In the Matter of Erik DeBenedictis)
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Filing Date: March 9, 2020) Case No: WBH-20-0003
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Issued: October 22, 2020
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Initial Agency Decision
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James P. Thompson III, Administrative Judge:

This Decision will consider a complaint filed by Erik DeBenedictis against his former employer National Technology and Engineering Solutions of Sandia, LLC (NTESS)[1] under the DOE's Contractor Employee Protection Program, set forth at 10 C.F.R. Part 708. Mr. DeBenedictis alleges that NTESS retaliated against him for engaging in protected activity. For the reasons set forth below, I have determined that Mr. DeBenedictis is not entitled to relief and that the complaint should be dismissed.

I. Background

A. The DOE Contractor Employee Protection Program

DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse at DOE's government-owned, contractor-operated facilities." 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The Part 708 regulations provide, in pertinent part, that a DOE contractor may not discharge or take some other reprisal action against an employee because that employee has disclosed, 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; a substantial and specific danger to employees or to the public health or safety; or, fraud, gross mismanagement, gross waste of funds, or abuse of authority. See 10 C.F.R. § 708.5(a).

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[1] At all times relevant to this proceeding, NTESS managed and operated Sandia National Laboratories (Sandia) for the Department of Energy (DOE) National Nuclear Security Administration.

Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE. It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29. If the complainant meets this burden of proof, "the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal." *Id.*

B. Procedural History

Mr. DeBenedictis is a computer engineer formerly employed by NTESS. After being terminated, he filed a complaint alleging that he had been retaliated against for engaging in two Part 708 protected activities: disclosing gross mismanagement and disclosing abuse of authority. Both allegations arose from circumstances surrounding his creation of two inventions related to quantum computing while still employed by NTESS.

Mr. DeBenedictis's complaint was previously dismissed by SNL's Employee Concerns Program (ECP), but the Office of Hearings and Appeals (OHA) later overturned the dismissal. OHA conducted an investigation of Mr. DeBenedictis's complaint and issued a Report of Investigation (ROI). The OHA Director assigned me as the Administrative Judge in this case. I requested briefs from the parties, which were filed with accompanying exhibits. NTESS filed a motion for summary judgment on May 18, 2020. Pursuant to this Motion, I dismissed Mr. DeBenedictis's claim that he had disclosed gross mismanagement.[2] However, I denied the motion with regard to Mr. DeBenedictis's remaining claim of abuse of authority, and, from June 30 to July 2, 2020, I held a three day hearing on the merits of this claim. I allowed the parties to file post-hearing closing argument briefs, which OHA received on August 24, 2020.

C. Factual Background

As part of his employment with NTESS, Mr. DeBenedictis signed two Proprietary Information Agreements (PIA). *Erik DeBenedictis*, WBZ-20-0003 at 2-3 (2020). Under the terms of the PIA, inventions created by employees can be made subject to NTESS ownership rights. *Id.* During his employment with NTESS, Mr. DeBenedictis conceived of two quantum computing related invention during his off-work hours. Tr. at 376; *DeBenedictis* at 3. Mr. DeBenedictis subsequently submitted two Technical Advanced (TA) notices into NTESS's IP database; these TAs informed NTESS of his inventions.[3] Mr. DeBenedictis notified NTESS attorney Greg Doudinkoff that his inventions were not subject to NTESS's intellectual property (IP) ownership review process. *Id.* To further buttress his assertion, Mr. DeBenedictis asserted that he created the inventions during off-work hours and on his home computer. *Id.* Mr. DeBenedictis made these assertions because he argued that a directive from manager John Aidun altered the effect of his PIA. The record reflects that on October 4, 2018,

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[2] *Erik DeBenedictis,* OHA Case No. WBZ-20-0003 (2020).

[3] To date, an IP ownership review to determine the relative ownership rights of Mr. DeBenedictis's invention has not occurred. *DeBenedictis* at 3.

Mr. Aidun sent Mr. DeBenedictis an email that stated that Mr. DeBenedictis should only act in his private capacity as a representative of the Institute of Electrical and Electronics Engineers (IEEE),[4] that he should not use Sandia resources for IEEE work, and that he was not authorized to represent Sandia when engaging in IEEE quantum computing activities. Ex. 7 at 24. Mr. DeBenedictis forwarded the October 4, 2018, email to Mr. Doudnikoff explaining that since he conceived of a "patentable idea" while at the IEEE conference, acting in a private capacity and using his home computer, Mr. Aidun's email directive "put the patent outside [his] scope of employment, and hence not subject to NTESS's [intellectual property (IP)] assignment . . . ." Ex. 7 at 23-24. As further explained below, the circumstances surrounding Mr. DeBenedictis's TAs led him to file his Part 708 complaint for abuse of authority.

On January 31, 2019, Mr. DeBenedictis sent a screenshot of his personal computer to NTESS manager Scott Collis, among others, as an attachment to an e-mail. Tr. at 34. The screenshot depicted a number of file names, some of which Mr. Collis testified that he identified as those that Mr. DeBenedictis submitted with the TAs. Tr. at 34. As a result, Mr. Collis testified that he and other managers felt that Mr. DeBenedictis's personal computer should be examined to determine whether Mr. DeBenedictis inappropriately possessed sensitive NTESS information because similar information had been previously submitted by Mr. DeBenedictis and that this information was considered sensitive by "quantum information systems" and "sciences program." *Id.* at 35. That same day, John Wagner, Mr. DeBenedictis's first line manager, instructed Mr. DeBenedictis to report to the Security Incident Management Program (SIMP). Ex. S at 2. When Mr. DeBenedictis failed to self-report, NTESS management, including Mr. Collis, decided to report the matter to SIMP. Tr. at 37. The circumstances surrounding the referral of Mr. DeBenedictis to SIMP set the stage for Mr. DeBenedictis's Part 708 complaint and are discussed further below.

Whether Mr. DeBenedictis cooperated with the SIMP investigation is disputed. However, it is undisputed that NTESS, through Mr. Wagner, issued Mr. DeBenedictis a Memorandum of Expectations dated February 28, 2019, which explained that all employees "have an obligation to comply with [NTESS] policy and government requirements pertaining to protecting unclassified controlled information (UCI)[.]" The memorandum also stated that "it is reasonable and necessary for SIMP to review the data and ensure there are no security concerns." Ex. F. at 3. It concluded by stating that "[r]eview of the data/documents would also enable an accurate determination of ownership." *Id.*

Mr. DeBenedictis received a letter of termination dated July 24, 2019. Ex. B at 1. The letter stated that Mr. DeBenedictis was terminated, in part, for his failure to comply with the SIMP process "to allow Sandia to verify the content and sensitivity of work-related data and information you work on at home." *Id.*

D. The Alleged Disclosure

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[4] IEEE is an outside professional organization Mr. DeBenedictis collaborated with while employed by NTESS. *See e.g.* Tr. at 78.

In his complaint, Mr. DeBenedictis alleged that he disclosed an abuse of authority when he sent a February 25, 2019, email to NTESS Vice President Susan Seestrom. ROI Ex. 15 at 3; Complainant's MSJ Rebuttal Brief at 3. That email contained the following text:

> I'm reporting to you that 1400 management issued a known-false SIMP report against me, tied to a false derivative classification, and then Scott Collis "boasted" about the issue. I'm bringing this to your attention to establish a paper trail for certain rights I may have, and also because it could embarrass Sandia.
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> I have an ongoing issue or disagreement with 1400 management related to IP ownership. The problem here is that 1400 management is re framing the IP issue by turning SIMP and derivative classification into tools of intimidation against me to achieve goals unrelated to the government's purposes for those programs.

Ex. U at 3-4. The email also contained the following text:

> The purportedly sensitive document on my home computer is also in the Sandia technical advance [TA] database as SD 14940. It was developed on my home computer under a provision in the PIA.
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> The document in question was incorrectly deemed export controlled by a DC [Derivative Classifier] . . . . I'd discussed the status of the document with this person and he acknowledged that he had not talked to export control and had no idea if any export control rules applied to the topic. This was the state of affairs when he "pushed the button" . . . in the role of DC. After hearing from SIMP, I contacted Robert Kearsley in export control, and his e-mail response concluded "[I]n the meantime we'll treat technology specific to quantum computing as not subject to stringent US export controls."
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> . . . .
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> Susan, I'm not entirely sure I know the scope of the broader issue, but I can give my impression. DOE pays Sandia to assure that the government gets "right of first refusal" to a broad range of IP. The root cause would be in the events that made filing a false SIMP report 1400 management's best option to meet DOE's mandate.

Id.[5]

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[5] Mr. DeBenedictis ignores this alleged protected disclosure in his closing argument brief. Instead, he argued for the first time at the hearing and in his closing brief that an email he sent to SIMP inquiry official Jessica Vanderburg on February 6, 2019, contained a protected disclosure. Compl. Cl. Br. at 7. That email contains his assertion that he had a "concern that SIMP is being used for intimidation to resolve an IP ownership issue." Ex. 7 at 8. The email includes Mr. DeBenedictis's statement that "the document in question is not sensitive. However, I concur with SNL legal's [sic] statement that we need to determine who owns the information." *Id.* Finally, he asserts that "there is a potential accusation" that John Aidun improperly classified the document as sensitive so that Sandia would have a justification to request documents via the SIMP process. *Id.* This email essentially contains the same assertions as the Seestrom email above. Thus, the same reasoning I apply to the Seestrom email applies to this Vanderburg email Mr. DeBenedictis cited to in the 11th hour.

IV. Analysis

A. Mr. DeBenedictis failed to demonstrate that he disclosed an abuse of authority.

Mr. DeBenedictis alleges that his email disclosed to NTESS officials that he was improperly referred to the SIMP by management because of an allegation that he had export-controlled documents on his home computer. ROI Ex. 15 at 3. Mr. DeBenedictis's Part 708 complaint is based on his belief that the referral to SIMP was an attempt to intimidate him or to obtain ownership of intellectual property as opposed to being based on a legitimate security concern. Complainant's Closing Brief at 5.

OHA case law defines abuse of authority as the "arbitrary or capricious exercise of power by an official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons." *Sherrie Walker*, OHA Case No. WBA-13-0015 at 17 (2014).

Based on the analysis provided below, I do not find that Mr. DeBenedictis engaged in protected activity.

1. Mr. DeBenedictis failed to prove that he reasonably believed NTESS acted arbitrarily or capriciously when it referred him to SIMP.

After reviewing the record, I do not find that Mr. DeBenedictis could reasonably conclude that NTESS's conduct, through Mr. Collis's action of reporting Mr. DeBenedictis to SIMP, constituted an arbitrary or capricious action given the information Mr. DeBenedictis knew at the time he disclosed his alleged concern. First, during the relevant period, Mr. DeBenedictis was actively communicating with NTESS management and a NTESS IP attorney on the issue of whether NTESS could claim title to an invention he created while working at home and on his personal computer. Tr. at 34 (referencing a January 31, 2019, email from Mr. DeBenedictis to Mr. Collis at 1). During one such exchange, Mr. DeBenedictis shared a screenshot of his personal computer. *Id.* That screenshot contained a list of forty-two different documents and their file names. Ex. R. Mr. DeBenedictis confirmed that he believed the forty-two documents or files contained information in NTESS's mission space. Tr. at 394. Thus, Mr. DeBenedictis knew that he had information on his computer for which NTESS may have had ownership rights, and he shared that fact with NTESS management.

Second, Mr. DeBenedictis knew that SIMP is the organization responsible for investigating security incidents related to sensitive information and data. That assertion was included in the email from Mr. Wagner which directed Mr. DeBenedictis to self-report to SIMP. Ex. S at 2. Mr. Wagner's email instructed Mr. DeBenedictis to "call SIMP right away and self-report that your management is concerned you might have sensitive documents at home or on your home computer . . . ." Ex. S at 2. Mr. DeBenedictis never disputed the purpose of SIMP, and the asserted reason for the instruction to self-report is consistent with the purpose of SIMP. The record also reflects that, in response to Mr. Wagner's instruction, Mr. DeBenedictis stated that he did not share management's concern and suggested that management should contact SIMP if management was concerned. *Id.* Consequently, I conclude that Mr. DeBenedictis recognized, at the relevant time, that SIMP was an appropriate tool for NTESS to address legitimate data security concerns.

At the hearing, Mr. DeBenedictis attempted to undermine NTESS's justification for forwarding him to SIMP by testifying that he knew the documents management forwarded to SIMP did not contain export controlled or sensitive information. He testified that, based on his understanding of the export control landscape, the concerning information was "known not to be export controlled." Tr. at 428. He stated that the claim that he possessed export control information "was hooey." Tr. at 434. In other words, he disagreed with NTESS management's opinion. To support his opinion, Mr. DeBenedictis additionally offered into evidence a February 25, 2019, email he received from Mr. Robert Kearlsey in Sandia Export Control. This e-mail contained Mr. Kearlsey's statement that Export Control was treating technology specific to quantum computing as "not subject to stringent US export controls." Ex. 7 at 6.[6] However, Mr. DeBenedictis's own testimony also supports NTESS's reason for the SIMP referral. He testified that he knew that the work he was doing at home could present a substantial security violation risk. Tr. at 431. He further testified that he addressed that risk by "check[ing] with a whole lot of people just to make absolutely sure that [he] wasn't doing anything improper." Tr. at 431.

NTESS's Director of Safeguards and Security, John Larson, explained that NTESS has policies in place to require employees to protect government data such as export controlled information. Tr. at 108-9, 111. NTESS also requires its managers to ensure employees have the proper training to protect sensitive information, and that unclassified controlled information is stored on properly designated computer systems. Tr. at 113. Mr. Larson further explained that NTESS employees should not possess export controlled information on personal computers, and if a manager is concerned that sensitive or controlled information may be on an employee's computer, the manager is required to report the issue to SIMP for investigation. Tr. at 114-15. In support of Mr. Larson's testimony, NTESS provided its SIMP Policy, its Unclassified Controlled Information Policy, and its Report Personnel Security Information and Security Incidents Policy. *See* Ex. L; Ex. M; Ex. N. Mr. DeBenedictis did not deny that he received training on how to handle sensitive information. Mr. DeBenedictis conceded that employees are "supposed to do Sandia paid work on Sandia gear . . . ." Tr. at 449. Mr. DeBenedictis's testimony also demonstrated that it was possible that he had export controlled information on his personal computer because he recalled marking as export controlled some of the information he supplied to an NTESS system as part of his TA submissions. Tr. at 395, 397-98.[7] Based on the above, Mr. DeBenedictis had adequate information to conclude that NTESS had a legitimate basis to refer him to SIMP. However, Mr. DeBenedictis alleges that his disagreement with NTESS's conclusion that he possessed sensitive information led him to conclude that IP issues related to his inventions actually drove NTESS's decision to report him to SIMP. Tr. at 435.

In his closing brief, Mr. DeBenedictis provides the following two ulterior motives for the SIMP investigation: (a) Mr. Collis was trying to intimidate him, or (b) Mr. Collis planned to get access to the forty-two documents from SIMP so Mr. Collis "could better negotiate the ownership, or IP

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[6] Ms. Vanderburg testified that she received the same conclusion from Export Control manager Michael Rosales; Mr. Rosales informed her that "quantum" was an emerging technology and there was no official guidance on how to classify it. Tr. at 166. But, Mr. Aidun, who acted as a derivative classifier, testified that he received confirmation from Mr. Kearlsey and another subject matter expert that it was appropriate to mark information in Mr. DeBenedictis's TA as sensitive (OUO) given Mr. Aidun's expertise. Tr. at 244.

[7] He stated that he did this "out of an abundance of caution." *Id.*

ownership issues." Compl. Cl. Br. at 5. I find that Mr. DeBenedictis failed to carry his burden to prove that he reasonably believed either theory motivated Mr. Collis's conduct.

As to the proposed theory that Mr. Collis attempted to intimidate Mr. DeBenedictis, there is little evidence to support that assertion. It is true that Mr. DeBenedictis reported his allegations that Mr. Collis was attempting to intimidate him. *See supra*; *see also* ft. 4. However, Mr. DeBenedictis does not provide any additional information to illuminate the theory. The fact that Mr. Collis referred Mr. DeBenedictis to SIMP during a time that Mr. DeBenedictis was attempting to assert IP rights over his inventions, in and of itself, is not a sufficient basis on which to conclude that the referral was an intimidation tactic. In that regard, I note that Mr. DeBenedictis failed to explain what behavior Mr. Collis's alleged intimidation was calculated to compel from Mr. DeBenedictis.

Mr. DeBenedictis has not pointed to any evidence that supports his assertion that Mr. Collis wanted to obtain access to the forty-two documents to negotiate IP ownership issues, nor has he provided evidence for me to conclude that it would be reasonable to believe that Mr. Collis referred him to SIMP for a purpose other than a security-related investigation. Further, there is no evidence supporting Mr. DeBenedictis's belief that his cooperation with the SIMP investigation would somehow enhance NTESS's claim to his inventions. Consequently, Mr. DeBenedictis has failed to prove that he reasonably believed the theory that Mr. Collis intended to affect IP negotiations by referring Mr. DeBenedictis to SIMP.

Lastly, Mr. DeBenedictis's assertion that he knew working on his home computer presented security risks, and his statement to management that they should contact SIMP if they were concerned about files on his home computer, undermine Mr. DeBenedictis's argument that he reasonably believed management's decision was arbitrary or capricious. For these reasons, I do not find that Mr. DeBenedictis reasonably believed his management was acting arbitrarily and capriciously when he disclosed his SIMP referral to Ms. Seestrom and other NTESS officials.

Upon finding that Mr. DeBenedictis failed to prove that he reasonably believed NTESS acted arbitrarily and capriciously, Mr. DeBenedictis's Part 708 complaint for abuse of authority cannot survive. However, I also find that he failed to prove the second prong of an abuse of authority disclosure: that he reasonably believed that the conduct adversely affected his rights or benefited somebody else.

2. Mr. DeBenedictis failed to demonstrate that he reasonably believed the SIMP referral adversely affected his rights or resulted in personal gain or advantage to another.

During his testimony, Mr. DeBenedictis stated that he was not aware of the impact of the SIMP referral until he had been terminated by NTESS. Tr. at 436. In other words, he was not aware of the impact until months after his alleged disclosure. He testified that the time he spent responding to the SIMP referral was minimal. Tr. at 436-37. He testified that the referral gave him a "negative reputation," but provided no additional information to support this assertion. Tr. at 436-37. He did, however, assert that the referral was an act of attempted intimidation in his disclosure. However, as I concluded in the preceding section, Mr. DeBenedictis failed to prove by a preponderance of evidence that he believed management was motivated by an intent to intimidate him. None of the assertions

are sufficient to demonstrate that Mr. DeBenedictis reasonably believed his rights were adversely affected by the SIMP referral.

In Mr. DeBenedictis's closing brief, he asserts that the alleged abuse of authority: (a) was intended to advantage NTESS management, by covering up poor management judgement and giving NTESS a more positive reputation, and (b) resulted in loss to both DOE and himself by negatively impacting SIMP and leading to his termination. However, the assertions constitute mere speculation; he did not provide sufficient evidence to demonstrate that he reasonably believed either assertion at the time he allegedly made a protected disclosure. Accordingly, I find that he did not satisfy the second prong of Part 708 abuse of authority.

B. The evidence in this case precludes a finding that NTESS retaliated against Mr. DeBenedictis.

Since I have concluded that Mr. DeBenedictis did not prove by a preponderance of evidence that he made a protected disclosure of abuse of authority, his Part 708 complaint cannot succeed. The fact that Mr. DeBenedictis failed to establish that he engaged in protected activity necessarily precludes a finding that NTESS's decision to terminate Mr. DeBenedictis was in retaliation for protected activity. *See* 10 C.F.R. § 708.29; *Dr. Shou-Yuan Zhang*, OHA Case No. WBH-16-0006 at 5 (2017) (dismissing the complaint on Motion to Show Cause because the complainant failed to disclose information that he could have reasonably believed revealed fraud); *John Robertson*, OHA Case No. WBH-12-0002 at 9 (2012) (dismissing the complaint after a hearing because the complainant failed to prove he engaged in protected activity). By the very terms of 10 C.F.R. § 708.5, there must be a protected disclosure before an act of retaliation can take place.

V. Conclusion

It is therefore Ordered that the Complaint filed by Erik DeBenedictis under 10 C.F.R. Part 708 is hereby denied.

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

James P. Thompson III
Administrative Judge
Office of Hearings and Appeals