

May 28, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Name of Case: Gilbert J. Hinojos
Date of Filing: April 21, 2003
Case Number: TBZ-0003

This determination will consider a Motion to Dismiss filed by Honeywell Federal Manufacturing & Technologies (Honeywell) on April 21, 2003. Honeywell seeks dismissal of the underlying complaint filed by Gilbert J. Hinojos under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708.

I. Background

Mr. Hinojos was employed by Honeywell as a "Material Control Coordinator, Sr." at a DOE facility in Albuquerque New Mexico. Initially, Mr. Hinojos alleges that he was subject to two acts of retaliation from Honeywell due to his having filed several complaints with the Equal Employment Opportunity Commission (EEOC) and the New Mexico Human Rights Division (NMHRD) against Honeywell alleging discrimination based on national origin. First, Mr. Hinojos was denied permission to attend classes during his duty hours beginning in June 2002 despite the fact that Honeywell had previously granted him permission in the past to attend classes. The second act of alleged retaliation occurred when a Honeywell official asked Mr. Hinojos to stop circulating a letter among his co-workers seeking support for his initial request to attend the classes. An Office of Hearings and Appeals Investigator conducted an investigation as to Mr. Hinojos's claims and issued a Report of Investigation on December 20, 2002 concluding that Mr. Hinojos had not engaged in any conduct protected by Part 708 since the Contractor Employee Protection Program does not cover complaints based upon EEOC complaints. *See* Report of Investigation, Case No. TBI-0003 (December 20, 2003) (Report). The Report also found that even if Mr. Hinojos had engaged in protected conduct, there was clear and convincing evidence that Honeywell's refusal to let Mr. Hinojos attend the classes was unrelated to his alleged protected conduct in filing the EEOC complaints.

During the pendency of this matter, Mr. Hinojos was discharged from his position with Honeywell. Mr. Hinojos then requested and was granted permission to amend his Part 708 complaint to include his termination as an additional act of retaliation.

In a Motion dated April 2, 2003, Honeywell argues that section 708.4 bars Mr. Hinojos's complaint. Section 708.4 states:

If you are an employee of a contractor, you, you may not file a complaint against your employer under this part if:

(a) The complaint is based upon race, color, religion, sex, age, national origin, or similar basis . . .

10 C.F.R. § 708.4. Honeywell asserts that Mr. Hinojos's sole claim as to the disclosure which prompted the alleged retaliation against him was his filing of his EEOC and NMHRD complaints alleging discrimination based on national origin. Consequently, Honeywell argues that section 708.4 bars Mr. Hinojos's complaint and Honeywell's Motion to Dismiss should be granted. Honeywell also argues Mr. Hinojos's complaint should be dismissed because he is continuing to seek redress for his alleged retaliation in two forums - the EEOC and OHA. Honeywell directs our attention to section 708.17(c)(3), which bars a Part 708 complaint where a party has filed a complaint under State or applicable law with respect to the same facts as alleged in a Part 708 complaint. *See* 10 C.F.R. § 708.17(c)(3).

II. Analysis

With regard to Mr. Hinojos's claim regarding the first two alleged acts of retaliation, he has steadfastly alleged that the actions were taken against him because he had filed complaints with the EEOC and the NMHRD against Honeywell alleging discrimination based upon national origin. I agree with Honeywell that section 708.4 bars the consideration of these alleged acts of retaliation under Part 708. Mr. Hinojos's complaint regarding the first two acts of retaliation is based upon the EEOC and NMHRD complaints alleging discrimination based on his national origin. As such they are barred from consideration pursuant to section 708.4. I will therefore grant Honeywell's Motion, in part, regarding Mr. Hinojos's complaint concerning Honeywell's decision to deny Mr. Hinojos time off to attend classes in June 2002 and Honeywell's actions in stopping him from circulating a letter to co-workers concerning that decision.

With regard to Mr. Hinojos's claim of retaliatory discharge, Mr. Hinojos contends that the discharge was motivated both by his filing EEOC claims and by his filing a Part 708 complaint. *See* Letter from Gilbert Hinojos to Richard Cronin, Hearing Officer (May 4, 2003) at 2. Section 708.4 does not bar Mr. Hinojos's claim concerning his discharge since he is alleging that his prior filing of a Part 708 claim was potentially the motivation for his discharge. Filing a Part 708 claim is protected conduct pursuant to section 708.5. *See* 10 C.F.R. § 708.5(a)(1) ("[d]isclosing to a DOE official . . . information that you reasonably and in good faith believe reveals . . . A substantial violation of a law rule or regulation" is employee conduct protected from retaliation). Consequently, I will deny

Honeywell's Motion with regard to Mr. Hinojos's Part 708 claim that he was terminated in response to his filing a prior Part 708 complaint. 1/

Honeywell's remaining argument as to why Mr. Hinojos's complaint should be dismissed in its entirety is unavailing. Section 708.17(c)(3) states: (c) Dismissal for lack of jurisdiction or other good cause is appropriate if . . . (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" 10 C.F.R. § 708.17(c)(3). Thus, if Mr. Hinojos's EEOC and Part 708 claims are based on the same facts, the Part 708 claim should be dismissed. However, I do not find that Mr. Hinojos's EEOC claim and Part 708 claim are based upon the same facts. Mr. Hinojos's latest claim under the EEOC is based upon his assertion that he was fired due to his national origin and in retaliation for his having filed four previous EEOC complaints, practices which are prohibited pursuant to *Title VII of the Civil Rights Act of 1964, as amended*, 42 U.S.C. § 2000e (*Title VII*). See Attachment to Letter from Jill Marchant, counsel for Honeywell to Richard Cronin, Hearing Officer (April 23, 2003). To prevail in his EEOC complaint, Mr. Hinojos must establish that adverse employment action was taken against him by reason of his national origin or his filing previous EEOC complaints. See, e.g., *Edwards v. Interboro Institute*, 840 F. Supp 222 at 227 (E.D.N.Y. 1994) (an element of *prima facie* case in *Title VII* discriminatory discharge cause of action is that individual belong to a protected class); see 42 U.S.C. § 2000e-3(a) (statutory protection from retaliation arising from filing an *Title VII* complaint). However, for Mr. Hinojos's Part 708 complaint to succeed, his termination must have been motivated by his filing a Part 708 complaint. See 10 C.F.R. § 708.5. Because the necessary factual prerequisites differ in the Part 708 and EEOC complaints, I find the complaints are not based upon the "same facts" for section 708.15(c)(3) purposes. See *Carl J. Blier*, 27 DOE ¶ 87,514 (1999) (Americans with Disabilities Act and Rehabilitation Act (ADA/RA) complaints do not bar Part 708 complaint since ADA/RA complaints require different factual motivation for employer's adverse personnel action); *Lucy B. Smith*, 27 DOE ¶ 87,520 (1999) (Age Discrimination in Employment Act (ADEA) complaint does not bar Part 708 complaint since ADEA complaint requires different factual motivation for employer's adverse personnel action).

With my decision regarding Honeywell's Motion to Dismiss there remains only one alleged retaliatory action before me - Honeywell's discharge of Mr. Hinojos purportedly motivated by reason of Mr. Hinojos having filed a Part 708 complaint. 2/ Consequently, at the hearing, Mr. Hinojos must prove by a preponderance of the evidence that he filed a Part 708 complaint and that this action was a contributing factor in Honeywell's decision to remove him from his job. If Mr. Hinojos can make this showing, the burden will shift to Honeywell to prove by clear and convincing evidence that it

1/ I will however grant Honeywell's motion with regard to that portion of Hinojos's claim of retaliatory discharge that is based upon his filing prior EEOC complaints.

2/ Because this allegation occurred after the Report of Investigation was issued in this matter, I will allow both parties sufficient time to conduct discovery on this issue.

would have removed Mr. Hinojos notwithstanding his filing of a Part 708 complaint. *See* 10 C.F.R. § 708.29.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Honeywell Federal Manufacturing & Technologies on April 21, 2003 is hereby granted in part as specified in Paragraph (2).

(2) All Part 708 claims relating to Honeywell's failure to grant Gilbert Hinojos permission to attend class in June 2002 are dismissed. All Part 708 claims relating to Honeywell's action in stopping Gilbert Hinojos from circulating a letter to his co-workers in support of his request to attend the class are dismissed. All Part 708 claims relating to Honeywell's termination of Mr. Hinojos's employment which are based on his filing prior EEOC complaints are dismissed.

(3) This is an Interlocutory Order of the Department of Energy. This Order may be appealed to the Director of OHA upon issuance of a decision by the Hearing Officer on the merits of the complaint.

Richard A. Cronin, Jr.
Hearing Officer
Office of Hearings and Appeals

Date: May 28, 2003

