

Case No. VBH-0011

December 22, 1999

DECISION AND ORDER OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Diane E. Meier

Date of Filing: April 16, 1999

Case Number: VBH-0011

This Decision involves a complaint filed by Diane E. Meier (Meier or "the complainant") under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Meier is the former employee of a DOE contractor, Lawrence Livermore National Laboratory (LLNL or "the contractor"), and alleges in her complaint that certain reprisals were taken against her, including being the subject of unjustified anger and threats from her supervisor, and ultimately being removed by the contractor from her position on a favored work project, as a result of her participating in an act protected under Part 708. More specifically, Meier alleges that these adverse personnel actions were taken against her in retaliation for disclosing to the contractor her disapproval of the supervisor's improper conduct in assuming supervision of his wife working on the project, in violation of the contractor's personnel rules concerning the supervision of "near relatives." In compensation for these alleged retaliations, the complainant seeks reinstatement, back pay, other unspecified damages, and reasonable attorney's fees. On the basis of the hearing that was conducted and the record before me, I have concluded that Meier is not entitled to relief under 10 C.F.R. Part 708.

I. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy'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 or -leased facilities. 57 Fed. Reg. 7533

(March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. Thus, contractors found to have discriminated against an employee for such a disclosure, or participating in a related proceeding, will be directed by the DOE to provide relief to the complainant.

As initially formulated, the program regulations, codified at 10 C.F.R. Part 708, generally prescribed independent fact-finding by the DOE Office of Inspector General (IG), followed by the issuance of a Report of Inquiry setting forth the IG's findings and recommendations on the merits of the complaint. Thereafter, the complainant could request a hearing before a Hearing Officer assigned by the DOE Office of Hearings and Appeals (OHA), pursuant to which the Hearing Officer rendered an Initial Agency

Decision. However, on March 15, 1999, DOE issued an amended Part 708, effective April 14, 1999, setting forth procedural revisions that “apply prospectively in any complaint proceeding pending on the effective date of this part.” 10 C.F.R. § 708.8; *see* 64 Fed. Reg. 12,862 (March 15, 1999). Under the revised regulations, OHA conducts the investigation of the complaint, if one is requested by the complainant. 10 C.F.R. § 708.22. Similar to the prior regulations, the Director of OHA then appoints a Hearing Officer who conducts a hearing on the record and issues an Initial Agency Decision. 10 C.F.R. §§ 708.28, 708.30. Parties may seek review of an Initial Agency Decision by the filing of an appeal with the Director of OHA, in accordance with section 708.32.

B. The Present Proceeding

(1) Procedural History

On April 22, 1998, Meier filed her complaint under Part 708 with the IG, which accepted jurisdiction in a letter dated June 2, 1998. On April 16, 1999, the complaint was transferred to OHA which immediately assigned an investigator to the case, 10 C.F.R. § 708.22. OHA Case No. VBI-0011. In conducting the investigation of the complaint, the investigator interviewed the complainant and other key individuals, and received pleadings and supporting documents filed on behalf of the individual and contractor. Based upon this information, the investigator issued a Report of Investigation on June 14, 1999.

In the Report of Investigation, the investigator sets forth her findings that the complainant arguably made disclosures protected under Part 708, and assuming a protected disclosure is found, that there is sufficient temporal proximity to the retaliations alleged by the complainant to permit an inference that the disclosure was a contributing factor. The investigator further found that while the contractor claimed that its actions with respect to the complainant were not in retaliation for any protected disclosure, the complainant challenges the contractor’s support for this claim.

Concurrent with the issuance of Report of Investigation, I was appointed as Hearing Officer in this case. 10 C.F.R. § 708.25. After a number of contacts with the parties in the form of written correspondence and conference calls, I conducted a hearing in this proceeding on September 9-10, 1999. The official transcript of that hearing will be cited in this determination as “Tr.”. Meier and LLNL filed respective post-hearing closing arguments on October 29, and November 2, 1999.

(2) Factual Background

The following summary is based upon the hearing testimony, the investigation file and submissions of the parties. Except as indicated, the facts set forth below are uncontroverted.

The complainant, Meier, was first employed by LLNL in September 1992, as a supplemental labor employee at the Washington Operations Office (WASHOP) located in Germantown, Maryland, a satellite office under LLNL’s Fission Energy Systems and Safety Program (FESSP). However, in March 1994, Meier accepted a position as a career LLNL employee working under Thomas Crites (Crites), who in early 1995 became Associate Program Leader (APL) for Environmental Safety and Health (ES&H). In the fall of 1995, the complainant assumed the position of Deputy APL under Crites.

Beginning in 1993, Crites’ wife, Linda Rahm-Crites (Rahm-Crites), also worked at WASHOP. Rahm-Crites was actually employed by an LLNL subcontractor, but worked at WASHOP as a supplemental labor employee performing technical editing and writing on various projects on an hourly rate. Although Rahm-Crites was assigned work as needed by project managers, she ultimately reported to Nancy Swertz, another APL who had overall WASHOP management responsibility. In early 1996, however, Ms. Swertz returned to LLNL’s home office in Livermore, California (Livermore), and under a reorganization, Crites assumed the position as APL in charge of general office management.

FESSP management personnel at Livermore oversee WASHOP, and ultimately determine hiring and firing of all WASHOP personnel as well as organizational structure. Thus, FESSP management was well aware of the potential conflict of interest associated with Rahm-Crites working under her husband, Crites, and was concerned that this arrangement under the reorganization might constitute a violation of LLNL's "near relative" policy. This policy, as described in LLNL's Personnel Policies and Procedures Manual, prohibits employees from working under the supervision of near relatives. During 1996, Shirley Loquist (Loquist), a FESSP administrator responsible for WASHOP staffing matters, examined this matter and determined that there was no violation since Rahm-Crites was not supervised by Crites, and he was not responsible for her assignments, salary or appraisal. Loquist also visited WASHOP and interviewed employees, including the complainant, to ascertain whether there were problems associated with Crites and Rahm-Crites working in the office. At that time, Meier raised no objection to the arrangement, stating only that it was sometimes "awkward." The complainant and Crites had a friendly, supportive relationship in the workplace, and Meier often interacted socially with Crites and Rahm-Crites outside of the workplace.

However, the friendly relationship between Meier and Crites began to deteriorate in August 1997, when both the complainant and Crites took on new work assignments as a result of impending budget restrictions imposed by DOE and consequential changes in WASHOP's project priorities. WASHOP managers anticipated that in fiscal year 1998 (beginning October 1997), DOE would significantly cut defense program projects, previously a leading source of WASHOP funding. It appeared, however, that there would be ample funding for an emerging project administered by WASHOP, the Highly Enriched Uranium (HEU) Transparency Program (HEU Project). Under the HEU Project, DOE provides assistance to Russia in accounting for and disposing of highly enriched uranium. As part of the program, the United States sends monitors to Russia to ensure that highly enriched uranium from nuclear weapons is properly down-blended. Part of WASHOP's mission for DOE under the HEU Project is to design and conduct the training of these monitors. From January 1996 until September 1997, the WASHOP project manager for the HEU Project was Joe Glazer (Glazer).

In August 1997, Meier completed a project assignment that had previously accounted for a major portion of her time, and Glazer agreed to have the complainant assume the position of Training Coordinator for monitor training under the HEU Project. Although Crites, as APL, agreed to the assignment of Meier as Training Coordinator, he expressed reservations since the complainant had no previous training experience. Crites also had reservations about the handling of the HEU Project in general, since during this time frame he had received complaints from the DOE sponsors about Glazer's performance in administering the program. On August 25, 1997, a meeting was held to discuss a proposed HEU Project training plan prepared by a member of Glazer's staff (not Meier). During this meeting, attended by Crites, Meier, Glazer and Rahm-Crites, Crites was caustically critical of the training plan and suggested that his wife, Rahm-Crites, should perhaps rewrite it. Both Meier and Glazer considered it inappropriate for Crites to have suggested using his wife, Rahm-Crites, to perform work on the project. Meier states that following the meeting, she telephoned Loquist to complain about Crites' behavior at the meeting as well as his attempt to insert his wife in the HEU Project. The complainant states that she also expressed these concerns to Crites. Notwithstanding, the complainant herself gave Rahm-Crites work assignments reviewing training modules on the HEU Project during September 1997, and the complainant was instrumental in having Rahm-Crites appointed as editor of the HEU quarterly newsletter.

Continuing to be concerned with Glazer's performance, however, Crites decided in late September 1997 that he would assume the position as Program Manager of the HEU Project in place of Glazer, and relinquish his position as APL in charge of WASHOP. Crites informed the DOE sponsors of this determination and new HEU Project staff assignments in a letter dated September 26, 1997. Most significantly, the letter states that "Linda Rahm-Crites will assume editorship of the quarterly report." Following issuance of the letter, Meier stated her concerns to Crites in a voice mail message that having Rahm-Crites working directly for him created an improper appearance to DOE sponsors and might cause problems for WASHOP. Almost immediately after making the appointment, however, Crites recognized that due to LLNL policy, he could not have his wife working under him and therefore, during the first week of October 1997, he rescinded the appointment and removed Rahm-Crites from the HEU Project.(1)

Beginning in October 1997, Pete Prassinis (Prassinis) assumed the position of Acting APL, replacing Crites as manager and director of WASHOP. Following the removal of Rahm-Crites from the HEU Project, Prassinis became increasingly concerned that there was insufficient work to justify retaining Rahm-Crites as a subcontracted supplemental employee in view of the diminishing work and available budget resources remaining on other WASHOP projects. Prassinis discussed this matter with the complainant, who continued to serve as Deputy APL besides holding the position of HEU Project training coordinator. Prassinis also discussed the matter with WASHOP project managers, the WASHOP office administrator, and ultimately with FESSP management personnel at Livermore, including Loquist, Mark Strauch (Strauch, FESSP Program Leader), and C.K. Chou (Chou, LLNL Associate Director in charge of FESSP). Based upon these discussions, Prassinis determined that Rahm-Crites should be released. Strauch made the decision to release Rahm-Crites on the basis of Prassinis' recommendation, and Chou approved the decision. Prassinis informed Rahm-Crites in mid-October 1997 that she would be laid off effective November 26, 1997.(2) Upon being informed of this determination, Crites attempted to intervene on his wife's behalf, since he believed that sufficient work remained in the office to justify retaining her services, and he did not believe that Prassinis had the authority to remove her. Crites acquiesced in the termination of Rahm-Crites when it became apparent that Prassinis' action was in fact authorized by FESSP management.

Meier maintains that once Crites became aware of the determination to terminate his wife, he became distant and withdrawn in his relations with the complainant and began take retaliatory actions against her. First, the complainant states that in October 1997, Crites informed the complainant that her billable working hours on HEU Project training were being cut to half time. The complainant states that when she complained about this training cutback, Crites reminded her that he had intended to recommend the complainant for the APL position (of ES&H) which he vacated. Meier states that she took this comment as a threat that Crites no longer intended to do so. In November 1997, the complainant states that Crites became enraged over a minor disagreement concerning the graphics to be used on the cover of the HEU Annual Report. In this instance, the complainant claims that Crites yelled at her with his hands raised in clenched fists and stormed out of the office. According to the complainant, these actions by Crites were taken in retaliation against her because Crites held the complainant responsible for the termination of his wife. Meier maintains that on separate occasions in late 1997, she complained about Crites' behavior toward her to Loquist and to Chou.

The complainant states that during January 1998, Crites continued to exert subtle pressure to undermine her position as HEU Project Training Coordinator. According to the complainant, the most egregious example of this occurred on January 30, 1998, when Crites improperly issued an HEU training solicitation letter. At the time the letter was issued, Meier was away in Oak Ridge, Tennessee (Oak Ridge), conducted HEU monitor training with Janie Benton (Benton), the DOE employee responsible for oversight of HEU Project training. The January 30, 1998, letter issued by Crites concerned proposed training on the use of specialized uranium testing equipment, referred to as NDA. Upon seeing the letter after returning from Oak Ridge, the complainant felt strongly that Crites had transgressed proper procedures by not getting approval from Benton to proceed with the NDA training, and the complainant was also disturbed that he had not discussed the matter with her. According to the complainant, Crites refused to discuss the NDA training letter with her in private and she therefore confronted Crites with the matter on February 13, 1998, at the monthly HEU Project staff meeting held to discuss action items. Meier states that Crites again attempted to avoid discussing the NDA training letter, stating that it was not an appropriate agenda item for the staff meeting. The complainant states that when she refused to drop the matter, Crites became enraged and told Meier with a hostile expression on his face that he had not involved her in NDA training since she was not competent to conduct training in this technical area, whereupon the complainant left the meeting.

On February 17, 1998, Meier telephoned Strauch and emotionally voiced her concerns that Crites was out of control and destroying the HEU Project, citing the NDA training letter and their confrontation at the February 13, 1998, meeting as examples. The complainant further claimed that Crites was physically

threatening to her and was retaliating against the complainant for her involvement in having Rahm-Crites terminated. The complainant insisted that Crites be removed from the HEU Project and warned Strauch that if Crites were not removed, she would go to the DOE Inspector General (IG) about the former improper working relationship between Crites and his wife. In response to this phone call, Strauch dispatched a crisis management team from Livermore, including an LLNL psychologist and a personnel specialist, to ascertain the causes of the turmoil in WASHOP and the legitimacy of Meier's charge that Crites had physically threatened her. The next day, on February 18, 1998, Meier had a private meeting with DOE sponsors overseeing the HEU Project, including Edward Mastel (Mastel), HEU Project Director. Mastel states that during that meeting, the complainant expressed her discontent with how the HEU Project was being run by Crites, and stated the operational and staffing changes that she would make if she were placed in charge of the project. At the time, Mastel had no difficulties about the manner in which Crites was running the HEU Project.

The next day, on February 19, 1998, the complainant had a conference call with FESSP management personnel including Chou, Strauch and Loquist, in which she vociferously restated her charges against Crites, claiming that she feared for her personal safety. The complainant again threatened that she would go to the IG if Crites were not removed from the HEU Project. According to Strauch, the complainant also threatened to take the HEU Project to another national laboratory. Strauch indicated that he would get back to the complainant with his decision within a few days.

In the interim, on February 24, 1998, the crisis management team that Strauch had sent to WASHOP issued its report of its findings with regard to the allegations made by Meier, based upon its interviews with staff personnel including those present at the February 13, 1998 meeting. The crisis management team found no basis for the complainant's allegation of "physical threats" by Crites, stating in the report that "[n]one of the individuals interviewed have observed behaviors by [Crites] that they interpreted as threatening toward [Meier]." To the contrary, the report states that "[s]everal individuals have expressed concern for [Meier's] behavior in dealing with these issues." While staff members noted a change in Crites' behavior toward Meier, perhaps attributable to the termination of his wife, "[o]f greater concern to several interviewed is recent behavior by [Meier]" and "[s]everal indicated that they feel she is overreacting to events and on the edge of losing control." At the same time, the report finds that Crites was not sensitive to "people issues."

On February 27, 1998, Strauch telephoned Meier and informed her of his determination that due to "irreconcilable differences" between her and Crites, Strauch had determined to remove Meier from the HEU Project. In a letter to the complainant issued the same day, Strauch explains that the DOE sponsors were generally satisfied with Crites' performance and "there is no significant basis for the removal of [Crites] from this leadership position as you have requested." The letter further notes what Strauch deemed "inappropriate interaction" between Meier and the DOE sponsors, and that the complainant had taken an "unprofessional approach" in conveying her demands to FESSP management. In this regard, the letter states that while any employee is free to go to the IG, "to frame a request for management action in your favor by threatening to go to the IG if not implemented is not a professional way to resolve differences with management." The letter concludes by itemizing a list of expectations regarding the complainant's future conduct, *e.g.* maintaining "civil, courteous and professional interaction" with all staff members. Strauch sent a corresponding letter to Crites informing him of his determination to transfer the complainant from the HEU Project that concludes with a similar list of behavioral expectations.

After receiving Strauch's telephone call, the complainant flew into a rage, based upon the observations of those present. The complainant first went to the personnel office and began copying portions of Rahm-Crites' time cards. Glazer stated that in the process of doing this, Meier upset the personnel secretary to the point of tears and also threatened to "steamroll" him if he got in her way. Meier later apologized to the secretary before packing some of her things and leaving the work site. The complainant never returned to work at WASHOP, but went on medical disability leave, apparently on the basis those prior occurrences had exacerbated a mental condition that prevents her from working. After a year's time, LLNL requested medical documentation of the work restriction from the complainant, which she refused to provide.

Therefore, in a letter to the complainant dated June 18, 1999, LLNL separated Meier from employment based upon her inability to perform the essential functions of her position.

II. Legal Standards Governing This Case

The regulations of the Contractor Employee Protection Program, 10 C.F.R. Part 708, provide in pertinent part that a DOE contractor may not take any adverse action, such as discharge, demotion, coercion or threat, against any employee because the employee “[d]isclosed to . . . the contractor . . . information that the employee in good faith believes evidences-- . . . (iii) Fraud, management, gross waste of funds, or abuse of authority; . . .” 10 C.F.R. § 708.5(a)(1). In the present case, Meier claims in her complaint that adverse personnel actions were taken against her, including threats and physical intimidation by her supervisor, Crites, and being removed from a favored work project by the contractor, as a result of making protected disclosures to Crites and FESSP management personnel. According to the complainant, her protected disclosures concerned, first, Crites improperly assigning his wife to a position on the HEU Project and, second, threatening behavior by Crites in retaliation for the complainant’s involvement in having his wife terminated.

A. The Complainant's Burden

The regulations describe the burdens of proof in a whistleblower proceeding as follows:

The complainant shall have the burden of establishing 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. Once the complainant has met this burden, 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, participation, or refusal.

10 C.F.R. § 708.9(d); see [Ronald Sorri](#), 23 DOE ¶ 87,503 (1993). “Preponderance of the evidence” is proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. See *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (*Hopkins*); 2 McCormick on Evidence § 339 at 439 (4th Ed. 1992). Under this standard, the burden of persuasion is allocated roughly equally between both parties. *Grogan v. Garner*, 111 S. Ct. 654, 659 (1991) (holding that the preponderance standard is presumed applicable in disputes between private parties unless particularly important individual interests or rights are at stake). As a result, Meier has the burden of proving by evidence sufficient to “tilt the scales” in her favor that she made a protected disclosure under Part 708. 10 C.F.R. § 708.5(a). If the complainant does not meet this threshold burden, she has failed to make a *prima facie* case and her claim must therefore be denied. If the complainant meets his burden, she must then prove that the disclosure was a “contributing factor” in the personnel actions taken against her. 10 C.F.R. § 708.9(d); see [Helen Gaidine Oglesbee](#), 24 DOE ¶ 87,507 (1994); [Universities Research Association, Inc.](#), 23 DOE ¶ 87,506 (1993). This standard of proof is similar to the standard adopted in the Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. § 1221(e)(1), and the 1992 amendment to § 210 (now § 211) of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851. In explaining the “contributing factor” test in the WPA, the Senate floor managers, with the approval/concurrence of the legislation’s chief House sponsors, stated: “The words ‘a contributing factor’ . . . mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” 135 Cong. Rec. H747 (daily ed. March 21, 1989) (Explanatory Statement on Senate Amendment-S.20). See *Marano v. Dep’t of Justice*, 2 F.3d 1137 (Fed. Cir. 1993) (applying “contributing factor” test).

B. The Contractor's Burden

If the complainant meets her burden, the burden shifts to the contractor. The contractor must prove by “clear and convincing” evidence that it would have taken the same personnel action(s) against the

complainant absent the protected disclosure(s). "Clear and convincing" evidence is a much more stringent standard; it requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt." *See Hopkins*, 737 F. Supp. at 1204 n.3. Thus, if Meier has established that it is more likely than not that a protected disclosure was a contributing factor in alleged retaliations, LLNL must convince me that it would have taken these actions despite the complainant's disclosure.

III. Analysis

I have carefully reviewed the record in this proceeding, including the testimony of the witnesses at the hearing and supporting documents submitted by the parties. For the reasons set forth below, I have determined that the complainant is not entitled to relief under the provisions of the 10 C.F.R. Part 708. While I find that Meier made protected disclosures, and that the complainant has by inference carried her burden to show that her protected disclosures were a contributing factor in the retaliations which she alleges, the contractor has met its burden to show by clear and convincing evidence that it would have taken the same actions in absence of such protected disclosures.

A. Protected Disclosures

The complainant made disclosures arguably protected under Part 708 first in August and September 1997, when the complainant expressed her disapproval of Crites assigning his wife to perform work on the HEU Project. Tr. at 49-51, 233-34, 476-77. The complainant also made arguably protected disclosures in February 1998, when she voiced a number of concerns to FESSP management in support of her effort to have Crites removed from the HEU Project. As discussed below, I find that while the complainant made protected disclosures in the first instance, in the latter she did not.

I am persuaded that the complainant's objections to Crites attempting to have his wife work on the HEU Project, and later selecting of his wife to the HEU Project then under his supervisory authority, fall within the purview of section 708.5(a)(1). Meier states she telephoned Loquist in August 1997 to complain about Crites, then APL, attempting to have his wife work on the HEU Project training report, and then complained to Crites directly in late September 1997, when Crites became HEU Project Manager and designated his wife as newsletter editor. LLNL concedes that the latter action, when Crites placed his wife under his supervisory authority, constituted a clear violation of their "near relative" policy. Tr. at 334. It is apparent that Meier was not specifically aware of LLNL's "near relative" policy at that time, and therefore did not couch her objection to Crites' actions in those terms. Nonetheless, the record shows that in both instances, Meier expressed her belief reasonably and in good faith that Crites' actions created an appearance of serious impropriety, particularly at a time of impending budget cutbacks on other projects. I am therefore persuaded that Meier's objections amounted to a protected disclosure of "abuse of authority" by Crites, deserving of protection under Part 708.

However, I am not persuaded that Meier made a protected disclosure in February 1998, when she demanded that FESSP management remove Crites from the HEU Project. The complainant's demand was lodged in two telephone discussions with FESSP managers, ensuing an acrimonious exchange between Meier and Crites during an HEU Project staff meeting held on February 13, 1999. During this meeting, Meier confronted Crites about his action in issuing an NDA training letter while she was away conducting HEU monitor training, an action which she perceived to be both a breach of proper protocol with respect to DOE and a transgression of her position as Training Coordinator. Tr. at 155-62.(3) The record persuades me that the NDA training matter and the complainant's claim that Crites had become a physical threat in the workplace were at the heart of the matters raised by Meier to FESSP management, in support of her position that Crites had lost judgment and should be removed from the HEU Project. Tr. at 101. Strauch confirmed that the complainant also charged Crites with nepotism for attempting to assign his wife to the HEU Project in violation of LLNL's "near relative" policy, and further claimed that Crites was retaliating against her for involvement in having his wife laid off. Tr. at 411. It is apparent, however, these latter assertions were designed to lay basis for Meier's ultimatum that if FESSP did not remove Crites, she

would go to the IG. According to the complainant: “I told them I would go [to the IG] unless something was done about [Crites], I had no recourse . . . I was afraid for my safety.” Tr. at 102. Having examined the complainant’s February 1998 statements in context, I do not find that the complainant at that time was making a disclosure protected under Part 708. While Meier referred to Crites’ past misconduct, I find nothing to indicate that Meier was attempting to reveal, reasonably and in good faith, an “abuse of authority” by Crites in February 1998.(4)

Thus I find that the complainant made protected disclosures in August and September 1997, relating to Crites’ improper behavior in attempting to assign his wife a position on the HEU Project. I now turn to whether the complainant has carried her burden to show that these disclosures were a contributing factor in any of the retaliations which she alleges.

B. Contributing Factor

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.” *Ronald Sorri*, 23 DOE at 89,010, citing *McDaid v. Dept. of Hous. and Urban Dev.*, 90 FMSR ¶ 5551 (1990); see also *County v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (*County*). In addition, “temporal proximity” between a protected disclosure and an alleged reprisal is “sufficient as a matter of law to establish the final required element in a prima facie case for retaliatory discharge.” *County*, 886 F. 2d 147, 148 (8th Cir. 1989).

Applying these standards to the present case, I find that there is temporal proximity between Meier’s protected disclosures in August and September 1997, and the subsequent alleged retaliations beginning in October by Crites, and ending in February 1998, when the complainant was removed from the HEU Project.

I therefore find Meier has established a *prima facie* case that her protected disclosures were a contributing factor in the retaliations which she alleges. The burden now shifts to LLNL to prove by clear and convincing evidence that it would have taken the same actions absent her protected disclosures. 10 C.F.R. § 708.9(d).

C. Clear and Convincing Evidence

The predominant portion of the retaliations alleged by Meier involve actions taken against her by Crites. Only the final alleged retaliation, the removal of Meier from the HEU Project, was an adverse personnel action taken against the complainant by the contractor itself. My consideration of the alleged retaliations is bifurcated in this manner below.

(1) Alleged Retaliations by Crites

The complainant asserts that Crites took a number of retaliations against her, including reducing her work as Training Coordinator on the HEU Project to half time, and then threatening and directing anger toward her. I emphasize, however, that the complainant does not contend that any of these alleged retaliations were specifically in response to her protected disclosure, *viz.* her stated disapproval of Crites’ decision to place Rahm-Crites on the HEU Project, particularly after he had become HEU Project Manager.(5) Instead, Meier claims that the alleged reprisals began weeks later when Crites learned that Prassinos had given notice to Rahm-Crites that she would be terminated due to lack of funding. According to Meier, Crites retaliated against her because he blamed her for the decision to terminate his wife. Tr. at 62, 592. However, in moving to the complainant’s highly subjective belief that Crites blamed her, in particular, I observe that there is no direct connection between the substance of the complainant’s protected disclosure and the alleged basis for the purported retaliations by Crites.(6)

Although the complainant apparently believes that Crites blamed her in particular for his wife's dismissal from WASHOP, it is not clear to me that this was truly the case. Crites admits that he resented the dismissal of his wife because he believed that there were ample work and funding remaining on projects apart from the HEU Project to justify her retention. Tr. at 472, 483. When Crites questioned Prassinos, then Acting APL, on the decision to release Rahm-Crites, Prassinos told him that he had discussed the matter with a number of individuals besides the complainant, including the WASHOP office administrator, WASHOP project managers, and FESSP management personnel at Livermore, who ultimately made the decision. Tr. at 482-83, 587-88 (Prassinos). Thus, I find Crites believable when he asserted during his testimony that he did not blame Meier for his wife being laid off, because the complainant had no authority to make that determination. Tr. at 530-31.(7) The complainant asserts that the reason she believes that Crites blamed her is a statement he made during a meeting in late October 1997, when Crites informed Meier that her training hours were to be cut to half time (discussed below). Meier states that when she challenged this decision, Crites responded by stating among other things that "no one was protecting [Rahm-Crites]." Tr. at 62. While Crites confirmed that he may have made the statement, Tr. at 496, I find no basis to assume that he was referring specifically to the complainant. Instead, under the circumstances presented, it is obvious that by use of the phrase "no one" Crites was referring to all of the individuals who had input regarding the determination to release his wife.

In any event, I find insufficient factual support in the record for Meier's claims of retaliation by Crites. The first matter she raises is that Crites informed her in late October 1997 that her billable hours for HEU Project training were being cut to half time. Tr. at 61-62. Crites explained, however, that the determination to cut training to half time was based upon fiscal year 1998 budget restrictions and specific instructions received from the DOE sponsor, specifically Mastel, HEU Project Director. Tr. 533-34. Mastel corroborated that for fiscal year 1998, HEU Project training was allocated only a half time budget, testifying that DOE envisioned that over the year, training should comprise "no more than six months." Tr. at 206. The complainant claims that another retaliation came at the very same meeting, when Crites made a statement to the effect that he "had been" intending to recommend her to Chou (FESSP Director) for an APL position. Meier states that "I took that to mean that now he wouldn't." Tr. at 63.(8) While it is difficult to assess whether Crites intended this statement to be a threat not to recommend the complainant, Chou verified in his testimony that at the ensuing management meeting in October 1997, Crites did in fact recommend Meier for the APL position. Tr. at 577-78.

Next, Meier claims that Crites retaliated against her in November 1997, when Crites became enraged over a minor disagreement concerning the graphics to be used on the cover of the HEU Annual Report. In this instance, the complainant claims that Crites yelled at her with his hands raised in clenched fists and stormed out of the room. Tr. at 65-66. Crites testified that he recalls the graphics matter as only a minor incident, and maintains that he never got angry. Tr. at 499-500. Since there were apparently no witnesses to the incident, I have no means to gauge the veracity of these conflicting accounts. Notwithstanding, the record provides little support for the complainant's logical leap that Crites' behavior could only have been because he blamed her for his wife's dismissal. Other WASHOP workers testified that during this time period, Crites was under strain in his position as HEU Project Manager, apparently driven to achieve project deliverables, and was many times abrupt and insensitive to his employees. Tr. at 289-90, 602, 621.(9) However, there was no perception that Crites was more harsh to the complainant. Tr. at 281, 621.

Finally, Meier's claims that the most severe retaliation by Crites came at the February 13, 1998, meeting when according to the complainant, Crites physically threatened her after she confronted him about the NDA training matter.(10) I consider this matter below in addressing the alleged retaliation by the contractor, since it is intertwined with LLNL's determination to remove Meier from the HEU Project.

(2) Alleged Retaliation by LLNL

The complainant finally alleges that, as a result of her disclosures regarding Crites' nepotism, LLNL retaliated against her by removing her from the HEU Project in February 1998.(11) I find, however, that the contractor has clearly and convincingly shown that this personnel action was completely justifiable,

and in no way related to the complainant's protected disclosures.

As indicated in the factual summary, Meier had telephone conversations with FESSP management on two occasions in February 1998, in which she demanding that Crites be removed as HEU Project Manager since Crites had physically threatened her, and threatened that she would go to the IG if Crites were not removed. Tr. at 95-96, 102.(12) Strauch dispatched a crisis management team to investigate Meier's claim that she had been physically threatened by Crites when she confronted him during the February 13, 1998, meeting. Based upon interviews with staff members including those present at the meeting, the crisis team determined in its report that there was no foundation for the complainant's claim of physical threats by Crites, but it was instead the complainant's behavior that caused the difficulty and was of greater concern to staff members. At the hearing, Dave Thomas (Thomas), a senior engineer who was present at the meeting, confirmed the findings of the crisis team. Thomas testified that Meier refused to allow Crites to conduct the meeting on the HEU Project agenda items, but continued to press him for an explanation of the NDA training letter while ignoring the urging from others present that she drop the subject. Tr. at 639-42. Thomas stated that while the complainant was clearly angry, Crites did not appear to be angry but gave her "very matter of fact, low key answers." Tr. at 643.(13) When Crites finally responded by telling the complainant that she was technically incompetent in the matter of NDA training, Thomas stated that Meier got up and left while Crites continued the meeting. Tr. at 642-43. Glazer and Ken Young similarly testified they had never observed any behavior by Crites that they considered physically threatening. Tr. at 283, 626.

Thus, while there was no basis for Meier's claim of a physical threat, it was clear on the basis of the complainant's demand for Crites' dismissal under threat of going to the IG, that she and Crites should no longer work together on the same project. Since FESSP and the DOE sponsor were satisfied with Crites' management of the HEU Project, I deem the removal of Meier from the project an appropriate response. I find absolutely nothing in the record which would lead me to conclude that LLNL's decision to remove Meier from the HEU Project was in any way related to Meier's disclosure in September 1997 about Crites' wife, a matter that FESSP deemed rectified months earlier when Rahm-Crites was removed from the HEU Project and subsequently released from WASHOP due to budget restraints. Instead, I find legitimacy for LLNL's charge in Strauch's February 27, 1998, letter of "inappropriate interaction" by the complainant with the DOE project sponsors(14), lending additional support for LLNL's determination.

IV. Conclusion

As set forth above, I have determined that the complainant has failed to establish the existence of a violation on the part of LLNL for which she may be accorded relief under DOE's Contractor Employee Protection Program, 10 C.F.R. Part 708. I find that the complainant made protected disclosures under Part 708, and that such disclosures were a contributing factor in the alleged retaliations taken against her. Notwithstanding, I find that to the extent that any of the actions raised by the complainant might be deemed to be truly retaliatory in nature, the contractor has shown by clear and convincing evidence that it would have taken the same actions even in the absence of the protected disclosures. Accordingly, I will deny Meier's request for relief under 10 C.F.R. Part 708.

It Is Therefore Ordered That:

- (1) The complaint filed by Diane E. Meier on April 22, 1998, under 10 C.F.R. Part 708 is hereby denied.
- (2) This Initial Agency Decision will become the Final Decision of the Department of Energy denying the complaint unless within fifteen days of its receipt, a party files a Notice of Appeal requesting review by the Director of the Office of Hearings and Appeals, in accordance 10 C.F.R. § 708.32.

Fred L. Brown

Hearing Officer

Office of Hearings and Appeals

Date: December 22, 1999

(1)By this time, FESSP management at Livermore had received a copy of the September 26, 1997, letter and determined that Rahm-Crites could not be allowed to remain on the HEU Project since it was a clear violation of LLNL's "near relative" policy. Mark Strauch, FESSP Program Leader, states that he instructed Loquist that the assignment could not be allowed. However, Loquist apparently issued no formal directive to Crites since Crites had already rescinded the appointment of his wife on his own initiative.

(2)Rahm-Crites was allowed to stay temporarily in order to work on certain assigned projects that were yet uncompleted on her scheduled separation date, and thus Rahm-Crites did not actually leave WASHOP until early December 1997.

(3)At the hearing, the complainant testified that her primary concern was that Crites should have cleared the NDA training letter with Janie Benton, DOE training coordinator, and she did not consider the training letter as a personal affront to her. Tr. at 155. However, Dave Thomas, an engineer who was present at the February 13, 1998, meeting testified that it was the complainant's unrelenting insistence on an explanation of why Crites had not involved her in NDA training that led to the verbal exchange. Tr. at 642. The account given by Thomas is consistent with testimony of Crites and the complainant that the confrontation finally ended, and Meier abruptly left the meeting, after Crites told her that the reason he had not involved her in NDA training was that she is not technically competent in that area. Tr. at 93, 509.

(4)Clearly, Crites' decision to issue the NDA training letter did not constitute an "abuse of authority." Crites explained during his testimony that he had been directed by the DOE, specifically, Edward Mastel (Mastel), HEU Project Director, to initiate NDA training. Tr. at 504. Mastel corroborated this testimony and stated the he was remiss in not having first run the matter of NDA training by Janie Benton, DOE training coordinator on his staff. Tr. at 196, 199. Nor do I find that the complainant made statements that might possibly constitute a protected disclosure of "mismanagement." 10 C.F.R. § 708.5(a)(1)(iii). The complainant disagreed with Crites' handling of the HEU Project, believing that Crites "had lost all judgment and sense of proportion." Tr. at 101. However, this general disagreement with management decisions does not rise to a protected disclosure of "mismanagement." See, e.g., [Roger H. Hardwick](#), Case No. VWA-0032 (July 6, 1999, [affirmed](#), Case No. VBA- 0032 (November 26, 1999). Moreover, I note that FESSP management and the DOE sponsors were pleased with Crites' handling of the HEU Project. Mastel, DOE HEU Project Director, testified with regard to his performance: "I enjoyed it. He was taking responsibilities for actions. In terms of milestones being met and reported against, we saw marked improvement since [Crites] came on board and was doing the work." Tr. at 211.

(5)Meier states that she first talked with Crites about his wife in September 1997, asking Crites about his plans concerning his wife in view of the budget cuts expected beginning October 1997 (fiscal year 1998). Tr. at 51-52. Meier states in her complaint, however, that during this time, she herself had Rahm-Crites appointed as editor of the HEU newsletter, prior to the time that Crites took over as HEU Project Manager. Declaration of Diane E. Meier, ¶ 23. Meier later criticized Crites' appointment of Rahm-Crites in the September 26, 1997 letter. However, Crites apparently realized the error of this appointment, which he himself had disclosed by issuance of the letter, and rescinded the appointment on his own initiative without intervention by FESSP management. Tr. at 476.

(6)It might be argued that the termination of Rahm-Crites was inevitable once she was removed from the HEU Project. Nonetheless, I draw a distinction between the determination to remove Rahm-Crites from the HEU Project, made by Crites, and the decision to terminate her, made by FESSP management upon the recommendation of Prassinos. Both Prassinos and Strauch testified that the decision to terminate Rahm-Crites was a budgetary matter, and not related to the past "near relative" policy violation which in their estimation had been rectified by removal of Rahm-Crites from the HEU Project. Tr. at 338, 607. Rahm-Crites had been employed at WASHOP since 1993, working on various projects. However, the 1998 fiscal

year budget was barely adequate to cover full time LLNL career employees at WASHOP, and a subcontracted supplemental labor employee such as Rahm-Crites was expendable.

(7)Crites maintains that the conflicts he had with Meier had purely to do with her handling of HEU Project training matters, such as budget overruns. Tr. at 490, 530, 542-43. Ken Young, a WASHOP project manager, also testified that in his perception based upon his conversations with the complainant, the conflicts between Crites and Meier stemmed from training matters. Tr. at 622.

(8)Interestingly, Meier stated that she didn't really want the position, Tr. at 63, and told others that she never expected to get the position because of sexism. Tr. at 137, 578. Notwithstanding, the complainant considered it a retaliation when she thought that Crites would not recommend her and, according to Glazer, she was upset when she did not in fact get the position when announced in December 1997. Tr. at 288-89.

(9)Strauch, FESSP Program Leader, testified that although Crites was successful as HEU Project Manager, he characterized Crites as "a hard-nosed manager that wants to deliver results for the customer, and the human side of him is not as warm and fuzzy as someone might like for a manager." Tr. at 360.

(10)I also find no appearance of retaliation in the issuance of the NDA training solicitation by Crites prior to reviewing the matter with the complainant. As noted above, Crites was directed to initiate NDA training by the DOE sponsor while the complainant was away conducting monitor training in Oak Ridge. *See* note 4, *supra*.

(11)I note that the removal of Meier from the HEU Project did not constitute termination or demotion, but was an adverse personnel action only to the extent that it reflected unfavorably upon the complainant, and she would no longer be able to work on this favored project.

(12)In Meier's view, Crites' past nepotism was just cause for his removal, under threat to initiate an IG investigation if necessary, despite the fact the matter had been resolved months earlier. According to the complainant, "It doesn't matter. He still did it." Tr. at 165. The complainant chose to ignore cautions from co-workers that her gambit to force the removal of Crites by ultimatum might not work out in her favor. Tr. at 293-94 (Glazer), 625-26 (Young).

(13)The complainant concedes that Crites did not raise his voice, but claims that there was "rage in his face." Tr. at 93, 162-63.

(14)On February 18, 1998, the day after the complainant's initial phone call to FESSP demanding the removal of Crites, the complainant admits that she met with the DOE sponsors and informed them that Crites would likely not be continuing as HEU Project Manager. Tr. at 99. The complainant maintained that she never mentioned herself as possible replacement manager or as APL in charge WASHOP, but only suggested that Glazer resume the position as HEU Project Manager. Tr. at 100. However, Mastel, the DOE HEU Project Director, recounted that during the meeting, the complainant stated how she would administer the HEU Project and change the staffing structure "if she were placed in charge or she was able to take over as the project leader." Tr. at 203. According to Mastel, "[the complainant] was trying to get our support to put her into a position as the project manager for the WASHOPS group." Tr. at 210. Consistent with Mastel's testimony, Glazer testified that Meier told him in mid-February 1998 that "she was going to take over, you know, the position that [Crites] held, head of the office . . . [and] she was going to put me back down as program manager." Tr. at 292.