

Case No. VWZ-0009

March 12, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Name of Petitioner: Lockheed Martin Energy Systems, Inc.

Date of Filing: March 8, 1999

Case Number: VWZ-0009

This decision will consider a "Motion to Strike Alleged Disclosures from Consideration" Lockheed Martin Energy Systems, Inc. (LMES) filed on March 8, 1999. In its Motion, LMES objects to the consideration of a number of alleged disclosures contained in a Complaint filed by Linda D. Gass under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Ms. Gass requested a hearing on her Complaint under 10 C.F.R. § 708.9 on January 12, 1999, and it has been assigned Office of Hearings and Appeals (OHA) Case No. VWA-0028.

I. Background

The Department of Energy established its Contractor Employee Protection Program 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 or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. The Part 708 regulations prohibit discrimination by a DOE contractor against its employee on the basis of certain activities by the employee, including certain disclosures by the "to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), . . ." 10 C.F.R. § 708.5(a)(1).

Ms. Gass has worked for LMES since March 1982. In her Complaint, Ms. Gass alleged that in 1991 she raised concerns with the DOE and its contractors regarding the environmental site characterization of a proposed industrial park. The Complainant also alleged that she made additional disclosures to LMES officials and the DOE, as well as to other federal agencies, including the Department of Labor (DOL), the Equal Employment Opportunity Commission (EEOC), and the Office of Federal Contract Compliance Programs (OFCCP). Some of the disclosures concerned alleged sexual discrimination and alleged violations of the Americans with Disabilities Act (ADA). The Complainant alleged that she suffered retaliation as a result of her disclosures.

On December 16, 1998, the DOE Office of Inspector General (IG) issued a Report of Investigation on Ms. Gass' Complaint. The report found that the Complainant failed to establish by a preponderance of the evidence that she had made disclosures protected under Part 708 regarding the proposed industrial park that are protected under Part 708. The report made no findings regarding the other disclosures included in Ms. Gass' Complaint. As stated above, Ms. Gass requested a hearing on her Complaint and a hearing in this matter is scheduled to start on March 23, 1999.

At a pre-hearing conference conducted on March 3, 1999, counsel for the Respondent LMES requested that the Complainant identify the specific disclosures that form the basis of her Complaint of reprisal. After a discussion, the Complainant agreed that her allegations were limited to the alleged disclosures regarding the proposed industrial park and five other disclosures. On March 8, 1999, the Respondent LMES submitted the present Motion. In it, the Respondent moves to strike from consideration the five other disclosures enumerated at the March 3, 1999 pre-hearing conference. In a March 8, 1999 pre-hearing conference, I informed the parties that I would allow arguments on the Motion to be submitted to me no later than March 10, 1999, and that I would issue a written ruling on the Motion no later than March 12, 1999.(1) I further informed the parties that I was also particularly interested in arguments on the applicability of two sections of the Part 708 regulations to the disclosures alleged by the Complainant. The first section, 10 C.F.R. § 708.2(b), states in part that “The procedures of this part 708 do not apply to . . . complaints of reprisal stemming from, or relating to, discrimination by contractors on a basis such as race, color, religion, sex, age, national origin, or other similar basis not specifically discussed herein.” The second section, 10 C.F.R. § 708.5(a)(1), prohibits reprisals because of disclosures “to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), . . .” On March 10, 1999, the Complainant submitted arguments to me on the Motion and the specific issues I identified.

II. Analysis

A. Standard of Proof

Though the present Motion is styled as a “Motion to Strike Alleged Disclosures from Consideration,” it is in effect a Motion to Dismiss the present Complaint in part. A Motion to Dismiss should only be granted where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact or law on a more complete record. See *M&M Minerals Corp.*, 10 DOE ¶ 84,021 (1982). The OHA considers dismissal “the most severe sanction that we may apply,” and has stated that it will be used sparingly. See *Boeing Petroleum Services*, 24 DOE ¶ 87,501 at 89,005 (1994).

B. Application of 10 C.F.R. § 708.2(b) to the Alleged Disclosures

In its Motion, the Respondent first contends that under 10 C.F.R. 708.2(b), “the EEOC Complaint disclosure, claimed to be on the basis of sex discrimination, may not be considered in a Part 708 proceeding; . . .” The Complainant responds that this section of the regulations “merely states that an employee cannot pursue an employment discrimination claim under Part 708.” On this point, I agree with the Respondent. Section 708.2(b) clearly excludes from coverage not only claims of sexual discrimination, but also any “complaints of reprisal stemming from, or relating to” a sexual discrimination claim. Thus, if it is the Complainant's contention that she suffered reprisals because of her disclosure of allegations of sexual discrimination, these “complaints of reprisal” clearly “stem[] from, or relat[e] to,” discrimination on the basis of sex, and thus are explicitly excluded from coverage by the plain language of Part 708. Additionally, to the extent the Complainant alleges that she suffered reprisals as a result of her disclosures of allegations of discrimination in violation of the Americans with Disabilities Act, these complaints of reprisals also fall outside the intended scope of Part 708, because such discrimination is on a “similar basis” to those specifically enumerated in Section 708.2(b). Accordingly, to the extent that the present Complaint is based upon alleged disclosures “stemming from, or relating to,” sexual discrimination or discrimination in violation of the Americans with Disabilities Act, the Complaint will be dismissed.

C. Application of 10 C.F.R. § 708.5(a)(1) to the Alleged Disclosures

Regarding the application of Part 708 to disclosures made by the Complainant to other Federal agencies, the Complainant states,

We acknowledge that [10 C.F.R. § 708.5(a)(1)] requires disclosure to “an official of DOE, to a member of Congress, or to the contractor.” We further acknowledge that in at least two disclosures, *e.g.*, the EEOC and Department of Labor (“DOL”) complaints, there was not a direct disclosure by Ms. Gass to the contractor. However, the regulations are silent on this issue and to interpret Part 708 to require direct disclosure would be inappropriate.

I disagree. Section 708.5(a)(1) is unambiguous as to whom a disclosure must be made to be protected. If the intent of Part 708 was to include within its protection disclosures to other federal agencies, such intent could have been explicitly expressed. Indeed, recently issued revisions to Part 708, to take effect on April 15, 1999, “expand[] coverage of disclosures to include those made to other government officials,” making it clear that Part 708, as currently in effect, does not cover such disclosures. Criteria and Procedures for DOE Contractor Employee Protection Program, 64 Fed. Reg. (1999). Thus, to the extent that the present Complaint is based upon alleged disclosures not made “to an official of DOE, to a member of Congress, or to the contractor,” the Complaint will be dismissed.

D. Other Bases Cited in the Respondent's Motion

The Respondent argues further in its Motion that the five other disclosures may not be considered in the present proceeding because the Complaint as to these disclosures does not meet the procedural requirements of 10 C.F.R. § 708.6(c). “[S]pecifically, the claim is to be made under oath, and a statement is required that the remedy is not being pursued under other available law, as well as requiring a Complaint to contain such rudimentary items as facts and relief, neither of which has been advanced on these five (5) lately-raised claims; . . .” Finally, LMES contends that I may not consider the five disclosures because there has been no investigation or Report of Investigation issued on those disclosures. I do not agree.

The Respondent's characterization of any of the identified disclosures as “lately-raised” is inaccurate. Each of the disclosures was included in a letter from the Complainant's counsel to the DOE's Office of Contractor Employee Protection (OCEP) dated April 8, 1996. This letter, along with a March 26, 1996 affirmation signed by the Complainant, is referred to in the IG's Report of Investigation as the Complaint. See Report of Investigation at 8. I find, as apparently did OCEP and later the IG, that this letter and affirmation meet the procedural requirements of 10 C.F.R. 708.6(c).

Moreover, the Respondent is incorrect when it suggests that because the IG's Report of Investigation made no findings on some of these disclosures I am barred from considering them in the present proceeding. First, the Respondent incorrectly cites 10 C.F.R. 708.5(a)(5) as requiring that a Report of Investigation “be made on any claimed disclosure, . . .” In fact, this section of the regulations speaks only of an “investigation of the complaint[,]” and there is no dispute that the IG investigated Ms. Gass' Complaint. Second, while the Respondent is correct in pointing out that the Report of Investigation becomes a part of the record of this proceeding, the regulations are quite explicit that “the Hearing Officer may rely upon, but shall not be bound by, the findings contained in the Report of Investigation.” 10 C.F.R. 708.10(b). Thus, I find no basis for narrowing the scope of the Complaint solely upon the contents of the IG's Report of Investigation.

III. Conclusion

Applying the above principles to the six alleged disclosures identified by the Complainant in the March 3, 1999 pre-hearing conference, the present Complaint will be dismissed as to all but (1) the alleged disclosures to the DOE and its contractors regarding the environmental site characterization of a proposed industrial park and (2) the alleged disclosures to LMES officials regarding alleged retaliation for activity protected under Part 708.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Lockheed Martin Energy Systems, Inc., on March 8, 1999, Case No. VWZ-0009, is granted in part and denied in part as set forth in Paragraphs 2 and 3 below. In all other respects, the Motion is denied.

(2) To the extent that the present Complaint, on which a hearing has been requested in Case No. VWA-0028, is based upon alleged disclosures stemming from, or relating to, sexual discrimination or discrimination in violation of the Americans with Disabilities Act, the Complaint is hereby dismissed.

(3) To the extent that the present Complaint, on which a hearing has been requested in Case No. VWA-0028, is based upon alleged disclosures not made to an official of DOE, to a member of Congress, or to the contractor, the Complaint is hereby dismissed.

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

Steven Goering

Staff Attorney

Office of Hearings and Appeals

Date: March 12, 1999

(1) These pre-hearing rulings are consistent with the Part 708 regulatory requirement that, “where a dismissal of a claim, defense, or party is sought,” I must provide all parties an opportunity to “show cause why the dismissal should not be granted and afford all parties a reasonable time to respond” 10 C.F.R. § 708.9(j).