

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

In the Matter of Dr. Shou-Yuan Zhang)		
)		
Filing Date: January 18, 2017)	Case No.:	WBA-16-0006
)		
_____)		

Issued: February 28, 2017

Decision and Order

This Decision considers an Appeal of an Initial Agency Decision issued by the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) on January 6, 2017, dismissing a Complaint of Retaliation filed by Dr. Shou-Yuan Zhang (Dr. Zhang) against his employer, Brookhaven Science Associates (BSA) under the DOE’s Contractor Employee Protection Program, 10 C.F.R. Part 708. On appeal, Dr. Zhang alleges that dismissal was improper as: (1) the standards of Fed. R. Civ. P. 12(b)(6) were not satisfied for dismissal; (2) he made a disclosure with information related to fraud; and (3) he reasonably believed that he was disclosing research misconduct or fraud. Statement of Issues (January 31, 2017). As set forth in this Decision, we have determined that the Appeal should be denied.

I. The DOE Contractor Employee Protection Program

The DOE’s Contractor Employee Protection Program was established for the purpose of “safeguarding public and employee health and safety; ensuring compliance with applicable laws, rules, and regulations; and preventing fraud, mismanagement, waste and abuse” at DOE’s government-owned, contractor-operated 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 retaliation by a DOE contractor against an employee because the employee has engaged in certain protected activity, including “disclosing to a DOE official, . . . any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, [their] employer, or any high tier contractor, information that [the employee] reasonably believes 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, gross mismanagement, gross waste of funds, or abuse of authority.” 10 C.F.R. § 708.5(a).

Part 708 sets forth the procedures for considering complaints of retaliation. OHA is responsible for investigating complaints, holding hearings, and considering appeals. 10 C.F.R. Part 708, Subpart C. According to the Part 708 regulations, a complaint must include 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.

II. Background

A. Factual Background

Dr. Zhang is a physicist employed by BSA, the management and operations contractor for the DOE’s Brookhaven National Laboratory (BNL). Report of Investigation (ROI) at 1-2 (October 17, 2016). He works in the BNL Collider-Accelerator Department (C-AD). *Id.* at 2. This department conducts experiments using sophisticated accelerators to study the properties of subatomic particles. *Id.* Dr. Zhang’s research interests have been to improve luminosity for one of the accelerators, the Relativistic Heavy Ion Collider (RHIC). *Id.* Previously, Dr. Zhang was assigned to the Injector subgroup of the Accelerator Physics group in the Accelerator Division. *Id.*

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 of the RHIC, improving luminosity. *Id.* at 3. Approximately one month later, on February 2, 2016, Dr. Zhang sent an e-mail to Dr. Thomas Roser, the Chair of C-AD, “reporting ... about the key factor” of the success of the RHIC. Zhang E-mail to Roser (February 2, 2016). In the e-mail, Dr. Zhang asserted that the increased luminosity was the result of a factor other than the e-lens technology. *Id.* Furthermore, Dr. Zhang disagreed with a series of statements made regarding the e-lens contribution, claiming the statements had changed over time and were “heading in the wrong direction.” *Id.* On March 7, 2016, BSA assigned Dr. Zhang to a different supervisor, with instructions to work on a different assignment within the Accelerator Physics group, but outside the Injector subgroup. ROI at 3.

B. Procedural Background

On March 23, 2016, Dr. Zhang filed a Part 708 Complaint against BSA with the DOE’s Brookhaven Site Office (BHSO). Zhang Complaint (March 23, 2016). In the Complaint, Dr. Zhang asserted that the information in his February 2, 2016, e-mail to Dr. Roser constituted a disclosure protected under Part 708 and that his reassignment was made in retaliation for sending the e-mail. *Id.* BHSO reviewed the Complaint and dismissed it on May 26, 2016. BHSO Dismissal Letter (May 26, 2016). On June 7, 2016, Dr. Zhang appealed that dismissal to the OHA Director. OHA Decision and Order (July 14, 2016). Granting the appeal, OHA remanded the matter to BHSO for further processing. *Id.* at 6. On remand, BHSO accepted the Complaint, transferring the case to OHA for an investigation followed by a hearing. Request for Investigation and Hearing (August 18, 2016).

On October 17, 2016, an OHA investigator issued a Report of Investigation. The investigator found that, based upon the evidence gathered during the investigation, Dr. Zhang would unlikely be able to prove, by a preponderance of the evidence, that he made a protected disclosure under Part 708. ROI at 1. The investigator also found that, if Dr. Zhang could prove 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. *Id.* However, the investigator found that, even if Dr. Zhang met his burden of proof, BSA would likely be able to show, by clear and convincing evidence, that it would have reassigned Dr. Zhang absent his alleged protected disclosure. *Id.* at 1-2.

At the conclusion of the investigation, the OHA Director appointed an Administrative Judge (AJ) to conduct a hearing. Initial Agency Decision (IAD) at 3 (January 6, 2017). Upon reviewing submissions by both parties, the AJ was unable to identify a disclosure protected by Part 708. *Id.* Because Dr. Zhang bears the burden of establishing by a preponderance of the evidence that he made a protected disclosure, the AJ issued an Order to Show Cause as to why the Complaint should not be dismissed. Order to Show Cause at 1 (December 5, 2016). In the Order to Show Cause, the AJ specifically asked Dr. Zhang to demonstrate how his e-mail to Dr. Roser was a disclosure protected by Part 708. *Id.* at 3. The AJ suggested that if Dr. Zhang believed he had disclosed a violation of law, rule, or regulation, or if he believed he disclosed fraud, he should provide an explanation of his position to avoid dismissal of his case. *Id.*

In his response to the Order to Show Cause, Dr. Zhang asserted that his e-mail to Dr. Roser disclosed fraud, relying on the definition provided to him by the AJ. Zhang Response to Order to Show Cause at 1 (December 12, 2016). Dr. Zhang argued that a series of e-mails written by Dr. Wolfram Fischer, Associate Chair for Accelerators of the C-AD, demonstrated a “knowing misrepresentation of the truth” because Dr. Fischer first attributed the increased luminosity to “higher bunch intensity” and gradually shifted towards attributing the increased luminosity to the e-lens. *Id.* at 1-2. According to Dr. Zhang’s response, the January 4, 2016, BSA press release reflected the latter opinion. *Id.* at 2. He also contended that BSA’s refusal to acknowledge the negative effect of the e-lens on luminosity contributed to a “concealment of material fact.” *Id.* at 2.

BSA submitted a reply, asserting that there was “no fraud, no intent to deceive, nor [was] there any misconduct.” BSA Reply to Order to Show Cause at 1 (December 14, 2016). BSA noted that no BSA employee “ever made the statement ‘electron lenses doubled intensity,’” and that the statements made by Dr. Roser and Dr. Fischer “are based on and supported by a peer-reviewed scientific paper.” *Id.* at 1-2. Furthermore, BSA requested that OHA dismiss Dr. Zhang’s Complaint. *Id.* at 2.

Although BSA did not file a motion to dismiss, the AJ determined, based upon BSA’s request for dismissal in its reply and Dr. Zhang’s burden to establish by a preponderance of the evidence that he made a protected disclosure, that he should consider whether dismissal was appropriate, applying the standards of Fed. R. Civ. P. 12(b)(6). IAD at 4. Pursuant to that rule, in order to survive a Rule 12(b)(6) motion, the 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). The AJ also noted that prior OHA cases instruct that a motion to dismiss should only be granted where

there are clear and convincing grounds for dismissal, and no further purpose would be served by resolving disputed issues of fact on a more complete record. IAD at 4.

Based upon the submissions of the parties and the authority guiding motions to dismiss, the AJ determined that, in spite of Dr. Zhang's ample opportunity to provide information to support his claim, he was unable to show that he made a protected disclosure under Part 708. IAD at 4. The AJ noted that the e-mail to Dr. Roser contained no language indicating that Dr. Zhang believed he was communicating any type of disclosure that falls within the protection of Part 708, and it was not until his response to the Order to Show Cause that Dr. Zhang alleged that BSA had engaged in fraud. *Id.* at 4-5. The AJ explained that Dr. Zhang's argument did not support an allegation of fraud as Dr. Zhang failed to show, or even allege, that BSA's revisions of opinion regarding increased luminosity were made with the intent to "induce another to act to his or her detriment." *Id.* at 5. Furthermore, the AJ explained that in order to be a protected disclosure under Part 708, the employee must reasonably believe that the information he disclosed revealed fraud, and "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." *Id.* Accordingly, on January 6, 2017, the AJ dismissed the Complaint. *Id.*

III. Appeal

On January 18, 2017, Dr. Zhang filed a Notice of Appeal, challenging the IAD. Notice of Appeal of IAD (January 18, 2017). In his Appeal, Dr. Zhang asserted a claim of "new retaliation." *Id.* We informed Dr. Zhang that it does not have jurisdiction to review any new claim of retaliation, and he would need to file a complaint with regard to any new retaliation claim with the BHSO. Acknowledgement Letter (January 23, 2017). Additionally, we asked Dr. Zhang to clarify the conclusions in the IAD with which he took issue.

Dr. Zhang responded, asserting three points of appeal: (1) the standards of Fed. R. Civ. P. 12(b)(6) were not satisfied for dismissal; (2) he made a disclosure with information related to fraud; and (3) he reasonably believed that he was disclosing research misconduct or fraud. Statement of Issues (January 31, 2017). In response, BSA argued that Dr. Zhang has not offered any new facts or concerns and "merely reiterated that the e-mail [to Dr. Roser] constituted a disclosure of fraud." BSA Response to Notice of Appeal (February 8, 2017).

"It is well established in appeals brought under 10 C.F.R Part 708 that factual findings of a[n Administrative Judge] are subject to being overturned only if they can be deemed to be clearly erroneous, giving due regard to the trier of fact to judge the credibility of witnesses." *Curtis Hall*, Case No. TBA-0002 at 5 (2008). However, an Administrative Judge's conclusions of law are reviewed de novo. *Id.*

IV. Analysis

In the Initial Agency Decision, the AJ determined that, even assuming the truth of Dr. Zhang's assertions, the allegations did not support a plausible claim that Dr. Zhang disclosed information that he reasonably believed revealed fraud. IAD at 5. We now must determine whether the AJ

erred, examining whether Dr. Zhang did provide sufficient facts to state a claim for which relief could be granted.

In his Appeal, Dr. Zhang argues that he presented enough facts to show that relief is plausible on its face, that there is no clear and convincing ground for dismissal, and that there is a further purpose to be served by resolving disputed issues of fact on a more complete record. Statement of Issues at 1. Dr. Zhang further argues that two issues of fact remain disputed: (1) the factor contributing to the RHIC's improved luminosity and (2) the negative effect of the e-lens. *Id.* at 1-2. Dr. Zhang supports each of these alleged disputed issues with examples of instances in which he asserts BSA misrepresented the facts related to the success of the e-lens. *Id.*

The alleged disputed facts that Dr. Zhang cites are only relevant to whether it was the e-lens or some other factor that contributed to the increased luminosity of the RHIC. However, OHA does not have the authority to resolve scientific disagreements. Dr. Zhang also fails to provide any explanation showing how the resolution of the alleged factual disputes is relevant to determining whether Dr. Zhang had a reasonable belief that fraud was occurring when he wrote his e-mail to Dr. Roser. Accordingly, we find that the AJ did not err with regard to these alleged factual disputes, and we proceed to examine whether the AJ erred in determining that Dr. Zhang would not be able to establish by a preponderance of the evidence that he reasonably believed that he was disclosing fraud in his e-mail to Dr. Roser.

In order to avoid a dismissal, Dr. Zhang would need to show that he alleged facts, which if established, would constitute a protected disclosure. *See David K. Isham*, Case No. TBH-0046 (2007). Dr. Zhang's belief underlying his alleged disclosure must be "reasonably" held. In order to make this determination, we must look at Dr. Zhang's disclosure from the perspective of a disinterested person. *See Eugene N. Kilmer*, TBH-0111 (2011); *accord Mark D. Siciliano*, Case No. TBH-0098 (2010) (finding a disclosure was not protected where not communicated in a way that a "disinterested person" would have construed complainant's comments as alleging an abuse of authority); *Heining v. General Serv. Admin.*, 116 M.S.P.R. 135, 143 (2011) ("The proper test for determining whether an employee had a reasonable belief that his disclosures were protected is 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 a violation of a law, rule, or regulation, . . .").

The relevant question before the AJ was whether a disinterested person could reasonably conclude that the e-mail revealed fraud. 10 C.F.R. § 708.5. In other words, the AJ needed to determine the reasonableness of Dr. Zhang's belief at the time he alleges to have disclosed the fraud to Dr. Roser. *See Eugene N. Kilmer*, TBH-0111 (2011). The AJ determined that, with regard to the e-mail, "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." IAD at 5.

In his Appeal, Dr. Zhang admits that he did not include any indication in his e-mail to Dr. Roser that he intended to reveal fraud or research misconduct. Statement of Issues at 4. Dr. Zhang claims that he purposefully omitted any such reference as he did not want to weaken support from DOE, and he wanted to resolve the issue internally within C-AD. *Id.* Nonetheless, Dr. Zhang asserts that he made a disclosure with information "related to fraud" in his e-mail to Dr. Roser, and that he

reasonably believed that he “was disclosing research misconduct or fraud in the e-mail.” *Id.* at 3-4.

In support of his claim that he made a disclosure with information “related to fraud,” Dr. Zhang contends that he presented seven statements of fact and one figure in his e-mail to Dr. Roser to prove the disclosure of a knowing misrepresentation of the truth and three statements of fact and seven figures to prove disclosure of a concealment of material fact. *Id.* at 3. He also claims that the truth in combination with the knowing misrepresentation implies that BSA induced another to act to his or her detriment, and there is a “possible detriment” to DOE. *Id.*

The legal definition of fraud, as the AJ provided to Dr. Zhang, is the “knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.” IAD at 3. At the outset, we note that Dr. Zhang fails to direct us to the specific facts and figures to which he refers for each element of fraud. Further, while Dr. Zhang contends that the facts and figures he provided in the e-mail to Dr. Roser satisfy the elements of fraud, he merely makes conclusory statements without providing any explanation. Statement of Issues at 3. Dr. Zhang’s e-mail to Dr. Roser begins by expressing his desire to “report... about the key factor of the successful RHIC proton run 2015, and the effect of the e-lens as well.” Zhang E-mail to Roser. Without an explanation from Dr. Zhang illustrating how these facts and figures meet the elements of fraud or demonstrating how the AJ erred, we conclude that Dr. Zhang’s e-mail does nothing more than present his own scientific findings to Dr. Roser and express disagreement with those that are contrary. Accordingly, we find that the AJ did not err in concluding that Dr. Zhang did not express his concerns in a manner in which a disinterested person would have construed as alleging fraud.

Additionally, we conclude that the AJ did not err in determining that Dr. Zhang failed to meet his burden with regard to the reasonableness element of Part 708. The AJ found that Dr. Zhang did not provide a context, nor could the AJ imagine one, “in which [Dr. Zhang’s] expression of...disagreement in the e-mail could indicate that he reasonably believed he was revealing fraud.” IAD at 5.

In support of his contention that he reasonably believed he was disclosing fraud or research misconduct in his e-mail to Dr. Roser, Dr. Zhang attached an e-mail to his Statement of Issues. Statement of Issues, E-mail Attachment. Dr. Zhang sent this e-mail to Dr. Peter Bond shortly after Dr. Zhang received OHA’s Initial Agency Decision. *Id.* In the e-mail, Dr. Zhang asks Dr. Bond to confirm that Dr. Zhang discussed his belief in the fraud prior to sending the e-mail to Dr. Roser. *Id.* Dr. Bond responded stating, “I do not remember any specific dates[,] but I do remember you bringing up the belief of research misconduct.” *Id.* Dr. Zhang contends that this e-mail is evidence of his belief that he was disclosing fraud or research misconduct to Dr. Roser. Statement of Issues at 5.

While this e-mail and Dr. Bond’s response may demonstrate that Dr. Zhang believed at some point that fraud or research misconduct may have occurred, that is not the relevant question. Dr. Bond’s recollection does not alter what was actually stated by Dr. Zhang in his February 2, 2016, e-mail to Dr. Roser. Moreover, this e-mail to Dr. Bond does not show that Dr. Zhang’s belief that the fraud occurred was reasonable. Therefore, we find that the AJ did not err in finding that Dr.

Zhang's disclosure to Dr. Roser was not protected under Part 708, as Dr. Zhang could not prove by a preponderance of the evidence that he reasonably believed he revealed fraud.

To the extent that Dr. Zhang is alleging that a disclosure of research misconduct is separate from a disclosure of fraud, we note that when given the opportunity, Dr. Zhang did not pursue this argument before the AJ. In the Order to Show Cause, the AJ stated that while there was no evidence to demonstrate that Dr. Zhang believed he was disclosing research misconduct in the e-mail to Dr. Roser, even if the AJ were to conclude that Dr. Zhang reasonably believed he was disclosing research misconduct, Dr. Zhang would need to show that an allegation of research misconduct was the type of information defined in Part 708.5(a), i.e., "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." Order to Show Cause at 2. In his response to the Order to Show Cause, Dr. Zhang solely argued that he made a disclosure of fraud. Zhang Response to Order to Show Cause at 1.

Even if we were to consider Dr. Zhang's alleged disclosure of research misconduct to be separate from that of the alleged disclosure of fraud and protected under a different subsection of Part 708.5, Dr. Zhang still failed to show that belief in the wrongdoing was reasonable. Accordingly, we determine that the AJ did not err in finding that Dr. Zhang failed to allege facts, which, if established, would constitute a protected disclosure under Part 708.

V. Conclusion

We find that Dr. Zhang's arguments in opposition to the Initial Agency Decision lack merit. Accordingly, based on the foregoing, we find that the determination of the Administrative Judge should be affirmed.

It Is Therefore Ordered That:

- (1) The Appeal filed by Dr. Shou-Yuan Zhang, Case No. WBA-16-0006, is hereby denied.
- (2) This Decision shall become a Final Agency Decision unless a party files a Petition for Secretarial Review with the Office of Hearings and Appeals within 30 days after receiving this decision, pursuant to 10 C.F.R. § 708.18(d).

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: February 28, 2017