April 27, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Hearing Officer's Decision

Name of Case: Gilbert J. Hinojos

Date of Filing: December 20, 2002

Case Number: TBH-0003

This Decision concerns a whistleblower complaint filed by Gilbert J. Hinojos (the Employee) under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. The Employee worked as a "Material Control Coordinator, Sr." at Honeywell Federal Manufacturing & Technologies (the Contractor), a DOE facility in Albuquerque, New Mexico. The Employee alleges that he engaged in protected activity and that the Contractor retaliated by taking several actions. The Employee's allegation of retaliatory discharge is the subject of this proceeding. As the decision below indicates, I have concluded that the Contractor would have taken the same action in the absence of protected activity and, therefore, the Employee is not entitled to relief.

I. Background

A. The DOE's Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program prohibits contractors from retaliating against contractor employees who engage in protected activity. Protected activity includes disclosing information that an employee believes reveals a substantial violation of a law, rule, or regulation or gross fraud, waste, or abuse of authority. Protected activity also includes participating in a Part 708 proceeding. If a contractor retaliates against an employee for protected activity, the employee may file a complaint. *See* 10 C.F.R. Part 708.

B. Procedural History

In July 2002, the Employee filed a complaint under 10 C.F.R. Part 708. In the complaint, the Employee alleges that he was subject to two acts of retaliation from the Contractor due to his having filed several complaints with the Equal Employment Opportunity

Commission (EEOC) and the New Mexico Human Rights Division (NMHRD). The first alleged act of retaliation was the Contractor's denial of the Employee's request to attend classes during his scheduled work hours despite the fact that the Contractor had previously granted the Employee permission to attend those classes. The second alleged act of retaliation occurred when the Contractor told the Employee to stop circulating a letter among his co-workers seeking support for his initial request to attend classes.

On October 22, 2002, the Director of the Office of Hearings and Appeals (OHA) appointed an investigator to examine the issues raised in the Employee's complaint. In December 2002, in his Report of Investigation, the investigator concluded that the Employee had not engaged in protected conduct under the Contractor Employee Protection Program because the program does not cover claims based upon the filing of EEOC complaints. The investigator further concluded that, even if the Employee had engaged in protected conduct, there was clear and convincing evidence that the Contractor's denial of the Employee's request to attend classes during scheduled work hours was not related to his filing complaints with the EEOC and NMHRD. After the OHA investigator issued his Report of Investigation, I was appointed the Hearing Officer in the case.

In January 2003, while this Part 708 action was pending, the Employee was discharged from his position with the Contractor. The Employee requested and was granted permission to amend his original Part 708 complaint to include the termination of his employment as an additional act of retaliation.

In April 2003, the Contractor filed an Amended Motion to Dismiss the Original and Amended Complaints. The Contractor argued that the Employee failed to make a claim for which relief could be granted under Part 708. The Contractor asserted that the Employee's claims were based on actions allegedly taken as a result of his filing claims with the EEOC and NMHRD and, therefore, are barred under 10 C.F.R. § 708.4. In May 2003, I granted the Contractor's motion in part. I determined that the claims regarding the first two alleged acts of retaliation—the denial of the Employee's request to attend classes during work hours and the Contractor's demand that the Employee stop circulating a letter among his coworkers in support of that request—should be dismissed because those claims alleged that the retaliatory actions were taken as a result of the Employee filing discrimination complaints with the EEOC and NMHRD and such claims are barred by 10 C.F.R. § 708.4. I further determined that the claim of retaliatory termination was not barred insofar as the claim alleged that the discharge was due to his filing a Part 708 claim, which is protected activity. *Gilbert J. Hinojos*, 28 DOE ¶ 87,037 at 89,264 (2003) (Motion to Dismiss) (*Hinojos*).

A hearing was held at Albuquerque, New Mexico on July 14-15, 2004. The Employee testified as to why he believed his termination was a result of the filing of his Part 708 complaint. The Contractor presented evidence, in the form of several witnesses and exhibits, seeking to establish that the Contractor would have taken the same action in the absence of the protected conduct. The Contractor's witnesses were the director of the Contractor's New Mexico operations (the Director), the Employee's supervisor (the

Supervisor), the Contractor's manager of Environment, Safety & Health (the Safety Manager), the Contractor's Human Resources Manager, and a forklift operator who was a co-worker of the Employee. The Contractor submitted an exhibit book. The Contractor numbered its exhibits and they are cited as "Ex. [number]."

II. Analysis

A. The Complainant's Burden

In filing a Part 708 complaint, the complainant must establish, by a preponderance of the evidence, that the complainant engaged in protected activity and that the activity was a contributing factor to an alleged retaliation. *See* 10 C.F.R. § 708.29; *see also Ronald Sorri*, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)). In the present case, although the Employee had a request for a hearing concerning his Part 708 claims pending at the time of his termination, the underlying original Part 708 claims were eventually dismissed because they were barred under 10 C.F.R. § 708.4. The only claim which was not dismissed was the Employee's claim that his employment was terminated because he filed the original Part 708 claim. The question then is whether the Employee's filing of a Part 708 claim, even though it was eventually dismissed as being barred by the regulations, is "protected activity" within the meaning of the regulations and therefore entitles the Employee to the benefit of protection against retaliatory discharge under Part 708. In my previous decision in *Hinojos*, I found that filing a Part 708 complaint was a protected activity and I reaffirm my decision below.

The stated purpose of the regulations is to provide "procedures for processing complaints by employees of DOE contractors alleging retaliation by their employers for disclosure of information concerning danger to public or worker health or safety, substantial violations of law, or gross mismanagement; for participation in Congressional proceedings; or for refusal to participate in dangerous activities." 10 C.F.R. § 708.1. Part 708 states that an employee may file a complaint against an employer for retaliation for participating in a proceeding under Part 708. *See* 10 C.F.R. § 708.5(b). Nonetheless, as demonstrated here, the fact that a claim is filed under Part 708 does not necessarily mean that the complaint is, on its face or in substance, one covered by the regulations.

Individuals who file complaints in good faith under Part 708 should not be denied its protection simply because they were mistaken in their belief that their claims fell within the scope of the regulations. The Part 708 regulations are intended to protect employees from retaliation for making disclosures about workplace safety or violations of law. To require employees to have absolute certainty that their claims fall within the scope of the regulations would deter employees from making such claims and would possibly subject employees whose claims are ultimately dismissed to retaliation for the simple act of filing the claim. This would frustrate the intention of the regulations. If we must err, it is better to err on the side of granting the protection to employees whose claims ultimately are not covered by the regulations than denying the protection to employees who file the claims in good faith. *See Rosie L. Beckham*, 27 DOE ¶ 87,557, Case No. VBA-0044 (2000)

("[F]or purposes of Part 708 it does not matter whether the information of a putative whistleblower disclosed is ultimately factually substantiated.") Therefore, I again find that filing a claim under Part 708 constitutes a disclosure as to a potential violation of law and may be a protected activity.

In the present case, I believe that the Employee made his initial Part 708 complaints in good faith. An examination of his submissions and pleadings in this matter convince me that his initial Part 708 complaint was made in good faith. Additionally, a Human Resource Manager who participated in the separation review board that made the decision to terminate the Employee's employment had knowledge of Hinojos' previous Part 708 complaint. *See* Hearing Transcript (Tr.) at 433, 438-39. Further, given the pendency of Employee's Part 708 hearing request at the time of his termination, I believe that there is sufficient temporal proximity to conclude that the Part 708 complaint was a contributing factor to his termination. Accordingly, I find that the Employee has satisfied his burden.

B. The Contractor's Burden

If the employee makes the required showings of protected activity and retaliation, the burden shifts to the contractor to establish by clear and convincing evidence that it would have taken the same action in the absence of the employee's protected activity. *See* 10 C.F.R. § 708.29; *see also Ronald Sorri*, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)).

After considering the record established in the investigation by OHA, the parties' submissions, and the testimony presented at the hearing, for the reasons stated below, I find that the Contractor has met its burden of establishing by clear and convincing evidence that it would have taken the same action in the absence of the Part 708 proceeding.

1. The Contractor's Arguments and Evidence

The Contractor maintains that the Employee's filing of the complaint was not considered when the decision regarding the termination was made. According to the Contractor, the Employee was terminated because he was a safety risk. The Contractor stated that it primarily based its decision on an accident involving the Employee which occurred on December 6, 2002. Following that incident, the Contractor convened a separation committee to evaluate the Employee and the accident. In considering whether to terminate the Employee, the Contractor looked at the severity of the accident, the Employee's failure to take preventative measures, the Employee's attitude about the accident, and a prior safety incident in which the Employee was involved. Tr. at 251. The Contractor maintains that it considered precedent in determining the best course of action and found that discharging the Employee was appropriate given the circumstances.

At the time of the December accident, the Employee was transporting large, aluminum containers, known as CRTs, from the Contractor's facility to an off-site vendor in a

government-owned truck. The CRTs weigh about 250 pounds each. Tr. at 356; Ex. 8. The CRTs were not secured in the bed of the truck. At a point during the transport the Employee stopped suddenly, causing the unsecured CRTs to shift. This resulted in the rear window of the truck cab shattering and a part of the load shifting atop the cab. [1] Tr. at 272, 304-307; Ex. 8.

The Contractor asserts that the accident was very severe and, although no one was injured, could have had very serious consequences. The Director testified at the hearing that the accident "had the potential to be a very serious incident, and in and of itself was a very serious incident." Tr. at 253. The Supervisor stated that that by failing to secure the load, the Employee "was subjecting not only the general public, but also himself and the material to danger, high probability of danger." Tr. at 409-410. The Contractor also presented evidence identifying safety as an integral component of its operations. The Director stated, "[Safety is] so ingrained in our environment that we expect each of the staff members and leadership to be safe, and be accountable for safety." Tr. at 243. The Contractor's Human Resources Manager testified that "[s]afety is paramount in our organization. In fact, safety is considered a lifestyle." Tr. at 435. The Contractor argues that, although no one was injured, the Employee could have been seriously injured had one of the CRTs struck him and that there could have been serious injury to a member of the general public had a CRT fallen off the truck and struck someone else. *See* Tr. at 355.

The Contractor also asserts that it considered the fact that the Employee had the training necessary to take preventative measures and failed to do so. The Safety Manager testified to the training the Employee received. The Safety Manager specifically mentioned training relating to the proper way to secure and transport a load. *See* Tr. at 351-355; *see also* Exhibit 1. The Supervisor also testified as to the Employee's training and stated that he believed that the Employee had the necessary training to properly secure the load he was transporting during the December 2002 accident. Tr. at 400.

The Contractor further asserts that the Employee's attitude toward the accident was a key factor in determining that the Employee should be discharged. The Director testified that it was apparent from the investigation that the Employee did not take responsibility for and did not acknowledge the seriousness of the accident. Tr. at 252.

The Contractor also stated that it considered a prior safety incident in making the decision to terminate the Employee. In August 2002, the Employee was involved in a safety incident involving an unsecured load, categorized as a "near-miss" since no one was injured and the damage was minimal. This incident involved items that were loaded onto a pallet or cart to be lowered by forklift from one floor to another. The materials were improperly secured and the load improperly balanced causing some of the items to fall. None of the individuals involved in the incident were reprimanded; they all received training on securing and transporting loads. Tr. at 250, 407. *See* Ex. 17 at 470, 632. The Contractor's position is that, although no one was assigned blame for the August 2002 incident, following the incident the Employee received training that should have

[1] The Employee denies that any of the CRTs shifted to the roof of the truck cab as a result of the December accident. Tr. at 459.

prevented the December 2002 accident. The Contractor maintains that the Employee's failure to use that training was a willful disregard for the Contractor's safety procedures.

The Contractor further asserts that in deciding the Employee's case it looked to precedent to help determine the appropriate course of action. The Director testified that in deciding the case, the Contractor looked at, among other things, "past precedent and other similar situations [the Contractor] had in the organization, [the Contractor] at large, not just New Mexico." Tr. at 248. In this regard, the Human Resources Manager testified about the procedure the Contractor's Environment Safety and Health (ES&H) Office used to find precedent. She stated that when the ES&H office was told of the accident, it "characterized" the incident. A search was run in the Contractor's databases for similar incidents. The Human Resources Manager stated that in terms of potential severity of consequences only one other case was found. In that case, a senior maintenance worker, in the process of working on an electrical problem, failed to take proper safety measures and cut through an electrical conduit while digging a trench in an area with electrical lines. Although the damage in that incident was minor, there was a potential for severe consequences, even multiple fatalities. In that case, the worker was terminated outright solely as a result of the incident. Tr. at 434-35. When asked on cross-examination about whether the incident with the maintenance worker was the only one the separation committee considered, the Human Resources Manager stated that while there may have been other incidents, the one they considered was the only one that had a potential for severe consequences similar to the Employee's accident. Tr. at 443-44; *see* Ex. 18.

Finally, the Human Resources Manager testified that the Employee's version of what happened in the December 2002 accident was inconsistent. She testified that in the ES&H investigation of the accident the Employee stated that the forklift operator may have told him to secure the load but that he did not remember exactly what was said. In a subsequent investigation of the incident by the Contractor's Human Resources department, the Employee stated that he took a strap from behind the driver's seat in the truck and put it on the bed of the truck. In that investigation the Employee also stated that he asked the forklift operator if the load needed to be secured and that the operator responded that the load did not need to be tied down. Tr. at 428. The Human Resources Manager also pointed out that the forklift operator's version of the incident (that he had told the Employee to tie down the load) remained consistent between the two investigations. *See infra* at 8-9.

The Contractor asserts that its decision to terminate the Employee was consistent with actions it had taken in the past for comparable incidents. Moreover, the Contractor argues that the Employee's failure to take the proper safety precautions to prevent the accident, the fact that he had the training to do so, the inconsistency in the Employee's version of events in the two investigations, and his attitude toward the seriousness of the accident all warranted his termination. The Contractor maintains that the Employee's general attitude toward safety made him a safety risk and, therefore, termination was an appropriate course of action. *See* Tr. at 251-53.

2. The Employee's Arguments and Evidence

The Employee alleges that his termination was based on the fact that he had filed a Part 708 complaint and that the December 2002 accident was merely an excuse to discharge him. The Employee testified at the hearing and his testimony, in pertinent part, is set out below.

The Employee stated that in December 2002 he was picking up a load of CRTs to transport them to an off-site vendor. After the forklift operator had loaded the CRTs into his truck, the employee left to deliver them to the off-site vendor. The Employee stated that while he was transporting the CRTs, he pressed on the brake of the truck and the load shifted. [2] He described the accident as follows:

> [A]ll I heard was a crash, you know, sounded like a gun went off. And I looked up, and you could just barely see one of the CRTs that had barely cleared the gate, the fence there, and it hit the frame, the window frame of the truck, not the – it didn't hit the glass at all, it just hit the frame. And I looked up at it, and I couldn't believe the noise and the glass. So I says, well, I better get out of here. I looked around and saw everything was okay. So I drove to a phone booth, and I knew there was a gas station down the road. So I drove down there and I parked the truck and I called up [a coworker], who was our lead person…I said 'I was in an accident. One of the CRTs shifted' – I think it was two of them that had shifted.

Tr. at 100. He further testified that none of the CRTs had shifted to the top of the roof of the truck's cab. Tr. at 459. The Employee stated that immediately after the accident no one was disciplined and no other action was taken. Tr. at 105. However, the Employee testified that a few days after the accident his driving privileges were restricted. Tr. at 117.

The Employee stated that about a week after the accident, an investigation of the accident began. The Employee testified that he told one of his coworkers at that time that "they're [the Contractor] trying to fire me" and that the coworker responded that he had been involved in an accident with one of the trailers and not been fired. Tr. at 119. The Employee testified that he felt he was being treated differently because of his prior complaints. *Id*. The Employee testified that he knew of several other safety incidents that did not result in terminations for those involved. Tr. at 121, 183.

C. Disputed Issues and Findings

The Employee argues that, contrary to the Contractor's stated reasons for discharging him, he had not been guilty of repeated violations of safety procedures. The Employee also maintains that the forklift operator told him that he had secured the load of CRT's

[2] The truck that the Employee drove during the December 2002 accident was a pick-up truck that had a railing around the bed of the truck. The height of the railing was approximately that of the roof of the truck's cab. *See* Ex. 8 at 659-61.

and that it was not the Employee's responsibility to secure the load. Related to this issue is whether the ultimate responsibility of securing the load belonged to the Employee or the forklift operator. The Employee also maintains that the Contractor overstates the severity of the accident. Finally, the Employee disputes the Contractor's characterization of his attitude toward the accident.

1. Stated Reasons for the Employee's Discharge from Employment

The Employee argues that one of the reasons listed in his termination notice - "repeated violations of safety procedures" - is false and is merely a pretext to fire him for filing his Part 708 complaint. See Ex. 17 at 424 (Memorandum terminating Employee's employment). The record clearly indicates that with regard to the August 2002 accident, there was no formal adjudication of responsibility. Tr. at 250, 407. Since the record only discloses one safety incident where the Employee was found at fault, namely, the December 2002 accident, one of the stated reasons for the Employee's discharge - "repeated violation of safety procedures" - is erroneous. However, the facts as described below still support a finding that the Contractor would have discharged the Employee in any event, notwithstanding his Part 708 complaint.

2. Securing the Load Prior to Transport

The Employee disputes the Contractor's assertion that he was responsible for tying or strapping the load of CRTs that shifted in the December 2002 accident. The Employee testified that while the forklift operator loaded the CRTs on to the Employee's truck, the Employee went "around the front" to take his break. Tr. at 99. He stated that before he went on his break, he handed the forklift operator a tie-down strap in case he needed it to secure the load. Tr. at 99, 160. The Employee stated that when he returned from his break he asked the forklift operator, "Is the load ready to go?" and the forklift operator responded, "Yeah, it's ready. Go ahead and go." Tr. at 100. The Employee stated that, as far as he was aware, he was not required to do an inspection of the load before he drove away from the Contractor's facility. Tr. at 101. He also testified that according to "the procedures he was aware of" it wasn't necessary to strap the CRTs down since they were "rusty and would stack on top of each other." Tr. at 99.

The forklift operator's version of events significantly conflicts with the Employee's version. He stated at the hearing that after he loaded the CRTs onto the truck he handed a tie-down strap to the Employee and told the Employee to tie down the load. Tr. at 298. The forklift operator testified that he asked the Employee whether the Employee needed help securing the load and the Employee responded, "No, I don't need any help, I'll take care of it." Tr. at 299. The forklift operator stated that after the Employee told him he did not need help in securing the load, the forklift operator backed the forklift back into the bay area and lowered the bay door. The forklift operator stated he did not see "any more of what he [the Employee] did or did not do, what he failed to do." Tr. at 332. Further, the forklift operator denied that the Employee had offered him a strap or asked him to tie the CRTs down. Tr. at 312.

The forklift operator, the Safety Manager, and the Supervisor each testified that the driver of a vehicle has the burden of ensuring that a load is secure. The forklift operator stated that "once you're the custodian of a vehicle, you're responsible for everything. He doesn't have to pull it [the vehicle] off the lot if he's uncomfortable about the way it's loaded." Tr. at 331. According to the Safety Manager, "It's still the driver's responsibility to make sure to check that load and make sure it's secure. You don't drive off without making sure that that load is secure." Tr. at 367. When asked whether it would make a difference if the driver had been told the load was secure or given the go-ahead to proceed, the Supervisor testified that such assurances do not lift the burden from the driver:

> I think he still should have looked at the load, you know. As the driver of the vehicle, he should have looked at the load, made sure that he thought it was safe to transport. And if he didn't, then he should have loaded and secured it, and resecured it or whatever he thought. It was his responsibility, in my opinion.

Tr. at 411.

After examining the evidence as well as assessing the demeanor of the witnesses, I find that the forklift operator gave the Employee the tie-down strap and told the Employee to be sure to secure the load. The forklift operator's version of events remained consistent through two investigations and at the hearing. In each of those instances, he testified that he provided the Employee with a tie-down strap and told him to secure the load. See Tr. at 303, 312, 426; Ex. 16 at 637 (ES&H Investigation); Ex. 16 at 477, 641 (HR Investigation). As mentioned above, the Human Resources Manager testified that the Employee's version of events was inconsistent from the ES&H investigation to the Human Resources investigation. The report of Employee's interview by ES&H indicate that the Employees told investigators that the forklift operator might have told him to secure the load but he did not remember exactly what was said. Ex. 16 at 637. The report of HR's interview with the Employee indicates that the Employee claims to have asked the forklift operator whether he needed to tie down the load and that the forklift operator replied that it did not need to be tied down. Ex. 16 at 642.

I also find that the driver of a vehicle is ultimately responsible for ensuring that a load is secure prior to transport. In making this finding I was persuaded by the testimony of the Safety Manager, supervisor and forklift operator. It is unreasonable to argue that the driver of a vehicle carrying a load does not have the responsibility to ensure that the load is safe for transport. I find that, despite his training on the proper securing of loads for transport, the Employee failed in his duty to ensure that the load he was transporting was secure and safe for travel.

3. Severity of the Accident

According to the Contractor, a critical factor in deciding to terminate the Employee was the severity of the accident and the possible consequences. The Contractor believes the

accident could have injured or even killed both the Employee and members of the general public. The Employee testified that, given the nature of the accident, he did not believe that anyone could have been injured. The validity of these assertions necessarily turns on what actually happened in the accident of December 6, 2002.

The Employee testified that when he pressed on his brake, the CRTs shifted forward a bit causing one to bump against the window frame which caused the glass in the rear window of the truck cab to shatter. He stated that a CRT never touched the glass. Tr. at 100. The Employee further stated that no part of a CRT ever shifted atop the cab of the truck. Tr. at 165, 170.

The forklift operator, who arrived at the scene of the accident after the Employee called a coworker to inform them of the accident, testified that a part of one of the CRTs had penetrated the rear window of the truck and that part of another CRT had shifted atop the cab roof of the truck. Tr. at 304. The forklift operator stated that he personally shifted the CRT from the roof of the truck back into place and secured the load in order to return the truck to the Contractor's facility. Tr. at 305.

In light of all of the testimony, I am inclined to agree that a CRT did penetrate the rear glass of the truck and another shifted atop the roof of the vehicle. Based upon the evidence and my assessment of the demeanor of the Employee's and forklift operator's testimony, I find that the forklift operator's version of the damage in the accident is the more plausible one. I also find the Employee's version of the damage in the accident, while not necessarily impossible, very unlikely. The forklift operator testified that he personally saw that the CRT had penetrated the glass and the other had slid atop the roof. *See* Ex. 8 at 660. The Safety Manager testified that the glass in the truck in question consisted of safety glass and that a "light broadside hit" on the frame of the back cab window would not caused the safety glass to shatter as it did. Tr. at 357. The Safety Manager also pointed out that in his opinion the Employee could have been seriously injured or killed. Tr. at 361. Given the nature of the damage in the accident, I find that the Contractor's estimation of the seriousness of the accident is reasonable.

4. The Employee's Attitude Toward the Accident

The Contractor maintains that the Employee's reaction to the accident demonstrated a disregard or indifference to the importance of safety in the workplace and a lack of understanding of the severity and the potential consequences of the accident. The Safety Manager testified that the Employee was concerned that he was going to lose job. Tr. at 358. The Safety Manager also testified that he believed the Employee "understood that it was a potentially severe situation" but that he could not speak to whether the Employee accepted responsibility for the accident. Tr. at 361. When asked about her interview with the Employee after the accident, the Human Resources Manager testified as follows:

> Q.: Did [a human resources associate] ask [the Employee] if he realized how close he was to being severely injured by the CRT coming through the back window?
>
> A.: Yes.
>
> Q.: What was [the Employee's] response?
>
> A.: That he didn't consider it serious, it wasn't that big of a deal.
>
> Q.: Did he use words like that?
>
> A.: He used words like that.
>
> Q.: Not that big of a deal?
>
> A.: Um-hum.

Tr. at 431-432. The Human Resources Manager repeated this testimony on cross-examination. Tr. at 442-443. The Employee maintains that his attitude toward the accident was not indifference toward safety, but rather a disagreement as to the seriousness of the accident. The Employee stated that he did not think the accident could have had the severe consequences the Contractor believed could have occurred. *See* Tr. at 467. The Employee testified that when he was interviewed during the investigation of the accident he was asked whether he was aware of how serious the accident was and that people could have been injured or even killed. He testified that he never made a statement disavowing any risk and saying that the accident was not serious. Tr. at 467. Instead, the Employee stated that no one could have been injured by his transporting unsecured CRTs. Tr. at 168. The Employee testified that he did not see the danger in his driving with the unsecured load based on the vehicle he was driving and his previous trips with similar loads. Tr. at 230. He also stated that he never said the accident was not "a big deal." The Employee stated that he responded that the accident was not intentional and that he did not put himself or anyone else at risk. Tr. at 122.

Based upon the testimony, I find that the Contractor's assessment of the Employee's attitude toward the accident was a reasonable one. Regardless of whether the Employee used the words "no big deal," it is clear from his own testimony at the hearing that he did not think, and still does not believe, the accident had the potential for serious consequences. As mentioned above, the Employee testified that he never made a statement in which he disavowed the risks or seriousness of the accident; however, earlier in his testimony, on cross-examination, when questioned about the statement he stated, "I felt it wasn't that serious." Tr. at 181. In essence, the Employee clearly did not believe that the accident could have had grave consequences.

III. Conclusion

After examining all of the evidence and testimony before me I find that the Contractor has presented clear and convincing evidence that it would have terminated the Employee notwithstanding the Part 708 complaint. As discussed above, I also find that the Employee was in fact responsible for ensuring that the CRT load was tied down and that he failed to fulfill this responsibility. In this regard, the testimony of the forklift operator, the Supervisor and the Safety Manager is more convincing than that of the Employee. Further I find that even if the Employee had instructed the forklift operator to tie the load down, he as the driver was ultimately responsible for ensuring that the load was properly secured. His failure to secure the load resulted in the December 2002 accident. This accident could have had serious consequences for the safety of the Employee or other public traffic around him. This accident occurred despite the fact that Employee had received specific training regarding securing loads to be transported.

The Contractor has also sufficiently proved that, in light of the severity of the accident, the Employee's failure to take appropriate preventative measures despite having prior training on the proper method of doing so, and the Employee's failure to this day to acknowledge the seriousness of the accident, the Employee was a safety risk. The Contractor further established that the Employee's case was handled in a manner appropriate for the serious safety violation involved and that the sanction of dismissal from employment was consistent with the sanction given in the only other case that the Contractor's ES&H department, after doing a database search, could find involving a similar potential for harm. Accordingly, I find that the Employee's claim for relief under Part 708 should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Complaint filed under 10 C.F.R. Part 708 by Gilbert J. Hinojos against Honeywell Federal Manufacturing & Technologies, Case No. TBH-003 is hereby denied.

(2) This is an initial agency decision, which shall become the final decision of the Department of Energy unless, within 15 days of issuance, a notice of appeal is filed with the Office of Hearings and Appeals, in which a party requests review of this initial agency decision.

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

Date: April 27, 2005