May 20, 2003

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Steven F. Collier

Date of Filing: July 1, 2002

Case Number: VBH-0084

This Decision involves a whistleblower complaint that Steven F. Collier filed under the Department of Energy's (DOE) Contractor Employee Protection Program. From December 1994 through February 2002, Mr. Collier was employed by Coleman Research Corporation (CRC), a subcontractor of Fluor Fernald, Inc. (FFI), at the DOE's Fernald, Ohio site. Mr. Collier alleges that CRC and FFI management retaliated against him for activity protected under the DOE Contractor Employee Protection Program.

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

On March 26, 2002, Mr. Collier filed a complaint with the DOE's Fernald Environmental Management Project. The Fernald project forwarded the complaint to the DOE's Ohio Field Office (DOE/OFO). After accepting jurisdiction of the complaint, DOE/OFO referred the complaint to the DOE's Office of Hearings and Appeals (OHA) for a hearing without an investigation. Letter from Anthony C. Eitreim, Chief

Counsel, DOE/OFO, to George B. Breznay, Director, OHA (July 1, 2002). On July 2, 2002, the OHA Director appointed me as the hearing officer in this matter. I convened a hearing held at Cincinnati, Ohio, on September 26-27, 2002, which was continued by telephone on October 3, 2002. The OHA received post-hearing submissions from the parties and closed the record on October 22, 2002.

II. Analysis

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29. 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 shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal." 10 C.F.R. § 708.29. Accordingly, in the present case, if Mr. Collier establishes that a protected disclosure, participation, or refusal was a factor contributing to a decision to deny him training or to his termination, CRC and FFI must convince me that they would have taken the actions even if Mr. Collier had not engaged in any activity protected under Part 708.

After considering the record established in the investigation by the parties' submissions and the testimony presented at the hearing, for the reasons stated below I have assumed that all fourteen of the disclosures of safety concerns that Mr. Collier alleges he made between October 10, 2000, and February 7, 2002, constitute protected activity under Part 708. I have concluded that Mr. Colllier has met the burden of proving by a preponderance of the evidence that many of these disclosures contributed to his termination, and I have assumed, for analytical purposes, that nearly all of the remaining disclosures were contributing factors as well. However, I find that CRC has shown by clear and convincing evidence that it would have taken the same action absent Mr. Collier's protected disclosures.

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

Mr. Collier worked for CRC as a "Senior Operations Specialist," one of five employed at the Fernald site. With a background in nuclear safety, Mr. Collier was hired in December 1994 to review the conduct of operations at Fernald. His responsibilities included identifying and reporting operations or conditions that were not in compliance with the many statutes, regulations and policies that govern the activities conducted at Fernald. *See, e.g.*, Transcript of Hearing (Tr.) at 56-57.

Mr. Collier alleges that he engaged in fourteen discrete activities that are protected under Part 708. The Part 708 regulations states that the following conduct by an contractor employee is protected from reprisal by his employer:

(a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your employer, or any higher tier contractor, information that you reasonably believe reveals--

(1) A substantial violation of a law, rule, or regulation;

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

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

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

(c) Subject to § 708.7 of this subpart, refusing to participate in an activity, policy, or practice if you believe participation would --

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

(2) Cause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public.

10 C.F.R. § 708.5.

Mr. Collier alleges that he made fourteen disclosures between October 10, 2000, and February 7, 2002, that meet the criteria of the above regulation. Although he states that most of the disclosures related to subsections (a)(1), (a)(2), and (a)(3) of section 708.5, a few related to only one or two of those subsections. *See* Complainant's "Summary Table of Details of Protected Activities" (submitted as an attachment to his August 21, 2002 cover letter to the Hearing Officer) (Summary Table). He does not allege that he engaged in any activities protected from reprisal by subsections (b) or (c). Solely for the purpose of analyzing Mr. Collier's complaint, I will assume that he made all fourteen disclosures "to a DOE official, . . . [his] employer, or any higher tier contractor," and that each disclosure contained information that he reasonably believed revealed "[a] substantial violation of a law, rule, or regulation; [a] substantial and specific danger to employees or to public health or safety; or [f]raud, gross mismanagement, gross waste of funds, or abuse of authority." 10 C.F.R.§ 708.5(a). Because no report of investigation was produced in this proceeding, it is important to catalog the fourteen disclosures in this document. After describing each of the disclosures below, I will describe and analyze each of the acts of retaliation that Mr. Collier alleges in his complaint, and from that discussion reach a conclusion as to the relative merits of the positions of the parties.

Mr. Collier's fourteen disclosures can be grouped into six categories, according to the substance of the information revealed in them. I will describe the disclosures in these groups.

1. Waste Pits Remedial Action Project

On October 10, 2000, Mr. Collier delivered a written memorandum to William Previty, the CRC manager at the Fernald site, with a six-page analysis attached. This document appears in the record as Complainant's Exhibit 1, and appears on Mr. Collier's Summary Table as Protected Activity 1. The document catalogs and analyzes "events and occurrences" of dangerous or potentially dangerous activities that occurred from September 1999 through September 2000 at the Waste Pits Remedial Action Project (WPRAP). All the events and occurrences he reviewed had been reported and stored in appropriate databases, which were the sources of the information Mr. Collier presented in his memorandum and analysis. The analysis breaks down the events and occurrences by type, e.g., radioactive contamination, poor design, human error, chemical leak, and points out that the frequency of the events and occurrences after the WPRAP temporarily ceased operation in March 2000 was about the same as while it was operating.

Mr. Collier made oral disclosures regarding his concerns about nuclear safety at the WPRAP as well. On April 26, 2001, he spoke with Brinley Varchol, Fluor Fernald's Quality Assurance Manager at Fernald. This conversation is identified on his Summary Table as Protected Activity 3. In his complaint, Mr. Collier contends that he raised "significant safety and health and environmental hazards brought on by the operations at the WPRAP project, and in particular, my belief that the central source of the problem was the knowing and willful violation of nuclear safety rules by the WPRAP subcontractor project manager." Complainant's Letter to Hearing Officer, August 21, 2002 (August 21 Submission) at 5. At the hearing, Mr. Varchol recalled that the conversation concerned safety issues, Tr. at 155, and "the way the IT [International Technologies Group] manager was managing the work, and that some of the issues that you were bringing to his attention were not being taken seriously enough." Tr. at 154. Mr. Varchol must have felt the concerns were significant, because he spoke to Dennis Carr, FFI's Senior Project Director, about them, and reported the result of that conversation back to Mr. Collier. Tr. at 156. Mr. Collier contends that he raised similar concerns, though in less detail, when he met with Randy Morgan, a CRC vice president, on May 30, 2001. August 21 Submission at 6. This conversation is identified on Mr. Collier's Summary Table as Protected Activity 4. Mr. Morgan testified that he recalled that Mr. Collier had discussed safety issues with him concerning the WPRAP project, but was not clear about the details. Tr. at 276.

In a 66-page letter dated June 5, 2001, Mr. Collier informed Keith Christopher, the director of the DOE's Office of Price-Anderson Enforcement, about his belief that knowing and willful violations of nuclear safety rules were occurring at the WPRAP project. This document appears in the record as Complainant's Exhibit 2, and appears on Mr. Collier's Summary Table as Protected Activity 5. In his letter, Mr. Collier alleged that the IT manager of the project knowingly and willingly, through acts and omissions, violated DOE regulations "to the detriment of operator safety, and possibly public and environmental safety," and

requested that the DOE conduct an investigation of the violations he alleged. Complainant's Exhibit (Ex.) 2 at 1. Mr. Collier then went on to recount in great detail the history of the WPRAP project, listing reported and unreported safety problems, and explaining his role in providing oversight of the conduct of operations, his contention that the IT manager largely ignored the concerns he raised, and his ultimate removal from the project.

On the basis of Mr. Collier's letter, Mr. Christopher directed that an investigation be conducted of the WPRAP program. *See* Complainant's Ex. 3c. Dennis Riley and Tulanda Brown, DOE Price-Anderson Act Coordinators for the Fernald site and for the Ohio Operations Office, respectively, conducted a review of the issues Mr. Collier raised, and in September 2001 produced a report of their activities and conclusions. Mr. Christopher forwarded a copy of the report to Mr. Collier. Mr. Collier took issue with the results of the investigation, and on October 26, 2001, wrote again to Mr. Christopher, to advise him that the investigation was flawed. This letter appears in the record as Complainant's Exhibit 3d, and appears on his Summary Table as Protected Activity 12. In his letter, Mr. Collier expressed his disappointment that the review team felt constrained to investigate his issues solely in the limited context of the Price-Anderson Act, and reiterated that significant problems, including nuclear safety problems, had riddled the project.

2. Respirator Issuance Program

On April 26, 2001, Mr. Collier sent by e-mail to James Barber, a Duratek employee at Fernald, a review he had prepared concerning the procedures for issuing respirators to workers at the Fernald site. The review document appears in the record as Complainant's Exhibit 8b, and appears on Mr. Collier's Summary Table as Protected Activity 2. This review contained comments and recommendations for improving or correcting two distinct documents in use at the site: the Respirator Issuance Procedure (SH-0017) and the Respirator Protection Requirements Manual (RM-0007). Mr. Barber was responsible for the most recent revision of SH-0017, and after reviewing the comments told Mr. Collier that his "comments and questions [pertaining to that document] were unfounded based on the fact [Mr. Collier] hadn't had the training" in the area of respirator issuance. Tr. at 114 (testimony of Mr. Barber). However, because Mr. Barber was not the subject matter expert for RM-0007, he asked Mr. Collier's permission to forward the review to those who were responsible for the regulatory requirements that RM-0007 set in place. Mr. Collier assented, and Mr. Barber sent Mr. Collier's review to Tony Renk and Bob Cullison, and discussed the review orally with Walt Mingle, the subject matter expert for respiratory protection. Tr. at 117-19, 147. These gentlemen all appear to be FFI employees. In time, William Previty and Ronald Houchins, CRC employees, as well as other FFI employees became aware that Mr. Collier had prepared and released this review. Finally, Mr. Collier produced a contemporaneous diary entry that indicates that on July 25, 2001, he spoke with Dennis Riley of the DOE about his concerns regarding the respirator issuance program. Complainant's Ex. 12 at 50. This conversation appears on his Summary Table as Protected Activity 8.

3. Nuclear Project Startup

Mr. Collier was a member of a sub-team formed to provide information to FFI's Integrated Task Team (Team) regarding the proposed reduction or elimination of the Standard Startup Review (SSR) program, which verified the readiness to start or restart nuclear projects at the Fernald site. After the sub-team provided its response to the Team, Mr. Collier prepared and, on June 26, 2001, delivered to the Team a package of materials that amounted to a dissenting opinion concerning the SSR process. The package appears in the record as Complainant's Exhibit 17, and appears on Mr. Collier's Summary Table as Protected Activity 6. Mr. Collier apparently prepared this package because he felt that the SSR program was essential to the safe conduct of nuclear operations and that the Team needed to be aware of his opinion. The package contains e-mail from supporters of the program, dissenting opinions to the proposal to eliminate the SSR, the results of an informal survey Mr. Collier conducted in which he sought the opinions of site managers on this issue, and an historical background of the program with discussion of problems from Mr. Collier's perspective. Mr. Collier produced a contemporaneous diary entry that indicates that on July 2, 2001, he met with Terry Hagen, FFI's Vice President for Site Closure, and contends that he disclosed the same information to Mr. Hagen as was contained in his package. Complainant's Ex. 12 at 47. This conversation appears on Mr. Collier's Summary Table as Protected Activity 7. Mr. Previty's testimony supports Mr. Collier's contention that the meeting had taken place, because Mr. Previty "followed up" on Mr. Collier's discussion with Mr. Hagen and "gave him a briefing and strongly supported that we keep the program." Tr. at 178.

4. "Smoking Train"

Mr. Collier contends that on three occasions he disclosed his concerns regarding the possibility that pyrophoric matter– spontaneously combustible substances, including radioactive material– were being loaded onto trains at the WPRAP facility and shipped across country for disposal in Utah. His concerns were that a small number of fires caused by pyrophoric matter had been reported at the Fernald site, and that the public safety would be threatened by radioactive smoke emanating from such a fire were it to occur once the train left the site, as he set out in his August 21, 2002 letter to the Hearing Officer. Mr. Collier first raised these concerns with Dennis Riley of the DOE on October 19, 2001, according to his diary entry for that date. *See* Complainant's Ex. 12 at 59. This conversation appears on his Summary Table as Protected Activity 9. In a second meeting with Mr. Riley, on October 29, 2001, Mr. Riley responded to Mr. Collier's concerns on the basis of information he had acquired from FFI, but Mr. Collier apparently contends that he expressed doubt that the information Mr. Riley had received was accurate. The occurrence of this second conversation is again noted in a diary entry, and appears on his Summary Table as Protected Activity 10. Between the two meetings with Mr. Riley, on October 25, 2001, Mr. Collier spoke with Mr. Previty, the highest ranked CRC employee at the Fernald site, about the same concerns. Mr. Previty testified that he remembered this conversation, though he did not join in those concerns because his "opinion was that the project had taken corrective action to fix our plans and procedures." Tr. at 559. This conversation appears on Mr. Collier's Summary Table as Protected Activity 11.

5. Chemical Management

Mr. Collier was a member of the Chemical Management Assessment Team, a team that was created by FFI's Independent Safety Review Committee to perform a site-wide assessment of chemical management at Fernald. The areas he reviewed were compliance with contractual requirements for chemical management by FFI's subcontractors, and compliance with the annual reporting requirements of the Superfund Amendments and Reauthorization Act. *See* August 21 Submission at 17-18. Mr. Collier contends that on October 30, 2001, he discussed potential violations of the Superfund reporting requirements and "apparent failure of FFI to properly enforce its contractual requirements of on-site subcontractors related to chemical inventory management" with James Curry, Sr., the team leader of the Chemical Management Assessment Team. *Id.* at 17. Mr. Curry testified that he had asked Mr. Collier to join the team because of his assessment experience, and that Mr. Collier's investigation uncovered wildly incorrect quantities of chemicals recorded in the database from which the Superfund reports were generated. Tr. at 481-82. This disclosure appears on Mr. Collier's Summary Table as Protected Activity 13. (Although Mr. Collier stated in his August 21 Submission that his diary entry for October 30, 2001, supports this disclosure, it does not. *See* Complainant's Ex. 12 at 60. Consequently, the date for this disclosure cannot be established, but Mr. Curry's testimony demonstrates that a disclosure was indeed made.)

6. Silos Project

Mr. Collier contends that on February 7, 2002, he spoke with Linda England, an FFI employee who was charged with revising and producing a document entitled the Integrated Project Execution Plan (IPEP) for the Silos Project at Fernald. He alleges that he pointed out to Ms. England a number of errors in the IPEP, first in conversation, then by e-mail at her request. He maintains that his comments disclosed matters of gross mismanagement. August 21 Submission at 19. This disclosure appears on Mr. Collier's Summary Table as Protected Activity 14. When shown a copy of Mr. Collier's e-mailed comments at the hearing, Ms. England testified that she must have received them, because the e-mail indicated she had responded to them. Tr. at 76; Item #6 produced by FFI at request of Mr. Collier. Nevertheless, Ms. England testified that she did not recall the content of any conversation she might have had with Mr. Collier on February 7, 2002. Tr. at 77.

In summary, Mr. Collier alleges that he made fourteen disclosures to CRC, FFI or the DOE related to six distinct concerns that he had about events that occurred at the Fernald site. He contends that each of these disclosures is protected under 10 C.F.R. Part 708 because it was the type of disclosure described in section 708.5(a). He also contends that each of them was a contributing factor in the two alleged retaliatory acts in which CRC and FFI engaged. The evidence presented in the record, as described above, clearly shows that most of these disclosures, particularly those reduced to writing, took place. Regarding other disclosures, specifically those Mr. Collier contends he made to Dennis Riley of the DOE and has labeled Protected Activities 8, 9, and 10, the only evidence in the record that Mr. Collier actually made the disclosures at all consists of the reproductions of his contemporaneous diary entries in which he

recorded his disclosures. Weak evidence though these may be, CRC and FFI have not argued that these events did not take place. In any event, as stated above, I will assume for the purpose of analysis that all fourteen of Mr. Collier's disclosures are protected under 10 C.F.R. § 708.5(a), and will move on to consider Mr. Collier's allegations of retaliation.

B. The Alleged Acts of Retaliation

Under the Part 708 regulations,

> Retaliation means an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to employment (e.g., discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment) as a result of the employee's disclosure of information, participation in proceedings, or refusal to participate in activities described in § 708.5 of this subpart.

10 C.F.R. § 708.2.

Mr. Collier alleges two instances of retaliation. They are (1) that on November 8, 2001, Joel Bradburne, the FFI manager of the Silos Project, where Mr. Collier was currently assigned, informed him that his request to attend Plant Automation Equipment training had been denied, and (2) that on February 28, 2002, his employment with CRC was terminated. Complainant's Ex. 6 (Complaint) at 5.

1. Denial of Training

As an initial matter, I must determine whether the first alleged retaliation can properly be considered in this proceeding. After the DOE's Ohio Field Office received Mr. Collier's complaint, it issued a jurisdictional decision in which it stated, "Your 708 complaint is not timely with regard to the denial of training that occurred on November 8, 2001, because the complaint was filed more than 90 days after you learned of this alleged retaliatory action. *See* 10 C.F.R. § 708.14(a)." Letter from Jack R. Craig, Acting Manager, Ohio Field Office, to Steven F. Collier, June 5, 2002. That provision states: "You must file your complaint by the 90th day after the date you knew, or reasonably should have known, of the alleged retaliation." 10 C.F.R. § 708.14(a). In a letter to Mr. Craig requesting a hearing with this Office, Mr. Collier argued that he did not know that the denial of training was a retaliatory act until some time in January 2002, so his complaint was in fact made within the 90-day period established in the regulations. Mr. Collier reiterated his position in his closing argument following the hearing:

> It wasn't until the sudden notification that my performance was somehow deficient, as told to me by Joel Bradburne on January 14, 2002, (when I knew my performance for him had to date been the best I could give), that I put together two and two and first KNEW that the earlier training cancellation must have been for retaliatory reasons.

Closing Argument of Steven F. Collier, October 14, 2002 at 13 (emphasis in original). Giving Mr. Collier the broadest possible latitude with respect to this argument, I thought it appropriate to receive and weigh evidence on this issue. After considering the evidence in the record, as discussed below, I have reached the same conclusion that DOE/OFO did– that the denial of Mr. Collier's request for training is not an act of retaliation that I may consider in this proceeding, because it occurred more than 90 days before the complaint was filed.

The crux of Mr. Collier's argument in favor of considering this alleged retaliation as part of the complaint he filed on March 26, 2002 is as follows. Mr. Collier states that the date on which Joel Bradburne told him he would not be permitted to attend the training was November 8, 2001. He contends, however, that the date on which he knew that Mr. Bradburne's action constituted retaliation was January 14, 2002. If I regard November 8, 2001, as the date on which Mr. Collier "knew, or reasonably should have known, of the alleged retaliation," then the complaint is clearly not timely with respect to this alleged retaliation. If, however, I accept Mr. Collier's contention and deem January 14, 2002, as the date on which he "knew, or reasonably should have known, of the alleged retaliation," then the complaint is timely with respect to this alleged retaliation. To resolve this issue, I will first consider the language of the governing regulation, 10 C.F.R. § 708.14(a). On its face the language is unclear. One interpretation is that an individual must file his complaint by the 90th day after he was aware of an action (here, Mr. Bradburne informing Mr. Collier that he would not be sent to training) that, upon further contemplation, he perceived to be an alleged retaliation. Under this interpretation, the critical date in this case would be November 8, 2001, the date on which Mr. Collier heard those words. A second interpretation is that the individual must file his complaint by the 90th day after he became aware that an alleged retaliation had transpired. Under this second interpretation, the critical date would be January 14, 2002, because, according to Mr. Collier, that is when he first perceived the November 8 action to be a form of retaliation. From a policy standpoint, neither interpretation is entirely satisfactory. On one hand, we want to encourage complainants to raise their allegations soon after retaliatory actions occur (or as soon as they learn that the retaliatory actions occurred, in those situations where complainants lacked contemporaneous knowledge of the actions having occurred), so that the allegations may be investigated promptly, and so that employers need not fear open-ended exposure to liability from complainants that perceive retaliation years after the alleged retaliatory actions occurred. On the other hand, we do not want to bar complainants from raising allegations of retaliatory actions that cannot be recognized as such until a pattern of behavior establishes itself. The latter is the position upon which Mr. Collier's argument relies. Without resolving which interpretation of section 708.14(a) is correct, I will adopt the interpretation that is more in Mr. Collier's favor, for the purpose of analysis in this proceeding. Even under that interpretation, it is my opinion that the alleged retaliation of November 8, 2001, nevertheless falls outside the scope of this proceeding.

I find that, at least in theory, an employer could conceivably engage in conduct that might not be perceived at the time to be retaliatory, but might later turn out to have been. Such a situation might occur when an employer engages in a personnel action of little import– perhaps an involuntary lateral transfer– but follows this action with a series of progressively more adverse actions that form a pattern of conduct that a complainant might perceive to be retaliatory. Under such circumstances, the complainant should not be

barred from alleging that the first, apparently innocent, personnel action was itself retaliatory merely because too much time passed between the date of that action and filing of the complaint. Rather, the complainant should be allowed some time to recognize the retaliatory action for what it is. The evidence in the record of this proceeding, however, indicates that such are not the circumstances in this case.

Mr. Collier asserts that he did not know that FFI's decision not to send him to the training program he desired was retaliation at the time Joel Bradburne so informed him, on November 8, 2001. The record reflects, however, that by the fall of 2001, Mr. Collier had already formed the perception that FFI and CRC were engaging in retaliation against him for protected disclosures. In his complaint, Mr. Collier enumerated a series of alleged disclosures and retaliation that predated the protected disclosures he asserts in this proceeding. Complainant Ex. 6 at 5-8. In addition, he admitted at the hearing that "as far back as September 2000 . . . I did have reason to believe that there was retaliation against me for some things that are not a part of my [present] complaint." Tr. at 53. As of October 24, 2000, when he filled out his portion of his performance evaluation, he "already had reason to believe that retaliatory events were headed my way. . . . I cannot separate whether it was Fluor or Coleman, I only knew that retaliation had already occurred [about] some issues which are not the subject of this case, and I foresaw the possibility of more in the future." Tr. at 528. Moreover, his diary entry for November 8, 2001, states in part:

> Joel [Bradburne] told me this morning that he was not going to send me to the Siemens PCS-7 training he had previously scheduled me for. Reason was vague– something about inability for subcontractors to travel on Fluor money. (I know Bill Previty was recently traveling on Fluor money.) Joel said he thought I was the best person for the job, but the fact that I was a subcontractor limited his ability to send me. . . . I think the timing of Joel's cancelling this training for me, the best person for the job (along with Bruce Ledbetter, also scheduled to go) is fishy, particularly after my meeting yesterday afternoon with Dennis Riley [about the "smoking train" issue]. To get to Riley's office, I have to walk through the Admin building where all the top Fluor offices are located, so it's not unreasonable to assume they've seen me travel that path a lot lately and put two and two together, as they prepare for their Nov 14 Enforcement Conference in Washington on the WPRAP issues. And Joel is closely related to one of the top company officials (son of the company Chairman of the Board). . . .

Complainant's Ex. 12 at 61. Given this evidence, in particular the diary entry that Mr. Collier maintains was made contemporaneously, it is difficult for me to conclude that Mr. Collier did not perceive the alleged retaliatory nature of FFI's decision until January 14, 2002. Apart from his own assertions to that effect, the record establishes that he was suspicious that retaliations were being taken against him, and was specifically suspicious that FFI "top officials" made the decision to deny him training in retaliation for his discussing WPRAP safety issues with the DOE's Mr. Riley. Although Mr. Collier may not have known with certainty on November 8, 2001, that the training decision was a retaliatory action, such certainty is not required. In fact, if complainants did not raise Part 708 concerns until they were certain of their allegations, they might never be in a position to do so. In light of the record in this case, I find that Mr.

Collier has not met his burden of establishing that he did not know, or could not reasonably have known, that the November 8, 2001 decision not to send him to training manifested retaliation until January 2002. I place the date of his knowledge of the retaliatory act at November 8, 2001, which is considerably more than 90 days before the date of his Part 708 complaint. I therefore uphold the Ohio Field Office's jurisdictional decision, and will not consider this alleged retaliation in this proceeding.1/

2. Termination

As will be discussed in more detail below, Mr. Collier was terminated from employment on February 28, 2002. Clearly, termination is an action with respect to Mr. Collier's employment, and therefore would fall within the Part 708 definition of retaliation. Moreover, Mr. Collier clearly met the regulatory time constraints by filing his complaint on March 26, 2002, within 90 days of this alleged retaliatory action. The next question is whether any of Mr. Collier's fourteen disclosures (assumed above to be protected under Part 708) was a contributing factor to his termination.

C. Whether Mr. Collier's Protected Activity Was a Factor Contributing to Retaliation

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).

1/ Even if I were to consider this alleged retaliation in this proceeding, I would find that FFI met its burden of establishing, by clear and convincing evidence, that it would have taken the same action absent Mr. Collier's protected activities. Mr. Previty, the manager of CRC operations at Fernald, Mr. Carr, FFI's senior project director at Fernald, and Mr. Bradburne, Mr. Collier's FFI supervisor at the Silos project, all testified that the reason Mr. Collier's training was cancelled was that FFI was not willing to pay for the training of subcontractors during a period of staff reductions. Tr. at 189-90 (testimony of Previty), 410 (testimony of Carr), 443 (testimony of Bradburne). Mr. Carr also testified that FFI wanted to create job opportunities for its own employees, and that this training was regarded as a step in that direction. Tr. at 410. Mr. Bradburne testified that he recalled telling Mr. Collier that if CRC would pay for his training, FFI would be happy to send him. Tr. at 444-45. Based on this evidence, even if Mr. Collier had not made his protected disclosures, it appears to me that FFI would not have paid for his training and, unless CRC paid for it, would not have sent him to the training he requested. (Mr. Collier contends that FFI's policy of not paying for the training of subcontractors was not applied consistently. He points to a trip to Virginia that Mr. Previty took at FFI's expense. The record reflects, however, that Mr. Previty was heading a team of FFI employees at FFI's request, and that no training was involved. Tr. at 210, 229-31.)

The retaliatory action remaining to be analyzed is that of Mr. Collier's termination from employment at CRC on February 28, 2002. The parties have stipulated that Mr. Collier's termination occurred in response to a business decision by FFI to reduce the size of the workforce at the Fernald site. On January 11, 2002, FFI notified CRC that it was reducing the estimated number of hours of "Senior Operations Specialist" work it would be requiring of CRC by 2400 hours, or the equivalent of two positions. *See* First Stipulation of Steven F. Collier and Fluor Fernald, Inc. As stated above, Mr. Collier was one of five senior operations specialists, out of total of seven CRC employees working at the Fernald site. The "official taking the action," the individual who notified Mr. Collier by letter of his termination, was Raymond Ross, Executive Vice President/General Manager of Coleman Federal. Complainant's Ex. 5. Although Mr. Ross was the signatory of Mr. Collier's termination letter, the record is clear that Mr. Previty was instrumental in developing and applying the criteria that were used in selecting which CRC employees would be terminated as a result of the required downsizing of personnel. Tr. at 212. There is considerable evidence that Mr. Previty had knowledge of several of Mr. Collier's protected disclosures: his October 10, 2000 WPRAP memorandum, Complainant's Ex. 1; the April 26, 2001 e-mail about the respirator issuance program, Tr. at 173; the May 30, 2001 discussion between Mr. Collier and Mr. Morgan, Tr. at 175; his June 26, 2001 dissenting opinion concerning nuclear project startup requirements, Tr. at 177, and his July 2, 2001 meeting with Terry Hagen of FFI on the same issue, Tr. at 178; and his October 25, 2001 discussion with Mr. Previty about the "smoking train" issues, Tr. at 559. In addition, he was aware of Mr. Collier's concerns about the chemical management program. Tr. at 182. In sum, Mr. Previty had knowledge of seven of Mr. Collier's fourteen protected disclosures before he submitted his proposal for terminating the employment of Mr. Collier and one other senior operations specialist to CRC headquarters for approval, on February 2, 2002. *See* Tr. at 561. (Of the seven disclosures of which he was not aware, six concerned the same issues and concerns as those raised in the seven disclosures known to Mr. Previty. The seventh disclosure unknown to Mr. Previty related to the Silos Project and was made to Linda England of FFI on February 7, 2002, after Mr. Previty had completed his decisionmaking process regarding Mr. Collier's termination.)

It is also clear that Randy Morgan, the CRC vice president to whom Mr. Previty reported, had knowledge of at least one of Mr. Collier's protected disclosures, the one made directly to him on May 30, 2001. The evidence is clear that he was involved in the development of the termination assessment criteria. Tr. at 212.

In addition, many FFI managers contributed their comments and observations to the assessment process itself. These individuals did not partake in the development of the criteria by which each CRC employee would be evaluated, nor did they rate or rank the CRC employees. Tr. at 253. Those tasks fell to Mr. Previty. But Mr. Previty continually sought feedback from the FFI managers, such as Joel Bradburne, to whose projects his CRC employees had been assigned. Tr. at 248-51. Consequently, even though FFI in no direct way issued the termination letter that Mr. Collier alleges is a retaliatory action, their input into the assessment process, through discussions with Mr. Previty, could have influenced the result. Any knowledge they had of Mr. Collier's protected disclosures could also have contributed to a retaliatory action carried out on their behalf, wittingly or not, by Mr. Previty.

After reviewing the events from the time of the first protected disclosure Mr. Collier alleges in his complaint, his October 10, 2000 memorandum about nuclear safety issues at WPRAP, through his termination some sixteen months later, I conclude that there is close enough temporal proximity to find that many of Mr. Collier's protected disclosures– those disclosures of which Mr. Previty had knowledge at the time of his decision to recommend Mr. Collier's termination– were contributing factors in the February 2002 decision to terminate Mr. Collier. Looked at in context, virtually all of the relevant events, both protected disclosures and alleged retaliation, were not isolated occurrences, but instead were part of a pattern of frustration and poor communication between Mr. Collier and his management, both FFI and CRC. For example, although his first protected disclosure occurred more than a year before his termination, Mr. Collier continued through May 30, 2001, to revisit the same issues (with Randy Morgan of CRC), and Mr. Previty had requisite knowledge of that discussion. Moreover, concerning those few protected disclosures of which Mr. Previty disavows any contemporaneous knowledge, such as those made to Keith Christopher of the DOE, I will assume, solely for the purpose of analysis, that they too were contributing factors in Mr. Collier's alleged retaliatory termination. I do not, however, find that Mr. Collier's last protected disclosure, to Linda England of FFI on February 7, 2002, was a contributing factor in his termination on February 25, 2002. First of all, Mr. Previty testified that he had no knowledge of this disclosure. Tr. at 560-61. Moreover, although this disclosure occurred before the date of CRC's letter officially informing Mr. Collier that he had been terminated, Mr. Previty had completed his evaluation of his employees and submitted his recommendations for termination to CRC management and human relations staff on February 2, 2002, five days before the disclosure took place. *See* CRC Ex. at 000001.

Notwithstanding these findings, it is clear to me that a large part of the mutual frustration and dissatisfaction had nothing to do with Mr. Collier's protected disclosures. Moreover, as I discuss below, CRC has proven by clear and convincing evidence that it would have terminated Mr. Collier in the absence of Mr. Collier's protected activities.

D. Whether CRC Would Have Taken the Alleged Retaliatory Action of Termination Absent Mr. Collier's Protected Activities

The nature of Mr. Collier's role as a consultant at Fernald required his monitoring of safety at the Fernald site and his occasional delivering "bad news" of noncompliance with safety requirements to managers of site operations. There is no dispute that much of Mr. Collier's work product would qualify as protected disclosures. Moreover, though many of the protected disclosures enumerated in Mr. Collier's complaint concern practices at Fernald that lay beyond the scope of his assigned posts, the parties have conceded that he was entitled to make those disclosures. Because I have concluded that most of Mr. Collier's protected disclosures were contributing factors in his termination, the burden now falls to CRC to prove by clear and convincing evidence that it would have terminated Mr. Collier in the absence of his protected disclosures. *See* 10 C.F.R. § 708.29. The contractor's burden is clearly heavier than that of the complainant, but meeting this burden effectively defeats the allegation of retaliation for whistleblowing conduct, despite evidence that its action appears to have been taken, at least in part, in response to the complainant's protected conduct. Therefore, CRC's burden is to demonstrate independent bases for its

decision to select Mr. Collier for termination, to such a degree that I am convinced that it would have reached the same decision had he made no protected disclosures.

The essence of Mr. Collier's position is that CRC retaliated against him by orchestrating several sequential acts. He contends that Mr. Previty retaliated against him for making protected disclosures beginning in October 2000, by giving him lower ratings than in previous years on his Performance Appraisals for October 1999 through September 2000 (CRC Ex. at 000021-25) (2000 Performance Appraisal) and for October 2000 through September 2001 (CRC Ex. at 000026-30) (2001 Performance Appraisal). (Although the 2000 Performance Appraisal covered a period preceding the first protected disclosure he listed in his complaint, Mr. Collier notes that the appraisal was signed in November 2000, by which time Mr. Previty had knowledge of that disclosure.) Mr. Collier then argues that Mr. Previty developed the employee evaluation process, by which he ranked his employees and recommended to CRC management which two employees should be let go, with the intent of assuring that the result of the process would support his selection of Mr. Collier as one of the two.

I note that, though the record contains references to prior reductions in force taken by CRC under its contract with FFI, *see* Tr. at 217-18, 232-33, the parties did not provide any evidence of how those reductions were conducted. Consequently, I cannot compare the process Mr. Previty developed for the 2002 staff reduction with others in which Mr. Collier was not selected. (I note that Mr. Collier has not advanced any argument that the 2002 downsizing differed in any material respect from previous staff reductions.) I have, however, considered to what extent the evidence demonstrates that the process was developed to meet legitimate business needs rather than to assure an outcome adverse to Mr. Collier in particular. To this end, I find the following. The procedures for the staff reduction were specified in advance. Mr. Previty's "Termination Selection Process" was submitted to and approved by CRC's management, including Randy Morgan. In his February 2, 2002 memorandum to Mr. Morgan, Mr. Previty set out the assessment process he developed.

> The assessment process is a multi-step process selected and conducted by the CRC Ohio Field Office Manager [Mr. Previty] to determine which two of the five assigned Senior Operations Specialists would be recommended for involuntary reduction. Steps included:
>
> Step 1: Determine core skills and job specific skills for individual employee evaluation
> Step 2: Perform the individual employee assessments
> Step 3: Rank the individual employees
> Step 4: Provide recommendations to CRC for approval.

CRC Ex. at 00004. The "Core Skills" identified were communications skills, teamwork, quality of work, and work habits. The "Job Specific Skills" were job/technical knowledge, skills applicability, skills transferability, and customer satisfaction. *Id.* at 000005. Although my understanding of the service CRC provided to FFI at Fernald is imprecise, the eight skills Mr. Previty identified to be assessed appear to me

to be correctly identified as critical qualities for CRC employees working under that contract. 2/ Moreover, I am convinced that, generally speaking, the assessment process, of which skills identification and ratings were a part, was properly developed to address the present and future business needs of CRC rather than as a means of terminating Mr. Collier's employment.

In performing the assessments of the five individuals, Mr. Previty wrote that he considered the last three annual performance appraisals for those employees who had worked that long, but two of the five were new employees for which no annual performance appraisals were available. *Id.* at 000006. Mr. Previty testified that, in addition to the annual performance appraisals, he also assessed the employees' performance for the most recent four months (for which no performance appraisals had been made) by seeking the comments of the FFI managers to whose project the CRC personnel had been assigned and reflecting on his own observations. Tr. at 204. It is unclear the degree to which Mr. Previty relied on the ratings on annual performance appraisals in reaching the score he arrived at in his assessments, rather than his contemporaneous observations or the comments of FFI managers. Tr. at 206. 3/ Under these circumstances and in view of the nature of performance appraisals in general, I must conclude that the assessments performed through this process were to some degree subjective in their nature.

Nevertheless, the assessment Mr. Collier was given appears to be reasonable and well supported by fact. Of the eight skills that were evaluated, Mr. Collier's scores were the lowest of the five assessed employees in the areas of quality of work, communication skills, teamwork, and customer satisfaction. I will focus on these areas, as did the parties. Mr. Previty testified that in the past few years Mr. Collier had fallen below the levels of the other employees in these skills, and the scores Mr. Previty assigned both in the annual performance appraisals for 2000 and 2001 and in the assessment reflected his opinions. Although it is possible that Mr. Collier's protected disclosures influenced Mr. Previty's evaluations of him, Mr. Previty impressed me as taking a realistic view of Mr. Collier's performance on the job and performing his

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2/ Rather than assigning each of the skills equal weight in the scoring process, Mr. Previty doubled the weight of two skills in the assessment, skills applicability and customer satisfaction. I have no reason to question whether those two skills were so critical to CRC's success that the scores an employee received in those areas should have been given twice their values. I will note, though, that even if those scores had not been doubled, Mr. Collier's overall score still would have been the lowest of the five employees. *See id.* at 000008 (summary scoring chart).

3/ It is also unclear why Mr. Previty chose to consider only the past three years of annual personnel appraisals rather than all that had been made, which in Mr. Collier's case was seven years' worth. Mr. Collier contends that not considering all seven appraisals is evidence that Mr. Previty designed the process to work against him. I cannot agree with Mr. Collier in this regard. The decision to consider three years of appraisals has a logical basis, because it placed the three long-term employees on equal footing. Reviewing any more than three years of appraisals would have been impractical because only two of the five employees had been on staff for more than three years. CRC Ex. at 000015. As stated above, to place all five employees on even ground with respect to prior performance appraisals would have required considering none of the appraisals, as the remaining two employees were recent hires and had none. Moreover, three years of appraisals included at least one appraisal that was issued before the date of any of the protected disclosures listed in the complaint.

evaluation based on a broad range of issues. For example, when questioned at the hearing about the drop in Mr. Collier's annual performance appraisal scores from 1999 to 2000, Mr. Previty stated,

> In the year 2000, I spent two and a half months concurrently with you on [the WPRAP] project. . . . So, I saw first-hand what you were doing out [at] the project. I interfaced with you over the next couple of months, probably in January, February time frame on an infrequent basis on what you were doing out [at] the project. I separately visited the project. In March, I was fully assigned to that project to help the recovery process. It was very obvious to me that your strained relationship with all the senior managers assigned to the project was really a factor in your effectiveness in helping them. I was very concerned about your communications problems. I was concerned about your ability in team work, and you didn't fit in the team anymore. There were too many senior managers that you couldn't work with to get the job done, and your inability at that time to pull this team together, address the issues and fix the problems, I felt that your effectiveness as a Coleman employee had been seriously reduced after the project.
>
> Then when we went onto the issues of communications, personally, with me in April in a heated exchange of e-mail, I have to tell you to stop. I get back in the fall and you still have another big issue on the standing orders. I was very concerned that you weren't doing as well as you had always done before. You were one of our best employees previously. This year you were not. Your communications were down. Your team work was down and they certainly affected your overall performance, and those are the areas that I focused on in this evaluation in 2000. You were lower. I didn't give you an unsatisfactory grade which is a 1; I gave you a 2 in communications. I lowered you in your team work category from a 4 to a 3. I lowered you in the corporate culture category from a 4 to a 3 because your attitude and your inability to work as a team, it affected the whole Coleman reputation on the site, and I lowered your grade [in] customer orientation because you no longer had a happy customer, and that's why you had a significant drop because of your performance in those areas.

Tr. at 214-16. I note that the categories on which he was evaluated in his 2000 performance appraisal had been unchanged for many years, and Mr. Collier does not contend that the process used in 2000 was unfair. That unfairness argument applies only to the evaluation procedure developed for termination purposes, and I have addressed that argument above. Mr. Previty also testified about the low score in communication skills he gave Mr. Collier on his rating form in the termination selection process. When asked to explain his stated rationale for that score, as it appeared at CRC Ex. at 000010, Mr. Previty responded,

> You're the only employee in Coleman that's ever had problems in this area with our job. I have never had to counsel anyone else about their performance in communications. You had difficulty early on in dealing with the fact that you were not in charge. . . . You were

> not in charge of any project. You made recommendations. You weren't in charge. I'll go back to early events that you had with Mr. Paige. Your verbal discussions with him and e-mails were so controversial that I was called to the Deputy Director of the site and [told] if I could not get the Coleman people in order and act professionally, we'd be out of here, specifically, the individual. [That was in] Ninety-six, '97, I don't know. You asked a question about your history [in] communications. When I went out to the WPRAP project in . . . late August, September, October, 2000, I met with the Project Director, the Deputy Project Director, the Operations Oversight Manager, the Project Engineer [at] Fluor . . . and Con Murphy in the IT project who was their project manager. Your relationship with those people was extremely stressful. They had great difficulty in doing business with you. I was out there and I made my own observations and I sensed that your relationship . . . with Mr. Murphy was poor.
>
> As we moved on I have e-mails when you were . . . reassigned from the project [and] not included in something. I had to send you e-mails to stop sending me e-mails about your performance. I didn't question your performance. You refused until I sent you formal, an e-mail that said stop discussing these performance matters; it's not professional.
>
> I come back from a week's vacation, later that year, I get an e-mail where you've been involved in some discussion about standing orders from IT that you wanted over in the Silos project with a personal note on it from the project manager. "You should please consider firing this employee."
>
> Steve, you had numerous problems communicating, and you would go through periods with . . . few problems to [periods with] very, very serious problems, and I gave you every opportunity. [On] your own personal evaluations that you submitted . . . [y]ou cite your own difficulty in dealing with issues like this.

Tr. at 207-09.

The record also supports finding that Mr. Previty's evaluation was based on input from FFI managers in addition to his own observations. For example, Joel Bradburne's testimony establishes that he, as the FFI manager on whose Silos project Mr. Collier had most recently consulted, conferred with Mr. Previty frequently. Mr. Collier had spoken with Mr. Previty several times about his sense that he was given little work at the Silos project, and Mr. Previty testified that he had responded: "I suggested to you to use your initiative to figure out where you could add value to the customer and do everything you could to help make them be successful. We always had that discussion." Tr. at 196. Nevertheless, Mr. Bradburne explained that his opinion of Mr. Collier's work declined after they began working together on the Silos project in 2001 and 2002, and he reported that he told the following to Mr. Collier about his mediocre performance. Tr. at 430.

> Previous interaction before, you know, I always thought, my estimation [was that you had] great talent, great attitude and what caused the mediocre performance . . . as we worked through the Silos, to me it was great talent, disinterest in some of the things that we were doing, [because] there was not . . . a lot of field activities going on, but a lot of administrative activities which nobody really jumps up and down about doing . . .

Tr. at 431. Mr. Bradburne testified as follows regarding communicating his concerns about Mr. Collier to Mr. Previty:

> I don't do a formal performance [assessment] on you or any of the other subcontractors that work for me or have at the time, but Bill [Previty] as the Coleman rep would . . . ask me about performance and I did relay to him . . . we had talked and I thought your performance was mediocre.

Tr. at 437.

In my role as hearing officer, I am called upon to judge the credibility of the witnesses who appeared before me at the hearing. Were I to believe any witness to be less than fully credible, I would assign less weight to his or her testimony. The lesser weight of that witness's testimony could well affect my making a factual finding that in turn could affect a conclusion of law, such as whether a party had met its burden. In this case, however, I find that the major witnesses were all highly credible. I must therefore consider the weight of the evidence presented in determining whether CRC has shown, clearly and convincingly, that it would have terminated Mr. Collier even if he had not made his protected disclosures. The crux of CRC's position is set forth above. Evidence demonstrating that Mr. Collier did not merit his lower ratings is highly circumstantial. For example, his annual performance appraisals for years before 1999 were relatively consistent to that of 1999, the first year included for consideration in the termination assessment criteria and, like 1999, higher than his 2000 and 2001 appraisals. The range of overall scores for all seven years of appraisals, however, is relatively small: 3.42 to 4.43 on a scale of 5. In addition, Mr. Collier produced three farewell electronic mail messages that praised his work at Fernald. While these messages show that at least some of his coworkers did not share CRC management's opinion of Mr. Collier's ability to perform well at his assignments, they do not challenge the weight and specificity of the evidence that supports CRC's decision.

Having considered the entirety of the record in this case, the weight of the evidence convinces me that the CRC employee assessment process was fairly developed and administered, that Mr. Collier was fairly rated as the lowest of the employees, and that CRC clearly would have terminated Mr. Collier's employment even if he had not made the protected disclosures he described in his complaint. 4/

4/ In his closing argument, Mr. Collier articulates a number of reasons that CRC might have been biased against him when evaluating which two of its employees to terminate. He contends that these biases illustrate that the decision to terminate him was founded in retaliation for his protected disclosures. These biases, however, instead demonstrate

(continued...)

III. Conclusion

As set forth above, I have presumed that the complainant has met his burden of proof of establishing by a preponderance of the evidence that he engaged in activity protected under 10 C.F.R. Part 708. In this regard, I have construed some of the evidence in a manner most favorable to the complainant. I also have determined, based on temporal proximity, that the complainant's activity was a contributing factor in one action taken against him, the termination of his employment with Coleman Research Corporation. However, I found that CRC has proven by clear and convincing evidence that it would have taken the same action 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 Steven F. Collier 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.

William M. Schwartz
Hearing Officer
Office of Hearings and Appeals

Date: May 20, 2003

4/ (...continued)
that CRC had numerous reasons, unrelated to his protected disclosures, to select him for termination. He points to Joel Bradburne's testimony in which Mr. Bradburne specifically requested the assistance of Eric Harper and Thomas Woodroffe, two CRC co-workers of Mr. Collier's, on his project. Tr. at 458-59; Complainant's Closing Argument at 15. He also contends that while he and Roger Hiss, the other CRC employee whom Mr. Previty selected for termination, had been hired by Mr. Previty's predecessor, the three not selected had been hired by Mr. Previty himself. *Id.* In addition, he contends that Mr. Previty had a bias in favor of selecting for termination the employees who had worked for CRC the longest, and therefore, he believes, were more highly paid. *Id.* I note that no evidence was taken on the two latter allegations of bias. Nevertheless, if we accept any of these allegations of bias by Mr. Collier, they furnish independent, if unfair, bases for Mr. Previty's decision to terminate Mr. Collier's employment. Those bases support, if anything, a finding that the decision to terminate Mr. Collier would have been taken even if he had not made his protected disclosures.