

**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of Leslie Smith)		
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Filing Date: August 3, 2020)	Case No.:	WBH-20-0006
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_____)		

Issued: February 5, 2021

Initial Agency Decision

Steven L. Fine, Administrative Judge

This Decision concerns a Complaint filed by Mrs. Leslie Smith (hereinafter referred to as “Mrs. Smith”) against her former employer, Consolidated Nuclear Security, LLC (CNS) under the Department of Energy’s (DOE) Contractor Employee Protection Program regulations set forth at Part 708 of Title 10 of the Code of Federal Regulations (Part 708). CNS manages and operates the Y-12 National Security Complex (Y-12) pursuant to a contract with the DOE. Mrs. Smith alleges that CNS terminated her employment in retaliation for engaging in protected conduct under Part 708. As discussed below, I have concluded that Mrs. Smith is not entitled to the relief that she seeks.

I. Background

A. The DOE Contractor Employee Protection Program

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. *See* Criteria and Procedures for DOE Contractor Employee Protection Program, 57 Fed. Reg. 7,533 (Mar. 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.

The Part 708 regulations prohibit DOE contractors from retaliating against an employee because that employee has engaged in protected conduct set forth at 10 C.F.R. § 708.5, such as disclosing information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation, a substantial and specific danger to employees or to public health or safety, or fraud, gross mismanagement, gross waste of funds, or abuse of authority. 10 C.F.R. § 708.5(a).

Available relief includes reinstatement, back pay, transfer preference, and such other relief as may be appropriate. *Id.* at § 708.36.

Employees of DOE contractors may file a whistleblower complaint with DOE and, if DOE determines that the allegations in that complaint are within the jurisdiction of Part 708, are entitled to an investigation by the Office of Hearings and Appeals (OHA), followed by a hearing conducted by an OHA Administrative Judge, and an opportunity for review of the Administrative Judge's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.22, 708.28, 708.32.

B. Procedural History

On November 20, 2019, Mrs. Smith filed a Part 708 Complaint against CNS with DOE's Office of Science's Employee Concerns Program (ECP). Report of Investigation (ROI) at 13. The ECP accepted jurisdiction and referred the Complaint to OHA on May 4, 2020. On that date, the OHA Director appointed an OHA Staff Attorney (the Investigator) to investigate the allegations in the Complaint. With Mrs. Smith's input and approval, the Investigator refined, clarified, and restated Mrs. Smith's allegations. Specifically, Mrs. Smith alleged protected conduct is quoted below:

- (1) In 2018, Mrs. Smith disclosed to Mr. Eddie Price that a Daily Administrative Check (DAC) had been improperly split between two people.
- (2) In 2018, Mrs. Smith disclosed to Mr. Price that she had discovered non-fissile material improperly labelled as fissile.
- (3) In 2018, Mrs. Smith disclosed to Eddie Price that she had discovered a fork truck with its kill switch taped down so that it could operate.
- (4) In 2019, Mrs. Smith disclosed to her Director, Abe Mathews, that she felt his decision not to interview her for the Assembly and Disassembly Operations (ADO) manager position was personal and that his behavior was unprofessional.
- (5) In 2019, Mrs. Smith disclosed to the head Y-12 psychologist, Dr. William Conklin, that she was being targeted by Eddie Price and Abe Mathews in retaliation for bringing forward safety and security concerns.
- (6) In 2019, Mrs. Smith disclosed concerns about the facility and its management to Tracy Nelson, an employee in the Ethics and Employee Concerns (E&EC) office. She disclosed to Leslie Daugherty, another E&EC employee, that her Human Reliability Program (HRP) review was prompted by Mr. Price and Mr. Mathews in retaliation for her disclosures of safety and security concerns.
- (7) In 2019, Mrs. Smith disclosed to Acting Interim Manager Matthew Green that a MOCKUp had been compromised.

- (8) In 2019, Mrs. Smith disclosed to Chad Wallace, a Human Resources employee, that he was not allowed to put drafts in personnel files.¹
- (9) In 2019, Mrs. Smith disclosed to Shift Manager Jerry Polson that one of her direct reports, Robert Cooper, had reported a DAC test concern to a different supervisor, and she disclosed to Matthew Green and Richard Young that she saw one of Mr. Cooper's peers, Michael Tarver, writing Mr. Cooper's personal statement in the break room.
- (10) In 2019, Mrs. Smith disclosed to Patricia Baker, an administrative assistant, that Mrs. Smith's direct report Greg Tye was insubordinate for not contacting her directly and she disclosed to her manager, Richard Young, that Greg Tye and Robert Cooper had stopped work without telling her.
- (11) In 2019, Mrs. Smith disclosed to Dr. Conklin that she was experiencing discrimination and a hostile work environment as retaliation for reporting safety and security concerns. She disclosed to CNS Vice President Ben Lunsford, Richard Young, and the shift superintendent that Abe Mathews was telling people she had been "hailed out" of Y-12.

ROI at 1–2. The Investigator similarly refined, clarified, and restated Mrs. Smith's allegations that CNS had retaliated against her for engaging in protected conduct. After the issues were clarified, Mrs. Smith alleged 5 acts of retaliation by CNS.² *Id.* at 3.³ The Investigator issued the ROI on August 3, 2020. Upon issuance of the ROI, the OHA Director appointed me as the Administrative Judge to preside over the present hearing.

On October 5, 2020, CNS submitted a Motion for Summary Judgment. I issued an interlocutory decision (the Interlocutory Decision) on October 22, 2020, in which I granted partial summary judgment to CNS with respect to two of Mrs. Smith's allegations of protected conduct and four of the five alleged acts of retaliation. *Leslie Smith*, WBH-20-0006 (October 22, 2020) (Interlocutory decision granting partial summary judgment).⁴ After the issuance of the Interlocutory Decision, the remaining issues to be resolved in the present case are: (1) whether Mrs. Smith engaged in the protected conduct alleged in allegations 1, 2, 3, 5, 6, 7, 9, 10, and 11; (2) whether these alleged

¹ I granted CNS summary judgment with respect to this alleged disclosure on the basis that Mrs. Smith's disclosure concerned her personal opinion as to whether Mr. Wallace's action was an "acceptable business practice" and did not allege that Mr. Wallace violated any law, rule, or regulation. *Id.* at 11.

² By letter dated August 6, 2020, I invited the parties to identify "any disagreements with the ROI findings." Mrs. Smith submitted a letter in which she provided additional information concerning the alleged protected conduct listed in the ROI, but did not dispute the comprehensiveness of the list of protected conduct. Accordingly, I deem this list of alleged protected conduct exhaustive, and will only consider the alleged protected conduct listed in the ROI.

³ I granted CNS summary judgment with respect to alleged acts of retaliation 1–4 because Mrs. Smith's complaint was untimely as it pertained to those four alleged acts of retaliation. *Leslie Smith*, OHA Case No. WBH-20-0003 at 9–10 (2020) (interlocutory order granting partial summary judgment to CNS).

⁴ Decisions issued by OHA are available on the OHA website located at <http://www.energy.gov/OHA>.

actions constitute protected conduct under 10 C.F.R. § 708.5; (3) whether any protected conduct that Mrs. Smith has engaged in was a contributing factor to CNS's decision to terminate her employment; and (4) whether, if Mrs. Smith is able to prove that her alleged protected conduct was a contributing factor to her termination, CNS is able to show, by clear and convincing evidence, that it would have terminated her in the absence of her protected conduct.

I held a three-day hearing to consider these remaining issues. CNS offered forty-one exhibits into the Record (Ex. A–OO) and Mrs. Smith offered eleven exhibits into the Record (Ex. 1–11), all of which were admitted into the record. Seventeen witnesses, including Mrs. Smith, testified at the hearing. I invited the parties to submit closing arguments on or before December 15, 2020, and, upon receipt of each party's closing arguments on that date, closed the Record.

C. Factual Background

Mrs. Smith began working at DOE's Y-12 National Security Complex (Y-12) in 2007, and CNS promoted her to a supervisory role on the Assembly and Disassembly Operations (ADO) team in 2017. Report of Investigation (ROI) at 1–2. In this capacity, Mrs. Smith oversaw the work of a crew of union laborers involved in “material movement to and from assembly, disassembly, [and] out of the building.” September 21, 2020, Deposition of Leslie Smith (Smith Deposition) at 39–41.

Y-12 requires that employees must conduct a Daily Administrative Check (DAC) of any building if nuclear operations are going to be performed that day. Transcript of Hearing (Tr.) at 162, 237, 272, 297. A DAC is “performed by a single individual or a team of two individuals [who] walk the entire outer perimeter of the building . . . looking for signs of degradation of the facility that may be indicative of someone attempting to divert highly enriched uranium.” *Id.* at 437. After this inspection, a document is prepared recording the DAC's findings.

On the morning of April 26, 2018, Mrs. Smith informed her manager, Mr. Eddie Price, that she had a significant amount of work to perform that day, and that several members of her crew had called out sick. Smith Deposition at 119–20. Nevertheless, Mrs. Smith assigned one of her crew members to perform the DAC. *Id.* at 120. Unbeknownst to Mrs. Smith, Mr. Price attempted to alleviate the burden on Mrs. Smith's crew by directing Ms. Amy Cottrell, who supervised another crew in Mrs. Smith's facility, to have Ms. Cottrell's crew conduct the DAC, instead. *Id.* Later that day, Mr. Price was meeting with representatives of the Defense Nuclear Safety Board and the National Nuclear Security Administration when Mrs. Smith interrupted, insisting that Mr. Price speak with her.⁵ Mrs. Smith alleges that, during the ensuing discussion, she informed Mr. Price that Ms. Cottrell's crew had conducted a DAC improperly⁶ and that Ms. Cottrell had improperly

⁵ CNS's personnel records indicate that Mrs. Smith “entered the conference room agitated stating she needed to talk to [Mr. Price]. [Mr. Price and Mrs. Smith] moved to the hallway to discuss the issue. [Mrs. Smith's] tone and volume were such the facilitator of the meeting entered the hallway and asked for the conversation to move somewhere else because it could be heard in the conference room.” Ex, D at 1.

⁶ Mrs. Smith argues that, pursuant to CNS procedure Y20-NM-307, crew members could perform DACs in their entirety either alone or with a partner but could not divide up different floors or portions of a building with a partner to separately review and then document the DAC with a certification signed by one person, since the procedure requires that the person responsible for certifying the DAC have personal knowledge that the entire building was

directed a crew member under Mrs. Smith's supervision to work in a glovebox without undergoing a pre-job briefing.⁷ Tr. at 160–64. During his hearing testimony, Mr. Price acknowledged that this conversation had occurred and claimed that Mrs. Smith had conducted herself in an angry and unprofessional manner.⁸ Mr. Price further recalled that Mrs. Smith complained to him that Ms. Cottrell had directed Mrs. Smith's employee to discontinue performing the DAC, and had directed a crew member to work in a glovebox without a pre-job briefing. However, Mr. Price denied that, during this conversation, Mrs. Smith raised concerns about how the DAC was performed. Tr. at 486–87.

Mrs. Smith testified that she made a second disclosure to Mr. Price on September 17, 2018, when she told him that “the procedure to bring [a shipping container] into the building had been failed” because the shipping container contained co-mingled fissile and non-fissile material and its contents were not properly inventoried before they entered the plant. *Id.* at 167–68.⁹ Mr. Price acknowledged that Mrs. Smith disclosed the procedural error to him on or about September 17, 2018, but indicated that he did not believe at the time that Mrs. Smith's disclosure raised an immediate safety or security concern. *Id.* at 503.

On December 4, 2018, Mrs. Smith informed Mr. Price that her team had discovered that a safety device, the kill switch, on a forklift had been deliberately bypassed.¹⁰ Tr. at 173–78, 504–05.

Mrs. Smith was required to maintain certification through the DOE's Human Reliability Program (HRP), “a security and safety reliability program designed to ensure that individuals who occupy positions affording access to certain materials, nuclear explosive devices, facilities, and programs meet the highest standards of reliability and physical and mental suitability.” 10 C.F.R. § 712.1.

suitable for nuclear operations. Tr. at 160–63. Thus, according to Mrs. Smith, Ms. Cottrell allegedly abetted a procedural violation that compromised security. Furthermore, Mrs. Smith believed the crewmember she found working in the glovebox to be a “haphazard worker” who had “previous problems” with glovebox work. Smith Deposition at 124. Mrs. Smith believed that the particular work the crewmember was performing posed a significant risk of puncturing the protective gloves worn inside the glovebox, and she feared that the crewmember might have been exposed to Beryllium if he was not working carefully. *Id.* at 123, 125.

⁷ Mrs. Smith alleges that Ms. Cottrell's decision to have the employee conduct glovebox operations, especially without briefing him on the task he was to perform, placed the employee and his co-workers at risk of Beryllium exposure. ROI at 1-2.

⁸ Mr. Price raised Mrs. Smith's interruption of the meeting to Mr. Abe Mathews, CNS's Director of Assembly and Disassembly Operations, for potential discipline. After discussing the matter, Mr. Price and Mr. Mathews initially decided that Mrs. Smith should receive informal coaching rather than formal discipline. Ex. MM at 38–40. However, on the recommendation of a representative of CNS's Labor Relations Office, Mr. Price issued her a formal oral reprimand on May 3, 2018. *Id.*; Ex. D. Mrs. Smith does not assert that this oral reprimand was an act of retaliation. CNS has not contended that this oral reprimand was the basis for its decision to terminate her employment.

⁹ Fissile material is capable of undergoing fission (the splitting of an atom) after capturing low-energy thermal (slow) neutrons.

¹⁰ According to Mrs. Smith, the forklift in question was experiencing a mechanical problem, and another crew taped down the kill switch safety feature so that they could continue to operate the forklift without stopping work. *Id.* at 175. Mrs. Smith testified that she believed that disabling the kill switch safety feature could cause an accident or injury. *Id.* at 177.

“Each supervisor of HRP-certified personnel must conduct an annual review of each HRP-certified individual during which the supervisor must evaluate information, based on his or her personal knowledge that is relevant to the individual's suitability to perform HRP tasks in a reliable and safe manner.” 10 C.F.R. § 712.13(b). If a supervisor has any concerns resulting from this review, they are required to report such concerns to the appropriate HRP management official. 10 C.F.R. § 712.13(c) On January 2, 2019, Mr. Price completed a Supervisory Review Checklist (SRC) in which he reported the results of his annual HRP review of Mrs. Smith. Ex. E at 1. In this checklist, Mr. Price marked boxes indicating his opinion that Mrs. Smith was often the center of conflict; was sometimes verbally or physically abusive; often exhibited poor anger control; sometimes demonstrated questionable judgment; and that coworkers had expressed concerns about her behavior. Ex. E at 1-2. In the comments section of this form, Mr. Price wrote:

[Ms. Smith] has faced disciplinary action again this year for her anger and one for a security incident. Controlling her temper or outburst is still an area she needs to correct. She doesn't take responsibility for her actions pertaining how to avoid these conflicts. She is quick to make rash judgments and will jump to conclusion without all the facts. She is also quick to deflect any negatives on to others.

Id. at 2. As part of her annual HRP recertification, Ms. Smith was initially evaluated by Dr. Pamela Jones, an HRP Psychologist. However, after it came to her attention that a decision on her recertification was delayed, Mrs. Smith expressed concern about her evaluation. Ex. MM at 115. As a result, the lead clinical psychologist at Y-12, Dr. William Conklin, became involved in Mrs. Smith's evaluation. Tr. at 349–350. Dr. Conklin met with Mrs. Smith to discuss her concerns about the process and to allow him to further evaluate her. Mrs. Smith claims that, during this meeting, she informed Dr. Conklin that Mr. Price was retaliating against her by providing false information in the SRC.¹¹ Tr. at 183. During his hearing testimony, however, Dr. Conklin testified that he could not recall Mrs. Smith alleging during this meeting that Mr. Price provided false information about her in the SRC or that Mr. Price had intended to retaliate against her. Tr. at 363-363. On March 19, 2019, Dr. Conklin sent Ms. Smith an email informing her that he had recommended her recertification in the HRP program. Ex. K.

On March 20, 2019, Mrs. Smith submitted a complaint to CNS's Ethics and Employee Concerns (E&EC) program alleging that she was disciplined in retaliation for disclosing “a departure from a security procedure, an unauthorized break in chain-of-command, and a potential adverse condition to worker safety” in connection with the 2018 DAC disclosure.¹² Ex. MM at 14. Ms. Leslie Daugherty, a Compliance and Ethics Specialist in E&EC, was assigned to investigate Mrs. Smith's complaint. *Id.* at 17–18. During an interview with Ms. Daugherty, Mrs. Smith provided an account of her disclosure to Mr. Price concerning the 2018 DAC, including her allegation that Ms. Cottrell had directed an employee with a history of unsafe work practices to work in a glovebox. *Id.* at 22. Mrs. Smith alleged to Ms. Daugherty that Mr. Price and Mr. Mathews had

¹¹ Mrs. Smith further testified that Dr. Conklin agreed with her, stating during that meeting that the SRC was “the worst one I've ever seen. It looks to me like this is a last-ditch effort of your old boss going out. It looks . . . targeted.” Tr. at 183. Dr. Conklin denied that he made this statement. *Id.* at 352.

¹² Mrs. Smith made several other allegations, including that Mr. Mathews was a “dictator” creating a negative work environment and that he engaged in favoritism. *Id.* at 21–25.

retaliated against her for her disclosure by disciplining her and providing derogatory information to Dr. Conklin in connection with her HRP recertification. *Id.* at 23.

Ms. Daugherty interviewed fifteen individuals concerning Mrs. Smith's allegations, including Dr. Conklin. Ex. MM at 1. Dr. Conklin opined that Mr. Price's prior SRCs concerning Mrs. Smith had been "critical but constructive," noting that the recent SRC was on "a different level" and "unusually critical." Ex. MM at 114-115. However, Dr. Conklin concluded that the recent SRC was factual in nature, "not inappropriate," and that he did not perceive the latest SRC to be an "assault on Mrs. Smith's character" or retaliatory in nature. Ex. MM at 114-116. Dr. Conklin further opined that Mrs. Smith "had some rough edges and needed to let this be an opportunity to improve." Ex. MM at 115. At the conclusion of her investigation, Ms. Daugherty issued findings in which she concluded that Mrs. Smith's allegations concerning Mr. Mathews' management style were partially substantiated based on interviews of other employees, but that Mrs. Smith's allegations of retaliation and unethical favoritism were unsubstantiated. Ex. MM at 2-8.

In May 2019, Mr. Richard Young, an African American, was selected to fill Mr. Price's position after Mr. Price accepted another position in CNS. Tr. at 490, 640. Mrs. Smith had applied for the position but was not interviewed or selected. Smith Deposition at 184-85.

On June 19, 2019, Mrs. Smith assigned Mr. Robert Cooper, a member of her crew, to perform the DAC. Ex. 3 at 17. While performing the DAC, Mr. Cooper identified an anomaly and reported it to the shift manager, Mr. Jerry Polson and Ms. Cottrell, rather than Mrs. Smith. *Id.* Mrs. Smith expressed her belief to Mr. Polson that the DAC procedure (CNS Procedure E-POL-1006 Code of Business Conduct) required Mr. Cooper to disclose the anomaly to her, and that Mr. Cooper's decision to contact Mr. Polson and Ms. Cottrell rather than her violated CNS's procedures and constituted an act of insubordination. Ex. 3 at 17; Tr. at 194-95. Mrs. Smith further alleged that she had informed Mr. Green and Mr. Young that she had observed Mr. Cooper's union steward writing a personal statement on Mr. Cooper's behalf in connection with the incident. Ex. 3 at 18.

On or about June 27, 2019, Mr. Emmet Wade, a supervisor outside of Mrs. Smith's chain of command, reported to Dr. Conklin that Mrs. Smith had engaged in four incidents of inappropriate behavior, including the use of a racial slur in the workplace. Tr. at 333-34; Ex. Q at 4. After obtaining a list of potential witnesses from Mr. Wade, Dr. Conklin again began investigating Mrs. Smith's conduct, interviewing seven employees. Ex. Q at 3-4. Each of the seven coworkers reported that Mrs. Smith was difficult to work with. Ex. Q at 3. Three of these coworkers alleged that Mrs. Smith "seemed to discriminate against African-Americans." Ex. Q at 3. One coworker, Mr. John "Mark" Anderson, an ADO team manager like Mrs. Smith, reported having witnessed Mrs. Smith use a racial slur to describe Mr. Young. *Id.*; Ex. Q at 3; Tr. at 337.

After receiving these reports, Dr. Conklin recommended that Mrs. Smith be temporarily removed from her HRP duties on July 8, 2019. On July 9, 2019, he met with Mrs. Smith to discuss these concerns. Ex. Q at 2. During this discussion, his notes indicate, Mrs. Smith denied her coworker's allegations, contending that her coworkers exhibited a lack of respect for women and were not happy with her because she held them accountable. Ex. Q at 2. Dr. Conklin met with Mrs. Smith again on July 10, 2019, "to discuss potential solutions to the difficulties she is having in her work

group.” Ex. Q at 1. During this discussion, Mrs. Smith stated to Dr. Conklin: “I feel I’m being targeted. I feel like this is a vicious rumor.” Ex. Q at 1. After this meeting, Dr. Conklin concluded:

I intend to discuss this matter with the Employee Issues Panel before making a recommendation regarding the employee's HRP status. While I have concerns, I do not see Revocation of the employee's HRP certification as justifiable at this time. I still hope to work with this employee in an effort to further conflict resolution skills.

Ex. Q at 1. On July 11, 2019, after meeting with the Employee Issues Panel and consulting with the HRP Certifying Official, Dr. Conklin concluded:

Ultimately, while the employee's alleged behavior is disconcerting we have no corroboration for the most egregious accusations. The current circumstances represent a troubling circumstance for the employee and her work group, but they are not presently seen as justification of Revocation of the employee's HRP certification. [The HRP Certifying Official] concurred with this assessment. As such, I have recommended her reinstatement into the HRP.

Ex. Q at 1.

On July 9, 2019, Mr. Lee Irons contacted Ms. Daugherty to initiate an E&EC complaint alleging that Mrs. Smith had singled him out for mistreatment, and that she was often rude and belittling to him in front of other employees.¹³ Ex. KK at 10–11, 13–14. Ms. Daugherty began an investigation of Mr. Irons’ complaint. According to CNS protocol, Ms. Angela Miller, a Senior Labor Relations Specialist in CNS’s Labor Relations Office, was included in E&EC’s investigation of Mr. Irons’ complaint because the investigation would require interviewing collective bargaining unit members.¹⁴ Tr. at 397–98. Ms. Daugherty prepared an investigatory plan for the joint investigation with Labor Relations (the Daugherty-Miller Investigation). Ex. KK at 8–9.

Ms. Miller and Ms. Daugherty interviewed Mr. Anderson on July 16, 2019. Ex. KK at 99. When Mr. Anderson was asked if he had observed Mrs. Smith treating any other employee in an inappropriate manner, he responded by stating that, just prior to a meeting at which they were going to be introduced to their new supervisor, Mr. Young, Mrs. Smith came to his office dressed in all white clothing and asked him if he was going to “meet the new head N***er.” Ex. KK at 102. Mr. Anderson reported that Mrs. Smith made the comment in the presence of his officemate, Mr. Dan Olson, and that Mr. Olson commented that Mrs. Smith’s comment was “a new level.” *Id.* Mr. Anderson also alleged that Mr. Mike Lyke, an Assembly Supervisor, had informed him that Mrs. Smith made the same comment to him on the same morning. *Id.*

¹³ Previously, on June 13, 2019, Mr. Irons emailed Dr. Conklin to express his concerns about Mrs. Smith’s behavior towards Mr. Irons. Ex. M at 1.

¹⁴ The Record suggests Ms. Miller had other reasons to participate in the investigation. Ms. Daugherty prepared notes of a phone conversation with Ms. Miller on July 10, 2019, in which she noted that Ms. Miller “wants to be in on interviews due to information rec’d [sic] on other issues involving L Smith.” Ex. KK at 18.

Mr. Anderson forwarded an e-mail dated May 16, 2019, to Ms. Miller and Ms. Daugherty, which Mr. Anderson alleged he had sent from his CNS e-mail account to his personal e-mail account, listing misconduct by Mrs. Smith.¹⁵ *Id.* at 27–28. This email discusses three areas of concerns involving Mrs. Smith, including Mr. Anderson’s allegation that on the morning of May 16, 2019, Mrs. Smith said to him “I guess we get to meet the Head N***er today that’s why I dress [sic] the way I did today.” *Id.*¹⁶ Mr. Anderson went to explain that he feared retaliation from Mrs. Smith, despite the fact that she was not in his supervisory chain, and “felt the best thing to do is write it and document it to -- because, when you do that, you know, it put a stamp on it, it made it to where you couldn’t change it, it made it real. And I thought it was the appropriate thing to do given the circumstance that I was in.” *Id.* at 281.

Ms. Miller and Ms. Daugherty subsequently interviewed Mr. Olson, who did not recall Mrs. Smith using a racial slur to describe Mr. Young, but speculated that “she prob [sic] did say it,” and that “if Mark says it happened then it happened.” Ex. KK at 139.¹⁷

Ms. Miller and Ms. Daugherty also interviewed Mr. Lyke, who reported that Mrs. Smith came to his office and said “I guess we’ll get to meet the new head N***er” on the same day as she allegedly made a similar remark to Mr. Anderson. *Id.* at 133. Mr. Lyke told Ms. Miller and Ms. Daugherty that he had learned of Mr. Anderson’s experience one week prior to the E&EC interview when he discovered a hand-written note in Mr. Anderson’s office describing the incident. *Id.*¹⁸ According to Mr. Lyke, he sometimes works out of Mr. Anderson’s office, which is on a different floor from his own, because it is a quieter working space. *Id.* Mr. Lyke reported that on one such occasion he observed the note and “covered it up,” which led Mr. Anderson to ask him if he had seen the note. *Id.*

¹⁵ One CNS employee interviewed during OHA’s investigation of the Complaint, Ms. Fonda Hampton, suggested that Mr. Anderson was not credible because he and other supervisors were “slanted” and “out for themselves.” Ex. 9 at 13:55–16:36.

¹⁶ Mr. Anderson’s e-mail further alleged that Mrs. Smith then “turned her hat sideways and said ‘what’s up’ with [gang] sign on both hands” *Id.* During the hearing, Mr. Anderson testified that Mrs. Smith had not told him that she purposefully dressed in all white and instead testified that he mentioned Mrs. Smith’s clothing in the e-mail because “I guess I thought about it during the day and knowing her nature of how meticulously dressed she was, it made me think that maybe that there was forethought into -- that what she said was not reactive, that there was a forethought into that action. But that is just speculation on my part. I don’t know why she wore what she wore.” Tr. at 282–83. Mrs. Smith submitted a photo of the clothes she was wearing on the day in question into evidence. Ex. 4 at 46. The items include a white American flag hat, a white t-shirt with a colorful nuclear-related logo, and white tennis shoes. *Id.* The items are unremarkable and would not lead a disinterested observer to believe that Mrs. Smith was trying to communicate a race-related message through her manner of dress.

¹⁷ Mr. Olson had been previously interviewed by Dr. Conklin as part of his investigation of Mrs. Smith’s HRP eligibility, at which time he denied hearing Mrs. Smith use a racial slur and did not volunteer information related to Mr. Anderson’s statement. Ex. V at 1; Tr. at 647.

¹⁸ According to Mr. Anderson, he wrote himself a note describing the incident to remind himself to write the e-mail which he ultimately forwarded to Ms. Daugherty and Ms. Miller. Tr. at 263.

On July 19, 2019, Ms. Miller met with Mrs. Smith to inform her that she would be placed on paid administrative leave while allegations that she used a racial slur were investigated. ROI at 12; Ex. Y at 2. During this meeting, Mrs. Smith denied using the racial slur, claiming that the allegations were a vicious rumor. ROI at 12; Ex. Y at 2; Ex. KK at 137.

Ms. Daugherty prepared a “Conclusive Summary” of the investigation reflecting the investigators’ finding that Mrs. Smith had described Mr. Young by using a derogatory racial term that violated CNS’s Code of Business Conduct. Ex. KK at 1–7.¹⁹ On September 3, 2019, Ms. Angela Miller prepared a “Discipline/Termination Case Summary” (the DTSC) recommending Mrs. Smith’s termination. Ex. Y at 1–2. The DTSC described Mr. Anderson, Mr. Lyke, and Mr. Olson’s accounts of the May 16, 2019, discussions in which Mrs. Smith was accused of using the racial slur. Ex. Y at 1. The DTSC further reported that Mr. Anderson and Mr. Lyke both alleged that Mrs. Smith had further stated that Mr. Young “had sent an email asking for our resumes, but if he needs something, he needs to go ask Tye,” and further noting that “Greg Tye is an African American who reports to Ms. Smith.” Ex. Y at 1. The DTSC further stated that Mr. Anthony Cannon had reported that he:

received an email at his home email address from Ms. Smith's home email address some time ago. In the email Ms. Smith was speaking of her daughter's injury and said "some BLACK girl ran into her ankle." He said he replied to the email stating he was sure she hadn't meant to send it to him but what difference did it make that the girl was Black. He said he didn't make a big deal about it, and she never replied back but she has been even nicer to him ever since.

Ex. Y at 2. The DTCS reported that Mrs. Smith was interviewed about her use of the racial slur. Ex. Y. at 2. During this interview, Mrs. Smith denied using the racial slur, stating that these allegations were “vicious rumors” and that she had never used that word. Ex. Y at 2. She further asked the interviewers to interview four African Americans, one of whom was not interviewed because they were not a CNS employee. Two of the three employees that Mrs. Smith requested to be interviewed stated that they had not witnessed Mrs. Smith acting inappropriately to them or anyone else. Ex. Y at 2. The fourth employee was Mr. Cannon. Ex. Y at 2.

Ms. Miller submitted the DTCS to Ms. Diane Grooms, CNS’s Chief Human Resources Officer, who was responsible for making the final determinations for disciplinary actions. Ex. KK at 133; Tr. at 44, 75. Ms. Grooms reviewed the DTSC and consulted with Ms. Miller, Mr. Chad Mee, CNS’s Labor Relations Manager, and Mr. Reed Mullins, CNS’s Senior Director of Production Operations, about the concerns raised in the DTSC. Tr. at 38, 89–90. Based on the accounts of Mr. Anderson, Mr. Olson, and Mr. Lyke, Ms. Grooms determined that the allegations were substantiated, and that Mrs. Smith’s employment should be terminated. *Id.* at 45–46, 73, 75.

On September 12, 2019, CNS terminated Mrs. Smith’s employment. Ex. AA at 1. Pursuant to the site’s policies, an armed security officer was present at Mrs. Smith’s termination and escorted her from the premises. Tr. at 512–15. The security officer testified at the hearing that her interactions with Mrs. Smith were brief and professional, she expressed empathy for Mrs. Smith’s termination,

¹⁹ The Conclusive Summary also found that Mrs. Smith violated CNS’s Discrimination and Harassment Policy and Standards of Conduct and Appearance Policy. Ex. KK at 6–7.

and she assisted Mrs. Smith in transporting her personal effects to her vehicle. *Id.* Mrs. Smith alleged that she felt falsely imprisoned and fearful for her life during the interaction. *Id.* at 141–42; *see also* Ex. 3 at 36.

II. Analysis

The employee bears the initial burden of proof to establish, by a preponderance of the evidence, that she engaged in protected conduct under 10 C.F.R. § 708.5 and that the protected conduct “was a contributing factor in one or more alleged acts of retaliation against the complainant by the contractor.” 10 C.F.R. § 708.29. If the employee meets these burdens, the burden then shifts to the contractor “to prove by clear and convincing evidence that it would have taken the same action without the complainant’s disclosure, participation, or refusal.” *Id.*²⁰

For the reasons set forth below, I find that Mrs. Smith has carried her initial burden of establishing, by the preponderance of the evidence, that she engaged in protected conduct on five occasions, and that one instance of her protected conduct was a contributing factor in an alleged act of retaliation by CNS. However, I have further found that CNS has demonstrated by clear and convincing evidence that it would have terminated Mrs. Smith’s employment regardless of her protected conduct.

A. Did Mrs. Smith Engage in Protected Conduct under 10 C.F.R. § 708.5?

1. Glovebox Concern

It is undisputed that, on April 26, 2018, Mrs. Smith informed Mr. Price that Ms. Cottrell directed a member of her crew to work in a glovebox without a pre-job briefing. Tr. at 486–87. Mrs. Smith also repeated this concern to Ms. Daugherty in March 2019. Ex. MM at 22. The glovebox protected workers and the environment from an atmospheric release of Beryllium, a dangerous substance. While these dangers are inherent to the work which needed to be performed, Mrs. Smith’s knowledge that the employee had not been pre-job briefed and the fact that she had recently removed him from glovebox work for problems with his work provided a sufficient basis for Mrs. Smith to demonstrate that she reasonably believed that she was disclosing a substantial and specific danger to employees when she made her disclosure to Mr. Price and Ms. Daugherty. Accordingly, I find that this disclosure constituted protected conduct under 10 C.F.R. § 708.5I(a)(2), which protects employees who disclose information that they reasonably believed would reveal a substantial and specific danger to employees or to public health or safety.

2. Improperly Conducted DAC

Mrs. Smith has failed to show that her concerns about the performance of the DAC were reasonable and that she disclosed those concerns to Mr. Price. The procedure governing the performance of

²⁰ The clear and convincing evidence standard requires a party to demonstrate that a conclusion is highly probable, which is a heavier burden of proof than the preponderance of the evidence standard but a lighter burden than the beyond a reasonable doubt standard. *Koszola v. FDIC*, 393 F.3d 1294, 1300 (D.C. Cir. 2005) (citing *Addington v. Texas*, 441 U.S. 418, 425 (1979)).

DACs indicates that two individuals may perform a DAC together, but does not indicate whether they can divide work amongst themselves or must walk the facility together when performing the DAC. Ex. GG at 11. Mr. Mathews testimony supported Mrs. Smith's assertion that two crew members could not properly divide a DAC and perform portions of it separately. *Id.* at 438–39. However, Mrs. Smith did not provide any evidence supporting her assertion the DAC in question was actually performed in this manner. Furthermore, Mr. Price denied that Mrs. Smith informed him that this DAC was improperly conducted. Tr. at 486. I therefore find that Mrs. Smith did not meet her burden of proving that she: (1) reasonably believed that the April 26, 2018, DAC was performed improperly, and (2) had expressed her concern about this DAC to Mr. Price. I therefore find that Mrs. Smith has not shown that she engaged in protected conduct by expressing her concerns about the April 26, 2018, DAC to Mr. Price.

3. Improper Labeling of Non-Fissile Material

On September 17, 2018, Mrs. Smith disclosed to Mr. Price that CNS procedures had been violated because her work crew had received a shipping container containing co-mingled fissile and non-fissile material, and because the shipping containers' contents had not been properly inventoried before they entered the plant. While Mr. Price acknowledged that Mrs. Smith disclosed the procedural error to him on or about September 17, 2018, he testified that he did not believe at the time that Mrs. Smith's disclosure raised an immediate safety or security concern. Tr. at 503. Mrs. Smith's belief that the improper labeling, segregation, and inventory control of fissile and non-fissile material substantially violated a law, rule, or regulation and presented a substantial and specific threat to employees or to public health and safety was clearly reasonable. *See* Tr. at 169–71 (reflecting Mrs. Smith's belief that non-compliance with the applicable procedure created risks of the diversion of fissile material or unwitting exposure of personnel to fissile material). Accordingly, I find that this disclosure was protected under 10 C.F.R. §§ 708.5(a)(1) and (a)(2).

4. The Disabled Safety Equipment

On December 4, 2018, Mrs. Smith disclosed to Mr. Price that her team had discovered that the kill switch on a forklift had been taped down to allow its operation without manually engaging the kill switch. Tr. at 173–78, 504–05. Mrs. Smith's belief that the intentional disabling of safety equipment could be expected to result in a substantial and specific danger to employees was clearly reasonable. Accordingly, I find that this disclosure was protected under 10 C.F.R. § 708.5(a)(2).

5. May 2019 Discussions with Dr. Conklin

Mrs. Smith claims that during her March 2019 discussions with Dr. Conklin concerning her HRP recertification, she disclosed to Dr. Conklin that Mr. Price was retaliating against her by providing false information in the SRC. However, when questioned about this assertion at the hearing, Mrs. Smith could not "recall exactly what [she] said" to Dr. Conklin during the interview. *Id.* at 181. Moreover, Dr. Conklin testified that he could not recall Mrs. Smith alleging that Mr. Price provided false information about her in the SRC or alleging that Mr. Price had intended to retaliate against her, and he denied recollection of Mrs. Smith making such a claim in his interview of her during the HRP recertification process. Tr. at 363-364. Accordingly, Mrs. Smith has not met her burden of proving that she made this alleged protected disclosure.

6. Disclosures of Alleged Retaliation to E&EC

Mrs. Smith has met her burden of proving that she engaged in protected conduct, under 10 C.F.R. §§ 708.5(a)(1) and 708.5(b), by alleging to an E&EC employee, Ms. Daugherty, that her managers retaliated against her for raising safety and security-related concerns. Ms. Daugherty testified during the hearing that she did not recall Mrs. Smith making this allegation. Tr. at 409. However, the Record clearly supports Mrs. Smith's allegation that she made this allegation during Ms. Daugherty's investigation of her March 2019 E&EC Complaint. Mrs. Smith's March 20, 2019, E&EC Complaint itself alleges that her managers retaliated against her for raising safety and security-related concerns. Ex. MM at 14-15. Moreover, Ms. Daugherty's summary of her investigation of Mrs. Smith's E&EC Complaint specifically states that Mrs. Smith alleged that "the management report submitted as part of her annual HRP review targeted her because she stood up to Mr. Mathews over security violations." Ex. MM at 1.

Section 708.5(b) protects an employee "Participating in . . . an administrative proceeding conducted under this part." *See In the Matter of Dr. Shou-Yuan Zhang*, Case Number WBH-17-0011 (May 16, 2019) (filing a Complaint under Part 708 constitutes protected conduct). By filing her complaint with E&EC alleging that her managers retaliated against her for raising safety and security-related concerns, Mrs. Smith was taking her first step towards filing her Part 708 Complaint.²¹ Accordingly, I find that, by alleging that she was being retaliated against by her managers for raising safety and security-related concerns making, Mrs. Smith was engaging in protected conduct under 10 C.F.R. § 708.5(b).

7. Disclosure of "a Compromised MOCKup"

Mrs. Smith's disclosure to Mr. Green on April 3, 2019, concerned similar circumstances to her 2018 disclosure to Mr. Price concerning improperly labeled non-fissile material. Tr. at 190-91. Accordingly, I find that this disclosure was protected under 10 C.F.R. § 708.5(a)(1) and (a)(2).

8. The Second DAC Incident

Mrs. Smith alleges that Mr. Cooper violated CNS Procedures, on June 19, 2019, by contacting Ms. Cottrell, rather than herself, when he found an anomaly while performing a DAC. She further alleges that Mr. Cooper's consultation with a union steward while preparing a statement concerning the incident was "unethical." Tr. at 194-98. Mrs. Smith claims that she informed Mr. Polson of these alleged issues. The DAC procedure requires employees to "contact the MBA Supervisor, Shift Manager, and MBA Custodian immediately" upon identifying an anomaly. Ex. P at 4. Multiple CNS personnel testified that they believed that Mr. Cooper acted properly under the circumstances by raising the anomaly to the first available supervisor so that it could be addressed as quickly as possible. Tr. at 321, 463-64, 628-29. Mrs. Smith admitted that the procedure in question was ambiguously worded and acknowledged that a quick response to identified anomalies would help to mitigate security threats. *Id.* at 196, 226. Accordingly, Mrs.

²¹ 10 C.F.R. § 708.13 requires that an employee must exhaust all applicable grievance or arbitration procedures before filing a complaint. 10 C.F.R. §§ 708.13(d) and 708.14.

Smith has not shown that she reasonably believed that Mr. Cooper violated the DAC procedure by initially reporting an anomaly to Ms. Cottrell, instead of Mrs. Smith.

With respect to Mrs. Smith's disclosure concerning Mr. Cooper's consultation with a union steward while preparing a statement about this incident, Mrs. Smith has not identified any law, rule or regulation that would prohibit a union member from obtaining the assistance of a union steward in preparing a statement. Moreover, several witnesses testified convincingly that members of the collective bargaining unit are entitled to consult with their union leadership when preparing a document that might have a bearing on a potential disciplinary action. I therefore find that Mrs. Smith has not met her burden of proving that her concern about Mr. Cooper's consultation with his union representative was reasonable. Accordingly, I find that she has not shown she was engaging in protected conduct by informing Mr. Polson that Mr. Cooper was receiving assistance from a union steward in preparing a statement concerning the DAC incident.

9. Alleged July 2019 Disclosures to Dr. Conklin

During their three meetings in July 2019, Mrs. Smith, expressed a concern to Dr. Conklin that she was being "targeted" by other CNS employees who were spreading "vicious rumors" about her. Dr. Conklin testified that he recalled Mrs. Smith telling him that she believed that other employees were hostile towards her because of her gender and that "they would do whatever they could to get out of work," but denied any recollection of Mrs. Smith claiming that she was being retaliated against for specific behavior on her part. Tr. at 365-66.²² Mrs. Smith's allegations are not sufficiently specific to meet her burden of proving that she engaged in any protected conduct during these meetings.

B. Were Mrs. Smith's Disclosures A Contributing Factor to CNS's Decision to Terminate Mrs. Smith?

I have found that Mrs. Smith has shown that she had engaged in protected conduct on five occasions, as noted above. However, in order to establish a prima facie case under 10 C.F.R. § 708.29, Mrs. Smith must establish a nexus between her protected conduct and her termination by CNS by proving that one or more of these five instances of protected conduct were a contributing factor to CNS's decision to terminate her employment on September 12, 2019.

1. Is there Direct Evidence that Mrs. Smith's Protected Conduct Was A Contributing Factor to Her Termination?

There is no direct evidence in the Record supporting an inference that her protected conduct was a contributing factor to her termination.

²² As of the date of her termination, Mrs. Smith insisted that her subordinates had concocted the allegation of her using a racial slur in retaliation for the second DAC disclosure. See Tr. at 563 (summarizing Mrs. Smith's statements at the termination meeting).

2. Is there Circumstantial Evidence that Mrs. Smith's Protected Conduct Was A Contributing Factor to Her Termination?

There is rarely a “smoking gun” that establishes a nexus between a complainant’s protected conduct and the alleged acts of retaliation. *Matter of Ronald Sorri*, OHA Case No. LWA-0001 at 3–4 (1993). Consequently, retaliatory intent can be established through circumstantial evidence. Specifically, an employee can demonstrate that their protected conduct was a contributing factor to an alleged retaliatory act if they can establish that the acting official had actual or constructive knowledge of the protected conduct, and acted within such a period of time (temporal proximity) that a reasonable person could conclude that the conduct was a factor in the personnel action. *Id.*

A. Was there Sufficient Temporal Proximity between Mrs. Smith's Protected Conduct and Her Termination to Infer that Her Protected Conduct Was a Contributing Factor to Her Termination?

Whether there is sufficient temporal proximity between protected conduct and an alleged act of retaliation to infer that the protected conduct was a contributing factor in the personnel action is a fact-specific inquiry. *Dr. Shou-Yuan Zhang*, OHA Case No. WBH-17-0011 at 13. In previous cases, we have considered the unique circumstances of each case before us when determining whether sufficient temporal proximity was present. *See e.g., Matter of Hansford F. Johnson*, OHA Case No. TBZ-0104 (2010) (finding seven months was sufficient temporal proximity within which to infer disclosures were a contributing factor to alleged acts of retaliation); *see also Matter of Gary S. Vander Boegh*, OHA Case No. TBH-0007 at 14 (2002) (finding the passage of nine months was “a reasonable period of time within which to presume that the disclosures were a contributing factor to alleged retaliations.”); *see also Matter of William Cor*, OHA Case No. VBH-0079 (2002) (finding eight months was sufficient temporal proximity to infer that protected conduct was a contributing factor to an act of retaliation); *but see Matter of Donald Searle*, OHA Case No. TBU-0079 at 3 (2008) (finding twelve months was an “unusually extended period of time” and too long to infer that protected conduct was a contributing factor to alleged acts of retaliation); *see also Matter of Jean G. Rouse*, OHA Case No. VBH-0056 (2001) (finding the passage of two years too lengthy to find temporal proximity between protected conduct and an alleged act of retaliation).

Mrs. Smith has shown that she has engaged in protected conduct on three occasions with sufficient temporal proximity to her September 12, 2019, termination to infer that the protected conduct was a contributing factor to CNS’s decision to terminate her employment. Specifically, on December 4, 2018, when she had informed Mr. Price that her team had discovered that the kill switch on a forklift had been taped down in order to allow its operation; on March 20, 2019, when she alleged to Mrs. Daugherty that CNS managers retaliated against her for raising safety and security-related concerns; and on April 3, 2019, when she informed Mr. Green that non-fissile material had been improperly labeled. Each of these instances of protected conduct occurred between five and nine months prior to her September 12, 2019, termination.

B. Has Mrs. Smith Shown that the Acting Official, Ms. Grooms, Had Actual or Constructive Knowledge of Her Protected Conduct?

Temporal proximity between protected conduct and an adverse personnel action, alone, does not establish that the protected conduct was a contributing factor to a contractor's personnel action.²³ To allow such an inference, a complainant must also show that the acting official had actual or constructive knowledge of the complainant's protected conduct.

There is no evidence in the Record indicating that the acting official, Ms. Grooms, had actual knowledge of any of Mrs. Smith's protected conduct. However, an employee can show that the acting official had "constructive knowledge" of the employee's protected conduct by proving that the acting official relied upon information or a recommendation supplied by an individual with actual knowledge of the employee's protected conduct. *See Jagdish C. Laul*, OHA Case No. VBH-0010 at 5 (2000) (finding that the acting officials had constructive knowledge of an employee's protected disclosures because "the individuals making the personnel decision were influenced by the opinions of those persons with knowledge of the protected conduct)."

The Record shows that Ms. Grooms consulted with Ms. Miller, Mr. Chad Mee, and Mr. Mullins before terminating Mrs. Smith's employment, and relied upon the information and recommendations contained in the DTSC prepared for Ms. Grooms by Ms. Miller in deciding to terminate Mrs. Smith. The Record further shows that Ms. Daugherty played a central role in the Daugherty-Miller investigation, which supplied the information forming the basis of the DTSC. Accordingly, Mrs. Smith could establish that Ms. Grooms had constructive knowledge of her alleged disclosures by proving that any of these CNS officials had actual knowledge of Mrs. Smith's protected conduct. Mrs. Smith has not shown that Ms. Miller, Mr. Mee, or Mr. Mullens had actual knowledge of Mrs. Smith's protected conduct.²⁴ However, since I have found that Mrs. Smith's March 20, 2019, allegations to Ms. Daugherty that CNS managers retaliated against her for raising safety and security-related concerns constitute protected conduct under 10 C.F.R. § 708.5(b), the Record clearly indicates that Ms. Daugherty had actual knowledge of Mrs. Smith's protected conduct. As a result, I conclude that Ms. Grooms had constructive knowledge of Mrs. Smith's protected conduct in March 2019.

The Record shows that CNS terminated Mrs. Smith's employment on September 12, 2019, approximately six months after Mrs. Smith engaged in protected conduct by alleging, to Mrs.

²³ *See Sue Rice Gossett*, OHA Case No. VBZ-0062 at 5–6 (finding that a decisionmaker's personal knowledge of an employee's disclosures, together with temporal proximity between the disclosure and the decisionmaker's termination of the employee, were sufficient to establish that the disclosures were a contributing factor in the employee's termination).

²⁴ Ms. Grooms denied speaking with Ms. Daugherty regarding Mrs. Smith. Tr. at 90. However, in light of the centrality of Ms. Daugherty to the investigation of Mrs. Smith's alleged use of the racial slur and Ms. Miller's reliance on the Conclusive Summary in her memo to Ms. Grooms recommending Mrs. Smith's termination, I find that Ms. Daugherty contributed to Ms. Groom's decision to terminate Mrs. Smith's employment. Ms. Grooms also indicated that she consulted with CNS legal counsel Kristie Stogsdill, Esq., and Mr. Morgan Smith, CNS's CEO. Tr. at 37–38. Neither Ms. Stogsdill nor Mr. Smith testified at the hearing and there is no basis in evidence for me to infer that they were aware of Mrs. Smith's alleged disclosures at the time of their participation in Ms. Groom's deliberations.

Daugherty in March 2019, that CNS managers retaliated against her for raising safety and security-related concerns, thereby establishing that there was sufficient temporal proximity between her protected conduct and her termination. Moreover, the Record shows that the acting official, Ms. Grooms, who made the decision to terminate Mrs. Smith, had constructive knowledge of Mrs. Smith's March 2019 protected conduct when making that decision. I therefore find that Mrs. Smith has met her burden of proving that her protected conduct was a contributing factor to CNS's decision to terminate her.

C. Would CNS Have Terminated Mrs. Smith's Employment In the Absence of Her Protected Conduct?

Having concluded that Mrs. Smith made a protected disclosure to Ms. Daugherty, and that the disclosure was a contributing factor in her termination, I must now consider whether CNS has shown, by clear and convincing evidence, that it would have terminated Mrs. Smith in the absence of her March 2019 protected conduct.

In evaluating whether a contractor would have taken an adverse action against an employee, regardless of the employee's protected conduct, OHA considers, among other things: "(1) the strength of the [employer's] reason for the personnel action excluding the whistleblowing, (2) the strength of any motive to retaliate for the whistleblowing, and (3) any evidence of similar action against similarly situated employees." *Matter of Dean P. Dennis*, OHA Case No. TBH-0072 at 5 (2009) (quoting *Kalil v. Dep't of Agriculture*, 479 F.3d 821, 824 (Fed. Cir. 2007)) (listing factors considered in cases interpreting the Whistleblower Protection Act); see also *Carr v. Soc. Sec. Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999) (adopting the three-factor test to determine whether an employer would have taken a personnel action but for an employee's disclosure under the Whistleblower Protection Act) (hereinafter the *Carr* Factors).

I find that CNS had good cause for terminating Mrs. Smith. The Miller-Daugherty investigation uncovered several allegations of racially offensive conduct by Mrs. Smith, including two first-hand accounts of Mrs. Smith using a racial slur, and a first-hand account of Mrs. Smith sending a racially insensitive email to an African American employee. An employee's alleged use of a racial slur can provide a strong reason for terminating the employee where "the inquiry is based on strong, corroborated evidence that the [employee] used the word in question." *Bruns v. U.S. Dep't of Agric.*, 2017 WL 4483933 at 10 (M.S.P.B. 2017). While there can be doubts concerning the credibility of Mr. Anderson and Mr. Lyke, the two employees who reported the use of the racial slur to Ms. Miller and Ms. Daugherty,²⁵ I also have doubts concerning Mrs. Smith's credibility. More importantly, there is no evidence in the Record indicating that Ms. Grooms, Ms. Miller, or Ms. Daugherty harbored similar doubts about Mr. Anderson and Mr. Lykes' credibility.²⁶ In light of these facts, I find that Ms. Groom's decision to terminate Mrs. Smith was appropriate and was the expected response by a human resources professional given the information she had before her

²⁵ Mr. Olson failed to corroborate Mr. Anderson's account, even though he was present at the time that the racial slur was allegedly uttered to Mr. Anderson.

²⁶ There is no evidence in the Record indicating that either Mr. Anderson or Mr. Lyke were aware of Mrs. Smith's protected conduct.

indicating that Mrs. Smith referred to her new manager by using an egregious racial slur. Moreover, Ms. Daugherty and Ms. Miller's recommendations were likewise expected, given the information that came to light during their investigations.

There is no evidence in the Record supporting an inference that Ms. Daugherty possessed a motive to retaliate against Mrs. Smith for her protected conduct. Nor is there evidence in the Record indicating that Ms. Daugherty steered the Daugherty-Miller investigation towards a recommendation to terminate Mrs. Smith's employment.²⁷ Importantly, I note that Mrs. Smith has offered no theory as to why Ms. Daugherty, a subordinate employee in E&EC, would harbor animus against her. Tr. at 130–31; Deposition of Leslie Smith at 110. Accordingly, I find that the absence of motive to retaliate against Mrs. Smith weighs heavily in favor of CNS.

With respect to comparator employees, CNS provided evidence that it terminated three employees who had used the same racial slur as Mrs. Smith. Ex. OO.²⁸ Mr. Mee also testified concerning four CNS employees whose employment was terminated based solely on allegations from their coworkers which the employees denied. Tr. at 603–05. Mrs. Smith proved that an employee at Y-12 was disciplined, but not terminated, in 2012, after that employee circulated a "racially oriented" e-mail containing a host of slurs. Ex. 7 at 1, 5–6. However, the decision not to terminate that employee was made by the previous M&O contractor at Y-12, Babcock and Wilcox Technical Services Y-12, LLC. *Id.* at 1. CNS did not become the M&O contractor at Y-12 until 2014. Tr. at 61, 74; *NNSA Production Office Contract*, NATIONAL NUCLEAR SECURITY ADMINISTRATION, <https://www.energy.gov/nnsa/nnsa-production-office-contract> (last visited December 17, 2020). CNS identified numerous employees whose employment was terminated under comparable circumstances to Mrs. Smith, and the comparator employee offered by Mrs. Smith was disciplined by a different contractor than CNS. Accordingly, I find that the evidence of comparator employees weighs in favor of CNS.

I therefore find that each of the *Carr* factors strongly supports CNS's contention that it would have terminated Mrs. Smith's employment in the absence of her protected conduct. The sound legal and business basis for this decision, the improbability of Ms. Daugherty holding retaliatory animus towards Mrs. Smith, and the evidence in the Record showing that CNS has terminated comparator employees making racial slurs, clearly and convincingly shows that CNS decided to terminate Mrs. Smith because of her use of a racial slur and not because of her protected disclosures. Accordingly, I deny Mrs. Smith's complaint.

²⁷ While Mr. Anderson's allegations could have constituted an act of retaliation, Mrs. Smith attributed Mr. Anderson's allegations to jealousy and resentment on his part for reasons unrelated to her alleged protected disclosures. Tr. at 115–16.

²⁸ CNS admitted that one of its employees was disciplined, but not terminated, for using the same slur Mrs. Smith allegedly used. Tr. at 74–75. CNS represented that the employee used the word in reference to the title of a television show. *Id.* at 95; CNS Motion for Summary Judgment at 5, n.9 (October 5, 2020). As the employee's alleged use of the word was apparently part of a literal recitation of what he believed to be the title of a show, and not directed at a person or necessarily intended to convey derogatory sentiment, I find that there is inadequate evidence in the record to conclude that the employee in question was a comparator employee to Mrs. Smith.

III. Conclusion

Mrs. Leslie Smith demonstrated that her protected conduct was a contributing factor in Consolidated Nuclear Security LLC's decision to terminate her employment. However, Consolidated Nuclear Security proved by clear and convincing evidence that it would have terminated Mrs. Smith's employment regardless of Mrs. Smith's protected conduct.

It is therefore Ordered that the Complaint filed by Mrs. Leslie Smith under 10 C.F.R. Part 708 is hereby denied.

This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after the party's receipt of the Initial Agency Decision, in accordance with 10 C.F.R. § 708.32.

Steven L. Fine
Administrative Judge
Office of Hearings and Appeals