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Issue Date: 15 October 2015

CASE No.: 2015-CPS-00002

In the Matter of:

MOHAMMAD EBDAAH,
Complainant

v.

GLOBALFOUNDRIES, INC.,
Respondent

Before: Drew A. Swank
Administrative Law Judge

**DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR
SUMMARY DECISION**

Complainant Mohammed Ebdah ("Ebdah") claims that Respondent GlobalFoundries, Inc. ("GlobalFoundries") fired him because he told company officials that its products were defective and potentially dangerous. GlobalFoundries denies Ebdah's allegations and states that it terminated him because he repeatedly violated company policies. The Occupational Safety and Health Administration ("OSHA") investigated Ebdah's claims and dismissed his complaint. For the reasons that follow, the undersigned also concludes that Ebdah's claims must be dismissed with prejudice.

ISSUES

GlobalFoundries has raised three issues in its Motion for Summary Decision:

- 1) Should the undersigned dismiss Ebdah's claim under the Occupational Safety and Health Act?
- 2) Should the undersigned dismiss Ebdah's claim under the Consumer Product Safety Inspection Act of 2008?
- 3) If both claims are dismissed, should GlobalFoundries receive attorneys' fees?

FACTS

Ebdah is a 35-year-old engineer. Bach Aff., Exhibit E. GlobalFoundries manufactures and processes silicon “wafers” used in technology products. Taylor Aff. ¶ 3. On January 7, 2013, Ebdah began working for GlobalFoundries as a Principal Engineer in Malta, New York. Kelly Aff. ¶ 2. A few months later, Ebdah told David Cho (a supervisor) that GlobalFoundries’ wafers had “backside contamination.” Cho Aff. ¶¶ 3-4. Cho said a taskforce was already investigating the problem, but Ebdah decided to look into it himself. *Id.* at ¶¶ 5-6.

In July 2013, Sanggil Bae (Ebdah’s direct supervisor) appointed him “block level lead engineer.” Bae Aff. ¶¶ 2-3. Ebdah’s behavior created several problems. *Id.* at ¶¶ 4-11. For example, he chastised colleagues, refused to delegate assignments, arrived late for work, worked outside normal business hours, sent offensive emails, and refused to complete assignments. *Id.*

The next month, in August 2013, Ebdah asked supervisor Cho if he could travel to Jordan for personal reasons. Cho Aff. ¶ 7. Cho informed Ebdah that some employees experienced long delays in reentering the United States after foreign travel. *Id.* Ebdah then asked Sana Salamah Kelly (Human Resources Department) whether he would have any problems reentering the United States with his visa. Kelly Aff., Exhibit A, p. 2. Kelly and Nadene Layton (Human Resources Department) referred Ebdah to GlobalFoundries’ immigration specialist. Kelly Aff., Exhibit A, p. 1. A few days later, Ebdah told Kelly that he decided not to travel to Jordan because it would not be a “practical option to choose” due to the potential reentry problems. Kelly Aff., Exhibit B, p. 1.

The next month, supervisor Cho informed engineers in his group – including Ebdah – that they must serve as “sustainers” on “night shift rotations” to satisfy a business need. Cho Aff. ¶ 10; Cho Aff. Exhibit A, p. 1. Shortly before Ebdah’s turn as a “sustainer” was set to begin, he sent this email to supervisor Cho:¹

David Cho,

This is a final notice to you to stop all aspects of retaliation and all other consequences against me as an Arab engineer as well as any Arab emerging leadership.

I recommend terminating your employment immediately.

Cho Aff., Exhibit B.

The next day, Ebdah emailed supervisor Cho to apologize for this “extremely aggressive and disturbing” message. Cho Aff. ¶ 13; Cho Aff., Exhibit B.

Given the tone of Ebdah’s email, GlobalFoundries’ personnel interviewed Ebdah to assess if he posed a safety risk to supervisor Cho or other employees. Kelly Aff. ¶ 10. After this

¹Ebdah copied Kevin Craig (Security Department) and Kelly (Human Resources Department) on the email. Cho Aff., Exhibit B, p. 1.

meeting, GlobalFoundries placed Ebdah on paid personal leave and continued to investigate whether he could return to work. *Id.* at ¶¶ 11-12. GlobalFoundries concluded that Ebdah did not pose a threat but kept him on paid leave while it looked into his allegations of retaliation by supervisor Cho. *Id.* at ¶ 12.

As part of the investigation, Kelly (Human Resources Department) and Peg Nelson (Employee Relations Department) met with Ebdah to discuss his allegations. *Id.* at ¶ 13. Ebdah had the following complaints at this meeting:

- GlobalFoundries failed to provide him with proper support to complete his assigned job duties;
- Supervisor Cho forced him to choose between his family life and career when Ebdah asked to travel to Jordan;
- Ebdah was randomly assigned to different projects without explanation; and
- Supervisor Cho retaliated against him because Ebdah was working on confidential projects for Advanced Technology Investment Company, one of GlobalFoundries investors.

Id. at ¶ 15; Nelson Aff. ¶ 4-7.

Ebdah did not feel comfortable returning to work, so GlobalFoundries let him stay on paid leave while it continued to investigate his complaints of retaliation. Kelly Aff. ¶ 16. GlobalFoundries then interviewed several people about Ebdah’s allegations, including supervisor Cho, Jean Raymond Fakhoury² (an engineer with Advanced Technology Investment Company), Sanggil Bae (Ebdah’s direct supervisor), and Vijay Sarathy (Ebdah’s co-worker). *Id.* at ¶ 17; Nelson Aff ¶ 22.

As part of GlobalFoundries’ investigation, William Taylor (a principal member of GlobalFoundries technical staff) also spoke with Ebdah about “backside wafer contamination.” Taylor Aff. ¶ 10. In their meeting, Ebdah “repeatedly expressed his concern that his supervisors...had not taken his concerns seriously, and that the backside wafer ‘contamination’ could contaminate GlobalFoundries other tools and influence the quality of the front side of the wafers.” *Id.* at ¶ 18. Taylor asserted, however, that Ebdah never stated that wafer backside contamination could harm GlobalFoundries’ customers or employees.³ *Id.* at ¶ 19. Instead,

²Contrary to Ebdah’s claims, Fakhoury stated that he did not know of any “secret projects” that Ebdah was working on for Advanced Technology Investment Company. Kelly Aff. ¶ 18.

³Taylor also stated, “Simply put, wafer backside ‘contamination’ is not a safety issue” because “the materials that might appear on the backside of the wafers are generally only those materials intentionally applied to the front side of every silicon wafer during the manufacturing process...” Taylor Aff. ¶ 20. Therefore, “to the extent that any of the substances used in the manufacturing process constitutes a safety concern, that concern is already fully anticipated and addressed because those substances are also present on the front side of the wafers.” *Id.*

Taylor asserted that Ebdah simply wanted to avoid blame for supervising a defective product.⁴ *Id.* at ¶ 26.

While GlobalFoundries investigated Ebdah's retaliation claims, he emailed an employee of Advanced Technology Investment Company (one of GlobalFoundries' investors). In this email, Ebdah stated that GlobalFoundries engaged in a "continuous unstoppable systematic and well organized campaign against me" after he discovered wafer backside contamination. Nelson Aff., Exhibit A, p. 1. He then listed several "risks" associated with wafer backside contamination. *Id.* at p. 2. More precisely, Ebdah stated that wafer backside contamination is a "risk" because it would damage GlobalFoundries' tools, factories, and products.⁵ *Id.* However, none of the "risks" Ebdah listed were related to public safety. *Id.*

GlobalFoundries finished its investigation and concluded that the company had not retaliated against Ebdah. Kelly Aff. ¶ 23; Nelson Aff. ¶ 22. It found that any action taken against Ebdah was a legitimate business decision, not unlawful retaliation. Kelly Aff. ¶ 23. GlobalFoundries thus told Ebdah to return to work at 7:30 a.m. on November 14, 2013. Kelly Aff., Exhibit C, p. 2. Ebdah refused and requested a transfer to a different facility. Kelly Aff., Exhibit D, p. 2-3. GlobalFoundries told Ebdah "your failure to return to work may result in the termination of your employment." Kelly Aff., Exhibit D, p. 2.

On November 14, 2013, Ebdah did not show up for work at 7:30 a.m.. Belokopitsky Aff., Exhibit A. His security badge shows that he arrived at work at the following times from November 14 – November 26, 2013⁶:

- Thursday, November 14, 2013: 1:00 p.m.
- Friday, November 15, 2013: 1:20 p.m.
- Monday, November 18, 2013: 1:11 p.m.
- Tuesday, November 19, 2013: 2:07 p.m.

⁴To support this assertion, GlobalFoundries notes that Ebdah stated in an email on June 4, 2013, "Very honestly, I cannot by my own allow the lot [of wafers] to be processed...due to the high risk of possible contamination/residuals to transfer to our litho tools and other tools in the FAB, which will be my responsibility if I allow it and it then happens." Taylor Aff., Exhibit A, p. 2. Similarly, Ebdah stated a few months later, "The wafers are contaminated and have high risk for further contamination spread through the Fab...Very honestly I won't be in fault when I call this as a corruption that is wasting millions of dollars' investment." Taylor Aff., Exhibit B, p. 1.

⁵Specifically, Ebdah stated that the risk of wafer backside contamination includes:

- "contaminating the Fab tools, and thus lowering the value of the Fab tools as time passes...";
- "causing water breaking inside the tools and thus causing a huge amount of silicon and other element defects to spread inside ultra-clean tools...";
- "single elements contamination could happen at any instant and risk the whole factory..."
- "spreading the defects throughout the Fab from tool to tool as the contaminated backside of the wafers acts as a moving sources for spreading the defects, and thus impacting the whole factory..."
- "[the failure of lithography] causes the whole technology development to severely fall and leads to a disaster...wafer backside contamination could even cause damage to some sensitive parts of the Lithography tools such as the scanner lens..."

Kelly Aff., Exhibit A, p. 2.

⁶A GlobalFoundries' employee can only enter the facility through certain entry and exit points with their employee identification badge. Belokopitsky Aff. ¶ 2. When an employee swipes their identification badge, a computerized database records information such as date, time, entry/exit point, and employee name. *Id.* at ¶ 3.

- Wednesday, November 20, 2013: No record
- Thursday, November 21, 2013: 9:58 a.m.
- Friday, November 22, 2013: No record
- Monday, November 25, 2013: 4:01 p.m.
- Tuesday, November 26, 2013: 9:31 a.m.

Belokopitsky Aff., Exhibit A, p. 1-6.

On November 25, 2013, Kelly (Human Resources Department) tried to arrange a meeting with Ebdah. Kelly Aff. ¶ 34. Ebdah refused to meet. Kelly Aff., Exhibit F. The next day, GlobalFoundries terminated him on three grounds:

- 1) Violation of GlobalFoundries' Conduct & Workplace Violence Policy by misusing company time, exhibiting aggressive behavior towards colleagues and supervisors, and refusing a legitimate work assignment⁷;
- 2) Violation of GlobalFoundries' Salaried (Exempt) Work Hours/Attendance Policy⁸; and
- 3) Violation of GlobalFoundries' Sick Time Policy by failing to enter appropriate time off request for sick days.⁹

Kelly Aff. ¶ 36; Kelly Aff., Exhibit G.

PROCEDURAL HISTORY

After being terminated by GlobalFoundries, Ebdah filed a claim against the company with OSHA on April 17, 2014. Bach Aff., Exhibit A. He asserted that GlobalFoundries terminated him as retaliation for his revelation that the company's wafers have backside contamination. *Id.*

On July 3, 2014, GlobalFoundries filed a statement opposing Ebdah's allegations. Bach Aff., Exhibit B. It argued that it terminated Ebdah because he violated several company policies and refused to return to work. GlobalFoundries stated that Ebdah's termination was unrelated to his concerns about wafer backside contamination. *Id.*

⁷GlobalFoundries' Conduct & Workplace Violence Policy "expressly prohibits threats and/or acts of violence by or targeted at employees, contractors, vendors, visitors, and customers." Kelly Aff., Exhibit G. "Misuse of company time" is listed as an example of "misconduct" that is inconsistent with GlobalFoundries' Conduct & Workplace Violence Policy and thus "may lead to corrective action, up to and including termination." *Id.*

⁸GlobalFoundries' Salaried (Exempt) Work Hours/Attendance Policy states that the company's standard business hours are 8:00 a.m. to 5:00 p.m. Monday – Friday, and salaried employees are "required to perform their designated job functions; be available during the above referenced times unless management and/or customer needs require different hours of operation; and to report to work on time when the worksite is open for operations." Kelly Aff., Exhibit G. The policy then states that "employees who demonstrate ineffective performance...may be subject to disciplinary action up to and including termination of employment." *Id.*

⁹GlobalFoundries' Sick Time Policy states that salaried employees must "enter sick time into PeopleSoft Self Service...for full day absences only." Kelly Aff., Exhibit G, p. 1. Further, "employees may be required to submit supporting documentation...for sick absences..." and "after 3 days...supporting documentation is required." Kelly Aff., Exhibit G, p. 2.

On July 20, 2014, Ebdah responded to GlobalFoundries' opposition statement. Bach Aff., Exhibit D. In essence, he reiterated that the company fired him because he exposed wafer backside contamination. *Id.* Ebdah filed a supplemental response on July 31, 2014 with the same basic assertions. Bach Aff., Exhibit E.

On October 1, 2014, Teri M. Wigger (an OSHA Assistant Regional Administrator acting on behalf of the Secretary of Labor) found "no reasonable cause to believe" that GlobalFoundries violated the Occupational Safety and Health Act (29 U.S.C. § 660(c)) or the Consumer Product Safety Improvement Act (15 U.S.C. § 2087). Bach Aff., Exhibit F. Wigger concluded that Ebdah's claim under the Occupational Safety and Health Act was untimely because he did not file it within 30 days after he was fired.¹⁰ *Id.* She thus dismissed this claim on behalf of the Secretary of Labor. *Id.*

As for Ebdah's claim under the Consumer Product Safety Improvement Act of 2008, Wigger found that Ebdah "engaged in 11(c) protected activity" when he "raised consumer product safety concerns over backside contaminated wafers." *Id.* Wigger concluded, however, that "other than the proximate timing of [Ebdah's] termination to some of his protected activities, there does not seem to be a nexus" between Ebdah's concerns and his termination. *Id.* Wigger noted that Ebdah arrived late to work or not at all in the days leading up to his termination and asserted that GlobalFoundries "has demonstrated by clear and convincing evidence" that it would have fired Ebdah even if he had not discussed wafer backside contamination with company officials. *Id.* She thus concluded that Ebdah's "protected activities were not a contributing factor" in his termination. *Id.* Accordingly, Wigger dismissed Ebdah's complaint on behalf of the Secretary of Labor. *Id.*

On October 24, 2014, Ebdah appealed OSHA's ruling to the Chief Administrative Law Judge in the U.S. Department of Labor.¹¹ Bach Aff., Exhibit G. GlobalFoundries filed a response on November 4, 2014. The company objected to OSHA's ruling that Ebdah engaged in protected activity under § 11(c) of the Occupational Safety and Health Act but otherwise agreed with OSHA's decision to dismiss Ebdah's claims.¹² Bach Aff., Exhibit H. The case was assigned to the undersigned on November 20, 2014.

On January 9, 2015, the undersigned issued a Notice of Assignment and Hearing. Bach Aff., Exhibit I. On April 3, 2015, GlobalFoundries filed a Motion for Summary Decision to dismiss Ebdah's claims in their entirety and moved to stay all discovery. On April 3, 2015, the undersigned cancelled the hearing and informed the parties they could file briefs on GlobalFoundries' Motion for Summary Decision by May 11, 2015. Ebdah requested several extensions to this deadline:

- On May 1, 2015, the undersigned granted his request to extend the deadline to June 1, 2015;

¹⁰GlobalFoundries terminated Ebdah on November 26, 2013. He filed his complaint with OSHA on April 17, 2014, which is 142 days after he was terminated.

¹¹In his appeal, Ebdah indicated that he wanted to consolidate all of his claims against GlobalFoundries. Bach Aff., Exhibit G. Accordingly, the undersigned will rule on Ebdah's claims under the Occupational Safety and Health (29 U.S.C. § 660(c)) and the Consumer Product Safety Improvement Act (15 U.S.C. § 2087), respectively.

¹²GlobalFoundries also requested an award of attorneys' fees. Bach Aff., Exhibit H, p. 4.

- On May 28, 2015, the undersigned granted his request to extend the deadline to June 15, 2015;
- On June 15, 2015, the undersigned granted his request to extend the deadline to June 25, 2015;
- On June 25, 2015, the undersigned granted his request to extend the deadline to July 12, 2015;¹³
- On July 13, 2015, the undersigned granted his request to extend the deadline to August 15, 2015; and
- On August 17, 2015, the undersigned granted his request to extend the deadline to September 15, 2015.

The undersigned did not receive a response from Ebdah by the September 15th, 2015 deadline. Ten days after the deadline, on September 25, 2015, Ebdah filed an untimely request to extend the briefing deadline to October 15, 2015. Via an order dated October 2, 2015, the undersigned denied Ebdah's request. Accordingly, GlobalFoundries' Motion for Summary Decision is ripe for adjudication.

STANDARD OF REVIEW

A moving party is entitled to summary decision if it “shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law.” 29 C.F.R. § 18.72(a). The administrative law judge must review the complainant's claims and determine the material facts. *Franchini v. Argonne Natl. Lab.*, 2012 DOL Ad. Rev. Bd. LEXIS 92 (Admin. Rev. Bd. 2012). The administrative law judge must then determine if the parties have a “genuine dispute” about the material facts. *Id.* at 12-13. A “genuine dispute” exists “if a fair-minded fact-finder...could rule for the nonmoving party after hearing all the evidence, recognizing that in hearing testimony is tested by cross-examination and amplified by exhibits and presumably more context.” *Id.* at 13; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

A moving party can also show there is no “genuine dispute” of material fact by supplying “affidavits or other documents and evidence, which purport to state the undisputed facts and challenge the complainant to produce admissible, contrary evidence that creates a genuine issue of fact.” *Franchini*, 2012 DOL Ad. Rev. Bd. at 15; 29 C.F.R. § 18.72(c)(1)(i). The non-moving party cannot simply respond with contrary facts; instead, the party must “attach admissible contradictory evidence to raise a genuine issue of material fact.” *Franchini*, 2012 DOL Ad. Rev. Bd. at 15. Stated differently, the non-moving party must “identify the specific facts and/or evidence he will bring to trial and such facts and evidence, if believed at trial, must be enough to allow for a ruling in his favor on the issue in question.” *Id.* at 15-16. The non-moving party has

¹³On July 8, 2015, the undersigned granted GlobalFoundries' request to extend the briefing deadline to July 30, 2015.

a low burden, however, and summary decision should only be granted “where the record is devoid of evidence that could reasonably be construed to support the complainant’s claim.” *Id.* at 16; *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 400 (6th Cir. 2008); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 252.

RELEVANT LAW

Occupational Safety and Health Act

Congress enacted the Occupational Safety and Health Act to “reduce the number of occupational safety and health hazards at...places of employment.” 29 U.S.C. § 651(b)(1). To achieve this goal, the statute states:

No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.

29 U.S.C. § 660(c).

An employee must file a complaint with the Secretary of Labor within 30 days of the alleged violation. 29 U.S.C. § 660(c)(2).

Consumer Product Safety Improvement Act of 2008

Congress enacted the Consumer Product Safety Improvement Act of 2008 to “protect the public against unreasonable risks of injury associated with consumer products.” 15 U.S.C. § 2051(b)(1). The statute prohibits, *inter alia*, a “manufacturer” from discharging or discriminating against an “employee” because the employee took one of the following actions:

- 1) Provided...the employer...information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of any provision of the Consumer Product Safety Improvement Act of 2008 or any other Act enforced by the Consumer Product Safety Commission¹⁴ or any order, rule, regulation, standard, or ban under such Acts;
- 2) Testified or is about to testify in a proceeding concerning such violation;
- 3) Assisted or participated or is about to assist or participate in such a proceeding; or
- 4) Objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee...reasonably believed to be in violation of any

¹⁴The Consumer Product Safety Commission is an independent regulatory commission with five commissioners appointed by the President of the United States and approved by the United States Senate. 15 U.S.C. § 2053(a).

provision of the Consumer Product Safety Improvement Act of 2008 or any other Act enforced by the Consumer Product Safety Commission, or any order, rule, regulation, standard, or ban under any such Acts.

15 U.S.C. § 2087(a)(1)-(4).

An employee must file a complaint within 180 days after the alleged violation with the Secretary of Labor. 15 U.S.C. § 2087(b)(1). A complainant must show that he performed an activity in § 2087(a)(1)-(4) and that this activity was a “contributing factor in the unfavorable personnel action” against him. 15 U.S.C. § 2087(B)(iii). Even if the complainant makes this showing, however, the employer can prevail by proving through “clear and convincing evidence” that it would have “taken the same unfavorable personnel action even in the absence of that behavior.” 15 U.S.C. § 2087(B)(iv).

DISCUSSION

The undersigned finds that Ebdah’s claim under the Occupational Safety and Health Act must be dismissed. The statute provides that an employee must file a complaint with the Secretary of Labor within 30 days after the alleged violation occurred. 29 U.S.C. § 660(c)(2). Here, GlobalFoundries committed the alleged violation (Ebdah’s termination) on November 26, 2013. Kelly Aff. ¶ 36; Kelly Aff., Exhibit G. Ebdah filed his complaint with the Secretary of Labor on April 17, 2014, which is 142 after the alleged violation. Bach Aff., Exhibit A. Ebdah thus failed to file a complaint with the Secretary of Labor within 30 days after the alleged violation occurred, as required by 29 U.S.C. § 660(c)(2). Accordingly, Ebdah’s claim under the Occupational Safety and Health Act is untimely and must be dismissed with prejudice.

As for Ebdah’s claim under the Consumer Product Safety Improvement Act of 2008, the undersigned initially finds that GlobalFoundries is a “manufacturer” and Ebdah is an “employee” under the statute. 15 U.S.C. § 2087(a). Ebdah also filed a complaint with the Secretary of Labor within 180 days after his termination, as required by 15 U.S.C. § 2087(b)(1).

Ebdah’s claim must be dismissed, however, because there is no evidence that he told GlobalFoundries before his termination that wafer backside contamination was a safety concern. Through several affidavits, GlobalFoundries has established that although Ebdah discussed wafer backside contamination with company officials and other stakeholders, he never expressed any concerns that the wafers could harm employees or the public. For example, in an email to an employee of Advanced Technology Investment Company, Ebdah listed numerous “risks” of wafer backside contamination. Nelson Aff., Exhibit A, p. 1. None of the “risks” that Ebdah identified, however, were related to safety. *Id.* Similarly, William Taylor (a principal member of GlobalFoundries technical staff) stated that Ebdah never expressed any concerns about public safety during their conversations about wafer backside contamination. Taylor Aff. ¶ 19. GlobalFoundries also provided emails from Ebdah indicating that he was worried about being blamed for supervising defective wafers, not public safety. Taylor Aff., Exhibit A, p. 2; Taylor Aff., Exhibit B, p. 1.

Given that GlobalFoundries has provided this evidence through several affidavits, Ebdah must “attach admissible contradictory evidence to raise a genuine issue of material fact” to avoid summary decision. Specifically, Ebdah must point to contradictory evidence or identify specific facts (other than mere assertions) showing that he told GlobalFoundries officials that wafer backside contamination was a safety issue before his termination. *Franchini*, 2012 DOL Ad. Rev. Bd. at 15.

Ebdah has not provided any such evidence. Although he alleges in his complaint that GlobalFoundries ignored his warnings about the safety dangers posed by wafer backside contamination, Ebdah fails to identify any “specific facts/and or evidence” to support his claims. The undersigned therefore finds that there is no genuine dispute that Ebdah never informed GlobalFoundries that wafer backside contamination was a safety concern prior to his termination. Ebdah thus did not engage in any protected activity under 15 U.S.C. § 2087(a)(1)-(4). Accordingly, his claim under the Consumer Product Safety Improvement Act of 2008 must be dismissed with prejudice.

Moreover, even if Ebdah told GlobalFoundries that its wafers were a safety concern, the undersigned finds that it was not a “contributing factor” in GlobalFoundries’ decision to terminate Ebdah. 15 U.S.C. § 2087(B)(iii). There is no genuine dispute that GlobalFoundries told Ebdah after its investigation concluded that he must return to work on November 14, 2013 and that failure to do so could result in termination. Kelly Aff., Exhibit C, p. 2. There is also no genuine dispute that Ebdah refused to comply with these instructions. In the days leading up to his termination, Ebdah repeatedly arrived late for work or not at all. He arrived at work between 9:30 – 10:00 a.m. two times; between 1:00 – 2:30 p.m. four times; after 4:00 p.m. one time; and he failed to report to work at all two times. Belokopitsky Aff., Exhibit A, p. 1-6. In fact, Ebdah never reported to work on time in the nine weekdays before his termination. *Id.*

There is also no genuine dispute that GlobalFoundries’ policies permit termination for Ebdah’s conduct and that Ebdah was terminated under these policies. Specifically, the record establishes that GlobalFoundries fired Ebdah under the Conduct and Workplace Violence Policy, the Salaried (Exempt) Work Hours/Attendance Policy, and the Sick Time Policy. Kelly Aff. ¶ 36; Kelly Aff., Exhibit G. GlobalFoundries’ Conduct and Workplace Violence Policy states that “misuse of company time” is “misconduct” that “may lead to...termination.” Kelly Aff., Exhibit G. GlobalFoundries’ Salaried (Exempt) Work Hours/Attendance Policy states that normal business hours are from 8:00 a.m. – 5:00 p.m. during the week. *Id.* Salaried employees must “report to work on time when the worksite is open for operations.” *Id.* Employees “may be subject to ...termination of employment” if they fail to comply. *Id.*

In short, the evidence establishes that GlobalFoundries told Ebdah to return to his normal work schedule after its investigation concluded; he failed to comply with that instruction by regularly reporting late to work or not at all; and GlobalFoundries terminated his employment under its company policies. Accordingly, the undersigned finds that even if Ebdah expressed safety concerns about wafer backside contamination, it did not contribute to GlobalFoundries’ decision to terminate his employment.

Furthermore, Ebdah's other complaints of retaliation against GlobalFoundries are also not supported by the record. For instance, he asserted that supervisor Cho forced him to choose between his family and career when he asked to travel to Jordan. Kelly Aff. ¶ 15; Nelson Aff. ¶ 4-7. The record reveals, however, that Ebdah decided not to travel to Jordan because "to take months for the passport visa to be issued that won't be a practical opinion to choose, so I decided not to travel." Kelly Aff., Exhibit B, p. 1. The evidence thus establishes that Ebdah himself elected not to travel to Jordan after weighing the costs and benefits of the trip. There is no evidence that supervisor Cho gave Ebdah an ultimatum or retaliated against him in any way.

Similarly, there is no evidence that GlobalFoundries singled out Ebdah for different work assignments without explanation. Kelly Aff. ¶ 15; Nelson Aff. ¶ 4-7. For example, the record shows that supervisor Cho informed all of the engineers in his group – not just Ebdah – that they must serve as "sustainers" on "night shift rotations" to fulfill a business need. Cho Aff. ¶ 10; Cho Aff. Exhibit A, p.1. Given that Ebdah's co-workers also had to serve as sustainers and supervisor Cho explained the reasons for this business decision in a group email, this assignment was neither different nor without explanation.

Finally, there is no evidence that GlobalFoundries retaliated against Ebdah because he was working on secret projects for Advanced Technology Investment Company. As part of its investigation, GlobalFoundries interviewed Jean Raymond Fakhoury, an engineer with Advanced Technology Investment Company. Contrary to Ebdah's claims, Fakhoury stated that he did not know of any projects that Ebdah was working on for Advanced Technology Investment Company. Kelly Aff. ¶ 18.

In sum, there is simply no evidence in the record that GlobalFoundries retaliated against Ebdah for any reason. Other than his bare assertions, Ebdah has not provided any facts or evidence that he told GlobalFoundries that wafer backside contamination is a safety issue. Further, even if Ebdah informed GlobalFoundries that wafer backside contamination is a safety concern, the record shows that GlobalFoundries ultimately fired Ebdah because he repeatedly showed up late to work (or not at all) after the company finished investigating his allegations of retaliation. Given that GlobalFoundries' policies authorize termination for Ebdah's actions, the undersigned finds that even if Ebdah told GlobalFoundries that wafer backside contamination was a safety concern, it was not a "contributing factor" in his termination. Accordingly, Ebdah's claim under the Consumer Product Safety Inspection Act of 2008 is dismissed with prejudice.

ATTORNEYS' FEES

Given that the undersigned has dismissed Ebdah's complaints in their entirety, the question now becomes whether GlobalFoundries should receive attorneys' fees. In the United States, the prevailing party is normally not entitled to attorneys' fees. *Oliveri v. Thompson*, 803 F.2d 1265, 1271 (2d Cir. 1986) (citing *Alyeska Pipeline Service Co., v. Wilderness Society*, 421 U.S. 240, 247 (1975)). The Consumer Product Safety Inspection Act of 2008, however, states that an employer may collect "a reasonable attorneys' fee, not exceeding \$1,000 to be paid by the complainant" if a complaint was "frivolous" or brought in "bad faith." 15 U.S.C. § 2087(C). A claim is "frivolous" if it lacks "an arguable basis either in law or in fact." *Shakur v. Selsky*, 391 F.3d 106, 113 (2d Cir. 2004) (citing *Neitzke v. Williams*, 490 U.S. 319, 325 (1989)). "Bad faith"

is present if a litigant lacks “good faith” or does not deal fairly with the opposing party. *See Dunnigan v. Metro. Life Ins. Co.*, 277 F.3d 223, 228 (2d Cir. 2002) (plaintiff seeking equitable relief in federal court under ERISA § 502(a)(3)(B) must show “bad faith,” which the court defined as a breach of good faith and fair dealing). “Bad faith” may be found in how a party behaves during litigation, not just in their actions that led to the lawsuit. *Oliveri*, 803 F.2d at 1272 (citing *Hall v. Cole*, 412 U.S. 1, 15 (1973)).

Here, the undersigned finds that attorneys’ fees should not be awarded to GlobalFoundries. First, Ebdah’s claim is not “frivolous.” The Consumer Product Safety Inspection Act of 2008 was enacted to “protect the public against unreasonable risks of injury associated with consumer products.” 15 U.S.C. § 2051(b)(1). The record establishes that Ebdah expressed concerns to GlobalFoundries about a “consumer product” (wafers), although his concerns were unrelated to public safety and ultimately without merit. Nonetheless, given the statute’s broad purpose and the general nature of Ebdah’s complaint, the undersigned finds he had “an arguable basis either in law or in fact” to file a claim under the statute. Accordingly, Ebdah’s claim was not “frivolous” for the purpose of awarding attorneys’ fees.

The undersigned also finds that Ebdah did not act in “bad faith,” although he comes perilously close to crossing that threshold. In Ebdah’s legal filings, he repeatedly disparaged GlobalFoundries and opposing counsel with unsubstantiated accusations and personal insults.¹⁵ These tactics have no place in a court of law and would likely merit sanction if performed by an attorney. But given that Ebdah proceeded *pro se* and may be unfamiliar with the judicial system, the undersigned will presume that his errors were honest mistakes rather than deliberate acts of bad faith. Accordingly, GlobalFoundries will not be awarded attorneys’ fees.

¹⁵These are a few examples of Ebdah’s statements from his court filings:

- “...We will confirm and prove in our response that GF legal representative [Ellen Bach] does not believe what she has composed in GFPS [GlobalFoundries Position Statement]. This certainly does not protect her from violating the corresponding legal statutes in such national and global violent scandal to obstruct justice from being applied ...” Bach Aff., Exhibit D, p. 3.
- “GlobalFoundries with its contaminated billions of dollars factory facility Fab8 in Malta, NY... threats [sic] not only the workers but the whole country with death and cancer has achieved another whole scandal to be added to its full of shame, and full of corruption history of corruption and violations.” Bach Aff., Exhibit G, p. 2.
- “...GF legal representative Ellen Bach has relied on her numerous, systematic, severe and rude falsifications as well as illegally concealing the evidences in her possession and GlobalFoundries possession to obstruct the truth and justice. The spectrum alone of her lie detector tests/polygraph will be enough to show how violent and how dangerous she is against the society, against the innocent victims, and against the victim Dr. Ebdah, and will reveal more of the hostile and dishonest character she possesses...” Bach Aff., Exhibit G, p. 2.

CONCLUSION

Ebdah's claims under the Occupational Safety and Health Act and Consumer Product Safety Improvement Act of 2008 are dismissed with prejudice. No attorneys' fees shall be awarded.

DREW A. SWANK
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within 14 days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1983.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1983.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1983.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1983.109(e) and 1983.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1983.110(b).