or other good cause to the Director of the Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.18.

## **B. Complaint**

BWXT produces fuel elements for DOE's Advanced Test Reactor (ATR), a reactor used for research purposes at the Idaho National Laboratory. Mr. Dalton works in BWXT's Quality Control division. On June 18, 2016, Mr. Dalton filed a Part 708 Complaint with the IOO. Complaint from Charles Dalton to Janice Ogilvie, IOO (June 18, 2016) (Complaint). He attached to the Complaint a 10-page document consisting of three undated letters that he had written to the IG. The letters raise various concerns related to the techniques that BWXT uses to inspect its products. He alleged to the IG, for instance, that BWXT inspectors use equipment that is not sufficiently precise, that they improperly round measurements and that they conduct inspections with reference to incorrect specifications. *See* Complaint at Attachment One (IG Letters). In one letter, he expresses a concern that someone at a university lab "[could] be hurt or killed because of something our company did wrong." IG Letters at 2. He further indicates that prior to raising his concerns with the IG, he filed a complaint with the NRC. *Id.* at 9.

In his Complaint, in a section titled "Retaliatory Action," Mr. Dalton alleges that his managers and colleagues learned of his disclosures and responded inappropriately. Specifically, he alleges that an individual, who he believes is one of his managers, described his disclosures in a weekly office-wide memo titled "Best & Worst" (Best & Worst Memo) that summarized the "Best and Worst" aspects of the work week. He contends that the description of his disclosures went into the section labeled "Worst." In his Complaint, Mr. Dalton quotes the relevant text of the Best & Worst Memo. Based on the text provided by Mr. Dalton, it appears that the memo did not name Mr. Dalton. However, it stated that an "employee" had "filed an allegation with the NRC that states [that] ATR [Advanced Test Reactor] elements have been inspected incorrectly." Complaint at 1. According to the text quoted in the Complaint, the Best & Worst Memo also indicated that DOE officials had received Mr. Dalton's disclosures and, as a result, had made inquiries with BWXT.

Mr. Dalton asserts all of his colleagues received copies of the memo and were required to sign a document acknowledging they had received it. He alleges that, for a time, the Best & Worst Memo was also posted on a bulletin board. Complaint at 1-2. He indicates that even though his name was not mentioned in the memo, it is understood among his colleagues that the memo referred to him. He alleges, for instance, that one colleague identified him in a meeting as the person who made the disclosures; that colleagues have been "stand-offish" and "resentful" toward him; and that they

call him “Mr. NRC, Mr. DOE and many other things.” *Id.* at 2. He contends that Mr. Ken Randolph, one of his managers, “has also been calling me in his office constantly scrutinizing my time.” *Id.* He claims that Mr. Randolph “has threatened to write me up since this incident.” *Id.* With respect to remedies, Mr. Dalton states that he wants his work environment to improve and that he is consulting with an attorney for guidance on what additional remedies to request. *Id.*

### **C. Dismissal**

Following the submission of his Complaint, the IOO contacted Mr. Dalton to request more information on the reprisal actions he alleged. In an email, the IOO asked Mr. Dalton: “Has the BWXT taken any action against you with respect to employment such as discharge, demotion, or other negative action with respect to your compensation, terms, conditions or privileges of employment?” Email from Janice Ogilvie, IOO, to Charles Dalton (June 20, 2016). Mr. Dalton responded: “As of yet, no. I have only been threatened.” Email from Charles Dalton to Janice Ogilvie, IOO (June 20, 2016). He also claimed, without further explanation, that “other things, not in regard to the allegations, [have been] printed about me plant wide.” *Id.*

On June 22, 2016, the IOO dismissed Mr. Dalton’s Complaint.<sup>1</sup> In its letter to Mr. Dalton, the IOO stated: “Your complaint has been dismissed because you did not state in your complaint, or in a request from the Department of Energy . . . , how you were retaliated against.” Dismissal Letter from Janice Ogilvie, IOO, to Charles Dalton (June 22, 2016) (Dismissal). Referring to the definition of “retaliation” in 10 C.F.R. § 708.2, the IOO specified that under Part 708, “retaliation is defined as action ‘taken by a contractor against an employee with respect to employment (e.g., discharge, demotion, or other negative action with respect to the employee’s compensation, terms, conditions or privileges of employment).’”<sup>2</sup> *Id.*

### **D. Appeal**

In his Appeal, Mr. Dalton summarizes and reframes what he alleged in his Complaint. He asserts, most likely referring to the Best & Worst Memo,<sup>3</sup> that in response to his complaint to the IG, “my employer targeted me in a memo that was sent out to fellow employees.” Appeal from Charles Dalton to OHA (July 12, 2016) (Appeal). He argues that this action should be considered an act of retaliation based on the definitions of terms such as “harassment,” “intimidation,” and “reprisal”

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<sup>1</sup> Part 708 states that the DOE office receiving a Part 708 complaint must provide the employer a copy of the complaint within 15 days after receiving it, allowing the employer a chance to respond. *See* 10 C.F.R. § 708.16(a). The IOO informed us that it did not provide BWXT a copy of the Complaint or obtain a response because it chose to dismiss the Complaint before the 15-day period elapsed. Memorandum of Telephone Conversation between Mark Arenaz, IOO, and Gregory Krauss, OHA (July 20, 2016). Accordingly, the record does not contain a response from BWXT.

<sup>2</sup> The IOO clearly found that the Complaint was deficient because it did not allege an act of retaliation. *See* 10 C.F.R. § 708.12(a) (requiring that Part 708 complaints contain a statement specifically describing the alleged retaliation and the disclosure, participation, or refusal that the complainant believes gave rise to the retaliation). However, the dismissal letter did not cite any of the grounds for dismissal listed in 10 C.F.R. § 708.17(c). Presumably, the IOO dismissed the Complaint based on a finding that the Complaint did not present issues for which relief can be granted under Part 708, or that the Complaint was frivolous or without merit on its face. *See* 10 C.F.R. § 708.17(c)(2) and (4).

<sup>3</sup> Mr. Dalton attaches a copy of the Best & Worst Memo to his Appeal.

in a DOE Employee Concerns Program guide. *See* DOE G 442.1-1 (February 1, 1999). Based on the definitions in that document, he argues, retaliation “does not just consist of loss of wages or employment.” Appeal at 2. Other actions intended to embarrass employees and discourage them from reporting concerns should also qualify as retaliation, he contends.<sup>4</sup> *See id.* at 1-2.

## II. Analysis

When evaluating whether the dismissal of a Part 708 complaint is appropriate, we must consider all materials in the light most favorable to the party opposing the dismissal. *See Billie Joe Baptist*, Case No. TBZ-0080 (May 7, 2009) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)). Here, we are unable to find that, considered in a light most favorable to Mr. Dalton, the actions he alleges do not constitute retaliation.

The Part 708 regulations define “retaliation” as “an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to employment (e.g., discharge, demotion, or other negative action with respect to the employee’s compensation, terms, conditions or privileges of employment) as a result of the employee’s disclosure of information, participation in proceedings, or refusal to participate in activities” protected under Part 708. 10 C.F.R. § 708.2. In interpreting this provision, we recognize that Part 708 “is not intended to permit DOE to manage the day-to-day decisions and human resource management of a DOE contractor.” *Sherrie Walker*, Case No. WBA-13-0015 (2014).<sup>5</sup> Moreover, an act that is “‘trivial’ . . . does not rise to an act of retaliation under Part 708.” *Mark D. Siciliano*, Case No. TBH-0098 (2010) (finding that a contractor’s failure to invite complainant to an event was not a “negative action” within the meaning of Part 708). Nevertheless, under Part 708, acts of retaliation are not limited to formal employment actions such as a discharge or a demotion. Actions that negatively affect the “terms, conditions or privileges of employment” can qualify as retaliation, as can threats to take such actions.

In the instant matter, Mr. Dalton alleges at least two actions taken by his employer in response to his complaints to the NRC and IG.<sup>6</sup> We start with his allegation that, in response to his disclosures, his manager has been scrutinizing his work and threatening to “write him up.” This allegation, considered in a light most favorable to Mr. Dalton, could be interpreted as an allegation that his employer has threatened disciplinary action. Such a threat, depending on the context, could constitute retaliation. In addition, Mr. Dalton’s principal allegation is that one or more of his managers criticized him for contacting the NRC and the IG in a memo sent to him and his

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<sup>4</sup> During the pendency of this Appeal, Mr. Dalton emailed to OHA an additional document that he believes was created by a colleague and subsequently pinned near his work space by Mr. Randolph. The document contains language that appears to ask him to “suck it up” and “move on” and stop making complaints about how BWXT operates. *See* Email from Charles Dalton to Gregory Krauss, OHA (August 5, 2016). He further contends that his managers have improperly denied him chances to work overtime hours. *Id.*

<sup>5</sup> Decisions by OHA are available on OHA’s web site at <http://energy.gov/oha>.

<sup>6</sup> We decline to address here the additional acts of retaliation that Mr. Dalton alleged after filing this Appeal. However, on remand, the IOO may wish to allow Mr. Dalton to incorporate any new retaliation allegations into an amended Complaint.

colleagues. Having reviewed the part of the Best & Worst Memo dealing with disclosures by an unnamed employee, we believe that it is possible that the relevant text was written by a BWXT manager and that it was intended to refer to Mr. Dalton and to admonish him for his disclosures. A written reprimand for contacting an IG's office has been treated by the Merit Systems Protection Board (MSPB), whose decisions we look to for guidance, as an action that could constitute whistleblower retaliation. *See Johnson v. Department of Health and Human Services*, 93 M.S.P.R. 38, 45-46 (2002) (finding that an agency's "letter of admonishment" criticizing an employee for contacting an IG, rather than first going to a supervisor, constituted a "personnel action" under 5 U.S.C. § 2302(a)(2)(A)). Taking into account the MSPB's decision in *Johnson*, we are unprepared to find that the facts Mr. Dalton has alleged with respect to the Best & Worst Memo could not have constituted a retaliatory act. We note that Part 708 was adopted by the DOE to encourage employees of DOE contractors to come forward with information that they reasonably believe "evidences unsafe, unlawful, fraudulent or wasteful practices." 64 Fed. Reg. 12862 (March 15, 1999).

Mr. Dalton must prove all the elements of a Part 708 claim. To show that he made a protected disclosure, for instance, he may need to establish that he reasonably believes he revealed "[a] substantial and specific danger to employees or to public health or safety." 10 C.F.R. § 708.5(a)(2). However, we do not believe that his complaint should be dismissed, at this juncture, on the grounds that he failed to allege an act of retaliation.<sup>7</sup> *See Clint Olson*, Case No. TBU-0027 (2004) (noting that jurisdictional issues may be considered more fully as the facts are developed in the investigation and hearing stages). We therefore will grant Mr. Dalton's appeal and remand this matter to the IOO.

It is Therefore Ordered That:

- (1) The Appeal filed by Mr. Charles Dalton (Case No. WBU-16-0007) is hereby granted.
- (2) This matter is remanded to the IOO for further processing as set forth in Subpart B of Part 708 as well as 10 C.F.R. § 708.21.

Poli A. Marmolejos  
Director  
Office of Hearings and Appeals

Date: August 12, 2016

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<sup>7</sup> We have taken note of Mr. Dalton's statement, in his email to the IOO, indicating that BWXT did not take a negative action with respect to his employment, but that it had threatened him. Considered in a light most favorable to Mr. Dalton, we do not interpret this statement as an admission by Mr. Dalton that his employer did not commit an act of retaliation. Rather, we interpret this statement as an acknowledgement that his employer did not take an employment action such as a discharge or a demotion. Looking at all the materials before us, we believe that Mr. Dalton has alleged that his employer took actions that could constitute retaliation.