

November 2, 2007

DECISION AND ORDER OF  
THE DEPARTMENT OF ENERGY

*Initial Agency Decision*

Name of Petitioner: Casey von Bargaen

Date of Filing: May 21, 2007

Case Number: TBH-0034

This Initial Agency Decision involves a whistleblower complaint filed by Mr. Casey von Bargaen (also referred to as the complainant or the individual) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. The complainant was an employee of COMPA Industries, Inc. (COMPA), a subcontractor of Sandia Corporation (Sandia) which manages the Sandia National Laboratories (SNL) in Albuquerque, New Mexico for the DOE. On June 2, 2003, he began employment at the SNL facility as a safety engineer. On September 20, 2004, the complainant was terminated from his position. In November 2004, he filed a complaint of retaliation against Sandia with the Employee Concerns Manager of the National Nuclear Security Administration (NNSA) Service Center. In his complaint, the individual contends that he made certain disclosures and that Sandia retaliated against him in response to these disclosures.

*I. Summary of Determination*

In this Decision, I first provide background information concerning the Part 708 program. I then discuss the filing and the development of the issues raised in the individual's Part 708 Complaint, focusing on the Office of Hearings and Appeal's Report of Investigation and the parties' subsequent efforts to frame issues for the Hearing. I then present the relevant testimony provided at the Hearing. Next is my analysis of this complaint. With regard to the issues raised in this proceeding, I first find that the complaint was timely filed. Second, I find that the complainant made two protected disclosures prior to the alleged

retaliations that he claims. I then find that Sandia's decision to terminate the complainant from his position at SNL meets the Part 708 criteria for a retaliation but that Sandia's refusal to assist the complainant in finding a transfer position at Sandia does not meet those criteria. I next find that the complainant's termination by Sandia occurred proximate in time to the complainant's protected disclosures and that therefore the complainant has shown by a preponderance of the evidence that his termination from SNL constitutes a retaliation against him under Part 708. On the basis of that finding, Part 708 imposes the significant requirement that Sandia show by clear and convincing evidence that, in the absence of the complainant's protected disclosures, it would have taken the same personnel action against the complainant.

Ultimately, I find that Sandia has established by clear and convincing evidence that it would have terminated the complainant's employment at SNL in the absence of the complainant's protected disclosures. Accordingly, I find that the complainant is not entitled to any relief under Part 708.

## *II. Background*

### *A. The DOE Contractor Employee Protection Program*

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). The purpose of this program is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices by protecting such "whistleblowers" from adverse personnel actions 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. The regulations provide, in pertinent part, protection against adverse personnel actions taken in retaliation against an employee for disclosing, to a DOE official or to a DOE contractor, information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation; or a substantial and specific danger to employees or to public health or safety. See 10 C.F.R. § 708.5(a)(1), (2). Employees of DOE

contractors who believe that they have made such a disclosure and that their employer has taken adverse personnel actions against them may file a whistleblower complaint with the DOE. As part of the proceeding, they are entitled to an investigation by an investigator appointed by the Office of Hearings and Appeals (OHA). After the investigator's report on the complaint is issued, they are entitled to an evidentiary hearing before an OHA Hearing Officer. The Hearing Officer issues a formal, written opinion on the complaint. Finally, they may request review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

*B. History: The Individual's Part 708 Complaint and the Identification of Relevant Issues for the Hearing*

The complainant filed his Part 708 complaint with the Employee Concerns Manager in November 2004. In June 2005, the complaint was referred to the OHA for an investigation followed by a hearing. The OHA Director appointed an Investigator on June 21, 2005. On May 30, 2006, the Investigator issued a decision denying Sandia's Motion to Dismiss the complaint. *Von Bargen, Casey* (Case No. TBZ-0034), 29 DOE ¶ 87,009 (2006). On May 21, 2007, the Investigator issued a Report of Investigation (ROI) concerning the complaint.

In his November 2004 complaint, the individual contended that after reporting safety concerns to Sandia officials, Sandia refused to assist him in transferring to another division at SNL and then terminated his employment. November 2004 complaint at 1, 9. In the ROI, the Investigator conducted an initial factual and legal analysis of this complaint, and made some preliminary determinations concerning protected disclosures and adverse personnel actions.

The ROI finds that the complainant worked as a Sandia contractor employee at SNL in the position of a safety engineer. His duties included reviewing safety plans provided by Sandia contractors, inspecting safety equipment, and investigating safety concerns. ROI at 2.

*1. ROI Findings on Disclosures*

The ROI indicates that the complainant made the following two disclosures relating to an April 21, 2004 incident during which a Sandia contractor employee received a shock while working on an overhead fluorescent lighting fixture:

(1) in June 2004, the complainant told Carla Lamb, who at the time was the Facilities Environmental, Safety and Health (ESH) Coordinator, that locking light switches in the off position does not safely cut off power to 277 volt fluorescent lighting systems. Specifically, he told her that 29 C.F.R. § 1910.147 does not allow control devices [such as light switches] to be used as a Lock-Out Tag-Out (LOTO) point. The complainant also communicated the substance of his conversation with Ms. Lamb to his supervisor, Mr. Johnny Vaughan, in a September 14, 2004 e-mail; and

(2) The complainant also reported to SNL management that the contractor whose employee received the shock, and 13 other contractors, did not have site-specific safety plans on file at SNL.

ROI at 3-5.

## *2. ROI Findings on Retaliation*

The ROI indicates that Sandia, in consultation with COMPA, took an adverse personnel action affecting the complainant when it terminated his employment at SNL on September 20, 2004. See ROI at 5. The ROI finds that Mr. Vaughan was the individual who made the decision to terminate the complainant. The ROI finds that Mr. Vaughan indicated that his decision to terminate the complainant was based on the complainant's poor performance at SNL. The ROI refers to a September 24, 2004 memorandum in which Mr. Vaughan explained why he believed that the complainant's workplace performance merited termination. The memorandum indicates:

1. That the complainant does not work well with others to arrive at solutions to problems, and reacts with a negative attitude to anyone who might suggest another way to get to the same level of safety;
2. That when the complainant reported safety-related issues as part of his job, he expected immediate responses, and interpreted any less-than-immediate responses as "indicative of SNL's lackluster attitude toward safety ..."

3. That on September 14, 2004, the complainant presented data on occupational injury and illness to a meeting of the Metal Trades Council-represented employees and the Joint Union Mgt. Council in a very condescending and unprofessional way; and

4. That the complainant frequently circumvented the work assignment system at SNL and became angry when required to repeat work when it was formally assigned to him. He reacted with insults when asked to follow the work assignment system, "calling it stupid";

ROI at 7-8 *citing* Mr. Vaughan's September 24, 2004 memorandum. The ROI also states that in an interview with the investigator, Mr. Vaughan asserted that the complainant was terminated because he seemed distracted and unhappy at SNL, because he was not a team player, and because he directed his anger at certain, female SNL employees to the extent of making sexual harassment allegations against them. ROI at 8.

Following my appointment as Hearing Officer on May 21, 2007, I directed the complainant, Sandia and COMPA to submit briefs focusing on the findings and conclusions in the ROI that they intended to dispute at the Hearing.<sup>1/</sup> In its brief, Sandia disputes the ROI's finding that the complainant made protected disclosures. In addition, Sandia and COMPA both contend that even if the complainant made protected disclosures, they were not a contributing factor in their decision to terminate his employment. Further, they assert that the decision to fire the complainant was based on legitimate business reasons unrelated to any protected activity. Accordingly, the Hearing focused on the complainant's alleged disclosures relating to safety concerns, and on Sandia and COMPA's contention that the complainant's employment at SNL was terminated in September 2004 for reasons unrelated to any protected disclosures.

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<sup>1/</sup> In this regard, I noted that while the ROI has made certain findings, I would be conducting an independent review of the issues. In making my findings, I stated that I would be most convinced by the best available evidence. May 23, 2007 letter to the parties at 3.

### *III. Hearing Testimony*

At the Hearing, testimony was received from twelve witnesses. The complainant testified and presented the testimony of Miriam Minton, a safety engineer with SNL's Environmental Safety and Health (ES&H) support group, and Al Bendure, a manager of Industrial Hygiene and Safety Programs at SNL. Sandia presented the testimony of Don Kerekes, a lighting systems technician, Diane Nakos, a consultant in Sandia's equal employment opportunity (EEO) department, Anthony Chavez, the Manager of SNL's Business Support Operations Department, Carla Lamb, the Facilities ES&H coordinator, Greg Kirsch, a safety engineer with the Safety Engineering Group, Gwen Germany, an analyst in the EEO department, Ann Jensen, an industrial hygienist with the ES&H support group, and Johnny Vaughan, the manager of the ES&H support group. COMPA presented the testimony of its president, Edna Lopez. 2/

As indicated in my analysis below, I find that the complainant's disclosures concerning LOTO requirements for the 277 volt lighting systems at SNL constitute protected disclosures under Part 708 that were made proximate in time to his termination. I also find that Sandia has shown, by clear and convincing evidence, that it would have terminated the complainant based on his performance and behavior in the workplace. Accordingly, my summary of relevant testimony will focus chiefly on the complainant's LOTO disclosures and his performance and workplace behavior.3/

#### *A. The Complainant's Witnesses*

##### *1. The Complainant*

The complainant testified that he has a bachelor of science degree in loss control management, industrial safety and environmental health. TR at 12. He stated that he has worked in the safety field since 1983. TR at 20. He testified that he was hired by

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2/ The job titles refer to the positions held by these individual's during the 2003-2004 time frame.

3/ Because I find that the complainant's LOTO disclosures are protected under Part 708, there is no need for me to address in this decision whether his disclosures concerning the lack of approved safety plans for SNL contractors also are protected under Part 708.

Sandia to work as a safety engineer. He stated that he was a subject matter expert on safety-related topics.

Our job is to cover a lot of different safety requirements. Essentially what we do is if we find something that we don't feel is our level of expertise, we go find somebody that is. I mean, we had different people in our group that were considered to be the most knowledgeable on related topics.

TR at 51. He stated that he is not a licensed electrician, and that he initially was unfamiliar with the workings of fluorescent lights and ballasts, particularly the Microlite 277 volt system. He stated that he did not initially realize that the light switch for the Microlite 277 volt system was a control volt relay into the lighting panel and that the wall switch would not completely shut off the power to the light fixture. TR at 52. After an employee received a shock while performing ballast replacement on a lighting panel on one of these systems in April 2004, he did additional research to understand the appropriate LOTO procedures for 277 volt systems. The complainant stated that he learned that while it is acceptable safety practice to deactivate a 120 volt lighting system by placing a LOTO device in the light switch, the manufacturer indicates that LOTO on a 277 volt lighting system should take place at the electrical panel. This procedure is utilized because the wall switch does not stop power from partially flowing to the lighting system. TR at 12-17.

*a. The Complainant's Disclosures Concerning LOTO Procedures*

The complainant testified that he raised the issue of LOTO procedures for the Microlite 277 volt lighting systems at SNL on June 17, 2004 with Ms. Lamb. He told her that the applicable Occupational Safety and Health Administration (OSHA) safety regulation at 29 C.F.R. § 1910.147 does not allow light switches to be used to perform LOTO in 277 volt lighting systems. He testified that an OSHA interpretation of Section 1910.147 issued to Mr. David Teague on July 15, 2003 indicated that it is not permissible to use control devices such as switches as a means of locking out electrical systems. TR at 19.

The complainant stated that when he advised Ms. Lamb of the OSHA requirements for LOTO on a 277 volt light system, he also told her that he had discussed this matter with Mr. Brian Drennan at SNL, and that SNL's Electrical Safety Committee wanted to have a meeting to discuss the proper LOTO on a 277 volt lighting system. The

complainant testified that Ms. Lamb then made the following statement to him.

We are just going to violate the standard, there's not going to be any meeting and this is going to be the end of it. The only reason that it will go further is if you make it an issue.

TR at 19.

The complainant stated that after his conversation with Ms. Lamb, he raised this issue with Mr. Gary Bultman, who he identified as the high voltage electrical supervisor at SNL. He stated that he also raised the issue with Mr. Herman Gomez, the supervisor at SNL who was overseeing the work on the 277 volt lighting systems. He stated that he told Mr. Gomez

Look, Herman. They are taking shortcuts on this stuff. We need to make sure that people are protected properly. The way it's supposed to be done is you go back to the electrical panel that actually controls the lighting panel and do the Lock-Out-Tag-Out....

TR at 24. The complainant stated that SNL continued to practice unsafe LOTO procedures for the 277 volt lighting systems through the summer of 2004. In a September 14, 2004 e-mail, Ms. Lamb indicates that SNL's "relamping/ballast folks" have been told that wherever lamp fixtures at SNL contain a fuse that deactivates the lamp's ballast, removing the fuse will serve as SNL's means of deactivating the lighting panel for purposes of replacing the ballast or other maintenance. September 14, 2004 e-mail from Ms. Lamb to Mr. Vaughan, Sandia Exhibit 5A. The complainant stated that this method for deactivating the lighting panels was not a safe method.

If I remember correctly, [the technician who got shocked in April 2004] removed a fuse from the system. Yet, there was a wire adjacent to that that was hot. That's why he was shocked. If you do a proper Lock-Out-Tag-Out, go back to the electrical panel and do the Lock-Out-Tag-Out so there's no current shooting through the wires associated with the light fixtures.

TR at 26-27. The complainant stated that he sent Mr. Vaughan an e-mail expressing his disagreement with Ms. Lamb's instructions. This e-mail, dated September 14, 2004, reads as follows:



Johnny,

This is rather interesting. The original issue was performing LOTO on control devices which is prohibited by 29 C.F.R. 1910.147. When I told Carla Lamb that the previous mentioned was an OSHA requirement, that there was an OSHA Letter of Interpretation prohibiting the use of a control device as a LOTO point and that the Electrical Safety Committee wanted to meet and discuss it, I was told by Carla "Well, we are just going to violate the standard, there is not going to be any meeting, and this is going to be the end of it." I found it rather bizarre that someone that is an ESH Coordinator would put someone's life at risk from electrocution, which is why I came to see you and you wrote the email response back on June 17<sup>th</sup>.

September 14, 2004 e-mail from complainant to Mr. Vaughan, attached to Complainant's November 19, 2004 Part 708 Complaint. The complainant testified that on the same e-mail string as Ms. Lamb's instructions, there is an e-mail from Mr. John J. Thayer that confirms the complainant's concerns with using light switches and fuses to disconnect lighting fixtures for repair and maintenance. This e-mail reads in part:

My recommendation is that all fixture LOTO's be done at the circuit breaker level where possible, as this is the safest method. From talking with Greg Anderson, Facilities Maintenance, it is common practice to replace ballasts by removing the fixture fuse to the ballast; this is questionable, but it does disconnect the power conductors. Fuses are required in our SNL Standard 16501 for fluorescent fixtures. If this is the case, only unfused fixtures would be an issue requiring shutdown of the entire circuit at the circuit breaker. Low voltage controlled lighting fixtures without fuses must always be shut down at the circuit breaker, regardless of the type of switch used.

June 17, 2004 e-mail from John J. Thayer, the electrical engineer who represented Sandia's Facilities Division on SNL's Electrical Safety Committee 4/, regarding "Light Switch LOTO", Sandia Exhibit 5B.

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4/ See testimony of Ms. Lamb, TR at 223.

The complainant testified that he considered proper LOTO procedures for the 277 volt lighting system to be a "very serious" safety matter.

It doesn't take a lot of electricity to kill somebody. If there's one person who has already been shocked on it. If you don't do Lock-Out-Tag-Out properly, you can be killed by it. To me this is very serious. I have been in the safety field since 1983 in various forms of safety, and [Ms. Lamb's comments] to me meant it's time for me to go to [Human Resources] to talk about this.

TR at 20. The complainant also testified that he received an e-mail from Microlite, the manufacturer of the 277 volt lighting system, that stated that LOTO for these lighting panels should take place at the electrical panel that controls the lighting.<sup>5/</sup>

*b. The Complainant's workplace behavior and performance*

The complainant testified that when he was employed at the DOE's Hanford site in about 1994, he became sensitized to issues concerning inappropriate workplace behavior because a female manager, tried to pinch and touch him in inappropriate ways. He stated that, as a result of this behavior, he quit his job at Pantex and transferred out of the area. TR at 36-37. He stated that he later worked at the DOE's Pantex plant in Amarillo, Texas. He testified that while working at Pantex, he was bothered by a female employee who

seemed to think it was acceptable to come and hang out in my cubicle and make comments, things that I just thought, "Just go away. If it's business related I will be more than happy to talk to you about it."

TR at 37.

The complainant testified that when he worked at SNL as a general safety engineer, his supervisor was Mr. Vaughan, but that he also was supplying safety information to staff members of Sandia's Facilities Division, and that operation was headed by Ms. Lamb. TR

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<sup>5/</sup> These E-mail messages, dated June 1, June 3, and July 20, 2004 between Mr. Steve Jaskowiak at microlite.net and the complainant, are attached to the complainant's November 19, 2004 Part 708 Complaint.

at 50. He stated that his working group supplied expert advice to Ms. Lamb on health and safety issues.

Essentially what we do is if we find something that we don't feel is our level of expertise, we go find somebody that is. I mean, we had different people in our group that were considered to be the most knowledgeable on related topics.

TR at 51. He stated that his area of expertise was safety related to facilities maintenance, while Mr. Kirsch handled construction safety issues and Ms. Jensen covered industrial hygiene. TR at 53.

The individual testified that while he was working at SNL, he had three angry outbursts while he was making personal telephone calls from his work cubicle during his lunch hour. TR at 72-75. He stated that on one of these occasions, he apologized to people working nearby because he had used profanity. TR at 73. He stated that he could not recall referring to his Sandia facilities customers as idiots after speaking to them on the telephone, although he admitted that he may have "muttered something under by breath" following telephone conversations. TR at 74.

The individual stated that in early 2004 he filed a complaint against a female co-worker in the safety group who interacted with him on hygiene and safety issues. TR at 78. He stated that he was uncomfortable with the way that she pressed against him when he showed her information on his computer screen. TR at 78. He stated that on another occasion, he was uncomfortable when she touched the back of his neck to illustrate where a co-worker had received a mosquito bite. TR at 79. He stated that after that incident, he began to view her repeated greetings and efforts at communication as a form of abuse.

We did that [exchanging greetings] a few minutes ago. Why are you having to do it again? To me, it was about power and control. I mean, it was definitely more than once, and finally I was to the point where I said - it creeped me out. I had chest pains. I thought I was going to be retaliated against because of this. I just wanted her to leave me alone.

TR at 80. He stated that he discussed this situation with Ms. Lopez, and that the two of them visited Ms. Nakos at Sandia's EEO on January 20, 2004. TR at 82-83. He stated that after Ms. Nakos investigated his complaints against this female co-worker,

she had another meeting with him and Ms. Lopez where she stated that the co-worker's behavior did not rise to either an EEO violation or an ethics violation. TR at 84.

The complainant testified that around July 6, 2004, he and Ms. Lopez met again with Ms. Nakos at the Sandia EEO because the complainant wanted to report some problems that he was having with Ms. Lamb. TR at 88. He stated that at this meeting he discussed Ms. Lamb's alleged statement to him on June 17, 2004, that he should violate OSHA LOTO requirements, along with other statements from Ms. Lamb that he considered to be inappropriate. TR at 89. He testified that she had come to the office area where he worked and stated "I need a man" because she needed someone to fix the chair in her office.

I felt it was inappropriate. If somebody wanted help in getting a chair fixed, they should have come out and said, "Can you help me fix my chair." I thought it was over the top to say "I need a man." Because I know if I walked up to one of these women in the workplace and said, "I need a woman," I think that would probably be looked at as inappropriate.

TR at 90. The complainant testified that he also reported that Ms. Lamb once asked him "where do you live?", which he considered inappropriate. He stated that

In general, she was kind of a difficult person to deal with. She always wanted a lot of attention. She needed to be the center of attention. . . . it was when you went to talk to her about a safety issue that could take place in seven or eight minutes you would be there a half hour, 45 minutes with her talking about herself.

TR at 92. He also recalled that on a couple of occasions, she made what he considered to be inappropriate comments related to female physiology. TR at 93-95. He stated that after Ms. Nakos investigated his complaints, Ms. Nakos had a follow-up meeting with the complainant and Ms. Lopez where she informed them that nothing Ms. Lamb had done rose to the level of an EEO or Sandia ethics violation. TR at 98. He stated that he did not challenge Ms. Nakos' conclusions at this meeting.

I was rather stunned. After the fact, when I read through the documentation, apparently all you have to do is say, "No, I didn't do it," and everything is fine.

TR at 99.

The complainant stated that on July 26, 2004, he and Ms. Lopez again went to Sandia EEO concerning a problem that he was having with the industrial hygienist in his working group, Ms. Jensen. TR at 99, 108. On this occasion, they met with EEO counselor Gwen Germany. TR at 108.

The complainant acknowledged that he and Ms. Jensen worked closely together on different aspects of the same occurrence or safety issue, and that they occasionally would be involved in joint inspections of Sandia facilities. TR at 103. He stated that initially he got along with Ms. Jensen "for the most part" because "I am pretty tolerant of people." However, in his meeting with Ms. Germany, he stated to Ms. Germany that at least half a dozen times, Ms. Jensen clasped her hands around his forearm or touched his shoulder when she spoke to him. TR at 101. He stated that

Finally, one day I said, "Ann, I really don't like people touching me," and her response was to turn to me, grab me by the forearm and say, "I am just a touchy-feely sort of person." I thought wow, if a woman told a man they didn't like being touched and they did that, I wonder what the response would be.

TR at 102. He also stated that she made an inappropriate comment when she announced that she was leaving for a doctor's appointment. TR at 103. He testified that on August 3, 2004, he had a follow-up meeting with Ms. Germany and that she told him that none of Ms. Jensen's actions rose to the level of an EEO violation or a Sandia Ethics violation. TR at 114.

## 2. *Miriam Minton*

Ms. Minton testified that she worked as a safety engineer at the Facilities support group for about three years before leaving in early 2004. TR at 136, 138. Ms. Minton stated that she was not aware of the LOTO issues raised by the complainant, and that she left before the April 2004 electrical accident. TR at 148-149.

Ms. Minton testified that the complainant had been hired to perform the safety engineering tasks in the maintenance area, while she and another engineer devoted more time to construction matters. TR at 136. She stated that part of her reason for leaving was "personality conflicts" with Ms. Lamb. TR at 136.

She stated that there were a couple of times where she and Ms. Lamb disagreed on how to read a safety policy,

and if I ever felt like it needed to be pushed forward, I would go to the subject matter expert. . . . Or I would go to my management. Because it didn't just stop with me. If I felt there was a safety issue I would go to the manager and bring in the safety matter expert and we would come together as a group and say, "Okay, how are we going to handle this?"

TR at 154.

Ms. Minton testified that as a safety engineer assigned to maintenance operations, the complainant did a lot of job site hazard evaluations. TR at 142. She stated that her routine was to arrange for a maintenance worker to walk the site with her so that she could learn exactly what the job entailed. She testified that the complainant preferred to have his own key and to perform the job site inspections by himself.

It seemed like Casey wanted to do it his way and not the way we had always done it. There were some times where it seemed like he wanted to work on the things that he was interested in and not what we were actually needing help on.

TR at 143. She testified that on at least two or three occasions, she heard the complainant lose his temper while on the telephone, then slam down the receiver and cuss the person to whom he had been speaking. TR at 144. Ms. Minton testified that the complainant always seemed uncomfortable around a large group of people. She stated that she believed that he made an effort to be an effective team member, but that it was difficult for him. TR at 146. She stated that he tried to contribute to assisting with the workload of the Facilities Support Group, but that his effort "did not take up the slack that we thought it would." TR at 147. She believed that this was because the complainant

tended to focus on the things that he wanted to do. He was interested in doing emergency management and instead of asking us if we needed help on additional things, he started ramping up on trying to get his niche in emergency management and emergency response.

TR at 147.

3. *Al Bendure*

Mr. Bendure testified that in 2004, he was the manager of Industrial Hygiene and Safety Programs at SNL. He stated that in the late summer of 2004, the complainant talked with him about a transfer from the Facilities Support Group to Industrial Hygiene. Mr. Bendure stated that he spoke to Mr. Vaughan about this conversation and then sent an e-mail to the complainant that he needed to "work on this" with Mr. Vaughan. TR at 160-161.

Mr. Bendure stated that some people who worked for Ms. Lamb had problems working for her and that there was a fair amount of turnover in the department due to her. TR at 161. He stated that he recalled that the complainant had told him in 2004 that he had made complaints about women that he worked with in his current position. Mr. Bendure testified that he did not recall telling the complainant that the actions of these female coworkers constituted harassment or suggesting that he contact Sandia's EEO. TR at 162.

Mr. Bendure testified that his experience with Ms. Jensen is that she is "a top-notch industrial hygienist, very professional, forthright" and that no one other than the complainant ever accused her of sexual harassment. TR at 163.

B. *Sandia's Witnesses*

1. *Johnny Vaughan*

Mr. Vaughan testified that in 2004, he was the manager of the ES&H support group and the individual's supervisor. He stated that the ES&H group provided multi-disciplinary environmental, safety and health subject matter experts to the line organizations at SNL. TR at 347.

a. *Testimony Concerning LOTO Procedures*

Mr. Vaughan testified that Ms. Lamb and other Sandia electrical experts had used the light switch to deactivate power to the lighting panels, but that once they were made aware of the OSHA requirements in this area, the practice stopped.

[Ms. Lamb] discussed the light switch [in her hearing testimony]. That was one element and it was low voltage control, but once we got that, everybody that got involved agreed. Lights - that light switch, low voltage

in this application, is not acceptable and does not meet Lock-Out-Tag-Out and we are not going to continue to do that.

TR at 389. Mr. Vaughan testified that the purpose of LOTO is to prevent and eliminate the risk associated with an employee coming into contact with electricity, and that Sandia always has established procedures and followed a process aimed at preventing electrical shocks. He stated that, with regard to the employee who received a shock while replacing fluorescent light ballasts in April 2004, even if the breaker connection to the those lights had been deactivated and locked out, the employee would have received a shock because "there was a stray wire up there that [was not powered through the lighting system and] could very well have remained energized." TR at 403.

Mr. Vaughan testified that following this accident, Sandia reviewed its practices for cutting power to fluorescent lighting systems at SNL with the goal of finding a method for depowering the lighting ballasts that was acceptable to the DOE. He stated that the string of e-mails entitled "Re: Light Switch LOTO" indicated that until they came up with an approved fixture or alternative method for cutting power to the fluorescent lamp ballasts,

that we would just have [the power] locked out at the breaker box, not at the switch. No one ever said that that switch, when we found out that [it] was a low voltage item, control item, that that was adequate. No one ever said that.

TR at 407-408, see also Sandia Exhibit 5A-D. Mr. Vaughan stated that after Sandia stopped work on the ballasts because of the April accident,

we never used that switch from that date forward. We found alternatives but we didn't develop the little locking device - I'm not sure exactly when that went in. But until that went in we went back to the breaker box.

TR at 408.

Mr. Vaughan stated to the complainant at the Hearing that he could not understand why the complainant was disagreeing with Sandia's actions in this area.



I felt we were aggressively, with the experts at Sandia, addressing the safety and health issues to ensure the worker was protected. If that meant going back to the breaker we went back to the breaker. I didn't understand why going back to the breaker, which was some of the things we put in place, or removing the fuse, but nothing had to do with the switches and that seemed to be the focus of your concern, the switches, using the switches for Lock-Out-Tag-Out, as I recall.

TR at 414.

Mr. Vaughan testified that Sandia initially believed that pulling the fuse from fluorescent lighting ballasts was a means of deactivating the power to the ballasts that did not require OSHA mandated LOTO. He stated that OSHA does not require Lock-Out-Tag-Out procedures where you can simply unplug an electrical device for servicing. He testified that removing the in-line fuse from a lighting ballast is similar to disconnecting the power cord from an electrical device, and that he believed that this method of cutting the power to lamp ballasts was an acceptable alternative to LOTO procedures at the breaker box. TR at 388-389.

He stated that Sandia and Mr. Ralph Fevig at the DOE ultimately agreed that power to the fluorescent lighting ballasts could be disconnected by removing the fuse, but that in order to comply with OSHA requirements, the fuse had to be tagged out.

At that point they made a little plastic thing that would go in this end [of the fuse] so nobody could put the fuse back in until you took it off.

TR at 405. He stated that the dialogue on this issue between Mr. Fevig and Sandia "was not really are we protecting the worker, but it was what's the interpretation of OSHA." *Id.* Mr. Vaughan testified that Sandia and the DOE reached their agreement on the appropriate LOTO for the fuses in fluorescent lamp ballasts sometime after March 2005. TR at 409.

*b. Testimony Concerning the Complainant's Workplace Behavior and Performance Issues*

Mr. Vaughan testified that in February 2004, he began to get reports that the complainant "didn't like the structure and the formality required to work in Facilities." TR at 352. He stated

that the complainant was tasked to review safety plans after they had been provided by the subcontractor to the Facilities division. However, the complainant was getting the plans for review directly from the subcontractor and then objecting to reviewing the plans again when they were submitted to the Facilities. TR at 352-353.

Mr. Vaughan testified that in January 2004, the complainant came to his office and complained about being physically harassed by a female co-worker. Mr. Vaughan stated that this matter was "certainly beyond my expertise" and referred him to Sandia's EEO. He stated that he had no complaints from other employees about this female co-worker. TR at 355-356.

He testified that the co-worker quit as a result of the complainant's allegations.

I came in one morning and I went to my mailbox, which was outside my office, and inside my mailbox was her phone, her pager, her badge, and a handwritten note saying that she couldn't take being accused like this. She had never experienced anything like this before in her life, and she got the feeling that even when people looked at her that they were thinking dirty old woman or something. If you knew [the coworker], it was just devastating for her, and she resigned.

TR at 357-358. He stated that he did not believe that Sandia policy allowed him to reveal her expressed reasons for leaving, so he explained at a meeting of his work group that she had another employment opportunity. TR at 358. He also stated that communicating her reasons for leaving would have created more anguish and hostility in the workplace, and his job was "to create cohesion and teamwork." He stated that the complainant attended this meeting, and reacted with a "gloat of satisfaction" when he announced that she had left. TR at 359.

Mr. Vaughan stated that in March 2004, the complainant came into his office and announced, using a derogatory epithet for women, that he had "just got rid" of one female co-worker and was not going to "take this stuff" from another one. TR at 359. He stated that the complainant told him that he was having problems with Ms. Lamb.

and he was saying she was asking him questions like, "Casey, where do you live?" "Casey, what are you doing this weekend?" Spread over some period of time. Then

there was "I need a man" and [it] turned out her chair was broken and she wanted him to work on it.

TR at 359. Mr. Vaughan testified that the complainant asked him to speak to Ms. Lamb and instruct her that any dialogue with the complainant "will stick to business". Mr. Vaughan stated that

I did, in fact, follow up with Carla and had some dialogue that I said basically that Casey had taken exception with some of the discussion that was not work-related and that just try to be conscious, and that's again, not really in Carla's nature, so to speak. She is another one of those fairly flamboyant people. I don't know if I would say flamboyant, but she is a people person. So she likes to have, you know, not all work. You know, we mix, like the average person, and again, that's my judgment. The average person you can talk about what you did this weekend and you can talk about what we need to do today to get the job done. That was the kind of person she was.

TR at 360. He stated that after his March 2004 conversation with the complainant about Ms. Lamb, he was told by another of the complainant's co-workers that several people in the Facilities Support Group felt threatened by the complainant's angry outbursts during or after his telephone conversations. TR at 361.

Mr. Vaughan stated that on April 26, 2004, the complainant again came to speak to him about Ms. Lamb. The complainant told him that she had "horned in" on a conversation that he had been having about the effects of blood sugar with a discussion of female hormonal cycles that he found extremely offensive. TR at 362.

Following this meeting, he met with the complainant's employer, Ms. Lopez, to try to get a better understanding of what his working group and the complainant could do "to make this relationship work."

I felt Casey had a background on resume and stuff where he could contribute to Sandia, but if everything that was said was going to be taken with such sensitivity, there was no way that I could create the work force that would be compatible with the comfort zone that Casey was exhibiting at that point and get work done.

TR at 363.

Mr. Vaughan stated that on May 3, 2004, he met separately with the complainant and Ms. Lamb about their working relationship, which he believed had become a problem.

I decided okay, we are at this juncture and [it] doesn't look like it's working for me, for Carla, for the corporation, the people. We are spending all out time, and I felt as a group it was becoming totally distracted. And in the business that we are in, we can't afford people to be distracted. All I need is somebody to mess up on a confined space or electrical safety job review or something and people's safety is at risk. And that's my responsibility.

TR at 364. He said that he told the complainant that he had to follow the processes that were in place, and that meant that "Carla is going to tell us what we need to do." TR at 364. He testified that he discussed with Ms. Lamb the need to censor herself around the complainant, and that she was struggling with this. He stated that Ms. Lamb reported to him that the complainant was avoiding her and that would not work because she needed to discuss issues with the Facilities Support Group as a team. TR at 365.

Mr. Vaughan testified that the complainant began to approach him frequently with suggestions for assignments, rather than interact with Ms. Lamb and accept assignments from her. Mr. Vaughan stated that the complainant needed to be in contact with Ms. Lamb about work assignments because he was not knowledgeable about the work direction and priorities in the Facilities Division. TR at 411-412.

Mr. Vaughan testified that in July 2004, he was kept informed when the complainant and Ms. Lopez met with Ms. Nakos and Ms. Germany concerning the complainant's problems with Ms. Lamb. Then, on August 3, 2004, Mr. Vaughan stated that he met with Ms. Nakos and Ms. Germany after he learned that the complainant had raised allegations of sexual harassment against another person in the Facilities Support Group, Ann Jensen. TR at 366. Mr. Vaughan stated that he had this meeting was to explore his options as a manager.

To be honest with you, I was beginning to feel as though I had a performance problem and my hands were tied. I was trying to understand how do we bring this resolution where we are meeting the EEO things and that I can deal

with a performance problem without it being construed as harassment over some EEO allegations.

TR at 367. Mr. Vaughan stated that on September 10, 2004, he contacted Ms. Germany to ask when the EEO would complete its investigation of the complainant's allegations against Ms. Jensen. TR at 368. On September 14, 2004, he again contacted Ms. Germany to report that Ms. Jensen was very upset by the complainant's allegations, which she believed were false, and had told him that she would quit Sandia because she could no longer work in close proximity to the complainant. TR at 369.

Mr. Vaughan stated that no one had ever complained about Ms. Jensen's behavior previously, and that she was a highly valued employee who he could not afford to lose.

With her expertise and her abilities combined with the excellent working relationship she had, not only with the people that were in Facilities but with the other team, it would have been devastating, yet another blow to a team I am trying to make.

TR at 369.

Mr. Vaughan stated that he is the chairman of Sandia's Joint Union Management Safety Committee, and that when this committee met on September 14, 2004, the complainant was assigned to provide a status report on developments since the last meeting with respect to on-the-job injuries, contributing factors, and safety lessons learned. He stated that the complainant made the comment at this meeting that some workers were probably injured away from work and are just trying to get workmen's compensation to cover it. Mr. Vaughan testified that such a comment was inappropriate and damaging to the working relationship between union representatives and safety representatives. TR at 371.

Mr. Vaughan stated that the complainant wanted to spend too much time helping out at the emergency operations center, but that was not his job assignment.

I guess obviously, he wasn't happy with his job. And he says so in his briefs, you know. He was distracted, he was unhappy. He expressed it to [Ms. Lopez], he expressed it to me. I was just wondering, okay, we have someone who is disruptive of the team that I am trying to provide service. We have someone who is unhappy. They

don't like where they are working. We have tried to do [some] things that we thought might be able to be a working relationship for both of us, or all three of us, including contractor management, and it wasn't coming together. It was getting worse. It was digressing.

TR at 376. Mr. Vaughan stated that he believed that it would be inappropriate for Sandia to transfer the complainant to another assignment at SNL because the complainant was the employee of a Sandia contractor.

I don't work to accommodate contractors like I do [Sandia] employees. . . . we have fluctuating needs of business, and that's where we use contractors to supplement the needs of the business. So far as I am not the employer, I wouldn't be doing professional development, and this was something [the complainant] felt he wanted as professional development and he didn't like the area that he was working in.

TR at 377. Mr. Vaughan stated that he believed it was not common for contract employees of Sandia change job assignments by making contacts within the Sandia organization. TR at 378.

Mr. Vaughan testified that aside from the complainant, he was involved in the termination of two other employees at SNL. One was a Sandia employee and the other a Sandia contractor employee. With regard to the former, he stated that

The termination of a [Sandia] employee takes on all of the legal ramifications with Sandia as the employer. Associated with that, there's a lot more, I would say, responsibility to accommodate, to look at opportunities for reassignment, to look at all of the things we might do to try to turn this around.

TR at 380. He stated that the Sandia contractor employee had worked as a radiation technician and suffered from narcolepsy. Mr. Vaughan stated that this technician fell asleep and rolled into a contamination area. He was fired because he failed to report that he had fallen in a contamination area. TR at 384. Mr. Vaughan testified that he knew of no Sandia or contract employees who had been fired for reporting a safety issue. *Id.*

Mr. Vaughan offered the following explanation for terminating the complainant from his position at SNL.

It just seemed there were two major issues that there was no way to overcome. One was a lot of his co-workers found him intimidating. There was nothing I could do to change that. That's just the way he was. Number two is the inability to work with the people who were directing and controlling the work. In this case it was Carla, and not able to get along with the team.

TR at 385. Mr. Vaughan testified that the complainant disclosures about LOTO issues and safety plans for contractors had nothing to do with his termination.

There was nothing associated with those items that had to do with the cause or the reason for termination. Absolutely nothing associated with those.

TR at 392.

## 2. *Carla Lamb*

Ms. Lamb testified that as the Facilities ES&H coordinator, her job made her the team lead for Sandia's matrix support team in responding to ES&H concerns and events. She stated that the Facilities organization is responsible for all of the construction and maintenance work at Sandia, and the matrix support team is designed to make ES&H experts available to Facilities personnel.

So we have two safety engineers, two industrial hygienists, one [radiation] technician, [and] two environmental folks matrixed from the ES&H group . . . over to Facilities.

TR at 210. She stated that the complainant was one of the safety engineers in the matrix support team. TR at 211.

### a. *Testimony Concerning LOTO Procedures*

Ms. Lamb testified that the April 2004 electrical accident involved a contract employee who was replacing the ballasts in 277 volt fluorescent lamps at SNL.<sup>6/</sup> She stated that following this

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<sup>6/</sup> She explained that fluorescent lamp ballasts transform electrical current into the form needed to operate fluorescent  
(continued...)

accident, a LOTO issue arose over the proper way to shut down the 277 volt lighting systems. She testified that

One of the maintenance people went over to do some LOTO and said that he didn't have the right LOTO mechanism for the switch. It had a toggle type switch instead of a regular light switch that you normally see, so he went back to his team lead and asked for a new mechanism to do that. It was my understanding from the team lead that he went and talked to the systems engineer and to [the complainant] in Safety as the person supporting maintenance, could they get us the right lock-out mechanism.

TR at 222. She stated that while they were responding to this request, Mr. Thayer, the systems engineer, stated that

we shouldn't be depending on the light switch to turn off the circuit to the light because [OSHA] says that you will not lock and tag or use the control voltage when you are working on a system.

TR at 222.

Ms. Lamb testified that no one at Sandia had realized until then that the OSHA requirement against using control devices for LOTO applied to light switches in certain fluorescent systems. TR at 222. She stated that once Mr. Thayer announced this requirement, Sandia began to work on developing other means of cutting power to the fluorescent lighting. They proposed to the DOE that for purposes of replacing lamp ballasts, pulling out the in-line fuses to the ballasts would be an acceptable method of cutting power because it would be a variation of the "cord and plug" method that is acceptable under OSHA rules. TR at 223-224. She stated that the DOE eventually accepted this proposal, but added the requirement that the fuses be tagged out when they are removed. TR at 224.

Ms. Lamb testified that the complainant was a part of the give and take and exploration to develop the best way to cut power to the fluorescent lights that met OSHA requirements. TR at 226. She stated that she was not directly involved in this dialogue, but

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6/ (...continued)  
bulbs. TR at 221.



understood that "everything was moving forward" with a plan based on removing in-line fuses. TR at 226-227.

Ms. Lamb testified that it came to her attention that the complainant still felt that there was a problem; that it wasn't being resolved appropriately. TR at 226. She stated that she had spoken to Greg Anderson, her team lead for Sandia subcontractors, and that Mr. Anderson reported that the complainant had issues with Sandia's approach of removing in-line fuses. She testified that she understood from her conversation with Mr. Anderson that Sandia had

met with the contractors [and told them] that we would use the fuses, that we would not lock and tag at the switch, depending on the 110 circuit, so we were no longer depending on 277 [control circuits], and they were resolving the issue whether that would be treated with cord and plug. That is how I remember that issue.

TR at 238. She stated that based on her conversation with Mr. Anderson, she went to talk to the complainant about LOTO for the 277 volt fluorescent lights. TR at 238. She stated that she explained to the complainant that in addition to performing LOTO on the light switch

on the 277 [volt lighting system], they would also ensure there was an in-line fuse [to disconnect] or bring in a qualified electrician to go to the panels.

TR at 227. She stated that during this conversation, the complainant kept insisting that she take the issue of appropriate LOTO on the 277 volt lighting system to Sandia's Electrical Safety Committee. She testified that she finally said to him

You know, you want to take it to the Electrical Safety Committee, go on, take it to the Electrical Safety Committee, but I don't feel the need to do that. If you need to take it to them, feel free. Go ahead. If they want to come and tell us that we need to do something different, that's fine, but I am not going to take that step. I don't think we need to do that. We are working in a safe manner, you know.

TR at 229. Ms. Lamb testified that everybody felt comfortable that pulling an in-line fuse was a safe solution, and that the only question was whether the DOE would agree that pulling a fuse was

a "cord and plug" disconnection acceptable under OSHA regulations. TR at 229.

*b. Testimony Concerning the Complainant's Workplace Behavior and Performance Issues*

Ms. Lamb testified that as the Facilities ES&H coordinator, she was responsible for organizing a response to ES&H concerns or events. She stated that she functioned as the team lead for the Facilities Support Group, which consisted of two safety engineers, two industrial hygienists, one radiation technician, and two environmental experts matrixed from the ES&H group over to Facilities. TR at 209-210.

She stated that in 2003 and early 2004, she had been occupied with issues of safety engineering and industrial hygiene, and had not had a lot of contact with the complainant who, as the safety engineer supporting maintenance, interfaced chiefly with the team leads at the Facilities Division. TR at 211-212. She stated that "it seemed kind of awkward sometimes with Casey" and that "I remember at one point thinking that I needed to be friendlier and talk to him more." TR at 212. She testified that because she was often overseeing the work of Ms. Jensen, who sat across from the complainant, she made an effort "to stop and say hello [to the complainant], try to be friendlier, try to talk more." TR at 213. She stated that this approach "didn't seem to really make a difference" and because she had good feedback from the team leads about the complainant, "I just decided it would be more of a hands off kind of situation . . . ." TR at 213.

Ms. Lamb testified that Ms. Jensen was finding it difficult to interact with the complainant. She stated that previously Ms. Jensen and Ms. Minton would team up and inspect spaces together, but that "we were having problems with Ann [Jensen] and [the complainant] kind of teaming on the process."

Just everything seemed really bad, so I went to talk to Johnny [Vaughan]. I said, "Johnny, can you help us? Can you help us figure out what we need to do here? How can we make this better?"

At that time I learned that Casey had made complaints about his interfaces with me, and with Ann. So I tried to talk to him, he tried to talk to Casey, but Casey went and talked to Johnny that he wasn't happy with the

interface, I wasn't happy with the interface, Ann wasn't happy with the interface. It wasn't going smoothly.

TR at 215. Ms. Lamb stated that she never "did anything that I would feel was sexual in nature to Casey." TR at 215. She recalled a conversation with the complainant about blood sugar where she referred to PMS symptoms affecting blood sugar.

The conversation [with the complainant] kind of stopped right there so - like somehow I felt like maybe I had said something that I shouldn't have. So we never had a conversation about blood sugar or exercise again. That's the only time. I just remembered it because it seemed kind of like it ended sort of strange.

TR at 216. She stated that she told Mr. Vaughan two weeks after his May 2004 efforts to improve their interactions, that her ability to communicate with the complainant was "getting worse and not better; that we just weren't communicating." TR at 249.

### 3. *Don Kerekes*

Mr. Kerekes testified that he works as a lamper performing maintenance and repair work on the lighting systems for Sandia six and a half years. He stated that he is an apprentice electrician. TR at 167. He stated that when he came to work at Sandia, he followed a LOTO procedure that involved turning off the light switch and putting a device on the switch that locks the switch in the off position. TR at 168. He stated that within six months of starting work at Sandia, he reported to his manager that there were light switches at Sandia that he could not lock out with the device. TR at 169. He stated that his manager reported to him that Sandia was considering various options, such as making devices that would fit the various light switches in use at Sandia. TR at 170. He stated that he finally was instructed to use one of two options.

If there's a fuse in the fixture, I was allowed to lock out there. If there wasn't, and I couldn't do it at the switch, we had to go to the breaker.

TR at 171.

Mr. Kerekes testified that all of the buildings constructed at Sandia within the last twenty years use 277 volt lighting. TR at 172. He stated that he performs the same LOTO procedures on both

the 277 volt lighting and the older 120 volt lighting systems. He stated that he uses the toggle switch LOTO device on both the 120 and 277 volt systems, but that in addition

we are checking for zero voltage before we cut anything or put ourselves in danger, so I am wearing my [personal protective equipment] while I am doing the voltage checking.

TR at 173.

#### 4. *Diane Nakos*

Ms. Nakos testified that from 1992 until July of 2005, she worked as a consultant in Sandia's EEO and AA Department. TR at 174-175. She stated that she met with the complainant and his employer, Ms. Lopez, in January 2004, because the complainant was concerned about a female employee in his work area who "was maybe brushing up against him more often than he felt comfortable." TR at 176. She stated that the complainant also expressed a concern that the female co-worker had touched him to illustrate where a friend of hers was bitten by a bug. TR at 177. She stated that she told the complainant that she had a lot of experience and training in policy violations concerning harassment, and that "in my view the allegations did not rise to the level of violation." TR at 179. She stated that she agreed to meet with the female co-worker and have a discussion with her about the behavior. *Id.* She stated that when she spoke to the female co-worker

she was stunned, she was really devastated. She was mortified to think that her behaviors could be interpreted in any way as being remotely of a sexual nature. She was very upset and confused as to why her behavior would be construed that way.

TR at 180.

Ms. Nakos testified that in July 2004, she again met with the complainant and Ms. Lopez. She stated that the complainant raised some safety concerns regarding LOTO "that I felt were more appropriately addressed through his management team." TR at 182. She stated that he also raised concerns about inappropriate comments made by Ms. Lamb. She stated that none of the alleged comments made by Ms. Lamb appeared to violate any EEO or Sandia Ethics standards of behavior. She testified that

But at the end of the second interview, I did get the sense that he had difficulties working with the women in the organization. It started to form a pattern and the allegations were such that some of the comments were what I would deem more as standard office - you know, where are you going this weekend, what did you do this weekend. Those kinds of things are fairly standard in the workplace.

TR at 185.

Ms. Nakos stated that on August 3, 2004, she met with Mr. Vaughan and Ms. Germany because the complainant had now made complainants about three female co-workers, and they needed to assess the situation. She stated that customarily EEO consultants would ask a supervisor to wait until the results of an investigation are completed before they take action. TR at 187.

She stated that they discussed concerns raised by some of Mr. Vaughan's staff concerning his refusal to be a team player.

And that was important, I think, because the workload was increasing, and they needed people to work in teams better. And I believe that Mr. von Barga was refusing to do that, wanting to work on his own and not really interested in working with others.

TR at 187. She stated that she could not recall if the meeting resulted in any consensus for action. TR at 187.

##### 5. *Anthony Chavez*

Mr. Chavez testified that in 2003 and 2004 he was Sandia's project manager for service contracts at SNL. TR at 197. He stated that Sandia had about fifty service contracts and that Sandia management understood that not all of these contractors had approved safety plans for the work they were performing at SNL. He testified that the complainant was assigned that task of determining which contractors had safety plans. TR at 199.

Mr. Chavez stated that he worked with Ms. Lamb when she was the Facilities ES&H coordinator and that he believed that she was knowledgeable about electrical safety and concerned about safety issues. TR at 199-201.

He stated that he generally was able to have discussions of safety issues with the complainant, but that when the complainant became red-faced and raised his voice, "I just tended to put it off and we would talk about it at a later date." TR at 202.

6. *Greg Kirsch*

Mr. Kirsch testified that he started working at SNL in 2002 as a contract safety engineer and is currently a Sandia employee. TR at 264-265. He stated that he worked with the complainant in the Facilities Support Group, and that the complainant was assigned maintenance safety activities while he and Ms. Minton focused on construction and service contracts. TR at 265-266.

He stated that on a few occasions he overheard the complainant having angry conversations on the telephone, and on one occasion he heard the complainant call someone who he was speaking to on the telephone a "[expletive deleted] idiot." TR at 268-270.

He stated that prior to the complainant's arrival the Facilities Support Group "was a good, cohesive team and we got a lot done and there was a lot of sense of team work and accomplishment." TR at 266. He stated that after the complainant went to the EEO in January 2004 about the behavior of a female coworker, he spoke with the female employee.

And she basically said somebody had said some stuff that was not true and made the work environment impossible for her to stay there. And she was very uncomfortable and very teary and very upset.

TR at 268. He stated that he never observed this female coworker acting in a sexually aggressive manner. TR at 275. Mr. Kirsch testified that Ms. Jensen is very pleasant to work with and does not have a sexually aggressive personality. TR at 276.

With regard to Ms. Lamb, Mr. Kirsch testified that he advises her frequently on safety matters. He stated that they have frequent disagreements, and she often asks him to justify his position. TR at 277-278. He stated that Ms. Lamb is very committed to keeping people safe. TR at 281. He stated that he still has disagreements with Ms. Lamb on safety issues but has never felt that his position at SNL was jeopardized by those disagreements. He testified that "I moved up raising safety concerns." TR at 282.

He stated that after the complainant arrived, the mood of the Facilities Support Group shifted and became "uptight."

You want it to flow, especially if you have a lot of extra work. And I think it affected kind of the teamwork. The intensity was different, you know. If you are worried about other people and their communication, that energy, it kind of takes away from what you are trying to get done, so I think from a teamwork standard it dropped off.

TR at 272. He stated that team camaraderie returned after the complainant was terminated. *Id.*

7. *Gwen Germany*

Ms. Germany stated that she has worked as an analyst at Sandia's EEO and AA department since 1992, performing consultations and investigations related to Sandia ethics policies and federal civil rights laws. TR at 292-293. She stated that on July 26, 2004, she met with the complainant, who discussed comments made to him by Ms. Lamb and Ms. Jensen that he found offensive. She stated that she had a telephone conference with Ms. Lopez, who told her that she hoped to move the complainant within the next couple of months. TR at 296-297. She stated that at a later, debrief meeting attended by the complainant and Ms. Lopez, she indicated to him that the comments of Ms. Lamb and Ms. Jensen did not rise to the level of either an EEO or a Sandia policy violation. TR at 302.

Ms. Germany testified that the complainant told her that he was trying to avoid Ms. Jensen and Ms. Lamb. TR at 298. She stated that in a September 8, 2004 telephone conversation with Mr. Vaughan

Mr. Vaughan told me that Mr. von Bargaen was doing everything in his power to not have interactions with [Ms. Lamb], and that a lot of things that should be going to [Ms. Lamb], Mr. von Bargaen was actually bringing to Mr. Vaughan.

TR at 300. She stated that Mr. Vaughan also reported that Ms. Jensen had come to him and stated that she was getting nervous because of some of the complainant's reactions to her. *Id.* She stated that Mr. Vaughan told her that the complainant was not a "viable candidate" for transfer to another Sandia organization because of his "interpersonal behaviors" which included avoidance,

belligerence, and being withdrawn. TR at 301. She stated that she was not surprised when Mr. Vaughan terminated the complainant because of the personality issues that the complainant was having

created a lot of disturbance within the work group to the impact of decreasing productivity within the group. Team work was affected, and based on what I knew of the situation, it seemed to all be pointed towards Mr. von Barga and his behaviors, his reactions to people, and the fact that he did not seem to want to cooperate with others.

TR at 301.

8. *Ann Jensen*

Ms. Jensen testified that she is a Sandia contract employee working as an industrial hygienist with the Facilities Support Group since 1999. TR at 319-320. She stated that with maintenance and construction ES&H issues

it was essential that you be a team working together, because it's a pretty fast pace to the edge of chaos kind of environment.

TR at 320. She stated that it was important for members of the team to consult with each other concerning ES&H issues. TR at 321.

Ms. Jensen testified that she worked out of a cubicle space that was across the corridor from the complainant's cubicle.

So it's a pretty close environment, and as I mentioned, you can hear over the cubby walls, so there wasn't a lot of privacy. People oftentimes would take a cell phone and go outside if they wanted to have a private conversation. So I did, in fact hear [the complainant] on a couple of occasions on the telephone in an upset condition. And I can only remember one time when he was - it was a banking type of business - and he was really upset.

TR at 322.

Ms. Jensen stated that in late January, early February 2004, a recently hired female co-worker told her that someone had accused her of harassment and that this female co-worker "was in total and



complete distress." TR at 327. She stated that the co-worker eventually left and that it was an "immense loss" to the Facilities Support Group. TR at 327.

Ms. Jensen stated that when the complainant was hired, she looked forward to working closely with him, because industrial hygiene and safety experts in the Facilities Support Group constituted a "sub team within the larger team." TR at 327. She testified that she never intended to say anything inappropriate or personal in her efforts to be friendly with him. TR at 329. She stated that she once referred to him as a SNAG or Sensitive New Age Guy because someone had used that term to describe her husband and she considered it a complement. TR at 330.

Ms. Jensen testified that when she was asked to meet with an EEO interviewer, she was not aware that the complainant had accused her of harassing behavior. She was told that the interview was about tension in the workplace. TR at 330. She stated that she never made inappropriate comments to the complainant concerning a visit to her doctor. TR at 331. She stated that her working relationship with the complainant deteriorated.

I can't give you a date or time, but there was a time, a specific time, when I was obviously irritating to him. Again, he and I were to have been a subset of the larger matrixed organization, and things that I was doing, saying, were obviously extremely - not just slightly but extremely - irritating to him.

. . . I was in my 50's by then, and I had never, never experienced a work setting - I mean, I might have irritated people. I probably did. But I had never been in a situation where it was so overt, and I felt like our ability to work as a sub team - I mean it was not only compromised it just wasn't there. It wasn't happening.

TR at 332. She stated that it was impossible to "bounce ideas" with the complainant or to ask for his assistance with a task. *Id.* She testified that, towards the end, the complainant refused to make eye contact with her when they communicated. TR at 333. She testified that she sometimes touches a person's arm or shoulder when she is conversing with them, but that she recalled no instance where she touched the complainant after he told her not to do so. TR at 334. She stated that other than the complainant, no one has ever filed any sort of complaint against her. *Id.*

*C. COMPA's witness: Edna Lopez*

Ms. Lopez testified that she is the President of COMPA, a company that supplies individuals for different government entities, and that it has about 180 employees working on contracts at SNL. TR at 313. She stated that she was present at a number of meetings with the complainant, Ms. Germany, Ms. Nakos and Mr. Vaughan. She stated that when Sandia officials would convey concerns or problems regarding the complainant to her, she would convey those concerns to the complainant in her capacity as his employer. TR at 314.

Ms. Lopez stated that in July 2004, she told the complainant that she thought that he should actively be seeking other employment. TR at 315. She testified that beginning in July, COMPA's recruiter began working with the complainant to place him in another position at Sandia or elsewhere. Ms. Lopez stated that she instructed the complainant to look at Sandia's website for job announcement and that the recruiter began to send him the job listings collected by COMPA. TR at 342.

Ms. Lopez testified that she was not surprised when Sandia terminated the complainant's contract. She stated that for several months her staff had been tracking various problems raised by Sandia regarding the complainant, and that this was unusual for one of her contract employees. TR at 315. She stated that in the complainant's case, she was notified that "his contract was just going to be terminated, that [Mr. Vaughan] no longer had work to support the contract." TR at 316. In a previous conversation with Mr. Vaughan, he rejected her suggestion that she make a written report on the complainant's problems in the workplace.

I mean, usually if we are having a situation with an employee and we write them up, it's almost like [termination] will happen within 30 days, because people don't change. But [Mr. Vaughan] said, "Well, let's wait."

TR at 317. Ms. Lopez testified that unlike some employees who have been fired from SNL for security breaches or other serious infractions, she does not believe that the complainant is barred from seeking future employment at SNL, and that COMPA would be willing to submit his resume to Sandia for a future position at SNL. TR at 343-346.

#### IV. *Legal Standards Governing This Case*

##### A. *The Complainant's Burden*

Initially, in a Part 708 proceeding, the burden is on the complainant 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.

It is my task, as the finder of fact in this Part 708 proceeding, to weigh the sufficiency of the evidence that has been presented by the complainant. "Preponderance of the evidence" is proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. See *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (*Hopkins*); 2 McCormick on Evidence § 339 at 439 (4th Ed. 1992).

##### B. *The Contractor's Burden*

If I find that the complainant has met his threshold burden, the burden of proof shifts to the contractor. Sandia and COMPA must then prove, by "clear and convincing" evidence, that they would have taken the same personnel actions regarding the complainant absent the protected disclosure. "Clear and convincing" evidence is a more stringent standard; it requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt". See *Hopkins*, 737 F. Supp. at 1204 n.3. Thus, if the complainant has established that it is more likely than not that he made a protected disclosure that was a contributing factor to an adverse personnel action taken by his employers, Sandia and COMPA must convince me that they clearly would have taken this adverse action had the complainant never made this protected disclosure.

## V. Analysis

### A. The Complaint Was Timely Filed

In its Initial Brief in this proceeding, Sandia asserted that the complainant's Part 708 complaint was not timely filed. Specifically, Sandia states that the filing date listed on the first page of the ROI is June 15, 2005, and that the ROI at page 2 contains the statement that "Mr. von Bargen filed this Complaint on June 15, 2005." Because the Part 708 regulations provide that a complainant has 90 days to file a complaint, and because the complainant was terminated by Sandia on September 20, 2004, Sandia contends that this complaint is untimely and the OHA does not have jurisdiction in this matter. Sandia's Initial Brief at 1. I find no merit to this argument. While the Part 708 regulations provide a ninety-day period for filing these complaints, the initial filing of a complaint is not with the OHA, but with the "Head of the Field Element at the DOE field element with jurisdiction over the contract." 10 C.F.R. § 708.10(b). The complainant's Part 708 complaint is signed and dated November 12, 2004, and an attached e-mail from the complainant to Ms. Eva Glow Brownlow at the DOE field office dated November 19, 2004, indicates that Ms. Brownlow already was reviewing the complaint on November 19<sup>th</sup>. The date of June 15, 2005, is the date on which the DOE field office forwarded the complaint to the OHA for an investigation and a hearing. See 10 C.F.R. § 708.21. Accordingly, I find that there is ample evidence to establish that this complaint was timely filed and was being reviewed by the DOE field office in November 2004, well within ninety days of the complainant's termination.

### B. The Complainant Made a Protected Disclosure

As noted above, in order for the information that the complainant allegedly disclosed to Ms. Lamb and Mr. Vaughan in 2004 to constitute a protected disclosure under Part 708, the complainant must reasonably believe that the information reveals one of the following:

- (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 . . .

10 C.F.R. § 708.5(a)(1), (2) and (3). Throughout this proceeding, the complainant has contended that his June 17, 2004, disclosure to Ms. Lamb that light switch LOTO procedures at SNL violated OSHA safety regulations was protected because it revealed a substantial and specific danger to employees or to public health or safety under 10 C.F.R. § 708.5(a)(2). However, in order for his statement to Ms. Lamb to be a protected disclosure of a health and safety concern under Part 708, the complainant must have had a reasonable belief at the time that he made the statement that the LOTO practices on lighting systems at SNL constituted a "substantial and specific danger" to SNL employees. The complainant asserts that he had such a belief, and that it was based upon: (1) his research on current OSHA rulings concerning the use of control devices for LOTO; (2) his e-mail correspondence with a Microlite company representative concerning the proper way to cut off power to their 277 volt lighting system; and (3) his education and years of work experience as a safety engineer. As discussed below, my review of the testimony and other evidence in the record of this proceeding leads me to conclude that the complainant made a disclosure to Ms. Lamb on or about June 17, 2004, that was based on his reasonable belief that Sandia was improperly performing LOTO on light switches, and that these LOTO practices presented "a substantial and specific danger to employees or to public health and safety" protected under Part 708.

*1. The Complainant Disclosed to Ms. Lamb and Mr. Vaughan that Sandia's Light Switch LOTO Practices Violated OSHA Safety Regulations*

As the summary of his testimony at the hearing indicates, the complainant contends that on June 17, 2004, he informed Ms. Lamb that the applicable OSHA safety regulation at 29 C.F.R. § 1910.147 does not allow controlled devices such as light switches to be used to perform LOTO. In her testimony at the hearing, Ms. Lamb stated that she recalled having a conversation with the complainant where he "was still concerned that we were using the switch that was controlling the lighting panel" to perform LOTO on the 277 volt lighting system. TR at 277. I conclude from this testimony that the complainant did say to Ms. Lamb that the use of light switches for LOTO violated OSHA safety regulations.

I also find that the complainant's September 14, 2004 e-mail to Mr. Vaughan constituted the disclosure of a safety concern. In his e-mail, entitled "RE: Light Switch LOTO - regulatory requirements clarified", he refers to his June 17, 2004 conversation with Ms. Lamb and states that he told her that the OSHA safety regulations prohibit the use of a "control device", i.e., a light switch, for LOTO. His e-mail then recounts her alleged rejection of his advice. While the primary purpose of the September 14, 2004 e-mail appears to be to inform Mr. Vaughan of Ms. Lamb's alleged rejection of the complainant's earlier safety disclosure, the facts discussed in the e-mail repeat the complainant's earlier statements that it is unsafe to use control devices for electrical LOTO.

I do not believe that the complainant has shown that he made the other alleged disclosures concerning lighting system LOTO that he discussed at the hearing. He did not attempt to corroborate the alleged statements that he made to Mr. Bultman or Mr. Gomez following his conversation with Ms. Lamb. Nor is there any support in the record for his assertion that he specifically stated to Ms. Lamb or Mr. Vaughan that he had safety concerns about Sandia's practice of cutting power to lamp ballasts by removing the in-line fuse. Accordingly, in my analysis below, I will examine whether the complainant reasonably believed on June 17 and September 14, 2004, that Sandia's practice of locking out light switches on Microlite 277 volt lighting systems constituted a substantial danger to the employees servicing light fixtures at SNL.

*2. The Complainant Had a Rational and Reasonable Belief that the use of Light Switches to Perform LOTO on Microlite 277 Volt Lighting Systems was a Safety Concern*

Based on the testimony and evidence at the Hearing, I find that the individual reasonably believed that his June 17, 2004, disclosure to Ms. Lamb and his September 14, 2004, disclosure to Mr. Vaughan provided information of a significant safety issue at SNL. The complainant stated at the hearing that he contacted a Microlite company representative by e-mail after the April 2004 accident and asked him how Microlite recommended that power to the lighting system be cut off for servicing. The Microlite representative, Mr. Steve Jaskowiak, replied by e-mail on June 3, 2004, and stated that power should be cut off by going to the electrical panel and turning off the breaker switch that is feeding power to the lighting panel being serviced. He specifically noted that turning off the "control voltage" to the lighting panel at the light switch will have "no effect on the actual [power] loads" running to the lighting

panel. E-mail from Mr. Jaskowiak to Complainant's November 12, 2004 Part 708 Complaint.

The complainant testified that he also discovered prior to his conversation with Ms. Lamb that, in 2003, OSHA had interpreted its LOTO regulation to forbid the use of light switches or other control devices to lock out electrical systems. This reading of OSHA requirements is supported by an e-mail that the complainant received from Mr. Thayer on June 17, 2004, and the hearing testimony of Mr. Vaughan. Accordingly, I find that when the complainant had his conversations with Ms. Lamb concerning light switch LOTO on the Microlite 277 volt lighting system, he had a reasonable belief that locking out the light switch would be ineffective in cutting power to the lighting panel.

Therefore, based on the testimony and evidence in the record, I find that the information known by the complainant at the time of his June 17, 2004 conversation with Ms. Lamb was sufficient to provide him with a reasonable belief that using light switch LOTO as a means of cutting power to the Microlite 277 volt lighting system was ineffective and considered a dangerous practice by OSHA.

*3. The Complainant's June 2004 Disclosure to Ms. Lamb and His September 2004 Disclosure to Mr. Vaughan Revealed A Substantial and Specific Danger to Employees at SNL*

The complainant has shown that he reasonably believed that light switch LOTO was an ineffective and therefore unsafe means of cutting power to the Microlite 277 volt lighting system. However, Sandia argues that the complainant's disclosure of this fact to Ms. Lamb and Mr. Vaughan did not reveal a substantial and specific danger to the safety of Sandia employees. It first contends that no substantial or specific danger can exist because at the time the complainant made his disclosures, Sandia had stopped using light switches for LOTO, and that it never resumed this practice.

I find this argument to be without merit. The record indicates that Sandia had temporarily halted the servicing of its lighting systems while it investigated the causes of the April 2004 accident. However, it is clear that at some point Sandia would resume the servicing of its lighting fixtures, and therefore the complainant's statements that Sandia's LOTO practice was unsafe procedure for servicing the 277 volt lighting system is protected under Part 708. A danger, by definition, generally involves an element of future

possibility and risk.<sup>7/</sup> Moreover, the regulatory language does not state that the danger must be "imminent" or "immediate" as a means of restricting this aspect of the term's meaning. See *Curtis Hall*, 29 DOE ¶ 87,022 at 89,113 (2007). Sandia argues that at the time of the complainant's conversation with Ms. Lamb, Sandia already had established a policy of eliminating light switch LOTO from its safety procedures. I find that this contention is not supported by the record. As late as June 16, 2007, Mr. Cerutti, a Sandia manager, e-mailed the complainant and Mr. Vaughan that it was important that "the huge number of [light] switches that will be installed in the MESA complex will be ones that we can lock out at the individual switches." Light Switch LOTO e-mail string, Sandia Hearing Exhibit 5C. In his September 14, 2004, e-mail to Mr. Vaughan, the complainant states that he brought Ms. Lamb's resistance to ending light switch LOTO to the attention of Mr. Vaughan following his June 17, 2004, conversation with her, and that this resulted in Mr. Vaughan's June 17, 2004, e-mail to Ms. Lamb in which he stated that locking out light switches "does not provide the power isolation required by OSHA" and stated that "breaker isolation" or in some cases the removal of fuses should be used to cut power in the future. Sandia Hearing Exhibit 5A. The complainant's recollection of Ms. Lamb's resistance to ending light switch LOTO is supported by her hearing testimony.

what I understood from the conversation was that Casey was still concerned that we were using the switch that was controlling the lighting panel, and I explained that we were not depending on that. If people also wanted to put the Lock-Out-Tag-Out switch on that, we thought that was the best practice.

TR at 227. Accordingly, Sandia has not shown that it had changed its policy to eliminate light switch LOTO prior to the complainant's June 17, 2004 conversation with Ms. Lamb. It is important to note

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<sup>7/</sup> "DANGER, the general term, implies the contingent evil (troubled by the *danger* that the manuscript will be lost - Carl Van Doren)(realizing that the buffalo in the United States were in *danger* of becoming extinct - Amer. Guide Series: N.H.)(the *dangers* of travel by air) (the *danger* of lowering one's standards) PERIL implies more strongly the imminence and fearfulness of the danger (the ship was in deadly peril of seizure by mutineers - C.C.Cutler)" *Webster's Third International Dictionary, Unabridged*, G&C Merriam Company, 1964 at 573.



that Sandia also would have to convince me that the complainant was aware that this LOTO practice had been changed.

Moreover, Sandia has not shown that it stopped using light switch LOTO when it resumed servicing its lighting systems following the April 2004 accident. Although Mr. Vaughan testified that the practice has stopped at Sandia [TR at 408], the statements of another Sandia witness contradict this testimony. Mr. Kerekes, a lighting technician, testified that he continues to use a toggle switch LOTO device to lock out the light switches at Sandia. TR at 173. Accordingly, I find that the complainant's disclosures concerning the dangers of light switch LOTO revealed a specific danger that concerned Sandia employees.

Finally, Sandia argues that the complainant's disclosure about light switch LOTO did not constitute a substantial danger to Sandia employees because Sandia did not rely exclusively on light switch LOTO to cut power to the Microlite 277 volt lighting panels. It stated that the longstanding practice of electricians at Sandia is to pull the in-line fuse to the lamp ballasts in the individual lighting panels prior to repairing or replacing those ballasts. Mr. Vaughan testified that it is now Sandia policy to either disconnect these fuses using a LOTO device or, where no in-line fuse exists, to lock out the power at the breaker box. However, in his testimony at the hearing, the complainant stated that he did not believe that pulling the fuse to the lamp ballast was an adequate safety practice, because electricity would continue to flow to other parts of the lighting panel and could expose a maintenance worker to the risk of shock. TR at 26-27. In his June 17, 2004 e-mail, Mr. Thayer stated that

My recommendation is that all fixture LOTO be done at the circuit breaker where possible, as this is the safest method. From talking to Greg Anderson, Facilities Maintenance, it is common practice to replace ballasts by removing the fixture fuse to the ballast; this is questionable, but it does disconnect the power conductors.

Sandia Hearing Exhibit 5B.

I find that the complainant has established that he reasonably believed that there are dangers inherent in cutting off power to only a portion of a lighting unit when servicing that unit. I also find that it was reasonable for the complainant to believe that Sandia's practice of ineffective light switch LOTO coupled with

pulling the fuse within a lighting fixture created a substantial danger of injury to employees.

In light of the evidence discussed above, I find that the evidence in this proceeding indicates that the complainant reasonably believed that his June 17, 2004 disclosure to Ms. Lamb and his September 14, 2004 disclosure to Mr. Vaughan revealed a substantial and specific danger to the health and safety of Sandia employees, and therefore constitute the type of disclosures that Part 708 was designed to encourage and protect.

*C. The Complainant's Alleged Retaliations*

As discussed above, the ROI finds that Sandia took an adverse personnel action affecting the complainant when Mr. Vaughan terminated his employment at SNL on September 20, 2004. See ROI at 5. I agree that Sandia's decision to discharge the complainant from his position at SNL meets the definition of a "retaliation" as that term is defined in Part 708. See 10 C.F.R. § 708.2.

In his November 2004 complaint, the complainant also asserts that Sandia retaliated against him in the period immediately prior to his dismissal. He asserts that, at that time, Mr. Vaughan and other Sandia managers failed to assist him in transferring out of his position in the Facilities division to another position at SNL.

The complainant did not explain in his filings or at the hearing why he believed that Sandia would under normal circumstances assist him with a transfer to another Sandia position. Indeed, his closing argument does not refer at all to this alleged retaliation. In his testimony, the complainant did not identify any subcontractor employees who have been assisted by Sandia in transferring to other positions.

Although Sandia may sometimes assist subcontractor employees in transferring to different positions within Sandia, there is no evidence that such assistance with transfers is customarily provided. Indeed, there is some evidence from the hearing which indicates the contrary. In his testimony, Mr. Vaughan stated that he believed it was not common for subcontractor employees of Sandia to get assistance from Sandia managers to change job assignments within the Sandia organization, and that he did not consider it proper for the complainant to ask him for assistance with such a transfer. TR at 377-378. He testified that because Sandia was not the complainant's employer, he did not believe that he was

responsible for the complainant's "professional development" at SNL. TR at 377.

While there is no evidence that Sandia commonly assists its subcontractor employees in changing jobs, Ms. Lopez testified that the complainant's subcontractor employer, COMPA, is regularly engaged in seeking transfer or replacement positions for its employees. In this regard, Ms. Lopez testified that beginning in July 2004, she was counseling the complainant on locating a new position at SNL and that COMPA's recruiter was sending him job listings. TR at 342.

Accordingly, the complainant has not established by a preponderance of the evidence that Sandia's refusal to assist the complainant in transferring to another position at SNL constituted a Part 708 "retaliation."

*D. The Complainant's Protected Disclosures Were a Contributing Factor to His Dismissal from SNL*

Under 10 C.F.R. § 708.29, the complainant must also show that his protected disclosures were a *contributing factor* with respect to a particular alleged retaliation taken against him. See *Helen Gaidine Oglesbee*, 24 DOE ¶ 87,507 (1994).<sup>8/</sup> A protected disclosure may be a contributing factor to an adverse personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action." *Ronald A. Sorri*, 23 DOE ¶ 87,503 at 89,010 (1993) *citing* *McDaid v. Dep't of Hous. and Urban Dev.*, 90 FMSR ¶ 5551 (1990). See also *Russell P. Marler, Sr.*, 27 DOE ¶ 87,506 at 89,056 (1998).

I conclude that the complainant has established by a preponderance of the evidence that his protected disclosures were contributing

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<sup>8/</sup> A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Luis P. Silva*, 27 DOE ¶ 87,550 at 89,263 (2000), *citing* 135 Cong. Rec. H747 (daily ed. March 21, 1989)(Explanatory Statement on Senate Amendment-S.20); see also *Stephanie A. Ashburn*, 27 DOE ¶ 87,554 (2000), *Marano v. Department of Justice*, 2 F.3d 1137 (Fed. Cir. 1993)(applying the "contributing factor" test in a case under the Whistleblower Protection Act, 5 U.S.C. § 1201).

factors to his termination. I base this conclusion on a finding that there are both knowledge and proximity in time between the protected disclosures made by the complainant and Mr. Vaughan's decision to terminate his employment at SNL in September 2004.

With respect to knowledge of the disclosures, the complainant made his disclosures to Ms. Lamb on June 17, 2004 and to his supervisor on September 14, 2004. With regard to timing, the disclosures took place in June and early September 2004, and the complainant's supervisor terminated his employment on September 20, 2004. This termination of employment clearly is an adverse personnel action and meets the criteria for a Part 708 retaliation. A reasonable person could conclude that the protected disclosures were a factor in Sandia's decision to terminate the complainant's employment because the termination occurred only a week after one protected disclosure and only about three months after the other disclosure. The disclosures were thus a contributing factor to the alleged retaliation. See *Jagdish C. Laul*, 28 DOE ¶ 87,006 at 89,050 (2000), *aff'd*. 28 DOE ¶ 87,011 at 89,086 (2001) (protected activity found to be contributing factor when it occurred proximate in time to a retaliation).

Sandia asserts that the complainant's protected disclosures have not been shown to constitute a contributing factor in his termination because it has shown that several other Sandia employees made similar safety disclosures and were not retaliated against, and because the complainant has admitted that Sandia had other reasons to take action against him. Sandia's Post-hearing brief at 8-11. I find that these contentions are just the type of argument that is appropriately considered when analyzing whether Sandia would have terminated the complainant in the absence of his protected disclosures. The complainant's showing that protected activity occurred proximate in time to his termination is sufficient for the complainant to meet the contributing factor test. I therefore will proceed to determine whether Sandia has shown, by clear and convincing evidence, that it would have taken the same action to dismiss the complainant in the absence of his protected disclosures.

*E. Sandia has Shown by Clear and Convincing Evidence that it would have Terminated the Complainant's Employment in the Absence of his Protected Disclosures*

In its closing argument, Sandia contends that it has presented substantial evidence to support its position that the complainant would have been terminated even in the absence of his alleged

disclosures. Sandia asserts that the complainant's continuing litany of behavior and attitude problems caused Mr. Vaughan to make the determination that the complainant's services were unsatisfactory and that he should be removed from his position. Referring to the points raised in Mr. Vaughan's September 24, 2004, memorandum, it contends that the testimony at the hearing demonstrated that the complainant demonstrated little ability to operate in accordance with the work processes in place at Sandia and to interact effectively with his co-workers. It asserts that the hearing testimony confirmed several of the criticisms contained in Mr. Vaughan's September 24, 2004, memorandum concerning the complainant. Sandia Closing Argument at 13. Sandia cites the complainant's inability to work as part of a team as a crucial factor in its decision to terminate his employment.

His inability to work with others was not limited to one or even two co-workers with which he allegedly had some sort of personality conflict - rather he demonstrated a general inability to work with anyone on a regular basis. His possessive attitude toward his own work and solutions to the exclusion of that of others was demonstrated in his hostile reactions to suggestions or discussion. When Complainant raised concerns about sexual harassment to his Sandia assigned manager, Johnny Vaughan, Mr. Vaughan diligently pursued internal EEO processes. These complaints were thoroughly investigated and determined to be unfounded. Although the EEO department and Mr. Vaughan made extraordinary efforts to attempt to repair relations between Complainant and his colleagues, Complainant's own attitude made resolution impossible. His continuous refusal to work with his colleagues caused not only constant strife within his own department, but also negatively affected his Sandia customers in facilities with whom he was assigned to provide safety engineering services.

Sandia Closing Argument at 14. Based on my analysis of witness testimony at the hearing, I find that Sandia has clearly and convincingly shown that its decision to fire the complainant was based on his poor performance, caused by his inability to interact with his co-workers.

As indicated in the summary of testimony, several of the complainant's co-workers and customers reported that they were concerned that he displayed angry or unfriendly behavior in the workplace. Ms. Minton, Ms. Jensen and Mr. Kirsch testified that the

complainant displayed anger during and after certain telephone conversations, and Mr. Chavez stated that he would postpone safety discussions with the complainant on occasions when the complainant became red-faced and raised his voice.

An even more disruptive aspect of the complainant's behavior involved his interactions with female co-workers or customers. The hearing testimony establishes that the complainant reported to Sandia's EEO that he was bothered by the behavior or conversation of three female employees who he worked with on a regular basis. I am convinced by the testimony and witness demeanor of Ms. Jensen and Ms. Lamb that their comments or behavior towards the complainant were not intended in any way to harass or disturb the complainant. I further accept the testimony of Ms. Nakos and Ms. Germany that they investigated the complainant's concerns and could find no evidence that the three female employees had violated any EEO or Sandia ethics provision in their interactions with the complainant. Rather, it appears that the complainant has a sensitivity that can make him very uncomfortable when he is required to work closely with women. The testimony of Ms. Jensen and Ms. Lamb convinces me that the complainant's ability to work with them steadily deteriorated to the point where it became impossible for them to interact with the complainant in a normal manner. The testimony of Ms. Jensen, Mr. Kirsch, and Mr. Vaughan indicates that the other female coworker left her position at Sandia in reaction to the complainant's allegations that she had behaved improperly towards him.

Regarding his interactions with the complainant, Mr. Vaughan testified that the complainant expressed contempt for his former female coworker and for Ms. Lamb. He stated that on May 3, 2004, he met separately with the complainant and Ms. Lamb about their working relationship, which he believed had become a problem. He testified that he told the complainant at that time that he had to take direction from Ms. Lamb, but that the complainant continued to approach him frequently with suggestions for assignments, rather than interact with Ms. Lamb and accept assignments from her.

Mr. Vaughan testified that on August 3, 2004, he was informed by Ms. Nakos and Ms. Germany that the complainant had raised allegations of sexual harassment against a third co-worker, Ms. Jensen. He testified that, at this point, he felt that he had a serious performance problem with the complainant but did not know how to address the problem "without it being construed as harassment over some EEO allegations." TR at 367. On September 14, 2004, Mr. Vaughan stated that he was told by Ms. Jensen that she would quit Sandia because she could no longer work in close proximity to

the complainant. TR at 369. Mr. Vaughan testified that Ms. Jensen was a highly valued employee who he could not afford to lose. On September 20, 2004, Mr. Vaughan made the decision to terminate the complainant's employment.

I find that as of September 14, 2004, Mr. Vaughan clearly believed that Ms. Jensen and the complainant could no longer work together on the ES&H Customer Support team. Mr. Vaughan also was aware that the complainant had serious problems interacting appropriately with the support team's chief customer, Ms. Lamb. Under these circumstances, the removal of the complainant from his position at SNL was a necessary and appropriate response to the complainant's inability to interact in a positive manner with his co-worker and his chief customer.

While the record indicates that Mr. Vaughan was unhappy about the way in which the complainant argued about safety issues with Ms. Lamb and others, I find that his overriding reasons for removing the complainant from his position at SNL were independent of the complainant's disagreements concerning LOTO safety procedures. As he testified convincingly at the hearing, Mr. Vaughan believed that the complainant's intimidating attitude and his inability to work with Ms. Jensen and Ms. Lamb could not be changed, and that his interactions were distracting team members from their jobs and undermining the effectiveness of their work. I find that this belief was reasonable, based on Mr. Vaughan's testimony concerning his interactions with the complainant and with the complainant's co-workers. In addition, the record indicates that the complainant's inability to work with Ms. Lamb predates their June 17, 2004 disagreement concerning LOTO procedures. The record also indicates that the complainant's problems interacting with Ms. Jensen were unrelated to safety concerns. These problems were undermining the effectiveness of the ES&H Customer Support team, not the complainant's disclosures about unsafe LOTO procedures. I find that it was these problems that led Mr. Vaughan to conclude that the termination of the complainant's position was essential to the effective function of his ES&H team and to safety at SNL. See TR at 364 and 385. Accordingly, the complainant's conduct leading to his termination was completely unrelated to his Part 708 protected activity. See *Diane E. Meier, Case No. VBA-0011, 28 DOE ¶ 87,004 at 89,042 (2000) (DOE contractor found not to have retaliated against a complainant because her removal from a project was due to "irreconcilable differences" with her co-worker that were unrelated to her protected activity).*

Finally, the testimony of Mr. Vaughan convinces me that his decision to terminate the complainant's employment was generally consistent with his previous treatment of contract employees in his organization. This conclusion also is supported by the testimony of Ms. Lopez, who as COMPA's president and the complainant's direct employer, met and spoke frequently with Mr. Vaughan concerning the complainant's workplace issues.

In his closing argument, the complainant contends that the behavior that Sandia cites as grounds for his termination has been exaggerated. He states that he can recall losing his temper on the telephone on only a few occasions, that e-mails in the record of the proceeding indicate that he had positive working relationships with several Facilities managers at Sandia, and that the demeanor of his co-workers became negative only after he "reported issues, including safety violations, to Sandia Human Resources." Complainant's Post-Hearing Brief at 4-7. There is factual support in the record for some of these contentions. The complainant received positive feedback for his safety work from Mr. Chavez and other facilities managers, and Ms. Lamb acknowledged in her testimony that she received no complaints from these managers about the complainant's performance. However, even two or three instances of angry telephone conversations over a one-year period may have a negative effect on working relationships with co-workers. Moreover, the complainant's arguments and his testimony at the hearing do not refute the testimony of several Sandia witnesses that he had serious personality conflicts with female co-workers that were unrelated to protected activity and that were seriously disruptive of the mission of his team.

The complainant admits in his closing argument that he adopted a pattern of avoiding Ms. Jensen, and states that it is a reasonable reaction to the negative experiences with her that resulted in his making an EEO complaint. Complainant's Closing Argument at 5. He does not discuss his difficulties in dealing with Ms. Lamb in that document, although at the hearing he presented Ms. Minton's testimony that Ms. Lamb could be a difficult person to work with. My observation of the complainant's demeanor at the hearing also leads me to conclude that he is uncomfortable in the presence of Ms. Jensen and Ms. Lamb, and would have difficulty interacting with them effectively in a business setting.

I reject the complainant's position that his avoidance of Ms. Jensen was reasonable and therefore something that Sandia management could be expected to tolerate. As discussed above, I find that the evidence at the hearing establishes that neither Ms. Jensen nor



Ms. Lamb behaved in an inappropriate manner toward the complainant. Nor has the complainant refuted the testimony of Ms. Jensen that she and the complainant were expected in many instances to operate as a team to survey work sites together for safety and hygiene issues. Finally, the complainant has not refuted the evidence presented by Sandia that his practice of avoiding Ms. Lamb violated work assignment procedures for the ES&H support team and diminished his effectiveness in providing safety support to SNL facilities managers. Accordingly, I find that there is abundant evidence to support the complainant's termination by Mr. Vaughan based on poor performance in the workplace, most notably the complainant's lack of an effective working relationship with Ms. Lamb and Ms. Jensen.

I therefore find that Sandia has established by clear and convincing evidence that it would have terminated the complainant's employment at SNL in the absence of his protected disclosures.

#### VI. CONCLUSION

As set forth above, I have determined that the complainant has failed to establish the existence of a violation on the part of Sandia or COMPA for which he may be accorded relief under DOE's Contractor Employee Protection Program, 10 C.F.R. Part 708. I find that the complainant made protected disclosures under Part 708, and that such disclosures were a contributing factor in the alleged retaliation of terminating his employment at SNL. Notwithstanding, I find that Sandia has shown by clear and convincing evidence that it would have taken the same action even in the absence of the protected disclosures. Accordingly, I will deny the complainant's request for relief under 10 C.F.R. Part 708.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Mr. Casey von Barga under 10 C.F.R. Part 708, OHA Case No. TBH-0034, is hereby denied.

(2) This is an initial agency decision, which shall become the final decision of the Department of Energy unless, within 15 days of

receiving this decision, a Notice of Appeal is filed with the Office of Hearings and Appeals Director, requesting review of the Initial Agency Decision.

Kent S. Woods  
Hearing Officer  
Office of Hearings and Appeals

Date: November 2, 2007

