

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Kamil Gierszal)
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Filing Date: November 19, 2014)
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Case No.: WBU-14-0013

Issued: December 8, 2014

Decision and Order

Dr. Kamil Gierszal, a former employee of Oak Ridge Associated Universities (ORAU) in Oak Ridge, Tennessee, appeals the dismissal of a Complaint that he filed under the Department of Energy’s (DOE) Contractor Employee Protection Program set forth at 10 C.F.R. Part 708. The DOE’s Oak Ridge Office’s (ORO) Employee Concerns Program Manager dismissed the Complaint on October 22, 2014. For the reasons set forth below, we find that ORO correctly dismissed Dr. Gierszal’s Complaint.

I. Background

A. Regulatory Background

The DOE’s Contractor Employee Protection Program was established to safeguard public and employee health and safety, ensure 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 (March 3, 1992). Its primary purposes are 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 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 or the DOE information that he or she reasonably believes reveals a substantial and specific danger to employees or to the public. 10 C.F.R. § 708.5. An employee who believes that he or she has suffered retaliation for engaging in protected activity may file a complaint with the DOE. It is the burden of the complainant under Part 708 to establish “by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate,

as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor.” 10 C.F.R. § 708.29.

Under Part 708, the DOE office initially receiving a Complaint may dismiss the Complaint for lack of jurisdiction or other good cause. 10 C.F.R. § 708.17. Such a dismissal is appropriate under any of the following circumstances: (i) the Complaint is untimely, (ii) the facts, as alleged in the Complaint, do not present issues for which relief can be granted under Part 708, (iii) the employee filed a complaint under State or other applicable law with respect to the same facts as alleged in the Part 708 Complaint, (iv) the Complaint is frivolous or without merit on its face, (v) the issues presented in the Complaint have been rendered moot by subsequent events or substantially resolved, or (vi) the employer has made a formal offer to provide the remedy that was requested in the Complaint or a remedy that DOE considers to be equivalent to what could be provided as a remedy under Part 708. 10 C.F.R. § 708.17(c). In reviewing cases such as this, we consider all materials in the light most favorable to the party opposing the dismissal. *See Billie Joe Baptist*, Case No. TBZ-0080, at 5 n. 13 (May 7, 2009) (*citing Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)).

B. Factual and Procedural Background

Dr. Gierszal was hired as a Postdoctoral Research Associate by ORAU in November 2012. In May 2013, an incident occurred with respect to one of Dr. Gierszal’s experiments during which a co-worker was accidentally exposed to melamine powder, a substance that could be hazardous if inhaled or ingested. In a letter to Dr. Gierszal dated June 12th, 2013, ORAU alleged that he was responsible for the May 2013 exposure, and for three previous safety-related incidents.

On that same day, Dr. Gierszal’s employment at ORAU ended when he signed a “Resignation in Lieu of Termination.” That agreement provides, in pertinent part, that in return for ORAU’s permitting Dr. Gierszal to resign, and other “promises contained herein, Dr. Gierszal hereby waives any and all rights, claims, or other causes of action of any kind (whether past, present, or pending) that he might have against ORAU or Oak Ridge National Laboratory . . . related to his employment by ORAU, including the conclusion of that employment” *See* attachment to December 3, 2014 e-mail from Dr. Gierszal to Robert Palmer, Senior Staff Attorney, Office of Hearings and Appeals.

On September 6, 2014, Dr. Gierszal filed his Part 708 Complaint, alleging an unsafe work environment stemming, at least in part, from the May 2013 incident. Incorporated by reference into Dr. Gierszal’s Complaint were four letters that he sent to the DOE Inspector General’s Office in 2014. In those letters, he claimed (i) that his May 2013 experiment was sabotaged by an unnamed party, leading to the exposure; (ii) that he had only two previous safety-related incidents, not three as alleged by ORAU; (iii) that the May 2013 incident was not caused by any failure on his part to follow instructions or adhere to proper safety procedures; and (iv) that the unnamed party who allegedly sabotaged his experiment also provided false information to ORAU officials about a previous safety incident that allegedly involved Dr. Gierszal. *Id.*

In a letter to Dr. Gierszal dated October 22, 2014, ORO dismissed his Complaint, finding that the facts, as alleged in the Complaint, do not present issues for which relief can be granted under

Part 708. Specifically, ORO cited 10 C.F.R. § 708.4, which bars complaints involving misconduct that the complainant, acting without direction from his or her employer, deliberately caused or knowingly participated in. ORO went on to state that “(i)n the communications and documents [Dr. Gierszal has] provided via e-mail and phone, [he has] taken responsibility for safety incidents that have occurred and could have been prevented, to include the most recent incident.” Dismissal letter at 3. ORO therefore concluded that because Dr. Gierszal’s Complaint involves incidents that occurred because of his own failure to follow safety principles, it does not present issues for which relief can be granted under Part 708.

In addition, ORO found that the Complaint does not present issues for which relief can be granted because it does not allege that Dr. Gierszal suffered retaliation for engaging in activities that are protected under Part 708. According to the letter, Dr. Gierszal told ORO that communications issues, mistrust, personality conflicts, and ill will on the part of management toward him were contributing factors to the May 2013 incident and then to his resignation. Dismissal Letter at 1-2.

On November 19, 2014, Dr. Gierszal appealed the dismissal of his Complaint. In that filing, Dr. Gierszal contests ORO’s characterization of some of the statements that he made to them regarding the factors that contributed to the May 2013 incident, or provides further explanation of those statements. He also reiterated his earlier claims that he had been involved in two, and not three, previous safety incidents, and that the May 2013 incident was caused by outside intervention, and not by any failure to follow proper procedures on his part.

II. Analysis

After reviewing Dr. Gierszal’s Complaint, ORO’s dismissal letter, and Dr. Gierszal’s Appeal, we find that ORO properly dismissed the Complaint. As an initial matter, Dr. Gierszal waived any right to file a Part 708 claim when he signed the “Resignation in Lieu of Termination” on June 12, 2013. As previously stated, that agreement provides that “Dr. Gierszal hereby waives any and all rights, claims, or other causes of action of any kind (whether past, present, or pending) that he might have against ORAU or Oak Ridge National Laboratory . . . related to his employment by ORAU, including the conclusion of that employment” A more comprehensive waiver is difficult to imagine. In his Appeal, Dr. Gierszal claims that at the time that he signed the agreement, he was “overwhelmed, caught by surprise, and under severe personal stress” Appeal at 5. However, there is nothing in the record that would indicate that he did not understand what he was signing, or that would cast doubt upon the validity of the agreement.

Furthermore, ORO correctly concluded that Dr. Gierszal’s Complaint does not present issues for which relief can be granted under Part 708. Those regulations were intended to protect employees of DOE contractors from reprisals for revealing “information concerning danger to public or worker health or safety, substantial violations of law, or gross mismanagement” 10 C.F.R. § 708.1. However, nowhere in Dr. Gierszal’s Complaint or his Appeal does he allege that he disclosed concerns about safety, violations of law, or gross mismanagement to his employer or to the DOE, or engaged in any other activity that is protected under Part 708 during his tenure at ORAU. Although Dr. Gierszal made disclosures in his letters to the IG that could

conceivably be viewed as involving danger to worker safety or gross mismanagement, those letters were written after his forced resignation, and could therefore not have been a contributing factor to that personnel action. The allegations in Dr. Gierszal's filings are more indicative of a disagreement with ORAU over the reasons for his forced resignation, rather than a claim that ORAU's action was taken in retaliation for protected activity on Dr. Gierszal's part. This does not form a proper basis for a Part 708 Complaint.³ We will therefore deny Dr. Gierszal's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Kamil Gierszal (Case No. WBU-14-0013) is hereby denied.

(2) This decision is the final decision of the Department of Energy unless, by the 30th day after receiving the appeal decision, a party files a Petition for Secretarial Review.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 8, 2014

³ Given our disposition of these issues, we need not address ORO's finding that Dr. Gierszal's Complaint involves misconduct that he, acting without direction from his employer, deliberately caused or knowingly participated in, or that Dr. Gierszal filed his Complaint over 14 months after his forced resignation, which is far in excess of the 90 day deadline provided for in 10 C.F.R. § 708.14.