Case No. VBH-0005

May 2, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Thomas Dwyer

Date of Filing: June 23, 1999

Case Number: VBH-0005

This Decision involves a whistleblower complaint filed by Thomas Dwyer under the Department of Energy's (DOE) Contractor Employee Protection Program. From January 1996 to October 1997, Mr. Dwyer was employed as a pipefitter by Fluor Daniel Fernald (FDF), a DOE contractor responsible for the cleanup of the Fernald Environmental Management Project, a former DOE uranium production facility located about 18 miles northwest of Cincinnati, Ohio. Mr. Dwyer alleges that FDF first suspended him and then terminated him in retaliation for taking certain actions and making health and safety disclosures.

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 purposes are 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. The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10 Part 708 of the Code of Federal Regulations.

B. Procedural History

In December 1997, Mr. Dwyer filed a complaint with the DOE's Office of Inspector General (IG). After making a preliminary determination that the complaint fell within the jurisdiction of Part 708, the IG referred the complaint to the DOE's Ohio Field Office (DOE/OH) for an attempt at informal resolution. After DOE/OH was unable to resolve the complaint, the IG began an investigation of the matter. The investigation was pending when, on April 14, 1999, revisions to Part 708 took effect. See 64 Fed. Reg. 12,862 (March 15, 1999). Under the revised procedures, investigations are conducted by the DOE's Office of Hearings and Appeals (OHA). On June 23, 1999, an OHA investigator issued a report of his investigation of the complaint, and the OHA Director appointed me to be the hearing officer in this matter. 10 C.F.R. § 708.23(a), 708.25(a).

On September 7, 1999, FDF filed a Motion to Dismiss Mr. Dwyer's complaint. FDF referred to the

decision of an arbitrator on a labor grievance filed by Mr. Dwyer's union, arguing that the "arbitrator considered the same issues and facts under a collective bargaining agreement with employee protections virtually identical to those in the [Contractor Employee Protection Program]. The Secretary should defer to the arbitrator's opinion and award." Motion to Dismiss at 1. FDF specifically cited a provision of the revised Part 708 regulations stating that a complaint may not be filed if a complainant has chosen "to pursue a remedy under State or other applicable law, including final and binding grievance-arbitration procedures, unless" the complainant has "exhausted grievance-arbitration procedures . . . and issues related to alleged retaliation for conduct protected under [Part 708] remain." 10 C.F.R. § 708.15(a)(3). I denied the Motion, finding that this provision of the revised regulations should not be retroactively applied to bar a complaint filed by Dwyer before the revised regulations took effect. Fluor Daniel Fernald, 27 DOE ¶ 87,532 (1999).

The hearing was held at Fernald, Ohio on January 18-19, 2000. At the conclusion of the hearing on January 19, the parties elected to forego oral argument, and requested permission to file post-hearing briefs. The OHA received post-hearing brief from both parties and closed the record on March 3, 2000.

II. Analysis

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. § 708.9(d). See Ronald Sorri, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)). If the complainant meets his burden of proof by a preponderance of the evidence that his protected activity was a "contributing factor" to the alleged adverse actions taken against him, "the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure . . . ." 10 C.F.R. § 708.9(d). See Ronald Sorri, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence, § 340 at 442 (4th ed. 1992)). Accordingly, in the present case if Mr. Dwyer establishes that a protected disclosure, participation, or refusal was a factor contributing to his termination, FDF must convince me that it would have taken the action even if Mr. Dwyer had not engaged in any activity protected under Part 708. Helen Gaidine Oglesbee, 24 DOE ¶ 87,507 at 89,034-35 (1994).

After considering the record established in the investigation by the Assistant Inspector General and OHA, the parties' submissions, the testimony presented at the hearing, and the post-hearing briefs, for the reasons stated below I have concluded that Mr. Dwyer has met his burden of proving by a preponderance of the evidence that he made a protected disclosure concerning health or safety that contributed to his termination. However, I have concluded that FDF has shown by clear and convincing evidence that it would have terminated Mr. Dwyer absent this disclosure.

A. Whether Mr. Dwyer Engaged in Activities Protected Under 10 C.F.R. § 708.5

The Part 708 regulations prohibit discrimination by a DOE contractor "against any employee because the employee (or any person acting pursuant to a request of the employee) has,"

(1) Disclosed to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), information that the employee in good faith believes evidences--

(i) A violation of any law, rule, or regulation;

(ii) A substantial and specific danger to employees or public health or safety; or

(iii) Fraud, mismanagement, gross waste of funds, or abuse of authority;

(2) Participated in a Congressional proceeding or in a proceeding conducted pursuant to this part; or

(3) Refused to participate in an activity, policy, or practice when--

(i) Such participation--

(A) Constitutes a violation of a Federal health or safety law; or

(B) Causes the employee to have a reasonable apprehension of serious injury to the employee, other employees, or the public due to such participation, and the activity, policy, or practice causing the employee's apprehension of such injury--

(1) Is of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude there is a bona fide danger of an accident, injury, or serious impairment of health or safety resulting from participation in the activity, policy, or practice; and

(2) The employee is not required to participate in such dangerous activity, policy, or practice because of the nature of his or her employment responsibilities;

(ii) The employee, before refusing to participate in an activity, policy, or practice has sought from the contractor and has been unable to obtain a correction of the violation or dangerous activity, policy, or practice; and

(iii) The employee, within 30 days following such refusal, discloses to an official of DOE, a member of Congress, or the contractor, information regarding the violation or dangerous activity, policy, or practice, and explaining why he has refused to participate in the activity.

57 Fed. Reg. at 7542 (1992) (10 C.F.R. § 708.5(a)).(1) There are a number of activities in which Mr. Dwyer alleges he engaged that are potentially protected under Part 708.

1. April 1996 Refusal to Participate

First, Mr. Dwyer states that in or around April 1996, while working with another pipefitter on a job that required cutting pipe, liquid came out of the pipe. Mr. Dwyer immediately left the work area following what he believed was safety protocol, while his co-worker stayed. Even assuming that the complainant could demonstrate the dangerous nature of the activity and that he was not required to participate in this activity because of the nature of his employment, Mr. Dwyer has not alleged that continuing to work on the job would have constituted "a violation of a Federal health or safety law," that he, "before refusing to participate in an activity, policy, or practice ha[d] sought from the contractor and ha[d] been unable to obtain a correction of the violation or dangerous activity, policy, or practice" or that he, "within 30 days following such refusal, disclose[d] to an official of DOE, a member of Congress, or the contractor, information regarding the violation or dangerous activity, policy, or practice, and explaining why he . . . refused to participate in the activity." 10 C.F.R. § 708.5(a)(3). Thus, I do not find Mr. Dwyer's refusal to continue working on this particular job to be a refusal to participate protected under Part 708.

2. August 1996 "Job Stop"

Second, the complainant states that in late August 1996, he and his co-workers "were doing a walk-through and not wearing respirators and somebody was wearing a respirator and I put a job stop and we evacuated the building . . . ." Tr. at 190, 280-81, 330-31. However, neither of the two witnesses whom Mr. Dwyer questioned at the hearing about this incident could remember it taking place, and I found the demeanor of these two witnesses, compared with that of the complainant, to reflect more credibility. In any event, it is unlikely that this alleged activity by the complainant would be protected under 10 C.F.R. § 708.5(a). First, this activity fails to meet the same criteria for a protected refusal under 10 C.F.R. §

708.5(a)(3) as discussed above with regard to Mr. Dwyer's April 1996 refusal. Moreover, such a "job stop" would not constitute a protected disclosure under 10 C.F.R. § 708.5(a)(1) because the complainant does not allege that he made any disclosure regarding this incident that he believed evidenced a "violation of any law, rule, or regulation," a "substantial and specific danger to employees or public health or safety," or "[f]raud, mismanagement, gross waste of funds, or abuse of authority."

3. Internal Company Grievances

Third, Mr. Dwyer refers to a number of internal company grievances he filed during the course of his employment. These grievances include allegations that management officials and employees of the company's medical department were harassing him, and also complain about the person assigned to hear the grievances and the timeliness of the company's response to them. These grievances could only conceivably be considered to be protected activity under 10 C.F.R. § 708.5(a) to the extent they might evidence what the complainant believed was mismanagement or abuse of authority, since there is no allegation that what Mr. Dwyer objected to was a "violation of any law, rule, or regulation," a "substantial and specific danger to employees or public health or safety," "[f]raud," or "gross waste of funds, . . ." However, I have reviewed copies of the grievances and find that they do not contain disclosures that evidence mismanagement or abuse of authority. At the root of these grievances are disagreements between Mr. Dwyer and his employer as to the application of company policy on medical leave, usually whether particular illnesses or injuries reported by Mr. Dwyer were genuine and whether they merited excused absences from work.

In considering whether such disclosures are protected under Part 708, I note that the Deputy Secretary of Energy has addressed this issue and concluded that

[e]quating a particular type of disagreement to "mismanagement" as contemplated by the "whistleblower" regulation demands a careful balancing lest the term encompass all disagreements between a contractor and its employees. . . . [T]here must be some assessment as to whether the nature of the disagreement evidences the type of disclosure of mismanagement that the regulation was designed to protect, at the same time granting appropriate deference to traditional management prerogatives needed to conduct an organization through teamwork.

Narish C. Mehta v. Universities Research Association, 24 DOE ¶ 87,514 at 89,065 (1995)

The regulatory preamble to the version of Part 708 being applied in this case speaks of the DOE's responsibility "for safeguarding public and employee health and safety; ensuring compliance with applicable laws, rules, and regulations; and preventing fraud, mismanagement, waste, and abuse" and the need "to assure workplace conditions at DOE facilities that are harmonious with safety and good management." This language indicates an intent to address problems that are more systemic and serious in nature than relatively minor disputes between an employee and his employer over the employee's qualification for medical leave. Thus, I do not find the grievances filed by the complainant evidence "mismanagement" as that term is used in Part 708. For the same reasons, I do not find that the grievances contain evidence of the type of "abuse of authority" the Part 708 regulations were designed to protect.

4. September 1997 Disclosures

Finally, Mr. Dwyer alleges that he made protected disclosures in September 1997 at Fernald's Plant 6. One of the allegations relates to complaints Mr. Dwyer made to a safety engineer about laundry bags presenting a tripping hazard in the entry way to Plant 6. Tr. at 248. Though the safety engineer does not dispute that there was "excessive trash and clothing coming out of Plant 6" at this time, Tr. at 257, and that arrangements were made after Mr. Dwyer's complaints to increase the frequency of pick-up of the bags in response to Mr. Dwyer's concerns, there was conflicting testimony as to whether the bags presented a safety hazard. The safety engineer testified that there was a three- or four-foot opening

between the bags for workers to walk through, and that therefore the bags were not a safety issue, only a housekeeping issue. Tr. at 248, 249, 259; see also Tr. at 76, 467 (witness testified that "there was a four-foot wide opening or better that you could get around between where you enter into Plant 6 and the desk where you badge in."). The complainant contends that the presence of the bags was a safety hazard and testified that he saw two workers' feet "just hit [a bag] a little, a little trip, that's all." Tr. at 325. Yet Mr. Dwyer also testified that he believed he could walk through the opening between the bags without risking any danger to himself. Tr. at 326, 329. There is no allegation that Mr. Dwyer's disclosure evidenced a "violation of any law, rule, or regulation" and, on balance, I do not find a preponderance of evidence to support a good faith belief that the bags presented a "substantial and specific danger to employees or public health or safety." I found the testimony of the complainant on this issue to be equivocal and, similar to my impressions of the demeanor of the complainant compared to other witnesses noted above, I found the testimony of Mr. Dwyer to be generally less credible than that of the other two witnesses who testified as to any safety hazard caused by the bags.

The other allegations of protected disclosures made in September 1997 relate to a Plant 6 asbestos abatement job in which Mr. Dwyer was assigned to assist. On September 23, 1997, Mr. Dwyer questioned why he was not required to wear the same type of dosimeter that he had worn during a previous assignment in Plant 6, and also complained that there was dust falling from the rafters of the building. A safety engineer was called in to address Mr. Dwyer's concerns, and testified at the hearing that Mr. Dwyer was wearing a regular dosimeter that measures alpha/beta [radiation]. The one he wore before measured gamma [radiation]. What I found out after we talked to him, before -- I did go back and try to find where he had been. He was working in a high radiation [area].

What we tried to explain, like I said, you could go in Plant 6 one day and be dressed one way. You could go in another day and be dressed differently, . . .

Tr. at 238. Asked whether there was a "dust concern" at the time of Mr. Dwyer's complaint, the safety engineer testified,

No. There was -- Plant 6 is dirty and it is dusty, but we do continuous air monitoring in Plant 6 and the guys that would be doing the job were going to be dressed out in PAPRs [powered air purifying respirator] and PPEs [personal protective equipment]. And the area was going to be cordoned off where we were going to be doing our work.

Because Mr. Dwyer was not satisfied with the explanation of the safety engineer, a radiation engineer came to address Mr. Dwyer's concerns, and concurred with the safety engineer. Tr. at 241-42. Mr. Dwyer was still not satisfied, and so was given the telephone number of FDF's director of health and safety. Tr. at 243. Mr. Dwyer apparently did not call the number.

Again, because Mr. Dwyer does not allege that these disclosures about his dosimeter and dust were evidence of a "violation of any law, rule, or regulation," the relevant issue is whether Mr. Dwyer disclosed information that he in good faith believed evidenced a "substantial and specific danger to employees or public health or safety; . . ." 10 C.F.R. § 708.5(a)(1)(ii). Regarding Mr. Dwyer's questions about his dosimeter, I see no basis for finding that, by Mr. Dwyer merely asking these questions, he conveyed any evidence of danger to employees or public health or safety, let alone evidence of a "substantial and specific danger." Therefore, I cannot find that the questions about his dosimeter constitute a protected disclosure.

The concern raised by Mr. Dwyer about dust falling from the rafters of the building presents a more difficult issue. A FDF "safety and health team coach," the manager of the safety engineer to whom Mr. Dwyer reported his concern, testified at the hearing as follows:

HEARING OFFICER GOERING: And you are aware that they were doing [asbestos] abatement that was marked off in certain areas of Plant 6?

THE WITNESS: Mm-hmm.

HEARING OFFICER GOERING: And there were certain areas of Plant 6, outside of the abatement area, that respiratory protection was not required?

THE WITNESS: Right.

HEARING OFFICER GOERING: So somebody in that period of time in Plant 6 in an area outside of the abatement area, they look up, they see dust falling from the rafters . . .

- . . .
- . . either inside or outside the abatement area. Is either one of those grounds for a reasonable person to raise a safety concern?

THE WITNESS: Sure. Anything -- anything anybody is concerned about they should feel free to say, hey, I'm concerned about this, talk to the safety professional, what do you think, no matter what the concern.

HEARING OFFICER GOERING: Okay. Well, all right. It gets a little difficult when I ask this kind of question here because we've had testimony that it's the philosophy of Fernald that, you know, you'll respond to even baseless concerns.

THE WITNESS: That's true.

HEARING OFFICER GOERING: So what I'm trying to get at is whether or not a reasonable person in a situation seeing dust falling down, is it reasonable for that person to have a safety concern?

THE WITNESS: Sure, sure. That's reasonable for them to voice that concern, sure.

HEARING OFFICER GOERING: Okay.

THE WITNESS: I have an unfair advantage because I see all the [dosimetry] results that come out of Plant 6. I know there were never any issues. I see all the internal doses that were received.

HEARING OFFICER GOERING: Right. But somebody in a -- a pipefitter who doesn't have that advantage --

THE WITNESS: Right.

HEARING OFFICER GOERING: -- it's -- you would say it's reasonable for that person?

THE WITNESS: Sure, sure.

Tr. at 506-08. This testimony leads me to conclude that, whether the falling dust in fact posed a danger to health or safety, the presence of falling dust in that environment was evidence sufficient to support a *good faith belief* of a substantial and specific danger to employee safety. See Rosie L. Beckham, Case No. VBA-0044, 27 DOE ¶ (April 10, 2000) ("for purposes of Part 708, it does not matter whether the information a putative whistleblower disclosed is ultimately factually substantiated").

The respondent argues that while the concerns about "dust might have been reasonable in the first instance, . . . his persistence in refusing to accept valid, accurate explanations from responsible employees, considered together with [earlier] stall tactics before the start of the job, more reasonably suggest that delay was his objective as opposed to the articulation of a good faith safety concern." Post-Hearing Brief of Respondent at 22. The respondent cites a prior hearing officer's opinion in a Part 708 case to support the proposition that a "claimant's personal, non-safety-related motive supports [the] conclusion that [an] alleged disclosure is unprotected." Id. (citing Francis M. O'Laughlin, 24 DOE ¶ 87,505 at 89,030 (1994)).

First, I note that the hearing officer's conclusion in O'Laughlin as to the "self-serving nature" of the disclosures was only one of many factors he relied upon, among them his finding that the complainant did not "explicitly disclose any matter of health and safety" or "implicitly communicate[] a cognizable health and safety danger by his stated concerns . . . ." O'Laughlin, 24 DOE at 89,029-30. In any event, a recent decision of the OHA Director, reviewing a hearing officer's opinion, makes clear that the motivations of a complainant are not relevant to the determination of whether a disclosure is protected under Part 708.

The Hearing Officer also appears to have considered that Ms. Beckham may have made her disclosures in response to KENROB's negative comments about her job performance. In evaluating whether a person has made a disclosure in good faith, however, the person's motivations for making the disclosure are irrelevant. See Howard W. Spaletta, 24 DOE ¶ 87,511 at 89,051 (1995) (whether the Complainant was motivated to protect his reputation is irrelevant to the question whether the disclosures come within the ambit of Part 708 protection). Cases decided under the Whistleblower Protection Act also are in accord with this view. See Bump v. Dep't of Interior, 69 M.S.P.R. 354 (1996) (WPA makes no provision for considering whether the employee's personal motivation rendered his belief not genuine), Carter v. Dep't of Army, 62 M.S.P.R. 393, 402 (1994), aff'd, 45 F.3d 444 (Fed. Cir. 1995); see also Frederick v. Dep't of Justice, 65 M.S.P.R. 517, 531 (1994), rev'd on other grounds, 73 F.3d 349 (Fed. Cir. 1996). Hence, to the extent the Hearing Officer considered Ms. Beckham's motivations in communicating her concerns about KENROB's implementation of the FASA in finding that Ms. Beckman did not make a protected disclosure under Part 708, she erred.

Rosie L. Beckham, Case No. VBA-0044, 27 DOE ¶ (April 10, 2000).

Rather than calling for an inquiry into the motives of the complainant, "the good faith clause is intended to relieve complainants of the burden of proving that their allegations are correct or accurate. Under 10 C.F.R. § 708.5(a)(1), complainants must show only that they had a *reasonable belief* that their allegations were accurate." Howard W. Spaletta, 24 DOE ¶ 87,511 at 89,051 (1995). In this case, based primarily upon the testimony of the safety and health "team coach" discussed above, I conclude that Mr. Dwyer's belief as to the danger posed by falling dust in Plant 6 was reasonable, whatever the motive may have been for his disclosure of this information. Accordingly, I find that Mr. Dwyer thereby engaged in activity protected under Part 708.

B. Whether Mr. Dwyer's Protected Activity Was a Factor Contributing to his Termination

In prior decisions of the Office of Hearings and Appeals, we have established that,

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."

Charles Barry DeLoach, 26 DOE ¶ 87,509 at 89,053-54 (1997) (quoting Ronald Sorri, 23 DOE ¶ 87,503 at 89,010 (1993)); Ronny J. Escamilla, 26 DOE ¶ 87,508 at 89,046 (1996).

In this case, there is fairly clear temporal proximity between Mr. Dwyer's protected disclosure in Plant 6 on September 23, 1997, and his subsequent suspension on October 6, 1997, and termination on October 16, 1997. It also appears that at least one of the two deciding officials in this case, FDF managers Mel Karnes and Jean West, knew of Mr. Dwyer's September 23 disclosure. Tr. at 15 (FDF opening statement recounting that "West and Karnes suspended him pending investigation."); Tr. at 215 (Mr. Karnes testimony that he was "the one who made the call on" Mr. Dwyer's termination). Mr. Karnes testified that he remembered the September 1997 events at Plant 6, that he "was brought into that one," and specifically that he "remember[ed] the concerns that were raised about dust." Tr. at 199-200. Thus, I find the preponderance of the evidence supports the conclusion that Mr. Dwyer's September 23, 1997 disclosure about dust in Plant 6 was a contributing factor to his suspension and dismissal.

C. Whether FDF Would Have Terminated Mr. Dwyer Absent His Protected Disclosure

For the reasons set forth below, I find based on my review of the record in this case clear and convincing evidence that FDF would have terminated Mr. Dwyer absent the protected disclosure described in section II.A above. My conclusion is based on compelling evidence that FDF's action was motivated by its finding that Mr. Dwyer violated two of the "Category A" rules of conduct governing FDF employees, violations that are considered "extremely serious misconduct." Respondent's Exhibit 24. The company's procedures for employee discipline define a "Category A Rule" as one "that, when not followed, may result in immediate discharge without oral reminder, written reminder, or decision-making leave." Respondent's Exhibit 21.(2) In Mr. Dwyer's case, the two violations at issue were "Willful hampering or interfering with work or production" and "Insubordination, including failure to carry out definite instructions or assignments." Respondent's Exhibit 2.

On October 6, 1997, Mr. Dwyer returned to work from medical leave. He had with him a note from his doctor dated October 3, 1997, stating that he could "return to work Monday 10/6/97, with light duty work. He cannot climb or lift anything over 10 lbs for the next two 2 wks." Respondent's Exhibit 13. Based on this restriction, FDF manager Jean West assigned Mr. Dwyer to work as a "porter," i.e. performing routine cleaning duties. Tr. at 516. According to Ms. West, this job did not require climbing, and that because Mr. Dwyer could control how much he lifted he would not have to lift over 10 pounds. Id. Mr. Dwyer refused to accept this assignment, telling Ms. West "that he was a pipefitter and that he was not a porter," id., and that he "had a walking restriction and . . . could not perform as a porter." Tr. at 21; see also Tr. at 370. At the hearing, Ms. West described her reaction.

I was giving him a direct assignment, which I had the power in [Industrial Relations] to do and did it frequently for other employees. And when he told me that he did not want to be a porter, along with some of the other things that Mel [Karnes] had brought to my attention, I thought at this point it might be best to suspend Mr. Dwyer. And he was very hostile. He was being very hostile, and I just needed to get him out of there at that point.

Tr. at 518-19. Mr. Karnes described his discussion with Ms. West leading to Mr. Dwyer's suspension.

At the time we stepped outside. I told Jean I hadn't had the time to look into a little bit more of Mr. Dwyer's past with other supervisors and told her that there was a definite pattern here to avoiding work. And we both decided at that time to put him under suspension to allow us time or allow me time to finish the investigation.

Tr. at 370-71. Mr. Karnes testified that he "went back and reviewed all the records, training records, time sheets, all the computer printouts that had anything attached with [Mr. Dwyer's] name, tracked down his supervisor[s]" and "went back and interviewed each one of them." He "talked to craft and talked to other rad techs and other safety individuals who had had contact with him." Based on the information he gathered, Mr. Karnes concluded "it was very obvious that [Mr. Dwyer] was avoiding certain types of training that he knew would keep him out of certain jobs in certain areas." Tr. at 371. While Mr. Dwyer's avoidance of training appeared to be Mr. Karnes' primary concern, he also found the following to be significant:

- "His constant visits to the medical department after jobs were assigned in the morning. He would go to the medical department. That was one of the traits; coming up with mysterious injuries, bleeding fingers, things of that nature. That was obvious."
- "The medical restrictions. Depending on who he worked for at the time, he would tell the supervisor he was under medical restriction where he couldn't do the work that they had for him."
- "The time spent in the restroom; a lot of the craft were complaining that they would get a job assignment and he'd go to the restroom, and he just happened to come out after the job and

everything was done in time to walk back to the shop with them."

- "Mr. Dwyer was quite famous, quite notorious for taking long times to dress out so that the crew who went in to do the work would be returning and, well, there was no sense of him going in, so he just returned with them."

Tr. at 372-73.

In addition to the information turned up by Mr. Karnes, Tr. at 23, Ms. West testified about her own observations of Mr. Dwyer on several occasions.

On one occasion -- on a couple of occasions you parked near me in the parking lot. We had to be here at 6:00. You would get here about quarter till or 10 till 6.

On a couple of occasions, you parked near me. I saw you get out of your vehicle, walk from your side of the car over to the passenger side, pick your crutches up, walk to the turnstile without the use of the crutches. And then, at the turnstile, you would put them under your arm and then proceed to limp.

Then, when you were assigned in the laundry, I saw you several times -- even though I was not your supervisor, but I was in that same area, I saw you, along with some of my other employees, walk around in the laundry without the assistance of crutches.

You would put them at the back of the building when you had to go over to the respirator side. You would . . . walk out of the building without the crutches without a limp.

You would go up at lunch time or break time up the hallway. I would stand in the back of the building and watch you walk up the hallway. You didn't limp or use the crutches.

Tr. at 24-25.

It is also clear, for several reasons, that FDF has not trumped up false or flimsy charges of insubordination or avoiding work as a pretext for terminating Mr. Dwyer in retaliation for protected conduct. First, the demeanor of the testimony of both Ms. West and Mr. Karnes convinced me that their motivation for terminating Mr. Dwyer was sincere--that he had been insubordinate and had a history of avoiding work.

Moreover, other hearing testimony and documentary evidence strongly supports the conclusion that Mr. Dwyer was in fact insubordinate and routinely tried to avoid work. As to the allegation of insubordination, Mr. Dwyer does not dispute that he refused to accept the work he was assigned on October 6, 1997. Instead, he claims that medical restrictions did not permit his to perform any job that required him to be on his feet, though the doctor's note he brought to work that day clearly contradicts this claim. In addition, the record is replete with testimony of Mr. Dwyer's co-workers and supervisors supporting the allegation that Mr. Dwyer had a pattern of avoiding work. See, e.g., Tr. at 69, 168, 425, 428-30, 442-43, 452-53, 484. While recounting all the testimony would extend the length of this decision considerably, the following excerpts capture the flavor of the opinions expressed, almost universally, at the hearing.

- "I believe the general consensus was you was a slacker and didn't want to pull your own weight." Tr. at 161 (testimony of co-worker).
- One of Mr. Dwyer's supervisors was reluctant to express his opinion. "It's kind of hard for me, because he's out of my local [union]. I don't really want to say anything bad against him." The supervisor continued,

I never had a good day with him, when I was his supervisor, not one good day with him. Every -- excuse me, folks. I just don't talk this way about people. But never had a good day. That's about all I could say.

. . . .

I had trouble with the folks working with him, because once they go on the job, they couldn't find him. You know, he'd be there with them, go to the job briefing whatever, then, from there, the guys would not see him, you know.

Tr. at 52-53.

· Another of Mr. Dwyer's co-workers summed up his opinion as follows, addressing Mr. Dwyer directly:

Well, I've done everything from flip hamburgers from 16 years old to working at General Motors and coming out here, and in my estimation, I've never seen anybody as sorry as what you were.

- . . .
- . . [Y]ou wanted everybody but yourself to do the work. You sit there and watched us, laughed at us while we worked, and sit there and had that stinking grin on your face. You know, you worked harder to get out of work than you did to do it. You made up excuses why you couldn't do it. It made me sick, to tell you the truth.

Tr. at 110.

Finally, there is both documentary evidence and hearing testimony supporting the opinion expressed by Mr. Karnes and Ms. West that Mr. Dwyer repeatedly attempted to avoid obtaining the training necessary to perform his job. See, e.g., Respondent's Exhibit 25 (training class attendance rosters); Tr. at 181-88 (testimony of training instructor).

I therefore conclude that the primary motivating factor behind the decision of Mr. Karnes and Ms. West to terminate Mr. Dwyer was their opinion that he had been insubordinate and had a history of work avoidance. Moreover, I am convinced that this factor, by itself, would have resulted in Mr. Dwyer's termination, i.e. would have occurred in the absence of Mr. Dwyer's disclosure that I found above to be protected under Part 708. Both Mr. Karnes and Ms. West testified credibly that, not taking into account the safety-related concerns raised by Mr. Dwyer, they would have nonetheless decided to terminate him based on the insubordination and avoidance of work described above. Tr. at 375 (testimony of Mr. Karnes that "10 percent, 20 percent maximum" of Mr. Dwyer's work avoidance due to his safety related concerns); Tr. at 376, 528. Bolstering this testimony is evidence that, in a five year period ending in 1999, sixteen FDF employees, including Mr. Dwyer, were terminated for committing Category A violations, in most cases based on only one violation. Respondent's Exhibit 21. Clearly, the finding of two Category A violations in this case would have led Mr. Karnes and Ms. West to terminate Mr. Dwyer absent the one instance in which Mr. Dwyer engaged in protected activity. In sum, I find that FDF has met its burden to "prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure . . . ." 10 C.F.R. § 708.9(d).

IV. Conclusion

As set forth above, I have found that the complainant has met his burden of proof of establishing by a preponderance of the evidence that he made a disclosure protected under 10 C.F.R. Part 708. I also have determined that the complainant's disclosure was a contributing factor in his termination. However, I found that FDF has proven by clear and convincing evidence that it would have terminated the complainant absent his disclosures. Accordingly, I conclude that the complainant has failed to establish the existence of any violations of the DOE's Contractor Employee Protection Program for which relief is warranted.

It Is Therefore Ordered That:

(1) The request for relief filed by Thomas Dwyer under 10 C.F.R. Part 708 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 receipt of the decision.

Steven J. Goering

Staff Attorney

Office of Hearings and Appeals

May 2, 2000

(1)This decision applies section 708.5 as it existed prior to the revisions of April 15, 1999. Linda D. Gass, 27 DOE ¶ 87,525 at 89,141 (1999) (“drafters of the revisions to Part 708 did not intend to apply the expansion in scope of 10 C.F.R. § 708.5 to cases pending on April 15, 1999").

(2)Thus, although Mr. Dwyer has repeatedly complained that his violations were never documented or brought to his attention, see, e.g., Post-Hearing Brief of Complainant at 2, the company’s employee discipline procedures clearly do not require such a warning. Moreover, in grievance reports he filed as early as May 1996, Mr. Dwyer notes that he was warned of violations of company rules, pointing to these warnings as evidence of harassment. FEMP Grievance Report Nos. A7450, A7452.