United States Department of Energy
Office of Hearings and Appeals

In the Matter of Brien Williams	)		
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Filing Date: May 31, 2022	)	Case No.:	WBH-22-0003
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Issued: October 27, 2022

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Motion for Summary Judgment
Initial Agency Decision

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This Decision considers a motion filed by Consolidated Nuclear Security, LLC (CNS) on September 26, 2022 (Motion), concerning the complaint (Complaint) filed by Mr. Brien Williams against CNS under the Department of Energy's (DOE) Contractor Employee Protection Program and its governing regulations set forth at Part 708 of Title 10 of the Code of Federal Regulations (Part 708). The Motion seeks summary judgment. For the reasons set forth below, I will grant the Motion.

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. Criteria and Procedures for DOE Contractor Employee Protection Program, 57 Fed. Reg. 7,533 (Mar. 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, unlawful, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. *Id.*

Part 708 prohibits DOE contractors from retaliating against an employee because that employee has engaged in protected activity, such as disclosing information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation, a substantial and specific danger to employees or to public health or safety, or fraud, gross mismanagement, gross waste of funds, or abuse of authority. 10 C.F.R. § 708.5(a). Employees are also protected from retaliation for refusing to participate in an activity, policy, or practice if the employee believes that doing so would violate a Federal health or safety law or cause the employee to have a reasonable fear of serious injury to themselves or others, provided that the employee first asks the contractor to

correct the violation or remove the danger. *Id.* at §§ 708.5(c), 708.7(a). Available relief includes reinstatement, back pay, transfer preference, and such other relief as may be appropriate. *Id.* at § 708.36.

Employees of DOE contractors who believe they have been retaliated against in violation of Part 708 may file a whistleblower complaint with DOE. *Id.* at § 708.11. Complaints are investigated by an investigator with the Office of Hearings and Appeals (OHA), followed by a hearing conducted by an OHA Administrative Judge, and an opportunity for review of the Administrative Judge's Initial Agency Decision by the OHA Director. *Id.* at §§ 708.22, 708.25, 708.32.

B. Factual Background

CNS is the management and operating contractor for DOE's Pantex Plant and Y-12 National Security Complex. Report of Investigation (ROI) at 1. Mr. Williams has worked as a firefighter for the Pantex Fire Department since 2005. *Id.* at 3. As a firefighter, Mr. Williams is required to wear various occupational face coverings in performing some of his duties. Motion at 3; Williams Response to CNS Motion (Response) at 1.[1]

On May 11, 2020, shortly after the FDA issued an emergency use authorization (EUA) for the use of face masks to prevent the spread of COVID-19, CNS mandated that employees wear face coverings when in the Pantex Plant. ROI at 3, 10; Motion at 3. On October 19, 2021, CNS advised its employees that, pursuant to Executive Order 14042, they were required to be fully vaccinated against COVID-19 by December 8, 2021, unless granted a religious, medical, or disability exemption. ROI at 3; Motion at 3; Response Exhibit (Ex.) B at 23.

On October 29, 2021, Mr. Williams requested that CNS grant him religious and medical exemptions from receiving the COVID-19 vaccine and provided CNS with a letter from his counsel detailing the legal and factual bases for his request. ROI at 3–4; Motion at 4; Response at 2; Response Ex. B at 24–30. In addition to providing information related to his request for an exemption from the COVID-19 vaccine mandate, Mr. Williams' counsel asserted in the October 29, 2021, letter that: "continuing to wear a mask would violate Mr. Williams' religious beliefs . . . ." ROI at 3; Response Ex. B at 29.

On November 16, 2021, CNS advised Mr. Williams that he had been granted an exemption from vaccination against COVID-19, but that he would need to continue wearing a mask while onsite and when performing work duties offsite. ROI at 4; Response Ex. B at 32. Mr. Williams complied with the masking requirement until January 2022. Motion at 4; Response at 2; ROI at 4 n.4 (finding that "[t]here is no indication in the record that Mr. Williams[] was refusing to wear a mask from . . . May 2020 to approximately January 2022"). In early January, Mr. Williams communicated to Mr. Robert Napp, Assistant Pantex Fire Chief, that he had received a religious exemption from wearing a mask and should not be required to wear one in the workplace. ROI at 4; Motion at 4. Over the next several days, Mr. Williams communicated his belief that he had

[1] Mr. Williams appended three exhibits to his Response but did not mark them. I have marked Mr. Williams' notes from a January 17, 2022, meeting as Response Exhibit A, a February 14, 2022, demand letter from Mr. Williams' counsel to CNS as Response Exhibit B, and a pamphlet authored by Dr. Russell Blaylock, MD, as Response Exhibit C.

received, or should be granted, a religious exemption from wearing a mask to Ms. Emily Graber, CNS's Human Resources Director, and Ms. Tonya Detten, the Acting Pantex Labor Relations Manager. ROI at 4; Motion at 4; Response Ex. B at 34.

Mr. Williams met with Ms. Detten on January 17, 2022. ROI at 4; Motion at 4–5; Response at 2. During the meeting, Ms. Detten explained to Mr. Williams that CNS had deemed his October 29, 2021, communication a request for a religious exemption from the masking requirement and that CNS would make a determination regarding the request on or before January 19, 2022. ROI at 4; Motion at 4–5. Ms. Detten advised Mr. Williams that he was required to continue wearing a mask in the workplace during CNS's review of his request for an exemption. ROI at 4. Mr. Williams refused to wear a mask. *Id.*; Motion at 5; Response at 2. Based on Mr. Williams' refusal to wear a mask in the workplace, Ms. Detten directed him to return home and take paid time off (PTO).[2] Motion Ex. A at 5. Mr. Williams did not claim during the meeting that CNS's mask mandate violated any law, rule, or procedure, or that wearing a mask presented any risk to his physical health.[3] ROI at 4, 8. CNS communicated to Mr. Williams that his request for a religious exemption from the mask mandate was denied on January 19, 2022. *Id.* at 5; Motion at 5; *see also* Motion Ex. B at 36–38 (providing CNS's bases for denying the request in a memorandum dated January 24, 2022).

During a January 26, 2022, meeting, Ms. Detten told Mr. Williams that he would be subjected to discipline if he did not report to work, wearing an appropriate mask, on January 31, 2022. ROI at 5; Motion at 5. Without notifying his supervisor, Mr. Williams failed to report to work on January 31, 2022. ROI at 5; Motion at 5. Mr. Napp issued Mr. Williams an Individual Personnel Report (IPR) and placed him on unpaid administrative leave for the day. ROI at 5; Motion at 5; Response

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[2] Mr. Williams alleges that Ms. Detten behaved in a harassing manner during the January 17, 2022, meeting, including yelling at and belittling him. ROI at 4; Response Ex. A.

[3] In the Response, Mr. Williams made the following claim:

> [T]here is a genuine question as to when Mr. Williams actually made his 708 complaint known to CNS. On Monday, January 17, 2022, Mr. Williams tried to verbally inform Ms. Detten of the CNS violation of the federal law in the 708 Complaint. She refused, on two occasions, to allow Mr. Williams to read to her the law. CNS claims that Mr. Williams needed to first inform them of the violation before his refusal, but Ms. Detten clearly forbaide [sic] Mr. Williams from informing her of the violation on January 17, the same day that Mr. Williams was refusing to participate in the forced masking.

Response at 2.

The Response does not cite to any record evidence to support this assertion. Appended to the Response, Mr. Williams provided a two-page, unsigned, undated, document stamped with a "DRAFT" watermark. Response Ex. A. The document appears to provide Mr. Williams' account of the January 17th meeting with Ms. Detten, and to describe Mr. Williams' efforts to read "the law" to Ms. Detten concerning whether or not a deadline existed for the submission of requests for religious exemptions from the mask mandate. Response Ex. A at 1. As described in greater detail below, Exhibit A does not provide support for a claim that Mr. Williams engaged in protected conduct on January 17, 2022, because it is apparent from context that Mr. Williams' attempts to recite "the law" to Ms. Detten concerned whether a deadline existed for his request for a religious exemption from the mask mandate and not the subject matter of the Complaint. *Infra* pp. 8–9.

Ex. B at 47. Mr. Williams' certification for the Human Reliability Program (HRP)[4] was temporarily removed by the HRP Management Official pursuant to applicable policies as a result of his being placed on unpaid leave. ROI at 5; Motion at 5. Upon receiving notice of these actions, Mr. Williams sent Ms. Detten an e-mail indicating that he would not comply with the mask mandate because doing so "would 'violate [his] sincerely held belief and dishonor God.'" ROI at 5. Mr. Williams failed to report to work on February 1, 2022, and Mr. Napp issued him a second IPR and suspended him without pay from February 1st through February 7th. ROI at 5; Response Ex. B at 49.

On February 2, 2022, Mr. Williams sent Mr. Napp and Ms. Detten an e-mail in which he asserted that CNS's mask mandate violated Section 564 of the Federal Food, Drug, and Cosmetic Act (the Act) – the law governing the FDA's EUA for mask use – pursuant to which he asserted that he was entitled to refuse to wear a mask, and that Part 708 prohibited CNS from retaliating against him for refusing to wear a mask. ROI at 5; Motion at 6.

Mr. Williams submitted a request on February 3, 2022, to use PTO from February 7, 2022, through February 21, 2022. ROI at 6; Motion at 7; *see also* Response at 3 (indicating that Mr. Williams requested to use PTO because he feared that CNS would terminate his employment if he returned to work and refused to wear a mask). Mr. Napp denied Mr. Williams' request because Mr. Williams was required to meet with an HRP psychologist for an evaluation on February 7, 2022. Motion at 7. Mr. Williams met with the HRP psychologist on February 7, 2022, following which the HRP psychologist recommended that Mr. Williams remain removed from HRP "for a period of observation to ensure that he complie[d] with the expectations set out by his supervisor." ROI at 6. The HRP psychologist provided direction to Mr. Williams regarding his mask during the evaluation, though the reasons for the direction and manner in which he communicated this direction are disputed. *Compare* Motion at 8 (indicating that Mr. Williams "was told repeatedly to raise his mask to cover his nose") *with* Response at 4 (indicating that Mr. Williams repeatedly attempted to adjust his mask to prevent it from falling, only to be "yelled at" for doing so by the HRP psychologist).

Following the decision not to reinstate Mr. Williams to HRP, Mr. Williams requested and was approved to remain out of work on PTO from February 7, 2022, to March 9, 2022. ROI at 6; Motion at 8. CNS recorded Mr. Williams as having used PTO for the entire day on February 7, 2022, and March 7, 2022, despite Mr. Williams having been onsite for part of each of the two days. ROI at 6; Motion at 8; Response at 5. After repeated communications from Mr. Williams concerning the discrepancies, CNS revised Mr. Williams' time sheet to restore improperly charged PTO time. Response at 5; Motion at 8.

In mid-March, CNS discontinued the mask mandate and Mr. Williams returned to work. ROI at 6; Motion at 8; Response at 5. On May 11, 2022, Mr. Williams was evaluated by a second HRP psychologist who recommended recertification of Mr. Williams into HRP. ROI at 7. However, Mr. Napp objected to Mr. Williams' recertification until he had been subject to additional observation on the basis that he "continued to refuse to comply with the mask policy . . . ." Motion at 8. In

[4] "HRP is a security and safety reliability program designed to ensure that individuals who occupy positions affording access to certain materials, nuclear explosive devices, facilities, and programs meet the highest standards of reliability and physical and mental suitability." 10 C.F.R. § 712.1.

August 2022, Mr. Napp withdrew his objection and Mr. Williams was recertified into HRP. *Id.* at 8–9; Response at 5.

C. Procedural History

Mr. Williams filed the Complaint on April 6, 2022. Complaint at 5. In the Complaint, Mr. Williams alleged that he engaged in activity protected under Part 708 when he: (1) refused to wear a mask to comply with CNS's mask mandate, which he asserted was in violation of the Act; and (2) disclosed in his February 2, 2022, e-mail his belief that the mask mandate constituted a substantial violation of a law, rule, or regulation and a substantial and specific danger to employees. Complaint at 2; ROI at 7–9. Mr. Williams alleged that he had experienced retaliation for engaging in these actions when:

(1) Mr. Napp issued him the IPRs on January 31, 2022, and February 1, 2022;
(2) he was placed on unpaid leave and suspended from work following the issuance of the IPRs;
(3) Ms. Detten behaved in a hostile manner towards him during the January 17, 2022, meeting;
(4) he was required to use PTO after being sent home following the January 17, 2022, meeting;
(5) Mr. Napp denied his request to use PTO from February 7, 2022, to February 21, 2022;
(6) Mr. Napp denied his request to come to work without a mask;
(7) he was required to use PTO from February 7, 2022, until the mask mandate was lifted;
(8) his PTO was improperly logged by CNS;
(9) the HRP psychologist behaved in a hostile manner during the February 7, 2022, evaluation;
(10) his certification in HRP was removed; and
(11) his HRP certification remained removed for an excessive period following the initial observation period.

Complaint at 2–3; ROI at 11.

An OHA investigator conducted an investigation concerning the matters alleged in the Complaint and, on August 2, 2022, issued the ROI. ROI at 1. On August 2, 2022, the OHA Director appointed me as the Administrative Judge for this case. On September 26, 2022, CNS submitted the present Motion. Motion at 23. In the Motion, CNS asserted that Mr. Williams did not engage in any protected activity under Part 708 because (1) he did not ask CNS to correct any violation or remove any danger before refusing to wear a mask; (2) his disclosure that CNS violated the Act was not based on a reasonable construction of the law; and (3) he did not reasonably allege that CNS's mask requirements presented a substantial and specific danger to employees or public health or safety. *Id.* at 2. CNS further asserted that, even if Mr. Williams had engaged in protected activity,

he was not entitled to relief because the actions Mr. Williams alleged were retaliatory either did not occur or would have occurred regardless of his protected disclosures.[5] *Id.*

Mr. Williams submitted the Response on October 18, 2022.[6] Response at 7. In the Response, Mr. Williams asserted that his refusal to wear a mask was protected under Part 708 because he attempted to "inform . . . CNS [of the] violation of the federal law" on January 17, 2022. *Id.* at 2. He further asserted that his alleged disclosure of a substantial and specific danger from mask wearing was based on a reasonable belief that mask wearing could cause physical harm. *Id.* at 2–3. The Response reiterated Mr. Williams' allegations of retaliatory conduct by CNS and argued that it would not have occurred but for his protected activity. *Id.* at 3–6.

On October 25, 2022, CNS submitted a reply brief (Reply). Reply at 7. In the Reply, CNS reiterated its claim that Mr. Williams' refusal to wear a mask was not protected under Part 708 because he did not provide CNS with an opportunity to correct any alleged violation before the refusal. *Id.* at 3–4. CNS also stated that Mr. Williams had failed to identify any evidence to support the reasonableness of his two alleged protected disclosures, and that Mr. Williams either did not suffer any harm from the alleged acts of retaliation or that the acts would have occurred regardless of his claimed protected activity. *Id.* at 4–6.

D. Standard of Review

The complainant bears the initial burden of proof to establish, by a preponderance of the evidence, that he or she engaged in protected activity under Part 708 and that the protected activity "was a

[5] CNS asserted that all of the alleged acts of retaliation that occurred prior to Mr. Williams' alleged protected disclosure on February 2, 2022, were not actionable because Mr. Williams did not request that CNS correct any violation or remove any danger before refusing to wear a mask. Motion at 17–18. CNS also provided Mr. Williams' personnel records to show that it did not deny his request to use PTO from February 7, 2022, to February 21, 2022, and denied that Mr. Williams was ever directed to use PTO from February 7, 2022, until the mask mandate was lifted. *Id.* at 18–19. CNS further asserted that Mr. Napp lacked the authority to grant Mr. Williams an accommodation and therefore his denial of Mr. Williams' request to work without a mask was not retaliatory. *Id.* at 19–20. CNS additionally argued that it followed standard procedures regarding the removal and reinstatement of Mr. Williams' HRP certification and that even if the HRP psychologist had behaved as Mr. Williams' claimed that rude and uncivil behavior would not constitute an act of retaliation under Part 708. *Id.* at 20–22.

[6] On August 16, 2022, I issued a scheduling letter in which I directed the parties to submit all dispositive motions on or before September 26, 2022, and indicated that the non-moving party could submit a response to a motion on or before October 7, 2022. CNS timely submitted the Motion on September 26, 2022. On October 6, 2022, Mr. Williams' counsel (Williams Counsel 1) withdrew from this matter. On October 7, 2022, alternate counsel to Mr. Williams (Williams Counsel 2) entered an appearance and requested an extension of at least 30 days to file their response to the Motion. CNS opposed the request and proposed an extension of 7 days based on prior objections by Mr. Williams to an extension sought by CNS and because Williams Counsel 2 had represented Mr. Williams in his efforts to receive a religious exemption from CNS's mask mandate and were sufficiently aware of the facts and circumstances of the case to expediently prepare a response. *See* Response Ex. B at 26–30, 34 (showing that Williams Counsel 2 authored the October 29, 2021, letter to CNS concerning Mr. Williams' request for an exemption from vaccination for COVID-19 and continued to represent Mr. Williams in January 2022 even after he retained Williams Counsel 1). In considering Williams Counsel 2's request, I also took into account the fact that briefing schedules are typically condensed in Part 708 proceedings in light of the expedited time frame within which such proceedings are to be conducted. *See* 10 C.F.R. § 708.26(a) (providing that hearings should usually be conducted within 90 days of the issuance of the ROI). Taking all of these factors into account, I granted Williams Counsel 2 an extension of 11 days to submit a response.

contributing factor in one or more alleged acts of retaliation against the complainant by the contractor." 10 C.F.R. § 708.29. If the complainant meets this test, the burden then shifts to the contractor "to prove by clear and convincing evidence that it would have taken the same action without the complainant's disclosure, participation, or refusal."[7] *Id.*

A complainant may demonstrate that his or her protected activity was a contributing factor in an act of retaliation through direct or circumstantial evidence. A complainant can demonstrate that a protected disclosure was a contributing factor to an alleged act of retaliation though circumstantial evidence by showing "that the official taking the action knew (or had constructive knowledge) of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action." *Ronald Sorri*, OHA Case No. LWA-0001 at 3–4 (1993) (quoting 135 Cong. Rec. H749 (Mar. 21, 1989)); *see also Dr. Shou-Yuan Zhang*, OHA Case No. WBH-17-0011 at 13 (2019) (summarizing OHA decisions concerning the period of time within which a reasonable person could conclude that a disclosure was a contributing factor in a personnel action and noting that such period is usually less than one year).[8]

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

The Motion seeks summary judgment in favor of CNS. Motion at 2. Part 708 does not establish a standard of review for procedural motions. OHA has consistently resolved such motions in a manner consistent with the Federal Rules of Civil Procedure. *E.g.*, *Edward G. Gallrein, III*, OHA Case No. WBA-13-0017 at 5 (2014). A party is entitled to summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986) (holding that the moving party in a summary judgment motion is entitled to judgment as a matter of law if "the nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof").

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

[8] Decisions issued by OHA are available on the OHA website located at http://www.energy.gov/OHA.

II. Analysis

A. Mr. Williams' Alleged Protected Activity

Mr. Williams alleged in the Complaint that he engaged in two forms of protected activity. First, he alleged that his refusal to wear a mask was protected under 10 C.F.R. § 708.5(c). Complaint at 2. Second, Mr. Williams argued that he disclosed a substantial violation of law and a substantial and specific danger to CNS employees through his February 2, 2022, e-mail. *Id.*; ROI at 8–9.

1. Mr. Williams' Refusal to Wear a Mask

There are two requirements for an employee's refusal to participate in a contractor's activity, policy, or practice, to be protected activity under Part 708. First, the employee must believe that participation would "[c]onstitute a violation of a Federal health or safety law; or [c]ause the employee to have a reasonable fear of serious injury . . . ." 10 C.F.R. § 708.5(c). Second, "[b]efore refusing to participate . . . the employee [must have] asked the employer to correct the violation or remove the danger, and the employer refused to take such action." *Id.* at § 708.7(a).

In an interview with the OHA investigator, Mr. Williams indicated that he definitively refused to wear a mask in the workplace during the January 17, 2022, meeting with Ms. Detten, but that he did not ask CNS to lift the mask mandate on the basis that it constituted a violation of a Federal health and safety law or posed a risk of serious injury until he sent the February 2, 2022, e-mail. ROI at 4, 8. CNS argues that it is entitled to summary judgment on the issue of Mr. Williams' refusal to participate in masking because, by his own admission, he refused to wear a mask before requesting that CNS correct what he believed to be a violation of a Federal health and safety law and a danger to his physical wellbeing. Motion at 11; Reply at 2–4.

Mr. Williams' Response represented that he "tried to verbally inform Ms. Detten of the CNS violation of the federal law," but that "she clearly forbaide [sic] Mr. Williams from informing her of the violation on January 17."[9] Response at 2. It is readily apparent from the evidence offered by Mr. Williams that the "violation" he attempted to communicate to Ms. Detten concerned the religious accommodation he was seeking from wearing a mask. The January 17, 2022, meeting was held to address Mr. Williams' claim that he was entitled to a religious exemption from CNS's mask mandate. ROI at 4. Purported notes of the meeting offered by Mr. Williams indicate that Ms. Detten said that "[t]he deadline has passed for religious exemptions" to which Mr. Williams

[9] Mr. Williams noted in the Response that he shared a brochure concerning the physical risks of masking "with his coworkers back in February 2021 . . . ." Response at 2. The Response presents this information under a heading entitled "Genuine Issue of Material Fact – Reasonableness of Mr. Williams's 708 Complaint," and I do not understand the Response to argue that Mr. Williams' alleged dissemination of a brochure constituted asking CNS to remove a danger from the workplace. However, if Mr. Williams had made such an argument, I would have rejected it. First, communicating the potential risks of a policy is not the same as requesting that the employer rescind the policy, and therefore there is no evidence that Mr. Williams asked CNS to "remove the danger" in February 2021 as required by 10 C.F.R. § 708.7(a). Second, there is no evidence that Mr. Williams communicated his concerns to an appropriate individual. *See Frederick L. Higgs*, OHA Case No. TBH-0057 at 8–9 (2007) (determining that a disclosure of a safety concern to a peer employee who was neither a manager nor responsible for receiving such concerns was not protected under Part 708). Finally, the passage of nearly one year between Mr. Williams' alleged dissemination of the brochure and his refusal to wear a mask is too lengthy for me to conclude that the two events were related.

responded "[a]ccording to the law, there is no deadline for receiving exemptions" and asked "[l]et me read you what the law says." Response Ex. A at 1; *see also* Ex. B at 41 (asserting that Ms. Detten said that she did not "care about the law" in response to Mr. Williams' claims that CNS's behavior constituted "religious discrimination and harassment").

CNS has pointed to Mr. Williams' own statements to the OHA investigator that he did not ask CNS to correct what he perceived to be a violation before refusing to wear a mask as evidence that he failed to make a showing sufficient to establish the existence of an element essential to his case. Motion at 11; *Celotex*, 477 U.S. at 322. Since Mr. Williams' efforts to communicate "the law" during the January 17, 2022, meeting pertained to antidiscrimination laws and not to Federal health and safety laws, the Response's citation to these efforts does not establish the existence of a dispute as to a genuine issue of material fact. *See Sykes v. Dudas*, 573 F. Supp. 2d 191, 199 (D.D.C. 2008) (indicating that, "[t]o be material, the factual assertion must be capable of affecting the substantive outcome of the litigation"). As Mr. Williams did not ask CNS to correct the alleged violation of a Federal health or safety law before refusing to wear a mask, his refusal to comply with CNS's masking policy was not protected under Part 708. 10 C.F.R. § 708.5(c); *see also* 10 C.F.R. § 708.4(a) (providing that a complaint based on religion, among other things, is not covered under Part 708). Accordingly, CNS is entitled to summary judgment with respect to Mr. Williams' alleged refusal to participate in masking.

2. Disclosure Concerning a Substantial Violation of Law

Mr. Williams asserted in his February 2, 2022, e-mail that he believed that CNS violated the Act because it failed to inform employees of their "right to decline masking . . . ." ROI at 5. Mr. Williams' counsel's letter of February 14, 2022, reiterated Mr. Williams' argument that CNS was required to provide employees with an option to refuse masking but failed to do so. Response Ex. B at 15. An employee's disclosure concerning a DOE contractor's alleged unlawful conduct is protected under Part 708 if it discloses "information that he reasonably believes reveals . . . [a] substantial violation of a law, rule, or regulation." 10 C.F.R. § 708.5(a)(1). The reasonableness of an employee's belief is assessed "from the perspective of a disinterested person . . . with knowledge of the essential facts known to and readily ascertainable by the employee . . . ." *Eugene N. Kilmer*, OHA Case No. TBH-0111 at 8 (2011) (citations omitted).

When issuing an EUA, the Act requires the Secretary of Health and Human Services to:

> establish such conditions on an authorization under this section as the Secretary finds necessary or appropriate to protect the public health, including . . . (ii) [a]ppropriate conditions designed to ensure that individuals to whom the product is administered are informed[:] (I) that the Secretary has authorized the emergency use of the product; (II) of the significant known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown; and (III) of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.

21 U.S.C. § 360bbb–3(e)(1)(A)(ii).

CNS argues that the plain language of the Act renders Mr. Williams' disclosure of an alleged violation of law unreasonable because the cited provisions impose duties on the Secretary of Health and Human Services and not private employers such as CNS. Motion at 12–13. Moreover, CNS cites to six Federal district court decisions predating Mr. Williams' disclosure, including one from the state of Texas, the state in which the Pantex facility is located, concluding that the cited provisions of the Act do not affect private employer mask mandates. Motion at 13–14; *e.g.*, *Bridges v. Hous. Methodist Hosp.*, 543 F. Supp. 3d 525, 527 (S.D. Tex. 2021) (determining that the relevant provision of the Act "neither expands nor restricts the responsibilities of private employers; in fact, it does not apply at all to private employers"). In light of the plain language of the Act, and the significant volume of relevant case law which existed before Mr. Williams' February 2, 2022, e-mail, CNS argues that Mr. Williams' belief that CNS violated the Act was unreasonable. Motion at 15–16.

Mr. Williams' Response asserts that "[t]he central question is this: Did CNS violate federal law at 21 USC [sic] by forcing Mr. Williams to wear a face covering whose [sic] use was only allowed under an FDA Emergency Use Authorization within which the conditions for authorization specifically included the unambiguous right for any person to opt out of the use of the measure? The clear, simple, and unambiguously fact-supported answer is 'yes.'" Response at 1. However, outside of this conclusory statement, the Response fails to provide any answer to CNS's arguments, or even to address the basis for Mr. Williams' opinion that CNS was subject to the Act. Based on my review of the record evidence, Mr. Williams has not identified any facts upon which he relied in forming his belief that a statutory provision that appears to plainly apply to the Secretary of Health and Human Services prohibits a private employer from directing its employees to wear face masks in the workplace. Thus, I cannot conclude that a disinterested person "with knowledge of the essential facts known to and readily ascertainable by" Mr. Williams could have believed that CNS's mask mandate violated the Act. *Eugene N. Kilmer*, OHA Case No. TBH-0111 at 8 (2011) (citations omitted).

CNS has identified factual information that it alleges demonstrates that Mr. Williams' belief that CNS violated the provisions of the Act was unreasonable. Mr. Williams' conclusory statement that CNS violated Federal law is insufficient to carry his burden because "mere allegations or denials of the adverse party's pleading are not enough to prevent the issuance of summary judgment." *Williams v. Callaghan*, 938 F. Supp. 46, 49 (D.D.C. 1996). Therefore, I find that CNS is entitled to summary judgment.[10]

[10] The reasonableness of a complainant's belief under Part 708 is assessed objectively. *Frank E. Isbill*, OHA Case No. VWA-0034 at 4 (1999). The objective reasonableness standard presents a question of law. *Scott v. Harris*, 550 U.S. 372, 381 n. 8 (2007) ("At the summary judgment stage, [] once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party to the extent supportable by the record . . . the reasonableness of [a relevant person's] actions . . . is a pure question of law."); *see also Erik DeBenedictis*, OHA Case No. WBU-20-0003 at 5 n.4 (2019) ("Reasonableness [of a complainant's belief under Part 708] is a question of law."). Thus, despite Mr. Williams having undisputedly disclosed an alleged violation of law by CNS which he claimed to have believed was substantial, summary judgment is appropriate because no reasonable person could have held such a belief in the absence of any facts to support it.

3. Disclosure Concerning a Substantial and Specific Danger to CNS Employees

In order for a disclosure to be protected on the basis of revealing potential danger to oneself or others, the employee must disclose information that he or she "reasonably believes reveals . . . [a] substantial and specific danger to employees or to public health and safety." 10 C.F.R. § 708.5(a)(2). OHA assesses whether an employee's disclosure of a danger is sufficiently "substantial and specific" to be protected under Part 708 by considering: "(1) the likelihood of harm resulting from the danger; (2) when the alleged harm may occur; and (3) the nature of the harm -- potential consequences." *Dennis Rehmeier*, OHA Case No. TBU-114 at 4 (2011) (citing *Chambers v. Dep't of Interior*, 515 F.3d 1362, 1369 (Fed. Cir. 2008)). The Complaint does not specifically identify what information Mr. Williams communicated to CNS that he believed concerned a substantial and specific danger to himself or other employees. Reading the record most favorably to Mr. Williams, one might surmise that he sought to communicate the existence of a substantial and specific danger from masking in his February 2, 2022, e-mail and through a February 14, 2022, letter from his counsel to CNS. However, as explained below, neither communication conveyed a substantial and specific danger protected under Part 708.

Mr. Williams' February 2, 2022, e-mail asserted that masks were not effective in stopping the transmission of COVID-19 and that CNS was responsible for establishing policies that would effectively protect employees from COVID-19. ROI at 6; Response Ex. B at 53. Assuming that Mr. Williams believed that masks were completely ineffective at stopping the spread of COVID-19, disclosing that belief was not protected under Part 708 because it merely asserted that a person wearing a mask was at the same risk of becoming infected with COVID-19 as an unmasked person. Since Mr. Williams did not allege that wearing a mask increased the risk to the wearer, and he did not claim that he feared returning to the workplace without effective protective equipment, he did not assert any danger, much less a substantial and specific one, from CNS's mask mandate.[11] Therefore, I find that Mr. Williams' February 2, 2022, e-mail did not disclose a reasonable belief of a substantial and specific danger under Part 708.

Like Mr. Williams' February 2, 2022, e-mail, the February 14, 2022, letter from Mr. Williams' counsel to CNS repeatedly highlighted the shortcomings of masking in preventing the transmission of COVID-19 and argued that Mr. Williams should not have been required to wear a mask. Response Ex. B at 6–12, 20–21. However, the letter from Mr. Williams' counsel also asserted that "face masking can be harmful" and "there are over 60 studies included in the 150 [contained in a

[11] To be clear, an employee's disclosure that he or she believed himself or herself to be in danger because safety equipment required by a contractor did not adequately protect them from a substantial environmental hazard would constitute a protected disclosure under 10 C.F.R. § 708.5(a)(2). Mr. Williams did not assert that he believed himself to be in danger from COVID-19 because of the lack of an adequate safety program, but instead requested to be allowed to return to work without taking unnecessary safety precautions that violated his firmly held religious beliefs. Response Ex. B at 52–53. Mr. Williams alluded to risks to employees from a false belief in the protective capabilities of masks in his interview with the OHA investigator. ROI at 8–9. However, it is apparent from his February 2, 2022, e-mail, in which he requested to be allowed to return to work without a mask and did not express that he needed alternative protection to feel safe returning to the workplace, that he did not perceive himself to be at substantial risk from COVID-19. Indeed, the Response did not claim that Mr. Williams perceived himself to be at risk of COVID-19 due to the inadequacy of masks in preventing transmission of the virus, but instead focused on Mr. Williams' belief that masks themselves can cause harm to their wearers. Response at 2–3. Thus, although a disclosure that a piece of protective equipment was ineffective could be protected under Part 708, Mr. Williams' disclosure is not.

URL link] above showing that masks can and do cause harm." *Id.* at 11. It is not apparent from this broad assertion what harms masking might cause, how likely such harms are to arise, or that any harms that could arise would be severe.[12] Thus, the allegations of potential harm in Mr. Williams' counsel's February 14, 2022, letter are not sufficiently specific or substantial to constitute protected disclosures under Part 708.

For the aforementioned reasons, neither Mr. Williams' e-mail of February 2, 2022, nor Mr. Williams' counsel's letter of February 14, 2022, communicated a substantial and specific danger to employees or to public health and safety under 10 C.F.R. § 708.5(a)(2). Therefore, I will grant CNS summary judgment as to these alleged disclosures.[13]

III. Conclusion

For the aforementioned reasons, I determined that Mr. Williams has not established that his disclosures or refusal to participate in masking were protected acts under Part 708. Thus, he cannot demonstrate that one or more protected acts contributed to the alleged acts of retaliation by CNS.

It Is Therefore Ordered That:

(1) The Motion for Summary Judgment filed by Consolidated Nuclear Security, LLC on September 26, 2022, OHA Case No. WBH-22-0003, is hereby: GRANTED.

(2) The Complaint filed by Mr. Brien Williams on April 6, 2022, OHA Case No. WBH-22-0003 is hereby: DENIED.

(3) 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.

Phillip Harmonick
Administrative Judge
Office of Hearings and Appeals

[12] Mr. Williams' Response to the Motion attempts to supply more specific health-related concerns of which Mr. Williams had knowledge when he sent the February 2, 2022, e-mail in the form of a brochure on the risks of masking authored by a medical doctor. Response at 2–3; Response Ex. C. However, Mr. Williams did not supply this information in his alleged protected disclosures and therefore it does not establish that Mr. Williams made a protected disclosure under 10 C.F.R. § 708.5(a)(2).

[13] Having determined that CNS is entitled to summary judgment with respect to each of Mr. Williams' alleged protected activities, I need not address CNS's claims that it would have taken the actions Mr. Williams asserted were retaliatory regardless of his activities.