

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

In the Matter of Mr. Ronald Walli)	
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Filing Dates: June 14, 2018)	Case Nos.: WBH-17-0009
June 20, 2018)	WBZ1-17-0009
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Issued: July 25, 2018

**Initial Agency Decision
Decision and Order on Order to Show Cause**

This Decision and Order concerns a Complaint filed by Ronald Walli (hereinafter referred to as “Mr. Walli” or “the Complainant”) against his employer, UT-Battelle, LLC (hereinafter referred to as “UT-Battelle”), under the Department of Energy’s (DOE) Contractor Employee Protection Program regulations found at 10 C.F.R. Part 708.¹ Mr. Walli alleges that UT-Battelle retaliated against him for engaging in protected activity by forcing his resignation. As discussed below, I have concluded that Mr. Walli’s Complaint should be dismissed.

I. BACKGROUND

A. Regulatory Background

DOE 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. *See* Criteria and Procedures for DOE Contractor Employee Protection Program, 57 Fed. Reg. 7533 (1992). The Program’s 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 retaliation by a DOE contractor against its employee because the employee has engaged in certain protected activity, including disclosing to his or her employer information that he or she reasonably believes reveals a substantial violation of a law, rule, or regulation; a substantial and specific danger to employees or to the public; or fraud, gross mismanagement, gross waste of funds or abuse of authority. 10 C.F.R. § 708.5(a). An employee who believes that

¹ At all times relevant to this proceeding, UT-Battelle operated the DOE’s Oak Ridge National Laboratory (ORNL) pursuant to a contract with the DOE.

he or she has suffered retaliation for engaging in protected activity may file a complaint with DOE. Complaints may be dismissed if the facts, as alleged in the complaint, “do not present issues for which relief can be granted under [Part 708].”² 10 C.F.R. 708.17(c)(2).

A. Procedural Background

On July 10, 2017, Mr. Walli filed a Complaint with DOE’s Oak Ridge National Laboratory Site Office (ORNL-SO). On August 7, 2017, ORNL-SO dismissed this Complaint. Mr. Walli appealed the dismissal to OHA’s Director, who granted the appeal and remanded the case to ORNL-SO for further processing. *Ronald A. Walli*, Case No. WBU-17-0009 (Sept. 29, 2017). On February 20, 2018, ORNL-SO forwarded the Complaint to OHA with Mr. Walli’s request for a hearing followed by an investigation, in accordance with 10 C.F.R. § 708.21(d). On February 20, 2018, the OHA Director appointed an OHA attorney (the Investigator) to investigate Mr. Walli’s Complaint. On June 14, 2018, the Investigator issued his Report of Investigation (ROI) and I was appointed as the Administrative Judge for this hearing. 10 C.F.R. § 708.

On June 20, 2018, I wrote the parties to address a number of matters. In this letter, I issued an Order to Show Cause to Mr. Walli, stating in pertinent part:

[T]he Complaint does not allege a protected disclosure under 10 C.F.R. § 708.5, and therefore fails to state a claim upon which relief can be granted. I am therefore ordering Mr. Walli to show cause why this case should not be dismissed. Mr. Walli’s response to the Order to Show Cause should identify specifically each written or verbal statement cited in his Complaint that he considers to be a protected disclosure, as defined in 10 C.F.R. § 708.5, and should explain why each alleged

² As Mr. Walli is the party whose claim may be dismissed, I reviewed the facts in the light most favorable to him. *Charles Dalton*, Case No. WBU-16-0007 at 4 (Aug. 12, 2016). I view his Response to the Order to Show Cause, and the accompanying exhibits, as amendments to his complaint.

When considering whether a case should be dismissed for failing to present an issue for which relief can be granted under Part 708, we have turned to the Federal Rules of Civil Procedure (Rules) for guidance. While those Rules do not govern this proceeding, their standards provide analogous support. *See, e.g., Hansford F. Johnson*, Case No. TBZ-0104 (Nov. 24, 2010) (applying standards of Fed. R. Civ. P. 12(b)(6) to motion to dismiss). In the present case, I will apply the standards of Fed. R. Civ. P. 12(b)(6) to evaluate whether, in light of the record before me, I should dismiss the Complaint.

The Supreme Court has held that, to survive a Rule 12(b)(6) motion, a complainant must plead “only enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Indeed, “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Id.* at 555 (citations omitted). In essence, a complainant may not “plead the bare elements of his cause of action ... and expect his complaint to survive a motion to dismiss.” *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009). In addition, OHA will dismiss a case 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 Broadus*, OHA Case No. TBH-0030 (2006); *Henry T. Greene*, OHA Case No. TBU-0010 (2003) (decision of OHA Director characterizing this standard as “well-settled”); *see also David K. Isham*, OHA Case No. TBH- 0046 (2007) (complaint may be dismissed where it fails to allege facts which, if established, would constitute a protected disclosure).

disclosure is protected under 10 C.F.R. § 708.5. In addition, Mr. Walli's response to the Order to Show Cause must specifically identify: to whom each alleged protected disclosure was made; the date on which each alleged protected disclosure was made; each individual that has personal knowledge of each alleged protected disclosure; and any documents evidencing each alleged protected disclosure.

June 20, 2018, Letter to the Parties from Administrative Judge Fine. Mr. Walli submitted a response to the Order (Response) on July 2, 2018, and UT-Battelle submitted its reply to the Response (Reply) on July 12, 2018.

B. Factual Background

From 2000 (when UT-Battelle began managing and operating ORNL DOE's Oak Ridge National Laboratory (ORNL) on behalf of DOE) until his forced resignation on March 13, 2017, Mr. Walli was employed as a media relations specialist in UT-Battelle's Media Relations group. Mr. Walli's responsibilities included developing stories and writing about lab research in order to generate positive media coverage for ORNL.

On November 16, 2016, scientists working at ORNL published a peer-reviewed scientific research paper (the Paper) in the scientific journal *Energy & Fuels* describing a new biomass conversion process. In November 2016, Mr. Walli was tasked with preparing a draft press release (the Draft Press Release) to be issued by ORNL in order to inform the public about this achievement and the new technology's potential benefits. The technology described in the Paper would, theoretically, constitute a substantial improvement over the efficiency of a technology that ORNL had licensed to a private firm, Vertimass, LLC (Vertimass).³ The Draft Press Release therefore could have affected Vertimass' ability to market the technology that it had licensed from ORNL. Moreover, the Draft Press Release specifically identified Vertimass as the licensee of the technology that could potentially become obsolete if the technology described in the paper were to be successfully implemented.

After the Draft Press Release had been prepared by UT-Battelle's Media Relations group and then submitted to DOE Communications for approval, Mr. Timothy Theiss, Program Manager for the Bioenergy Technologies Program, shared a copy of the Draft Press Release with Vertimass's Chief Executive Officer (CEO). The CEO objected to some of the language in the Draft Press Release and requested that it be modified or discarded. Ex. A at 3. Specifically, the CEO expressed concerns that the Draft Press Release, as then worded, could interfere with Vertimass' ongoing negotiations with potential investors since, in the CEO's opinion, it did not accurately portray the new process and inaccurately implied that the technology that Vertimass had licensed from ORNL was not effective or commercially viable. Ex. 3 at 1. Vertimass' concerns led to discussions between ORNL and Vertimass, and within ORNL (between Mr. Theiss, Mr. Walli's supervisor, Ms. Morgan McCorkle, Mr. Walli, and several other individuals employed at ORNL), regarding how best to proceed with the Draft Press Release. Ex. 2; Ex. 3. During his discussions with Ms.

³ Two of the Paper's authors were UT-Battelle employees who were also minority owners in Vertimass. Ex. A at 2.

McCorkle, Mr. Walli suggested including a quote from Vertimass in the Draft Press Release in order to address Vertimass' concerns. Ex. A; Ex. 2. However, Ms. McCorkle was hesitant to do so, stating in a December 2, 2016, email to Mr. Walli and others: "Considering [that Vertimass is] not yet an official licensee [of the new technology] and did not participate in this research, my concern is that [quoting Vertimass] would create the appearance of a conflict of interest." Ex. 2. She then passed along Vertimass's proposed press release edits to Mr. Theiss, Mr. Walli, and others involved with the research. Ex. 3 at 3.

After these discussions, and having reviewed suggested edits of the Draft Press Release, Mr. Theiss stated, on December 5, 2016, that he was "inclined to simply stop the press release," noting that "the [P]aper is able to go into enough detail to provide the needed context for the new work, while the press release's purpose is just to draw attention to the existence of new research . . . Vertimass understandably does not want our previous work and their work to look silly without this new development." Ex. 3 at 2. He then asked the team involved with evaluating the release, including Mr. Walli, "[d]oes it work for everyone here to simply pull this release?" Ex. 3 at 2. *Id.* Later that day, Ms. McCorkle replied to Mr. Theiss stating:

I am ok with pulling the release . . . I wish that that we had understood Vertimass's position and concerns about publicity before we began. I do not like setting a precedent that a company can essentially kill an already written and approved press release on significant R&D that the company was not directly involved in. But I understand this is a somewhat unique and complicated situation, and I recognize the need to be sensitive to their concerns as a research partner and licensee. It is unlikely that we will be able to edit the release sufficiently to allay Vertimass's concerns. Perhaps, if they end up licensing this new IP, we can repurpose the press release at that point in time.

Ex. 3 at 1. Mr. Theiss ultimately decided against issuing any press release concerning the Paper, stating in an email dated December 5, 2016:

From my perspective, Vertimass is not killing the release, I am. The nature of the press release forces us to lose a lot of important motivation and detail that make the release too ambiguous to be as value-added as needed. Vertimass has no issue with the paper nor the work.

Ex. 2.

Mr. Walli alleges that from December 8, 2016, through February 2017, he complained to Ms. McCorkle on several occasions that Vertimass' influence was a "conflict of interest," and that failing to issue the Draft Press Release would be "ethically inappropriate." Response at 2. On March 13, 2017, UT-Battelle presented Mr. Walli with an ultimatum: he could resign or be terminated. Mr. Walli chose to resign. Mr. Walli further alleges that his complaints that Vertimass's influence on the press release constituted a "conflict of interest" and that his complaints about Mr. Theiss' decision against issuing the Draft Press Release were both protected

disclosures under 10 C.F.R. § 708.5. He alleges that these complaints motivated UT-Battelle to retaliate against him by forcing him to resign.

II. ANALYSIS

Mr. Walli bears the burden of proving, by a preponderance of evidence, that he has made a protected disclosure under 10 C.F.R. § 708.5. 10 C.F.R. § 708.29. In order for a disclosure to be protected under Part 708, it must consist of “information that [the employee] reasonably⁴ believe[s] reveals— (1) A substantial violation of a law, rule, or regulation; (2) A substantial and specific danger to employees or to public health or safety; or (3) Fraud,⁵ gross mismanagement, gross waste of funds, or abuse of authority.” 10 C.F.R. § 708.5(a). Therefore, if Mr. Walli’s allegations cannot constitute protected disclosures under § 708.5(a) as a matter of law, he has not stated a claim for which relief can be granted, and his complaint must be dismissed. After considering the Response and the Reply, I find that the statements Mr. Wallis alleges he has made concerning UT-Battelle’s decision against issuing the Draft Press Release and its decision to obtain input from an affected party, Vertimass, do not constitute protected disclosures under 10 C.F.R. § 708.5. Simply put, I am not convinced that a decision against issuing a press release after soliciting input from an outside party whose interests could be affected by the press release could reasonably be expected to constitute Gross Mismanagement, a Gross Waste of Funds, or an Abuse of Authority.

1. Gross Mismanagement

Our case law defines Gross Mismanagement as “more than de minimis wrongdoing or negligence. It does not include management decisions that are merely debatable, nor does it mean action or inaction which constitutes simple negligence or wrongdoing. There must be an element of blatancy. Therefore, 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.*” *Fred Hua*, Case No. TBU-0078 at 4 (May 2, 2008) (emphasis added).

Mr. Walli claims that his alleged protected disclosures revealed “a management action that created a substantial risk of significant adverse impact upon the Agency’s ability to accomplish its mission because of the influence of the non-licensee, Vertimass, and the employees and managers thereof that also worked for the Agency.” Response 6. Obviously, however, Mr. Theiss’ decision against issuing the Draft Press Release never threatened to create “a substantial risk of significant adverse impact upon the Agency’s ability to accomplish its mission.” Indeed, it strains credulity to believe that ORNL’s mission is so precariously situated that stopping a press release publicizing an already public paper could risk a significant adverse impact to ORNL’s mission.

⁴ When considering whether a belief was reasonable, “I must consider the employee’s intent at the time of the disclosure, and whether ‘a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions evidenced’ the revelation of information that falls within one or more of those categories [of protected disclosures set forth at § 708.5(a)].” *Edward G. Gallrein, III*, Case No. WBH-13-0017, et. al., at 8 (April 10, 2014) (internal quotations omitted).

⁵ Mr. Walli does not allege that he disclosed any information revealing fraudulent activity.

Accordingly, I find that Mr. Walli's contention that his statements about conflicts of interest constitute a protected disclosure of Gross Mismanagement is without merit.

2. Gross Waste of Funds

Our case law defines 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." *Robert Schweiger*, Case No. WBU-16-0001 at 6 (March 4, 2016) (internal citations omitted). In his Response, Mr. Walli claims that he expressed a concern to Ms. McCorkle that deciding against issuing the Draft Press Release would result in a Gross Waste of Funds, since the underlying research had been funded by taxpayer dollars, and that failing to issue the Draft Press Release would result in a waste of the funds spent on the research. Response at 6. Since the underlying research had already been made publically available by publication of the Paper, any assertion that the public funds spent on the research would have been wasted by failing to issue a press release about the research would have been clearly unreasonable.⁶

Accordingly, I find that Mr. Walli's contention that he disclosed information that he reasonably believed would reveal a Gross Waste of Funds is without merit.

3. Abuse of Authority

Our case law defines 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." *Sherie Walker*, WBA-13-0015 at 7 (May 21, 2014).

UT-Battelle's decision to consult with a third party who was specifically identified in the Draft Press Release and whose financial interests would likely be affected by its release would clearly not constitute an Abuse of Authority. Nor would its decision to refrain from issuing the Draft Press Release constitute an Abuse of Authority. At the time that he was allegedly raising concerns about the Draft Press Release, Mr. Walli had no reason to believe that Mr. Thiess or any preferred other persons would improperly gain from this decision, based on the facts he presents. While Mr. Thiess' decision to forego issuing the Draft Press Release may well have benefitted Vertimass by preventing a possible mischaracterization that might have negatively (and possibly unfairly) affected the value of a license it had purchased from ORNL, it clearly does not follow that his decision was arbitrary or capricious. Allowing an outside party whose interests would be affected by the issuance of a press release to be heard, and then acting upon the information or arguments presented by that party, does not present a set of circumstances that would lead a reasonable person to conclude that an Abuse of Authority was occurring, without any additional evidence of

⁶ Furthermore, even absent the publication of the Paper, I find no basis to believe that the failure to publish a press release undermines the value of scientific research to the extent that it could constitute a Gross Waste of Funds.

impropriety. Mr. Walli has neither shown nor alleged that he was aware of such evidence when he made his alleged protected disclosures.⁷

Accordingly, I find that Mr. Walli's contention that he disclosed information which he reasonably believed to reveal an Abuse of Authority is without merit.

V. Conclusion

In this case, even viewing the alleged facts in the light most favorable to the Complainant – that is, assuming that the factual underpinnings of his disclosures occurred as he represented – the Complainant has not demonstrated that he made any disclosures which a reasonable person could conclude revealed wrongdoing that falls within the definitions of fraud, gross mismanagement, gross waste of funds, or abuse of authority protected under Part 708. Since I have found, as a matter of law, that none of Mr. Walli's alleged protected disclosures are protected under 10 C.F.R. § 708.5, I find that Mr. Walli's Complaint has not presented an issue for which relief can be granted under Part 708. I therefore find that the Complaint should be dismissed.

It is therefore Ordered that the Complaint filed by Ronald A. Walli under 10 C.F.R. Part 708 is hereby dismissed with prejudice.

This is an Initial Agency Decision which shall become the Final Decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after the party's receipt of this Initial Agency Decision, in accordance with 10 C.F.R. § 708.32.

Steven L. Fine
Administrative Judge
Office of Hearings and Appeals

⁷ In his Declaration, Mr. Walli stated: "At the time I objected to the press release decision, I did not know that UT-Battelle or the journal paper authors had a financial interest in Vertimass. I discovered the connection after I was forced to resign. The focus of my objection was on the significance of the technology and the fact that DOE is in a constant battle to demonstrate its value to members of congress [sic] and to taxpayers." Ex. A at 3.