United States Department of Energy
Office of Hearings and Appeals

In the Matter of Dr. Shou-Yuan Zhang	)	
	)	
Filing Date: October 17, 2016	)	Case No.: WBH-16-0006
	)	

Issued: January 6, 2017

Initial Agency Decision

This Decision will consider Responses to an Order to Show Cause filed by Dr. Shou-Yuan Zhang and Brookhaven Science Associates (BSA), the management and operating contractor for the Department of Energy's (DOE) Brookhaven National Laboratory (BNL) in Upton, New York, in connection with the pending Complaint of retaliation filed by Dr. Zhang against BSA under the DOE's Contractor Employee Protection Program and its governing regulations set forth at 10 C.F.R. Part 708. For the reasons set forth below, I will dismiss Dr. Zhang's Complaint.

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 (Mar. 3, 1992). Its primary purpose is 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. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any 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).[1] Available relief includes reinstatement, back pay, transfer preference, and such other relief as may be appropriate. *Id.* at § 708.36.

Employees of DOE contractors who believe they have been retaliated against in violation of the Part 708 regulations may file a whistleblower Complaint with the DOE and are entitled to an investigation by an investigator assigned by the Office of Hearings and Appeals (OHA), followed by a hearing by an OHA Administrative Judge, and an opportunity for review of the Administrative Judge's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

An employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure, as described in section 708.5, and that the disclosure was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. Once the employee has met that burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure. 10 C.F.R. § 708.29.

B. Factual Overview

Dr. Zhang is an employee of BSA, the management and operations contractor for the DOE's Brookhaven National Laboratory (BNL). He works in BNL's Collider-Accelerator Department (C-AD), which conducts experiments using sophisticated accelerators to study the properties of subatomic particles. Dr. Zhang's research interests have been to improve luminosity in one of those accelerators, the Relativistic Heavy Ion Collider (RHIC). He was previously assigned to the Injector subgroup of the Accelerator Physics group in the Accelerator Division, where he had worked for at least 15 years.

On January 4, 2016, BNL issued a press release announcing that it had successfully implemented a new electron lensing (e-lens) technology that allowed it to double proton collision rates at the RHIC, improving the luminosity of its experiments, the subject that interests Dr. Zhang. On February 2, 2016, Dr. Zhang sent an e-mail to Dr. Thomas Roser, the Chair of C-AD, in which he disputed the effectiveness of the e-lens technology, claiming that a factor other than the e-lens accounted for the RHIC's luminosity improvements. On or about March 7, 2016, BSA assigned Dr. Zhang to a different supervisor, with instructions to work on a different project within the Accelerator Physics group, but no longer within the Injector subgroup.

C. Procedural History

Dr. Zhang filed a Part 708 Complaint on March 23, 2016, against BSA with the DOE's Brookhaven Site Office (BHSO). In his Complaint, Dr. Zhang contends that information in his

[1] The regulations provide the same protection to employees who participate in a Congressional proceeding or an administrative proceeding under Part 708, and to those who refuse to participate in an activity, policy, or practice that they believe could (1) constitute a violation of a federal health or safety law or (2) cause the employee to have a reasonable fear of serious injury to himself or herself, other employees, or members of the public. 10 C.F.R. § 708.5(b), (c). The Complaint sets forth the disclosure contained in a February 2, 2016, e-mail as the sole basis for BSA's alleged retaliation, and for this reason I will consider only that disclosure in my analysis.

February 2, 2016, e-mail to Dr. Roser was a disclosure protected under Part 708, and that his reassignment was made in retaliation for sending the e-mail. BHSO reviewed the Complaint and dismissed it on May 26, 2016. On June 7, 2016, Dr. Zhang appealed that dismissal to the Director of the Office of Hearings and Appeals (OHA). Granting the appeal, OHA remanded the matter to BSHO for further processing. On remand, BSHO transferred this case to OHA for an investigation followed by a hearing. An OHA investigator issued her Report of Investigation on October 17, 2016, in which she found that, based on the evidence gathered, it would be unlikely that Dr. Zhang would be able to prove, by a preponderance of the evidence, that he made a disclosure protected under Part 708. Report of Investigation at 8. She further found that, if he could prove that he made a protected disclosure, he would likely be able to show by a preponderance of the evidence that his disclosure was a contributing factor to the alleged retaliation, his reassignment to another project within the same working group. *Id.* at 3, 9. Finally, the investigator also found that BSA would likely be able to show by clear and convincing evidence that it would have assigned Dr. Zhang to his current position in the absence of his alleged protected disclosure. *Id.* at 11.

Upon issuance of the Report of Investigation, the OHA Director appointed me as the Administrative Judge in this case. On October 20, 2016, I sent a letter to the parties, offering them the opportunity to address the specific issues in this case in written submissions and to respond to each other's submissions. After reviewing those submissions, I was still unable to identify a disclosure protected by Part 708, without which the Complaint would have no merit. Because the complainant, Dr. Zhang, bears the burden of establishing through a preponderance of the evidence that he made such a disclosure, I issued an Order to Show Cause why his Complaint should not be dismissed. Dr. Zhang submitted a response to that Order on December 12, 2016, and BSA submitted a reply to that response on December 14, 2016.

II. Analysis

Pursuant to section 708.12, a whistleblower complaint must contain a statement specifically describing the alleged retaliation and the disclosure, participation, or refusal that the complainant believes gave rise to the retaliation. 10 C.F.R. § 708.12(a).

In his Complaint, Dr. Zhang averred for the first time that he was reporting research misconduct when he wrote to Dr. Roser on February 2, 2016. *See* Complaint at 1 (March 23, 2016). In my Order to Show Cause, I asked Dr. Zhang to demonstrate that his February 2, 2016, e-mail to Dr. Roser was a disclosure of a nature that is protected under Part 708, as defined in section 708.5(a). I noted that nothing in the wording of the e-mail indicated that he was presenting to Dr. Roser anything other than a scientific difference of opinion. I suggested that if he believed he had disclosed a violation of law, rule, or regulation, or if he believed he had disclosed fraud, then he should explain his position to avoid having his case dismissed for lack of a protected disclosure. Order to Show Cause (December 5, 2016) at 2-3.

In his response to the Order to Show Cause, Dr. Zhang contended that his e-mail disclosed fraud. He relied on the standard legal definition of fraud, which I had provided to him in my Order to Show Cause: the knowing misrepresentation of the truth or concealment of a material fact to in induce another to act to his or her detriment. He argued that a series of e-mails written by Dr. Wolfram Fischer, Associate Chair for Accelerators of the C-AD, demonstrate "knowing

misrepresentation of the truth" because they at first attributed increased luminosity to "higher bunch intensity" and gradually shifted toward attributing that success to the e-lens. Ultimately, according to Dr. Zhang, a BSA press release issued on January 4, 2016, reflected that later opinion. He also argued that BSA's failure to acknowledge the negative effect of the e-lens on luminosity constituted a "concealment of a material fact." Zhang Response to Order to Show Cause (December 12, 2016).

BSA filed a brief reply to Dr. Zhang's response to the Order to Show Cause. The reply contends that "[t]here is no fraud, no intent to deceive, nor is there any misconduct." BSA Reply to Order to Show Cause (December 14, 2016). BSA pointed out that no BSA employee "has ever made the statement 'electron lenses doubled intensity,'" and that any statements made by Dr. Roser or Dr. Fischer "are based on and supported by a peer-reviewed scientific paper." *Id.*

The Part 708 regulations do not include procedures and standards governing Orders to Show Cause. Responses to Orders to Show Cause commonly include motions to dismiss or motions for summary judgment; neither was filed in this case, though BSA did request that "Dr. Zhang's charges be rejected and that any allegation of a violation of 10 C.F.R. [Part] 708 be dismissed." *Id.* at 2. In cases where motions to dismiss have been filed, we have turned to the Federal Rules of Civil Procedure for guidance. While those Rules do not govern this proceeding, their standards may be used for analogous support. *See, e.g., Hansford F. Johnson,* Case No. TBZ-0104 (2010) (applying standards of Fed. R. Civ. P. 12(b)(6) to motion to dismiss). In the present case, where no motion has been filed, but where Dr. Zhang nevertheless bears the burden to establish by a preponderance of the evidence that he made a protected disclosure, I will apply the standards of Fed. R. Civ. P. 12(b)(6) to evaluate whether, in light of the record before me, Dr. Zhang's Complaint should be dismissed.

The Supreme Court has held that, to survive a Rule 12(b)(6) motion, a complaint must plead "only enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550, 544, 570 (2007). While the complaint "does not need detailed factual allegations, . . . [f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all of the Complaint's allegations are true (even if doubtful in fact), ..." *Id.* at 555 (citations omitted). In addition, prior cases of this Office instruct that such a motion should be granted only where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact on a more complete record. *Curtis Broaddus,* Case No. TBH-0030 (2006); *Henry T. Greene*, Case No. TBU-0010 (2003) (decision of OHA Director characterizing this standard as "well-settled"); *see also David K. Isham*, Case No. TBH-0046 (2007) (complaint may be dismissed where it fails to allege facts which, if established, would constitute a protected disclosure).

Dr. Zhang has been given ample opportunity to provide information to support his claim that he made a protected disclosure by means of his February 2, 2106, e-mail to Dr. Roser. As discussed above, the e-mail itself contains no language that reflects a belief that Dr. Zhang was communicating any type of protected disclosure as that term is defined in section 708.5(a). In his Complaint, Dr. Zhang alleged that the e-mail identified research misconduct. Even if I were to accept that the e-mail describes research misconduct, the Part 708 regulations require that the complainant have made a protected disclosure. I must therefore analyze the e-mail to determine

whether Dr. Zhang made a protected disclosure, not whether he raised a claim of research misconduct. For that reason, I issued my Order to Show Cause and, in his response, Dr. Zhang alleged for the first time that BSA had engaged in fraud. He has alleged no other basis to support his allegation that he made a protected disclosure.

When analyzing allegations of fraud in other Part 708 cases, we have looked to a standard legal reference for a definition of the term: the "knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." *Edward G. Gallrein, III,* Case No. WBH-13-0017 (2014) at 11; *Eugene N. Kilmer*, Case No. TBH-0111 (2011) at 11 (citing *Black's Law Dictionary* (9th ed. 2009)). Although Dr. Zhang contends in his response to the Order to Show Cause that Dr. Fischer's e-mails and the press release prove that BSA was engaging in fraud, his argument does not support that charge. Even if, as Dr. Zhang claims, Dr. Fischer revised his opinion concerning the factors that contributed to improvements at the RHIC and BSA has failed to acknowledge the negative effect of the e-lens, Dr. Zhang has not shown, or even alleged, that these steps were taken with the intent to "induce another to act to his or her detriment."

To be considered a protected disclosure under Part 708, and employee must reasonably believe that the information he or she reveals falls within certain categories, in this case, fraud. 10 C.F.R. § 708.5(a). I must consider what the employee reasonably believed at the time of the disclosure. I have reviewed the text of the February 2, 2016, e-mail to Dr. Roser for evidence that Dr. Zhang had a reasonable belief that he was disclosing fraud, and conclude that his disclosures do not rise to the level of this definition of fraud. Dr. Zhang did not mention fraud in the e-mail, and the language he employed indicates instead that Dr. Zhang was upset and disagreed with Dr. Fischer's opinion on scientific grounds. Based on the record, I find that Dr. Zhang did not communicate his concerns in a way that a disinterested person would have construed his comments as claiming that BSA had engaged in fraud. Dr. Zhang has not provided a context, nor can I posit one, in which his expression of dissatisfaction and disagreement in the e-mail could indicate that he reasonably believed he was revealing fraud in his e-mail. Therefore, after considering Dr. Zhang's February 2, 2016, e-mail, his Complaint, and his response to the Order to Show Cause, I find that Dr. Zhang would not be able to demonstrate at the hearing, by the requisite preponderance of the evidence, that he made a disclosure of fraud protected under Part 708.

As I cannot find that the complainant disclosed information that he could have reasonably believed revealed fraud, Dr. Zhang's February 2, 2016, disclosure to Dr. Roser is not protected under section 708.5.

III. Conclusion

I have found above that, even assuming the truth of the complainant's allegations as to the relevant facts of this case, those allegations do not support a plausible claim that Dr. Zhang disclosed information that he reasonably believed revealed fraud. For these reasons, I will dismiss with prejudice Dr. Zhang's Complaint of retaliation filed under 10 C.F.R. Part 708.

It Is Therefore Ordered That:

(1) The Complaint filed by Dr. Shou-Yuan Zhang against Brookhaven Science Associates on March 23, 2016, is hereby dismissed with prejudice.

(2) This is an Initial Agency Decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the 15th day after receipt of the decision in accordance with 10 C.F.R. § 708.32.

William M. Schwartz
Administrative Judge
Office of Hearings and Appeals

Date: January 6, 2017