

November 5, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Case: David K. Isham

Date of Filing: June 19, 2007

Case Number: TBH-0046

David Isham filed a retaliation complaint (the Part 708 Complaint or the Complaint) under the Department of Energy (DOE) Contractor Employee Protection Program. 10 C.F.R. Part 708 (2007). As explained below, I have determined that the Complaint should be dismissed.

I. Background

A. The Complaint

Mr. Isham was employed by EG&G Technical Services (EG&G), a subcontractor of Bechtel BWXT Idaho, LLC (BWXT). Mr. Isham worked as a "Visual Examiner" on the Idaho Cleanup Project (ICP), where he inspected waste prior to its shipment to the Waste Isolation Pilot Project (WIPP) in New Mexico. A third firm, Washington True Solutions (WTS)/Central Characterization Project (CCP), characterized waste prior to shipment. A fourth firm, CH2M-WG Idaho, LLC (CWI), BWXT's successor on the ICP, represents BWXT in this matter.

EG&G terminated Mr. Isham on April 1, 2005. On May 10, 2006, Mr. Isham filed the Part 708 Complaint with the local employee concerns office. After initial processing, that office forwarded the Complaint to OHA.

In his Complaint, Mr. Isham alleged that he was terminated in response to a protected disclosure contained in his March 29, 2005, email to Christine Gomez, a CCP employee. Complaint at 3. In that email, he complained of being required to change his inspection reports. Also in his Complaint, Mr. Isham alleged

that Larry J. Walker, the CCP visual examiner "lead," told employees "to leave early on occasion", but Mr. Isham did not allege that he disclosed that matter prior to his termination. *Id.* at 5.

The OHA Investigator found that the March 29, 2005, disclosure concerning changes in inspection reports was a possible Part 708 protected disclosure. June 19, 2007 Report at 5. The OHA Investigator also found that Mr. Isham alleged a disclosure to Thomas Johnsen, a BWXT employee, that Mr. Walker was allowing employees to leave early; the OHA Investigator found that allegation to be a possible protected disclosure. *Id.* at 6.

The OHA Acting Director appointed me to serve as the Hearing Officer. I offered Mr. Isham several opportunities to provide further detail concerning his alleged protected disclosures.

B. Pre-Hearing Efforts to Identify the Alleged Protected Disclosure

1. July 5, 2007 Letter

In a July 5, 2007 letter to the parties, I noted that Mr. Isham's alleged protected disclosures lacked specificity. See 10 C.F.R. § 708.12(a)(2) (2007). I asked Mr. Isham to provide three examples of changes to the inspection reports and explain why he believed that those changes revealed a violation, danger, or impropriety that forms the basis of a protected disclosure. See 10 C.F.R. § 708.5(a) (2007). I also asked Mr. Isham to specify the date of his alleged disclosure to Mr. Johnsen concerning early departures.

In his response, Mr. Isham maintained that any changes made or directed by others rendered the reports "fraudulent." July 27, 2007 Response at 2. Mr. Isham did not provide the date of his alleged disclosure to Mr. Johnsen concerning early departures.

2. August 29, 2007 Letter

In an August 29, 2007 letter to the parties, I proposed to dismiss the Complaint. I noted that the governing regulations require that a complaint include a statement "specifically describing" the alleged protected disclosure. 10 C.F.R. § 708.12(a)(2) (2007). I stated that, if Mr. Isham objected to the proposed dismissal, he should provide specific information about the changes made in his reports, as well as a specific description of his disclosure to Mr. Johnsen. Finally, I stated

that Mr. Isham should respond to BWXT's arguments that Mr. Isham did not allege a protected disclosure.

In response to that letter, Mr. Isham stated that (i) Mr. Walker instructed him to delete the word "cylinder" or "cylindrical" and to substitute alternative terminology, (ii) other inspectors changed weights that he recorded, and (iii) visual examiners were experiencing "difficulties" in correcting graphite's density value. As for his allegation that he disclosed to Mr. Johnsen that Mr. Walker allowed employees to leave early, Mr. Isham did not provide further detail, except to say that he also made the disclosure to Tammy Hobbes, another BWXT employee.

3. October 1, 2007 Letter

In an October 1, 2007 letter to the parties, I found that Mr. Isham's allegations concerning the inspection reports did not rise to the level of protected disclosures. I stated:

The foregoing alleged disclosures do not warrant further consideration. Mr. Isham does not allege that the substitution of alternative terminology for the words "cylinder" or "cylindrical" violated the characterization standards. Nor does he allege that the waste was ineligible for shipment to WIPP. In fact, Mr. Isham reported a "dose rate" for the object and certified that it was not a prohibited item. See September 7 Submission, Ex. F. Similarly, Mr. Isham does not allege that, when other examiners revised data prior to the finalization of a report, the revised values were inaccurate or less reliable. Finally, as an example of the "difficulties" he reported in correcting the density value for graphite, Mr. Isham cites his desire to start a fresh report, rather than continue to revise an existing report. As the foregoing indicates, Mr. Isham was unable to describe a reasonable belief that the information disclosed rose to the level of the type of violation, danger, or impropriety covered by Part 708.

October 1, 2007 Letter at 2. Accordingly, I stated that I would give no further consideration to the alleged inspection report disclosures. See 10 C.F.R. § 708.28(b)(5) (2007) (granting a hearing officer the authority to dismiss claims or defenses).

I also continued to question the specificity of Mr. Isham's alleged disclosure to Mr. Johnsen and Ms. Hobbes that Mr. Walker

allowed employees to leave early, and I cautioned that I had not ruled out the possibility of dismissal. I ordered pre-hearing affidavits from both parties, including an affidavit from Mr. Isham detailing what he disclosed about early departures, "including any statements he made concerning the number of occasions on which employees left early and, for each occasion, the identity of the employees who left early and how early they left" October 1, 2007 Letter at 4.

Mr. Isham filed an affidavit (Isham Affidavit 1), providing none of the requested detail about his alleged disclosure. Instead, he merely reiterated his allegation that he told Mr. Johnsen and Ms. Hobbes that Mr. Walker allowed employees to leave early. Aff. 1 at 2. Mr. Johnsen and Ms. Hobbes filed affidavits denying that Mr. Isham made the alleged disclosure. In his response (Isham Affidavit 2), Mr. Isham again did not provide the requested detail concerning his disclosure but requested Respondents' records concerning time and attendance.

II. Analysis

A complainant is required to include in his complaint a "statement specifically describing ... the disclosure" giving rise to the retaliation. 10 C.F.R. § 708.12(a)(2). A complaint may be dismissed where the complaint fails to allege facts which, if established, would constitute a protected disclosure. See 10 C.F.R. § 708.17(c)(2) (2007).

The Complaint did not comply with Section 708.12(a). In the Complaint, Mr. Isham did not allege that he disclosed that Mr. Walker was allowing employees to leave early, let alone specifically describe the disclosure.

Mr. Isham has not cured that deficiency by alleging a disclosure that is specific enough to be protected. I required that Mr. Isham submit an affidavit, stating "in detail what he told Mr. Johnsen and Ms. Hobbes, including any statements he made concerning the number of occasions on which employees left early and, for each occasion, the identity of the employees who left early and how early they left." October 1, 2007 Letter at 4. In the affidavit, Mr. Isham stated that he told Mr. Johnsen "that employees were being instructed to leave the work site early" and that he told Ms. Hobbes "that employees had been instructed to leave early on more than one occasion." Aff. 1 at 2, 3. In his supplemental affidavit, Mr. Isham stated that he told Mr. Johnsen and Ms. Hobbes that "employees were being directed and/or allowed to leave the work place early after

their time sheets had already been turned in for submission to the federal government." Aff. 2 at 3.

As the foregoing indicates, at most, Mr. Isham has alleged that he disclosed to Mr. Johnsen and Ms. Hobbes that Mr. Walker let more than one employee leave an unspecified amount of time early on more than one occasion. That leaves open the possibility that Mr. Isham disclosed that two employees left five minutes early on two occasions, a *de minimus* amount of time. See generally *Donald R. Rhodes*, 29 DOE ¶ 87017 (2006) (TBU-0058) (contractor change from 20-minute to 30-minute billing increments was *de minimis*). Thus, Mr. Isham's alleged disclosure is too general to support a reasonable belief that it reveals fraud or some other impropriety or that it involves some other protected activity.

Mr. Isham's other statements about early departures do not change that conclusion. First, in those statements, he does not discuss his alleged disclosure; instead, he simply refers to his underlying allegation that Mr. Walker allowed employees to leave early. Second, I question whether it is appropriate to rely on post-termination statements to characterize this disclosure. Cf. *Ellison v. Merit Systems Protection Bd.*, 7 F.3d 1031, 1036 (Fed. Cir. 1993) ("[T]he test of the sufficiency of an employee's charges of whistleblowing . . . is the statement that the employee makes in the complaint . . ., not the employee's *post hoc* characterization of those statements") (citations omitted). In any event, those statements do not provide *post hoc* clarification of the alleged disclosure.

Mr. Isham's post-termination statements concerning his allegation that Mr. Walker allowed employees to leave early are inconsistent. In an April 26, 2005 letter to the Office of the Inspector General (OIG), Mr. Isham stated that employees left early on "several occasions" after time sheets had been submitted to the employer. April 26, 2005 Letter at 1. He later told the OIG that employees left an hour early every other week. April 28, 2005 OIG Form. In his Complaint, Mr. Isham stated that employees left early "on occasion," elaborating:

It is more important to show the ability of the action than the actual action itself. Were we told to leave early on occasion? Yes, but what is more important is the power or the control that one can think he or she can do something that is not legal and is unethical!

Complaint at 5. In October 2007, in his first affidavit, Mr. Isham described the frequency as a "daily occurrence:" "I remember that this was a daily occurrence which would escalate as we neared the end of our shift. Employees would consistently leave at least 10 to 20 minutes early." Aff. 2 at 2. A week later, in his second affidavit, Mr. Isham stated that there was "at least one instance" in March 2005 in which three or more employees left early¹ and that records would show "a substantial number of other such occurrences." Aff. 2 at 4. Given the inconsistent and generally escalating nature of these post-termination allegations, they are unreliable and their use as a *post hoc* characterization of his alleged disclosure inappropriate.

As the foregoing indicates, Mr. Isham has not alleged facts which, if proven, would establish that he made a protected disclosure. Accordingly, the Complaint will be dismissed with prejudice. Based on this determination, I need not address other requests that the parties have made.

IT IS THEREFORE ORDERED THAT:

The Complaint filed by David Isham on May 10, 2006, be and hereby is dismissed.

Janet N. Freimuth
Hearing Officer
Office of Hearings and Appeals

Date: November 5, 2007

¹ Mr. Isham has alleged that he left early in March 2005 at Mr. Walker's direction and, therefore, would have been one of those employees. Nonetheless, Mr. Isham has not stated how early he left, something clearly within his knowledge.