

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

In the Matter of Jeffrey S. Derrick)
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Filing Date: June 22, 2012) Case No.: WBH-12-0005
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Issued: July 29, 2013

Initial Agency Decision

Richard A. Cronin, Jr., Hearing Officer:

This Decision and Order involves a Complaint of Retaliation filed by Jeffrey S. Derrick (Derrick or “complainant”) against his former employer, Shaw AREVA MOX Services, LLC (MOX Services) under the DOE’s Contractor Employee Protection Program and its governing regulations set forth at 10 C.F.R. Part 708. The complainant was an employee of MOX Services, which is the design, licensing, and construction contractor for the National Nuclear Security Administration’s (NNSA) Mixed-Oxide Fuel Fabrication Facility (MFFF or MOX facility) at the Department of Energy’s (DOE) Savannah River Site in Aiken, South Carolina.¹ Derrick worked as a Field Superintendent supervising field craft personnel installing piping and piping supports. Derrick worked for MOX Services for a five-month period, from October 24, 2011, until the company terminated his employment on March 21, 2012. Derrick alleges that his termination was in retaliation for activities protected under Part 708. For the reasons set forth below, I will deny Derrick’s Complaint.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE’s Contractor Employee Protection Program was established 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, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is 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. Available relief includes reinstatement, back pay, transfer preference, and such other relief as may be appropriate. 10 C.F.R. § 708.36.

¹ The NNSA is a semi-autonomous agency within the U.S. Department of Energy responsible for the management and security of the nation’s nuclear weapons. The NNSA MOX facility would convert weapon-grade plutonium into a Mixed Oxide (MOX) nuclear fuel. See Plutonium Disposition Program Fact Sheet at <http://nnsa.energy.gov/mediaroom/factsheets/pudisposition> (visited July 23, 2013).

B. Procedural History

On April 12, 2012, Derrick filed a Part 708 complaint with the Whistleblower Program Manager for the NNSA Albuquerque Complex. Upon receiving a copy of the Complaint, MOX Services filed a response in which it argued that Derrick's complaint should be dismissed because the facts alleged in the Complaint do not support an action under Part 708. Response at 11. On June 22, 2012, the Whistleblower Complaint Manager forwarded the matter for a hearing by OHA.² I was appointed by the OHA Director to be the Hearing Officer in this matter.

After reviewing Derrick's complaint and MOX Services' Motion to Dismiss, I requested briefs from both parties regarding whether Derrick's complaint was sufficient, as a matter of law, to support a Part 708 action. *Jeffrey S. Derrick*, Case No. WBZ-12-0005 (2012) (*Derrick*). On October 2, 2012, I dismissed the MOX Services' Motion finding that there might be sufficient information in Derrick's complaint to support a Part 708 action.³ *Derrick*, slip. op. at 6.

I convened a four-day hearing in this case, in Aiken, South Carolina. Derrick introduced 63 exhibits totaling 427 pages into the record of this proceeding, and presented the testimony of six witnesses, in addition to his own testimony. MOX Services introduced 104 exhibits, totaling 721 pages and presented the testimony of five witnesses. The transcript of the hearing comprised 1413 pages of testimony. I also permitted the parties to submit post-hearing briefs in the case. After granting both parties extensions of time, MOX Services and Derrick tendered their briefs on May 6, 2013.

C. Factual Background

Derrick was hired by MOX Services in October 2011 as a Superintendent at the MFFF facility. Transcript of Hearing (Tr.) at 464. Initially, Derrick's immediate supervisor was Charles Schmitt (Schmitt), MOX Services' Site Superintendent for the MFFF. Later, Tim Shepard (Shepard), MOX Services Area Superintendent, became Derrick's immediate supervisor. Tr. at 464, 1291; Ex. GGGG. In Derrick's management chain, Shepard reported to Schmitt who reported to Edward Najmola (Najmola), Vice President for Construction, and Najmola's deputy, Construction Manager Steve Murphy (Murphy). Tr. at 1289-91; Ex. GGGG. Derrick's duties included supervising the craft employees⁴ responsible for installing piping at the MOX Facility. Tr. at 464.

The origin of the disagreements that led to Derrick's complaint have their root in the process by which MOX Services decided to construct the MFFF's piping system. MOX Services decided to begin construction of the MFFF while the final design of the facility was, in some cases, still

² In her transmittal letter OHA, the Whistleblower Complaint Manager forwarded a June 22, 2012, E-mail from Derrick requesting an OHA hearing without an investigation. Memorandum from Michelle Rodriguez de Varela, Whistleblower Complaint Manager, NNSA, to Poli A. Marmolejos, Director, Office of Hearings and Appeals (June 22, 2012).

³ In my Decision, however, I also held that I offered no opinion regarding whether any of Derrick's alleged disclosures would be sufficient with regard to a determination on the final merits of Derrick's complaint. *Derrick*, slip. op. at 6 n.2 and that Derrick would have to meet the regulatory requirements under 10 C.F.R. 708.5 in order to prevail on the merits.

⁴ Craft employees are construction employees with special skills such as welders and fitters. Tr. at 27.

being determined. Tr. at 827-28. In electing this approach (proceeding “at risk”), MOX Services planned for the possibility that a portion of the supports might have to be changed or modified believing that this methodology would be more cost effective. Tr. at 848-49, 947, 1019, 1059. With regard to the piping system, MOX began to attach pipe supports to various parts of the MFFF without always having the piping package: a set of drawing specifying the exact route and connection points of the pipes, the pipes themselves, or specifications for cutting and connecting the pipes. Tr. at 827-28, 1019. Derrick believed that the supports should not be installed until all documentation and pipes were available to the craft personnel.⁵ Tr. at 848, 860-61.

In late November 2011, a NNSA Construction Engineer, Kevin Buchanan (Buchanan), identified issues involving the installation of pipes and piping supports. Tr. at 42, 532; Ex. A. In a December 1, 2011, NNSA Construction and Startup Team Daily Activity Report (December 2011 Report), NNSA noted a problem with regard to the installation of pipe supports in one MOX Facility building. Attachment 5 to August 6, 2012, MOX Service Reply Brief regarding Dismissal of Complaint. Specifically, the NNSA team stated that there were problems with pipe supports being installed at the incorrect angle and slope. Additionally, the design drawings failed to provide the tolerances for the angles at which pipe supports were designed to be attached. December 2011 Report at 1.

Upon receipt of the December 2011 Report, MOX Services began to develop a corrective action plan to address the concerns raised in the report. Tr. at 42-43. Various E-mails were sent during December 2011 to and from MOX Services officials (including Derrick, Najmola, Schmitt, and Shepard) regarding the pipe support slope problems and possible solutions. Exs. A - I; Exs. 14, 25, 29 (E-mails discussing pipe slope issues). MOX Services officials disagreed among themselves as to the best way to resolve the pipe installation and slope issues. Ex. H at 2-3; Ex. I at 2-3. On December 21, 2011, Derrick complained in an E-mail (December 21, 2011, E-mail) to Shepard and Schmitt that the practice of establishing the slope of pipe supports by installing them prior to installing the pipe eliminated the tolerances (the possible range of location) by which the pipe location could be moved.⁶ Ex. 14. In the December 21, 2011, E-mail, Derrick suggested the use of chalking and pull strings to establish the correct location and slope of piping and supports. Ex. 14; *see* Tr. at 205. During this time, Schmitt reported to Najmola and Shepard that Derrick did not agree with the approach that was being adopted to install the pipes and resolve the slope issues but that Derrick was also making suggestions to help resolve the problems. Tr. at 873-74. MOX Services undertook several measures to reduce the possibility that pipe supports would have to be reworked including using chalk strings (as suggested by

⁵ Schmitt also testified that the craft employees who were to install the piping preferred the approach Derrick advocated of having all materials present before actually installing pipe supports or pipes. Tr. at 853-54.

⁶The text of the message states:

Tim, after review and . . . collaboration [with] eng[ineering] it's becoming apparent that the use of angle finders on the installation of the supports is not the proper way nor the correct way to install. Establishing the slope on the supports prior to pipe installation eliminates the tolerances on pipe. As you and I have discussed, the pipe installation determines the location of the support. Per our conversations this past week, I suggest craft install supports chalking and/or pulling string to establish slope. Conversion from percent to degree really isn't necessary. Conversion from percent to inches per foot in my opinion should be a more accurate and "error free" way to install. Please advise.

Derrick), obtaining new slope measurement instruments, increasing the specified support location tolerances, and modifying the work packages (plans and instructions for installing the pipe supports). Ex. H; Ex. N.

On December 29, 2011, Derrick stumbled into a picnic-table. Tr. at 589. Derrick did not report this injury until the next day when the MOX Facility Occupational Health Coordinator, Nurse Suzanne Spade (Nurse Spade), advised him to report the picnic-table incident to his supervisor. Tr. at 589; Tr. at 1317-18. Ex. FF. Derrick subsequently filed a report regarding this incident noting that he had walked into a picnic-table and had lost his balance and that the incident was a “non-injury event.” Ex. XX. MOX Services policy requires a supervisor to report injuries to his or her supervisor no later than 15 minutes after the injury. Tr. at 882, 1087-88; Ex. ZZZ. In turn, the supervisor must file an incident report and an investigation report within two hours after being notified. *Id.*; Ex. ZZZ.

On January 3, 2012, Derrick visited Nurse Spade and complained that he was too sore to sit at a computer as a result of the picnic-table incident. Ex. FF. Later that day, Nurse Spade briefed Najmola and other management officials regarding the picnic-table incident as they entered a hallway. Tr. at 1320-21. Nurse Spade and Najmola observed Derrick walking normally from afar. However, when Derrick walked closer to Nurse Spade and Najmola, they observed him begin to limp. Ex. FF. Najmola consulted with Christopher Bethmann (Bethmann), Human Resources Manager for MOX Services, to inquire if he could remove Derrick for “Loss of Confidence” based upon Derrick’s failure to timely report the picnic-table injury incident pursuant to MOX Services policy and his belief that Derrick had faked the severity of his injury. Ex. EE; Tr. at 1320-24. Eventually, after input with other MOX Services and Shaw Group, Inc. (Shaw)⁷ officials and departments, Najmola decided not to terminate Derrick based upon this incident. Tr. at 1323.

Derrick was subsequently orally counseled by Shepard on January 11, 2012, about his excessive absenteeism over the previous couple of weeks.⁸ Ex. LL; Tr. at 346-47. On January 12, 2012, Derrick had a conversation with Shepard and stated that he could not be fired because he had contacted the DOE’s Office of the Inspector General’s hotline about waste at the MOX Facility.⁹ Tr. at 3151, 513, 603, 608; Ex. LL. Derrick also disclosed that he had filed a whistleblower complaint against a former employer and had been awarded money. Tr. at 315. He also told Shepard that he had been awarded enough money to buy his wife a Mercedes and that the MOX project would “buy him a Bentley.”¹⁰ Tr. at 315. Shepard became concerned that Derrick could be setting the ground for another whistleblower action against MOX Services. Tr. at 316; *see* Tr. at 930.

⁷ MOX Services is a joint venture formed by subsidiaries of The Shaw Group, Inc. and AREVA. June 4, 2012 MOX Services Initial Response at 1.

⁸ Shepard became aware of Derrick’s absenteeism after observing Derrick’s apparent reluctance to talk to a MOX Services “workman’s comp” official on the phone over a two-day period in January 2012. Tr. at 352-54.

⁹ Derrick asserted at the hearing that the remark about not being able to be fired was made as a joke. Tr. at 605.

¹⁰ Schmitt testified that he had heard the same comment about Derrick from employees in the field. Tr. at 930; *see* Tr. at 162. Derrick conceded at the hearing that the statement had been made about him but that the remarks had been said in jest. Tr. at 487.

Shepard's concern with Derrick's absenteeism began when, on January 4, 2012, Derrick left work early to deal with a flood in a church he was renovating and then took off the following two work days using vacation time, without getting advance approval. Tr. at 355-56. While Derrick did not submit a prior request for vacation days, he did contact Shepard to inform him that he "may or may not" be back at work the next day. Tr. at 365-66.

On February 22, 2012, Derrick sent an E-mail (February 22, 2012, E-mail) message to Najmola stating:

Ed, I'm really having a problem executing my role as superintendent, my concerns go un-resolved. The union appears to be "eating our lunch." We, as Shaw, seem to have no control on labor. I have expressed my concerns to Charles. No one, including Steve, seems to inform you of our problems in the field. (I assume). I was told today, *I could not readjust crews to even fitters vs. welders. I had to talk to the Steward?* What's up with that? Today as VP, we had to get approval from you for a procedure violation. You have no confidence in our decisions?

Packages. doc[ument] control, rev. drwg's [drawings], etc. We have been talking about this for 2 weeks, still not in place. You guys have not a clue. Russell, Steve, and Charles seem to argue back and forth. No one is a problem solver.

Tim, myself, and upstairs have gone all week without computer access. No one seems to CARE. I've been coming to work @ 4:00 am to check packages with no support from field eng[ineering].

QC including (DOE) Kevin Buchanan and the NRC recognize problems. Everyone in our group passes the buck.

TOTAL CHAOS in the field. NO management, NO design, NO help.

I take pride. I'm conscientious, enjoy my work. Please help me correct these problems.

Ex. P at 1.

In response to the February 22, 2012, E-mail, Najmola asked Murphy to meet with Derrick to discuss the concerns listed in the February 22, 2012, E-mail. Tr. at 61. Murphy, Schmitt, and Shepard met with Derrick on February 23, 2012, to discuss the issues raised in the February 22, 2012, E-mail. Tr. at 383-84, 628. Shepard recorded notes memorializing the discussion and Derrick signed the notes certifying that his concerns as contained in his February 22, 2012, E-mail had been addressed. Ex. PP.

On March 8, 2012, Derrick sent an E-mail to Shepard, Schmitt, and Murphy (March 8, 2012, E-mail) stating that: "Charles [Schmitt], unless directed otherwise, all supports, (my area) are being installed with 2" random and without u-bolt location. This will allow us to use tolerances when installing piping horizontally. The vertical runs should (not always) be OK because of the + or - tolerance allowed on piping. As we have discussed in the past, string piping, angle finder, etc. Still needs to be utilized when slope is involved. If this is not adopted, the piping tolerance will be non-existent."

Derrick Amended Brief at 5. MOX Services officials did not object to Derrick's suggested course of action regarding the installations.

On March 15, 2012, Derrick sent an E-mail to Najmola, Shepard and Schmidt (March 15, 2012, E-mail). Ex. 5; Ex. T. It contained a copy the February 22, 2012, E-mail as well as several other E-mails. In the message, Derrick again complains that his concerns have not been resolved and cites his numerous E-mails sent through his chain of command to resolve the issues he had previously identified. Derrick states "[th]e E-mail I sent you over a month ago, I would have expected you to have "my a** in your office asking questions." Ex. 5 at 2; Ex. T at 2. Derrick concludes by stating:

I have, on many occasions, tried to address the improper installations of supports. This will be costly and time consuming. You have to address this problem. This issue could result in 50% rework. This too, was addressed months ago in unanswered emails. We can not [sic] continue to ignore this issue.

This is our tax payer money (you and I) we need to address. We need support. I can show you, submit "all of my concern," but first you have to sit down with the people involved and make some tough decisions.

You are encouraged at this point to request all info and emails I have in my possession. You really need to understand the magnitude of these problems. Do not start pointing fingers, or direct accusations toward people that's only trying to proceed forward.

Ex. 5 at 2; Ex. T at 2.

On March 19, 2012, Derrick sent an E-mail (March 19, 2012, Buchanan E-mail) to Buchanan, and sent copies of the message to Najmola, Shepard, and Schmidt. In this E-mail, Derrick sent Buchanan a copy of the March 15, 2012, E-mail to "give you a head's-up on problems I still encounter." Ex. U at 2. Derrick also states in the March 19, 2012, Buchanan E-mail that, on the following day, he is going to seek the "involvement" of the Office of Inspector General." Ex. U at 2. Additionally, Derrick sent another E-mail to Najmola, Shepard, Buchanan and Schmitt (March 19, 2012, E-mail) containing a copy of the March 15, 2012, E-mail. In the message, Derrick states:

Beginning 26 March 2012, I will no longer direct installation of supports (unless directed by Ed or Kelly) in my area (BMP) without piping packages being a precursor to all support packages. At the direction of Tim and myself, last few weeks we have chosen to install with random and no U-bolt location but this decision was ours without support from management. This will help with some of the issues but not all. We need constructive answers on how to proceed with issues we have described. This has not been formally addressed by Ed, Steve, or Charlie. This issue has been brought to everyone's attention including engineering. Design and Engineering have established installation guide lines based on piping location. I have sent numerous emails to the proper and qualified persons for an answer. I want an answer and I want that answer to be confirmed, and agreed with all involved. 90% of all packages are built, support packages,

then piping packages, with a time lag time of weeks. This is making installation difficult, time consuming, inaccurate, and virtually impossible. (Check the data base. I have multiple copies) I have been trying to address this issue for months. We cannot continue to install without the proper and the correct way design has intended. Piping has to come first, and in such a way, it allows for the tolerance to be confirmed. To date, as I have advised, this is not happening. Your cooperation is needed to resolve the issue. I have contacted Kevin for his help in resolving this ongoing issue. Ed has emails of this concern. Estimated cut out of already installed conservatively is 50%.

We all need to reach a resolution, and we need to reach it promptly.

Ex. 5 at 1; Ex. T.

After receiving the March 19, 2012, E-mail, Najmola met with Bethmann. Tr. at 1260. At this meeting, Najmola informed Bethmann that based upon that message Najmola had concluded that Derrick was refusing to perform his work tasks and that he could not depend on Derrick to supervise his craft employees. Tr. at 1260. Further, Najmola had decided that Derrick should be removed from employment for Loss of Confidence. Tr. at 1261. Bethmann concurred with this course of action, and after personally reviewing all of the circumstances regarding Derrick's employment, sought review of the proposed removal from the MOX Services Human Relations and Legal departments. Tr. at 1262. Derrick was informed that he was being placed on paid leave so that his March 19, 2012, E-mail incident could be investigated. Tr. at 490. On March 21, 2012, MOX Services contacted Derrick to inform him of his termination. Tr. at 1263; June 4, 2012, MOX Services Initial Response, Attachment 23.

II. Analysis

A. Did Derrick Make A Protected Disclosure under Part 708?

Under Part 708, a contractor employee may not be subject to retaliation for disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, the employee's employer, or any higher 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).

Derrick asserts that the four E-mails mentioned in his complaint demonstrate that he disclosed gross waste of funds and gross mismanagement at MOX Services. A gross waste of funds has been defined by OHA as "a more-than-debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government." *Fred Hua*, Case No. TBU-0078 (2008) (*Hua*). Likewise, OHA has held that gross mismanagement is characterized by:

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.

Hua, slip. op. at 2; *Roger Hardwick*, OHA Case No. VBA-0032 (1999); *see also Carolyn v. Dep't of the Interior*, 63 M.S.P.R. 684 (1994). It is the burden of a complainant to prove by a preponderance of the evidence that he or she made a disclosure as described in 10 C.F.R. § 708.5. *See* 10 C.F.R. § 708.29.

In his complaint, Derrick alleges that he made protected disclosures in the December 21, 2011, February 22, 2012, March 15, 2012, March 19, 2012, and March 19, 2012, Buchanan E-mails. Derrick alleges that his disclosures concerned not only slope issues regarding pipe installation, but pipe "installation practice." July 25, 2012, Amended Brief at 1. Derrick asserts that his concerns with installation practice refer to conflicting "notes" and "specs" regarding pipe installation and the non-existence of piping tolerances. *Id.* He also alleges that his disclosures revealed gross mismanagement and waste of funds regarding Shaw's decision to continue to install piping notwithstanding the alleged problems in installation practice. *Id.*

1. December 21, 2011, and February 22, 2012, E-mails

As an initial matter, I find that the December 21, 2011, and February 22, 2012, E-mails are not protected disclosures under Part 708. Neither message identifies a substantial violation of a law rule, or regulation or seeks to identify a substantial specific danger to employees or to public health and safety. The December 21, 2011, E-mail reports Derrick's opinion regarding problems with establishing the slope of pipe supports and suggesting methods to ensure how the pipe and pipe supports should be installed but, on its face, does not seek to complain about fraud, gross mismanagement or an abuse of authority. While the February 22, 2012, E-mail complains about various pipe installation practices, it does not seek to point out fraud, gross mismanagement, gross waste of funds, or abuse of authority. The message is a request to obtain resolution regarding various workplace issues Derrick experienced with his supervision of pipe installation. Consequently, I find, as a matter of law that the December 21, 2011, and February 22, 2012, E-mails were not protected disclosures under Part 708.

2. March 15, 2012, March 19, 2012, and March 19, 2012, Buchanan E-mails

After considering the March 15, 2012, March 19, 2012, and March 19, 2012, Buchanan E-mails (collectively referred to as the March 2012 E-mails), the additional hearing exhibits and testimony, I find that Derrick did not intend to disclose a gross waste of funds in the March 2012 E-Mails. The March 2012 E-mails reference Derrick's statement that some 50 percent of the pipe supports at the MFFF would have to be remediated. The E-mails contain the statement "[t]his is our tax payer money (you and I) we need to address." However, it is apparent that Derrick uses this alleged fact to make the argument that MOX Services management needs to make decisions regarding various issues as indicated in the sentence that follows – "[w]e need support. I can show you, [sic] submit 'all of my concern,' but first you have to sit down with the people involved and make some tough decisions."¹¹ Additionally, the March 2012 E-mails themselves

¹¹ Derrick's original complaint states his belief that "I have the 'right' to question my employer and seek answers to legitimate concerns and issues" and that he was terminated as a result. April 26, 2012, Derrick Complaint at 2.

provided little detail on how the alleged deficiencies in pipe support installation practice constitutes a gross waste of funds. *See Hua*.

I also find that Derrick's purpose in sending the March 2012 E-mails was not to reveal a gross waste of funds but to complain about MOX Service management's alleged failure to adequately respond to his complaints regarding the procedures to be used in installing the pipes at the MOX facility and to urge management to make certain decisions regarding pipe installation practices. Derrick testified that over his period of employment he became frustrated and that he was "used to getting answers when I ask a question . . . I just didn't feel I was receiving that information." Tr. at 471. After sending the March 19, 2012, Buchanan E-mail, Derrick sent Najmola another E-mail stating "[o]nly trying to do the job Shaw hired me to do. Only hope I don't get the 'chilling effect' or lose my position. Just a personal concern. Really hope we can go forward and resolve the issues." Ex. V. The reference to the E-mail referencing a "personal concern" is inconsistent with an intent to disclose a systemic gross waste of funds committed by his employer. During the period of the March 2012 E-mails, Derrick was also frustrated because of an alleged suggestion by Najmola that the craft responsible for piping be sent to a "Piping Class 101," and the assignment of his organization to another department head of whom Derrick thought "shouldn't be involved." Tr. at 683-84. Consequently, I find that, in light of the proffered testimony, the text of the March 2012 E-mails did not disclose a gross waste of money such as to be protected under Part 708. Further, I find that the text of March 2012 E-mails do not reference the type of gross mismanagement to meet the standard for gross mismanagement as described in *Hua*. Neither of the E-mails describes mismanagement rising to the level of gross mismanagement. At best, they describe Derrick's frustration with management decisions regarding the methodology to install pipes and pipe supports. Consequently, I do not find the March 2012 E-mails to be protected pursuant to Part 708.

Even if I were to conclude that Derrick, in his March 2012 E-mails, intended to reveal a gross waste of funds, I would find that Derrick has failed to provide sufficient evidence to establish that he reasonably believed that his disclosure evidenced a gross waste of funds by MOX Services. The test of "reasonableness" is an objective one, *i.e.*, whether a reasonable person in the complainant's position, with his level of experience, could believe that his disclosure met any of the three criteria set forth above. *Arun K. Dutta*, Case No. TBH-0088 (2009); *Curtis Broadbus*, Case No. TBH-0030 (2005).

With regard to his estimate that 50 percent of the installed pipe supports would need remedial work, Derrick testified, "the 50-percent I used is not an accurate figure. It could be 90. It could be 40." Tr. at 796-97. The only other evidence in the record regarding the basis of Derrick's 50 percent estimate is found in a deposition transcript. Ex. KKKK at 216. In this deposition, Derrick gave the following testimony regarding the basis for his 50 percent estimate:

Q: I am just trying to better understand the reference to the 50 percent rework for now . . . And what do you base that 50 percent figure on?

A: [Derrick] Because we know for sure it was 80 percent, because Jim La Fontaine, myself and Tim Shepard identified 80 percent. So I thought I would be conservative and give them 50 percent.

Q: Okay. And what is that 80 percent figure based on?

A: Based on random checking of supports that were --

Q: And did you document that random checking of supports at any time?

A: Jim La Fontaine did, construction engineering.

Q: Okay. And do you know how he did that?

A: As far as documenting, I have got no idea.

Q: Okay. Did you talk to Jim about that -- excuse me, Mr. La Fontaine about that?

A: He and I did it together. Be and I physically went out there and tried to determine, to the best of our ability, without the piping in there -- see, they had us doing the same thing wrong too. But without the piping in there, we were trying to determine if there was a slope issue if they continued for all these months using PVC pipe as strings, well, there is a slope issue.

Q: Okay. So that 80 percent --

A: Tim Shepard can verify that. He knows that number.

Ex. KKKK at 216-17; *see also* Ex. KKKK at 237 (Derrick statement that he, La Fontaine and Shepard inspected the piping and found “80 percent [of the pipe supports] was wrong.”)

At the hearing, Shepard testified that before Derrick and he had been involved with the pipe slope issue, there was a 20-25 percent probability that various pipe installations might have to be re-worked. Tr. at 1131. Even given the fact that MOX Services had elected to use the “at-risk” construction methodology, Shepard believed that that 50 percent figure was “way overestimating.” Tr. at 1131. Shepard’s testimony regarding his assessment of the re-work percentage is confirmed by Schmitt who testified that LaFontaine (who was referenced in Derrick’s deposition) and other engineers who surveyed 100 pipe supports in December 2011 and found an approximate 20-percent failure rate with the slope of pipe support attachments before MOX services took remedial action. Tr. at 214. I found Shepard’s and Schmitt’s testimony much more convincing than that of Derrick’s on this issue.

Based upon the evidence before me and my assessment of the credibility of the witnesses, I cannot find that Derrick, by a preponderance of the evidence, disclosed information that he reasonably believed revealed a gross waste of funds or gross mismanagement.¹² In sum, I find that none of Derrick’s disclosures are protected under Part 708 and as such, his complaint must fail. While this finding would be dispositive of this case, for purposes of a possible appeal, I will make findings regarding the issue of whether MOX Services would have discharged Derrick notwithstanding his alleged disclosures.

¹² Because of my findings, I need not decide whether Derrick’s alleged disclosures were a contributing factor in his termination. Nonetheless, given the temporal proximity between the alleged disclosures and Derrick’s termination, I would have found that Derrick’s disclosures, if protected under Part 708, were presumptively a contributing factor in Derrick’s termination. *See, e.g., Douglas L. Cartledge*, Case No. TBH-0096 (2010).

B. Whether MOX Services Would Have Terminated Derrick Notwithstanding His Protected Disclosures

Section 708.29 states that an employee has the burden of “establishing by a preponderance of evidence that he or she has made a disclosure . . . , 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, “the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee’s disclosure, participation, or refusal.” 10 C.F.R. § 708.29. “Clear and convincing evidence” requires a degree of persuasion higher than preponderance of the evidence, but less than “beyond a reasonable doubt.” See *David L. Moses*, Case No. TBH-0066, slip op. at 19-20 (2008) (*Moses*). If the contractor meets this heavy burden, the allegation of retaliation for whistleblowing is defeated despite evidence that the retaliation may have been in response to the complainant’s protected conduct.

1. MOX Service’s Rationale for Terminating Derrick’s Employment

On March 21, 2012, Derrick was informed that he had been terminated from his position with MOX Services due to “Loss of Confidence.” Ex. RR. Bethmann testified that Loss of Confidence represents a finding that MOX Services has a significant level of concern regarding the performance of a supervisor and such action is authorized in the MOX Services Human Resources Manual. Tr. at 1281-82. During his employment at MOX Services, Bethmann has been involved with approximately five terminations for Loss of Confidence.

In making the decision to terminate Derrick, Najmola testified that he usually will terminate an employee if they demonstrate an accumulation of events which demonstrate performance failures. Tr. at 1371. Specifically, in Derrick’s case, Najmola’s concerns over a documented pattern of incidents, *i.e.*, Derrick’s absenteeism problems, Derrick’s possible faked injury, Derrick’s failure to report the injury as prescribed in the proper manner, and Derrick’s insubordination, as reflected in the March 2012 E-mails, motivated his decision to terminate Derrick. Tr. at 1367-71; see also Tr. at 1261-62 (Bethmann testimony stating that review of Derrick’s absenteeism issues, a potential false injury report, and insubordinate March 2012 E-mails were considered in reviewing Najmola proposed action to terminate Derrick). Below, I review the evidence presented regarding alleged grounds for Derrick’s termination.¹³

a. Picnic-Table Injury Incident

On December 29, 2011, Derrick was speaking to another employee, Allen Cunningham (Cunningham), outside the MOX Service’s engineering building’s porch when, while turning back to answer a question from Cunningham, he “walked into” a picnic-table and lost his balance. Ex. XX; Ex. YY; Tr. at 589. Despite the requirement that all such incidents be verbally reported within 15 minutes to a supervisor, Derrick did not report this incident nor did he complete an incident report within two hours of the event. Tr. at 589, 882, 1194. The following day, Derrick completed a MOX Services’ incident report and E-mailed it to various MOX Services officials. Ex. XX. In the report, Derrick checked a box indicating that the picnic-table

¹³ MOX Services did not submit into the record a copy of its Human Resources Manual (except for one portion dealing with absences - Ex. UUU) in effect at the time Derrick was employed by the company. The record does contain a summary of craft discipline.

injury incident was a “non-injury” event. Ex. XX. However, Derrick also reported that his left knee and right back had been injured but did not report receiving any medical treatment. Ex. XX at 2.

On the following day, Friday, December 30, 2011, Derrick reported to Nurse Spade that his back was “a little sore” from the picnic-table injury incident and he needed help to write up the incident report in the event “something came of it.” Tr. at 1194. On the following Tuesday, January 3, 2012, Derrick approached Nurse Spade and stated that he had significant back pain and asked to be referred to a physician.¹⁴ Tr. at 1198. When she asked Derrick to come to her office, she noticed that Derrick walked with a steady gate and no slow or guarded movement. Tr. at 1198. Derrick informed her that he was not going into “the field” on this day because of his pain. Tr. at 1199. Because she could not place employees on restricted duties, Nurse Spade contacted Derrick’s management who informed her that Derrick could work in his office on that day. Tr. at 1199. Nurse Spade recalled that when Derrick was informed of this, he remarked that he must not be making himself clear since “I can’t even sit at a computer today.” Tr. at 1199.

Nurse Spade reported her interaction with Derrick to her supervisor, Trent Rogers. Tr. at 1202. Later that day, while walking in a hall, Nurse Spade discussed Derrick’s injury with a group including Najmola and other management officials. She related Derrick’s injury, the need to find light duty work for Derrick, and Derrick’s request for a physician. The group observed Derrick walking towards them. Tr. at 1202. Najmola, upon seeing Derrick, asked “That Mr. Derrick is who you’re talking about?” Tr. at 1316. Najmola, Schmitt, and Nurse Spade noticed that Derrick was walking with a normal gate. Tr. at 1202, 1316-17. Najmola and Nurse Spade observed that when Derrick noticed that the group was looking at him, his gate changed and he suddenly developed a pronounced limp.¹⁵ Tr. at 1202, 1316-17; Ex. DD; Ex. FF; Ex. YY.

On Friday, January 6, 2012, Derrick attempted to receive treatment from a medical facility because of his back pain but the facility refused because it did not have an authorization to treat Derrick’s work-related injury. Ex. 49 at 1-2. On the next day, Derrick sought treatment at a hospital emergency room and was prescribed muscle relaxant and analgesic medications. Ex. 48 at 5-6. On the following Monday, January 9, 2012, Derrick refused a request to come to the MOX facility so that he could be examined by a physician via a referral from the MOX facility’s medical department. Ex. AA. Derrick stated that the driving entailed to come to the MOX facility would aggravate his back injury. Ex. AA. Nonetheless, Derrick, later that day, went to an occupational medicine facility and was diagnosed as having a lower back strain or sprain and was prescribed a steroid medication, exercises, ice therapy, and was cleared to return to work under various restrictions.¹⁶ Ex. 48 at 1-3.

On January 11, 2012, Najmola contacted Bethmann and informed him that, in his opinion, Derrick was trying to fake an injury. Tr. at 1250; Ex. EE. Additionally, Najmola expressed concern that Derrick, a supervisor, did not deem it important to timely report an injury. Ex. EE.

¹⁴ Derrick was not due to report to work on the day before, January 2, 2012, since it was a holiday.

¹⁵ Schmitt, who was present during Nurse Spade’s briefing, noticed that Derrick was walking towards them without a limp but did not recall if he subsequently developed a limp. Tr. at 890.

¹⁶ Derrick went to the facility the next week on January 16, 2012, and his work restrictions were reduced. Ex. 48 at 4-5.

Najmola also expressed his intention to terminate Derrick pending receipt of documentation from his management team and others regarding the incident. Ex. EE. Najmola submitted the documentation regarding the picnic-table injury incident to the Human Relations and Legal Departments. Tr. at 1323. A collective decision was made by Najmola and other MOX Services and Shaw officials not to terminate Derrick despite the fact that Derrick had violated the policy mandating that injuries be reported within two hours and Najmola's conclusion that Derrick had faked the severity of the injury. Tr. at 1323. Specifically, the Legal and Human Resources departments believed that, despite Derrick's failure to follow the injury reporting requirement and his apparent faking of an injury, Derrick met the spirit of the attendance policy. Tr. at 1323.

b. Absenteeism

On January 3, 2012, a MOX Services employee asked Shepard to have Derrick contact a MOX Services Worker's Compensation official about the picnic-table injury incident. Tr. at 352-53. Shepard initially had a difficult time getting Derrick to contact the official but Derrick eventually called. Tr. at 353. After speaking to a MOX Services Worker Compensation employee about the picnic-table injury incident, Derrick left work early.¹⁷ Tr. at 354-55; Ex. OOO. Derrick told Shepard that, because the Worker's Compensation official asked questions that he believed were not her business, he informed Shepard that he was leaving an hour early to consult a lawyer about his Worker's Compensation situation. Tr. at 354.

On Wednesday, January 4, 2012, Derrick received a phone call regarding a water leak in the basement of a church he was renovating. He left work one hour early to attend to the leak. Tr. at 355. Derrick informed Shepard that he might be back to work the following day or two depending on his ability to resolve the leak. Tr. at 357. Derrick, however, did not return to work on the following Thursday or Friday. Tr. at 358. Derrick was also absent on the following Monday, January 9, 2012, because of his back pain. Tr. at 358. Shepard was becoming aware of what he believed to be Derrick's excessive absenteeism. Tr. at 360, 1079. On January 11, 2012, Shepard counseled Derrick about his number of absences. Tr. at 360. Shepard sought to counsel Derrick more as a friend rather than in an official capacity. Tr. at 347.

After the January absences, Schmitt reviewed Derrick's time sheets and began to suspect that there might be a problem with Derrick taking excessive time off. Tr. at 877-81, 916-17. Schmitt was informed by Shepard that he had already counseled Derrick concerning his absences from work. Tr. at 892-93. Schmitt continued to monitor Derrick's attendance after Shepard's counseling of Derrick. Tr. at 915-16. After reviewing Derrick's attendance record from October 2011 to early February 2012 and the relevant corporate attendance policies, Schmitt, Shepard and Derrick met on March 5, 2012, to discuss Schmitt's concern with Derrick's work attendance and unapproved vacation time.¹⁸ Ex. QQ. At the meeting, Derrick admitted that his absenteeism did not "look good" and that he would "tighten up" and "do better" with his attendance. Tr. at 614-16, 916, 918; Ex. QQ. Schmitt drafted a memorandum of the meeting, entitled "Verbal Warning for Absenteeism," summarizing his conversation with Derrick and providing the relevant corporate policy on absences. Among these provisions was one that stated that notification of an absence does not make an absence excusable and may still be subject to

¹⁷ This incident is discussed *supra*.

¹⁸ Derrick's two day absence on January 5 and 6, 2012 had been charged as vacation time. Derrick did not submit a written request for vacation for those absences only a verbal request. Tr. at 982.

disciplinary action. Ex. QQ. Schmitt did not formally issue the memorandum to Derrick but held it in his files to be issued at a later date if Derrick's absenteeism became a problem in the future. Tr. at 917-18.

3. *Insubordinate March 19, 2012, E-mail and Termination*

On March 19, 2012, upon reading Derrick's March 15, 2012, E-mail, Najmola believed that the message reflected "a little tone" on the part of Derrick and that the message indicated that Derrick was frustrated and becoming "dictatorial." Tr. at 1349, 1354, 1357. Nonetheless, Najmola did not believe that Derrick's message was raising any new concerns other than the installation of pipe supports that Derrick had previously raised. Tr. at 1350. Najmola knew that these issues had already been brought to the attention of the NNSA, the Nuclear Regulatory Commission and MOX Services management. Tr. at 1350; Ex. A. Najmola was surprised by the E-mail because he believed that Derrick's concerns had been addressed by the meeting following Derrick's February 22, 2012, E-mail. Tr. at 1355. On this day, Najmola also received a copy of March 19, 2013, Buchanan E-mail. Tr. at 1390; Ex. U.

Najmola subsequently called Buchanan and informed him that he would continue to look into the issues raised by the March 19, 2012, Buchanan E-mail. Buchanan had no comment regarding the E-mail except to just "keep me informed." Tr. at 1361-62. As recounted earlier, after sending the March 19, 2012, Buchanan E-mail, Derrick sent Najmola stating "Only trying to do the job Shaw hired me to do. Only hope I don't get the 'chilling effect' or lose my position. Just a personal concern. Really hope we can go forward and resolve the issues." Ex. V. Najmola interpreted this message as setting the ground for a claim against MOX Services given the particular language of words "chilling effect" and its use regarding employee concerns complaints and that Derrick may be attempting to "game the system" and set up a claim. Tr. at 1363. At the time he received this message, Najmola had not considered firing Derrick. Tr. at 1363. Later that day, Najmola read the March 19, 2012, E-mail in which Derrick states that he would no longer direct the installation of supports without piping packages unless directed by Najmola or Kelly Trice. Ex. T. Najmola interpreted this message as Derrick stating that he would no longer follow the instruction of his chain of command, Shepard and Schmitt, and would only take directions from the President or Vice-President of MOX Services. Tr. at 1364.

In response to the E-mail, Najmola met with Bethmann and asked the Human Relations Department to review the events concerning Derrick to see if sufficient grounds existed to terminate Derrick for Loss of Confidence. Tr. at 1367-68. Consequently, Derrick was placed on administrative leave with pay so that a determination could be made regarding whether Derrick should be terminated. Tr. at 1367, 1369. Additionally, Najmola now believed that Derrick was irritated and aggravated to the extent he was now being insubordinate. Tr. at 1367-68. After the Human Relations and Legal Departments reviewed all information relating to Derrick, it was decided to terminate Derrick for Loss of Confidence. Tr. at 1371-72.

2. *Analysis*

It is well settled that several factors may be considered in determining whether an employer has shown, by clear and convincing evidence, that it would have taken the alleged act of retaliation against a whistleblower in the absence of the whistleblower's protected conduct. The Federal Circuit, in cases interpreting the federal Whistleblower Protection Act (WPA), upon which Part 708 is modeled, has identified several factors that may be considered, including "(1) the strength of the [employer's] reason for the personnel action excluding the whistleblowing, (2) the strength of any motive to retaliate for the whistleblowing, and (3) any evidence of similar action against similarly situated employees" *Moses*, slip op. at 19-20; *Dennis Patterson*, Case No. TBH-0047, slip op. at 19 (2008) (quoting *Kalil v. Dep't of Agriculture*, 479 F.3d 821, 824 (Fed. Cir. 2007)). After reviewing the *Kalil* factors, I find that MOX Services has established by clear and convincing evidence that it would have terminated Derrick notwithstanding Derrick's alleged disclosures.

With regard to the first *Kalil* factor – I find that MOX Services' reasons for terminating Derrick excluding the alleged disclosures were strong. As discussed above, Derrick was terminated for Loss of Confidence regarding the incidents described above. Of these incidents, I find that Derrick's alleged excessive absenteeism provides the least support to justify his termination. It is undisputed that Derrick did contact a supervisor before leaving the worksite in almost all of the workdays at issue. Further, while an employee such as Derrick could be disciplined for excessive absences, even with giving notice before leaving the worksite, Schmitt only issued a verbal warning to Derrick regarding these absences. However, Derrick's failure to notify a supervisor about the picnic-table injury incident within the specified time deadline represents a significant failure on Derrick's part. This is especially true since Derrick, as a supervisor, was responsible for enforcing the rules regarding injuries among the craft employees he supervised.

While I offer no opinion if, in fact, Derrick suffered injuries as a result of his collision with the picnic-table, I found the testimony of Nurse Spade and Najmola sufficiently compelling to conclude that Derrick attempted to mislead MOX Services as to the extent of his injuries, if any.¹⁹ In assessing the strength of MOX Service's motivation to terminate Derrick, I find it significant that Najmola already believed that sufficient grounds existed to terminate Derrick when he consulted Bethmann on January 11, 2012, – some two months before Derrick's purported Part 708 disclosures in the March 2012 E-mails. Given the questions this incident raises concerning Derrick's integrity, I find that MOX Services had a significant reason to want to terminate Derrick.

Lastly, Derrick's March 19 2012, E-mail evidences his intent to be insubordinate in that Derrick stated that he would no longer obey commands given by Shepard and Schmitt, his two immediate supervisors in his chain of command. The offense of insubordination is serious as evidenced by the fact that for MOX Services craft employees, insubordination, in and of itself is sufficient grounds to justify termination. See Ex. SSS at 8.

In the present case, Derrick was terminated for Loss of Confidence which in the MOX Services employee discipline system represents a finding that an employee has failed to conform to satisfactory conduct in a number of instances. Tr. at 1281. In the present case, Derrick's questionable conduct regarding his failure to report an injury in a timely manner, his attempt to exaggerate the extent of his injuries and his insubordinate E-mail provide clearly convincing evidence that MOX Services had a strong motivation to terminate Derrick outside of his alleged disclosures.

¹⁹ Derrick submitted medical records indicating that he suffered from a back injury purportedly from the collision with the picnic-table. See Ex. 48.

As for the second *Kalil* factor, I find that MOX Services had little motivation to retaliate against Derrick. Derrick's initial alleged disclosures concerned problems with mounting pipe supports at the correct slope. As the testimony and the documents indicate, this problem had been discussed by NNSA and MOX Services from at least the date of the December 1, 2011, NNSA Report. *See also* Ex. A. (November 30, 2011, E-mail from Buchanan regarding problems). MOX Services entertained a number of proposed solutions for this problem including the suggestions Derrick made in some of his E-mails. As for Derrick's alleged disclosure regarding problems resulting from installing pipe supports without all of the documentation and pipes being available during the actual installation, I found the testimony of Najmola and Schmitt convincing regarding the initial MOX Service's decision to install pipe supports using an "at-risk" methodology and MOX Services' knowledge that there would inevitably be some pipe supports that would have to be re-worked. Further, I find that NNSA already knew about the proposed "at-risk" construction methodology and that MOX Services had knowledge that despite Derrick's 50 percent figure, the actual percentage of potential problems with pipe support installation resulting from this approach was closer to 20 or 25 percent. MOX Services itself sought to address Derrick's concerns raised in the February 22, 2012, E-mail in the February 23, 2012, meeting Shepard and Schmitt had with Derrick. *See* Ex. UU. Overall, based on the documentary evidence and my assessment of the testimony of the witnesses, I find that MOX Services had little, if any, motivation to retaliate against Derrick because of the alleged disclosures.

There is limited evidence in the record regarding the third *Kalil* factor – actions taken against similarly situated employees. Najmola testified that he has discharged one other supervisor for Loss of Confidence. This employee was an Engineering Construction Manager who reported directly to Najmola. Najmola found that this manager continually failed to perform his job of implementing corrective actions to simplify the craft's work. The manager's failure ultimately resulted in a four day work stoppage for craft employees. Tr. at 1373. Bethmann testified that in his position he had been involved with the termination of approximately four employees for Loss of Confidence. Tr. at 1284. While Bethmann could not recall the specifics that resulted in the termination of these employees, he believed that, because of the reviews made in each case, the number and seriousness of the incidents leading to the terminations were the same or greater than in Derrick's case. Tr. at 1285. The available records regarding employee discipline at MOX Services which resulted from reasons similar to those accusations made against Derrick indicate that one craft employee, an electrician, was given a "First Warning" concerning insubordination and that the manager described above was terminated for Loss of Confidence. Ex. 46 at 2, 7. Given that a termination of a manager for Loss of Confidence entails a number of failures and the lack of information as to *all* managers who were discharged for Loss of Confidence, I cannot find that this factor weighs strongly one way or the other regarding the issue of whether Derrick would have been discharged notwithstanding his alleged disclosures.

In sum, after weighing the three *Kalil* factors, I find that MOX Services has demonstrated by clear and convincing evidence that it would have discharged Derrick notwithstanding his alleged disclosures. Because of my findings that Derrick did not make a protected discharge under Part 708 and, even if he did, MOX Services has proven by clear and convincing evidence that it would have terminated him nonetheless, I must deny Derrick's Part 708 complaint.

It Is Therefore Ordered That:

(1) The complaint filed by Jeffrey S. Derrick under 10 C.F.R. Part 708, OHA Case No. WBH-12-0005, is hereby denied.

(2) This is an Initial Agency Decision that becomes 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 the Initial Agency Decision.

Richard A. Cronin, Jr.
Hearing Officer
Office of Hearings and Appeals

Date: July 29, 2013