August 5, 2010

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Petitioner: Douglas L. Cartledge

Date of Filing: March 9, 2010

Case Number: TBH-0096

This Initial Agency Decision involves a whistleblower complaint filed by Douglas L. Cartledge ("Cartledge" or "the Complainant") under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. The Complainant was an employee of Parsons Corporation ("Parsons" or "the Contractor"), a first-tier contractor at the DOE Savannah River Site (SRS) in Aiken, South Carolina, where he was employed as a laborer. On August 6, 2009, he filed a complaint of retaliation ("the Complaint") against Parsons with the DOE SRS Employee Concerns Program (ECP) Office. In the Complaint, Cartledge contends that he made certain disclosures to Parsons and DOE officials and that Parsons retaliated by terminating his employment. The Complainant seeks reinstatement to his former position and back pay.

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; ensure compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are to encourage contractor employees to disclose information that they believe reveals unsafe, illegal, fraudulent, or wasteful practices, and to protect those employees from consequential reprisals by their employers. 10 C.F.R. Part 708. Under the regulations, protected conduct includes:

> (a) 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] employer, or any higher-tier contractor, information that [the employee] reasonably believes reveals –
>
> (1) A substantial violation of 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; or

(b) Participating in a Congressional proceeding or an administrative proceeding conducted under this part; or

(c) Subject to § 708.7 of this subpart, refusing to participate in an activity, policy, or practice if [the employee] believe[s] participation would –

(1) Constitute a violation of a federal health or safety law; or

(2) Cause [the employee] to have a reasonable fear of serious injury to [himself or herself], other employees, or members of the public.

10 C.F.R. § 708.5.

Part 708 sets forth the procedures for considering complaints of retaliation. The DOE's Office of Hearings and Appeals (OHA) is responsible for investigating complaints, holding hearings, and considering appeals. *See* 10 C.F.R. §§ 708.21 – 708.34.

B. Procedural Background

Cartledge filed the Complaint with the ECP Office on August 6, 2009,[1] alleging that Parsons terminated his employment in retaliation for his making protected disclosures. On October 15, 2010, the ECP Office forwarded the Complaint to Parsons, which then filed a response. The parties engaged in a mediation conference on December 16, 2009. The parties were unable to resolve the matter through mediation, and Cartledge requested that the Complaint be forwarded to the OHA for an investigation followed by a hearing. 10 C.F.R. § 708.28(a). The OHA received the Complaint on January 12, 2010, and the OHA Director appointed an attorney-investigator. After interviewing Cartledge and six other Parsons employees, and gathering numerous documents from both parties, the attorney-investigator issued a Report of Investigation (ROI) on March 9, 2010. On that same day, I was appointed as Hearing Officer in this matter. On March 16, 2010, I requested that the parties submit statements identifying any disagreements with the ROI. Letter from Diane DeMoura, OHA, to Douglas L. Cartledge, Complainant, and Lisa R. Claxton, counsel for Parsons (March 16, 2010).

I convened a hearing in Aiken, South Carolina, over a three-day period from May 18-20, 2010. Both parties submitted exhibits at the hearing. Cartledge submitted Exhibits 1 through 24, and Parsons submitted Exhibits A through OOO into the record. Cartledge testified on his own behalf, and called five additional witnesses. Parsons, represented by counsel, presented the testimony of five management employees and two non-management employees. *See* Transcript

[1] Cartledge contacted the ECP office to notify them of his complaint on August 6, 2009. He submitted his initial statement on August 10, 2009. Cartledge submitted additional statements to supplement his complaint on September 20, 2009, and October 14, 2009. The three submissions together are considered the Complaint in this proceeding.

of Hearing, Case No. TBH-0096 (hereinafter cited as "Tr."). The parties did not submit post-hearing briefs.

C. Factual Background

The pertinent facts in this proceeding are essentially undisputed. The following is a brief timeline of the events relevant to this proceeding.

Parsons is a DOE contractor at SRS in Aiken, South Carolina. The company has a contract to design and construct a Salt Waste Processing Facility (SWPF). Tr. at 325. Cartledge, an active member of the Augusta Building and Construction Trades Council, AFL-CIO, Union, Local 515 ("the labor union") was employed as a "Laborer" with Parsons from November 5, 2008, until his termination on August 6, 2009. Tr. at 40. According to the position description for a Parsons laborer, the laborer may be responsible for various tasks, including the following: physical labor at building and heavy construction sites; operation of hand and power tools, including air hammers, jack hammers, clay spades, earth tampers, cement mixers, concrete vibrators; cleaning and preparing sites; digging trenches; laying underground pipe; setting braces to support the sides of excavations; assisting in the erection of scaffolding; cleaning up rubble, debris, and hazardous waste materials; and assisting other craft workers. Ex. D. In addition, Parsons laborers, other craft personnel, and supervisory staff at the SWPF attend daily meetings to discuss the day's work, as well as weekly all-hands meetings on Monday mornings. *See, e.g.*, Tr. at 356, 426, 530. Safety-related issues are a frequent topic at those meetings. *See* Exs. HHH, III. When Cartledge began working at the SWPF project, he worked on a laborer crew whose primary responsibility was to work with concrete. Tr. at 38.

On April 10, 2009, Cartledge's then-foreman, William Fallen, assigned a task to Cartledge. Cartledge, in turn, instructed an apprentice to begin the task. Tr. at 94. Fallen objected to Cartledge's assignment of the task to the apprentice. *Id*. Fallen and Cartledge argued about whether Cartledge or the apprentice should perform the assigned task, and this argument resulted in Cartledge being verbally reprimanded for insubordination to his foreman.[2] *Id*.; s*ee also* Ex. I.

On July 10, 2009, while searching for the contact information for the ECP Office, Cartledge observed that a required ECP notice was missing from its usual location on a bulletin board in the craft tent. Cartledge notified James Goodall, the Parsons Labor Relations Specialist, of the missing notice. Goodall obtained a copy of the notice for Cartledge and replaced the missing copy. Tr. at 112. Also on July 10, 2009, Cartledge was transferred to a different crew whose main duties included site clean-up and maintenance, despite his preference to remain on the concrete crew.[3] Ex. B. On July 15, 2009, a representative from the labor union held a meeting with the laborers at the SWPF site in the craft tent, during which the laborers discussed various concerns regarding their work. Complaint; ROI at 3. In addition, on several occasions in July 2009, Cartledge contacted the ECP Office to raise concerns regarding his working conditions. *See* Exs. 1, 4; Ex. M. Relevant to this proceeding, among Cartledge's allegations was that, while assigned to "weed-eater duty," he was stationed away from drinking water and was routinely

[2] The reprimand was documented in a "Verbal Record of Category Three Work Rule Violation." Ex. I.

[3] The official payroll time records indicate that the Complainant was officially transferred on July 13, 2009. Ex. B.

assigned to work alone in high heat conditions, in alleged violation of Parsons' "buddy system." *Id*.

On August 5, 2009, a lawnmower threw a rock, which broke a window of the site administration building. Ex. Z. Following this incident, Cartledge was assigned the task of picking up rocks around the administration building. Cartledge alleged that, as a result of bending over and straightening repeatedly while performing this task, he became ill and had to leave work early that day. Complaint; *see also* Tr. at 186.

During an August 6, 2009, morning meeting, Cartledge questioned Michael Quattro, Parsons' Construction Safety Manager, about the company's policies for addressing worker heat stress. Complaint; Tr. at 181-82, 454-55. Seeing that Cartledge was not satisfied with his response, Quattro told Cartledge that they could continue the conversation in Quattro's office in the safety trailer after the meeting if Cartledge needed more information or had additional questions. Tr. at 455. Following the meeting, Cartledge was again assigned the task of picking up rocks around the administration building. Tr. at 186. While completing this task, Cartledge again reported feeling ill and asked to go to the site safety office to seek medical attention. Michael Lynn, Parsons' Construction Superintendent at the SWPF site, accompanied Cartledge. Tr. at 455.

When they arrived at the safety office, Cartledge informed Quattro that he was not feeling well and informed him that a prior medical condition was aggravated by Cartledge's repeated bending over and straightening while picking up rocks. Tr. at 186, 455. Quattro was unaware of the condition Cartledge described and noted that Cartledge did not have any medically-necessary work restrictions in his file. Quattro suggested that Cartledge complete his task with a shovel to eliminate the need for repeated bending over and straightening. Tr. at 457. During this visit to the safety trailer, Cartledge also again raised concerns regarding Parsons' heat stress procedures, including the concern that Parsons was not responding appropriately to high heat conditions and was jeopardizing worker safety. Tr. at 455. Cartledge was dissatisfied with the answers he received and soon the conversation escalated into an argument. Lynn observed the argument. *Id*., Tr. at 529.

Later that day, while he was continuing with his assignment of picking up rocks, Cartledge was called to see Michael Lynn. Lynn informed Cartledge that he was being terminated for insubordination due to his interactions with Quattro. Tr. at 70.

II. FINDINGS OF FACT AND ANALYSIS

A. Whether the Complainant Engaged in Protected Conduct That Was a Contributing Factor to an Alleged Retaliation

A complainant "has the burden of establishing by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under Section 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29. The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not when weighed against the evidence opposed to it.

See Joshua Lucero, Case No. TBH-0039 (2006) (*citing Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990)).

1. Whether the Complainant Engaged in Protected Conduct

Protected conduct includes the disclosure of information to a DOE official or the individual's employer that the individual reasonably believes reveals "a substantial violation of a law, rule, or regulation;" "a substantial and specific danger to employees or to public health or safety; or "fraud, gross mismanagement, gross waste of funds, or abuse of authority." 10 C.F.R. § 708.5(a).

In the ROI, the attorney-investigator identified the alleged protected disclosures in Cartledge's complaint. The parties stipulated that certain disclosures were not protected.[4] Therefore, the hearing focused on the following four disclosures: (1) Cartledge's July 10, 2009, disclosure to Parsons' Labor Relations Specialist that a required ECP notice was not posted in its usual location; (2) Cartledge's subsequent July 2009 disclosures to the ECP Office regarding his assignment to weed-eater duty; (3) Cartledge's alleged disclosures during a July 15, 2009, meeting between the laborers at the SWPF and a union representative; and (4) Cartledge's August 6, 2009, disclosures regarding whether Parsons was adhering to its heat stress procedures. As the discussion below indicates, the August disclosure rises to the level of a protected disclosure, but none of the July disclosures are protected.

a. The August 6, 2009, Disclosures Regarding Parsons' Heat Stress Procedures

As indicated above, the following is undisputed. On August 6, 2009, Cartledge raised concerns during a morning safety meeting regarding whether Parsons was properly administering to heat stress on the SWPF site. Cartledge asked Michael Quattro, the Construction Safety Manager, why Parsons was not taking appropriate actions in response to the high temperatures at the work site, such as instituting a work-rest regimen. Tr. at 181-82. Cartledge further stated that he had heard public address announcements elsewhere at SRS regarding heat-stress levels and questioned Quattro's explanation that temperatures had not reached the point where the heat stress procedures would take effect. *Id*. Cartledge expressed the view that his employer was exposing employees to danger by ignoring their physical safety on days where employees were working outside in high heat. *Id*. Because it was a daily safety meeting, several Parsons management personnel were present. *Id*. Later the same day in Quattro's office, Cartledge again questioned Quattro regarding whether Parsons had failed to follow its heat stress procedures and ignored employees' physical safety. Cartledge asked to see the temperature readings taken at the SWPF and inquired as to how Quattro determined whether to take any actions to protect employees working in the heat. Tr. at 455. Michael Lynn was present during that conversation. *Id*.

[4] In the ROI, in a section titled "Disclosures Not Likely To Be Protected," the attorney-investigator identified several disclosures that did not appear to rise to the level of protected disclosures. ROI at 4-5. During a May 5, 2010, pre-hearing telephone conference, the parties stipulated that those disclosures fall outside the ambit of Part 708 and, therefore, were outside the scope of the instant proceeding. *See* Record of Pre-Hearing Telephone Conference, May 5, 2010.

Parsons maintains that Cartledge's disclosure is not protected under Part 708, stating that Cartledge raised the issue after hearing announcements regarding heat stress procedures by other contractors at SRS and that he could not have reasonably believed that Parsons was required to follow the policies of other contractors. I find this argument to be without merit. Cartledge, having heard an announcement that temperatures were hot enough at SRS to prompt a response by another contractor, questioned whether Parsons was adequately protecting hundreds of employees from the high heat.[5] The fact that another contractor made such an announcement supports Cartledge's position that he reasonably believed that he was disclosing a substantial and specific danger to employees. Therefore, I find that Cartledge's safety concern, which he raised to the Parsons Site Safety Manager, and other management personnel, regarding Parsons' heat stress procedures is a protected disclosure within the meaning of Part 708.

b. The July Disclosures

Cartledge has not established that he reasonably believed that the July 10, 2009, disclosure regarding the missing ECP poster is a protected disclosure. The Part 708 regulations do require that contractors inform their employees of the Part 708 program by "posting notices in conspicuous places at the work site." 10 C.F.R. § 708.40. However, Cartledge could not have reasonably believed that the absence of the notice, which he had seen earlier, revealed a violation, let alone a *substantial* violation, of the Part 708 regulations. Cartledge admitted that he was aware that Parsons maintained another bulletin board outside, which is covered with a hard plastic sheet, making posters less susceptible to removal, and that the ECP notice was likely also posted there. Tr. at 111-12. Indeed, when Cartledge asked for a copy of the notice, James Goodall, the Parsons Labor Relations Specialist, immediately provided Cartledge with a copy. Tr. at 112. Accordingly, I cannot find that Cartledge reasonably believed that his disclosure of the absence of the ECP notice revealed a substantial violation of law, rule, or regulation.

Similarly, Cartledge's July 2009 disclosures to the ECP Office were not protected. Cartledge filed concerns with the ECP Office regarding his assignment to the task of weed-eating. Cartledge reported that his supervisors abused their authority by assigning him to the same task several days in a row, and that they endangered his safety by assigning him to work alone in remote locations away from drinking water. Cartledge's assertions are unfounded. Although Cartledge did not like the task to which he was assigned, at no time was he assigned any tasks falling outside those listed in the position description for a laborer. Tr. at 57-60 (Cartledge's testimony), 348-51 (Hyder's testimony). In addition, water was readily available to Cartledge. He had the option to carry water with him, walk to stationary water coolers, or call for water to be brought to his location. Tr. at 219-22 (co-worker's testimony), 332-33 (Hyder's testimony). Cartledge's expressed belief that those options were undesirable or inconvenient does not amount to a denial of access to water. Moreover, while Parsons encourages workers to look out for one another on hot days, there is no rule requiring employees to be assigned to tasks in pairs. Tr. at 282, 297, 303 (foreman's testimony). Finally, the SWPF site is not overly large, and the areas where Cartledge was assigned to work are heavily trafficked during the workday. Tr. at 328 (Hyder's testimony), 714-15 (Head's testimony); *see also* Ex. JJ. Based on these facts, Cartledge could not have reasonably believed that he was disclosing "a substantial violation of a

[5] Mark Hyder, the Daytime General Superintendent, testified that Parsons has approximately 300 employees on the SWPF site. Tr. at 319.

law, rule, or regulation;" "a substantial and specific danger to employees or to public health or safety; or "fraud, gross mismanagement, gross waste of funds, or abuse of authority." Therefore, his disclosures to the ECP Office do not rise to the level of protected disclosures.

Finally, Cartledge's alleged July 15, 2009, disclosures during the laborers' meeting with the union representative were not protected disclosures. First, there is little evidence in the record regarding what Cartledge disclosed at the meeting. Cartledge alleges generally that he raised concerns regarding assignment of work tasks and other safety issues, but could not recall with any specificity exactly which safety issues he discussed. Cartledge's notes from July 15, 2009, indicate only that he complained to the union representative about "chain of command," *i.e.*, the process for assigning job tasks. Ex. C. One of Cartledge's co-workers testified that she remembered that Cartledge raised concerns at the meeting, but could not recall the nature of the concerns. Tr. at 234. Such general allegations do not meet the threshold for a protected disclosure under Section 708.5. *See David K. Isham*, Case No. TBH-0046 (2007) (complainant's alleged disclosure too general to satisfy evidentiary burden). Moreover, even if Cartledge disclosed information that could be the basis for a protected disclosure under Part 708, no DOE officials or Parsons management personnel were present. Although Cartledge and two of his witnesses alleged that James Goodall and Michael Lynn were present during the meeting, Tr. at 120 (Cartledge's testimony), 233, 549 (co-workers' testimony), both Goodall and Lynn denied being present, Tr. at 509 (Lynn), 635-36 (Goodall). Likewise, other witnesses did not recall either Goodall or Lynn being present during the meeting. Tr. at 247, 693 (co-workers). Rather, they recalled the meeting involving only the laborers and the union representative. Therefore, even if Cartledge had made any disclosures during the meeting, they do not rise to the level of a protected disclosure under Part 708 because they were not made to, or in the presence of, DOE officials or Parsons management personnel.

2. Whether Protected Activity Was a Contributing Factor to a Retaliation

An individual must show, by a preponderance of the evidence, that his or her protected disclosure or conduct was a contributing factor in an retaliation. 10 C.F.R. § 708.29. Accordingly, I consider whether the August 6, 2009, disclosure was a contributing factor to an alleged retaliation.

A retaliation is "an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to employment (e.g. discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions, or privileges of employment) as a result of the disclosure of information." 10 C.F.R. § 708.2. Cartledge alleges that Parsons retaliated against him by (1) transferring him from one crew to another (on July 10, 2009), (2) assigning him to belittling tasks (from July 10, 2009, until August 6, 2009) and (3) terminating his employment (on August 6, 2009). Since the first two alleged retaliations occurred before the August 6, 2009, protected disclosure, that disclosure could not have been a contributing factor. Accordingly, I turn to whether the August 6, 2009, disclosure was a contributing factor to Cartledge's termination on the same date.

In prior decisions of the Office of Hearings and Appeals, we have stated:

> A protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action."

Jonathan K. Strausbaugh, Case No. TBH-0073 (2008) (internal citations omitted). In this case, Parsons management was aware that Cartledge made a protected disclosure during the August 6, 2009, morning meeting. Cartledge was terminated on the same day. Based on Parsons' knowledge and the temporal proximity between the protected disclosure and the alleged retaliation, I find that a reasonable person could conclude that Cartledge's protected disclosure was a factor in his termination. *See id*. (two weeks between disclosure and alleged retaliation sufficiently proximate in time); *see also David L. Moses*, Case No. TBH-0066 (2008) (eight days sufficiently proximate in time). Consequently, I now turn to Parsons' contention that it would have terminated Cartledge even in the absence of a protected disclosure.

B. Whether the Contractor Would Have Taken the Same Action in the Absence of the Protected Disclosure

Once a complaining employee has met the burden of demonstrating that conduct protected under Section 708.5 was a contributing factor to a retaliation, "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 [protected conduct]." 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." *David L. Moses*, Case No. TBH-0066 (2008) (*citing Casey Von Bargen*, Case No. TBH-0034 (2007)).

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 factors include "(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 . . . ." *Dennis Patterson*, Case No. TBH-0047 (2008) (*quoting Kalil v. Dep't of Agriculture*, 479 F.3d 821, 824 (Fed. Cir. 2007)).

As just indicated, the first factor in *Kalil* is the strength of the employer's reason for the adverse action. In this case, the termination letter cites "insubordination" and "failure to complete work task efficiently" as the reasons for Parsons' decision to terminate Cartledge. Ex. ZZ. Parsons management testified extensively on the rationale for the termination.

Michael Quattro testified that he was offended by Cartledge's attitude toward him on August 6, 2009, and that Cartledge's behavior was inappropriate. Tr. at 458. Quattro testified that Cartledge questioned him during the morning meeting about Parsons' heat stress procedures and was not satisfied was his response. Tr. at 454-55. Because Quattro felt they were not getting the issue resolved, Quattro told Cartledge they could continue the conversation after the meeting in his office if Cartledge wanted additional information. *Id*. Mark Hyder, the Daytime General

Superintendent, believed Carteldge became confrontational when discussing his concerns with Quattro. Tr. at 357. Later that morning, Cartledge and Michael Lynn went to Quattro's office in the safety trailer because Cartledge stated that he was not feeling well. Tr. at 455. After discussing Cartledge's condition, the topic again turned to heat stress. Tr. at 457. Quattro testified that Cartledge was "accusatory" and "argumentative," accused Quattro of lying, and was "attacking [his] honesty and integrity." Tr. at 458. Lynn observed the confrontation and felt that Cartledge crossed the line with Quattro. Tr. at 529-30. Lynn was disturbed by Cartledge's behavior toward a manager and brought the matter to the attention of Craig Head, the General Superintendent. *Id*. (Lynn), 735 (Head).

Parson's project work rules very clearly define types of disciplinary violations and their consequences. A first instance of insubordination is defined as a "Category Two" violation and is subject to suspension. Tr. at 376 (Hyder); *see also* Ex. AA. Repeated insubordination is designated as a "Category One" violation and can result in immediate termination. *Id*. Cartledge had been insubordinate to his foreman on April 10, 2009. Tr. at 291-94, Ex. I. Four months later, on August 6, 2009, he was insubordinate to the Michael Quattro, the Construction Safety Manager. Charles Head testified that, after learning of Cartledge's confrontation with Quattro, he made the decision to terminate Cartledge because it was not Cartledge's first incident of insubordination. Head further testified that he was not aware of any individuals who had engaged in repeated insubordination who had not been terminated and he believed the decision to terminate Cartledge's employment was consistent with how other cases of repeated insubordination had been handled. Tr. at 717.

Based on the foregoing, applying the first factor set forth in *Kalil* – the strength of the reason for the personnel action – the record as a whole supports a finding that the reason for the decision to terminate Cartledge's employment was that Cartledge's confrontation with the site safety manager was his second instance of insubordination in four months. I further find that the nature of the confrontation itself and the company's express policy regarding repeated instances of insubordination is evidence of the strength of the reason for the termination.

As for the second factor – the strength of any motive to retaliate against Cartledge for his protected disclosure – I find no evidence of any such motive. Parsons conducts extensive and mandatory safety training for incoming employees. Tr. at 429-33 (Quattro), 625-32 (Goodall); *see also* Exs. JJJ – OOO. The safety personnel maintain an incentive program recognizing employees who raise safety concerns, report "near-misses," or suggest safety topics for meetings. Tr. at 388 (safety specialist), 426-28 (Quattro). The weekly all-hands meetings and daily laborers' meetings focus on safety topics. Tr. at 354 (Hyder), 426 (Quattro). In addition, the employees discuss safety issues during their daily meetings. Tr. at 356 (Hyder), 386 (safety specialist), 426 (Quattro), 530-31 (Lynn). Employees are allowed to stop work on a task if they feel it is unsafe without fear of retaliation or other negative consequences. Tr. at 387-88 (safety specialist), 432-33 (Quattro). The record as a whole supports a conclusion that Parsons employees at the SWPF are encouraged to raise safety concerns without fear of reprisal. Therefore, applying the second *Kalil* factor, I find no evidence of any motive on the part of the company to retaliate against Cartledge for raising a safety concern.

The final factor set forth in *Kalil* is whether there is any evidence that the employer has taken similar action against similarly situated employees. Parsons submitted termination notices of two other employees terminated for repeated insubordination. One employee was terminated on June 4, 2009 for insubordination. That employee refused to do his job and then had a confrontation with his foreman. Ex. T. The other employee was terminated for insubordination on December 9, 2008, as a result of failing to perform a task as instructed and demonstrating a "poor attitude." Ex. BBB. Mark Hyder, the Daytime General Superintendent, also testified that he recalled several instances of repeatedly insubordinate employees being terminated. Tr. at 373-75. Finally, Craig Head, the General Superintendent, testified that he recalled at least one other employee who was terminated for insubordination. Tr. at 736.

Considering all of the relevant factors as applied to the evidence discussed above, I am convinced that, in light of Cartledge's prior instance of insubordination toward his foreman, Parsons would have chosen to terminate Cartledge's employment following his insubordinate behavior toward Michael Quattro, regardless of whether Cartledge had engaged in any activity protected under Part 708. Therefore, I find that Parson has proven, by clear and convincing evidence, that it would have terminated Cartledge's employment on August 6, 2009, in the absence of Cartledge's protected disclosure on the same day.

IV. CONCLUSION

As set forth above, I have concluded that the Complainant made one protected disclosure and has proven by a preponderance of the evidence that the protected disclosure was a contributing factor to his termination. I have determined, however, that the Contractor has provided clear and convincing evidence that it would have terminated the Complainant even if he had not made his protected disclosure. In conclusion, I find that Cartledge has failed to establish the existence of any violations of the DOE Contractor Employee Protection Program for which relief is warranted under Part 708.

It Is Therefore Ordered That:

(1) The complaint filed by Douglas L. Cartledge under 10 C.F.R. Part 708, Case No. TBH-0096, 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. 10 C.F.R. § 708.32.

Diane DeMoura
Hearing Officer
Office of Hearings and Appeals

Date: August 6, 2010