

United States Department of Energy  
Office of Hearings and Appeals

In the matter of Cassandra B. Stark                     )  
   )  
Filing Date: March 8, 2013                     )     Case No.:     WBU-13-0003  
\_\_\_\_\_)

Issued: March 27, 2013

---

**Decision and Order**

---

Cassandra Stark, an employee of CH2M Hill Plateau Remediation Company (CHPRC), appeals the dismissal of her retaliation Complaint filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program.<sup>1</sup> DOE’s Employee Concerns Program (ECP) Manager at the Richland Operations Office (RL) dismissed Ms. Stark’s Complaint on January 22, 2013. As explained below, we reverse in part the dismissal of Ms. Stark’s Complaint, granting in part and denying in part her Appeal.

**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 the DOE’s government-owned, contractor operated facilities. 57 Fed. Reg. 7533 (Mar. 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.

Ms. Stark was employed as an Engineering Technician/Technical Specialist for Respondent CHPRC<sup>2</sup> and its subcontractor, Respondent Babcock Services, Inc. (Babcock), when she was

---

<sup>1</sup> The OHA reviews jurisdictional appeals under Part 708 based upon the pleadings and other information submitted by the Appellant. See 10 C.F.R. § 708.18(b) (appeal must include a copy of the notice of dismissal, and state the reasons why the Appellant thinks the dismissal was erroneous). While Ms. Stark states in her Appeal that she filed a request for an investigation under 10 C.F.R. § 708.21, as explained in our Acknowledgment Letter, Ms. Stark may only appeal the RL’s dismissal of her Complaint. Acknowledgment Letter from Shiwali Patel, Staff Attorney, OHA, to Appellant (Feb. 26, 2013). In its Dismissal Letter, the ECP Manager erroneously stated that the regulations allowed for Ms. Stark to request an investigation after it dismissed her Complaint. *Id.*

<sup>2</sup> CHPRC is the prime contractor for the environmental cleanup of the Central Plateau at DOE’s Hanford Site.

terminated from her employment on September 27, 2012. In her position, Ms. Stark asserts that she was tasked with auditing rental equipment and implementing cost saving measures. Compl. at 3. She claims that before she was terminated, sometime in February 2012, she was “involved in numerous conversations regarding excessive costs to the project.” Compl. at 1. Furthermore, she states that on May 23, 2012, she submitted her concerns to the CHPRC’s human resources representative and Babcock regarding the following:

(1) her February through April 2012 observations of waste, fraud, abuse of authority, or gross mismanagement in the failure to eliminate excessive rental equipment costs to the project and her co-worker’s role in failing to appropriately move items off rent; (2) the failure of Deputy Manager Swartz [to] ensure his subordinate was completing the task for which she was billing despite his awareness that she was not completing assigned tasks; (3) waste, fraud, gross mismanagement or abuse of authority in the inappropriate relationship between above-referenced and Deputy Manager Mike Swartz, including concerns that the improper relationship was enabling abusive conduct from the co-worker.

Compl. at 3. In addition, Ms. Stark contends that on June 4, 2012, Robert Boykin, of the CHPRC’s ECP, interviewed her concerning her allegations of harassment and bullying of a co-worker by Mr. Swartz, and she reported that “supervisor Swartz often failed to provide proper oversight to his projects, in part because he was often offsite with the junior subordinate.” *Id.* She claims that soon after she reported these concerns, Mr. Swartz “informed another manager to be careful about what was said because Complainant was ‘leaking’ information.” *Id.* at 4.

Ms. Stark avers that as a result of these protected disclosures, she was retaliated against by her employer by “promoting, allowing and/or failing to abate a hostile work environment, including failing to act when on notice that a co-worker was calling Complainant a ‘c---’; and allowing management to report her as a ‘leak.’” *Id.* at 3. She claims that she was further retaliated against when she was terminated from her employment on September 27, 2012. *Id.* Ms. Stark asserts that although there were other positions for which she was qualified when she was laid off, the CHPRC did not place her in those positions, even while they remained short-staffed of employees with her skill set. *Id.* at 4. Finally, Ms. Stark contends that on September 25, 2012, immediately before her termination, her “direct manager attempted to have Swartz extend Complainant’s employment with the company;” however, he declined, “stating that he heard that Complainant had been ‘talking s--- and making accusations.’” *Id.*

On December 14, 2012, Ms. Stark filed a Part 708 Complaint requesting reinstatement to her prior job or to a comparable position, back pay, front pay, removal of derogatory information in her personnel file as result of retaliation, and an order enjoining the CHPRC and Babcock to engage in further retaliatory action. *Id.* at 5.

On January 7, 2013, the CHPRC submitted its response to Ms. Stark’s Complaint. The CHPRC explained that Mr. Boykin interviewed Ms. Stark in June 2012 because “she was identified as a **witness** who could provide information concerning an employee concern that was filed with the DOE Office of Employee Concerns by a female employee,” contrary to Ms. Stark’s assertion that the interview was conducted in response to her allegations of bullying and harassment by

Mr. Swartz. Response from John C. Fulton, President and Chief Executive Officer, CHPRC, to Jenise C. Connerly, Contracting Office, RL (Jan. 7, 2013) (emphasis in original). Hence, CHPRC argues that Ms. Stark's complaints did not prompt its investigations, and accordingly, it did not retaliate against her for any protected disclosures. *Id.* Moreover, the CHPRC asserts that while Ms. Stark claimed that a manager was having an inappropriate relationship with a subordinate, she failed to provide any corroborating evidence or direct knowledge of that relationship, and during her interview, she did not raise any independent allegations of fraud, gross mismanagement or waste of funds, or abuse of authority. *Id.*

Further, the CHPRC avers that it had legitimate, non-retaliatory reasons for Ms. Stark's separation. The CHPRC stated that before Ms. Stark was terminated, she was working in support of a project that was funded by the American Recovery and Reinvestment Act (ARRA). Once the ARRA-funded projects were completed, Ms. Stark's services ceased; indeed, the CHPRC claims that 30 out of the 32 employees in her organization were either laid off or transferred due to the project's completion. CHPRC Response at 2. Moreover, after her termination, in November 2012, the CHPRC posted an opening for a clerical position, which Ms. Stark applied for. *Id.* The CHPRC subsequently offered Ms. Stark the position, which began on January 7, 2013, and is coincidentally, the same day that the CHPRC submitted its Response to her Complaint.<sup>3</sup> *Id.*

On January 22, 2013, the ECP Manager dismissed Ms. Stark's Complaint for lack of jurisdiction. He stated that "the facts do not present issues for which relief can be granted under 10 CFR 708." Dismissal of Complaint by Stan Branch, ECP Manager, RL, to Cassondra Stark (Jan. 22, 2013). He further stated that "[t]he information provided in your Complaint is insufficient to support a conclusion that the rental equipment costs rose to the level of 'fraud, gross mismanagement, gross waste of funds, or abuse of authority' sufficient to support a claim of protected conduct." *Id.* However, the ECP Manager acknowledged that while the issue of "[w]hether the manager's inappropriate relations constituted an 'abuse of authority' under the law might be a closer question," the "Complaint does not support a conclusion that [she was] retaliated against." *Id.* Moreover, the ECP Manager concluded that the CHPRC provided sufficient evidence that there was a legitimate, non-retaliatory, reason for her termination.

## II. Analysis

Under the DOE's regulations, an employee of a contractor may file a whistleblower complaint against their employer alleging that he has been retaliated against for:

- (a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your employer, or any higher tier contractor, information that you reasonably believe reveals-- (1) A substantial violation of a law, rule, or regulation; (2) A substantial and specific danger to employees or to public health

---

<sup>3</sup> While the CHPRC states that it eventually offered Ms. Stark a clerical position, which started on January 7, 2013, there was still a period of time where she was unemployed as a result of her employer's decision to terminate her, and the issue as to whether or not she was retaliated against for making a protected disclosure remains open.

or safety; or (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority.

10 C.F.R. § 708.5. The whistleblower complaint must contain:

(a) A statement specifically describing (1) the alleged retaliation taken against you and (2) the disclosure, participation, or refusal that you believe gave rise to the retaliation; (b) A statement that you are not currently pursuing a remedy under State or other applicable law, as described in § 708.15 of this subpart; (c) A statement that all of the facts that you have included in your complaint are true and correct to the best of your knowledge and belief; and (d) An affirmation, as described in § 708.13 of this subpart, that you have exhausted (completed) all applicable grievance or arbitration procedures.

10 C.F.R. § 708.12.

The DOE may dismiss a complaint for lack of jurisdiction or good cause if:

(1) Your complaint is untimely; or (2) The facts, as alleged in your complaint, do not present issues for which relief can be granted under this part; or (3) You filed a complaint under State or other applicable law with respect to the same facts as alleged in a complaint under this part; or (4) Your complaint is frivolous or without merit on its face; or (5) The issues presented in your complaint have been rendered moot by subsequent events or substantially resolved; or (6) Your employer has made a formal offer to provide the remedy that you request in your complaint or a remedy that DOE considers to be equivalent to what could be provided as a remedy under this part.

10 C.F.R. § 708.17(c). In reviewing cases such as this, we consider all materials in the light most favorable to the party opposing the dismissal. *See Billie Joe Baptist*, OHA Case No. TBZ-0080, at 5 n. 13 (May 7, 2009) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)).<sup>4</sup>

*A. Alleged Disclosures Concerning Excessive Rental Costs and Items on Rent*

In her Complaint, Ms. Stark contends that she observed fraud, gross mismanagement and gross waste of funds regarding the “failure to eliminate excessive rental equipment costs to the project and her co-worker’s role in failing to appropriately move items off rent.” Compl. at 3. She states that she reported these concerns on May 23, 2012 in a statement that she submitted to the CHPRC human resources representative, Jamie Hafer, and a Babcock representative, Kim Baldwin. *Id.* As explained below, we conclude that the ECP Manager properly dismissed these claims from Ms. Stark’s Complaint.

---

<sup>4</sup> Decisions issued by the DOE Office of Hearings and Appeals (OHA) are available on the OHA website at: <http://energy.gov/oha>.

The Merit Systems Protection Board (MSPB), whose decisions the OHA refers to as useful guidance for the Part 708 analysis, has defined “gross mismanagement” as “more than a de minimis wrongdoing or negligence,” which must include an “element of blatancy.” *Smith v. Dep’t of the Army*, 80 M.S.P.R. 311, 315 (1998). It stated that “gross mismanagement means a management action or inaction that creates a substantial risk of significant adverse impact upon the agency’s ability to accomplish its mission.” *Id.* In *Smith v. Department of the Army*, the MSPB concluded that the appellant’s allegations did not constitute a gross mismanagement because he did not claim that certain purchases were “significantly out of proportion to the benefits reasonably expected to accrue, nor does he claim that they were in fact being used in employees’ personal businesses.” *Id.* at 316. Here, too, we conclude that Ms. Stark has not sufficiently alleged that the “failure to eliminate excessive rental costs to the project” constituted gross mismanagement. While she claims that the rental equipment costs were “excessive,” she fails to sufficiently allege whether such costs were “significantly out of proportion to the benefits reasonably expected to accrue.” *See id.* Moreover, she did not assert that any funds derived from the rental equipment costs were used for employees’ personal gains, or that the CHPRC blatantly failed to eliminate the excessive costs. Finally, her Complaint does not provide any additional allegations pertaining to “her co-worker’s role in failing to move items appropriately off rent,” and accordingly, we cannot ascertain that Ms. Stark had a reasonable belief that it constituted gross mismanagement. Thus, we conclude that Ms. Stark has not sufficiently alleged any observations of “gross mismanagement” in her Complaint with regards to the rental equipment costs and her “co-worker’s role in failing to appropriately move items off rent.”

The OHA has defined a “gross waste of funds” as a “more-than-debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government.” *See Thomas L. Townsend*, OHA Case No. TBU-0082 (Sept. 15, 2008); *Fred Hua*, OHA Case No. TBU-0078 (May 2, 2008) (citing *Jensen v. Dep’t of Agric.*, 104 M.S.P.R. 379 (2007)). In *Jensen*, the MSPB considered whether the appellant demonstrated that there was a gross waste of funds when her manager requested her to sign invoices on the contract that she believed were incorrect and fraudulent. 104 M.S.P.R. 379. The MSPB concluded that there was “no indication in the record of the scale of the expenditures involved or what, if any, funds were either involved in the project or would have been required to satisfy the appellant’s concerns.” 104 M.S.P.R. at 385. Thus, it held that the appellant failed to establish that she made disclosures concerning gross waste of funds. *Id.* at 386.

Similarly, here, we find that Ms. Stark has not sufficiently alleged that she had a reasonable belief that the CHPRC engaged in a gross waste of funds. Ms. Stark does not specify the scale of the expenditures involved concerning the rental equipment costs and she does not allege the amount of funds necessary to satisfy the rental equipment costs in comparison to the amount that the CHPRC actually spent for those services. Indeed, her Complaint is silent as to the amount of waste that she claims resulted from these alleged actions. Without such information, her allegation is too vague and inadequate to survive dismissal. Even in construing the allegations in the light most favorable to Ms. Stark, we cannot conclude that she alleged a “more-than-debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government.” *See Thomas L. Townsend*, OHA Case No. TBU-0082.

Finally, Ms. Stark inadequately alleges that she observed “fraud” with regard to the rental equipment costs and her co-worker’s alleged role in failing to abate rental costs. While Part 708 does not contain a specific definition of “fraud,” what Ms. Stark is alleging is clearly not “fraud” as that term is generally understood in the law. *See Black’s Law Dictionary* (9th ed. 2009) (defining “fraud” as a “knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment”). Accordingly, we find that the ECP Manager properly determined that her allegations of fraud, gross mismanagement or gross waste of funds pertaining to the rental equipment costs and her co-worker’s failure to move items off rent shall be dismissed.

**B. Alleged Disclosures Concerning Mr. Swartz’ Relationship with a Co-worker**

However, we conclude that Ms. Stark’s allegations pertaining to an inappropriate relationship between her supervisor, Mr. Swartz, and a subordinate, sufficiently satisfy the requirements of 10 C.F.R. § 708.17(c) to survive dismissal. The MSPB’s decision in *Sirgo v. Department of Justice* provides useful guidance for my analysis on this issue. 66 M.S.P.R. 261, 267 (1995). In *Sirgo*, the MSPB determined that preferential treatment given to a subordinate based on an intimate relationship with a supervisor constituted an “abuse of authority.” *Id.* There, the appellant complained about preferential treatment that was given to co-worker based on her relationship with their supervisor; the MSPB agreed that his disclosure was protected under the Whistleblower Protection Act because it constituted an abuse of authority. *Id.* Furthermore, the OHA has defined an abuse of authority as “an arbitrary or capricious exercise of power by an official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons.” *See Thomas L. Townsend*, OHA Case No. TBU-0082 (2008). Hence, based on the MSPB’s decision in *Sirgo* and OHA’s definition of abuse of authority, we conclude that Ms. Stark has sufficiently alleged a claim for abuse of authority based on the intimate relationship between Mr. Swartz and his subordinate, which enabled the subordinate to engage in abusive conduct towards Ms. Stark.

While the ECP Manager concluded that there was evidence to support a conclusion that Ms. Stark was terminated for non-retaliatory reasons, this is the type of issue that the OHA is charged with investigating under Section 708.22 and considering through the hearing process described at Section 708.28. At this stage, where the DOE has not even commenced an independent investigation of Ms. Stark’s Complaint, the ECP Manager’s determination as to the merits of the CHPRC’s arguments concerning the reasons for terminating Ms. Stark is premature. Ms. Stark’s allegation of retaliation based on her complaints regarding Mr. Swartz intimate relationship with a subordinate deserves closer examination, and is still in dispute. If this matter proceeds to an investigation, the OHA investigator can examine the contents of those alleged disclosures to make a factual finding regarding the sufficiency of this claim.

A DOE Office may not dismiss a case by reaching this type of substantive determination under the provisions of Section 708.17, unless the facts do not present issues for which relief can be granted under Part 708, or the complaint is frivolous or without merit on its face. 10 C.F.R. § 708.17(c)(2), (4). Accordingly, we conclude that the ECP Manager’s determination to dismiss Ms. Stark’s Complaint for lack of jurisdiction was incorrect only as to her allegations regarding abuse of authority. *Daryl J. Shadel*, OHA Case No. VBU-0050 (2000). Furthermore, as

explained above, we also find that the ECP Manager properly determined that Ms. Stark's allegations concerning gross mismanagement, gross waste of funds and fraud pertaining to the rental equipment costs and items on rent shall be dismissed.

It Is Therefore Ordered That:

The Appeal filed by Cassondra B. Stark (Case No. WBU-13-0003) is hereby denied in part and granted in part and that this matter is remanded in part to the Richland Operations Office Employee Concerns Program for further processing as set forth in 10 C.F.R. § 708.21.

Poli A. Marmolejos  
Director  
Office of Hearings and Appeals

Date: March 27, 2013