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August 31, 2000

Charles E. Mullens, Esq.
Senior Attorney
Office of the General Counsel
Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Vermont Yankee

Dear Mr. Mullins:

Pursuant to our conversation, please find enclosed the following documents:

1. Complaint for Declaratory Judgment.

2. Defendant William Sorrell, Attorney General of the State of Vermont's Answer and Affirmative Defenses.

3. Defendant Vermont Attorney General William Sorrell's Motion to Dismiss.

4. Petition to Compel Enforcement Pursuant to 9 V.S.A. § 2460(c).

5. Vermont Yankee Nuclear Power Corporation's Motion for Dismissal or, in the Alternative, for Stay of Proceedings in Light of Prior Pending Federal Court Action.

6. Order Staying Proceedings

We will also provide you with a copy of the transcript of the hearing in Vermont Superior Court as soon as it becomes available. These documents should bring you up to date. Please note that the Vermont Attorney General and the EEOC should already have these documents, except for the transcript. I will copy you on all documents that we file in the future.

Please note that the factual references in the documents do not reflect all the facts or where facts may be in dispute. For example, Vermont Yankee strongly disagrees with the Vermont Attorney

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General's "interpretation" of NRC regulations. Indeed, Vermont Yankee believes the NRC should interpret its own regulations. The pleadings also fail to reflect the substantial amount of information provided by Vermont Yankee to the Vermont Attorney General. The pleadings do not reveal the nature and extent of the Medical Review Officer's ("MRO") review of the Employee, including whether there was a physical examination by the MRO. Thus, the information in the documents does not reflect a complete or agreed upon set of facts.

Finally, I recognize the concern that your Office be kept informed of developments in this case. It was never Vermont Yankee's intention to exclude the NRC from the process. Rather, Vermont Yankee's personnel did make the NCR's on-site representative aware of the issues, and I will now insure that your Office is aware of litigation developments.

If you have any questions, please contact me. Thank you for calling me.

Very truly yours,

Peter B. Robb

Peter B. Robb

/lp

Enclosures

BRT\27671.1

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

VERMONT YANKEE NUCLEAR POWER CORPORATION and DR. GEORGE IDELKOPE,

Plaintiffs,

v.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and WILLIAM SORRELL, ATTORNEY GENERAL OF THE STATE OF VERMONT,

Defendants.

Docket No. 1:00cv254

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiffs Vermont Yankee Nuclear Power Corporation ("VY") and Dr. George Idelkope ("Dr. Idelkope") complain of Defendants, the United States Equal Employment Opportunity Commission ("EEOC") and William Sorrell, the Attorney General of the State of Vermont as follows:

1. Plaintiffs bring this action pursuant to Fed. R. Civ. P. 57 and 28 U.S.C. §§ 2201-2202 for a judgment declaring Plaintiffs' rights and obligations under the Atomic Energy Act see 42 U.S.C. § 2011 et. seq. and regulations promulgated thereunder, the Americans With Disabilities Act, see 42 U.S.C. § 12111 (the "ADA") et. seq., and the Vermont Fair Employment Practices Act, see 21 V.S.A. § 495 et. seq. ("FEPA").

2. Plaintiff VY is a Vermont corporation that owns and operates a commercial nuclear power facility located in Vernon, Vermont.

3. Plaintiff Dr. Idelkope is a resident of Chesterfield, New Hampshire and practices medicine from his office in Hinsdale, New Hampshire.

4. Defendant EEOC is an Agency of the Federal Government and is responsible for enforcing the ADA.

5. Defendant William Sorrell is the Vermont Attorney General and is responsible for enforcing FEPA. The Attorney General's office is a "deferral agency" for the EEOC. As a deferral agency, the Vermont Attorney General's office investigates alleged violations of the ADA for and on behalf of the EEOC and issues a recommendation to the EEOC at the conclusion of each investigation.

Jurisdiction

6. This is an action seeking declaratory judgment and injunctive relief pursuant to Fed. R. Civ. P. 57 and 28 U.S.C. §§ 2201-2202. This Court has jurisdiction to hear this Complaint under 28 U.S.C. §§ 1331, 1346, and 1367; the Atomic Energy Act of 1954, 42 U.S.C. § 2011 et seq.; and the Americans With Disabilities Act, 42 U.S.C. § 12111 et seq. The Plaintiffs have a right to maintain this action under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and the Administrative Procedures Act, 5 U.S.C. § 551 et seq. Venue is proper in this District.

The Facts

7. VY operates a commercial nuclear power facility under an operating license issued by the Nuclear Regulatory Commission (the "NRC").

8. Regulations promulgated by the NRC require that, as a condition of its license, VY establish and maintain a "Fitness for Duty Program" see 10 C.F.R. § 26.2(a), to ensure that

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employees with unescorted access to protected areas of the facility "will perform their duties in a reliable and trustworthy manner and are not under the influence of any substance, legal or illegal, or mentally or physically impaired from any cause, which in any way adversely affects their ability to safely and competently perform their duties." 10 C.F.R. § 26.2(a).

9. NRC regulations require that Vermont Yankee have a Medical Review Officer ("MRO") who is responsible for determining individuals' Fitness for Duty, which determinations are binding upon VY.

10. NRC regulations also require that personal information collected for the purpose of complying with Fitness for Duty regulations shall not be disclosed, except to the MRO or other licensed personnel for the purpose of making the unescorted access decision or in certain other situations exclusively listed in the regulations. See 10 C.F.R. § 26.29.

11. From 1997 to 1999, the individual who later commenced the Charge that is the subject of this action (the "Employee") was employed by VY as a plant mechanic. The Employee's position required him to have unescorted access to protected areas of VY's facility.

12. While out on medical leave in late January or early February, 1999, the Employee informed VY that a doctor had placed him on methadone, which is a synthetic narcotic listed as a "Schedule II" controlled substance under the Federal Controlled Substances Act see 21 U.S.C. § 812.

13. "Methadone may impair the mental and/or physical abilities required for the performance of potentially hazardous tasks, such as driving a car or operating machinery." PHYSICIANS DESK REFERENCE 2547 (52nd ed. 1998).

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14. VY's MRO, Dr. Idelkope, determined that the Employee was not Fit for Duty while taking methadone and would not be approved to return to work at the plant as long as he was taking methadone. Because the MRO had not deemed the Employee Fit for Duty, the Employee's unescorted access was not reinstated.

15. VY advised the Employee that he could return to work provided that he satisfied Fitness for Duty prerequisites.

16. From February 1999 to September 1999, the MRO and VY personnel attempted to work with the Employee and his doctors to find an alternative to methadone that was acceptable to the MRO.

17. Ultimately these efforts were unsuccessful, and in September, 1999 the Employee's physician informed VY that the Employee would continue taking methadone. As a result, VY discharged the Employee on September 27, 1999.

18. By a Charge dated October 28, 1999 and filed with the Vermont Attorney General and the EEOC, the Employee asserted allegations of disability discrimination against VY under the ADA and FEPA.

19. By letter dated January 20, 2000, VY responded to the charge by explaining to the Vermont Attorney General inter alia, that the Employee "was not qualified for his job because he had not been declared fit for duty by VY's MRO" and as a result was not a qualified employee who is entitled to certain treatment under ADA and FEPA.

20. VY included within its response to the Vermont Attorney General information setting forth the MRO's determination that mandated the action taken by VY, and provided copies of VY's Fitness for Duty policy, the pertinent NRC regulations, and the Employee's

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medical records that had been made available to VY. Pursuant to a second request by the Vermont Attorney General's office, VY supplemented its responses and forwarded copies of its hiring policy and the job description for the plant mechanic position.

21. Nevertheless, in April, 2000 the Attorney General's Office issued an "Information and Document Request" to VY setting forth fourteen categories of requests seeking a broad range of information and documents including a statement of "what contacts [the MRO] had with Complainant's physicians, or other medical professionals, to discuss or assess Complainant's ability to think clearly and work safely at his job"; and "a list of individuals who are or have been employed by [VY] and who are/were taking a prescription narcotic drug while so employed."

22. VY responded to the Information and Document Request by providing a detailed description of its obligations imposed by the NRC with respect to Fitness for Duty, by explaining that it was bound by the Fitness for Duty determination reached by the MRO, and that the only avenue for reviewing the MRO's determination was through procedures implemented by the NRC.

23. VY also provided additional documentation, including more VY policies and transcripts of depositions of the Employee and his physician conducted in a separate proceeding. VY refused to produce information called for by several requests directed towards scrutinizing the MRO's determinations with respect to Fitness for Duty concerning the Employee and other employees.

24. Subsequently, the Attorney General's Office issued Civil Investigative Demands pursuant to 9 V.S.A. § 2460 to VY and to the MRO on June 21 and June 23, 2000, respectively.

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25. Both Civil Investigative Demands state that "the Attorney General has reason to believe that [VY] has violated [FEPA] in its treatment of the Employee based on his physical disability" and seek substantially the same information as the April, 2000 Information and Document Request.

26. Since the Employee's job required him to have unescorted access to protected areas of VY's facility, and the Employee did not have unescorted access because the MRO failed to deem him fit for duty while using methadone, the Employee was not "qualified" under the ADA or FEPA.

27. As applied to this case, NRC regulations governing Fitness for Duty and Unescorted Access pre-empt any claim of disability discrimination.

28. The premise underlying the Attorney General's continued prosecution of the Charge and his reason to believe VY violated disability laws – that VY discriminated against the Employee by not permitting him to work at VY while using methadone – exposes VY to potential liability for violating NRC regulations.

29. Since none of the listed exceptions to the requirement that VY maintain the confidentiality of personnel information collected as part of unescorted access decisions is present, the Civil Investigative Demands purport to compel VY to violate 10 C.F.R. § 26.29.

30. Defendants' actions, as set forth in paragraphs 18-29, above, have created a controversy within the jurisdiction of this Court and resolution by this Court is necessary to ensure that Plaintiffs are not forced to violate any federal and/or state laws and regulations.

31. Declaratory and injunctive relief will effectively adjudicate the rights of the parties.

32. Plaintiffs bring this cause of action for a declaratory judgment and injunction enjoining Defendants from enforcing FEPA and ADA and ordering Defendants to withdraw the Civil Investigative Demands against Plaintiffs and stop all enforcement action against Plaintiffs arising out of or relating to the charge filed by the Employee.

WHEREFORE, Plaintiffs request that:

1. The Court declare that no prima facie case of disability discrimination under FEPA or the ADA exists in this case;

2. Pending a final hearing and determination of the Court in this matter, a preliminary injunction be issued to enjoin the Defendants from enforcing or attempting to enforce the Civil Investigative Demands issued to Plaintiffs or take any other action against Plaintiffs;

3. The Court restrain the Defendants, their officers, employees, agents and servants from any further enforcement of the Charge filed by the Employee;

4. The Court issue such other and further relief as it may deem necessary, including an award of costs and attorney's fees.

Brattleboro, Vermont
July 18, 2000

DOWNS RACHLIN & MARTIN, PLLC

By _____

Peter B. Robb
Fed. ID # 000362657
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80 Linden Street
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ATTORNEYS FOR PLAINTIFFS
VERMONT YANKEE NUCLEAR
POWER CORPORATION and
DR. GEORGE IDELKOPE

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

VERMONT YANKEE NUCLEAR POWER CORPORATION and DR. GEORGE IDELKOPE, Plaintiffs, v. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and WILLIAM SORRELL, ATTORNEY GENERAL OF THE STATE OF VERMONT, Defendants	)	Docket No. 1:00cv254

DEFENDANT WILLIAM SORRELL, ATTORNEY GENERAL OF THE STATE OF VERMONT'S ANSWER AND AFFIRMATIVE DEFENSES

NOW COMES the defendant William Sorrell, Attorney General of the State of Vermont (the defendant), and answers the plaintiffs' Complaint for Declaratory Judgment as follows:

1. The assertions contained in this paragraph are statements of law only, which require no response from the defendant. To the extent a response is required, the defendant denies.

2. Admitted.

3. Defendant lacks knowledge or information sufficient either to admit or to deny the allegations contained in paragraph 3.

4. Admitted.

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5. The defendant admits the assertions contained in the first two sentences of paragraph 5. The defendant denies the remainder of this paragraph.

6. The assertions contained in this paragraph are statements of law only which require no response from the defendant. To the extent a response is required, the defendant denies.

7. The defendant lacks knowledge or information sufficient either to admit or to deny the allegations contained in paragraph 7.

8. The defendant lacks knowledge or information sufficient either to admit or to deny the allegations contained in paragraph 8. The defendant admits the existence of the regulations cited.

9. The defendant admits that NRC regulations require that a licensed nuclear facility have a Medical Review Officer, but denies all other assertions contained in this paragraph.

10. Admitted.

11. The defendant admits the allegation contained in the first sentence of paragraph 11. The defendant lacks knowledge or information sufficient either to admit or to deny the allegation contained in the second sentence.

12. Admitted.

13. Admitted that the Physicians' Desk Reference 2547 contains the language quoted in this paragraph.

14. The defendant lacks knowledge or information sufficient either to admit or to deny the allegations contained in paragraph 14.

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15. The defendant lacks knowledge or information sufficient either to admit or to deny the allegation contained in paragraph 15.

16. The defendant lacks the knowledge or information sufficient either to admit or to deny the allegation contained in paragraph 16.

17. The defendant lacks the knowledge or information sufficient either to admit or to deny the allegations contained in paragraph 17.

18. Admitted

19. Admitted that Vermont Yankee responded to the charge of discrimination as alleged in paragraph 19.

20. The defendant admits that Vermont Yankee provided the Attorney General copies of its Fitness for Duty policy, some NRC regulations concerning Fitness for Duty Programs, copies of some of the charging employee's medical records in its possession, a copy of its hiring policy and a job description for the plant mechanic position. The defendant denies the remainder of the allegations contained in paragraph 20.

21. Denied.

22. Admitted that Vermont Yankee responded as alleged in paragraph 22.

23. Admitted.

24. Admitted, except both Civil Investigative Demands were served on June 26, 2000.

25. Admitted.

26. Denied.

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27. The assertion contained in this paragraph is an statement of law only which requires no response from the defendant. To the extent a response is required, the defendant denies.

28. Denied.

29. Denied.

30. Denied.

31. Denied.

32. The assertions contained in this paragraph are arguments and allegations of law only which require no response. To the extent a response is required, the defendant denies.

AFFIRMATIVE DEFENSES

1. Failure to state a claim upon which relief can be granted.

2. Lack of jurisdiction.

3. Abstention.

Dated at Montpelier, Vermont this 16th day of August, 2000.

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: _____

Katherine A. Hayes
Assistant Attorney General
Federal Bar ID No. 000520153

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

VERMONT YANKEE NUCLEAR POWER CORPORATION and DR. GEORGE IDELKOPE, Plaintiffs,	)	
V.	)	Docket No. 1:00cv254
UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and WILLIAM SORRELL, ATTORNEY GENERAL OF THE STATE OF VERMONT, Defendants	)	

DEFENDANT VERMONT ATTORNEY GENERAL WILLIAM SORRELL'S MOTION TO DISMISS

NOW COMES the defendant William Sorrell, Attorney General of the State of Vermont, and moves to dismiss this declaratory judgment action on the following grounds:

1) Plaintiffs have failed to present a justiciable case or controversy and, therefore, the court is without subject matter jurisdiction;

2) Plaintiffs' claim does not arise out of federal law, but rather states a federal defense to a state enforcement action and, therefore, the court is without subject matter jurisdiction;

3) The NRC regulations on which Plaintiffs rely do not preempt Vermont's Fair Employment Practices Act, and

4) The court should abstain from exercising jurisdiction pursuant to the *Younger* and *Pullman* doctrines.

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MEMORANDUM OF LAW

I. INTRODUCTION

The plaintiffs seek a declaratory ruling that no prima facie case of disability discrimination exists with respect to an ex-employee who filed a claim of discrimination with the Vermont Attorney General's office. They also seek to enjoin the Vermont Attorney General from investigating this charge of employment discrimination. This complaint for declaratory relief is without merit and this case should be dismissed.

II. BACKGROUND

Plaintiff Vermont Yankee Nuclear Power Corporation ("VY") is a Vermont Corporation, which owns and operates a nuclear power facility in Vernon, Vermont. Complaint for Declaratory Judgment, ¶2. Plaintiff Dr. George Idelkope is VY's "medical review officer" ("MRO"). Complaint, ¶14. Defendant Vermont Attorney General ("AG") is empowered to enforce, by a variety of means, the Vermont Fair Employment Practices Act which prohibits, among other things, employment discrimination against a "qualified handicapped individual." 21 V.S.A. §§ 495b(a), 495(a)(1). The AG has a contract with the defendant United States Equal Employment Opportunity Commission ("EEOC") to investigate complaints arising out of a number of federal employment laws, including Title I of The Americans with Disabilities Act ("ADA"), 42 U.S.C.A. §§12111-12117. Under this contract, the AG does *not* issue recommendations to the EEOC at the conclusion of its investigations as to whether federal law has been violated. Rather, the AG issues findings regarding whether there has been any violation of Vermont law only. The EEOC is free to give

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weight to the findings in conducting its own independent investigation of any allegations that federal law has been violated.

In order to enforce FEPA, the Civil Rights Unit of the AG's office accepts and reviews complaints from employees who believe that their legal rights have been violated, and investigates those cases in which a prima facie violation has been alleged. Prior to assigning such cases to an investigator, however, the Civil Rights Unit first asks the employer about whom the complaint has been made to give a written point-by-point response to the charge that has been made by the employee. In addition, the employer is usually sent a "Request for Information" ("RFI"), which asks for documents and narrative information relevant to the charge of discrimination by the employee and the response by the employer. In many cases, based upon information it receives in the response and theRFI, the Unit determines that no violation of law can be proven, and the case is closed with no further investigation.

When an employer refuses to respond to an RFI and the Civil Rights Unit continues to have reason to believe that a violation of FEPA has occurred, the AG issues to the employer a Civil Investigative Demand ("CID") for testimony and/or the production of documents. This method of enforcing the statute is expressly authorized by 21 V.S.A. §495b(a) and 9 V.S.A. §2460(a).[1] If an employer refuses to comply with a CID, 9 V.S.A. §2460(c) authorizes the AG to file, in the appropriate state superior court, a petition for an order for the enforcement of the CID.

In this case, on November 1, 1999, an employee filed a charge of employment discrimination with the AG, alleging that he had been employed by VY as a plant

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[1] 9 V.S.A. §2460(a) also authorizes the AG to issue a CID to "any other person having knowledge" about the alleged violation of law.

mechanic for approximately two years, but in December of 1998 became unable to work because of severe and chronic back and leg pain. He further alleged that in February 1999, his physician released him to return to work but the VY would not allow him to return because his physician had prescribed, and he was taking, methadone to control his pain. Because of VY's position, the employee made several attempts to substitute other medications, but none was effective. During the summer of 1999, the employee was evaluated by two other physicians, who both stated that it was reasonable for him to continue to take methadone as prescribed and to continue to work as a mechanic at VY. Although VY was made aware of these opinions, it continued to refuse to allow the employee to return to work and, on September 27, 1999, terminated his employment. Employee's Charge, Attachment A.

This charge of discrimination was forwarded to VY, which responded that the charge was without merit. It argued that the employee was not a "qualified handicapped individual" within the meaning of 21 V.S.A. §495(a)(1). It stated that its MRO determined that the employee was not fit to return to work while taking methadone and that it therefore refused to allow him to return to work. It also stated that certain Nuclear Regulatory Commission ("NRC") regulations mandate that nuclear facilities have an MRO and that this person has sole responsibility for determining whether an individual is fit for duty. Finally it asserted that the "MRO's decisions could not be overruled by state law." VY's point-by-point response to the discrimination charge, Attachment B.

When VY refused to provide the AG with most of the information requested in an RFI, the AG issued a CID, in which it requested substantially the same information.

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The CID requests information about how and why VY's MRO came to his determination that methadone was not an approved medication for fitness for duty purposes, about whether VY's MRO was, in fact, the only person involved in making the decision concerning the employee not returning to work while taking methadone, and about other employees who have been allowed to work at VY while taking prescription narcotic drugs. CID to VY, Attachment C. This information is relevant and necessary in order for the AG to investigate whether the employee's use of methadone, as properly prescribed for pain, was a reasonable accommodation under the circumstances and to determine whether other similarly situated employees were treated differently than the employee.

The AG also sent a CID to VY's MRO, Dr. Idelkope, requesting similar information. CID to Dr. Idelkope, Attachment D. The information was requested from Dr. Idelkope because of the possibility that only he, and no one at VY, had control of some or all of this information.

The AG served the CIDs on VY and Dr. Idelkope on June 26, 2000. On July 14, 2000, counsel for VY and Dr. Idelkope notified Assistant Attorney General Martha Csala by phone that they would not comply with the CIDs. On July 20, 2000, the AG filed a Petition to Compel Enforcement of the CIDs in the Windham County Superior Court.

On July 26, 2000, the AG was served with the plaintiffs' Complaint for Declaratory Judgment.[2] In the complaint, the plaintiffs assert that 1) NRC regulations concerning "Fitness for Duty" preempt any claim of disability discrimination; 2) the premise underlying the AG's continued prosecution of the charge - that VY may have

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discriminated against the employee by not permitting him to work at VY while taking methadone - exposes VY to potential liability for violating NRC regulations; 3) the CID issued to VY would compel it to violate, the confidentiality provision of the "Fitness for Duty" regulations; and 4) the AG's actions have created a controversy within the jurisdiction of this court and resolution by this court is necessary to ensure that the plaintiffs are not forced to violate any federal and/or state laws and regulations. Complaint ¶¶ 27-30. For the reasons set forth below, none of these assertions have merit.

On August 14, 2000, the Windham Superior Court stayed the enforcement action filed by the AG, pending decisions by this court about whether it would dismiss the plaintiff's declaratory action and, if not, about the merits of the claims.

III. NO CASE OR CONTROVERSY

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976). In the absence of a palpable case or controversy, the court lacks subject matter jurisdiction. *Railway Mail Assn v. Corsi,* 326 U.S. 88, 93 (1945). The doctrine of standing is "an essential and unchanging part of the case-or-controversy requirements of Article III." *Associated General Contractors v. City of Jacksonville,* 508 U.S. 656, 663 (1993) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). The closely related doctrine of ripeness is also grounded in Article III of the United States Constitution and is determinative of jurisdiction. *Tari v. Collier County,* 56 F.3d 1533,

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[2] The Complaint was filed in this court on July 18, 2000.

1535-1536 (11 th Cir. 1995); *Southern Pacific Trans. Co. v. Los Angeles,* 922 F.2d 498, 502 (9th Cir. 1990).

At a minimum, the party seeking to invoke the court's jurisdiction must establish the following elements of standing: 1) an actual or imminent injury in fact, 2) a causal connection between the injury and the conduct complained of, and 3) likelihood that the injury will be redressed by a favorable decision. *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 103 (1998); *Lujan, supra,* 504 U.S. at 560-61. In order to overcome a ripeness challenge, the party seeking to invoke the court's jurisdiction must establish that his claim involves events that are not uncertain or contingent. *See Massachussets Ass'n of AfroAmerican Police, Inc. v. Boston Police Dept,* 973 F.2d 18, 20 (1st Cir. 1992).

The burden of establishing standing and ripeness falls squarely on the party invoking federal jurisdiction. *Steel Co. v. Citizens for a Better Environment, supra,* 523 U.S. at 104 (1998); *Renne v. Geary, 501 U.S.* 312, 316 (1991). Like other federal actions, declaratory judgment actions are limited by the case-or-controversy requirement in general and the ripeness doctrine in particular. 15 J. Moore, Moore's Federal Practice §101.80[1] (3d ed. 1998).

Applying these principles to the case at hand reveals that neither VY nor Dr. Idelkope have alleged any actual or imminent injury and that VY is asserting a claim involving events that are very uncertain.

A. Vermont Yankee Does Not Have Standing and its Claim is Not Ripe

The two potential injuries asserted by VY are: 1) that the AG's investigation into whether VY violated disability laws by not allowing the employee to work at VY while

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taking methadone exposes it to liability for violating NRC regulations, and 2) that the CID compels it to violate the confidentiality provision of the "Fitness for Duty"' regulations.

With respect to the first asserted injury, the AG's investigation, which is presently in its preliminary stages, in no way exposes VY to liability for violating NRC regulations. The regulations at issue here are contained in 10 C.F.R. pt. 26, which deals with the establishment and maintenance of "fitness for duty" ("FFD") programs and procedures by licensed nuclear power facilities. By simply seeking information in the usual course of its investigatory process, the AG is not putting VY in a position of violating the regulations or its own policy established pursuant to the regulations.

10 C.F.R. §26.20 requires all licensed nuclear power facilities to establish written policies which must address the use of illegal drugs and abuse of legal drugs, must prohibit the consumption of alcohol within five hours before any working period, and must address such things as mental stress, fatigue and illness. 10 C.F.R. §26.20(a). The policy must also specify procedures to be utilized for testing for drug and alcohol use. 10 C.F.R. §26.20(c). 10 C.F.R. §26.24 sets forth requirements for drug and alcohol testing by covered facilities. According to the definition section, 10 C.F.R. §26.3, and provisions of the testing regulation, the MRO is the person responsible for receiving lab results and interpreting and evaluating positive test results. 10 C.F.R. pt. 26, Attachment E.

10 C.F.R. §26.27 concerns the actions and sanctions that nuclear facility management must take when it receives evidence that an employee has used, sold or possessed illegal drugs. The numerous actions and sanctions listed in §26.27 do not

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apply to workers who are impaired or otherwise potentially unfit for duty because of the consumption of alcohol or the use of valid prescription drugs. In such a case, when a worker's fitness may be questionable, he "shall be removed from activities within the scope of this Part, *and may be returned only after determined to be fit to safely and competently perform activities within the scope of this Part.* 10 C.F.R. §26.27(b)(1) (emphasis added). Nowhere in this section does it state that the MRO is responsible for making this determination, as it does in the drug testing section. Moreover, §26.27 specifically refers to actions to be taken by *management* of the facility. 10 C.F.R. §26.28 provides for an internal appeal procedure, but only for employees who have tested positive for alcohol or drug use. Thus, it does not apply to determinations made pursuant to §26.27(b)(1).

VY established a FFD policy as required. VY Policy 222, Attachment F. The policy prohibits the use of illegal drugs, the misuse of legal drugs, and the consumption of alcohol during working hours or up to five hours before a shift. It also requires employees to notify their supervisors or the Occupational Health Nurse ("OHN") if they are taking certain types of medications. The OHN is to notify the employee's supervisor if a risk exists, and the supervisor is to consider reassignment of the employee as appropriate, after assessing the situation. VY Policy 222 §III. VY's policy provides for testing of employees only in the following four circumstances: 1) randomly, 2) prior to employment, 3) for cause[3], and 4) as follow-up to ensure that employees who have been returned to duty following a violation of the FFD policy are abstaining from the abuse of drugs and alcohol. VY Policy 222 §V. The employee's

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situation did not fall within any of these categories. As required by the NRC regulations, VY established an appeal procedure, but only for appealing positive drug and alcohol tests. VY Policy 222 §VI.M. VY's policy again specifically addresses the MRO's responsibilities: "The role of the MRO is to review and interpret positive drug test results obtained through the company Fitness for Duty program." VY Policy 222-3 §IV, Attachment G.

These provisions strongly undermine VY's assertion that it "was bound by the Fitness for Duty determination reached by the MRO, and that the only avenue for reviewing the MRO's determination was through procedures implemented by the NRC. Complaint ¶22. Moreover, VY's policy specifically states that its supervisors are responsible for 1) responding appropriately to situations involving FFD, including reassigning job responsibilities or disciplinary action up to and including termination and 2) reviewing information provided by the OHN following her assessment of a disclosure of use of medication and determining the feasibility of reassigning the individual during the affected period. VY Policy 222 §VII.C.5 & 8.

By complying with the AG's CID and providing him with information about 1) why VY's MRO determined that the employee was not fit for duty, 2) who else at VY was involved in the decision to not allow the employee to return to work while taking methadone, and 3) whether and under what circumstances other employees (names redacted) have been allowed to work at VY while taking prescription narcotic drugs, VY will not violate any provision of 10 C.F.R. pt. 26. Thus, it has not asserted any injury, actual or imminent, and therefore does not have standing.

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[3] The "for cause" testing may only be done if the employee is observed behaving in such a way as to indicate substance abuse, after an accident if the employee's behavior may have contributed to the

Plaintiffs may argue that by providing the requested information, they may face injury if the following events occur: 1) the AG continues his investigation into the charge of discrimination, 2) upon completion of the full investigation, he finds that VY did unlawfully discriminate against the employee, 3) the AG then decides to bring a court action against VY on the basis of the alleged discrimination, and 4) as a result of the litigation, VY must pay monetary damages and/or reinstate the employee in his position as a mechanic despite the fact that he takes methadone. Even assuming, *arguendo*, that such reinstatement would violate the federal FFD regulations, these events are extremely uncertain, speculative and remote and are, therefore, not ripe for review.

First, upon receiving the information requested in the CIDs, the AG could determine that the decisions made by the MRO and VY management were not arbitrary, that the employee was not treated differently than other similarly situated employees, and that the taking of methadone was not a "reasonable accommodation" under the circumstances. At that point, the parties would be so notified and the AG would close his case. Even if the CID information did not lead immediately to this conclusion, after a full investigation, the AG could find that VY did not unlawfully discriminate against the employee, and close his case. If, after an investigation, the AG did find that VY discriminated against the employee, it is not likely that he would choose to litigate the case. Given the large number of charges received and investigated by the AG, the high prportion of cases which are withdrawn or settled, and the limited resources of the Civil Rights Unit, the office litigates only a fraction of the cases in which it finds a violation of an employment law. Finally, even if the case

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event, or if the supervisor has received credible information that a person is abusing drugs or alcohol.

is litigated the outcome is, of course, uncertain. Thus, events that *might* lead to injury on the part of VY are very uncertain and remote and its claims based upon these events are unripe for review.

VY's claim of potential injury based on the FFD confidentiality provision is even more specious. 10 C.F.R. §26.29 requires that facilities that collect personal information about an individual for the purpose of complying with the FFD program must provide for confidentiality of the information. There are, however, a number of persons listed to whom the facilities may provide the information, including the subject individual or his representative.

Along with his charge of discrimination, the employee sent to the AG a signed and notarized statement in which he authorized VY to allow the AG to have access to any relevant personnel and medical records deemed confidential. Attachment H. The employee has never revoked this consent. Moreover, VY has already, without any apparent concern about §26.29, provided the AG with a June 1999 lab report concerning the employee in which he tested positive for methadone, a letter from Dr. Idelkope to a VY manager in which he states his opinion that the employee was not fit for duty, and all of the medical records concerning the employee in its possession. Because VY has already voluntarily provided the AG with numerous documents which would fall under §26.29, and because of the employee's release, VY cannot assert that compliance with the CID would force it to violate the NRC regulation.

The AG's request for information about whether other employees have been allowed to work at VY while taking prescription narcotic drugs would also not force VY to violate 10 C.F.R. §26.29. First, the CID request specifically states that the

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employees' names can be redacted and no other identifying information is requested. Secondly, section 26.29(b) allows for the release of the information pursuant to a court order. Because this matter is still pending in the state court, if that court grants the AG's petition to compel and orders VY to provide the information, the order would protect VY from any potential liability for violating the regulation.

For all of these reasons, VY lacks standing to bring this action, its claims are unripe for review by this court, and its case should be dismissed.

B. Dr. George Idelkope Does Not Have Standing

It is even more clear that plaintiff Dr. Idelkope lacks standing to bring this action. The charge of discrimination was brought against VY, not Dr. Idelkope, and the AG is investigating only VY's actions. While decisions of Dr. Idelkope are relevant to this investigation, the doctor is not under investigation, not could he be since he was not the employees's employer.

Moreover, the complaint asserts only two potential injuries and both concern potential liability for violating NRC regulations. Since the regulations apply only to licensed nuclear facilities, Dr. Idelkope cannot assert any actual or imminent injury based upon the regulations.

Because Dr. Idelkope has not asserted any injury and has no personal stake in the outcome of this litigation, he lacks standing to bring this action and his claims must be dismissed.

IV. PLAINTIFFS' CLAIM DOES NOT ARISE OUT OF FEDERAL LAW

The Declaratory Judgment Act does not confer federal subject matter jurisdiction; the act is procedural only. *See, eg., Skelly Oil Co. v. Phillips Patroleum*

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Co., 339 U.S. 667, 671-72 (1950). In *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237 (1952), the Supreme Court gave important guidance about how to determine whether federal-question jurisdiction exists in declaratory judgment actions:

> Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim.

Id. at 247. More recently, the Supreme Court reiterated this holding in *Franchise Tax Board v. Laborers Vacation Trust,* 463 U.S. 1, 16 (1983), stating: "[I]f, but for the availability of the declaratory judgment procedure, [a] federal claim would arise only as a defense to a state created action, jurisdiction is lacking." *See, also, Int'l Tin Council v. Amalgamet, Inc.,* 645 F. Supp. 879, 881 (S.D.N.Y. 1986) (claim of immunity under international law, even when raised as an affirmative assertion by a declaratory judgment plaintiff, is actually a defense, and will not support federal-question jurisdiction).

Many courts have followed *Wycoff* in holding that declaratory judgment actions seeking a declaration that federal law preempts a state law based claim do not establish federal-question jurisdiction. *See, e.g., Exxon Corp. v. Hunt,* 683 F.2d 69, 74 (3d Cir. 1982), *cert. denied,* 459 U.S. 1104 (1982). In *Exxon*, although the declaratory plaintiff cited a federal statute which it argued exempted it from paying a state tax, the United States Court of Appeals for the Third Circuit held that the action was simply an effort to establish a federal defense to a purely state law tax enforcement action and there was no federal question jurisdiction. *Id.*

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Just as in *Exxon*, this case asserts a federal defense to a purely state enforcement action. The Vermont AG, in carrying out his statutorily mandated responsibility to enforce the state's employment discrimination law, issued CIDs to VY and its MRO when VY refused to provide necessary and relevant information. The state law which authorizes the AG to issue CIDs also provides for their enforcement, when appropriate, by a Vermont Superior Court. In response to the CID and in anticipation of the imminent enforcement action in state court, VY filed this declaratory judgment action in which it asserts a federal preemption defense to the state action. Complaint ¶¶27-29. Because the plaintiffs' action is in the nature of a defense to a state enforcement action, there is no federal-question jurisdiction and the action should be dismissed.

V. THE NRC REGULATIONS DO NOT PREEMPT VERMONT'S FAIR EMPLOYMENT PRACTICES ACT

Plaintiffs assert that the NRC regulations governing fitness for duty preempt any claim of disability discrimination. Since a federal statute or regulation cannot preempt a "claim," presumably plaintiffs meant to assert that the FFD regulations preempt the state statute prohibiting discrimination on the basis of disability. These regulations do not preempt FEPA.

When analyzing a preemption claim, it is important for courts to keep in mind that there is a presumption that Congress does not intend to supplant state law. *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 654 (1995) Even in a case involving ERISA, which has a broad and explicit preemption clause, the United State Court of Appeals for the Second Circuit stated: "[W]e cannot completely read the presumption against pre-emption out

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of the law." *Devlin v. Transportation Communications Int'l Union,* 173 F.3d 94, 98 (2d Cir. 1999).

Preemption of state law can be found under four circumstances: 1) when Congress expresses a clear intent to preempt state law, 2) when there is direct conflict between the federal and state law, or compliance with both would be impossible, 3) where there is implicit in federal law a barrier to state regulation, or 4) where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplant federal law. *Louisiana Public Service Commission v. FCC,* 476 U.S. 355, 368 (1986).

Turning to this case, nowhere in the NRC fitness for duty regulations is there an express intent to preempt state employment discrimination, or any other type of laws. Nor do they contain an implicit barrier to state regulation of discrimination in the workplace. The FFD regulations set forth requirements for licensed nuclear facilities to follow to ensure reasonably that their employees safely and capably function on the job. The regulations prohibit the consumption of alcohol and illegal drugs, establish procedures to follow to determine whether an employee is unfit to work, and establish procedures to follow for testing employees for alcohol and illegal drugs. These regulations contain absolutely no implicit barrier to state legislation concerning employment discrimination based upon disability.

With respect to the third variety of preemption, there is no conflict between the federal FFD regulations and the disability discrimination provisions of FEPA or the CID enforcement statute, and compliance with both the regulations and the state laws is possible. At this time, the only thing that the AG is seeking from VY is information

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about why it determined that the employee was not fit for duty and therefore refused to allow him to return to work. Because the employee has signed a release authorizing VY to provide the AG with all of his relevant personnel and medical records, and because the information about use of drugs by other employees would contain no identifying information and would be provided pursuant to a court order, VY can provide the information requested pursuant to 9 V.S.A. §2460 without violating 10 C.F.R. §26.29 or any other section of the FFD regulations. See Section III.A. of this memorandum.

Looking more broadly at a nuclear facility's ability to comply with both the FFD regulations and FEPA, compliance with both is possible. When an employee has a physical impairment that would bring him within the scope of FEPA, the law requires that the employer not discriminate against the employee if he is "capable of performing the essential functions of the job or jobs for which he is being considered *with reasonable accomodation* to his handicap." 21 V.S.A. §495d.[4] (emphasis added). If an accomodation sought by an employee of a nuclear facility would cause him to be impaired or potentially unable to safely and competently carry out his duties, that accomodation would not be "reasonable," and the employer would not be required under FEPA to provide it. Indeed, in this case, if VY provided the AG with documentation that showed that its determination that the employee in question was unfit for duty was reasonable and was consistent with other such determinations, the AG would make a finding that there was insufficient evidence of discrimination and would close this case.

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Finally, the fourth type of preemption is also not present in this case. The FFD regulations certainly do not occupy the entire field of employment disability discrimination regulation and leave a great deal of room for the states to supplant federal law. In fact, the ADA is the federal law which addresses discrimination based on disability, and it, like FEPA, requires employers to provide disabled employees with reasonable accomodations. Being a federal statute, the ADA can not be preempted by the NRC regulations at issue in this case.

Keeping in mind the presumption against preemption, and because the FFD regulations do not present any of the circumstances which would warrant preemption of FEPA and its CID enforcement mechanism, the plaintiffs' claim of preemption should be dismissed.

VI. THIS COURT SHOULD ABSTAIN FROM EXERCISING JURISDICTION

Even if this court determines that the plaintiffs' claim arises out of federal law, the court should abstain from exercising its jurisdiction pursuant to the *Younger* and *Pullman* doctrines.

A. *Younger* Abstention

In *Younger v. Harris,* 401 U.S. 37 (1971), the Supreme Court held that a federal court improperly enjoined a state criminal prosecution. The Court based its decision in large part on the notion of comity, stating:

> The underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of "comity," that is, a proper respect for state functions.

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[4] 21 V.S.A. §495d (6) also specifically excludes from FEPA's protections individuals who are alcoholics or drug abusers and whose use of substances prevent them from performing their duties or whose use of substances constitutes a threat to the safety of others.

Id. at 43. Although the *Younger* abstention doctrine was developed in the context of criminal proceedings, the Supreme Court has subsequently applied the doctrine when the state is a party in state court civil litigation. *See, Huffman v. Pursue Ltd.*, 420 U.S. 592 (1975); *Trainor v. Hernandez,* 431 U.S. 434 (1977). In applying the *Younger* doctrine in *Trainor*, which was wholly civil, the Court emphasized that the state was a party to the proceding and was acting to vindicate important state interests.

The Supreme Court subsequently applied the *Younger* doctrine in a civil case which involved state interests that are very similar to the interests involved in this case. *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986). In the *Dayton* case, an employee of the Dayton Christian Schools filed a complaint with the Ohio Civil Rights Commission alleging sex discrimination, and the Commisssion found probable cause to believe that Dayton had discriminated against the employee. When the Commission initiated administrative proceedings against Dayton, Dayton filed an action in the federal district court in which it sought an injuction against the state proceedings on the grounds that any investigation of its hiring or firing decisions would violate the Religion Clause of the First Amendment.

The Supreme Court held that the District Court should have abstained from adjudicating the case because of the important state interests involved. *Id.* at 626-27. The Court stated:

> We have no doubt that the elimination of prohibited sex discrimination is a sufficiently important state interest to bring the present case within the ambit of [*Younger* and the line of cases extending the *Younger* doctrine to administrative proceedings.] We also have no doubt that Dayton will receive an adequate opportunity to raise its constitutional claim.

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Id. at 628. The Court also noted that, however the constitutional claim should be decided, the Commission had violated no constitutional rights by merely *investigating* the circumstances of the employee's discharge. *Id.*

This case involves the very similar and equally important state interest of prohibiting discrimination on the basis of disability. VY will have an adequate opportunity to raise its arguments based on the NRC regulations in the state court. Moreover, as argued above, these regulations are not even implicated by the AG's investigation into the circumstances of the employee's discharge. Therefore, this court should follow the holding of *Dayton* and abstain from adjudicating the case.

This court should not be reluctant to abstain because of the fact that the state superior court recently stayed its proceeding to await a ruling from this court. In so ruling, the judge stated that it was his last day in that particular court, that therefore he did not want to delay in issuing a ruling until the state had an opportunity to respond to the motion to dismiss or stay filed by VY on the day of the hearing, and that he would grant the motion for stay on the grounds argued in the motion: that the federal action had been filed two days before the state action. The judge also stated that he was aware that the AG was planning to file this motion to dismiss in this court and that he would stay the state court proceeding until the federal court had a chance to rule on this motion to dismiss.

With respect to the argument that VY filed its case in this court before the AG filed its petition to compel enforcement of the CIDs in state court, it is the AG's position that, for purposes of abstention, the court should consider the AG's issuance of the CIDs as his commencement of the state proceeding. The AG does not issue

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CIDs lightly, and unless a case settles, always requests court enforcement of a CID when compliance is refused. VY was fully aware that the AG intended to seek enforcement of the CIDs if it did not voluntarily comply, and the AG did not file the petition to compel in response to VY's declaratory judgment action. In fact, it was VY that rushed into federal court with this action after the CIDs were issued and knowing that the AG would soon ask a state court to enforce them.

There is strong legal support for the argument that this court should abstain from adjudicating this matter even though VY filed its action two days before the state filed its petition. Courts have held that an arrest commences a state proceeding for *Younger* purposes, even though nothing has been filed in the state court. *See, Rialto Theater Co. v. City of Wilmington,* 440 F.2d 1326 (3rd Cir. 1971); *Eve Products, Inc. v. Shannon,* 439 F.2d 1073 (8th Cir. 1971). In *Hicks v. Miranda,* 422 U.S. 332 (1975), the Supreme Court applied *Younger* principals in holding that the lower court should have abstained from interfering with a state criminal prosecution despite a first-filed federal declaratory relief action. The court explained that because the federal suit was in its initial stages the federal court should defer to the state court proceedings. All of the curcuit courts follow the *Hicks* rule and defer to a state proceeding if the federal litigation is embryonic. 17 J. Moore, Moore's Federal Practice §122.05[2][b] (3d ed. 1998).

Because, for abstention purposes, the AG commenced the state action first by issuing its CIDs, and because the federal action is still "embryonic," this court should abstain from adjudicating the plaintiffs' claims and allow the state court to rule on the

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issue of whether the AG can investigate this case by gathering the information in its CIDs.

B. *Pullman* Abstention

This court should also abstain from adjudicating this matter under the theory set forth by the Supreme Court in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Under the *Pullman* doctrine, federal abstention is appropriate if two related elements are present in a case: 1) there is an uncertain question of state law, and 2) that question of state law must be susceptible of a construction that will eliminate the need to decide the federal question. *Id.* at 499-501. These two elements are present in this case.

Although the plaintiffs have presented this case as one of construction of federal regulations, the case actually involves a question of state law which is very susceptible of a construction that will eliminate the need to decide whether the NRC regulations preempt the state laws at issue. The uncertain question of state law concerns interpretation of the "reasonable accommodation" provision of FEPA, 21 V.S.A. §495d(6). This provision can be construed to exclude, because they are not reasonable, any accommodations which cause an employee of a licensed nuclear facility to be impaired in his ability to perform his job. Such a construction of the state statute by a state court would eliminate the need for a federal court to decide whether the NRC fitness for duty regulations are in conflict with and, therefore, preempt FEPA. Because the elements of the *Pullman* doctrine are present in this case, this court should abstain from adjudicating this matter.

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VII. CONCLUSION

This complaint for declaratory judgment is without merit and is meant to interfere with and manipulate Vermont's statutory scheme for investigating and enforcing its employment discrimination laws. The matter should be dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. In the alternative, this Court should abstain from adjudicating this matter and dismiss on that ground.

Dated: August 17, 2000

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: _____
Katherine A. Hayes
Assistant Attorney General
Federal Bar Id. No. 000520153

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STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
PUBLIC PROTECTION DIVISION

CHARGING PARTY: Walter C. Webster
461 Sugarhouse Hill Road
Guilford, VT 05301

Charge of Employment Discrimination

RESPONDENT: Vermont Yankee Nuclear Power Corp.
John P. O' Connor, Agent
185 Old Ferry Road
Brattleboro, VT 05301

I charge Respondent Vermont Yankee Nuclear Power Corp. with an unlawful discriminatory act in employment on the basis of:

__Race; __ Color; __National Origin; __ Age; __ Religion; __ Sexual Orientation; __ Sex; __ Place of Birth; __ Ancestry; X Disability; __ Worker's Compensation Retal.; __ Retaliation; __ Parental and Family Leave; __ Short-Term Leave; __ Equal Pay

---

The following statements set forth the reasons I believe I have been discriminated against:

1. I have been permanently employed by Respondent as plant mechanic from November 16, 1997 to September 27, 1999. I am fully qualified for the job, and my performance has been satisfactory. Upon information and belief Respondent employs 15 or more persons.

2. I suffer from chronic severe back and leg pain (sciatica). This constitutes a disability.

3. I last worked on December 31, 1998. I was unable to continue to work because the pain had increased. On February 10, my physicians released me to return to work. Respondent refused to permit me to return to work because my physicians had prescribed, and I was taking, methadone to control my pain.

4. On May 3, 1999, my physicians again released me to work. Respondent but refused to allow me to return to work as long as I continue to take the medication which my doctors have prescribed for my pain. Based on my physician's release, Respondent also terminated my short-term disability benefits as of that date.

5. On June 30, 1999, I obtained another medical evaluation, and another doctor stated that it was reasonable for me to continue to take methadone as prescribed, and to continue to work as a mechanic. Respondent was made aware of this independent evaluation and opinion, and still refused to allow me to return to work as long as I take my prescribed pain medication.

6. On August 16, 1999, at a meeting I had with my supervisors, one supervisor said, "You mean to tell me that they can put a man on the moon, but they can't come up with something to fix your back?"

7. On August 30, 1999, yet another doctor issued a report stating that there was nothing wrong with my continue to take methadone as prescribed, and that it was unfortunate that Respondent continued its policy of refusing to permit me to return to work because the scientific evidence does not support this policy.

8. Respondent continued to refuse to permit me to return to work if I was taking methadone as prescribed to control the pain that my disability caused.

9. Respondent's refusal to permit me to return to work while taking properly prescribed and monitored medication, which has no effect on my ability to perform the essential functions of my job, was a denial of reasonable accommodation for my disability.

10. On September 27, 1999, Respondent terminated my employment, because I continued to use medication as prescribed by my physicians to control my pain.

11. My son Beau, has cerebral palsy, a disability, and as a result, my family incurs substantial medical expenses, which are paid by the Respondent's health insurance plan. Our costs are far in excess of the average costs of Respondent's employees. I believe my association with Beau, and its attendant costs, may have been a factor in Respondent's decision to terminate my employment.

12. Upon information and belief, the above described discriminatory conduct violates the State of Vermont's Fair Employment Practices Act, 21 V.S.A. § 495 et seq., as enforced by the State of Vermont's Office of Attorney General, and the Americans with Disabilities Act of 1991, 42 U.S.C. § 12111 et seq., as enforced

by the federal Equal Employment Opportunity Commission.

X I also want this allegation filed with the EEOC. I will advise the agencies if I change my address or telephone number, and I will cooperate fully with them in the processing of my allegation in accordance with their procedures.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Walter Webster
Complainant (Signature)

Oct. 28, 99
Date

Notary Clause

Subscribed and sworn to before me by the above named person on

10/28/99
Month, Day, Year

Notary Public
My commission expires: 2/19/2003

DOWNS RACHLIN & MARTIN PLLC
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January 20, 2000

Katherine A. Hayes, Esq.
Assistant Attorney General
Civil Rights Division
State of Vermont
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001

Re: Walter Webster v. Vermont Yankee Nuclear Power Corp.

Dear Ms. Hayes:

We represent Vermont Yankee Nuclear Power Corporation in the above-referenced matter. This is in response to your request for a point by point response to the charge of employment discrimination in the above-case. For your convenience, we have numbered the paragraphs in our response to correspond with the numbered paragraphs in the charge.

Preliminarily, Vermont Yankee believes that the timing and content of the charge indicate it was filed to gain leverage in collateral proceedings. Mr. Webster is part of a collective-bargaining unit represented by Local 300 of the IBEW (the "Union"). The Union has filed a grievance on behalf of Mr. Webster (copy attached as Exhibit 1) over the same incidents recited in the charge. Mr. Webster has also filed an appeal of the denial of his Worker's Compensation claims. Vermont Yankee had been attempting to resolve those issues when this charge was filed. As explained more fully below, the charge is without merit.

1. The Charging Party has been employed by Vermont Yankee as a plant mechanic from November 16, 1997 to September 27, 1999. Prior to that, the Charging Party worked for Fishbach and NPS, two contractors that performed work at Vermont Yankee. Vermont Yankee does not employ individuals "permanently." The Charging Party is not qualified for his job because he has not been deemed "fit for duty" by Vermont Yankee's Medical Review Officer (the "MRO"). A copy of Vermont Yankee's Fitness For Duty policy is attached as Exhibit 2. Vermont Yankee does employ more than 15 persons.

2. The Charging Party has reported pain in various areas of his body including but not limited to neck, shoulder, back and legs. Some doctors have described the pain as sciatica. The Charging Party's pain is not a disability under state or federal law. Indeed, the Charging

Party's physicians have consistently claimed that the Charging Party is not restricted from working a wide range of jobs. There is no evidence or contention that the Charging Party is limited in any other major life function.

3. The Charging Party last worked on December 31, 1998. He reported that he could not work because of a stiff neck. In late January or early February 1999, the Charging Party reported that he was taking methadone to control his pain.

A review of the medical records produced by the Charging Party reveals there is no medical documentation as to when or why the Charging Party was placed on methadone. The Charging Party's attorney indicates the decision to place the Charging Party on methadone was done over the phone by one of his physicians. The medical records for December 1998 and January 1999 do not indicate any injury or other precipitating event that would support such a radical change in treatment. Failure to document the medication change, dosage for the new medication and reason for the change would be inconsistent with accepted medical practice. In addition, we have no medical records confirming the Charging Party's statement that his physicians "released" him to return to work on February 10, 1999. The MRO determined that the Charging Party was not fit to return to work while on methadone pursuant to the Vermont Yankee Fitness For Duty Policy which is mandated by federal law, 10 CFR § 26.20 (copy attached as Exhibit 3). Thereafter, the MRO attempted to work with the Charging Party's physician to find an alternative pain control method that would be acceptable to the MRO.

4. From January 1999 to May 1999, the Charging Party was placed on short-term disability. The Charging Party's application for Worker's Compensation Benefits was denied. Although the Charging Party reported that he had tried to get off methadone, he was unable to stop taking methadone. In May 1999, Vermont Yankee terminated the Charging Party's short-term benefits because the Charging Party's physician indicated the Charging Party was no longer disabled because he was on methadone.

5. & 7. The Charging Party solicited and submitted to Vermont Yankee opinions from other physicians that the Charging Party should be able to work at Vermont Yankee while he was on methadone. On August 3, 1999, at a meeting attended by Vermont Yankee's MRO, Vermont Yankee's Manager of Human Resources, a representative of the Union and two of the Charging Party's physicians, one of the physicians, Dr. Shapiro, indicated that the Charging Party was "dependent" on methadone. Dr. Shapiro also stated that the Charging Party was <u>not</u> disabled.

6. The Charging Party has misquoted and offered out of context a statement made at an August 16, 1999 meeting. The statement was a heartfelt expression of empathy with the Charging Party's struggle to find an effective treatment regime, not one of skepticism, as the Charging Party has mis-characterized it. The actual statement - "You would think that if they

could put people on the moon they could find a treatment that would work for you" was merely an expression of regret that modern medicine had not done more for the Charging Party. The Charging Party's attempt to rephrase the statement to belie some sinister motive is unfounded and inappropriate.

8. through 10. Vermont Yankee refused to permit the Charging Party to return to work during the summer of 1999 because the MRO refused to declare him fit for duty in light of his methadone usage. The Charging Party requested and was allowed to make additional attempts to get off methadone. The Charging Party reported that he was unable to do so. The Charging Party was terminated on September 27, 1999.

11. The Charging Party has stated that one of his children has cerebral palsy. Vermont Yankee knew that when it hired the Charging Party. Although the Charging Party's submission of medical expense has been in excess of the average Vermont Yankee employee, such considerations had absolutely nothing to do with any decisions made by Vermont Yankee with respect to the Charging Party's employment and there is not a scintilla of evidence to support such a base allegation.

12. Based on the Charging Party's own information it is clear that he does not have a disability within the meaning of 21 V.S.A. § 495 et seq. or the Americans With Disabilities Act, 42 U.S.C. § 12111 et seq. Specifically, the Charging Party has submitted uncontradicted evidence that he can work without limitation at a wide range of jobs. In fact, the Charging Party is only prohibited from working at a job at Vermont Yankee that requires unescorted access. Thus, by the Charging Party's own admission, he is not substantially limited in the major life function of "working." See Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2151 (1999) ("to be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs."); Murphy v. United Parcel Service, 119 S. Ct. 2133, 2138 (1999) (fact that plaintiff's hypertension prevented him from obtaining Department of Transportation certification as driver of commercial vehicle "is not sufficient to create a genuine issue of fact as to whether [plaintiff] is unable to perform a class of jobs utilizing his skills. At most, [plaintiff] has shown that he is regarded as unable to perform the job of mechanic only when that job requires driving a commercial motor vehicle. . ."); Muller v. Costello, 187 F.3d 298, 313 (2d. Cir. 1999) ("a limitation on a single, particular job cannot constitute a substantial limitation of the major life activity of working"). Because the Charging Party has never even asserted that he is limited in any other major life function, he does not have a disability under state or federal law.

Moreover, the Charging Party has also failed to establish that even if he had a covered disability, he could perform the essential functions of his job with a reasonable accommodation. An

essential function of the Charging Party's job as a plant mechanic at a nuclear power station is qualifying for unescorted access to the nuclear plant. The unescorted access requirement is imposed by the Nuclear Regulatory Commission ("NRC") under federal law which preempts conflicting state law. The NRC regulations mandate that a nuclear facility, such as Vermont Yankee, have an MRO who has sole responsibility for determining whether an individual is fit for duty. An individual must be determined fit for duty by the MRO in order to have unescorted access to the nuclear facility. There is no provision for the appeal of the MRO's decision outside the NRC. The MRO's decisions cannot be overruled by state law. In addition, the Charging Party never asked for another job or for any other form of accommodation.

The importance of the Fitness For Duty Program is amply demonstrated by this case. The Charging Party was taking an extremely potent narcotic which is listed as a "Schedule II" controlled substance under the Federal Controlled Substances Act. Although the Charging Party's medical records are inadequate on dosage, it is clear that he was taking at least 20 milligrams of methadone three times per day, an amount just short of the 80 milligram per day dosage recommended for treatment of heroin abuse. A plant mechanic at a nuclear facility may be required to play a critical role in an emergency situation where even the slightest confusion or hesitation could spell disaster. Fitness For Duty is not an area for brinkmanship and the MRO was well within his authority in his decision that the Charging Party was not fit for duty.

In order to facilitate your review, I have enclosed the following documents:

1. Union Grievance
2. Vermont Yankee Fitness for Duty Policy
3. Pertinent provisions of the Nuclear Regulatory Commission Regulations
4. Copies of the Charging Party's medical records that have been made available to Vermont Yankee

I believe the response and the documents should be sufficient to dispose of this case.

Very truly yours,

Peter B. Robb

Peter B. Robb

/jsb
Enclosure

BRT\23429.1

IN THE MATTER OF

Walter Webster

v.

Vermont Yankee Nuclear Power Corp.

CIVIL INVESTIGATIVE DEMAND
PURSUANT TO 9 V.S.A. §2460

Attention: Peter Robb, Esq.

As a result of the facts and statements contained in Walter Webster's sworn charge of discrimination stating a prima facie violation, the Attorney General has reason to believe that Vermont Yankee Nuclear Power Corporation has violated 21 V.S.A. §495, Vermont's Fair Employment Practices Law, in its treatment of Walter Webster based on his physical disability. (See attached charge of discrimination.)

Upon information and belief, Respondent is in possession of information relevant to the Attorney General's investigation of Walter Webster's charge of discrimination.

Accordingly, you are hereby notified to produce at the office of Downs, Rachlin & Martin, at 80 Linden Street, Brattleboro, Vermont on July 18, 2000 at eleven o'clock in the morning (11:00 a.m.) the following documents and/or information for examination by Martha E. Csala, Assistant Attorney General for Civil Rights, designated by the Attorney General to represent him for such purposes:

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

1. Please produce the job description for Walter Webster's (Complainant's) position while employed by Vermont Nuclear Power Corporation (Respondent).

2. Please identify the individuals at Vermont Yankee with whom George Idelkope, M.D. spoke or consulted regarding Complainant's use of Methadone to

control the pain caused by his back condition.

3. Please provide any policies, regulations, lists or other documentation concerning approved or non-approved medicines or drugs (for purposes of fitness for duty) kept, used or drafted by the NRC, Respondent or Dr. Idelkope. If no such documentation exists, please state the basis for Dr. Idelkope's statement that "Methadone is not an approved medicine for fitness for duty requirements." (See Dr. Idelkope's letter to Susan Hohnquist, dated February 10, 1999)

4. Please provide all letters, memoranda, notes and other documents, other than Dr. Idelkope's February 10, 1999 letter to Ms. Hohnquist, which address his opinions, reasoning and conclusions about Complainant's failure to meet "fitness for duty" requirements while taking Methadone.

5. Please state what contacts Dr. Idelkope had with Complainant's physicians, or other medical professionals, to discuss or assess Complainant's ability to think clearly and work safely at his job with Respondent. Please also state why Respondent did not request Complainant to submit to neutocognitive-specific studies to test his thinking capacities, as suggested by Gilbert Fanciullo, M.D.

6. Please state, in as much detail as possible, what specific actions Dr. Idelkope took when he "attempted to work with the Charging Party's physician to find an alternative pain control method that would be acceptable to" Dr. Idelkope. (See Respondent's Point-by-Point Response, #3, dated January 20, 2000)

7. Please state which specific NRC regulations mandate that nuclear facilities' medical review officers have "sole responsibility for determining whether an individual is fit for duty." (See Respondent's Point-by-Point Response, p. 4, dated January 20, 2000)

8. Please provide a list of individuals (if Respondent is concerned about confidentiality, the names can be redacted) who are or have been employed by Respondent and who are/were taking a prescription narcotic drug while so employed. For each named individual, please identify the drug taken, the duration of its use, if known, the duration of the individual's employment with Respondent, and whether the use of the drug was approved or allowed (tacitly or explicitly) by Respondent or its MRO.

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

If all of the above-described documents and information are provided prior to the date specified, the Attorney General will consider Respondent in compliance with this demand.

Any person who, with intent to avoid, evade, or prevent compliance, in whole or

in part, with any civil investigation under 21 V.S.A. §495b, removes from any place, conceals, withholds, or destroys, mutilates, alters, or by any other means falsifies any documentary material in the possession, custody or control of any person subject of any such notice, or mistakes or conceals any information, shall be fined not more than $5,000.00 pursuant to 9 V.S.A. §2460(b).

Dated at Montpelier, County of Washington, and State of Vermont, this 21st day of June, 2000.

STATE OF VERMONT
WILLIAM H. SORRELL
ATTORNEY GENERAL

By: Martha Csala

Martha E. Csala, Esq.
Assistant Attorney General
for Civil Rights

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

IN THE MATTER OF

Walter Webster

v.

Vermont Yankee Nuclear Power Corp.

CIVIL INVESTIGATIVE DEMAND
PURSUANT TO 9 V.S.A. §2460

Attention: George Idelkope, M.D.

As a result of the facts and statements contained in Walter Webster's sworn charge of discrimination stating a prima facie violation, the Attorney General has reason to believe that Vermont Yankee Nuclear Power Corporation has violated 21 V.S.A. §495, Vermont's Fair Employment Practices Law, in its treatment of Walter Webster based on his physical disability. Upon information and belief, George Idelkope, M.D. is in possession of information relevant to the Attorney General's investigation of Walter Webster's charge of discrimination.

Accordingly, you are hereby notified to appear and produce at the Office of the Attorney General, 109 State Street, Montpelier, Vermont, 05609-1001, on Thursday, July 20, 2000, at eleven o'clock in the morning (11:00 a.m.) the following documents and/or information for examination by Martha E. Csala, Assistant Attorney General for Civil Rights, designated by the Attorney General to represent him for such purposes:

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

1. Please identify the individuals at Vermont Yankee with whom you spoke or consulted regarding Walter Webster's (Complainant's) use of Methadone to control the pain caused by his back condition.

2. Please provide any policies, regulations, lists or other documentation concerning approved or non-approved medicines or drugs (for purposes of fitness

for duty) kept, used or drafted by you. If no such documentation exists, please state the basis for your statement that "Methadone is not an approved medicine for fitness for duty requirements." (See Dr. Idelkope's letter to Susan Hohnquist, dated February 10, 1999)

3. Please provide all letters, memoranda, notes and other documents, other than your February 10, 1999 letter to Ms. Hohnquist, which address your opinions, reasoning and conclusions about Complainant's failure to meet "fitness for duty" requirements while taking Methadone.

4. Please state your process or procedure for determining whether an individual is "fit for duty" at the Vermont Yankee Nuclear Power Plant pursuant to NRC regulations.

5. Please state what contacts you had with Complainant's physicians, or other medical professionals, to discuss or assess Complainant's ability to think clearly and work safely at his job with Vermont Yankee. Please also state why you did not request Complainant to submit to neurocognitive-specific studies to test his thinking capacities, as suggested by Gilbert Fanciullo, M.D.

6. Please state, in as much detail as possible, what specific actions you took to attempt to find an alternative pain control method for Complainant that would be acceptable to you.

If all of the above-described documents and information are provided prior to the date specified, the Attorney General will consider Respondent in compliance with this demand.

Any person who, with intent to avoid, evade, or prevent compliance, in whole or in part, with any civil investigation under 21 V.S.A. §495b, removes from any place, conceals, withholds, or destroys, mutilates, alters, or by any other means falsifies any documentary material in the possession, custody or control of any person subject of any such notice, or mistakes or conceals any information, shall be fined not more than $5,000.00 pursuant to 9 V.S.A. §2460(b).

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

Dated at Montpelier, County of Washington, and State of Vermont, this 21st day of June, 2000.

STATE OF VERMONT
WILLIAM H. SORRELL
ATTORNEY GENERAL

By: Martha Csala

Martha E. Csala, Esq.
Assistant Attorney General
for Civil Rights

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

CODE OF FEDERAL REGULATIONS
TITLE 10--ENERGY
CHAPTER I--NUCLEAR REGULATORY COMMISSION
PART 26--FITNESS FOR DUTY PROGRAMS
GENERAL PROVISIONS
Current through June 20, 2000; 65 FR 38332

§ 26.1 Purpose.

This part prescribes requirements and standards for the establishment and maintenance of certain aspects of fitness-for-duty programs and procedures by the licensed nuclear power industry, and by licensees authorized to possess, use, or transport formula quantities of strategic special nuclear material (SSNM).

[58 FR 31469, June 3, 1993]

<General Materials (GM) - References, Annotations, or Tables>

10 C. F. R. § 26.1

10 CFR § 26.1

END OF DOCUMENT

CODE OF FEDERAL REGULATIONS
TITLE 10--ENERGY
CHAPTER I--NUCLEAR REGULATORY COMMISSION
PART 26--FITNESS FOR DUTY PROGRAMS
GENERAL PROVISIONS
Current through June 20, 2000; 65 FR 38332

§ 26.2 Scope.

(a) The regulations in this part apply to licensees authorized to operate a nuclear power reactor, to possess or use formula quantities of SSNM, or to transport formula quantities of SSNM. Each licensee shall implement a fitness- for-duty program which complies with this part. The provisions of the fitness-for-duty program must apply to all persons granted unescorted access to nuclear power plant protected areas, to licensee, vendor, or contractor personnel required to physically report to a licensee's Technical Support Center (TSC) or Emergency Operations Facility (EOF) in accordance with licensee emergency plans and procedures, and to SSNM licensee and transporter personnel who:

(1) Are granted unescorted access to Category IA Material;

(2) Create or have access to procedures or records for safeguarding SSNM;

(3) Make measurements of Category IA Material;

(4) Transport or escort Category IA Material; or

(5) Guard Category IA Material.

(b) The regulations in this part do not apply to NRC employees, to law enforcement personnel, or offsite emergency fire and medical response personnel while responding onsite, or SSNM transporters who are subject to U.S. Department of Transportation drug or alcohol fitness programs that require random testing for drugs and alcohol. The regulations in this part also do not apply to spent fuel storage facility licensees or non-power reactor licensees who possess, use, or transport formula quantities of irradiated SSNM as these materials are exempt from the Category I physical protection requirements as set forth in 10 CFR 73.6.

(c) Certain regulations in this part apply to licensees holding permits to construct a nuclear power plant. Each construction permit holder, with a plant under active construction, shall comply with §§ 26.10, 26.20, 26.23, 26.70, and 26.73 of this part; shall implement a chemical testing program, including random tests; and shall make provisions for employee assistance programs, imposition of sanctions, appeals procedures, the protection of information, and recordkeeping.

(d) The regulations in this part apply to the Corporation required to obtain a certificate of compliance or an approved compliance plan under part 76 of this chapter only if the Corporation elects to engage in activities involving formula quantities of strategic special nuclear material. When applicable, the requirements apply only to the Corporation and personnel carrying out the activities specified in § 26.2(a)(1) through (5).

[54 FR 29139, July 11, 1989; 54 FR 33148, Aug. 11, 1989; 58 FR 31469, June 3, 1993; 59 FR 48959, Sept. 23, 1994]

<General Materials (GM) - References, Annotations, or Tables>

10 C. F. R. § 26.2

10 CFR § 26.2

END OF DOCUMENT

10 CFR s 26.3
10 C.F.R. § 26.3

CODE OF FEDERAL REGULATIONS
TITLE 10--ENERGY
CHAPTER I--NUCLEAR REGULATORY COMMISSION
PART 26--FITNESS FOR DUTY PROGRAMS
GENERAL PROVISIONS
Current through June 20, 2000; 65 FR 38332

§ 26.3 Definitions.

"Aliquot" means a portion of a specimen used for testing.

"Category IA Material" means strategic special nuclear material (SSNM) directly useable in the manufacture of a nuclear explosive device, except if:

(1) The dimensions are large enough (at least 2 meters in one dimension, greater than 1 meter in each of two dimensions, or greater than 25 cm in each of three dimensions) to preclude hiding the item on an individual;

(2) The total weight of 5 formula kilograms of SSNM plus its matrix (at least 50 kilograms) cannot be carried inconspicuously by one person; or

(3) The quantity of SSNM (less than 0.05 formula kilogram) in each container requires protracted diversions in order to accumulate 5 formula kilograms.

"Commission" means the Nuclear Regulatory Commission or its duly authorized representatives.

"Confirmatory test" means a second analytical procedure to identify the presence of a specific drug or drug metabolite which is independent of the initial screening test and which uses a different technique and chemical principle from that of the initial screening test in order to ensure reliability and accuracy. For determining blood alcohol levels, a "confirmatory test" means a second test using another breath alcohol analysis device. Further confirmation upon demand will be by gas chromatography analysis of blood.

"Confirmed positive test" means the result of a confirmatory test that has established the presence of drugs, drug metabolites, or alcohol in a specimen at or above the cut-off level, and that has been deemed positive by the Medical Review Officer (MRO) after evaluation. A "confirmed positive test" for alcohol can also be obtained as a result of a confirmation of blood alcohol levels with a second breath analysis without MRO evaluation.

"Contractor" means any compai which the licensee has contracte to be performed inside the prote either by contract, purchase agreement.

"Cut-off level" means the value set for designating a test result as positive.

"Follow-up testing" means chemical testing at unannounced intervals, to ensure that an employee is maintaining abstinence from the abuse of drugs or alcohol.

"Illegal drugs" means those drugs included in Schedules I through V of the Controlled Substances Act (CSA), but not when used pursuant to a valid prescription or when used as otherwise authorized by law.

"Initial or screening tests" means an immunoassay screen for drugs or drug metabolites to eliminate "negative" urine specimens from further consideration or the first breathalyzer test for alcohol. Initial screening may be performed at the licensee's testing facility; a second screen and confirmation testing for drugs or drug metabolites must be conducted by a HHS-certified laboratory.

"Medical Review Officer" means a licensed physician responsible for receiving laboratory results generated by an employer's drug testing program who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's positive test result together with his or her medical history and any other relevant biomedical information.

"Protected area" has the same meaning as in § 73.2(g) of this chapter, an area encompassed by physical barriers and to which access is controlled.

"Random test" means a system of unannounced drug testing administered in a statistically random manner to a group so that all persons within that group have an equal probability of selection.

"Suitable inquiry" means best-effort verification of employment history for the past five years, but in no case less than three years, obtained through contacts with previous employers to determine if a person was, in the past, tested positive for illegal drugs, subject to a plan for treating substance abuse, removed from, or

made ineligible for activities within the scope of 10 CFR Part 26, or denied unescorted access at any other nuclear power plant or other employment in accordance with a fitness-for-duty policy.

"Transporter" means a general licensee pursuant to 10 CFR 70.20a, who is authorized to possess formula quantities of SSNM in the regular course of carriage for another or storage incident thereto, and includes the driver or operator of any conveyance, and the accompanying guards or escorts.

"Vendor" means any company or individual, not under contract to a licensee, providing services in protected areas.

[58 FR 31469, June 3, 1993]

<General Materials (GM) - References, Annotations, or Tables>

10 C. F. R. § 26.3

10 CFR § 26.3

END OF DOCUMENT

CODE OF FEDERAL REGULATIONS
TITLE 10--ENERGY
CHAPTER I--NUCLEAR REGULATORY COMMISSION
PART 26--FITNESS FOR DUTY PROGRAMS
GENERAL PERFORMANCE OBJECTIVES
Current through June 20, 2000; 65 FR 38332

§ 26.10 General performance objectives.

Fitness-for-duty programs must:

(a) Provide reasonable assurance that nuclear power plant personnel, transporter personnel, and personnel of licensees authorized to possess or use formula quantities of SSNM, will perform their tasks in a reliable and trustworthy manner and are not under the influence of any substance, legal or illegal, or mentally or physically impaired from any cause, which in any way adversely affects their ability to safely and competently perform their duties;

(b) Provide reasonable measures for the early detection of persons who are not fit to perform activities within the scope of this Part; and

(c) Have a goal of achieving a drug-free workplace and a workplace free of the effects of such substances.

[58 FR 31469, June 3, 1993]

<General Materials (GM) - References, Annotations, or Tables>

10 C. F. R. § 26.10

10 CFR § 26.10

END OF DOCUMENT

CODE OF FEDERAL REGULATIONS
TITLE 10--ENERGY
CHAPTER I--NUCLEAR REGULATORY COMMISSION
PART 26--FITNESS FOR DUTY PROGRAMS
PROGRAM ELEMENTS AND PROCEDURES
Current through June 20, 2000; 65 FR 38332

§ 26.20 Written policy and procedures.

Each licensee subject to this Part shall establish and implement written policies and procedures designed to meet the general performance objectives and specific requirements of this Part. Each licensee shall retain a copy of the current written policy and procedures as a record until the Commission terminates each license for which the policy and procedures were developed and, if any portion of the policies and procedures are superseded, retain the superseded material for three years after each change. As a minimum, written policies and procedures must address fitness for duty through the following:

(a) An overall description of licensee policy on fitness for duty. The policy must address use of illegal drugs and abuse of legal drugs (e.g., alcohol, prescription and over-the-counter drugs). Written policy documents must be in sufficient detail to provide affected individuals with information on what is expected of them, and what consequences may result from lack of adherence to the policy. As a minimum, the written policy must prohibit the consumption of alcohol--

(1) Within an abstinence period of at least 5 hours preceding any scheduled working tour, and

(2) During the period of any working tour.

Licensee policy should also address other factors that could affect fitness for duty such as mental stress, fatigue and illness.

(b) A description of programs which are available to personnel desiring assistance in dealing with drug, alcohol, or other problems that could adversely affect the performance of activities within the scope of this Part.

(c) Procedures to be utilized in testing for drugs and alcohol, including procedures for protecting the employee and the integrity of the specimen, and the quality controls used to ensure the test results are valid and attributable to the correct individual.

(d) A description of immediate and follow-on actions which will be taken, and the procedures to be utilized, in those cases where employees, vendors, or contractors assigned to duties within the scope of this Part are determined to have been involved in the use, sale, or possession of illegal drugs; or to have consumed alcohol during the mandatory pre-work abstinence period, while on duty, or to excess prior to reporting to duty as demonstrated with a test that can be used to determine blood alcohol concentration.

(e) A procedure that will ensure that persons called in to perform an unscheduled working tour are fit to perform the task assigned. As a minimum, this procedure must--

(1) Require a statement to be made by a called-in person as to whether he or she has consumed alcohol within the length of time stated in the pre-duty abstinence policy;

(2) If alcohol has been consumed within this period, require a determination of fitness for duty by breath analysis or other means; and

(3) Require the establishment of controls and conditions under which a person who has been called-in can perform work, if necessary, although alcohol has been consumed. Consumption of alcohol during the abstinence period shall not by itself preclude a licensee from using individuals needed to respond to an emergency.

(f) The Commission may at any time review the licensee's written policy and procedures to assure that they meet the performance objectives of this Part.

<General Materials (GM) - References, Annotations, or Tables>

10 C. F. R. § 26.20

10 CFR § 26.20

END OF DOCUMENT

CODE OF FEDERAL REGULATIONS
TITLE 10--ENERGY
CHAPTER I--NUCLEAR REGULATORY COMMISSION
PART 26--FITNESS FOR DUTY PROGRAMS
PROGRAM ELEMENTS AND PROCEDURES
Current through June 20, 2000; 65 FR 38332

§ 26.21 Policy communications and awareness training.

(a) Persons assigned to activities within the scope of this Part shall be provided with appropriate training to ensure they understand--

(1) Licensee policy and procedures, including the methods that will be used to implement the policy;

(2) The personal and public health and safety hazards associated with abuse of drugs and misuse of alcohol;

(3) The effect of prescription and over-the-counter drugs and dietary conditions on job performance and on chemical test results, and the role of the Medical Review Officer;

(4) Employee assistance programs provided by the licensee; and

(5) What is expected of them and what consequences may result from lack of adherence to the policy,

(b) Initial training must be completed prior to assignment to activities within the scope of this Part. Refresher training must be completed on a nominal 12 month frequency or more frequently where the need is indicated. A record of the training must be retained for a period of at least three years.

<General Materials (GM) - References, Annotations, or Tables>

10 C. F. R. § 26.21

10 CFR § 26.21

END OF DOCUMENT

CODE OF FEDERAL REGULATIONS
TITLE 10--ENERGY
CHAPTER I--NUCLEAR REGULATORY COMMISSION
PART 26--FITNESS FOR DUTY PROGRAMS
PROGRAM ELEMENTS AND PROCEDURES
Current through June 20, 2000; 65 FR 38332

§ 26.24 Chemical and alcohol testing.

(a) To provide a means to deter and detect substance abuse, the licensee shall implement the following chemical testing programs for persons subject to this Part:

(1) Testing within 60 days prior to the initial granting of unescorted access to protected areas or assignment to activities within the scope of this Part.

(2) Unannounced drug and alcohol tests imposed in a statistically random and unpredictable manner so that all persons in the population subject to testing have an equal probability of being selected and tested. The tests must be administered so that a person completing a test is immediately eligible for another unannounced test. As a minimum, tests must be administered on a nominal weekly frequency and at various times during the day. Random testing must be conducted at an annual rate equal to at least 50 percent of the workforce.

(3) Testing for-cause, i.e., as soon as possible following any observed behavior indicating possible substance abuse; after accidents involving a failure in individual performance resulting in personal injury, in a radiation exposure or release of radioactivity in excess of regulatory limits, or actual or potential substantial degradations of the level of safety of the plant if there is reasonable suspicion that the worker's behavior contributed to the event; or after receiving credible information that an individual is abusing drugs or alcohol.

(4) Follow-up testing on an unannounced basis to verify continued abstention from the use of substances covered under this Part.

(b) Testing for drugs and alcohol, at a minimum, must conform to the "Guidelines for Drug and Alcohol Testing Programs," issued by the Nuclear Regulatory Commission and appearing in appendix A to this part, hereinafter referred to as the NRC Guidelines. Licensees, at their discretion, may implement programs with more stringent standards (e.g., lower cutoff levels, broader panel of drugs). All requirements in this part still apply to persons who fail a more stringent standard, but do not test positive under the NRC Guidelines. Management actions must be the same with the more stringent standards as if the individual had failed the NRC standards.

(c) Licensees shall test for all substances described in paragraph 2.1(a) of the NRC Guidelines. In addition, licensees may consult with local law enforcement authorities, hospitals, and drug counseling services to determine whether other substances with abuse potential are being used in the geographical locale of the facility and the local workforce. When appropriate, other substances so identified may be added to the panel of substances for testing. Appropriate cutoff limits must be established by the licensee for these substances.

(d)(1) Licensees may conduct initial screening tests of an aliquot before forwarding selected specimens to a laboratory certified by the Department of Health and Human Services (HHS), provided the licensee's staff possesses the necessary training and skills for the tasks assigned, the staff's qualifications are documented, and adequate quality controls for the testing are implemented. Quality control procedures for initial screening tests by a licensee's testing facility must include the processing of blind performance test specimens and the submission to the HHS-certified laboratory of a sampling of specimens initially tested as negative. Except for the purposes discussed below, access to the results of preliminary tests must be limited to the licensee's testing staff, the Medical Review Officer (MRO), the Fitness-for- Duty Program Manager, and the employee assistance program staff, when appropriate.

(2) No individual may be removed or temporarily suspended from unescorted access or be subjected to other administrative action based solely on an unconfirmed positive result from any drug test, other than for marijuana (THC) or cocaine, unless other evidence indicates that the individual is impaired or might otherwise pose a safety hazard. With respect to onsite initial screening tests for marijuana (THC) and cocaine, licensee management may be informed and licensees may temporarily suspend individuals from unescorted access or from normal duties or take lesser administrative actions against the individual based on an unconfirmed presumptive positive result provided the licensee complies with the following conditions:

(i) For the drug for which action will be taken, at least

85 percent of the specimens which were determined to be presumptively positive as a result of preliminary onsite screening tests during the last 6-month data reporting period submitted to the Commission under § 26.71(d) were subsequently reported as positive by the HHS-certified laboratory as the result of a GC/MS confirmatory test.

(ii) There is no loss of compensation or benefits to the tested person during the period of temporary administrative action.

(iii) Immediately upon receipt of a negative report from the HHS-certified laboratory, any matter which could link the individual to a temporary suspension is eliminated from the tested individual's personnel record or other records.

(iv) No disclosure of the temporary removal or suspension of, or other administrative action against, an individual whose test is not subsequently confirmed as positive by the MRO may be made in response to a suitable inquiry conducted under the provisions of § 26.27(a), a background investigation conducted under the provisions of § 73.56, or to any other inquiry or investigation. For the purpose of assuring that no records have been retained, access to the system of files and records must be provided to licensee personnel conducting appeal reviews, inquiries into an allegation, or audits under the provisions of § 26.80, or to an NRC inspector or other Federal officials. The tested individual must be provided a statement that the records in paragraph (d)(2)(iii) of this section have not been retained and must be informed in writing that the temporary removal or suspension or other administrative action that was taken will not be disclosed, and need not be disclosed by the individual, in response to requests for information concerning removals, suspensions, administrative actions or history of substance abuse.

(e) The Medical Review Officer's review of the test results must be completed and licensee management notified within 10 days of the initial presumptive positive screening test.

(f) All testing of specimens for urine drug testing, except onsite testing under paragraph (d) above, must be performed in a laboratory certified by the U.S. Department of Health and Human Services for that purpose consistent with its standards and procedures for certification. Except for suspect specimens submitted for special processing (Section 2.7(d) of Appendix A), all specimens sent to certified laboratories shall be subject to initial screening by the laboratory and all specimens screened as presumptively positive shall be subject to confirmation testing by the laboratory. Licensees shall submit blind performance test specimens to certified laboratories in accordance with the NRC Guidelines (Appendix A).

(g) Tests for alcohol must be administered by breath analysis using breath alcohol analyses devices meeting evidential standards described in Section 2.7(O)(3) of Appendix A. A breath alcohol content indicating a blood alcohol concentration of 0.04 percent or greater must be a positive test result. The confirmatory test for alcohol shall be done with another breath measurement instrument. Should the person demand further confirmation, the test must be a gas chromatography analysis of blood.

[56 FR 41926, Aug. 26, 1991; 57 FR 55443, Nov. 25, 1992; 58 FR 31469, June 3, 1993; 59 FR 507, Jan. 5, 1994]

<General Materials (GM) - References, Annotations, or Tables>

10 C. F. R. § 26.24

10 CFR § 26.24

END OF DOCUMENT

CODE OF FEDERAL REGULATIONS
TITLE 10--ENERGY
CHAPTER I--NUCLEAR REGULATORY COMMISSION
PART 26--FITNESS FOR DUTY PROGRAMS
PROGRAM ELEMENTS AND PROCEDURES
Current through June 20, 2000; 65 FR 38332

§ 26.27 Management actions and sanctions to be imposed.

(a)(1) The licensee shall obtain a written statement from the individual as to whether activities within the scope of this part were ever denied the individual before the initial--

(i) Granting of unescorted access to a nuclear power plant protected area;

(ii) Granting of unescorted access by a formula quantity SSNM licensee to Category IA Material;

(iii) Assignment to create or the initial granting of access to safeguards of procedures for SSNM;

(iv) Assignment to measure Category IA Material;

(v) Assignment to transport or escort Category IA Material;

(vi) Assignment to guard Category IA Material; or

(vii) Assignment to activities within the scope of this part to any person.

(2) The licensee, as applicable, shall complete a suitable inquiry on a best- efforts basis to determine if that person was, in the past--

(i) Tested positive for drugs or use of alcohol that resulted in on-duty impairment;

(ii) Subject to a plan for treating substance abuse (except for self-referral for treatment);

(iii) Removed from activities within the scope of this part;

(iv) Denied unescorted access at any other nuclear power plant;

(v) Denied unescorted access to SSNM;

(vi) Removed from responsibilities to create or have access to safeguards records or procedures for SSNM;

(vii) Removed from responsibilities to measure SSNM;

(viii) Removed from the responsibilities of transporting or escorting SSNM; or

(ix) Removed from the responsibilities of guarding SSNM at any other facility in accordance with a fitness-for-duty policy.

(3) If a record of the type described in paragraph (a)(2) of this section is established, the new assignment to activities within the scope of this part or granting of unescorted access must be based upon a management and medical determination of fitness for duty and the establishment of an appropriate follow-up testing program, provided the restrictions of paragraph (b) of this section are observed. To meet this requirement, the identity of persons denied unescorted access or removed under the provisions of this part and the circumstances for the denial or removal, including test results, will be made available in response to a licensee's, contractor's or vendor's inquiry supported by a signed release from the individual.

(4) Failure to list reasons for removal or revocation of unescorted access is sufficient cause for denial of unescorted access. Temporary access provisions are not affected by this part if the prospective worker passes a chemical test conducted according to the requirements of § 26.24(a)(1).

(b) Each licensee subject to this Part shall, as a minimum, take the following actions. Nothing herein shall prohibit the licensee from taking more stringent action.

(1) Impaired workers, or those whose fitness may be questionable, shall be removed from activities within the scope of this Part, and may be returned only after determined to be fit to safely and competently perform activities within the scope of this Part.

(2) Lacking any other evidence to indicate the use, sale, or possession of illegal drugs onsite, a confirmed positive test result must be presumed to be an indication of offsite drug use. The first confirmed positive test must, as a minimum, result in immediate removal from activities within the scope of this part for at least 14 days and referral to the EAP for assessment and counseling during any suspension period. Plans for treatment, follow-up, and future employment must

be developed, and any rehabilitation program deemed appropriate must be initiated during such suspension period. Satisfactory management and medical assurance of the individual's fitness to adequately perform activities within the scope of this part must be obtained before permitting the individual to be returned to these activities. Any subsequent confirmed positive test must result in, as applicable--

(i) Removal from unescorted access to nuclear power plant protected areas;

(ii) Removal from unescorted access to Category IA Material;

(iii) Removal from responsibilities to create or have access to records or procedures for safeguarding SSNM;

(iv) Removal from responsibilities to measure Category IA Material;

(v) Removal from the responsibilities of transporting or escorting Category IA Material;

(vi) Removal from the responsibilities of guarding Category IA Material at any other licensee facility; and

(vii) Removal from activities within the scope of this part for a minimum of 3 years from the date of removal.

(3) Any individual determined to have been involved in the sale, use, or possession of illegal drugs, while, as applicable, within a protected area of any nuclear power plant, within a facility that is licensed to possess or use SSNM, or within a transporter's facility or vehicle, must be removed from activities within the scope of this part. The individual may not--

(i) Be granted unescorted access to nuclear power plant protected areas;

(ii) Be granted unescorted access to Category IA Material;

(iii) Be given responsibilities to create or have access to safeguards records or procedures for SSNM;

(iv) Be given responsibilities to measure Category IA Material;

(v) Be given responsibilities to transport or escort Category IA Material;

(vi) Be given responsibilities to guard Category IA Material; or

(vii) Be assigned to activities within the scope of this part for a minimum of 5 years from the date of removal.

(4) Persons removed for periods of three years or more under the provisions of paragraphs (b) (2) and (3) of this section for the illegal sale, use or possession of drugs and who would have been removed under the current standards of a hiring licensee, may be granted unescorted access and assigned duties within the scope of this Part by a licensee subject to this Part only when the hiring licensee receives satisfactory medical assurance that the person has abstained from drugs for at least three years. Satisfactory management and medical assurance of the individual's fitness to adequately perform activities within the scope of this Part must be obtained before permitting the individual to perform activities within the scope of this Part. Any person granted unescorted access or whose access is reinstated under these provisions must be given unannounced follow-up tests at least once every month for four months and at least once every three months for the next two years and eight months after unescorted access is reinstated to verify continued abstinence from proscribed substances. Any confirmed use of drugs through this process or any other determination of subsequent involvement in the sale, use or possession of illegal substances must result in permanent denial of unescorted access.

(5) Paragraphs (b) (2), (3), and (4) of this section do not apply to alcohol, valid prescriptions, or over-the-counter drugs. Licensee sanctions for confirmed misuse of alcohol, valid prescription, and over-the-counter drugs shall be sufficient to deter abuse of legally obtainable substances as a substitute for abuse of proscribed drugs.

(c) Refusal to provide a specimen for testing and resignation prior to removal for violation of company fitness-for-duty policy concerning drugs must be recorded as removals for cause. These records must be retained for the purpose of meeting the requirements of § 26.27(a).

(d) If a licensee has a reasonable belief that an NRC employee may be under the influence of any substance, or otherwise unfit for duty, the licensee may not deny access but shall escort the individual. In any instance of this occurrence, the appropriate Regional Administrator must be notified immediately by

telephone. During other than normal working hours, the NRC Operations Center must be notified.

[58 FR 31470, June 3, 1993]

<General Materials (GM) - References, Annotations, or Tables>

10 C. F. R. § 26.27

10 CFR § 26.27

END OF DOCUMENT

CODE OF FEDERAL REGULATIONS
TITLE 10--ENERGY
CHAPTER I--NUCLEAR REGULATORY COMMISSION
PART 26--FITNESS FOR DUTY PROGRAMS
PROGRAM ELEMENTS AND PROCEDURES
Current through June 20, 2000; 65 FR 38332

§ 26.28 Appeals.

Each licensee subject to this Part, and each contractor or vendor implementing a fitness-for-duty program under the provisions of § 26.23, shall establish a procedure for licensee and contractor or vendor employees to appeal a positive alcohol or drug determination. The procedure must provide notice and an opportunity to respond and may be an impartial internal management review. A licensee review procedure need not be provided to employees of contractors or vendors when the contractor or vendor is administering his own alcohol and drug testing.

<General Materials (GM) - References, Annotations, or Tables>

10 C. F. R. § 26.28

10 CFR § 26.28

END OF DOCUMENT

CODE OF FEDERAL REGULATIONS
TITLE 10--ENERGY
CHAPTER I--NUCLEAR REGULATORY COMMISSION
PART 26--FITNESS FOR DUTY PROGRAMS
PROGRAM ELEMENTS AND PROCEDURES
Current through June 20, 2000; 65 FR 38332

§ 26.29 Protection of information.

(a) Each licensee subject to this Part, who collects personal information on an individual for the purpose of complying with this Part, shall establish and maintain a system of files and procedures for the protection of the personal information. This system must be maintained until the Commission terminates each license for which the system was developed.

(b) Licensees, contractors, and vendors shall not disclose the personal information collected and maintained to persons other than assigned Medical Review Officers, other licensees or their authorized representatives legitimately seeking the information as required by this Part for unescorted access decisions and who have obtained a release from current or prospective employees or contractor personnel, NRC representatives, appropriate law enforcement officials under court order, the subject individual or his or her representative, or to those licensee representatives who have a need to have access to the information in performing assigned duties, including audits of licensee's, contractor's, and vendor's programs, to persons deciding matters on review or appeal, and to other persons pursuant to court order. This section does not authorize the licensee, contractor, or vendor to withhold evidence of criminal conduct from law enforcement officials.

<General Materials (GM) - References, Annotations, or Tables>

10 C. F. R. § 26.29

10 CFR § 26.29

END OF DOCUMENT

FITNESS FOR DUTY POLICY

I. POLICY STATEMENT

Vermont Yankee is committed to providing a work environment that protects the health and safety of nuclear plant personnel and the public. The operation of a nuclear plant requires that personnel meet very strict job performance standards. Public and regulatory agency confidence in Vermont Yankee's ability to fulfill its responsibilities also depends on meeting such standards.

Employees, contractors and vendors, as defined in Section IV, must comply with all provisions of Vermont Yankee's Fitness for Duty Policy and Procedures. Additionally, any contractor employee found to be in violation of this policy and associated procedures will be denied access to company property and their supervisor will be so notified and held responsible for taking appropriate, immediate, administrative action. Vermont Yankee will inform the contractor specifically about the confirmed positive drug or alcohol test. Prior to individuals being permitted to return to Vermont Yankee, the contractor will have to resolve the situation with the individual and satisfy Vermont Yankee that access requirements, where applicable, are again met. Contractor Fitness for Duty Programs, if accepted by Vermont Yankee, are subject to licensee audit provisions of 10CFR26.

The use classification of this procedure is Information Use.

II. REFERENCES

A. 10CFR, Parts 2 and 26: Fitness for Duty Programs, Final Rule and Policy Statement
B. Guideline VYP:222-1: Drug and Alcohol Testing Procedure
C. Guideline VYP:222-2: Alcoholic Beverages
D. Guideline VYP:222-3: Medical Review Officer Qualifications and Responsibilities
E. Guideline VYP:222-4: Employee Assistance Program
F. Guideline VYP:222-5: Appeal Procedure
G. Guideline VYP:222-6: Suitable Inquiry
H. Guideline VYP:222-7: Recordkeeping and Reporting Requirements
I. Guideline VYP:222-8: Collection Site Procedure
J. Guideline VYP:222-9: Administrative Procedure

III. POLICY

A. No Vermont Yankee employee, contractor, or visitor shall illegally use, possess, or sell any drug on company property. Any confiscated drugs will be turned over to the local law enforcement agency.

B. No Vermont Yankee employee, contractor, or visitor shall consume, possess, or sell alcohol on company property or report for or return to work under the influence of alcohol.

C. No employee or contractor shall consume alcohol within five hours of reporting for or returning to scheduled work. If an employee is called to report to work or required to respond to a plant emergency and has consumed alcohol within the five-hour time period or has taken a medication that could impair his/her ability to perform the required work, it is the responsibility of the employee to notify his/her supervisor (refer to VYP:222-2).

D. Misuse of prescription drugs or other legal drugs such as using someone else's prescription or using a medication for a condition other than originally prescribed is prohibited.

E. All employees and contractors are required to notify their supervisor if their fitness for duty may be affected by a medication they are taking. The individual is only obligated to notify the supervisor of the fact and is not required to specify the details of the condition in the spirit of medical confidentiality. The supervisor will consider reassignment, as appropriate, following the assessment of the situation.

F. All employees and contractors are required to report the use of the following types of medications to the Occupational Health Nurse as soon as practical even if the medication was taken during absence from work (i.e., day off, vacation):

- Any medications containing alcohol
- Any over-the-counter medication whose label contains a warning that use may have an effect such as a hazard in equipment/vehicle operation; included in this are many cold relief compounds.
- Any prescription medications with possible effects labels on them
- Anti-seizure medications
- Narcotic pain medications
- Anti-depressants
- Anxiolytics such as valium
- Cardiac medications

The following do <u>not</u> need to be reported:

- Topical creams
- Birth control pills
- Anti-inflammatory drugs
- Ulcer medications
- Gout medications
- Antibiotics

The Occupational Health Nurse will evaluate the potential for on-the-job impairment due to the use of the identified substance and will inform the individual's supervisor if a risk exists. In the absence of the Occupational Health Nurse, the Security Manager will be advised of the use of the substance and utilize the available resources to provide the supervisor with the notification, if appropriate.

G. An Employee Assistance Program (EAP) is in place to help those employees who may need assistance in dealing with personal problems. The Brattleboro Retreat will offer these same services to contractors on a fee-for-service basis. Those problems include, but are not limited to, alcoholism, drug abuse, prescription drug mismanagement resulting in addiction, emotional stress, domestic problems. Should a Vermont Yankee employee be suspended for drug or alcohol use, that employee will also be referred to the Employee Assistance Program. Notwithstanding this program, however, administrative action will be required as set forth herein.

IV. DEFINITIONS

A. <u>Plant Site</u>: The protected area within the plant security fence of a nuclear plant.

B. Vermont Yankee Property: The Vermont Yankee plant site and any buildings or property owned or leased by Vermont Yankee.

C. Employee: Any individual hired directly by Vermont Yankee Nuclear Power Corporation to perform work on behalf of Vermont Yankee, and who is placed on the Vermont Yankee payroll.

D. Contractor: Any company or individual with which Vermont Yankee has contracted for work or service to be performed on Vermont Yankee property by contract, purchase order, or verbal agreement.

E. Drug(s) [but not limited to]:

1. Cannabro-based drugs (e.g., marijuana, hashish)
2. Cocaine
3. Opiates, including but not limited to, heroin and morphine based drugs
4. Phencyclidine
5. Amphetamines

F. Alcoholic Beverages:

1. Distilled and rectified spirits
2. Wines
3. Fermented and malt liquors and ciders
4. Beer, lager beer, ale, porter, stout
5. Any other liquid containing 1% or more of alcohol by volume at 60°F

G. Personnel Exempt from FFD Testing Program

The following types of personnel are exempt from the pre-access and random program at Vermont Yankee:

- Corporate cleaning/janitorial service personnel
- Owner Controlled Area Workers

Note: Department managers/supervisors are responsible for ensuring that an appropriate level of supervision/observation is provided for OCA workers involved in the maintenance, testing, installation or modification of plant equipment or structures which assures that the provisions of this policy are met and that the workers report for work fit for duty.

- Part-time contractors with infrequent access at the Corporate Office or Governor Hunt House and who are not required to support the Emergency Operations Facility

All other provisions of the Vermont Yankee FFD program do apply to the above individuals.

H. Observed Collections

When there is reason to believe that an individual may alter or substitute a urine specimen, the specimen collection shall be observed. The following are "reasons to believe":

1. a provided sample temperature is outside the normal range and the individual refuses to submit to an oral body temperature measurement or the obtained oral temperature is inconsistent with the specimen temperature.

2. the provided specimen appears to contain blue dye or other contaminants.

3. the Collection Site personnel observes the individual attempting to substitute or adulterate the specimen.

4. previous specimens with low specific gravity (< 1.003) or low creatinine levels (< 0.2 g/l).

The Security Manager shall be notified of any of the above conditions prior to the observed collection. Observed collections will be with an individual of the same gender. In addition to the above, all Return to Duty Tests following a previous positive will be observed collections.

V. TESTING (Types of chemical drug and breath alcohol screening required by the Fitness for Duty Program)

A. Random Drug Testing: Unannounced tests conducted in a random manner. Tests will be administered so that any individual (VY employee or contractor) completing a test is immediately eligible for another test. Random testing will be conducted at a rate equal to at least 50% of the employee/contractor work force per year. This testing will be conducted nominally once per week at various times on random days (VYP:222-1, Section IV).

B. Pre-Employment Testing: All prospective employees are required to be tested for drugs and alcohol within 60 days prior to employment.

C. For Cause Testing: The company may test for any illegal drugs during a for cause test, or analyze any specimen suspected of being adulterated or diluted. Any person may be tested for cause for drugs and alcohol as soon as possible following any observed suspicious behavior indicating possible substance abuse or for the following:

1. After accidents involving a failure in individual performance resulting in personnel injury, or a radiation exposure or release of radioactivity in excess of regulatory limits or actual or potential substantial degradation of the level of safety of the plant, if there is reasonable suspicion that the person's behavior contributed to the event.

2. After supervision has received credible information that a person is abusing drugs and/or alcohol (see VYP:222-1, Section VI).

D. Follow-Up Testing: Chemical drug and breath alcohol screening administered at unannounced intervals to ensure that personnel who have been returned to duty following a violation of the Fitness for Duty Policy are abstaining from the abuse of drugs or alcohol. This screening is in addition to random screening.

E. Contractor Pre-Access Testing: Contractors will be tested for drugs and alcohol within 60 days prior to being granted unescorted access to Vermont Yankee property.

F. Confirmation Testing:

1. Any specimen which fails the initial immunoassay drug test will be given a Gas Chomotography/Mass Spectrometry confirmation test. No administrative action will be taken unless both the initial and confirmation tests are failed and results have been reviewed by the Medical Review Officer.

2. Any person who fails an alcohol test will be given a confirmation test. No administrative action will be taken unless both the initial and confirmation tests are failed. The individual may request a blood test for further confirmation.

G. Rejected Sample: If a sample is rejected by the testing laboratory for any reason, the individual providing the sample will be required to provide another sample at the earliest available opportunity.

VI. ADMINISTRATIVE ACTION

A. Any employee apprehended, or determined to be involved in, selling, using, or possessing illegal drugs on Vermont Yankee property will be terminated from employment. Any contractor apprehended, or determined to be involved in selling, using or possessing illegal drugs on Vermont Yankee property will be permanently denied access to Vermont Yankee property.

B. If a company employee or contractor refuses to participate in random drug and alcohol testing for any reason, their refusal will be treated as a positive test result and will be grounds for disciplinary action up to and including termination of employment/or denial of access to Vermont Yankee property for contractors.

C. Resignation prior to removal for violation of the FFD policy will be recorded as a removal for cause.

D. Any company employee convicted of illegal use, sale, or possession of drugs off the job will be terminated from employment. Any contractor will be permanently denied access to Vermont Yankee property.

E. A first confirmed positive urine test result for employees and contractors, at a minimum, will result in:

- immediate suspension of unescorted access to the plant protected area;
- a minimum 14-day suspension (without pay); and
- mandatory EAP referral.

Note: Other action may be directed depending on the severity of the violation(s) and the conditions under which they occurred.

An individual may return to work following the appropriate suspension without pay and EAP referral if the Medical Review Officer provides a written recommendation assuring the individual is fit to perform their duties. The individual must also have a negative drug and alcohol screen and authorization from the Plant Manager or appropriate Vice President to return to duty. Returning individuals will be subject to follow-up testing, in addition to random testing, for an eighteen month period following the date they returned to work.

F. Any subsequent confirmed positive test for employees will result in termination of employment; or permanent denial of access to Vermont Yankee property for contractors.

G. Consumption of alcoholic beverages on Vermont Yankee property, or possession of alcohol in company buildings, vehicles, or in the protected area or a violation of the 5-hour abstinence period will result in a minimum 14-day suspension (without pay) and EAP referral on the first offense; the second offense will result in termination of employment if within eighteen months of the initial infraction.

H. Failure to report to the Occupational Health Nurse, or in her absence, the Security Manager, use of any medication specified in Section III may result in disciplinary action.

I. Employees who are required to submit to urinalysis for reasonable cause shall be placed on a paid leave of absence pending the outcome of the analysis. If the analysis is negative, no record of the leave will be kept. If the analysis is confirmed positive, EAP and disciplinary action will be initiated as discussed above.

J. Employees who are required to submit to a breath alcohol test for reasonable cause and request a blood alcohol test for additional confirmation, shall be placed on an unpaid leave of absence pending the outcome of the blood analysis. If the analysis is positive (equal to or greater than 0.04% blood alcohol concentration) administrative action will be initiated in accordance with this policy.

K. All personnel entering the Vermont Yankee plant site shall be subject to personal and/or vehicle search.

- Refusal to participate in a personal or vehicle search shall be grounds for denying access to the plant site and properties controlled by Vermont Yankee.

L. Failure to follow the FFD policy and related procedures or tampering with samples will be grounds for disciplinary action up to and including termination.

M. A company employee or contractor may appeal a confirmed positive drug and/or alcohol test by using the appropriate steps as set forth in VYP:222-5, Appeal Procedure.

VII. RESPONSIBILITY

A. Administrative

1. The Vice President, Operations is responsible for assuring compliance and mediation of any conflicts that may result from implementation of this policy.

2. The Human Resources Department is responsible for the following:

   a) Assisting supervisors and the Security Manager in determining disciplinary actions to be taken due to FFD program violations.

   b) Providing overall coordination of the Employee Assistance Program.

   c) Providing for Continued Behavior Observation Training, both initial and refresher.

3. The Security Manager is responsible for the following:

   Note: In the absence of the Security Manager, the Technical Services Superintendent (TSS) will carry out any functions delineated in this policy and associated procedures.

   a) Overall administration and implementation of the FFD program.

   b) Providing coordination of any necessary interpretation or resolution of conflicts that result from implementation of this policy and associated procedures.

   c) Assisting supervisors in determining actions to be taken in the FFD program.

   d) Ensuring site access privileges are suspended as stipulated in this policy.

B. Employees and Contractors

1. All employees and contractors are responsible for the following:

   a) Reporting to work at their designated time, fit for duty, and drug and alcohol free.

   b) Reporting to the Collection Site for drug and alcohol testing collection when notified.

   c) Reporting to their supervisor when conditions exist which may impair their ability to perform work.

   d) Reporting to their supervisor when they feel other employees are unfit for duty.

e) Abstaining from any on-the-job or off-the-job illegal drug use or activity.

f) Immediately reporting to the supervisor his/her arrest involving the commission of a felony or other serious crime or activity.

g) Reporting to the Occupational Health Nurse any use of medications as specified in Section III.

C. Supervisory

Supervisors are those persons, generally in grade 7 or above, charged with full-time supervisory responsibilities, including the annual performance evaluations for assigned subordinates. All supervisors, VY and contractor, are responsible for B.1.a-g above, as well as the following:

1) Ensuring that all personnel under their authority are aware of, and understand, the provisions of the FFD program.

2) Ensuring that all personnel under their supervision report to the Collection Site, when notified, for random drug and alcohol test collection.

3) Attending training on supervisor responsibilities in the FFD program, both initial and refresher.

4) Familiarizing themselves with the behavior patterns of the employees they supervise and recognizing when an individual is exhibiting unusual and aberrant behavior and acting inappropriately.

5) Responding appropriately and on a timely basis to situations involving FFD, possibly including but not limited to, reassigning employee job responsibilities or disciplinary action up to and including termination.

6) Notifying the Security Manager of any FFD situation that develops.

7) Notifying the Security Manager of any new supervisors in their area to allow any necessary training to be provided.

8) Reviewing information provided by the Occupational Health Nurse following her assessment of a disclosure of use of medications. The supervisor must determine the feasibility of reassigning the individual during the affected period.

D. Training

The Training Department is responsible for facilitating and coordinating the following:

1) General employee orientation regarding the company FFD program.
2) Annual General Employee Training which includes a module regarding FFD.
3) Necessary training to newly promoted supervisors.

E. Contracts Department

The Contracts Department is responsible for ensuring contractors and vendors are informed of the requirements of 10CFR26, this policy and its associated procedures.

THIS POLICY IS EFFECTIVE: 4/3/94

APPROVED: J. G. Wiggand 4/3/94
President & CEO Date

/dm

VYP:222-3
REV. # 1

MEDICAL REVIEW OFFICER QUALIFICATIONS AND RESPONSIBILITIES

INFORMATION USE

I. PURPOSE

The purpose of this guideline is to describe the qualifications and responsibilities of the Medical Review Officer (MRO) related to the Vermont Yankee Fitness for Duty Program.

II. SCOPE

An essential part of the company Fitness For Duty Program is the final review of positive drug testing results. A positive drug test result does not automatically identify a company employee or contractor as having used substances in violation of the FFD program. A qualified individual with a detailed knowledge of possible alternate medical explanations is essential to the review of results. This review shall be performed by the MRO prior to the transmission of confirmed positive results to the Security Manager.

III. QUALIFICATIONS

The MRO shall be a licensed physician with knowledge of substance abuse disorders and who has appropriate training to interpret and evaluate the relationship and impact of an individual's medical history and other relevant biomedical information with regard to a positive test result. The MRO may be either a company employee or a contractor.

IV. RESPONSIBILITIES

The role of the MRO is to review and interpret positive drug test results obtained through the company Fitness for Duty program. In carrying out this responsibility, the MRO shall examine alternate medical explanations for any positive drug test results. This action shall include conducting a medical interview with the individual; review of the individual's medical history; and review of any other relevant biomedical factors. The MRO shall review all medical records made available by the tested individual when a confirmed positive drug test could have resulted from legally prescribed medication. The MRO's review of the test results must be completed and the Security Manager notified within 10 days of the initial presumptive positive drug screening test. The MRO shall not consider the results of tests that are not obtained or processed in accordance with the company Fitness for Duty program.

THIS POLICY IS EFFECTIVE: 4/3/94

APPROVED: [signature] 4-3-94
President & CEO

/dm

WILLIAM H. SORRELL
ATTORNEY GENERAL

J. WALLACE MALLEY, JR.
DEPUTY ATTORNEY GENERAL

WILLIAM E. GRIFFIN
CHIEF ASST. ATTORNEY GENERAL

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STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER
05609-1001

AUTHORIZATION TO INVESTIGATE, CONSENT TO DISCLOSURE

I, **Walter Webster**, hereby file a charge of discrimination in matters of employment based on **Disability.** I authorize the Public Protection Division of the Attorney General's Office of the State of Vermont to investigate this matter and to file a charge on my behalf with the Equal Employment Opportunity Commission.

In addition, I authorize VT Yankee Nuclear Power Corporation to allow a representative of the Public Protection Division of the Attorney General's Office of the State of Vermont to have access to and copies of any personnel records deemed confidential that are pertinent to this investigation. **I further authorize VT Yankee Nuclear Power Corporation to allow a representative of the Public Protection Division of the Attorney General's office of the State of Vermont to have access to and copies of any medical records within its control & possession related to my disability or requests for accommodation of my disability.**

I also authorize the Civil Rights Unit of the Vermont Attorney General's Office to disclose information about my disability and related treatment, and charge of discrimination, VT Yankee Nuclear Power Corp for the purpose of processing my charge of discrimination, and possible conciliation and/or litigation of this matter. This consent is subject to revocation at any time except to the extent that the office that is to make disclosure has already taken action in reliance on it. If not previously revoked, this consent will terminate upon final disposition of the civil rights charges pending with this office.

Dated at Brattleboro, Vermont, on the 29 day of October, 1999.

Signed: Walter Webster DOB: 11/12/56

Before me, on this 29th day of October, 1999, appeared the above-named person, and subscribed and swore/affirmed to the truth of the document, and swore/affirmed that s/he signed same of his/her free act and deed.

Susan Minster
Notary Public

Commission expires: 2/10/03

STATE OF VERMONT
WINDHAM COUNTY, SS.

SUPERIOR COURT
DOCKET NO.

IN THE MATTER OF:

STATE OF VERMONT,]
Complainant,]
]
v.]
]
VERMONT YANKEE]
NUCLEAR POWER CORP.]
Respondent]

PETITION TO COMPEL ENFORCMENT PURSUANT TO 9 V.S.A. § 2460(c)

NOW COMES the State of Vermont, by and through its Attorney General, William H. Sorrell, and respectfully requests the Honorable Court to issue an order to compel the respondent, Vermont Yankee Nuclear Power Corporation (Vermont Yankee) and George Idelkope, M.D. to comply with Civil Investigative Demands (Attachments A and B) which have been properly issued and served upon them. They have refused production.

Pursuant to 21 V.S.A. §495b(a) and 9 V.S.A. §2460(a), respondent and its medical review officer (MRO), George Idelkope, M.D., were served Civil Investigative Demands by mail on June 26, 2000. On July 14, 2000, counsel for respondent and Dr. Idelkope notified the Attorney General's office by phone that respondent and Dr. Idelkope would not comply.

WHEREFORE, the Attorney General's office requests this Court to issue an Order pursuant to 9 V.S.A. §2460(c) directing the Respondent and Dr. Idelkope to provide the information requested in the Civil Investigative Demands to the Attorney General's office within fourteen days.

MEMORANDUM IN SUPPORT OF PETITION TO COMPEL

1. Authority for Enforcement

The underlying cause of action which forms the basis for the civil investigative demands (CID) at issue here is an allegation that Vermont Yankee, as Walter Webster's employer, discriminated against Mr. Webster on the basis of a physical disability, in violation of 21 V.S.A. §495(a)(1). The Attorney General is authorized to enforce the Fair Employment Practices Act by, among other means, "conducting civil investigations in accordance with the procedures established in sections 2458-2461 of Title 9, [the Consumer Fraud Act], as though discrimination under this section were an unfair act in commerce." 21 V.S.A. §495b(a).

The relevant section of the Consumer Fraud Act permits the Attorney General to issue demands for the production of testimony and documents when he has "reason" to believe that a violation has occurred. 9 V.S.A. §2460(a). Mr. Webster's signed and sworn charge of discrimination (Attachment C), states a prima facie case of prohibited discrimination on the basis of disability. A prima facie case of disability discrimination requires a showing that an employee: 1) has a physical or mental impairment, 2) which substantially limits one or more major life activities, and 3) is capable of performing the essential functions of his job with reasonable accommodations to his handicap. 21 V.S.A. §495d(5)-(9). As explained more fully below, Mr. Webster's allegations meet this standard. His sworn statement thus provides the Attorney General with reason to believe that a violation of the Fair Employment Practices Act has occurred and with the basis for issuance of a CID.

The Attorney General is permitted to seek enforcement of CIDs through an order from this Court by 9 V.S.A. §2460 (c).

2. Need for the Information

On November 1, 1999, Walter Webster filed a charge of employment discrimination with the Attorney General, alleging that he had been employed by Vermont Yankee as a plant mechanic for approximately two years, but in December of 1998 became unable to work because of severe and chronic back and leg pain. He further alleged that in February, 1999, his physician released him to return to work but that Vermont Yankee would not allow him to return because his physician had prescribed, and he was taking, methadone to control his pain. Because of Vermont Yankee's position, Mr. Webster made several attempts to substitute other medications, but none was effective.

Mr. Webster alleged that in June, 1999, he obtained another medical evaluation and another physician stated that it was reasonable for him to continue to take methadone as prescribed and to continue to work as a mechanic. Vermont Yankee was made aware of this opinion but continued to refuse to allow Mr. Webster to return to work while taking methadone. In August, 1999 Mr. Webster was evaluated by yet another physician, who issued a report stating that there was nothing inappropriate with his use of methadone as prescribed, and that it was unfortunate that Vermont Yankee continued its policy of refusing to permit him to return to work because the scientific evidence did not support that policy. Vermont

Yankee continued to refuse to allow Mr. Webster to return to work and, on September 27, 1999, terminated Mr. Webster's employment.

This charge of discrimination was forwarded to Respondent Vermont Yankee, which answered, stating that the charge was without merit. More specifically, Vermont Yankee claimed that Mr. Webster was not a "qualified handicapped individual" within the meaning of 21 V.S.A. §495 (a)(1). It stated that its MRO determined that Mr. Webster was not fit to return to work while taking methadone and that it therefore refused to allow him to return to work. It also stated that Nuclear Regulatory Commission (NRC) regulations mandate that nuclear facilities have an MRO and that this person has sole responsibility for determining whether an individual is fit for duty. Finally, it asserted that the MRO's decisions cannot be overruled by state law.

The CID sent to Vermont Yankee requests information about how and why Vermont Yankee's MRO came to his determination that methadone was not an approved medication for fitness for duty purposes. This information is necessary in order for the Attorney General to investigate whether Mr. Webster's use of methadone, as properly prescribed for pain, was a reasonable accommodation under the circumstances. For example, paragraph 3 of the CID asked for "policies, regulations, lists or other documentation concerning approved or non-approved medicines or drugs (for purpose of fitness for duty) kept, used or drafted by the NRC, Respondent or Dr. Idelkope." See Attachment A, ¶¶3-6.

The CID also requests the names of individuals at Vermont Yankee with whom its MRO spoke or consulted regarding Mr. Webster's use of methadone to

control the pain caused by his back condition. *Id.* ¶2. This information is necessary because the regulations cited by Vermont Yankee for its proposition that the MRO has sole and nonreviewable decision making capacity for determining which individuals are fit for duty do not, in fact, contain any such provision. Furthermore, submissions from both Mr. Webster and Vermont Yankee make it clear that there were at least two meetings during the summer of 1999, attended by Mr. Webster and Vermont Yankee personnel at which the issue of his methadone use was discussed. The Attorney General needs to verify Vermont Yankee's claim that no one other than Dr. Idelkope was involved in the determination that Mr. Webster would not be allowed to return to his job while taking his methadone prescription. If employees of Vermont Yankee were involved in making this determination together with, or after consultation with, Dr. Idelkope, this information is relevant and necessary in order to investigate whether Mr. Webster was denied a reasonable accommodation for his disabling condition.

Finally, the CID requests a list of individuals, with names redacted, employed by Vermont Yankee, who have at any time during their employment been allowed to take a prescription narcotic drug. *Id.* ¶8 This information is necessary in order for the Attorney General to investigate Mr. Webster's allegation that other employees have been allowed to work while taking such drugs, and to determine whether or not other similarly-situated employees were treated differently than Mr. Webster.

The CID sent to Vermont Yankee's MRO, Dr. Idelkope, requests similar information about how and why he came to his determination that methadone was not an approved medication for fitness for duty purposes, and about with whom at

Vermont Yankee he spoke and consulted on this issue. The information is necessary for the same reasons given above and was requested from Dr. Idelkope in the event that only he, and no one at Vermont Yankee, had some or all of this information.

The Attorney General has probable cause to believe that a violation of law occurred, and the documents requested in the CIDs are narrowly tailored and reasonable. The MRO's determination in this case that he would not approve the use of methadone and Vermont Yankee's subsequent decision to terminate Mr. Webster's employment are reviewable by the Attorney General's office to determine whether a violation of state law has occurred.[1] The Attorney General therefore requests that the Court issue an order compelling Vermont Yankee and George Idelkope, M.D. to comply with the Civil Investigative Demand forthwith. A proposed order is enclosed.

[1] The NRC regulations cited by Vermont Yankee in support of its claim that these decisions are not reviewable, 10 CFR § 26.20, deal largely with the use of illegal drugs and abuse of legal drugs.

DATED at Montpelier, Vermont, this 19th day of July, 2000.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: _____
Martha E. Csala
Assistant Attorney General
for Civil Rights

IN THE MATTER OF

Walter Webster

v.

Vermont Yankee Nuclear Power Corp.

CIVIL INVESTIGATIVE DEMAND
PURSUANT TO 9 V.S.A. §2460

Attention: Peter Robb, Esq.

As a result of the facts and statements contained in Walter Webster's sworn charge of discrimination stating a prima facie violation, the Attorney General has reason to believe that Vermont Yankee Nuclear Power Corporation has violated 21 V.S.A. §495, Vermont's Fair Employment Practices Law, in its treatment of Walter Webster based on his physical disability. (See attached charge of discrimination.)

Upon information and belief, Respondent is in possession of information relevant to the Attorney General's investigation of Walter Webster's charge of discrimination.

Accordingly, you are hereby notified to produce at the office of Downs, Rachlin & Martin, at 80 Linden Street, Brattleboro, Vermont on July 18, 2000 at eleven o'clock in the morning (11:00 a.m.) the following documents and/or information for examination by Martha E. Csala, Assistant Attorney General for Civil Rights, designated by the Attorney General to represent him for such purposes:

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

1. Please produce the job description for Walter Webster's (Complainant's) position while employed by Vermont Nuclear Power Corporation (Respondent).

2. Please identify the individuals at Vermont Yankee with whom George Idelkope, M.D. spoke or consulted regarding Complainant's use of Methadone to

control the pain caused by his back condition.

3. Please provide any policies, regulations, lists or other documentation concerning approved or non-approved medicines or drugs (for purposes of fitness for duty) kept, used or drafted by the NRC, Respondent or Dr. Idelkope. If no such documentation exists, please state the basis for Dr. Idelkope's statement that "Methadone is not an approved medicine for fitness for duty requirements." (See Dr. Idelkope's letter to Susan Hohnquist, dated February 10, 1999)

4. Please provide all letters, memoranda, notes and other documents, other than Dr. Idelkope's February 10, 1999 letter to Ms. Hohnquist, which address his opinions, reasoning and conclusions about Complainant's failure to meet "fitness for duty" requirements while taking Methadone.

5. Please state what contacts Dr. Idelkope had with Complainant's physicians, or other medical professionals, to discuss or assess Complainant's ability to think clearly and work safely at his job with Respondent. Please also state why Respondent did not request Complainant to submit to neutocognitive-specific studies to test his thinking capacities, as suggested by Gilbert Fanciullo, M.D.

6. Please state, in as much detail as possible, what specific actions Dr. Idelkope took when he "attempted to work with the Charging Party's physician to find an alternative pain control method that would be acceptable to" Dr. Idelkope. (See Respondent's Point-by-Point Response, #3, dated January 20, 2000)

7. Please state which specific NRC regulations mandate that nuclear facilities' medical review officers have "sole responsibility for determining whether an individual is fit for duty." (See Respondent's Point-by-Point Response, p. 4, dated January 20, 2000)

8. Please provide a list of individuals (if Respondent is concerned about confidentiality, the names can be redacted) who are or have been employed by Respondent and who are/were taking a prescription narcotic drug while so employed. For each named individual, please identify the drug taken, the duration of its use, if known, the duration of the individual's employment with Respondent, and whether the use of the drug was approved or allowed (tacitly or explicitly) by Respondent or its MRO.

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

If all of the above-described documents and information are provided prior to the date specified, the Attorney General will consider Respondent in compliance with this demand.

Any person who, with intent to avoid, evade, or prevent compliance, in whole or

in part, with any civil investigation under 21 V.S.A. §495b, removes from any place, conceals, withholds, or destroys, mutilates, alters, or by any other means falsifies any documentary material in the possession, custody or control of any person subject of any such notice, or mistakes or conceals any information, shall be fined not more than $5,000.00 pursuant to 9 V.S.A. §2460(b).

Dated at Montpelier, County of Washington, and State of Vermont, this 21st day of June, 2000.

STATE OF VERMONT
WILLIAM H. SORRELL
ATTORNEY GENERAL

By: Martha Csala

Martha E. Csala, Esq.
Assistant Attorney General
for Civil Rights

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

IN THE MATTER OF

Walter Webster

v.

Vermont Yankee Nuclear Power Corp.

CIVIL INVESTIGATIVE DEMAND
PURSUANT TO 9 V.S.A. §2460

Attention: George Idelkope, M.D.

As a result of the facts and statements contained in Walter Webster's sworn charge of discrimination stating a prima facie violation, the Attorney General has reason to believe that Vermont Yankee Nuclear Power Corporation has violated 21 V.S.A. §495, Vermont's Fair Employment Practices Law, in its treatment of Walter Webster based on his physical disability. Upon information and belief, George Idelkope, M.D. is in possession of information relevant to the Attorney General's investigation of Walter Webster's charge of discrimination.

Accordingly, you are hereby notified to appear and produce at the Office of the Attorney General, 109 State Street, Montpelier, Vermont, 05609-1001, on Thursday, July 20, 2000, at eleven o'clock in the morning (11:00 a.m.) the following documents and/or information for examination by Martha E. Csala, Assistant Attorney General for Civil Rights, designated by the Attorney General to represent him for such purposes:

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

1. Please identify the individuals at Vermont Yankee with whom you spoke or consulted regarding Walter Webster's (Complainant's) use of Methadone to control the pain caused by his back condition.

2. Please provide any policies, regulations, lists or other documentation concerning approved or non-approved medicines or drugs (for purposes of fitness

for duty) kept, used or drafted by you. If no such documentation exists, please state the basis for your statement that "Methadone is not an approved medicine for fitness for duty requirements." (See Dr. Idelkope's letter to Susan Hohnquist, dated February 10, 1999)

3. Please provide all letters, memoranda, notes and other documents, other than your February 10, 1999 letter to Ms. Hohnquist, which address your opinions, reasoning and conclusions about Complainant's failure to meet "fitness for duty" requirements while taking Methadone.

4. Please state your process or procedure for determining whether an individual is "fit for duty" at the Vermont Yankee Nuclear Power Plant pursuant to NRC regulations.

5. Please state what contacts you had with Complainant's physicians, or other medical professionals, to discuss or assess Complainant's ability to think clearly and work safely at his job with Vermont Yankee. Please also state why you did not request Complainant to submit to neurocognitive-specific studies to test his thinking capacities, as suggested by Gilbert Fanciullo, M.D.

6. Please state, in as much detail as possible, what specific actions you took to attempt to find an alternative pain control method for Complainant that would be acceptable to you.

If all of the above-described documents and information are provided prior to the date specified, the Attorney General will consider Respondent in compliance with this demand.

Any person who, with intent to avoid, evade, or prevent compliance, in whole or in part, with any civil investigation under 21 V.S.A. §495b, removes from any place, conceals, withholds, or destroys, mutilates, alters, or by any other means falsifies any documentary material in the possession, custody or control of any person subject of any such notice, or mistakes or conceals any information, shall be fined not more than $5,000.00 pursuant to 9 V.S.A. §2460(b).

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

Dated at Montpelier, County of Washington, and State of Vermont, this 28th day of June, 2000.

STATE OF VERMONT
WILLIAM H. SORRELL
ATTORNEY GENERAL

By: Martha Csala

Martha E. Csala, Esq.
Assistant Attorney General
for Civil Rights

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
PUBLIC PROTECTION DIVISION

CHARGING PARTY: Walter C. Webster
461 Sugarhouse Hill Road
Guilford, VT 05301

Charge of Employment Discrimination

RESPONDENT: Vermont Yankee Nuclear Power Corp.
John P. O' Connor, Agent
185 Old Ferry Road
Brattleboro, VT 05301

I charge Respondent Vermont Yankee Nuclear Power Corp. with an unlawful discriminatory act in employment on the basis of:

__Race; __ Color; __National Origin; __ Age; __ Religion; __ Sexual Orientation; __ Sex; __ Place of Birth; __ Ancestry; X Disability; __ Worker's Compensation Retal.; __ Retaliation; __ Parental and Family Leave; __ Short-Term Leave; __ Equal Pay

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The following statements set forth the reasons I believe I have been discriminated against:

1. I have been permanently employed by Respondent as plant mechanic from November 16, 1997 to September 27, 1999. I am fully qualified for the job, and my performance has been satisfactory. Upon information and belief Respondent employs 15 or more persons.

2. I suffer from chronic severe back and leg pain (sciatica). This constitutes a disability.

3. I last worked on December 31, 1998. I was unable to continue to work because the pain had increased. On February 10, my physicians released me to return to work. Respondent refused to permit me to return to work because my physicians had prescribed, and I was taking, methadone to control my pain.

4. On May 3, 1999, my physicians again released me to work. Respondent but refused to allow me to return to work as long as I continue to take the medication which my doctors have prescribed for my pain. Based on my physician's release, Respondent also terminated my short-term disability benefits as of that date.

5. On June 30, 1999, I obtained another medical evaluation, and another doctor stated that it was reasonable for me to continue to take methadone as prescribed, and to continue to work as a mechanic. Respondent was made aware of this independent evaluation and opinion, and still refused to allow me to return to work as long as I take my prescribed pain medication.

6. On August 16, 1999, at a meeting I had with my supervisors, one supervisor said, "You mean to tell me that they can put a man on the moon, but they can't come up with something to fix your back?"

7. On August 30, 1999, yet another doctor issued a report stating that there was nothing wrong with my continue to take methadone as prescribed, and that it was unfortunate that Respondent continued its policy of refusing to permit me to return to work because the scientific evidence does not support this policy.

8. Respondent continued to refuse to permit me to return to work if I was taking methadone as prescribed to control the pain that my disability caused.

9. Respondent's refusal to permit me to return to work while taking properly prescribed and monitored medication, which has no effect on my ability to perform the essential functions of my job, was a denial of reasonable accommodation for my disability.

10. On September 27, 1999, Respondent terminated my employment, because I continued to use medication as prescribed by my physicians to control my pain.

11. My son Beau, has cerebral palsy, a disability, and as a result, my family incurs substantial medical expenses, which are paid by the Respondent's health insurance plan. Our costs are far in excess of the average costs of Respondent's employees. I believe my association with Beau, and its attendant costs, may have been a factor in Respondent's decision to terminate my employment.

12. Upon information and belief, the above described discriminatory conduct violates the State of Vermont's Fair Employment Practices Act, 21 V.S.A. § 495 et seq., as enforced by the State of Vermont's Office of Attorney General, and the Americans with Disabilities Act of 1991, 42 U.S.C. § 12111 et seq., as enforced

by the federal Equal Employment Opportunity Commission.

X I also want this allegation filed with the EEOC. I will advise the agencies if I change my address or telephone number, and I will cooperate fully with them in the processing of my allegation in accordance with their procedures.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Walter Webber Jr.
Complainant (Signature)

Oct. 28, 99
Date

Notary Clause

Subscribed and sworn to before me by the above named person on

10/28/99
Month, Day, Year

Notary Public
My commission expires: 2/19/2003

STATE OF VERMONT
WINDHAM COUNTY, SS.

SUPERIOR COURT
DOCKET NO.

STATE OF VERMONT,
Plaintiff,

v.

VERMONT YANKEE
NUCLEAR POWER CORP.,
Respondent

ACCEPTANCE OF SERVICE

I, _____, as authorized agent for Vermont Yankee Nuclear Power Corporation and George Idelkope, M.D., do hereby accept service and acknowledge receipt of the attached Petition to Compel Enforcement of Civil Investigative Demands in the above-captioned action and hereby waive the right to any other manner of service.

Dated: _____ _____

STATE OF VERMONT
WINDHAM COUNTY, SS.

SUPERIOR COURT
DOCKET NO.

IN THE MATTER OF:

STATE OF VERMONT, Complainant,	]	
v.	]	ORDER COMPELLING ENFORCMENT PURSUANT TO 9 V.S.A. § 2460(c)
VERMONT YANKEE NUCLEAR POWER CORP. Respondent	]	

Based upon the State's Petition for Order Compelling Enforcement and supporting documents, it is hereby ORDERED that:

1. The State's Petition is GRANTED, and

2. Vermont Yankee Nuclear Power Corporation and George Idlekope, M.D. shall comply with the terms of the Civil Investigative Demands issued by the State in the above matter within 7 days of the date of this order.

DATED at Brattleboro, Vermont, this ___ day of _____, 2000.

_____
Superior Court Judge

STATE OF VERMONT
COUNTY OF WINDHAM

WINDHAM SUPERIOR COURT
DOCKET NO. 304-7-00 Wmcv

IN THE MATTER OF:

STATE OF VERMONT,)
Complainant,)
)
v.)
)
VERMONT YANKEE)
NUCLEAR POWER CORP.)
Respondent.)

VERMONT YANKEE NUCLEAR POWER CORPORATION'S MOTION FOR DISMISSAL OR, IN THE ALTERNATIVE, FOR STAY OF PROCEEDINGS IN LIGHT OF PRIOR PENDING FEDERAL COURT ACTION

Vermont Yankee Nuclear Power Corporation ("Vermont Yankee") moves the Court for dismissal of the Petition to Compel Enforcement Pursuant to 9 V.S.A. § 2460(c) (the "Petition") filed by the Attorney General of the State of Vermont (the "Attorney General") because a prior pending action in United States District Court for the District of Vermont involves the same parties, arises out of the same facts and contains issues identical to those raised in this proceeding See Weiner v. Prudential Ins. Co., 110 Vt. 22, 24 (1938). As an alternative to dismissal, Vermont Yankee seeks a stay of this proceeding pending the Federal Court's determination concerning the legality of the Vermont Attorney General's continued investigation. In support, Vermont Yankee relies on the following Memorandum of Law.

MEMORANDUM OF LAW

This is the second of two actions prompted by the Attorney General's insistence that he is entitled to second-guess Vermont Yankee's decision that an employee could not have an unescorted access security clearance to a nuclear reactor while using methadone. As Vermont Yankee has shown through reams of documentation produced in response to the Attorney

General's Information Requests, this is an issue of nuclear safety, an area in which Vermont Yankee's obligations are strictly and solely regulated by the federal government and in which Vermont Yankee is not willing to cut corners, or to submit its Medical Review Officer's fitness for duty determinations to de novo review by jury, which is the only proceeding that the Vermont Attorney General can invoke if he disagrees with Vermont Yankee's failure to grant an unescorted access security clearance. This Motion is directed to the Attorney General's most recent effort to bludgeon the targets of its investigation into capitulation with burdensome and costly piecemeal litigation.

I. Background

The instant Petition and the prior pending action in Vermont Yankee Nuclear Power Corporation and Dr. George Idelkope v. Unites States Equal Employment Opportunity Commission and William Sorrell, Attorney General of the State of Vermont, Docket No. 1:00cv254 are based on the same set of undisputed facts. Vermont Yankee is a Vermont corporation that owns and operates a commercial nuclear power facility in Vernon, Vermont pursuant to an operating license issued by the Nuclear Regulatory Commission (the "NRC"). Dr. George Idelkope is a resident of Chesterfield, New Hampshire and practices medicine from his office in Hinsdale, New Hampshire.

In 1997, the individual,[1] who later filed a charge with the Vermont Attorney General was

[1] NRC regulations require that information related to determinations on Fitness For Duty security clearances be confidential. See 10 C.F.R. § 26.29. The Attorney General's blatant disregard for the letter and spirit of the federal regulations by filing in this case public documents which purport to name an employee involved in a security clearance issue is inappropriate and evidence of why the Attorney General should not be permitted to circumvent federal law designed to protect individual employees. Copies of the relevant NRC regulations are attached as Exh. 1.

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BURLINGTON VT
LITTLETON NH

employed by Vermont Yankee as a plant mechanic, a position that required him to have an unescorted access security clearance to protected areas of the nuclear plant. Consistent with Vermont Yankee policies, the Employee's unescorted access security clearance lapsed while he was out on medical leave for an extended period in January 1999.

In late January or February 1999, the Employee informed Vermont Yankee that a doctor had placed him on methadone, which is a synthetic narcotic listed as a "Schedule II" controlled substance under the Federal Controlled Substance Act. See 21 U.S.C. § 812. The Employee's unescorted access security clearance was not reinstated because Dr. Idelkope, an independent contractor serving as Vermont Yankee's Medical Review Officer ("MRO") as required by NRC regulations, see Exh. 1, 10 C.F.R. Part 26, App.A, would not deem the Employee Fit for Duty. The Employee could not qualify for his position as a plant mechanic without the unescorted access security clearance.

By a Charge dated October 28, 1999 and filed with the Vermont Attorney General and the EEOC, the Employee asserted allegations of disability discrimination against Vermont Yankee under the Americans With Disabilities Act, 42 U.S.C. § 12111 et seq. (the "ADA") and the Vermont Fair Employment Practices Act, 21 V.S.A. § 495 et seq. ("FEPA").[2] By letter dated January 20, 2000, Vermont Yankee responded to the charge by explaining to the Vermont Attorney General, inter alia, that the Employee was not a qualified employee entitled to the protections of the ADA and FEPA. Nonetheless, Vermont Yankee provided the Attorney

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[2] The Attorney General's office is a "deferral agency" for the EEOC. Pursuant to a "workshare agreement" between the two agencies, the Attorney General's office investigates alleged violations of the ADA for and on behalf of the EEOC and issues a recommendation to the EEOC at the conclusion of each investigation.

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General with extensive information as demanded by the Attorney General over the ensuing months. When the Attorney General demanded information about the security access determinations on other employees and information related to second guessing the MRO's determination with respect to the Employee, Vermont Yankee and the MRO refused to provide information on those questions.

A. The Prior Pending Federal Court Action

The Attorney General's Civil Investigative demands purport to place Vermont Yankee on a collision course with NRC regulations that are a condition of Vermont Yankee's operating license, and contradict established precedent concerning the preemptive effect of the Federal Government's pervasive regulation of nuclear safety. Accordingly, Vermont Yankee, together with the MRO, commenced a Complaint for Declaratory Judgment in United States District Court for the District of Vermont (the "Federal Complaint") on July 18, 2000. A copy of the Federal Complaint and proofs of service are attached as Exh. 2. The Assistant Attorney General who signed the Petition in this case was verbally informed on July 17, 2000 that the Federal Complaint would be filed the next day. The Federal Complaint names both the EEOC and the Attorney General as Defendants, seeks a declaration that further investigation is preempted by NRC regulations, and further seeks injunctive relief precluding both Defendants from proceeding with the investigation. The EEOC was served on July 24, 2000 and the Attorney General was served on July 26, 2000. See Exh. 2. The Federal Court Action is now proceeding.

B. The Subsequent State Court Action

After the Federal Court Action was filed and in response to Vermont Yankee informing

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the Attorney General of the Federal Court Action, the Attorney General filed the instant Petition with this Court -- and conveniently failed to inform the Court about the prior pending Federal Court Action.[3] Curiously, the Attorney General's Petition does not name the MRO as a respondent, but seeks an order "directing the Respondent and Dr. Idelkope to provide the information requested in the Civil Investigative Demands...." Presumably, therefore, the Petition seeks to compel Vermont Yankee to cause the MRO to comply with the order. However, the Attorney General fails to address and Vermont Yankee does not know how Vermont Yankee can require Dr. Idelkope to comply with such an order.

II This Action Must be Dismissed in Favor of the Prior-Pending Federal Court Action

> The general rule is well established in Vermont and elsewhere that in cases of concurrent jurisdiction the court first acquiring jurisdiction will retain it to the end to the exclusion of other tribunals.

Weiner v. Prudential Ins. Co., 110 Vt. 22, 24 (1938); the "prior-pending" rule applies with equal force where the respective actions are in federal and state courts. See e.g. Florida Crushed Stone Co. v. The Travelers Indemnity Co., 632 So.2d 217, 220 (Fla. Dist. Ct. App. 1994) (Copy attached as Exh. 3) ("it is nonetheless an abuse of discretion to refuse to stay a subsequently filed state court action in favor of a previously filed federal action which involves the same parties and the same or substantially the same issues"). In order for the "prior-pending" doctrine to apply therefore, three elements must be present. There must be 1) a previously filed and currently

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[3] In discussing the NRC regulations requiring strict confidentiality of information regarding fitness for duty determinations, see Exh. 1, 10 C.F.R. § 26.29, in relation to the Federal Complaint, the Assistant Attorney General informed Vermont Yankee's attorney that she believed there would be an exception to the confidentiality requirement "if I get a State Court order."

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pending action; 2) involving the same parties as the subsequent action; and 3) involving the same or substantially the same issues. See id.

The first element of the "prior-pending" doctrine is satisfied because the Federal Court Action was commenced by filing on July 18, 2000, and Vermont Yankee promptly thereafter effected service on the EEOC and the Attorney General.[4] The Attorney General commenced this action two days later after being informed that the Federal Action had been filed -- and only effected service on Vermont Yankee last Wednesday, August 9, 2000.

The second element is established and also demonstrates one reason why this dispute is more appropriately before a Federal Court. While there is identity of parties between the two actions in the sense that Vermont Yankee and the Attorney General are parties to both, the Federal Court action also includes additional parties needed for a just adjudication of this dispute - the EEOC and the MRO - who are not parties to the state action.

The third element is present because it is beyond dispute that these actions involve "the same or substantially the same issues." Florida Crushed Stone, 632 So.2d at 220. Both cases arise out of Vermont Yankee's refusal to grant an unescorted access security clearance to an employee based on the employee's revelation of methadone use. In the Federal Court action, Vermont Yankee will establish that the Attorney General may not lawfully proceed with this investigation because: a) regulations promulgated by the NRC pursuant to the Atomic Energy Act preempt the field of nuclear safety and exclusively dictate Vermont Yankee's obligations with respect to employees determined to be taking potentially impairing substances, and b) the

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[4] Pursuant to FED. R. CIV. P. 12, the deadline for the Attorney General to answer the Federal Court Complaint is Tuesday, August 15, 2000.

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LITTLETON NH

aforementioned regulations also constitute a bona fide occupational qualification, for which the failure to satisfy precludes any finding of disability discrimination under state or federal law. Because the Attorney General's only authority to investigate claims of disability discrimination requires that the Attorney General have "reason to believe" a FEPA violation has occurred, see 9 V.S.A. § 2460 and 21 V.S.A. § 495b, the Federal Court action will determine as a threshold matter whether the Attorney General may proceed with this investigation. See Florida Crushed Stone, 632 So.2d at 220 ("it is sufficient that the two actions involve a single set of facts and the resolution of the one case will resolve many of the issues involved in the subsequently filed case").

Indeed, the Attorney General's own Petition demonstrates that he seeks to make interpretation of the NRC's Fitness For Duty regulations an issue in this litigation. See Petition at 5 ("This information is necessary because the regulations cited by Vermont Yankee for the proposition that the MRO has sole and nonreviewable decision making capacity for determining which individuals are not fit for duty[5] do not, in fact, contain any such provision."). As Vermont Yankee will establish in the Federal Court Action, it is not for the Attorney General to interpret a nuclear licensee's Fitness for Duty and security clearance obligations. Moreover, the Attorney General's information requests seeking disclosure of information about the fitness for duty determinations made on other individuals goes to interpreting how those individuals were treated.

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[5] Contrary to the Attorney General's assertion, Vermont Yankee has never said that unescorted access determinations are "nonreviewable," but that the only avenue for review was through procedures established by the NRC.

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under federal regulations -- another question already properly before the Federal Court.[6]

Finally, the relief sought by the Attorney General in this action is identical to the relief Vermont Yankee has requested the United States District Court to prohibit in the previously filed action. In the Federal Court Action Vermont Yankee seeks a declaration prohibiting the Attorney General from proceeding with the investigation. Here, the Attorney General requests an order allowing the investigation to proceed. Thus, it is clear that this action is subject to dismissal because it is "the same or substantially the same" as the Federal Court Action. See Florida Crushed Stone, 632 So.2d at 220.

Beyond the elements establishing that the "Prior Pending" doctrine requires that this action yield to the Federal Court Action, there are further reasons favoring dismissal of this case. Although the Attorney General States interchangeably that he has "'reason' to believe that a violation has occurred", Petition at 2, or that he "has probable cause to believe a violation of law occurred," Petition at 6, neither conclusory statement withstands even a cursory examination. As Vermont Yankee has repeatedly pointed out to the Attorney General, any claim of disability discrimination requires a showing that the alleged victim was qualified to perform his job. See 21 V.S.A. § 495d. As Federal Courts have repeatedly held, NRC Fitness For Duty Requirements are qualifications, and the failure to meet them precludes any claim of disability discrimination. In McCoy v. Pennsylvania Power & Light Co., 933 F. Supp. 438, 444 (M.D. Pa. 1996)(copy

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[6] The Attorney General's Petition is not supported by any alleged facts on this issue. Vermont Yankee has not been made aware of any evidence that employees similarly situated to this Employee have been allowed to work at Vermont Yankee. The Employee has been asked but failed to identify such individuals. This is an issue of public safety and not an appropriate area for the Attorney General to hide his cards- he should either advise Vermont Yankee of any evidence of a potential safety issue or admit he has no such evidence.

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attached as Exh. 4), the court held that an employee whose security clearance in the employer's nuclear plant was revoked because of his alcoholism was not a "qualified individual with a disability" because:

> 1) NRC regulations make security clearance an essential component of [the employee's] former job as a nuclear plant operator; 2) maintaining security clearance is an essential job function and any revocation or suspension of that status renders an employee ineligible, i.e. not qualified, under NRC regulations, to work as a nuclear plant operator; 3) suspension and revocation of [the employee's] security clearance was not only justified, but necessitated by [the employee's] alcoholism and related emotional and psychological problems; 4) failure to suspend or revoke his security status would have placed [the employer] in conflict with, and in contravention of, its duties as an [sic] nuclear plant licensee to safeguard the public welfare by restricting unsupervised access to secure areas to those not likely to pose a risk to operation of the plant; and 5) [the employer] could make no "reasonable accommodation" that would have allowed [the employee] to remain in his former position and retain his security clearance without compromising its obligation imposed by NRC regulations to supervise carefully employees granted access to secure areas and take steps to restrict access by any employee who poses a potential threat to the safe operation of the plant.

Id. at 443-44. See also McDaniel v. Allied Signal, Inc., 896 F. Supp. 1482, 1487 (W.D.Mo. 1995) (copy attached as Exh. 5) ("Because the Court finds a security clearance to be an essential function of Plaintiff's employment position, it seems to go without saying that a security clearance is both job-related and consistent with business necessity."); Albertsons Inc. v. Kirkingburg, 119 S. Ct. 2162, 2174 (1999) (copy attached as Exh. 6) (Trucking company's visual acuity standards established in compliance with Federal Department of Transportation safety regulations were a valid job qualification defeating claim of disability discrimination). Even if the Petition were not subject to dismissal under the "Prior Pending" doctrine, it should still be

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dismissed for lack of a reason to believe the Employee was a qualified employee entitled to the protection of FEPA.

In the alternative in the event the Court declines to dismiss the Attorney General's petition, the Court should stay these proceedings pending resolution of the Federal Court Action. As set forth in greater detail in the Federal Court Complaint, several of the Attorney General's information requests purport to compel Vermont Yankee to violate NRC Fitness for Duty Regulations mandating that information on individual employees used in making fitness for duty determinations be kept confidential. If this Action proceeds, Vermont Yankee will be subject to the very Catch-22 the Federal Court Action seeks to prevent.

Against the potential prejudice to Vermont Yankee there is no countervailing urgent need for the Attorney General to immediately proceed with the investigation (nor has the Attorney General alleged any such urgency in the Petition). A stay of this action should not prejudice the Attorney General in any way. If the Federal Court determines that the Attorney General's investigation is lawful - a scenario Vermont Yankee considers unlikely given the clear precedent- there is no reason to believe that the evidence the Attorney General seeks will be any less available. Moreover this is not a case involving a potential back-pay or job reinstatement determination because, as the Employee's physician has testified, the Employee has been completely unable to work since October 26, 1999. See Deposition of Dr. Gary Shapiro at 56 (Attached at Tab 2.). There will be no disadvantage to the Employee or the Attorney General's investigation in permitting the legality of that investigation to be appropriately determined in the Federal Court Action.

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WHEREFORE, Respondent Vermont Yankee Nuclear Power Corporation respectfully requests that this Honorable Court dismiss the Attorney General's Petition or, in the alternative, grant a Stay of this action pending the outcome of the action currently pending in United States District Court for the District of Vermont entitled Vermont Yankee Nuclear Power Corporation and Dr. George Idelkope v. Unites States Equal Opportunity Commission and William Sorrell, Attorney General of the State of Vermont, Docket No. 1:00cv254. Vermont Yankee also requests that this Court grant such other and further relief as the Court deems just and proper.

Brattleboro, Vermont
August 14, 2000

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dentials upon arrival. Normally, however, Federal representatives will provide advance notification in the form of an NRC Form 277, "Request for Visit or Access Approval," with the "need-to-know" certified by the appropriate NRC office exercising licensing or regulatory authority and verification of an NRC access authorization by the Division of Facilities and Security.

(c) The licensee, certificate holder, or others shall include the following information on all Visit Authorization Letters (VAL) which they prepare.

(1) Visitor's name, address, and telephone number and certification of the level of the facility security clearance;

(2) Name, date and place of birth, and citizenship of the individual intending to visit;

(3) Certification of the proposed visitor's personnel clearance and any special access authorizations required for the visit;

(4) Name of person(s) to be visited;

(5) Purpose and sufficient justification for the visit to allow for a determination of the necessity of the visit; and

(6) Date or period during which the VAL is to be valid.

(d) Classified visits may be arranged for a 12 month period. The requesting facility shall notify all places honoring these visit arrangements of any change in the individual's status that will cause the visit request to be canceled before its normal termination date.

(e) The responsibility for determining need-to-know in connection with a classified visit rests with the individual who will disclose classified information during the visit. The licensee, certificate holder or other facility shall establish procedures to ensure positive identification of visitors before the disclosure of any classified information.

[62 FR 17689, Apr. 11, 1997, as amended at 64 FR 15649, Apr. 1, 1999]

VIOLATIONS

§25.37 Violations.

(a) An injunction or other court order may be obtained to prohibit violation of any provision of:

(1) The Atomic Energy Act of 1954, as amended;

(2) Title II of the Energy Reorganization Act of 1974, as amended; or

(3) Any regulation or order issued under these Acts.

(b) National Security Information is protected under the requirements and sanctions of Executive Order 12958.

[48 FR 24320, June 1, 1983, as amended at 57 FR 55072, Nov. 24, 1992; 64 FR 15649, Apr. 1, 1999]

§25.39 Criminal penalties.

(a) Section 223 of the Atomic Energy Act of 1954, as amended, provides for criminal sanctions for willful violation of, attempted violation of, or conspiracy to violate, any regulation issued under sections 161b, 161i, or 161o of the Act. For purposes of section 223, all the regulations in part 25 are issued under one or more of sections 161b, 161i, or 161o, except for the sections listed in paragraph (b) of this section.

(b) The regulations in part 25 that are not issued under sections 161b, 161i, or 161o for the purposes of section 223 are as follows: §§25.1, 25.3, 25.5, 25.7, 25.8, 25.9, 25.11, 25.19, 25.25, 25.27, 25.29, 25.31, 25.37, and 25.39.

[57 FR 55072, Nov. 24, 1992]

APPENDIX A TO PART 25—FEES FOR NRC ACCESS AUTHORIZATION

Category	Fee
Initial "L" access authorization	[1] $130
Initial "L" access authorization (expedited processing)	[1] 203
Reinstatement of "L" access authorization	[2] 130
Extension or Transfer of "L" access authorization	[2] 130
Renewal of "L" access authorization	[1] 130
Initial "Q" access authorization	2856
Initial "Q" access authorization (expedited processing)	3295
Reinstatement of "Q" access authorization	[2] 2856
Reinstatement of "Q" access authorization (expedited processing)	[2] 3295
Extension or Transfer of "Q"	[2] 2856
Extension or Transfer of "Q" (expedited processing)	[2] 3295
Renewal of "Q" access authorization	[2] 1705

[1] If the NRC determines, based on its review of available data, that a single scope investigation is necessary, a fee of $4000 will be assessed before the conduct of the investigation.

[2] Full fee will only be charged if an investigation is required.

[64 FR 15649, Apr. 1, 1999]

PART 26—FITNESS FOR DUTY PROGRAMS

GENERAL PROVISIONS

GENERAL PERFORMANCE OBJECTIVES

PROGRAM ELEMENTS AND PROCEDURES

INSPECTIONS, RECORDS AND REPORTS

AUDITS

ENFORCEMENT

AUTHORITY: Secs. 53, 81, 103, 104, 107, 161, 68 Stat. 930, 935, 936, 937, 948, as amended, sec. 1701, 106 Stat. 2951, 2952, 2953 (42 U.S.C. 2073, 2111, 2112, 2133, 2134, 2137, 2201, 2297f); secs. 201, 202, 206, 88 Stat. 1242, 1244, 1246, as amended (42 U.S.C. 5841, 5842, 5846).

SOURCE: 54 FR 24494, June 7, 1989, unless otherwise noted.

GENERAL PROVISIONS

§26.1 Purpose.

This part prescribes requirements and standards for the establishment andmaintenance of certain aspects of fitness-for-duty programs and procedures by the licensed nuclear power industry, and by licensees authorized to possess, use, or transport formula

quantities of strategic special nuclear material (SSNM).

[58 FR 31469, June 3, 1993]

§ 26.2 Scope.

(a) The regulations in this part apply to licensees authorized to operate a nuclear power reactor, to possess or use formula quantities of SSNM, or to transport formula quantities of SSNM. Each licensee shall implement a fitness-for-duty program which complies with this part. The provisions of the fitness-for-duty program must apply to all persons granted unescorted access to nuclear power plant protected areas, to licensee, vendor, or contractor personnel required to physically report to a licensee's Technical Support Center (TSC) or Emergency Operations Facility (EOF) in accordance with licensee emergency plans and procedures, and to SSNM licensee and transporter personnel who:

(1) Are granted unescorted access to Category IA Material;

(2) Create or have access to procedures or records for safeguarding SSNM;

(3) Make measurements of Category IA Material;

(4) Transport or escort Category IA Material; or

(5) Guard Category IA Material.

(b) The regulations in this part do not apply to NRC employees, to law enforcement personnel, or offsite emergency fire and medical response personnel while responding onsite, or SSNM transporters who are subject to U.S. Department of Transportation drug or alcohol fitness programs that require random testing for drugs and alcohol. The regulations in this part also do not apply to spent fuel storage facility licensees or non-power reactor licensees who possess, use, or transport formula quantities of irradiated SSNM as these materials are exempt from the Category I physical protection requirements as set forth in 10 CFR 73.6.

(c) Certain regulations in this part apply to licensees holding permits to construct a nuclear power plant. Each construction permit holder, with a plant under active construction, shall comply with §§ 26.10, 26.20, 26.23, 26.70, and 26.73 of this part; shall implement a chemical testing program, including random tests; and shall make [illegible] sions for employee assistance [illegible] grams, imposition of sanctions, [illegible] procedures, the protection of [illegible] tion, and recordkeeping.

(d) The regulations in this part [illegible] to the Corporation required to obtain [illegible] certificate of compliance or [illegible] proved compliance plan under part [illegible] of this chapter only if the Corporation elects to engage in activities involving formula quantities of strategic special nuclear material. When applicable, these requirements apply only to the Corporation and personnel carrying out the activities specified in § 26.2(a)(1) through (5).

[58 FR 31469, June 3, 1993, as amended at 59 FR 48959, Sept. 23, 1994]

§ 26.3 Definitions.

Aliquot means a portion of a specimen used for testing.

Category IA Material means strategic special nuclear material (SSNM) directly useable in the manufacture of a nuclear explosive device, except if:

(1) The dimensions are large enough (at least 2 meters in one dimension, greater than 1 meter in each of two dimensions, or greater than 25 cm in each of three dimensions) to preclude hiding the item on an individual;

(2) The total weight of 5 formula kilograms of SSNM plus its matrix (at least 50 kilograms) cannot be carried inconspicuously by one person; or

(3) The quantity of SSNM (less than 0.05 formula kilogram) in each container requires protracted diversions in order to accumulate 5 formula kilograms.

Commission means the Nuclear Regulatory Commission or its duly authorized representatives.

Confirmatory test means a second analytical procedure to identify the presence of a specific drug or drug metabolite which is independent of the initial screening test and which uses a different technique and chemical principle from that of the initial screening test in order to ensure reliability and accuracy. For determining blood alcohol levels, a "confirmatory test" means a second test using another breath alcohol analysis device. Further confirmation upon demand will be [illegible] gas chromatography analysis of blood

Confirmed positive test means the result of a confirmatory test that has established the presence of drugs, drug metabolites, or alcohol in a specimen at or above the cut-off level, and that has been deemed positive by the Medical Review Officer (MRO) after evaluation. A "confirmed positive test" for alcohol can also be obtained as a result of a confirmation of blood alcohol levels with a second breath analysis without MRO evaluation.

Contractor means any company or individual with which the licensee has contracted for work or service to be performed inside the protected area boundary, either by contract, purchase order, or verbal agreement.

Cut-off level means the value set for designating a test result as positive.

Follow-up testing means chemical testing at unannounced intervals, to ensure that an employee is maintaining abstinence from the abuse of drugs or alcohol.

Illegal drugs means those drugs included in Schedules I through V of the Controlled Substances Act (CSA), but not when used pursuant to a valid prescription or when used as otherwise authorized by law.

Initial or screening tests means an immunoassay screen for drugs or drug metabolites to eliminate "negative" urine specimens from further consideration or the first breathalyzer test for alcohol. Initial screening may be performed at the licensee's testing facility; a second screen and confirmation testing for drugs or drug metabolites must be conducted by a HHS-certified laboratory.

Medical Review Officer means a licensed physician responsible for receiving laboratory results generated by an employer's drug testing program who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's positive test result together with his or her medical history and any other relevant biomedical information.

Protected area has the same meaning as in §73.2(g) of this chapter, an area encompassed by physical barriers and to which access is controlled.

Random test means a system of unannounced drug testing administered in a statistically random manner to a group so that all persons within that group have an equal probability of selection.

Suitable inquiry means best-effort verification of employment history for the past five years, but in no case less than three years, obtained through contacts with previous employers to determine if a person was, in the past, tested positive for illegal drugs, subject to a plan for treating substance abuse, removed from, or made ineligible for activities within the scope of 10 CFR part 26, or denied unescorted access at any other nuclear power plant or other employment in accordance with a fitness-for-duty policy.

Transporter means a general licensee pursuant to 10 CFR 70.20a, who is authorized to possess formula quantities of SSNM in the regular course of carriage for another or storage incident thereto, and includes the driver or operator of any conveyance, and the accompanying guards or escorts.

Vendor means any company or individual, not under contract to a licensee, providing services in protected areas.

[54 FR 24494, June 7, 1989, as amended at 58 FR 31469, June 3, 1993]

§26.4 Interpretations.

Except as specifically authorized by the Commission in writing, no interpretation of the meaning of the regulations in this part by any officer or employee of the Commission other than a written interpretation by the General Counsel will be recognized to be binding upon the Commission.

§26.6 Exemptions.

The Commission may, upon application of any interested person or upon its own initiative, grant such exemptions from the requirements of the regulations in this part as it determines are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest.

§26.8 Information collection requirements: OMB approval.

(a) The Nuclear Regulatory Commission has submitted the information collection requirements contained in this part to the Office of Management

and Budget (OMB) for approval as required by the Paperwork Reduction Act (44 U.S.C. 3501 et seq.). The NRC may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB number. OMB has approved the information collection requirements contained in this part under control number 3150–0146.

(b) The approved information collection requirements contained in this part appear in §§ 26.20, 26.21, 26.22, 26.23, 26.24, 26.27, 26.29, 26.70, 26.71, 26.73, 26.80 and appendix A.

[54 FR 24494, June 7, 1989, as amended at 62 FR 52185, Oct. 6, 1997]

GENERAL PERFORMANCE OBJECTIVES

§ 26.10 General performance objectives.

Fitness-for-duty programs must:

(a) Provide reasonable assurance that nuclear power plant personnel, transporter personnel, and personnel of licensees authorized to possess or use formula quantities of SSNM, will perform their tasks in a reliable and trustworthy manner and are not under the influence of any substance, legal or illegal, or mentally or physically impaired from any cause, which in any way adversely affects their ability to safely and competently perform their duties;

(b) Provide reasonable measures for the early detection of persons who are not fit to perform activities within the scope of this part; and

(c) Have a goal of achieving a drug-free workplace and a workplace free of the effects of such substances.

[54 FR 24494, June 7, 1989, as amended at 58 FR 31469, June 3, 1993]

PROGRAM ELEMENTS AND PROCEDURES

§ 26.20 Written policy and procedures.

Each licensee subject to this part shall establish and implement written policies and procedures designed to meet the general performance objectives and specific requirements of this part. Each licensee shall retain a copy of the current written policy and procedures as a record until the Commission terminates each license for which the policy and procedures were developed and, if any portion of the policies and procedures are superseded, retain the superseded material for three years after each change. As a minimum, written policies and procedures must address fitness for duty through the following:

(a) An overall description of licensee policy on fitness for duty. The policy must address use of illegal drugs and abuse of legal drugs (e.g., alcohol, prescription and over-the-counter drugs). Written policy documents must be in sufficient detail to provide affected individuals with information on what is expected of them, and what consequences may result from lack of adherence to the policy. As a minimum, the written policy must prohibit the consumption of alcohol—

(1) Within an abstinence period of at least 5 hours preceding any scheduled working tour, and

(2) During the period of any working tour.

Licensee policy should also address other factors that could affect fitness for duty such as mental stress, fatigue and illness.

(b) A description of programs which are available to personnel desiring assistance in dealing with drug, alcohol, or other problems that could adversely affect the performance of activities within the scope of this part.

(c) Procedures to be utilized in testing for drugs and alcohol, including procedures for protecting the employee and the integrity of the specimen, and the quality controls used to ensure the test results are valid and attributable to the correct individual.

(d) A description of immediate and follow-on actions which will be taken, and the procedures to be utilized, in those cases where employees, vendors, or contractors assigned to duties within the scope of this part are determined to have been involved in the use, sale, or possession of illegal drugs; or to have consumed alcohol during the mandatory pre-work abstinence period, while on duty, or to excess prior to reporting to duty as demonstrated with a test that can be used to determine blood alcohol concentration.

(e) A procedure that will ensure that persons called in to perform an unscheduled working tour are fit to perform the task assigned. As a minimum, this procedure must—

(1) Require a statement to be made by a called-in person as to whether he or she has consumed alcohol within the length of time stated in the pre-duty abstinence policy;

(2) If alcohol has been consumed within this period, require a determination of fitness for duty by breath analysis or other means; and

(3) Require the establishment of controls and conditions under which a person who has been called-in can perform work, if necessary, although alcohol has been consumed. Consumption of alcohol during the abstinence period shall not by itself preclude a licensee from using individuals needed to respond to an emergency.

(f) The Commission may at any time review the licensee's written policy and procedures to assure that they meet the performance objectives of this part.

§26.21 Policy communications and awareness training.

(a) Persons assigned to activities within the scope of this part shall be provided with appropriate training to ensure they understand—

(1) Licensee policy and procedures, including the methods that will be used to implement the policy;

(2) The personal and public health and safety hazards associated with abuse of drugs and misuse of alcohol;

(3) The effect of prescription and over-the-counter drugs and dietary conditions on job performance and on chemical test results, and the role of the Medical Review Officer;

(4) Employee assistance programs provided by the licensee; and

(5) What is expected of them and what consequences may result from lack of adherence to the policy,

(b) Initial training must be completed prior to assignment to activities within the scope of this part. Refresher training must be completed on a nominal 12 month frequency or more frequently where the need is indicated. A record of the training must be retained for a period of at least three years.

§26.22 Training of supervisors and escorts.

(a) Managers and supervisors of activities within the scope of this part must be provided appropriate training to ensure they understand—

(1) Their role and responsibilities in implementing the program;

(2) The roles and responsibilities of others, such as the personnel, medical, and employee assistance program staffs;

(3) Techniques for recognizing drugs and indications of the use, sale, or possession of drugs;

(4) Behavioral observation techniques for detecting degradation in performance, impairment, or changes in employee behavior; and

(5) Procedures for initiating appropriate corrective action, to include referral to the employee assistance program.

(b) Persons assigned to escort duties shall be provided appropriate training in techniques for recognizing drugs and indications of the use, sale, or possession of drugs, techniques for recognizing aberrant behavior, and the procedures for reporting problems to supervisory or security personnel.

(c) Initial training must be completed prior to assignment of duties within the scope of this part and within 3 months after initial supervisory assignment, as applicable. Refresher training must be completed on a nominal 12 month frequency, or more frequently where the need is indicated. A record of the training must be retained for a period of at least three years.

§26.23 Contractors and vendors.

(a) All contractor and vendor personnel performing activities within the scope of this part for a licensee must be subject to either the licensee's program relating to fitness for duty, or to a program, formally reviewed and approved by the licensee, which meets the requirements of this part. Written agreements between licensees and contractors or vendors for activities within the scope of this part must be retained for the life of the contract and will clearly show that—

(1) The contractor or vendor is responsible to the licensee for adhering

to the licensee's fitness-for-duty policy, or maintaining and adhering to an effective fitness-for-duty program; which meets the standards of this part; and

(2) Personnel having been denied access or removed from activities within the scope of this part at any nuclear power plant for violations of a fitness-for-duty policy will not be assigned to work within the scope of this part without the knowledge and consent of the licensee.

(b) Each licensee subject to this part shall assure that contractors whose own fitness-for-duty programs are relied on by the licensee adhere to an effective program, which meets the requirements of this part, and shall conduct audits pursuant to §26.80 for this purpose.

§ 26.24 Chemical and alcohol testing.

(a) To provide a means to deter and detect substance abuse, the licensee shall implement the following chemical testing programs for persons subject to this part:

(1) Testing within 60 days prior to the initial granting of unescorted access to protected areas or assignment to activities within the scope of this part.

(2) Unannounced drug and alcohol tests imposed in a statistically random and unpredictable manner so that all persons in the population subject to testing have an equal probability of being selected and tested. The tests must be administered so that a person completing a test is immediately eligible for another unannounced test. As a minimum, tests must be administered on a nominal weekly frequency and at various times during the day. Random testing must be conducted at an annual rate equal to at least 50 percent of the workforce.

(3) Testing for-cause, i.e., as soon as possible following any observed behavior indicating possible substance abuse; after accidents involving a failure in individual performance resulting in personal injury, in a radiation exposure or release of radioactivity in excess of regulatory limits, or actual or potential substantial degradations of the level of safety of the plant if there is reasonable suspicion that the worker's behavior contributed to the event; or after receiving credible information that an individual is abusing drugs or alcohol.

(4) Follow-up testing on an unannounced basis to verify continued abstention from the use of substances covered under this part.

(b) Testing for drugs and alcohol, at a minimum, must conform to the "Guidelines for Drug and Alcohol Testing Programs," issued by the Nuclear Regulatory Commission and appearing in appendix A to this part, hereinafter referred to as the NRC Guidelines. Licensees, at their discretion, may implement programs with more stringent standards (e.g., lower cutoff levels, broader panel of drugs). All requirements in this part still apply to persons who fail a more stringent standard, but do not test positive under the NRC Guidelines. Management actions must be the same with the more stringent standards as if the individual had failed the NRC standards.

(c) Licensees shall test for all substances described in paragraph 2.1(a) of the NRC Guidelines. In addition, licensees may consult with local law enforcement authorities, hospitals, and drug counseling services to determine whether other substances with abuse potential are being used in the geographical locale of the facility and the local workforce. When appropriate, other substances so identified may be added to the panel of substances for testing. Appropriate cutoff limits must be established by the licensee for these substances.

(d)(1) Licensees may conduct initial screening tests of an aliquot before forwarding selected specimens to a laboratory certified by the Department of Health and Human Services (HHS), provided the licensee's staff possesses the necessary training and skills for the tasks assigned, the staff's qualifications are documented, and adequate quality controls for the testing are implemented. Quality control procedures for initial screening tests by a licensee's testing facility must include the processing of blind performance test specimens and the submission to the HHS-certified laboratory of a sampling of specimens initially tested as negative. Except for the purposes discussed

below, access to the results of preliminary tests must be limited to the licensee's testing staff, the Medical Review Officer (MRO), the Fitness-for-Duty Program Manager, and the employee assistance program staff, when appropriate.

(2) No individual may be removed or temporarily suspended from unescorted access or be subjected to other administrative action based solely on an unconfirmed positive result from any drug test, other than for marijuana (THC) or cocaine, unless other evidence indicates that the individual is impaired or might otherwise pose a safety hazard. With respect to onsite initial screening tests for marijuana (THC) and cocaine, licensee management may be informed and licensees may temporarily suspend individuals from unescorted access or from normal duties or take lesser administrative actions against the individual based on an unconfirmed presumptive positive result provided the licensee complies with the following conditions:

(i) For the drug for which action will be taken, at least 85 percent of the specimens which were determined to be presumptively positive as a result of preliminary onsite screening tests during the last 6-month data reporting period submitted to the Commission under §26.71(d) were subsequently reported as positive by the HHS-certified laboratory as the result of a GC/MS confirmatory test.

(ii) There is no loss of compensation or benefits to the tested person during the period of temporary administrative action.

(iii) Immediately upon receipt of a negative report from the HHS-certified laboratory, any matter which could link the individual to a temporary suspension is eliminated from the tested individual's personnel record or other records.

(iv) No disclosure of the temporary removal or suspension of, or other administrative action against, an individual whose test is not subsequently confirmed as positive by the MRO may be made in response to a suitable inquiry conducted under the provisions of §26.27(a), a background investigation conducted under the provisions of §73.56, or to any other inquiry or investigation. For the purpose of assuring that no records have been retained, access to the system of files and records must be provided to licensee personnel conducting appeal reviews, inquiries into an allegation, or audits under the provisions of §26.80, or to an NRC inspector or other Federal officials. The tested individual must be provided a statement that the records in paragraph (d)(2)(iii) of this section have not been retained and must be informed in writing that the temporary removal or suspension or other administrative action that was taken will not be disclosed, and need not be disclosed by the individual, in response to requests for information concerning removals, suspensions, administrative actions or history of substance abuse.

(e) The Medical Review Officer's review of the test results must be completed and licensee management notified within 10 days of the initial presumptive positive screening test.

(f) All testing of specimens for urine drug testing, except onsite testing under paragraph (d) above, must be performed in a laboratory certified by the U.S. Department of Health and Human Services for that purpose consistent with its standards and procedures for certification. Except for suspect specimens submitted for special processing (Section 2.7(d) of appendix A), all specimens sent to certified laboratories shall be subject to initial screening by the laboratory and all specimens screened as presumptively positive shall be subject to confirmation testing by the laboratory. Licensees shall submit blind performance test specimens to certified laboratories in accordance with the NRC Guidelines (appendix A).

(g) Tests for alcohol must be administered by breath analysis using breath alcohol analyses devices meeting evidential standards described in section 2.7(O)(3) of appendix A. A breath alcohol content indicating a blood alcohol concentration of 0.04 percent or greater must be a positive test result. The confirmatory test for alcohol shall be done with another breath measurement instrument. Should the person demand further confirmation, the test must be

a gas chromatography analysis of blood.

[54 FR 24494, June 7, 1989, as amended at 56 FR 41926, Aug. 26, 1991; 58 FR 31469, June 3, 1993; 59 FR 507, Jan. 5, 1994]

§ 26.25 Employee assistance programs (EAP).

Each licensee subject to this part shall maintain an employee assistance program to strengthen fitness-for-duty programs by offering assessment, short-term counseling, referral services, and treatment monitoring to employees with problems that could adversely affect the performance of activities within the scope of this part. Employee assistance programs should be designed to achieve early intervention and provide for confidential assistance. The employee assistance program staff shall inform licensee management when a determination has been made that any individual's condition constitutes a hazard to himself or herself or others (including those who have self-referred).

§ 26.27 Management actions and sanctions to be imposed.

(a)(1) The licensee shall obtain a written statement from the individual as to whether activities within the scope of this part were ever denied the individual before the initial—

(i) Granting of unescorted access to a nuclear power plant protected area;

(ii) Granting of unescorted access by a formula quantity SSNM licensee to Category IA Material;

(iii) Assignment to create or the initial granting of access to safeguards of procedures for SSNM;

(iv) Assignment to measure Category IA Material;

(v) Assignment to transport or escort Category IA Material;

(vi) Assignment to guard Category IA Material; or

(vii) Assignment to activities within the scope of this part to any person.

(2) The licensee, as applicable, shall complete a suitable inquiry on a best-efforts basis to determine if that person was, in the past—

(i) Tested positive for drugs or use of alcohol that resulted in on-duty impairment;

(ii) Subject to a plan for treating substance abuse (except for self-referral for treatment);

(iii) Removed from activities within the scope of this part;

(iv) Denied unescorted access at any other nuclear power plant;

(v) Denied unescorted access to SSNM;

(vi) Removed from responsibilities to create or have access to safeguards records or procedures for SSNM;

(vii) Removed from responsibilities to measure SSNM;

(viii) Removed from the responsibilities of transporting or escorting SSNM; or

(ix) Removed from the responsibilities of guarding SSNM at any other facility in accordance with a fitness-for-duty policy.

(3) If a record of the type described in paragraph (a)(2) of this section is established, the new assignment to activities within the scope of this part or granting of unescorted access must be based upon a management and medical determination of fitness for duty and the establishment of an appropriate follow-up testing program, provided the restrictions of paragraph (b) of this section are observed. To meet this requirement, the identity of persons denied unescorted access or removed under the provisions of this part and the circumstances for the denial or removal, including test results, will be made available in response to a licensee's, contractor's or vendor's inquiry supported by a signed release from the individual.

(4) Failure to list reasons for removal or revocation of unescorted access is sufficient cause for denial of unescorted access. Temporary access provisions are not affected by this part if the prospective worker passes a chemical test conducted according to the requirements of § 26.24(a)(1).

(b) Each licensee subject to this part shall, as a minimum, take the following actions. Nothing herein shall prohibit the licensee from taking more stringent action.

(1) Impaired workers, or those whose fitness may be questionable, shall be removed from activities within the scope of this part, and may be returned

only after determined to be fit to safely and competently perform activities within the scope of this part.

(2) Lacking any other evidence to indicate the use, sale, or possession of illegal drugs onsite, a confirmed positive test result must be presumed to be an indication of offsite drug use. The first confirmed positive test must, as a minimum, result in immediate removal from activities within the scope of this part for at least 14 days and referral to the EAP for assessment and counseling during any suspension period. Plans for treatment, follow-up, and future employment must be developed, and any rehabilitation program deemed appropriate must be initiated during such suspension period. Satisfactory management and medical assurance of the individual's fitness to adequately perform activities within the scope of this part must be obtained before permitting the individual to be returned to these activities. Any subsequent confirmed positive test must result in, as applicable—

(i) Removal from unescorted access to nuclear power plant protected areas;

(ii) Removal from unescorted access to Category IA Material;

(iii) Removal from responsibilities to create or have access to records or procedures for safeguarding SSNM;

(iv) Removal from responsibilities to measure Category IA Material;

(v) Removal from the responsibilities of transporting or escorting Category IA Material;

(vi) Removal from the responsibilities of guarding Category IA Material at any other licensee facility; and

(vii) Removal from activities within the scope of this part for a minimum of 3 years from the date of removal.

(3) Any individual determined to have been involved in the sale, use, or possession of illegal drugs, while, as applicable, within a protected area of any nuclear power plant, within a facility that is licensed to possess or use SSNM, or within a transporter's facility or vehicle, must be removed from activities within the scope of this part. The individual may not—

(i) Be granted unescorted access to nuclear power plant protected areas;

(ii) Be granted unescorted access to Category IA Material;

(iii) Be given responsibilities to create or have access to safeguards records or procedures for SSNM;

(iv) Be given responsibilities to measure Category IA Material;

(v) Be given responsibilities to transport or escort Category IA Material;

(vi) Be given responsibilities to guard Category IA Material; or

(vii) Be assigned to activities within the scope of this part for a minimum of 5 years from the date of removal.

(4) Persons removed for periods of three years or more under the provisions of paragraphs (b) (2) and (3) of this section for the illegal sale, use or possession of drugs and who would have been removed under the current standards of a hiring licensee, may be granted unescorted access and assigned duties within the scope of this part by a licensee subject to this part only when the hiring licensee receives satisfactory medical assurance that the person has abstained from drugs for at least three years. Satisfactory management and medical assurance of the individual's fitness to adequately perform activities within the scope of this part must be obtained before permitting the individual to perform activities within the scope of this part. Any pers granted unescorted access or whose cess is reinstated under these pro sions must be given unannounced f low-up tests at least once every mor for four months and at least once ev three months for the next two ye and eight months after unescorted cess is reinstated to verify contin abstinence from proscribed substan Any confirmed use of drugs thro this process or any other determi tion of subsequent involvement in sale, use or possession of illegal stances must result in permanent nial of unescorted access.

(5) Paragraphs (b) (2), (3), and (4) of this section do not apply to alcohol, valid prescriptions, or over-the-counter drugs. Licensee sanctions for confirmed misuse of alcohol, valid prescription, and over-the-counter drugs shall be sufficient to deter abuse of legally obtainable substances as a substitute for abuse of proscribed drugs.

(c) Refusal to provide a specimen for testing and resignation prior to removal for violation of company fitness-

for-duty policy concerning drugs must be recorded as removals for cause. These records must be retained for the purpose of meeting the requirements of § 26.27(a).

(d) If a licensee has a reasonable belief that an NRC employee may be under the influence of any substance, or otherwise unfit for duty, the licensee may not deny access but shall escort the individual. In any instance of this occurrence, the appropriate Regional Administrator must be notified immediately by telephone. During other than normal working hours, the NRC Operations Center must be notified.

[54 FR 24494, June 7, 1989, as amended at 58 FR 31470, June 3, 1993]

§ 26.28 Appeals.

Each licensee subject to this part, and each contractor or vendor implementing a fitness-for-duty program under the provisions of § 26.23, shall establish a procedure for licensee and contractor or vendor employees to appeal a positive alcohol or drug determination. The procedure must provide notice and an opportunity to respond and may be an impartial internal management review. A licensee review procedure need not be provided to employees of contractors or vendors when the contractor or vendor is administering his own alcohol and drug testing.

§ 26.29 Protection of information.

(a) Each licensee subject to this part, who collects personal information on an individual for the purpose of complying with this part, shall establish and maintain a system of files and procedures for the protection of the personal information. This system must be maintained until the Commission terminates each license for which the system was developed.

(b) Licensees, contractors, and vendors shall not disclose the personal information collected and maintained to persons other than assigned Medical Review Officers, other licensees or their authorized representatives legitimately seeking the information as required by this part for unescorted access decisions and who have obtained a release from current or prospective employees or contractor personnel, NRC representatives, appropriate law enforcement officials under court order, the subject individual or his or her representative, or to those licensee representatives who have a need to have access to the information in performing assigned duties, including audits of licensee's, contractor's, and vendor's programs, to persons deciding matters on review or appeal, and to other persons pursuant to court order. This section does not authorize the licensee, contractor, or vendor to withhold evidence of criminal conduct from law enforcement officials.

INSPECTIONS, RECORDS, AND REPORTS

§ 26.70 Inspections.

(a) Each licensee subject to this part shall permit duly authorized representatives of the Commission to inspect, copy, or take away copies of its records and inspect its premises, activities, and personnel as may be necessary to accomplish the purposes of this part.

(b) Written agreements between licensees and their contractors and vendors must clearly show that the—

(1) Licensee is responsible to the Commission for maintaining an effective fitness-for-duty program in accordance with this part; and

(2) Duly authorized representatives of the Commission may inspect, copy, or take away copies of any licensee, contractor, or vendor's documents, records, and reports related to implementation of the licensee's, contractor's, or vendor's fitness-for-duty program under the scope of the contracted activities.

§ 26.71 Recordkeeping requirements.

Each licensee subject to this part and each contractor and vendor implementing a licensee approved program under the provisions of § 26.23 shall—

(a) Retain records of inquiries conducted in accordance with § 26.27(a), that result in the granting of unescorted access to protected areas, until five years following termination of such access authorizations;

(b) Retain records of confirmed positive test results which are concurred in by the Medical Review Officer, and the related personnel actions for a period of at least five years;

(c) Retain records of persons made ineligible for three years or longer for assignment to activities within the scope of this part under the provisions of §26.27(b) (2), (3), (4) or (c), until the Commission terminates each license under which the records were created; and

(d) Collect and compile fitness-for-duty program performance data on a standard form and submit this data to the Commission within 60 days of the end of each 6-month reporting period (January–June and July–December). The data for each site (corporate and other support staff locations may be separately consolidated) must include: random testing rate; drugs tested for and cut-off levels, including results of tests using lower cut-off levels and tests for other drugs; workforce populations tested; numbers of tests and results by population, and type of test (i.e., pre-access, random, for-cause, etc.); substances identified; summary of management actions; and a list of events reported. The data must be analyzed and appropriate actions taken to correct program weaknesses. The data and analysis must be retained for three years. Any licensee choosing to temporarily suspend individuals under the provisions of §26.24(d) must report test results by process stage (i.e., onsite screening, laboratory screening, confirmatory tests, and MRO determinations) and the number of temporary suspensions or other administrative actions taken against individuals based on onsite unconfirmed screening positives for marijuana (THC) and for cocaine.

[54 FR 24494, June 7, 1989, as amended at 57 FR 55444, Nov. 25, 1992]

§26.73 Reporting requirements.

(a) Each licensee subject to this part shall inform the Commission of significant fitness-for-duty events including:

(1) Sale, use, or possession of illegal drugs within the protected area and,

(2) Any acts by any person licensed under 10 CFR part 55 to operate a power reactor or by any supervisory personnel assigned to perform duties within the scope of this part—

(i) Involving the sale, use, or possession of a controlled substance,

(ii) Resulting in confirmed positive tests on such persons,

(iii) Involving use of alcohol within the protected area, or

(iv) Resulting in a determination of unfitness for scheduled work due to the consumption of alcohol.

(b) Notifications must be made to the NRC Operations Center by telephone within 24 hours of the discovery of the event by the licensee.

(c) Fitness-for-duty events shall be reported under this section rather than reported under the provisions of §73.71.

(d) By November 30, 1993 each licensee who is authorized to possess, use, or transport formula quantities of SSNM shall certify to the NRC that it has implemented a fitness-for-duty program that meets the requirements of 10 CFR part 26. The certification shall describe any licensee cut-off levels more stringent than those imposed by this part.

[54 FR 24494, June 7, 1989; 54 FR 47451, Nov. 14, 1989, as amended at 58 FR 31470, June 3, 1993]

AUDITS

§26.80 Audits.

(a) Each licensee subject to this part shall audit the fitness-for-duty program nominally every 12 months. In addition, audits must be conducted, nominally every 12 months, of those portions of fitness-for-duty programs implemented by contractors and vendors. Licensees may accept audits of contractors and vendors conducted by other licensees and need not re-audit the same contractor or vendor for the same period of time. Each sharing utility shall maintain a copy of the audit report, to include findings, recommendations and corrective actions. Licensees retain responsibility for the effectiveness of contractor and vendor programs and the implementation of appropriate corrective action.

(b) Audits must focus on the effectiveness of the program and be conducted by individuals qualified in the subject(s) being audited, and independent of both fitness-for-duty program management and personnel directly responsible for implementation of the fitness-for-duty program.

(c) The result of the audit, along with recommendations, if any, must be documented and reported to senior corporate and site management. The resolution of the audit findings and corrective actions must be documented. These documents must be retained for three years. NRC Guidelines require licensee audits of HHS-certified laboratories as described in appendix A.

ENFORCEMENT

§ 26.90 Violations.

(a) An injunction or other court order may be obtained to prohibit a violation of any provision of—

(1) The Atomic Energy Act of 1954, as amended;

(2) Title II of the Energy Reorganization Act of 1974; or

(3) Any regulation or order issued under these Acts.

(b) A court order may be obtained for the payment of a civil penalty imposed under section 234 of the Atomic Energy Act of 1954, for violations of—

(1) Section 53, 57, 62, 63, 81, 82, 101, 103, 104, 107, or 109 of the Act;

(2) Section 206 of the Energy Reorganization Act of 1974;

(3) Any rule, regulation, or order issued under these Sections;

(4) Any term, condition, or limitation of any license issued under these Sections; or

(5) Any provisions for which a license may be revoked under section 186 of the Atomic Energy Act of 1954.

[54 FR 24494, June 7, 1989, as amended at 57 FR 55072, Nov. 24, 1992]

§ 26.91 Criminal penalties.

(a) Section 223 of the Atomic Energy Act of 1954, as amended, provides for criminal sanctions for willful violation of, attempted violation of, or conspiracy to violate, any regulation issued under sections 161b, 161i, or 161o of the Act. For purposes of section 223, all the regulations in part 26 are issued under one or more of sections 161b, 161i, or 161o, except for the sections listed in paragraph (b) of this section.

(b) The regulations in part 26 that are not issued under sections 161b, 161i, or 161o for the purposes of section 223 are as follows: §§ 26.1, 26.2, 26.3, 26.4, 26.6, 26.8, 26.90, and 26.91.

[57 FR 55072, Nov. 24, 1992]

APPENDIX A TO PART 26—GUIDELINES FOR DRUG AND ALCOHOL TESTING PROGRAMS

SUBPART A—GENERAL

1.1 Applicability

(1) These guidelines apply to licensees authorized to operate nuclear power reactors and licensees who are authorized to possess, use, or transport formula quantities of strategic special nuclear material (SSNM).

(2) Licensees may set more stringent cutoff levels than specified herein or test for substances other than specified herein and shall inform the Commission of such deviation within 60 days of implementing such change. Licensees may not deviate from the provisions of these guidelines without the written approval of the Commission.

(3) Only laboratories which are HHS-certified are authorized to perform urine drug testing for NRC licensees, vendors, and licensee contractors.

1.2 Definitions

For the purposes of this part, the following definitions apply:

"Aliquot." A portion of a specimen used for testing.

"BAC." Blood alcohol concentration (BAC), which can be measured directly from blood or derived from a measure of the concentration of alcohol in a breath specimen, is

a measure of the mass of alcohol in a volume of blood such that an individual with 100 mg of alcohol per 100 ml of blood has a BAC of 0.10 percent.

"Commission." The U.S. Nuclear Regulatory Commission or its duly authorized representatives.

"Chain-of-custody." Procedures to account for the integrity of each specimen by tracking its handling and storage from the point of specimen collection to final disposition of the specimen.

"Collection site." A place designated by the licensee where individuals present themselves for the purpose of providing a specimen of their urine, breath, and/or blood to be analyzed for the presence of drugs or alcohol.

"Collection site person." A person who instructs and assists individuals at a collection site and who receives and makes an initial examination of the specimen(s) provided by those individuals. A collection site person shall have successfully completed training to carry out this function or shall be a licensed medical professional or technician who is provided instructions for collection under this part and certifies completion as required herein. In any case where: (a) a collection is observed or (b) collection is monitored by nonmedical personnel, the collection site person must be a person of the same gender as the donor.

"Confirmatory test." A second analytical procedure to identify the presence of a specific drug or drug metabolite which is independent of the initial screening test and which uses a different technique and chemical principle from that of the initial test in order to ensure reliability and accuracy. (At this time gas chromatography/mass spectrometry [GC/MS] is the only authorized confirmation method for cocaine, marijuana, opiates, amphetamines, phencyclidine). For determining blood alcohol levels, a "confirmatory test" means a second test using another breath alcohol analysis device. Further confirmation upon demand will be by gas chromatography analysis of blood.

"Confirmed positive test." The result of a confirmatory test that has established the presence of drugs, drug metabolites, or alcohol in a specimen at or above the cut-off level, and that has been deemed positive by the Medical Review Officer (MRO) after evaluation. A "confirmed positive test" for alcohol can also be obtained as a result of a confirmation of blood alcohol levels with a second breath analysis without MRO evaluation.

"HHS-certified laboratory." A urine and blood testing laboratory that maintains certification to perform drug testing under the Department of Health and Human Services (HHS) "Mandatory Guidelines for Federal Workplace Drug Testing Programs" (53 FR 11970).

"Illegal drugs." Those drugs included in Schedules I through V of the Controlled Substances Act (CSA), but not when used pursuant to a valid prescription or when used as otherwise authorized by law.

"Initial or screening test." An immunoassay screen for drugs or drug metabolites to eliminate "negative" urine specimens from further consideration or the first breathalyzer test for alcohol.

"Licensee's testing facility." A drug testing facility operated by the licensee or one of its vendors or contractors to perform the initial testing of urine samples and to perform initial breath tests for alcohol. Such a testing facility is optional and not required to maintain HHS certification under this part.

"Medical Review Officer." A licensed physician responsible for receiving laboratory results generated by an employer's drug testing program who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's positive test result together with his or her medical history and any other relevant biomedical information.

"Permanent record book." A permanently bound book in which identifying data on each specimen collected at a collection site are permanently recorded in the sequence of collection.

"Reason to believe." Reason to believe that a particular individual may alter or substitute the urine specimen.

"Split sample." A portion of a urine specimen that may be stored by the licensee to be tested in the event of appeal.

SUBPART B—SCIENTIFIC AND TECHNICAL REQUIREMENTS

2.1 The Substances

(a) Licensees shall, as a minimum, test for marijuana, cocaine, opiates, amphetamines, phencyclidine, and alcohol for pre-access, for-cause, random, and follow-up tests.

(b) Licensees may test for any illegal drugs during a for-cause test, or analysis of any specimen suspected of being adulterated or diluted through hydration or other means.

(c) Licensees shall establish rigorous testing procedures that are consistent with the intent of these guidelines for any other drugs not specified in these guidelines for which testing is authorized under 10 CFR 26, so that the appropriateness of the use of these substances can be evaluated by the Medical Review Officer to ensure that individuals granted unescorted access are fit for maintaining access to and for performing duties in protected areas.

(d) Specimens collected under NRC regulations requiring compliance with this part may only be designated or approved for testing as described in this part and shall not be used to conduct any other analysis or test

without the permission of the tested individual.

(e) This section does not prohibit procedures reasonably incident to analysis of a specimen for controlled substances (e.g., determination of pH on tests for specific gravity, creatinine concentration, or presence of adulterants).

2.2 General Administration of Testing

The licensee testing facilities and HHS-certified laboratories described in this part shall develop and maintain clear and well-documented procedures for collection, shipment, and accession of urine and blood specimens under this part. Such procedures shall include, as a minimum, the following:

(a) Use of a chain-of-custody form. The original shall accompany the specimen to the HHS-certified laboratory. A copy shall accompany any split sample. The form shall be a permanent record on which is retained identity data (or codes) on the employee and information on the specimen collection process and transfers of custody of the specimen.

(b) Use of a tamperevident sealing system designed in a manner such that the specimen container top can be sealed against undetected opening, the container can be identified with a unique identifying number identical to that appearing on the chain-of-custody form, and space has been provided to initial the container affirming its identity. For purposes of clarity, this requirement assumes use of a system made up of one or more pre-printed labels and seals (or a unitary label/seal), but use of other, equally effective technologies is authorized.

(c) Use of a shipping container in which one or more specimens and associated paperwork may be transferred and which can be sealed and initialled to prevent undetected tampering.

(d) Written procedures, instructions, and training shall be provided as follows:

(1) Licensee collection site procedures and training of collection site personnel shall clearly emphasize that the collection site person is responsible for maintaining the integrity of the specimen collection and transfer process, carefully ensuring the modesty and privacy of the individual tested, and is to avoid any conduct or remarks that might be construed as accusatorial or otherwise offensive or inappropriate.

(2) A non-medical collection site person shall receive training in compliance with this appendix and shall demonstrate proficiency in the application of this appendix prior to serving as a collection site person. A medical professional, technologist, or technician licensed or otherwise approved to practice in the jurisdiction in which collection occurs may serve as a collection site person if that person is provided the instructions described in 2.2(3) and performs collections in accordance with those instructions.

(3) Collection site persons shall be provided with detailed, clearly-illustrated, written instructions on the collection of specimens in compliance with this part. Individuals subject to testing shall also be provided standard written instructions setting forth their responsibilities.

(4) The option to provide a blood specimen for confirmatory analysis following a positive breath test shall be specified in the written instructions provided to individuals tested. The instructions shall also state that failure to request a confirmatory blood test indicates that the individual accepts the breath test results.

2.3 Preventing Subversion of Testing

Licensees shall carefully select and monitor persons responsible for administering the testing program (e.g., collection site persons, laboratory technicians, specimen couriers, and those selecting and notifying personnel to be tested), based upon the highest standards for honesty and integrity, and shall implement measures to ensure that these standards are maintained. As a minimum, these measures shall ensure that the integrity of such persons is not compromised or subject to efforts to compromise due to personal relationships with any individuals subject to testing.

As a minimum:

(1) Supervisors, co-workers, and relatives of the individual being tested shall not perform any collection, assessment, or evaluation procedures.

(2) Appropriate background checks and psychological evaluations shall be completed prior to assignment of any tasks associated with the administration of the program, and shall be conducted at least once every three years.

(3) Persons responsible for administering the testing program shall be subjected to a behavioral observation program designed to assure that they continue to meet the highest standards for honesty and integrity.

2.4 Specimen Collection Procedures

(a) "Designation of Collection Site." Each drug testing program shall have one or more designated collection sites which have all necessary personnel, materials, equipment, facilities, and supervision to provide for the collection, security, temporary storage, and shipping or transportation of urine or blood specimens to a drug testing laboratory. A properly equipped mobile facility that meets the requirements of this part is an acceptable collection site.

(b) "Collection Site Person." A collection site person shall have successfully completed training to carry out this function. In any case where the collection of urine is observed, the collection site person must be a

person of the same gender as the donor. Persons drawing blood shall be qualified to perform that task.

(c) "Security." The purpose of this paragraph is to prevent unauthorized access which could compromise the integrity of the collection process or the specimen. Security procedures shall provide for the designated collection site to be secure. If a collection site facility cannot be dedicated solely to drug and alcohol testing, the portion of the facility used for testing shall be secured during that testing.

(1) A facility normally used for other purposes, such as a public rest room or hospital examining room, may be secured by visual inspection to ensure other persons are not present, and that undetected access (e.g., through a rear door not in the view of the collection site person) is impossible. Security during collection may be maintained by effective restriction of access to collection materials and specimens. In the case of a public rest room, the facility must be posted against access during the entire collection procedure to avoid embarrassment to the individual or distraction of the collection site person.

(2) If it is impractical to maintain continuous physical security of a collection site from the time the specimen is presented until the sealed container is transferred for shipment, the following minimum procedures shall apply: The specimen shall remain under the direct control of the collection site person from delivery to its being sealed in a mailer or secured for shipment. The mailer shall be immediately mailed, maintained in secure storage, or remain until mailed under the personal control of the collection site person. These minimum procedures shall apply to the mailing of specimens to licensee testing facilities from collection sites (except where co-located) as well as to the mailing of specimens to HHS-certified laboratories. As an option, licensees may ship several specimens via courier in a locked or sealed shipping container.

(d) "Chain-of-Custody." Licensee chain-of-custody forms shall be properly executed by authorized collection site personnel upon receipt of specimens. Handling and transportation of urine and blood specimens from one authorized individual or place to another shall always be accomplished through chain-of-custody procedures. Every effort shall be made to minimize the number of persons handling the specimens.

(e) "Access to Authorized Personnel Only." No unauthorized personnel shall be permitted in any part of the designated collection site where specimens are collected or stored. Only the collection site person may handle specimens prior to their securement in the mailing or shipping container or monitor or observe specimen collection (under the conditions specified in this part). In order to promote security of specimens, avoid distraction of the collection site person, and ensure against any confusion in the identification of specimens, a collection site person shall conduct only one collection procedure at any given time. For this purpose, a collection procedure is complete when the specimen container has been sealed and initialed, the chain-of-custody form has been executed, and the individual has departed the collection site.

(f) "Privacy." Procedures for collecting urine specimens shall allow individual privacy unless there is reason to believe that a particular individual may alter or substitute the specimen to be provided. For purposes of this appendix the following circumstances are the exclusive grounds constituting a reason to believe that the individual may alter or substitute a urine specimen:

(1) The individual has presented a urine specimen that falls outside the normal temperature range, and the individual declines to provide a measurement of oral body temperature by sterile thermometer, as provided in paragraph (g)(14) of this appendix, or the oral temperature does not equal or exceed that of the specimen.

(2) The last urine specimen provided by the individual (i.e., on a previous occasion) was determined by the laboratory to have a specific gravity of less than 1.003 or a creatinine concentration below .2 g/L.

(3) The collection site person observes conduct clearly and unequivocally indicating an attempt to substitute or adulterate the sample (e.g., substitute urine in plain view, blue dye in specimen presented, etc.).

(4) The individual has previously been determined to have used a substance inappropriately or without medical authorization and the particular test is being conducted as a part of a rehabilitation program or on return to service after evaluation and/or treatment for a confirmed positive test result.

(g) "Integrity and Identity of Specimens." Licensees shall take precautions to ensure that a urine specimen is not adulterated or diluted during the collection procedure, that a blood sample or breath exhalent tube cannot be substituted or tampered with, and that the information on the specimen container and in the record book can identify the individual from whom the specimen was collected. The following minimum precautions shall be taken to ensure that authentic specimens are obtained and correctly identified:

(1) To deter the dilution of urine specimens at the collection site, toilet bluing agents shall be placed in toilet tanks wherever possible, so the reservoir of water in the toilet bowl always remains blue. There shall be no other source of water (e.g., no shower or sink) in the enclosure where urination occurs. If there is another source of water in the enclosure, it shall be effectively secured

or monitored to ensure it is not used (undetected) as a source for diluting the specimen.

(2) When an individual arrives at the collection site for a urine or breath test, the collection site person shall ensure that the individual is positively identified as the person selected for testing (e.g., through presentation of photo identification or identification by the employer's representative). If the individual's identity cannot be established, the collection site person shall not proceed with the collection.

(3) If the individual fails to arrive for a urine or breath test at the assigned time, the collection site person shall contact the appropriate authority to obtain guidance on the action to be taken.

(4) After the individual has been positively identified, the collection site person shall ask the individual to sign a consent-to-testing form and to list all of the prescription medications and over-the-counter preparations that he or she can remember using within the past 30 days.

(5) The collection site person shall ask the individual to remove any unnecessary outer garments such as a coat or jacket that might conceal items or substances that could be used to tamper with or adulterate the individual's urine, breath, or blood specimen. The collection site person shall ensure that all personal belongings such as a purse or briefcase remain with the outer garments outside of the room in which the blood, breath, or urine sample is collected. The individual may retain his or her wallet.

(6) The individual shall be instructed to wash and dry his or her hands prior to urination.

(7) After washing hands prior to urination, the individual shall remain in the presence of the collection site person and shall not have access to any water fountain, faucet, soap dispenser, cleaning agent or any other materials which could be used to adulterate the urine specimen.

(8) The individual may provide his/her urine specimen in the privacy of a stall or otherwise partitioned areas that allows for individual privacy.

(9) The collection site person shall note any unusual behavior or appearance in the permanent record book and on the chain-of-custody form.

(10) In the exceptional event that a designated collection site is inaccessible and there is an immediate requirement for urine specimen collection (e.g., an accident investigation), a public or on-site rest room may be used according to the following procedures. A collection site person of the same gender as the individual shall accompany the individual into the rest room which shall be made secure during the collection procedure. If possible, a toilet bluing agent shall be placed in the bowl and any accessible toilet tank. The collection site person shall remain in the rest room, but outside the stall, until the specimen is collected. If no bluing agent is available to deter specimen dilution, the collection site person shall instruct the individual not to flush the toilet until the specimen is delivered to the collection site person. After the collection site person has possession of the specimen, the individual will be instructed to flush the toilet and to participate with the collection site person in completing the chain-of-custody procedures.

(11) Upon receiving a urine specimen from the individual, the collection site person shall determine that it contains at least 60 milliliters of urine. If there is less than 60 milliliters of urine in the container, additional urine shall be collected in a separate container to reach a total of 60 milliliters. (The temperature of the partial specimen in each separate container shall be measured in accordance with paragraph (f)(13) of this section, and the partial specimens shall be combined in one container.) The individual may be given a reasonable amount of liquid to drink for this purpose (e.g., a glass of water). If the individual fails for any reason to provide 60 milliliters of urine, the collection site person shall contact the appropriate authority to obtain guidance on the action to be taken.

(12) After the urine specimen has been provided and submitted to the collection site person, the individual shall be allowed to wash his or her hands.

(13) Immediately after the urine specimen is collected, the collection site person shall measure the temperature of the specimen. The temperature measuring device used must accurately reflect the temperature of the specimen and not contaminate the specimen. The time from urination to temperature measurement is critical and in no case shall exceed 4 minutes.

(14) If the temperature of a urine specimen is outside the range of 32.5°- 37.7 °C/90.5°-99.8 °F, that is a reason to believe that the individual may have altered or substituted the specimen, and another specimen shall be collected under direct observation of a same gender collection site person and both specimens shall be forwarded to the laboratory for testing. An individual may volunteer to have his or her oral temperature taken to provide evidence to counter the reason to believe the individual may have altered or substituted the specimen caused by the specimen's temperature falling outside the prescribed range.

(15) Immediately after a urine specimen is collected, the collection site person shall also inspect the specimen to determine its color and look for any signs of contaminants. Any unusual findings shall be noted in the permanent record book.

(16) All urine specimens suspected of being adulterated or found to be diluted shall be forwarded to the laboratory for testing.

(17) Whenever there is reason to believe that a particular individual may alter or substitute the urine specimen to be provided, a second specimen shall be obtained as soon as possible under the direct observation of a same gender collection site person. Where appropriate, measures will be taken to prevent additional hydration.

(18) Alcohol breath tests shall be delayed at least 15 minutes if any source of mouth alcohol (e.g., breath fresheners) or any other substances are ingested (e.g., eating, smoking, regurgitation of stomach contents from vomiting or burping). The collection site person shall ensure that each breath specimen taken comes from the end, rather than the beginning, of the breath expiration. For each screening test, two breath specimens shall be collected from each individual no less than two minutes apart and no more than 10 minutes apart. The test results shall be considered accurate if the result of each measurement is within plus or minus 10 percent of the average of the two measurements. If the two tests do not agree, the breath tests shall be repeated on another evidential-grade breath analysis device. Confirmatory testing is accomplished by repeating the above procedure on another evidential-grade breath analysis device.

(19) If the alcohol breath tests indicates that the individual is positive for a BAC at or above the 0.04 percent cut-off level, the individual may request a confirmatory blood test, at his or her discretion. All vacuum tube and needle assemblies used for blood collection shall be factory-sterilized. The collection site person shall ensure that they remain properly sealed until used. Antiseptic swabbing of the skin shall be performed with a nonethanol antiseptic. Sterile procedures shall be followed when drawing blood and transferring the blood to a storage container; in addition, the container must be sterile and sealed.

(20) Both the individual being tested and the collection site person shall keep urine and blood specimens in view at all times prior to their being sealed and labeled. If a urine specimen is split (as described in Section 2.7(j)) and if any specimen is transferred to a second container, the collection site person shall request the individual to observe the splitting of the urine sample or the transfer of the specimen and the placement of the tamperevident seal over the container caps and down the sides of the containers.

(21) The collection site person and the individual shall be present at the same time during procedures outlined in paragraphs (h) through (j) of this section.

(22) The collection site person shall place securely on each container an identification label which contains the date, the individual's specimen number, and any other identification information provided or required by the drug testing program. If separate from the labels, the tamperevident seals shall also be applied.

(23) The individual shall initial the identification labels on the specimen containers for the purpose of certifying that it is the specimen collected from him or her.

(i) The individual shall be asked to read and sign a statement on either the chain-of-custody form or in the permanent record book certifying that the specimens identified as having been collected from him or her are in fact the specimen he or she provided.

(ii) The individual shall be provided an opportunity to set forth on the urine chain-of-custody form information concerning medications taken or administered in the past 30 days.

(24) The collection site person shall enter in the permanent record book all information identifying the specimens. The collection site person shall sign the permanent record book next to the identifying information.

(25) A higher level supervisor in the drug testing program shall review and concur in advance with any decision by a collection site person to obtain a urine specimen under the direct observation of a same gender collection site person based on a reason to believe that the individual may alter or substitute the specimen to be provided.

(26) The collection site person shall complete the chain-of-custody forms for both the aliquot and the split sample, if collected, and shall certify proper completion of the collection.

(27) The specimens and chain-of-custody forms are now ready for transfer to the laboratory or the licensee's testing facility. If the specimens are not immediately prepared for shipment, they shall be appropriately safeguarded during temporary storage.

(28) While any part of the above chain-of-custody procedures is being performed, it is essential that the specimens and custody documents be under the control of the involved collection site person. The collection site person shall not leave the collection site in the interval between presentation of the specimen by the individual and securement of the samples with identifying labels bearing the individual's specimen identification numbers and seals initialled by the individual. If the involved collection site person leaves his or her work station momentarily, the specimens and chain-of-custody forms shall be taken with him or her or shall be secured. If the collection site person is leaving for an extended period of time, the specimens shall be packaged for transfer to the laboratory before he or she leaves the site.

(h) "Collection Control." To the maximum extent possible, collection site personnel shall keep the individual's specimen containers within sight both before and after the individual has urinated or provided a breath or blood sample. After the specimen

is collected and whenever urine specimens are split, they shall be properly sealed and labeled. A chain-of-custody form shall be used for maintaining control and accountability of each specimen from the point of collection to final disposition of the specimen. The date and purpose shall be documented on the chain-of-custody form each time a specimen is handled or transferred, and every individual in the chain of custody shall be identified. Every effort shall be made to minimize the number of persons handling specimens.

(i) "Transportation to Laboratory or Testing Facility." Collection site personnel shall arrange to transfer the collected specimens to the drug testing laboratory or licensee testing facility. To transfer specimens offsite for initial screening and for a second screen and confirmatory analysis of presumptive positive specimens and for transferring suspect specimens to a laboratory for analysis under special processing [Section 2.7(d)], the specimens shall be placed in containers designed to minimize the possibility of damage during shipment (e.g., specimen boxes, padded mailers, or bulk shipping containers with that capability) and those containers shall be securely sealed to eliminate the possibility of undetected tampering. On the tape sealing the container, the collection site person shall sign and enter the date specimens were sealed in the containers for shipment. The collection site personnel shall ensure that the chain-of-custody documentation is attached to each container sealed for shipment to the drug testing laboratory.

(j) "Failure to Cooperate." If the individual refuses to cooperate with the urine collection or breath analysis process (e.g., refusal to provide a complete specimen, complete paperwork, initial specimen), then the collection site person shall inform the Medical Review Officer and shall document the non-cooperation in the permanent record book and on the specimen custody and control form. The Medical Review Officer shall report the failure to cooperate to the appropriate management. The provision of blood specimens for use to confirm a positive breath test for alcohol shall be entirely voluntary, at the individual's discretion. In the absence of a voluntary blood test the second positive breath test shall be considered a confirmed positive.

2.5. HHS-certified Laboratory Personnel

(a) "Day-to-Day Management of the HHS-certified Laboratories."

(1) The HHS-certified laboratory shall have a qualified individual to assume professional, organizational, educational, and administrative responsibility for the laboratories' drug testing facilities.

(2) This individual shall have documented scientific qualifications in analytical forensic toxicology. Minimum qualifications are:

(i) Certification as a laboratory director by the appropriate State in forensic or clinical laboratory toxicology; or

(ii) A Ph.D. in one of the natural sciences with an adequate undergraduate and graduate education in biology, chemistry, and pharmacology or toxicology, or

(iii) Training and experience comparable to a Ph.D. in one of the natural sciences, such as a medical or scientific degree with additional training and laboratory/research experience in biology, chemistry, and pharmacology or toxicology, and

(iv) In addition to the requirements in (i), (ii), and (iii) above, minimum qualifications also require:

(A) Appropriate experience in analytical forensic toxicology including experience with the analysis of biological material for drugs of abuse; and

(B) Appropriate training and/or experience in forensic applications of analytical toxicology, e.g., publications, court testimony, research concerning analytical toxicology of drugs of abuse, or other factors which qualify the individual as an expert witness in forensic toxicology.

(3) This individual shall be engaged in and responsible for the day-to-day management of the testing laboratory even where another individual has overall responsibility for an entire multispecialty laboratory.

(4) This individual shall be responsible for ensuring that there are enough personnel with adequate training and experience to supervise and conduct the work of their testing laboratories. He or she shall assure the continued competency of laboratory personnel by documenting their inservice training, reviewing their work performance, and verifying their skills.

(5) This individual shall be responsible for the laboratory's having a procedure manual which is complete, up-to-date, available for personnel performing tests, and followed by those personnel. The procedure manual shall be reviewed, signed, and dated by this responsible individual whenever procedures are first placed into use or changed or when a new individual assumes responsibility for management of the laboratory. Copies of all procedures and dates on which they are in effect shall be maintained. (Specific contents of the procedure manual are described in Section 2.7(0) of this appendix).

(6) This individual shall be responsible for maintaining a quality assurance program to assure the proper performance and reporting of all test results; for maintaining acceptable analytical performance for all controls and standards; for maintaining quality control testing; and for assuring and documenting the validity, reliability, accuracy, precision, and performance characteristics of each test and test system.

(7) This individual shall be responsible for taking all remedial actions necessary to

maintain satisfactory operation and performance of the laboratory in response to quality control systems not being within performance specifications, errors in result reporting or in analysis of performance testing results. This individual shall ensure that test results are not reported until all corrective actions have been taken and he or she can assure that the test results provided are accurate and reliable.

(b) "Test Validation." The laboratory's urine drug testing facility shall have a qualified individual(s) who reviews all pertinent data and quality control results in order to attest to the validity of the laboratory's test reports. A laboratory may designate more than one person to perform this function. This individual(s) may be any employee who is qualified to be responsible for day-to-day management or operation of the drug testing laboratory.

(c) "Day-to-Day Operations and Supervision of Analysts." The laboratory's urine drug testing facility shall have an individual to be responsible for day-to-day operations and to supervise the technical analysts. This individual(s) shall have at least a bachelor's degree in the chemical or biological sciences or medical technology or equivalent. He or she shall have training and experience in the theory and practice of the procedures used in the laboratory, resulting in his or her thorough understanding of quality control practices and procedures; the review, interpretation, and reporting of test results; maintenance of chain-of-custody; and proper remedial actions to be taken in response to test systems being out of control limits or detecting aberrant test or quality control results.

(d) "Other Personnel." Other technicians or nontechnical staff shall have the necessary training and skills for the tasks assigned.

(e) "Training." The laboratory's testing program shall make available continuing education programs to meet the needs of laboratory personnel.

(f) "Files." Laboratory personnel files shall include: résumé of training and experience; certification or license, if any; references; job descriptions; records of performance evaluation and advancement; incident reports; and results of tests which establish employee competency for the position he or she holds, such as a test for color blindness, if appropriate.

2.6 Licensee Testing Facility Personnel

(a) "Day-to-Day Management of Operations." Any licensee testing facility shall have an individual to be responsible for day-to-day operations and to supervise the testing technicians. This individual(s) shall have at least a bachelor's degree in the chemical or biological sciences or medical technology or equivalent. He or she shall have training and experience in the theory and practice of the procedures used in the licensee testing facility, resulting in his or her thorough understanding of quality control practices and procedures; the review, interpretation, and reporting of test results; and proper remedial actions to be taken in response to detecting aberrant test or quality control results.

(b) "Other Personnel." Other technicians or nontechnical staff shall have the necessary training and skills for the tasks assigned.

(c) "Files." Licensees' testing facility personnel files shall include: résumé of training and experience; certification or license, if any; references; job descriptions; records of performance evaluation and advancement; incident reports; results of tests which establish employee competency for the position he or she holds, such as a test for color blindness, if appropriate and appropriate data to support determinations of honesty and integrity conducted in accordance with Section 2.3 of this appendix.

2.7 Laboratory and Testing Facility Analysis Procedures

(a) "Security and Chain-of-Custody."

(1) HHS-certified drug testing laboratories and any licensee testing facility shall be secure at all times. They shall have in place sufficient security measures to control access to the premises and to ensure that no unauthorized personnel handle specimens or gain access to the laboratory processes or to areas where records and split samples are stored. Access to these secured areas shall be limited to specifically authorized individuals whose authorization is documented. All authorized visitors and maintenance and service personnel shall be escorted at all times in the HHS-certified laboratory and in the licensee's testing facility. Documentation of individuals accessing these areas, dates, and times of entry and purpose of entry must be maintained.

(2) Laboratories and testing facilities shall use chain-of-custody procedures to maintain control and accountability of specimens from receipt through completion of testing, reporting of results, during storage, and continuing until final disposition of specimens. The date and purpose shall be documented on an appropriate chain-of-custody form each time a specimen is handled or transferred, and every individual in the chain shall be identified. Accordingly, authorized technicians shall be responsible for each urine specimen or aliquot in their possession and shall sign and complete chain-of-custody forms for those specimens or aliquots as they are received.

(b) "Receiving."

(1) When a shipment of specimens is received, laboratory and licensee's testing facility personnel shall inspect each package

for evidence of possible tampering and compare information on specimen containers within each package to the information on the accompanying chain-of-custody forms. Any direct evidence of tampering or discrepancies in the information on specimen containers and the licensee's chain-of-custody forms attached to the shipment shall be reported within 24 hours to the licensee, in the case of HHS-certified laboratories, and shall be noted on the laboratory's chain-of-custody form which shall accompany the specimens while they are in the laboratory's possession. Indications of tampering with specimens at a testing facility operated by a licensee shall be reported within 8 hours to senior licensee management.

(2) Specimen containers will normally be retained within the laboratory's or testing facility's accession area until all analyses have been completed. Aliquots and the chain-of-custody forms shall be used by laboratory or testing facility personnel for conducting initial and confirmatory tests, as appropriate.

(c) "Short-Term Refrigerated Storage." Specimens that do not receive an initial test within 7 days of arrival at the laboratory or are not shipped within 6 hours from the licensee's testing facility and any retained split samples shall be placed in secure refrigeration units. Temperatures shall not exceed 6 °C. Emergency power equipment shall be available in case of prolonged power failure.

(d) "Specimen Processing." Urine specimens identified as presumptive positive by a licensee's testing facility shall be shipped to an HHS-certified laboratory for testing. Laboratory facilities for drug testing will normally process urine specimens by grouping them into batches. The number of specimens in each batch may vary significantly depending on the size of the laboratory and its workload. When conducting either initial or confirmatory tests at either the licensee's testing facility or an HHS-certified laboratory, every batch shall contain an appropriate number of standards for calibrating the instrumentation and a minimum of 10 percent controls. Both quality control and blind performance test samples shall appear as ordinary samples to laboratory analysts. Special processing may be conducted to analyze specimens suspected of being adulterated or diluted (including hydration). Any evidence of adulteration or dilution, and any detected trace amounts of drugs or metabolites, shall be reported to the Medical Review Officer.

(e) "Preliminary Initial Test."

(1) For the analysis of urine specimens, any preliminary test performed by a licensee's testing facility and the initial screening test performed by a HHS-certified laboratory shall use an immunoassay which meets the requirements of the Food and Drug Administration for commercial distribution. The initial test of breath for alcohol performed at the collection site shall use a breath measurement device which meets the requirements of Section 2.7(o)(3). The following initial cut-off levels shall be used when screening specimens to determine whether they are negative for the indicated substances:

Initial test cut-off level (ng/ml)	
Marijuana metabolites	100
Cocaine metabolites	300
Opiate metabolites	300*
Phencyclidine	25
Amphetamines	1,000
Alcohol	0.04% BAC

*25 ng/ml is immunoassay specific for free morphine.

In addition, licensees may specify more stringent cutoff levels. Results shall be reported for both levels in such cases.

(2) The list of substances to be tested and the cut-off levels are subject to change by the NRC in response to industry experience and changes to the HHS Guidelines made by the Department of Health and Human Services as advances in technology, additional experience, or other considerations warrant the inclusion of additional substances and other concentration levels.

(f) "Confirmatory Test."

(1) Specimens which test negative as a result of this second screening shall be reported as negative to the licensee and will not be subject to any further testing unless special processing of the specimen is desired because adulteration or dilution is suspected.

(2) All urine samples identified as presumptive positive on the screening test performed by a HHS-certified laboratory shall be confirmed using gas chromatography/mass spectrometry (GC/MS) techniques at the cut-off values listed in this paragraph for each drug, and at the cut-off values required by the licensee's unique program, where differences exist. All confirmations shall be by quantitative analysis. Concentrations which exceed the linear region of the standard curve shall be documented in the laboratory record as "greater than highest standard curve value."

Confirmatory test cut-off level (ng/ml)	
Marijuana metabolite	15*
Cocaine metabolite	150**
Opiates:	
Morphine	300
Codeine	300
Phencyclidine	25
Amphetamines:	
Amphetamine	500
Methamphetamine	500
Alcohol	0.04% BAC

*Delta-9-tetrahydrocannabinol-9-carboxylic acid.

**Benzoylecgonine.

In addition, licensees may specify more stringent cut-off levels. Results shall be reported for both levels in such cases.

(3) The analytic procedure for confirmatory analysis of blood specimens voluntarily provided by individuals testing positive for alcohol on a breath test shall be gas chromatography analysis.

(4) The list of substances to be tested and the cut-off levels are subject to change by the NRC in response to industry experience and changes to the HHS Guidelines made by the Department of Health and Human Services as advances in technology, additional experience, or other considerations warrant the inclusion of additional substances and other concentration levels.

(5) Confirmatory tests for opiates shall include a test for 6-monoacetylmorphine (MAM) if the screening test is presumptive positive for morphine.

(g) "Reporting Results."

(1) The HHS-certified laboratory shall report test results to the licensee's Medical Review Officer within 5 working days after receipt of the specimen by the laboratory. Before any test result is reported (the results of initial tests, confirmatory tests, or quality control data), it shall be reviewed and the test certified as an accurate report by the responsible individual at the laboratory. The report shall identify the substances tested for, whether positive or negative, the cut-off(s) for each, the specimen number assigned by the licensee, and the drug testing laboratory specimen identification number. The results (positive and negative) for all specimens submitted at the same time to the laboratory shall be reported back to the Medical Review Officer at the same time when possible.

(2) The HHS-certified laboratory and any licensee testing facility shall report as negative all specimens, except suspect specimens being analyzed under special processing, which are negative on the initial test or negative on the confirmatory test. Specimens testing positive on the confirmatory analysis shall be reported positive for a specific substance. Except as provided in §26.24(d), presumptive positive results of preliminary testing at the licensee's testing facility will not be reported to licensee management.

(3) The Medical Review Officer may routinely obtain from the HHS-certified laboratory, and the laboratory shall provide, quantitation of test results. The Medical Review Officer may only disclose quantitation of test results for an individual to licensee management, if required in an appeals process, or to the individual under the provisions of Section 3.2. (This does not preclude the provision of program performance data under the provisions of 10 CFR 26.71(d).) Quantitation of negative tests for urine specimens shall not be disclosed, except where deemed appropriate by the Medical Review Officer for proper disposition of the results of tests of suspect specimens. Alcohol quantitation for a blood specimen shall be provided to licensee management with the Medical Review Officer's evaluation.

(4) The laboratory may transmit results to the Medical Review Officer by various electronic means (e.g., teleprinters, facsimile, or computer) in a manner designed to ensure confidentiality of the information. Results may not be provided verbally by telephone from HHS-certified laboratory personnel to the Medical Review Officer. The HHS-certified laboratory must ensure the security of the data transmission and limit access to any data transmission, storage, and retrieval system.

(5) The laboratory shall send only to the Medical Review Officer a certified copy of the original chain-of-custody form signed by the individual responsible for day-to-day management of the drug testing laboratory or the individual responsible for attesting to the validity of the test reports and attached to which shall be a copy of the test report.

(6) The HHS-certified laboratory and the licensee's testing facility shall provide to the licensee official responsible for coordination of the fitness-for-duty program a monthly statistical summary of urinalysis and blood testing and shall not include in the summary any personal identifying information. Initial test data from the licensee's testing facility and the HHS-certified laboratory, and confirmation data from HHS-certified laboratories shall be included for test results reported within that month. Normally this summary shall be forwarded from HHS-certified laboratories by registered or certified mail and from the licensee's testing facility not more than 14 calendar days after the end of the month covered by the summary. The summary shall contain the following information:

(i) Initial Testing:

(A) Number of specimens received;

(B) Number of specimens reported out: and

(C) Number of specimens screened positive for:

Marijuana metabolites
Cocaine metabolites
Opiate metabolites
Phencyclidine
Amphetamines
Alcohol

(ii) Confirmatory Testing:

(A) Number of specimens received for confirmation;

(B) Number of specimens confirmed positive for:

Marijuana metabolite
Cocaine metabolite
Morphine, codeine
Phencyclidine
Amphetamine
Methamphetamine

Alcohol

(7) The statistics shall be presented for both the cut-off levels in these guidelines and any more stringent cut-off levels which licensees may specify. The HHS-certified laboratory and the licensee's testing facility shall make available quantitative results for all samples tested when requested by the NRC or the licensee for which the laboratory is performing drug testing services.

(8) Unless otherwise instructed by the licensee in writing, all records pertaining to a given urine or blood specimen shall be retained by the HHS-certified drug testing laboratory and the licensee's testing facility for a minimum of 2 years.

(h) "Long-Term Storage." Long-term frozen storage (−20 °C or less) ensures that positive urine specimens will be available for any necessary retest during administrative or disciplinary proceedings. Unless otherwise authorized in writing by the licensee, HHS-certified laboratories shall retain and place in properly secured long-term frozen storage for a minimum of 1 year all specimens confirmed positive. Within this 1-year period a licensee or the NRC may request the laboratory to retain the specimen for an additional period of time, but if no such request is received, the laboratory may discard the specimen after the end of 1 year, except that the laboratory shall be required to maintain any specimens under legal challenge for an indefinite period. Any split samples retained by the licensee shall be transferred into long-term storage upon determination by the Medical Review Officer that the specimen has a confirmed positive test.

(i) "Retesting Specimens." Because some analytes deteriorate or are lost during freezing and/or storage, quantitation for a retest is not subject to a specific cut-off requirement but must provide data sufficient to confirm the presence of the drug or metabolite.

(j) "Split Samples." Urine specimens may be split, at the licensee's discretion, into two parts at the collection site. One half of such samples (hereafter called the aliquot) shall be analyzed by the licensee's testing facility or the HHS-certified laboratory for the licensee's purposes as described in this appendix. The other half of the sample (hereafter called the split sample) may be withheld from transfer to the laboratory, sealed, and stored in a secure manner by the licensee until the aliquot has been determined to be negative or until the positive result of a screening test has been confirmed. As soon as the aliquot has tested negative, the split sample in storage may be destroyed. If the aliquot tests positive by confirmatory testing, then, at the tested individual's request, the split sample may be forwarded on that day to another HHS-certified laboratory that did not test the aliquot. The chain-of-custody and testing procedures to which the split sample is subject, shall be the same as those used to test the initial aliquot and shall meet the standards for retesting specimens [Section 2.7(i)]. The quantitative results of any second testing process shall be made available to the Medical Review Officer and to the individual tested.

(k) "Subcontracting." HHS-certified laboratories shall not subcontract and shall perform all work with their own personnel and equipment unless otherwise authorized by the licensee. The laboratory must be capable of performing testing of the five classes of drugs (marijuana, cocaine, opiates, phencyclidine, and amphetamines) and of whole blood and confirmatory GC/MS methods specified in these guidelines.

(l) "Laboratory Facilities."

(1) HHS-certified laboratories shall comply with applicable provisions of any State licensure requirements.

(2) HHS-certified laboratories shall have the capability, at the same laboratory premises, of performing initial tests for each drug and drug metabolite for which service is offered, and for performing confirmatory tests for alcohol and for each drug and drug metabolite for which service is offered. Any licensee testing facilities shall have the capability, at the same premises, of performing initial screening tests for each drug and drug metabolite for which testing is conducted. Breath tests for alcohol may be performed at the collection site.

(m) "Inspections." The NRC and any licensee utilizing an HHS-certified laboratory shall reserve the right to inspect the laboratory at any time. Licensee contracts with HHS-certified laboratories for drug testing and alcohol confirmatory testing, as well as contracts for collection site services, shall permit the NRC and the licensee to conduct unannounced inspections. In addition, prior to the award of a contract, the licensee shall carry out pre-award inspections and evaluation of the procedural aspects of the laboratory's drug testing operation. The NRC shall reserve the right to inspect a licensee's testing facility at any time.

(n) "Documentation." HHS-certified laboratories and the licensee's testing facility shall maintain and make available for at least 2 years documentation of all aspects of the testing process. This 2-year period may be extended upon written notification by the NRC or by any licensee for which laboratory services are being provided. The required documentation shall include personnel files on all individuals authorized to have access to specimens; chain-of-custody documents; quality assurance/quality control records; procedure manuals; all test data (including calibration curves and any calculations used in determining test results); reports; performance records on performance testing; performance on certification inspections; and hard copies of computer-generated data.

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The HHS-certified laboratory and the licensee's testing facility shall be required to maintain documents for any specimen under legal challenge for an indefinite period.

(o) "Additional Requirements for HHS-certified Laboratories and Licensee's Testing Facilities."

(1) "Procedure manual." Each laboratory and licensee's testing facility shall have a procedure manual which includes the principles of each test, preparation of reagents, standards and controls, calibration procedures, derivation of results, linearity of methods, sensitivity of the methods, cutoff values, mechanisms for reporting results, controls, criteria for unacceptable specimens and results, remedial actions to be taken when the test systems are outside of acceptable limits, reagents and expiration dates, and references. Copies of all procedures and dates on which they are in effect shall be maintained as part of the manual. Superseded material must be retained for three years.

(2) "Standards and controls." HHS-certified laboratory standards shall be prepared with pure drug standards which are properly labeled as to content and concentration. The standards shall be labeled with the following dates: when received; when prepared or opened; when placed in service; and expiration date.

(3) "Instruments and equipment."

(i) Volumetric pipettes and measuring devices shall be certified for accuracy or be checked by gravimetric, colorimetric, or other verification procedure. Automatic pipettes and dilutors shall be checked for accuracy and reproducibility before being placed in service and checked periodically thereafter.

(ii) Alcohol breath analysis equipment shall be an evidental-grade breath alcohol analysis device of a brand and model that conforms to National Highway Traffic Safety Administration (NHTSA) standards (49 FR 48855) and to any applicable State statutes.

(iii) There shall be written procedures for instrument set-up and normal operation, a schedule for checking critical operating characteristics for all instruments, tolerance limits for acceptable function checks, and instructions for major troubleshooting and repair. Records shall be available on preventive maintenance.

(4) "Remedial actions." There shall be written procedures for the actions to be taken when systems are out of acceptable limits or errors are detected. There shall be documentation that these procedures are followed and that all necessary corrective actions are taken. There shall also be in place systems to verify all stages of testing and reporting and documentation that these procedures are followed.

(5) "Personnel available to testify at proceedings." The licensee's testing facility and HHS-certified laboratory shall have qualified personnel available to testify in an administrative or disciplinary proceeding against an individual when that proceeding is based on positive breath analysis or urinalysis results reported by the licensee's testing facility or the HHS-certified laboratory.

2.8 Quality Assurance and Quality Control

(a) "General." HHS-certified laboratories and the licensee's testing facility shall have a quality assurance program which encompasses all aspects of the testing process including but not limited to specimen acquisition, chain-of-custody, security, reporting of results, initial and confirmatory testing, and validation of analytical procedures. Quality assurance procedures shall be designed, implemented, and reviewed to monitor the conduct of each step of the process of testing for drugs.

(b) "Licensee's Testing Facility Quality Control Requirements for Initial Tests." Because all positive preliminary tests for drugs are forwarded to an HHS-certified laboratory for screening and confirmatory testing when appropriate, the NRC does not require licensees to assess their testing facility's false positive rates for drugs. To ensure that the rate of false negative tests is kept to the minimum that the immunoassay technology supports, licensees shall process blind performance test specimens and submit a sampling of specimens screened as negative from every test run to the HHS-certified laboratory. In addition, the manufacturer-required performance tests of the breath analysis equipment used by the licensee shall be conducted as set forth in the manufacturer's specifications.

(c) "Laboratory Quality Control Requirements for Initial Tests at HHS-Certified Laboratories." Each analytical run of specimens to be screened shall include:

(1) Urine specimens certified to contain no drug;

(2) Urine specimens fortified with known standards; and

(3) Positive controls with the drug or metabolite at or near the threshold (cut-off).

In addition, with each batch of samples, a sufficient number of standards shall be included to ensure and document the linearity of the assay method over time in the concentration area of the cut-off. After acceptable values are obtained for the known standards, those values will be used to calculate sample data. Implementation of procedures to ensure that carryover does not contaminate the testing of an individual's specimen shall be documented. A minimum of 10 percent of all test samples shall be quality control specimens. Laboratory quality control samples, prepared from spiked urine samples of determined concentration,

shall be included in the run and should appear as normal samples to laboratory analysts. One percent of each run, with a minimum of at least one sample, shall be the laboratory's own quality control samples.

(d) "Laboratory Quality Control Requirements for Confirmation Tests." Each analytical run of specimens to be confirmed shall include:

(1) Urine specimens certified to contain no drug;

(2) Urine specimens fortified with known standards; and

(3) Positive controls with the drug or metabolite at or near the threshold (cut-off).

The linearity and precision of the method shall be periodically documented. Implementation of procedures to ensure that carryover does not contaminate the testing of an individual's specimen shall also be documented.

(e) "Licensee Blind Performance Test Procedures."

(1) Licensees shall purchase chemical testing services only from laboratories certified by DHHS or a DHHS-recognized certification program in accordance with the HHS Guidelines. Laboratory participation is encouraged in other performance testing surveys by which the laboratory's performance is compared with peers and reference laboratories.

(2) During the initial 90-day period of any new drug testing program, each licensee shall submit blind performance test specimens to each HHS-certified laboratory it contracts within the amount of at least 50 percent of the total number of samples submitted (up to a maximum of 500 samples) and thereafter a minimum of 10 percent of all samples (to a maximum of 250) submitted per quarter.

(3) Approximately 80 percent of the blind performance test samples shall be blank (i.e., certified to contain no drug) and the remaining samples shall be positive for one or more drugs per sample in a distribution such that all the drugs to be tested are included in approximately equal frequencies of challenge. The positive samples shall be spiked only with those drugs for which the licensee is testing.

(4) The licensee shall investigate, or shall refer to DHHS for investigation, any unsatisfactory performance testing result, and based on this investigation, the laboratory shall take action to correct the cause of the unsatisfactory performance test result. A record shall be made of the investigative findings and the corrective action taken by the laboratory, and that record shall be dated and signed by the individuals responsible for the day-to-day management and operation of the HHS-certified laboratory. Then the licensee shall send the document to the NRC as a report of the unsatisfactory performance testing incident within 30 days. The NRC shall ensure notification of the finding to DHHS.

(5) Should a false positive error occur on a blind performance test specimen and the error is determined to be an administrative error (clerical, sample mixup, etc.), the licensee shall promptly notify the NRC. The licensees shall require the laboratory to take corrective action to minimize the occurrence of the particular error in the future, and if there is reason to believe the error could have been systematic, the licensee may also require review and reanalysis of previously run specimens.

(6) Should a false positive error occur on a blind performance test specimen and the error is determined to be a technical or methodological error, the licensee shall instruct the laboratory to submit to them all quality control data from the batch of specimens which included the false positive specimen. In addition, the licensee shall require the laboratory to retest all specimens analyzed positive for that drug or metabolite from the time of final resolution of the error back to the time of the last satisfactory performance test cycle. This retesting shall be documented by a statement signed by the individual responsible for day-to-day management of the laboratory's substance testing program. The licensee and the NRC may require an on-site review of the laboratory which may be conducted unannounced during any hours of operation of the laboratory. Based on information provided by the NRC, DHHS has the option of revoking or suspending the laboratory's certification or recommending that no further action be taken if the case is one of less serious error in which corrective action has already been taken, thus reasonably assuring that the error will not occur again.

2.9 Reporting and Review of Results

(a) "Medical Review Officer shall review results." An essential part of the licensees' testing programs is the final review of results. A positive test result does not automatically identify a nuclear power plant worker as having used substances in violation of the NRC's regulations or the licensee's company policies. An individual with a detailed knowledge of possible alternate medical explanations is essential to the review of results. This review shall be performed by the Medical Review Officer prior to the transmission of results to licensee management officials.

(b) "Medical Review Officer—qualifications and responsibilities." The Medical Review Officer shall be a licensed physician with knowledge of substance abuse disorders and may be a licensee or contract employee. The role of the Medical Review Officer is to review and interpret positive test results obtained through the licensee's testing program. In carrying out this responsibility, the

) Should a false positive error occur on a
id performance test specimen

Medical Review Officer shall examine alternate medical explanations for any positive test result (this does not include confirmation of blood alcohol levels obtained through the use of a breath alcohol anaylsis device). This action could include conducting a medical interview with the individual, review of the individual's medical history, or review of any other relevant biomedical factors. The Medical Review Officer shall review all medical records made available by the tested individual when a confirmed positive test could have resulted from legally prescribed medication. The Medical Review Officer shall not consider the results of tests that are not obtained or processed in accordance with these Guidelines, although he or she may consider the results of tests on split samples in making his or her determination, as long as those split samples have been stored and tested in accordance with the procedures described in these Guidelines.

(c) "Positive Test Results." Prior to making a final decision to verify a positive test result, the Medical Review Officer shall give the individual an opportunity to discuss the test result with him or her. Following verification of a positive test result, the Medical Review Officer shall, as provided in the licensee's policy, notify the applicable employee assistance program and the licensee's management official empowered to recommend or take administrative action (or the official's designated agent).

(d) "Verification for opiates; review for prescription medication." Before the Medical Review Officer verifies a confirmed positive result and the licensee takes action for opiates, he or she shall determine that there is clinical evidence—in addition to the urine test—of unauthorized use of any opium, opiate, or opium derivative (e.g., morphine/codeine). Clinical signs of abuse include recent needle tracks or behavioral and psychological signs of acute opiate intoxication or withdrawal. This requirement does not apply if the GC/MS confirmation testing for opiates confirms the presence of 6-monoacetylmorphine. For other drugs that are commonly prescribed or commonly included in over-the-counter preparations (e.g., benzodiazepines in the first case, barbiturates in the second) and that are listed in the licensee's panel of substances to be tested, the Medical Review Officer shall also determine whether there is clinical evidence—in addition to the urine test—of unauthorized use of any of these substances or their derivatives.

(e) "Reanalysis authorized." Should any question arise as to the accuracy or validity of a positive test result, only the Medical Review Officer is authorized to order a reanalysis of the original sample and such retests are authorized only at laboratories certified by DHHS. The Medical Review Officer shall authorize a reanalysis of the original aliquot on timely request of the individual tested, and shall also authorize an analysis of any sample stored by the licensee.

(f) "Results consistent with responsible substance use." If the Medical Review Officer determines that there is a legitimate medical explanation for the positive test result and that use of the substance identified through testing in the manner and at the dosage prescribed does not reflect a lack of reliability and is unlikely to create on-the-job impairment, the Medical Review Officer shall report the test result to the licensee as negative.

(g) "Result scientifically insufficient." Additionally, the Medical Review Officer, based on review of inspection reports, quality control data, multiple samples, and other pertinent results, may determine that the result is scientifically insufficient for further action and declare the test specimen negative. In this situation, the Medical Review Officer may request reanalysis of the original sample before making this decision. (The Medical Review Officer may request that reanalysis be performed by the same laboratory or, that an aliquot of the original specimen be sent for reanalysis to an alternate laboratory which is certified in accordance with the HHS Guidelines.) The licensee's testing facility and the HHS-certified laboratory shall assist in this review process as requested by the Medical Review Officer by making available the individual(s) responsible for day-to-day management of the licensee's test facility, of the HHS-certified laboratory or other individuals who are forensic toxicologists or who have equivalent forensic experience in urine drug testing, to provide specific consultation as required by the licensee. The licensee shall maintain records that summarize any negative findings based on scientific insufficiency and shall make them available to the NRC on request, but shall not include any personal identifying information in such reports.

SUBPART C—EMPLOYEE PROTECTION

3.1 Protection of Employee Records

Licensee contracts with HHS certified laboratories and procedures for the licensee's testing facility shall require that test records be maintained in confidence, as provided in 10 CFR 26.29. Records shall be maintained and used with the highest regard for individual privacy.

3.2 Individual Access to Test and Laboratory Certification Results

Any individual who is the subject of a drug or alcohol test under this part shall, upon written request, have access to any records relating to his or her tests and any records relating to the results of any relevant laboratory certification, review, or revocation-of-certification proceedings.

SUBPART D—CERTIFICATION OF LABORATORIES ENGAGED IN CHEMICAL TESTING

4.1 Use of DHHS-certified laboratories

(a) Licensees subject to this part and their contractors shall use only laboratories certified under the DHHS "Mandatory Guidelines for Federal Workplace Drug Testing Programs", Subpart C—"Certification of Laboratories Engaged in Urine Drug Testing for Federal Agencies," (53 FR 11970, 11986–11989) dated April 11, 1988, and subsequent amendments thereto for screening and confirmatory testing except for initial screening tests at a licensee's testing facility conducted in accordance with 10 CFR 26.24(d). Information concerning the current certification status of laboratories is available from: The Office of Workplace Initiatives, National Institute on Drug Abuse, 5600 Fishers Lane, Rockville, Maryland 20857.

(b) Licensees or their contractors may use only HHS-certified laboratories that agree to follow the same rigorous chemical testing, quality control, and chain-of-custody procedures when testing for more stringent cut-off levels as may be specified by licensees for the classes of drugs identified in this part, for analysis of blood specimens for alcohol, and for any other substances included in licensees' drug panels.

[54 FR 24494, June 7, 1989, as amended at 56 FR 41927, Aug. 26, 1991; 58 FR 31470, June 3, 1993]

PART 30—RULES OF GENERAL APPLICABILITY TO DOMESTIC LICENSING OF BYPRODUCT MATERIAL

GENERAL PROVISIONS

EXEMPTIONS

LICENSES

RECORDS, INSPECTIONS, TESTS, AND REPORTS

ENFORCEMENT

SCHEDULES

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED

2000 JUL 18 P 4:19

CLERK
BY _____
DEPUTY CLERK

VERMONT YANKEE NUCLEAR POWER CORPORATION and DR. GEORGE IDELKOPE,

Plaintiffs,

v.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and WILLIAM SORRELL, ATTORNEY GENERAL OF THE STATE OF VERMONT,

Defendants.

Docket No. 1:00cv254

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiffs Vermont Yankee Nuclear Power Corporation ("VY") and Dr. George Idelkope ("Dr. Idelkope") complain of Defendants, the United States Equal Employment Opportunity Commission ("EEOC") and William Sorrell, the Attorney General of the State of Vermont as follows:

1. Plaintiffs bring this action pursuant to Fed. R. Civ. P. 57 and 28 U.S.C. §§ 2201-2202 for a judgment declaring Plaintiffs' rights and obligations under the Atomic Energy Act see 42 U.S.C. § 2011 et. seq. and regulations promulgated thereunder, the Americans With Disabilities Act, see 42 U.S.C. § 12111 (the "ADA") et. seq., and the Vermont Fair Employment Practices Act, see 21 V.S.A. § 495 et. seq. ("FEPA").

2. Plaintiff VY is a Vermont corporation that owns and operates a commercial nuclear power facility located in Vernon, Vermont.

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3. Plaintiff Dr. Idelkope is a resident of Chesterfield, New Hampshire and practices medicine from his office in Hinsdale, New Hampshire.

4. Defendant EEOC is an Agency of the Federal Government and is responsible for enforcing the ADA.

5. Defendant William Sorrell is the Vermont Attorney General and is responsible for enforcing FEPA. The Attorney General's office is a "deferral agency" for the EEOC. As a deferral agency, the Vermont Attorney General's office investigates alleged violations of the ADA for and on behalf of the EEOC and issues a recommendation to the EEOC at the conclusion of each investigation.

Jurisdiction

6. This is an action seeking declaratory judgment and injunctive relief pursuant to Fed. R. Civ. P. 57 and 28 U.S.C. §§ 2201-2202. This Court has jurisdiction to hear this Complaint under 28 U.S.C. §§ 1331, 1346, and 1367; the Atomic Energy Act of 1954, 42 U.S.C. § 2011 et seq.; and the Americans With Disabilities Act, 42 U.S.C. § 12111 et seq. The Plaintiffs have a right to maintain this action under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and the Administrative Procedures Act, 5 U.S.C. § 551 et seq. Venue is proper in this District.

The Facts

7. VY operates a commercial nuclear power facility under an operating license issued by the Nuclear Regulatory Commission (the "NRC").

8. Regulations promulgated by the NRC require that, as a condition of its license, VY establish and maintain a "Fitness for Duty Program" see 10 C.F.R. § 26.2(a), to ensure that

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employees with unescorted access to protected areas of the facility "will perform their duties in a reliable and trustworthy manner and are not under the influence of any substance, legal or illegal, or mentally or physically impaired from any cause, which in any way adversely affects their ability to safely and competently perform their duties." 10 C.F.R. § 26.2(a).

9. NRC regulations require that Vermont Yankee have a Medical Review Officer ("MRO") who is responsible for determining individuals' Fitness for Duty, which determinations are binding upon VY.

10. NRC regulations also require that personal information collected for the purpose of complying with Fitness for Duty regulations shall not be disclosed, except to the MRO or other licensed personnel for the purpose of making the unescorted access decision or in certain other situations exclusively listed in the regulations. See 10 C.F.R. § 26.29.

11. From 1997 to 1999, the individual who later commenced the Charge that is the subject of this action (the "Employee") was employed by VY as a plant mechanic. The Employee's position required him to have unescorted access to protected areas of VY's facility.

12. While out on medical leave in late January or early February, 1999, the Employee informed VY that a doctor had placed him on methadone, which is a synthetic narcotic listed as a "Schedule II" controlled substance under the Federal Controlled Substances Act see 21 U.S.C. § 812.

13. "Methadone may impair the mental and/or physical abilities required for the performance of potentially hazardous tasks, such as driving a car or operating machinery." PHYSICIANS DESK REFERENCE 2547 (52nd ed. 1998).

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14. VY's MRO, Dr. Idelkope, determined that the Employee was not Fit for Duty while taking methadone and would not be approved to return to work at the plant as long as he was taking methadone. Because the MRO had not deemed the Employee Fit for Duty, the Employee's unescorted access was not reinstated.

15. VY advised the Employee that he could return to work provided that he satisfied Fitness for Duty prerequisites.

16. From February 1999 to September 1999, the MRO and VY personnel attempted to work with the Employee and his doctors to find an alternative to methadone that was acceptable to the MRO.

17. Ultimately these efforts were unsuccessful, and in September, 1999 the Employee's physician informed VY that the Employee would continue taking methadone. As a result, VY discharged the Employee on September 27, 1999.

18. By a Charge dated October 28, 1999 and filed with the Vermont Attorney General and the EEOC, the Employee asserted allegations of disability discrimination against VY under the ADA and FEPA.

19. By letter dated January 20, 2000, VY responded to the charge by explaining to the Vermont Attorney General inter alia, that the Employee "was not qualified for his job because he had not been declared fit for duty by VY's MRO" and as a result was not a qualified employee who is entitled to certain treatment under ADA and FEPA.

20. VY included within its response to the Vermont Attorney General information setting forth the MRO's determination that mandated the action taken by VY, and provided copies of VY's Fitness for Duty policy, the pertinent NRC regulations, and the Employee's

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medical records that had been made available to VY. Pursuant to a second request by the Vermont Attorney General's office, VY supplemented its responses and forwarded copies of its hiring policy and the job description for the plant mechanic position.

21. Nevertheless, in April, 2000 the Attorney General's Office issued an "Information and Document Request" to VY setting forth fourteen categories of requests seeking a broad range of information and documents including a statement of "what contacts [the MRO] had with Complainant's physicians, or other medical professionals, to discuss or assess Complainant's ability to think clearly and work safely at his job"; and "a list of individuals who are or have been employed by [VY] and who are/were taking a prescription narcotic drug while so employed."

22. VY responded to the Information and Document Request by providing a detailed description of its obligations imposed by the NRC with respect to Fitness for Duty, by explaining that it was bound by the Fitness for Duty determination reached by the MRO, and that the only avenue for reviewing the MRO's determination was through procedures implemented by the NRC.

23. VY also provided additional documentation, including more VY policies and transcripts of depositions of the Employee and his physician conducted in a separate proceeding. VY refused to produce information called for by several requests directed towards scrutinizing the MRO's determinations with respect to Fitness for Duty concerning the Employee and other employees.

24. Subsequently, the Attorney General's Office issued Civil Investigative Demands pursuant to 9 V.S.A. § 2460 to VY and to the MRO on June 21 and June 23, 2000, respectively.

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25. Both Civil Investigative Demands state that "the Attorney General has reason to believe that [VY] has violated [FEPA] in its treatment of the Employee based on his physical disability" and seek substantially the same information as the April, 2000 Information and Document Request.

26. Since the Employee's job required him to have unescorted access to protected areas of VY's facility, and the Employee did not have unescorted access because the MRO failed to deem him fit for duty while using methadone, the Employee was not "qualified" under the ADA or FEPA.

27. As applied to this case, NRC regulations governing Fitness for Duty and Unescorted Access pre-empt any claim of disability discrimination.

28. The premise underlying the Attorney General's continued prosecution of the Charge and his reason to believe VY violated disability laws – that VY discriminated against the Employee by not permitting him to work at VY while using methadone – exposes VY to potential liability for violating NRC regulations.

29. Since none of the listed exceptions to the requirement that VY maintain the confidentiality of personnel information collected as part of unescorted access decisions is present, the Civil Investigative Demands purport to compel VY to violate 10 C.F.R. § 26.29.

30. Defendants' actions, as set forth in paragraphs 18-29, above, have created a controversy within the jurisdiction of this Court and resolution by this Court is necessary to ensure that Plaintiffs are not forced to violate any federal and/or state laws and regulations.

31. Declaratory and injunctive relief will effectively adjudicate the rights of the parties.

32. Plaintiffs bring this cause of action for a declaratory judgment and injunction enjoining Defendants from enforcing FEPA and ADA and ordering Defendants to withdraw the Civil Investigative Demands against Plaintiffs and stop all enforcement action against Plaintiffs arising out of or relating to the charge filed by the Employee.

WHEREFORE, Plaintiffs request that:

1. The Court declare that no prima facie case of disability discrimination under FEPA or the ADA exists in this case;

2. Pending a final hearing and determination of the Court in this matter, a preliminary injunction be issued to enjoin the Defendants from enforcing or attempting to enforce the Civil Investigative Demands issued to Plaintiffs or take any other action against Plaintiffs;

3. The Court restrain the Defendants, their officers, employees, agents and servants from any further enforcement of the Charge filed by the Employee;

4. The Court issue such other and further relief as it may deem necessary, including an award of costs and attorney's fees.

Brattleboro, Vermont
July 18, 2000

DOWNS RACHLIN & MARTIN, PLLC

By _____

Peter B. Robb
Fed. ID # 000362657
Timothy E. Copeland, Jr.
Fed. ID #000629016
80 Linden Street
P.O. Box 9
Brattleboro, VT 05302-0009

ATTORNEYS FOR PLAINTIFFS
VERMONT YANKEE NUCLEAR
POWER CORPORATION and
DR. GEORGE IDELKOPE

BRT\26764.1

CHITTENDEN COUNTY SHERIFF'S DEPARTMENT
P.O. Box 1426
Burlington, Vermont 05402

RETURN OF SERVICE

On the 24 day of July 2000 made service of the following document(s) upon the defendant United States Equal Employment Opportunity Commission

(X) Summons	( ) Interrogatories
(X) Complaint	( ) Exhibit(s)
( ) Motion (s)	( ) Writ of Possession
( ) Affidavit	( ) Judgment Order
( ) Summons to Trustee	( ) Order
( ) List of Exemptions	( ) Memorandum of Law
( ) Disclosure Under Oath	( ) Notice of
( ) Final Order	( ) Writ of Attachment
( ) Trustee Disclosure	( ) Recognizance

( ) Subpoena - Witness fees of _____
( ) _____
( ) _____
( ) _____

( ) by delivering a copy of same to the defendant.
(X) by delivering a copy of same to June Chapotte Agent For U.S Attorney - District Of Vt
( ) a person of suitable age and discretion and then and there a resident at the usual place of abode of said defendant.
(X) At 11 Elmwood Ave Burlington Vermont, (for each of them) a copy thereof with my return endorsed thereon.

Service	1	Copies	$ 2.50
Travel	10	Miles	3.05
Postage			
Copying		Copies	
Town Clerk		Pages	.75
Notary Fee			
Other			
TOTAL			6.30

Sheriff / Deputy Sheriff
SGT DANIEL GAMELIN
DEPUTY SHERIFF

Washington County Sheriff's Department

P. O. Box 678

10 Elm Street

MONTPELIER, VERMONT 05601

802-223-3001

FAX 802-223-0875

DONALD G. EDSON, Sheriff

RETURN OF SERVICE

DOCKET NUMBER: 1:00 CV 254

Vermont Yankee Nuclear Pwr Corp vs. William Sorrell

STATE OF VERMONT
WASHINGTON COUNTY, SS.

ON THE 26 DAY OF July, 2000, ~~199~~, I MADE SERVICE OF THE Summons and Complaint

UPON THE DEFENDANT William Sorrell, Vermont Attorney General

BY DELIVERING A COPY OF THE ABOVE THE VERMONT ATTORNEY GENERAL AT HIS OFFICE IN MONTPELIER, VERMONT.

SERVICE		$ 22.50
TRAVEL	2 MILES	$ .65
FEES		$
POSTAGE		$ .33
TOTAL		$ 23.48

Tom Rowell

~~SHERIFF~~/DEPUTY

Washington County Sheriff's Department

P. O. Box 678

10 Elm Street

MONTPELIER, VERMONT 05601

802-223-3001

FAX 802-223-0875

DONALD G. EDSON, Sheriff

RETURN OF SERVICE

DOCKET NUMBER: 1:00 cv 254

Vermont Yankee Nuclear et al vs. United States Equal Employ. Opportunity Commission

STATE OF VERMONT
WASHINGTON COUNTY, SS.

ON THE 26 DAY OF July, 2000, ~~199~~, I MADE SERVICE OF THE Summons and Complaint

UPON THE DEFENDANT United States Equal Employment Opportunity Commission

BY DELIVERING A COPY OF THE ABOVE THE VERMONT ATTORNEY GENERAL AT HIS OFFICE IN MONTPELIER, VERMONT.

SERVICE		$ 12.50
TRAVEL	_____ MILES	$ _____
FEES		$ _____
POSTAGE		$ _____
	TOTAL	$ 22.50

Lon Rouelle

~~SHERIFF~~/DEPUTY

CHITTENDEN COUNTY SHERIFF'S DEPARTMENT
P.O. Box 1426
Burlington, Vermont 05402

RETURN OF SERVICE

On the 24 day of July 2003 made service of the following document(s) upon the defendant United States Equal Employment Opportunity Commission

(X) Summons	( ) Interrogatories
(X) Complaint	( ) Exhibit(s)
( ) Motion (s)	( ) Writ of Possession
( ) Affidavit	( ) Judgment Order
( ) Summons to Trustee	( ) Order
( ) List of Exemptions	( ) Memorandum of Law
( ) Disclosure Under Oath	( ) Notice of
( ) Final Order	( ) Writ of Attachment
( ) Trustee Disclosure	( ) Recognizance
( ) Subpoena - Witness fees of	
( )	
( )	
( )	

( ) by delivering a copy of same to the defendant.

(X) by delivering a copy of same to Julie Chapple Agent For U.S Attorney - district of VT

( ) a person of suitable age and discretion and then and there a resident at the usual place of abode of said defendant.

(X) At 11 Elmwood Ave Burlington Vermont, (for each of them) a copy thereof with my return endorsed thereon.

Service	1	Copies	$ 2.50
Travel	10	Miles	3.25
Postage			
Copying		Copies	
Town Clerk		Pages	5.75
Notary Fee			
Other			
TOTAL			16.30

Sheriff / Deputy Sheriff

SGT DANIEL GAMELIN
DEPUTY SHERIFF

Washington County Sheriff's Department

P. O. Box 678

10 Elm Street

MONTPELIER, VERMONT 05601

802-223-3001

FAX 802-223-0875

DONALD G. EDSON, Sheriff

RETURN OF SERVICE

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Vermont Yankee Nuclear Pwr Corp vs. William Sorrell

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WASHINGTON COUNTY, SS.

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FEES		$
POSTAGE		$ .33
	TOTAL	$ 23.48

Tom Rowell

~~SHERIFF~~/DEPUTY

Washington County Sheriff's Department

P. O. Box 678
10 Elm Street
MONTPELIER, VERMONT 05601
802-223-3001
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RETURN OF SERVICE

DOCKET NUMBER: 1:00 cv 254

Vermont Yankee Nuclear et al VS. United States Equal Employ. Opportunity Commission

STATE OF VERMONT
WASHINGTON COUNTY, SS.

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UPON THE DEFENDANT United States Equal Employment Opportunity Commission

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SERVICE		$ 22.50
TRAVEL	_____ MILES	$ _____
FEES		$ _____
POSTAGE		$ _____
	TOTAL	$ 22.50

Tom Rowell
~~SHERIFF~~/DEPUTY

632 So.2d 217
19 Fla. L. Weekly D385
(Cite as: 632 So.2d 217)

District Court of Appeal of Florida,
Fifth District.

FLORIDA CRUSHED STONE COMPANY,
Appellant,
v.
The TRAVELERS INDEMNITY COMPANY,
Appellee.

No. 92-3044.

Feb. 18, 1994.

Insurers brought action in state court against insured to recover balance due under note for retrospective premium adjustment. Insurer's motion for summary judgment was granted by the Circuit Court, Lake County, G. Richard Singeltary, J., and insured appealed. The District Court of Appeal, Griffin, J., held that earlier federal actions involved substantially similar issues as did subsequent state court suit brought by insurers, and thus, state court suit was required to be stayed pending resolution of federal action.

Reversed and remanded.

Harris, C.J., dissented.

West Headnotes

[1] Action ⚿69(3)
13k69(3)

Although trial court has broad discretion to order or refuse stay of action pending before it, it is nonetheless an abuse of discretion to refuse to stay subsequently filed state court action in favor of previously filed federal action which involves same parties and same or substantially similar issues; such rule is based on principles of comity.

[2] Action ⚿69(5)
13k69(5)

Earlier federal actions brought by insured against insurers based essentially on allegations that insured breached its obligation to insure it in calculating retrospective premium payments, and by insurers for breach of contract, seeking to recover retrospective premium adjustment allegedly owed, involved substantially similar issues as did subsequent state court suit brought by insurers against insured to recover balance due under promissory note for retrospective premium adjustment in one year, and thus, state court suit was required to be stayed pending resolution of federal action; entire thrust of federal action by insured was its contention that insurers' retroactive premium assessments were invalid.

*217 Kevin C. Knowlton, J. Davis Connor, and Stephen R. Senn of Peterson, Myers, Craig, Crews, Brandon & Puterbaugh, P.A., Lakeland, for appellant.

Roy W. Cohn of Chorpenning, Good, Gibbons & Cohn, P.A., Tampa, for appellee.

GRIFFIN, Judge.

Appellant, Florida Crushed Stone Company ("FCS"), purchased retrospective workers' compensation insurance and retrospective business, automobile and general liability insurance under three annual policies for the period beginning May 1, 1985 and ending on May 1, 1988. The policies were variously issued by Appellee, Travelers Indemnity, The Travelers Insurance Company ("Travelers Insurance") and The Travelers Indemnity Company of Illinois ("Travelers Illinois"). These will be collectively referred to as "Travelers."

*218 Under the insurance contracts, FCS was required to pay current and retrospective premiums calculated pursuant to a complex formula that included calculation of "incurred losses," "reserves for unpaid losses," "claims handling factor" adjustments and "tax multipliers."

Under the contracts, beginning November 1, 1986 and annually thereafter, Travelers was entitled to calculate an "adjusted retrospective premium" using audited basic premium charges and FCS's actual losses. The "adjusted retrospective premium" was then compared to the sums already paid under the policies as an estimated "retrospective premium." If the total figure for the accounting period was less than the estimated premiums already paid, FCS was entitled to a refund. However, if the estimated premium proved insufficient to cover actual premiums, FCS was obligated to pay the difference. Travelers was entitled to make these adjustments on a yearly basis as long as there were any ongoing losses or payments still being sustained under the policies.

FCS paid $1,090,643 in estimated retrospective premiums under the 1985 policy, [FN1] $1,095,871 in estimated retrospective premiums under the 1986 policy, [FN2] and $1,005,078 in estimated

retrospective premiums under the 1987 policy. [FN3] Thereafter, in November 1990, Travelers made a "retrospective premium adjustment" for the period from May 1, 1985 to May 1, 1988. Travelers' calculations allegedly showed that FCS owed $592,345 in retrospectively adjusted premiums as of November 1990.

FN1. FCS' total estimated premium under the 1985 policy was $1,451,720, but this included $361,077 in non-retrospective premiums.

FN2. FCS' total estimated premium under the 1986 policy was $1,626,009, but this included $530,138 in non-retrospective premiums.

FN3. FCS' total estimated premium under the 1987 policy was $1,424,412, but this included $419,334 in non-retrospective premiums.

Thereafter, as an "accommodation" to FCS, Travelers agreed to accept reduced monthly installment payments on the retrospectively adjusted premiums due as of November, 1990, together with interest at the rate of ten percent, for a period of twelve months beginning July 15, 1991. [FN4] The remaining balance was to be paid on July 15, 1992 in a balloon payment of $313,498.44, which included interest of $2,590.90. Principal and interest under the agreement totalled $641,503. The extended payments schedule was memorialized in a "promissory note" executed by FCS in favor of Travelers on July 15, 1991. The note provided in part as follows:

FN4. The first four monthly installments were $37,216.77. Thereafter, the payments were reduced to $27,333.72 for a period of eight months.

This Promissory Note has been entered into as an accommodation to FCS in connection with the payment of the retrospective adjustment premium for the policy period 5/1/85--5/1/88, valuation date November 1, 1990. The Travelers Indemnity Company makes this accommodation without prejudice to or waiver of any rights or remedies, including but not limited to any remedies stated in any agreement or agreement letter between the parties. In consideration of this accommodation, FCS acknowledges the retrospective adjustment premium indebtedness which is the subject of this Promissory Note, and FCS waives all defenses concerning the calculation, amount and payment thereof. Any indebtedness which develops as a result of any future retrospective premium adjustment, audit or paid losses will be due and payable when presented and are not subject to the terms of this Promissory Note. (emphasis added).

After making ten monthly payments under the promissory note, FCS failed to make the payment due on April 15, 1992. By this time, Travelers had made yet another retrospective premium adjustment which showed that FCS owed an additional $643,324 in retrospective premiums as of November 1991. Two weeks after the default under the promissory note, on April 30, 1992, FCS brought an action against Travelers Insurance in federal district court, suing on theories of negligence, breach of contract and seeking a declaratory judgment.

*219 The claim for breach of contract was based essentially on allegations that FCS had previously paid retrospective premiums under the three policies which it was entitled to recover because Travelers had breached its obligation under the policies to:

a) competently and diligently investigate and adjust losses and claims covered by the policies, so as to reasonably minimize losses paid and incurred which would form part of the basis for retrospectively adjusted premiums charged to FCS; and

b) competently and diligently compute and/or establish loss reserves pertaining to claims covered by the policies which form part of the basis for retrospectively adjusted premiums charged to FCS.

The contract claim concerned only those damages to FCS which had "accrued on or after May 1, 1988," which apparently refers to retrospective premium payments made after that date. The claim for declaratory judgment sought a determination whether Travelers had breached its obligations under the policies and, if so, whether FCS "currently owe[d] Travelers Insurance $643,324 in retrospective premiums" (the amount allegedly due under the 1991 adjustment) and whether it was obligated "to pay future retrospectively adjusted premiums to Travelers" under its contracts. FCS later filed an amended complaint in this action on or about October 6, 1992. The amended complaint was virtually identical to the initial complaint, but it added Travelers Indemnity and Travelers Illinois as additional defendants to the action. Neither the complaint nor the amended complaint specifically appears to seek relief concerning the promissory note.

Shortly after FCS filed the initial federal action, Travelers Indemnity brought its own action in federal district court against FCS for breach of contract. [FN5] In that action, Travelers sought to recover the

$643,324 in retrospective premiums allegedly owed by FCS for the 1991 retrospective adjustment. FCS answered this complaint on July 30, 1992. The only affirmative defense it asserted was that Travelers had breached the insurance contracts by its failure to competently and diligently adjust losses. FCS also brought a two count counterclaim in that action in which it sought the same declaratory relief and damages for breach of contract it had sought in the earlier action.

FN5. This suit (Case No. 92-778-Civ-T-15C) was filed on June 9, 1992, nine days after the filing of the original complaint.

Travelers Indemnity then filed the instant action in state court against FCS on June 11, 1992 to recover the balance due under the promissory note for the 1990 retrospective adjustment. This action demanded judgment in the principal amount of $359,781.47, plus interest.

Instead of filing an answer below, on July 7, 1992 FCS moved to stay the action, contending that a stay was appropriate because the federal court actions had been filed first and involved the same issues. Travelers Indemnity opposed the stay, contending that the two actions involved different parties and different causes of action. Specifically, Travelers noted that it was not a party to the initial federal action; rather, that action had been brought against Travelers Insurance. Travelers Indemnity further noted that the federal actions contained no claims involving the promissory note, which formed the basis of the state court action. Finally, Travelers contended that the federal actions involved the 1991 retrospective adjustment, while the state action involved only the 1990 retrospective adjustment.

At approximately the same time that Travelers Indemnity responded to FCS's motion to stay, Travelers moved for summary judgment in state court based on FCS's failure to make payments under the promissory note. The only documents filed by Travelers in support of the motion were a copy of the note and the affidavit of Jeffrey W. Rice, which established the nonpayment of monies due under the note.

FCS opposed the motion for summary judgment by filing, in addition to the two federal complaints, a copy of its First Amended Complaint in the initial federal action. It also filed the affidavit of Rosario Ciccarello, an independent insurance consultant *220 for FCS who asserted "Travelers Insurance Companies" had breached several express or implied contractual duties and certain statutory obligations.

The trial court heard the motion for summary judgment and the motion to stay the state court proceedings in a joint hearing. At the hearing, Travelers Indemnity contended that a stay was improper because none of the federal actions concerned the 1990 retrospective adjustment or the promissory note.

On November 9, 1992, the court granted Traveler Indemnity's motion for summary judgment in a non-speaking order. FCS has appealed, contending that the trial court erred by entering summary judgment for Travelers Indemnity and refusing to stay the state court proceedings. We reverse.

[1] Although a trial court has broad discretion to order or refuse a stay of an action pending before it, it is nonetheless an abuse of discretion to refuse to stay a subsequently filed state court action in favor of a previously filed federal action which involves the same parties and the same or substantially similar issues. State v. Harbour Island, Inc., 601 So.2d 1334 (Fla. 2d DCA 1992); Ricigliano v. Peat, Marwick, Main & Co., 585 So.2d 387 (Fla. 4th DCA 1991); Koehlke Components, Inc. v. South East Connectors, Inc., 456 So.2d 554 (Fla. 3d DCA 1984); Schwartz v. DeLoach, 453 So.2d 454 (Fla. 2d DCA 1984). [FN6] This rule is based on principles of comity. Polaris Public Income Funds v. Einhorn, 625 So.2d 128, 129 (Fla. 3d DCA 1993); Robinson v. Royal Bank of Canada, 462 So.2d 101 (Fla. 4th DCA 1985).

FN6. See also Towers Constr. Co. of Panama City, Inc. v. Key West Polo Club Apartments, Ltd., 569 So.2d 830 (Fla. 5th DCA 1990) (where suit pending in different circuit involving same parties and substantially same issue, venue should be transferred to county in which action was first filed); Lightsey v. Williams, 526 So.2d 764 (Fla. 5th DCA 1988) (failure to stay action subsequently filed in another circuit involving same parties and substantially same issues was abuse of discretion); Robinson v. Royal Bank of Canada, 462 So.2d 101 (Fla. 4th DCA 1985) (recognizing rule and requiring stay of later filed Florida action in favor of previously filed Canadian action).

[2] The need for the state and federal actions to involve the same parties appears to be satisfied in this case. Although "Travelers Insurance Companies" was initially the named party in the federal proceeding,

Travelers Indemnity was specifically named in the amended complaint. The initial identification of the defendant was plainly a misnomer.

More problematical is the question whether there was a sufficient identity of issues between either the amended federal action or the second federal action and the later-filed state court action to warrant a stay of the state proceeding. The causes of action do not have to be identical; it is sufficient that the two actions involve a single set of facts and that resolution of the one case will resolve many of the issues involved in the subsequently filed case. National American Ins. Co. v. Charlotte County, 611 So.2d 1284 (Fla. 2d DCA 1992) (trial court erred by refusing to grant stay of state court action by surety for breach of surety bond in view of prior pending federal action for declaratory judgment concerning substantially same issues); Harbour Island, 601 So.2d at 1334 (trial court abused its discretion by refusal to stay state court action pending determination of prior federal action which did not involve identical claims but where disposition of federal case would resolve many issues raised in state action); Koehlke Components, 456 So.2d at 554 (trial court abused its discretion by refusal to stay later filed state court action for declaratory judgment when earlier action asserting rights under contract involved in declaratory judgment action had been filed in federal court).

Travelers Indemnity apparently theorizes that neither of the federal actions closely enough resembles this action to require a stay because this action is based on the promissory note, which concerned unpaid retrospective premiums due as of November, 1990. FCS contends that the action on the note is "subsumed" within its action (and/or counterclaim) for breach of contract and declaratory judgment, even though the 1990 retrospective premiums left unpaid under the note does not appear to be directly addressed in either federal action. In its federal action (or counterclaim) for breach of contract, *221 FCS sought to recover those adjusted retrospective premiums which had already been paid as of the filing of the complaint (e.g. the adjusted retrospective premiums paid in 1989, plus the ten months of payments made for the 1990 adjustment). The claim for declaratory judgment sought a resolution concerning whether FCS "currently owe[d] Travelers Insurance $643,324 in retrospective premiums," which was the amount allegedly due under the 1991 adjustment, as well as a declaration concerning whether FCS was obligated "to pay future retrospectively adjusted premiums to Travelers" under its contracts. As far as we can determine, none of these claims addressed the unpaid balance allegedly due under the promissory note for the 1990 adjustment.

Nonetheless, we conclude a stay of the state court proceeding was warranted since resolution of the federal action will resolve many of the issues involved in this action. The entire thrust of FCS's federal action is its contention that Travelers retroactive premium assessments are invalid. Moreover, the note will necessarily be an affirmative defense to FCS's attempt in the federal action to recover the payments already made by FCS for the 1990 adjustment based on Travelers' alleged breaches. All of the disputes between these parties plainly stem from the basic question of whether Travelers is guilty of any breach of conduct or other legal duty, and, if so, how much FCS is entitled to recover or be excused from paying. This should be determined in a single forum. The federal actions were filed first and the state court should give way. It was therefore error to refuse to grant the stay and to grant summary judgment.

REVERSED and REMANDED.

DIAMANTIS, J., concurs.

HARRIS, C.J., dissents, without opinion.

END OF DOCUMENT

933 F.Supp. 438
6 A.D. Cases 1709, 18 A.D.D. 416, 8 NDLR P 233
(Cite as: 933 F.Supp. 438)

United States District Court,
M.D. Pennsylvania.

Michael W. McCOY, Plaintiff,
v.
PENNSYLVANIA POWER AND LIGHT COMPANY, Defendant.

Civ. No. 4: CV-96-0090.

July 30, 1996.

Employee, whose security clearance in nuclear plant was revoked because of his alcoholism, brought action against employer under Americans with Disabilities Act (ADA). On employer's motion to dismiss for failure to state claim, the District Court, McClure, J., held that employee was not "qualified individual with a disability" under ADA, since disability precluded him from retaining security clearance necessary to perform his former job.

Motion granted.

West Headnotes

[1] Federal Civil Procedure ⚿1829
170Ak1829

[1] Federal Civil Procedure ⚿1835
170Ak1835

In deciding motion to dismiss for failure to state claim, district court is required to accept as true all allegations in complaint and all reasonable inferences that can be drawn from them after construing them in light most favorable to nonmovant. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[2] Federal Civil Procedure ⚿1832
170Ak1832

In determining whether claim should be dismissed for failure to state claim, district court looks only to facts alleged in complaint and its attachments without reference to other parts of record. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[3] Federal Civil Procedure ⚿1773
170Ak1773

Dismissal for failure to state claim is not appropriate unless it clearly appears that no relief can be granted under any set of facts that could be proved consistently with plaintiff's allegations. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[4] Civil Rights ⚿173.1
78k173.1

ADA was enacted to bar employers from discriminating against qualified individuals with a disability. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

[5] Civil Rights ⚿173.1
78k173.1

To establish prima facie case under ADA, employee must show that: (1) he or she is disabled as defined by ADA; (2) he or she is qualified, with or without reasonable accommodation, to do job he or she held or seeks; and (3) his or her failure to get or keep job constituted unlawful discrimination based on disability. Americans with Disabilities Act of 1990, § 102(a), 42 U.S.C.A. § 12112(a).

[6] Civil Rights ⚿174
78k174

Employee, whose security clearance in nuclear plant was revoked because of his alcoholism, was not "qualified individual with a disability" under ADA; federal regulations made security clearance an essential component of employee's former job, maintaining security clearance was essential job function, revocation of clearance was necessitated by employee's alcoholism and related emotional and psychological problems, failure to suspend or revoke clearance would have placed employer in conflict with its duties as nuclear plant licensee, and employer could make no reasonable accommodation without compromising obligations imposed by regulations. Americans with Disabilities Act of 1990, § 101(8), 42 U.S.C.A. § 12111(8).

[7] Civil Rights ⚿174
78k174

Even if employee, whose security clearance in nuclear plant was revoked because of his alcoholism, was covered individual under ADA, employer's reassignment of him to loading dock position which did not require security clearance was reasonable accommodation within meaning of ADA. Americans with Disabilities Act of 1990, § 102(b)(5)(A), 42

U.S.C.A. § 12112(b)(5)(A).
*439 Michael W. McCoy, pro se.

C. Edward Mitchell, Bret J. Southard, Mitchell, Mitchell, Gray and Gallagher, Williamsport, PA, for defendant.

MEMORANDUM

McCLURE, District Judge.

BACKGROUND:

Plaintiff Michael W. McCoy brings this action against his employer, Pennsylvania Power and Light Company (PP & L), alleging the violation of his rights under the Americans With Disabilities Act of 1990, (ADA) 42 U.S.C. §§ 12101-12134. Plaintiff alleges that PP & L revoked his security clearance because he is an alcoholic. The revocation of his security clearance precluded plaintiff from remaining in his job as a nuclear plant operator. PP & L reassigned him to a position on the loading dock which does not require security clearance. Plaintiff protests the reassignment and revocation of his security status as a violation of his rights under the ADA.

PP & L moves to dismiss the complaint under Rule 12(b) for failure to state a cause of action. Its motion is unopposed. Local Rule 7.6. For the reasons which follow, we *440 consider the motion on the merits and will dismiss the complaint.

DISCUSSION

Rule 12(b)(6) motion

[1][2][3] In deciding defendants' motion, we are "required to accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the non-movant." Jordan v. Fox, Rothschild, O'Brien & Frankel, Inc., 20 F.3d 1250, 1261 (3d Cir.1994). "In determining whether a claim should be dismissed under Rule 12(b)(6)," we look "only to the facts alleged in the complaint and its attachments without reference to other parts of the record." Id. Dismissal is not appropriate unless "it clearly appears that no relief can be granted under any set of facts that could be proved consistently with the plaintiff's allegations." Id.

ADA claims

[4][5] The ADA was enacted to bar employers from discriminating against qualified individuals with a disability. To establish a prima facie case under the ADA, a plaintiff must show that: 1) he is "disabled" as defined by the ADA; 2) he is qualified, with or without reasonable accommodation, to do the job he held or seeks; and 3) his failure to get or keep the job constituted unlawful discrimination based on his disability. Adapted from White v. York International Corp., 45 F.3d 357, 360-61 (10th Cir.1995); Tyndall v. National Educ. Ctrs., 31 F.3d 209, 212 (4th Cir.1994); Zambelli v. Historic Landmarks, Inc., 1995 WL 116669 at * 3 (E.D.Pa. Mar. 20, 1995); and 42 U.S.C. § 12112(a).

Under the ADA, a "qualified individual with a disability" is one who "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). Acts of discrimination may include failing or refusing to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability" who is a current or prospective employee. 42 U.S.C. § 12112(b)(5)(A).

McDaniel v. AlliedSignal

[6] At issue in this case is the interplay between the regulations propounded by the Nuclear Regulatory Commission (NRC) requiring that only individuals with security clearance be permitted to serve as nuclear plant operators, 10 C.F.R. Chapters 26 and 73, and the provisions of the ADA.

The United States District Court for the District Court of Missouri considered the interplay between government-mandated security clearance requirements and the ADA in McDaniel v. AlliedSignal, Inc., 896 F.Supp. 1482 (W.D.Mo.1995). Floyd McDaniel was employed by a government contractor, AlliedSignal, Inc. (AlliedSignal), which performed work for the United States Department of Energy (DOE). Under the terms of its contract, AlliedSignal had to conform to all DOE security requirements and could not allow individuals to have access to classified information unless the requirements of the Atomic Energy Act, Executive Order 12356 and DOE security regulations and requirements, 10 C.F.R. §§ 710.1-710.60, were met. Because all AlliedSignal employees had access to classified information relating to national security, DOE imposed a contractual requirement that all AlliedSignal employees obtain and maintain a DOE security access authorization (security clearance) from

the federal government.

A DOE Administrative Order required contractors to "establish and implement procedures within their organization to assure that information regarding any employee mental illness which may cause a significant defect in judgment or reliability is promptly brought to the contractor's attention." Id. at 1484.

An awareness of such difficulties triggers an obligation on the part of the employer to alert DOE. "Once aware of this information, the contractor must promptly notify the appropriate DOE official with specific data." Id. "Relevant to this action, when an employee who may have a mental illness has been hospitalized or is otherwise being treated, the contractor must provide the DOE with

> (1) the employee's full name, social security number, and date of birth; (2) competent *441 medical authority's opinion as to whether the employee has (or does not have) a mental illness which may cause a significant defect in judgment or reliability; (3) management action taken or contemplated; (4) after hospitalization, but prior to return to work, a current statement is required from a competent medical authority that the employee does not have a mental illness which may cause a significant defect in judgment or reliability; and (5) other details considered pertinent."

Id.

DOE regulations impose on the government contractor an obligation to collect and relay to it any derogatory information which could imperil an employee's security clearance. In response to this obligation, AlliedSignal relayed to DOE information it received about psychological problems McDaniel was experiencing. McDaniel was twice hospitalized for major depression and was also arrested for and pled guilty to driving under the influence. This information was relayed by AlliedSignal to DOE and resulted in the suspension of plaintiff's security clearance. Information which came to light after the suspension indicated that plaintiff had also been hospitalized for alcoholism. McDaniel's security clearance was later revoked.

McDaniel challenged the revocation in federal court in an action filed under the ADA. The court summarized the issues before it as:

> (1) Is a security clearance a "qualification" for Plaintiff's job under the ADA?
> (2) Is a security clearance an "essential function" of Plaintiff's job under the ADA?
> (3) When an employer knows that a disability will result in the loss of a security clearance, does an employer have a duty to accommodate that disability by providing medical care that cures or mitigates the disability to the extent that a security clearance would be assured?

Id. at 1487.

In concluding that security clearance was a qualification of plaintiff's job, the court considered: 1) legislative history of the ADA which "strongly indicates that Congress intended retention of a government security clearance to qualify as an essential job function under the ADA;" [FN1] 2) evidence that AlliedSignal "has always considered a security clearance to be an essential function of all employment positions at the Kansas City Plant;" and 3) case law decided under section 501 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, finding that required security clearance issued by the United States Navy was an essential function of a civilian computer specialist, Guillot v. Garrett, 970 F.2d 1320 (4th Cir.1992).

> FN1. McDaniel, 896 F.Supp. at 1487. The court then quoted from the committee report: The Committee also notes that the federal government, in granting national security clearances, takes into account current or former drug or alcohol use in denying or terminating such clearances. The Committee recognizes that any function of any employment position that requires a security clearance is an essential function of the employment position.
> Id., at 1487-88, quoting H.R.Rep. No. 485(II), 101st Cong., 2nd Sess. 57, reprinted in 4 U.S.C.C.A.N. 339 (1990). (Emphasis in original)

Having determined that security clearance was, under the facts before it, an essential function of plaintiff's job, the court then considered whether plaintiff could have performed this essential function with a reasonable accommodation from AlliedSignal. The court found that there was nothing in the record to show that AlliedSignal had any authority to rescind or modify the security clearance requirement. Plaintiff's security clearance was revoked by DOE, not AlliedSignal, and was based on requirements imposed on AlliedSignal by DOE, not on decisions or determinations made independently by AlliedSignal.

After reviewing Supreme Court precedent holding that a governmental agency's decision to grant, deny or revoke a security clearance is not open to further review, Department of Navy v. Egan, 484 U.S. 518, 108 S.Ct. 818, 98 L.Ed.2d 918 (1988), the court held

that "[b]ecause the security clearance process is committed by law to federal agency discretion, however, this Court finds that AlliedSignal cannot effect and assure the outcome ***442** of the Government's security clearance decisions." McDaniel, 896 F.Supp. at 1490-91. "In sum, the Court finds that AlliedSignal cannot accommodate the essential function of maintaining a government security clearance." Id. at 1491.

This finding led the court to conclude that McDaniel could not be considered a qualified individual with a disability within the meaning of the ADA, since no reasonable accommodation by AlliedSignal could remove the security clearance requirement or rescind the suspension or revocation of plaintiff's security clearance, that being a matter controlled by the DOE and constrained by its regulations.

McDaniel also challenged the security clearance requirement as an employer-generated qualification standard which screened out individuals with a disability. The court rejected that contention, stating:

> The ADA specifically states ... that an employer can utilize even those qualification standards that screen out individuals with disabilities on the basis of disability as long as the qualification standard is "job-related and consistent with business necessity." 42 U.S.C. § 12112(b)(6); see also 42 U.S.C. § 12113(a) (may be a defense to a charge of discrimination where job qualification is shown to be job-related and consistent with business necessity). Because the Court finds a security clearance to be an essential function of Plaintiff's employment position, it seems to go without saying that a security clearance is both job-related and consistent with business necessity. Accordingly, the Court finds that the qualification standard requirement of a security clearance to maintain Plaintiff's employment does not violate this section of the ADA.

Id. at 1491. See also: Daugherty v. City of El Paso, 56 F.3d 695 (5th Cir.1995).

Plaintiff's allegations

The details given in plaintiff's complaint are somewhat sketchy but provide enough to outline the key events upon which his claim is based. Plaintiff alleges that after he notified PP & L of his disability on September 7, 1994, he was transferred to a position on the loading dock. He states that on April 21, 1995 he was evaluated by a company-retained evaluator, and that thereafter his security clearance was revoked. Attached to the complaint is a copy of a notice dated May 2, 1995 which states that plaintiff's security clearance was suspended on September 28, 1994 after PP & L received notice that plaintiff had been "self-admitted" to supervision, was an alcoholic, was experiencing marital problems and was arrested for DUI (driving under the influence). The suspension notice was signed by William L. Bohrer, Director-Corporate Security. There is a further notation on the same sheet which states "Fail psych--Dr. Baird-4/13/95," and the notation of a denial of clearance, citing Rule 8.

Attached to the foregoing notice is a single sheet bearing the heading "Denial Criteria," with a list of nine criteria. Item number eight on the list is highlighted and has a checkmark beside it. It reads: "A psychological evaluation which indicates that the individual is a risk in terms of trustworthiness or reliability."

Also attached as an exhibit to plaintiff's complaint is a document titled "Clearance File Review," which states that Chris D. Lopes, Manager-Nuclear Security made the decision to deny security clearance to McCoy on May 2, 1995, based on the following criteria:

> * A psychological evaluation which indicates that the individual is a risk in terms of trustworthiness or reliability.
> - Psychological evaluation performed April 13, 1995 determined subject is a security risk for a nuclear assignment at the present time. Recommendation is that subject remain on special assignment until evidence of sobriety for at least one year and then be re-evaluated.

The document indicates that "security clearance is to remain denied," is signed by Robert G. Byram, Senior Vice President-Nuclear, and is dated May 23, 1995.

Additional documents attached to the complaint reflect the following: 1) plaintiff was diagnosed an alcoholic and received treatment for his condition from August 17, 1994 to November 15, 1994; and 2) an assessment ***443** from Dave Steffenauer, plaintiff's direct supervisor, that plaintiff, whom he has known for seven years, is trustworthy and reliable.

PP & L contends that NRC regulations required it to suspend McCoy's security clearance after it received notice of a problem with alcoholism and other psychological difficulties. NRC regulations impose on the licensee (PP & L) the obligation of establishing and maintaining "an access authorization program" to

assure that individuals granted access to secure areas "are trustworthy and reliable and do not constitute an unreasonable risk to the health and safety of the public, including a potential to commit radiological sabotage." 10 C.F.R. § 73.56(b).

NRC regulations also impose on nuclear reactor licensees an obligation to implement what are know as "Fitness for Duty Programs." Regulations require that such programs apply to "all persons granted unescorted access to nuclear power plant protected areas," 10 C.F.R. § 26.2., and "provide reasonable assurance that nuclear power plant personnel ... will perform their tasks in a reliable and trustworthy manner and are not under the influence of any substance, legal or illegal, or mentally or physically impaired from any cause, which in any way adversely affects their ability to safely and competently perform their duties ... and have a goal of achieving a drug fee workplace and a workplace free of the effects of such substances." 10 C.F.R. § 26.10.

The regulations also impose an obligation on the part of the licensee to take remedial action if such problems are brought to its attention. Chapter 26 regulations require "each licensee subject to this part" to suspend or revoke the right of employees with such problems to unrestricted access to secure areas of the plant. 10 C.F.R. § 26.27. These requirements and restrictions are implemented and explained to employees in PP & L's Personnel Security Manual.

PP & L submits, in support of its motion to dismiss, a psychological evaluation report dated December 15, 1994 from Carl S. Payne, M.S.Ed. Dr. Payne states plaintiff should not be considered a security risk if he can remain sober for one year. (Record document no. 7, exhibit "C") [FN2]

> FN2. Since we decide this motion under Rule 6(b), not Rule 56, Dr. Payne's report did not play a material role in our analysis and we would have reached the same result without it. It is clear from the documents attached to plaintiff's complaint that the basis for the revocation of his security clearance was the diagnosis of alcoholism and related emotional, psychological and legal problems experienced by McCoy.

PP & L argues that plaintiff's alcoholism, and attendant psychological and legal problems, rendered him no longer qualified to hold security clearance status, and that its obligation, imposed by NRC regulations to police potential security risks and take remedial action if necessary, required it to revoke plaintiff's security status at least until such time as there is clear evidence that his problem with alcoholism is in the past and that he can be allowed unrestricted access to secure areas with no potential threat to the plant or the public.

The issues here are the same as those considered by the district court in McDaniel, i.e. whether 1) security clearance is a "qualification" necessary to plaintiff's job as a nuclear plant operator under the ADA; 2) whether obtaining and maintaining security clearance is an "essential function" of plaintiff's job under the ADA; and 3) whether PP & L had a duty to accommodate plaintiff's disability by, e.g. lifting the security clearance requirement or granting him continued clearance despite warning signals suggesting that he does not meet the criteria for continued employment in a secured area imposed by the Fitness of Duty Program. See McDaniel, 896 F.Supp. at 1487.

For the reasons stated by the district court in McDaniel, we reach the same conclusions. We find that: 1) NRC regulations make security clearance an essential component of plaintiff's former job as a nuclear plant operator; 2) maintaining security clearance is an essential job function and any revocation or suspension of that status renders an employee ineligible, i.e. not qualified, under NRC regulations, to work as a nuclear plant operator; 3) suspension and revocation *444 of plaintiff's security clearance was not only justified, but necessitated, by McCoy's alcoholism and related emotional and psychological problems; 4) failure to suspend or revoke his security status would have placed PP & L in conflict with, and in derogation of, its duties as an nuclear plant licensee to safeguard the public welfare by restricting unsupervised access to secure areas to those not likely to pose a risk to operation of the plant; and 5) PP & L could make no "reasonable accommodation" that would have allowed plaintiff to remain in his former position and retain his security clearance without compromising its obligation imposed by NRC regulations to supervise carefully employees granted access to secure areas and take steps to restrict access by any employee who poses a potential threat to the safe operation of the plant. For all of these reasons, it is apparent as a matter of law that plaintiff is not a qualified individual with a disability within the meaning of the ADA, since his disability precludes him from retaining the security clearance necessary to perform his former job.

[7] Finally, even if we were to conclude that plaintiff is a covered individual under the ADA, PP & L's reassignment of him to a loading dock position which does not require security clearance is a reasonable

accommodation within the meaning of the ADA, See, e.g., Pattison v. Meijer, Inc., 897 F.Supp. 1002, 1008 (W.D.Mich.1995), such that no liability attaches to its decision to revoke his security status.

* * *

An order will be issued consistent with this memorandum.

ORDER

For the reasons stated in the accompanying memorandum, IT IS ORDERED THAT:

1. The Rule 12(b) motion filed by the defendant Pennsylvania Power and Light Company (PP & L) (record document no. 7) is granted.

2. Plaintiff's complaint is dismissed with prejudice and without leave to amend.

3. Any appeal from this order will be deemed frivolous and without merit.

4. The Clerk of Court is directed to close this file.

END OF DOCUMENT

United States District Court,
W.D. Missouri,
Western Division.

Floyd E. McDANIEL, Plaintiff,
v.
ALLIEDSIGNAL, INC., Defendant.

No. 94-0522-CV-W-3.

Aug. 24, 1995.

Government contractor's employee who was hospitalized for depression and alcoholism and who, following his hospitalization, had his Department of Energy (DOE) security clearance revoked brought action against government contractor under Americans with Disabilities Act (ADA). Employer moved for summary judgment. The District Court, Elmo B. Hunter, Senior District Judge, held that: (1) security clearance was essential function of the employment position held by employee, and (2) employee was not a "qualified individual" with a disability within meaning of ADA and therefore, contractor did not have duty to accommodate employee's disability by providing medical care that cured or mitigated his disability to extent that security clearance would be assured.

Motion granted.

West Headnotes

[1] Federal Civil Procedure ⚿2543
170Ak2543

[1] Federal Civil Procedure ⚿2544
170Ak2544

Movant for summary judgment bears burden of proving that no genuine issue of material fact exists and to determine whether movant has satisfied its burden, court must consider all inferences drawn from the underlying facts in light most favorable to nonmovant and resolve all reasonable doubts against movant. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[2] Civil Rights ⚿173.1
78k173.1

Security clearance was "essential function" of employment position held by worker whose employer was a management and operating contractor for the Department of Energy (DOE) for purposes of ADA section defining "qualified individual with a disability" as an individual with a disability who can perform "essential functions" of employment position that such individual holds; employee handbook stated that it was a condition of employment that employee obtain and retain government security clearance and collective bargaining agreement stated that, where government security regulations are placed upon employer, such regulations will govern acceptance of employee for work. Americans with Disabilities Act of 1990, § 101(8), 42 U.S.C.A. § 12111(8).

[3] Civil Rights ⚿173.1
78k173.1

To establish prima facie case under ADA, plaintiff must show that he was disabled as defined by the ADA, that he was qualified, with or without accommodation, to do the job, and that his termination amounted to unlawful discrimination based on his disability. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

[4] Civil Rights ⚿173.1
78k173.1

To make out prima facie case under ADA, plaintiff must show that he can perform essential functions of the job in spite of the disability either (a) with no need for accommodation or (b) with reasonable accommodation since plaintiff must show that he was "qualified" as part of the prima facie case and since that term has been defined to include the concept of "reasonable accommodation." Americans with Disabilities Act of 1990, § 101(8), 42 U.S.C.A. § 12111(8).

[5] Statutes ⚿223.1
361k223.1

When dealing with ADA case, cases brought under Rehabilitation Act are instructive because of the similarities between ADA and Rehabilitation Act and their implementing regulations. Rehabilitation Act of 1973, § 2 et seq., 29 U.S.C.A. § 701 et seq.; Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

[6] Civil Rights ⚿173.1
78k173.1

Focus of ADA's requirement of "reasonable accommodation" is employee's job, not employee's

disability. Americans with Disabilities Act of 1990, § 101(9), 42 U.S.C.A. § 12111(9).

[7] Civil Rights ⚖173.1
78k173.1

Under ADA, accommodation is unreasonable if it would necessitate modification of essential nature of the program or place undue burdens on employer. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

[8] Civil Rights ⚖174
78k174

Government contractor's employee who was hospitalized for depression and alcoholism and who, following his hospitalization, had his Department of Energy (DOE) security clearance revoked was not a "qualified individual" with a disability within meaning of ADA and therefore, government contractor did not have duty to accommodate employee's disability by providing medical care that cured or mitigated employee's disability to the extent that government security clearance would be assured. Americans with Disabilities Act of 1990, § 101(8), 42 U.S.C.A. § 12111(8).

[9] Civil Rights ⚖173.1
78k173.1

Qualification standard requirement of a security clearance to maintain worker's employment for government contractor did not violate ADA section stating that the term "discriminate" includes using qualification standards that screen out individual with a disability unless the standard is shown to be job related and is consistent with business necessity; security clearance was essential function of worker's employment and, therefore, was both job related and consistent with business necessity. Americans with Disabilities Act of 1990, § 102(b)(6), 42 U.S.C.A. § 12112(b)(6).

*1483 Jerry Kenter and John B. Boyd, Connaughton, Boyd & Kenter, P.C., Kansas City, MO, for plaintiff.

Jill Marchant Munden and David A. Sosinski, Allied-Signal Inc., Kansas City, MO, for defendant.

ORDER

ELMO B. HUNTER, Senior District Judge.

In this action, Floyd McDaniel alleges defendant AlliedSignal Inc.'s Kansas City Division (AlliedSignal) engaged in unlawful discrimination under the provisions of Title I of the Americans With Disabilities Act of 1990, 42 U.S.C. § 12112 (1990) ("ADA"). Plaintiff claims that AlliedSignal was obligated under the ADA to provide him a reasonable accommodation that would cure or mitigate his disability to the extent that his required security clearance would not be revoked by the United States Government. AlliedSignal now moves for summary judgment claiming the maintenance of a security clearance is a matter solely between an individual employee and the Government and thus Plaintiff's claim that Allied Signal unlawfully failed to reasonably accommodate him to the extent that his required security clearance would not be revoked has no merit.

ALLIEDSIGNAL'S RELATIONSHIP WITH THE DEPARTMENT OF ENERGY

AlliedSignal is a management and operating contractor for the United States Department of Energy ("DOE") at DOE's Kansas City Plant. (Def.'s Mot. Sum. Judg., App. B, ¶ 2). DOE and AlliedSignal entered into Contract No. DE-ACO4- 76DP00613 ("Contract") that provides for AlliedSignal to manage and operate the government-owned Kansas City Plant. [FN1] Id. AlliedSignal's primary mission is to produce non-nuclear components of nuclear weapons for the national defense. Id. at ¶ 3. A critical aspect of this mission is the protection and safeguarding of classified information relating to matters of national security. Id.

FN1. Operation of the Kansas City Plant is undertaken under the authority of the Atomic Energy Act of 1954, as amended ("AEA").

Under the security provisions of its contract, AlliedSignal agrees to conform to all DOE security requirements and not to permit individuals to have access to classified information except in accordance with the Atomic Energy Act, Executive Order 12356, *1484 and DOE's security regulations and requirements. [FN2] (Def.'s Mot. Sum. Judg., App. A, ¶ 2, App. B, ¶ 3). Because all AlliedSignal employees have access to classified information relating to national security, [FN3] the DOE contractually requires AlliedSignal to only employ those persons who obtain and maintain a DOE security access authorization ("security clearance") from the Government. [FN4] The DOE Albuquerque Operations Office issued Administrative Order 5631.2B (DOE AL Order 5631.2B) setting forth the policies, procedures, and objectives of the DOE

Personnel Security Program. [FN5] The provisions of this Order apply to the DOE Albuquerque Operations Office (AL), DOE AL contractors, subcontractors, consultants and all personnel performing work for the Department as provided by law and/or contract. (DOE AL Order 5631.2B). Notably, this Order requires a contractor to establish and implement procedures within their organization to assure that information regarding any employee mental illness which may cause a significant defect in judgment or reliability is promptly brought to the contractor's attention. See DOE AL Order 5631.2B, Attachment III-1.E.1.(a). Once aware of this information, the contractor must promptly notify the appropriate DOE official with specific data. [FN6] DOE AL Order 5631.2B, Attachment III-1.E.1.(a)(b). Relevant to this action, when an employee who may have a mental illness has been hospitalized or is otherwise being treated, the contractor must provide the DOE with

> (1) the employee's full name, social security number, and date of birth; (2) competent medical authority's opinion as to whether the employee has (or does not have) a mental illness which may cause a significant defect in judgment or reliability; (3) management action taken or contemplated; (4) after hospitalization, but prior to return to work, a current statement is required from a competent medical authority that the employee does not have a mental illness which may cause a significant defect in judgment or reliability; and (5) other details considered pertinent.

DOE AL Order 5631.2B, Attachment III-1.C.1.(b) and Attachment III-1.E.1. (a)(b).

Also relevant to this action, the DOE AL Order charges the contractor with the responsibility to establish and implement procedures within the organization to assure that derogatory information and other information of security interest concerning employees is promptly brought to the contractor's attention. DOE AL Order 5631.2B, Attachment III-2.C.1.(a). The Order specifically defines derogatory information as

> information which indicates an individual is or has been subject to circumstances or engaged in conduct which indicates the individual is not reliable or trustworthy or may be subject to coercion, influence, or pressure which may cause the individual to act contrary to the best interests of the national security. Information is to be considered derogatory and reported if it reflects that an employee or applicant:
>
> * * * * * *
>
> d. Has questionable character. Character-type derogatory information includes, but is not limited to, the following:
> *1485 (1) Arrest, except minor traffic violations for which a fine of $100.00 or less is imposed. Note that any alcohol or drug-related arrests must be reported regardless of disposition and/or amount of fine.
>
> * * * * * *
>
> (3) Alcoholism, except as becomes known through voluntary involvement in Employee Assistance Programs. However, failure to successfully complete the program negates the reporting exception in such cases.

DOE AL Order 5631.2B, Attachment III-2.B.3. Once aware of this derogatory information, the contractor must promptly notify the appropriate DOE official with the specific relevant facts. DOE AL Order 5631.2B, Attachment III- 2.C.1(b).

PLAINTIFF'S BACKGROUND AT ALLIEDSIGNAL

Plaintiff was hired by Defendant on July 21, 1977, as

FN2. The DOE criteria and procedures to obtain and retain security clearance are found at 10 C.F.R. § 710.

FN3. Plaintiff alleges in his Opposition Brief that Defendant presents conflicting statements to the Court regarding whether everyone must have a security clearance at the AlliedSignal Kansas City Plant. Plaintiff's Opposition at p. 2. This Court finds no such conflict in the affidavits Defendant submitted in support of summary judgment.

FN4. According to Steve Taylor, Acting Area Manager of the DOE's Kansas City Office, it is the physical configuration of the Kansas City Plant and the access of AlliedSignal employees to "Restricted Data," as defined under the AEA, that induced the DOE to require all persons employed at AlliedSignal to obtain and retain a DOE security clearance. (Def.'s Mot. Sum. Judg., App. B, ¶¶ 1-3).

FN5. The authority to promulgate administrative orders such as this one is granted to the Department of Energy through the Atomic Energy Act, 42 U.S.C. § 2201 (1994).

FN6. The Order designates an appropriate DOE official as the AL Area Manager, the Project Office Manager, the Contracting Officer, or the Director of the Security and Nuclear Safeguards Division.

an electrical-mechanical inspector trainee and was ultimately promoted to the position of Electrician. On November 14, 1977, Plaintiff was granted the required security clearance from the Government.

On September 3, 1985, AlliedSignal Medical Director Dr. Easterday received a phone call from Plaintiff's wife who reported that she had hospitalized Plaintiff at the Truman Medical Center psychiatric ward for treatment of depression. (Pl.'s Personnel Security File, 9-3 85 Memorandum to E.C. McGurren [FN7] from J.E. McLaury [FN8]). Mrs. McDaniel indicated in her phone call that the depression started after the death of Plaintiff's father approximately two years earlier, and that he had periodically visited a psychologist but that the condition continued to worsen until it became necessary for hospitalization. Id. As a result of this call, Dr. Easterday immediately put Plaintiff on two weeks medical leave. Id. Plaintiff returned to work on September 16, 1995. On September 25, 1985, AlliedSignal sent Dr. Brillantes, Plaintiff's doctor, a fitness for duty questionnaire. [FN9] Although Dr. Brillantes did not respond to this questionnaire until August 20, 1986, he ultimately stated in the questionnaire that continuing treatment on an outpatient basis was necessary, and that although in his opinion Defendant had a mental illness which may cause a defect in judgment or reliability, it was not of a nature which may cause a significant defect in judgment or reliability. (Pl.'s Personnel Security File, 8-20-86 Fitness for Duty Statement by Dr. Brillantes) (emphasis added).

FN7. E.C. McGurren was the manager of security for AlliedSignal at this time.

FN8. John McLaury was the Supervisor for Personnel and Vendor Security at AlliedSignal at this time. Mr. McGurren was his immediate supervisor.

FN9. As noted above, when an employee who may have a mental illness has been hospitalized or is otherwise being treated, the contractor must provide the DOE with a "competent medical authority's opinion as to whether the employee has (or does not have) a mental illness which may cause a significant defect in judgment or reliability." DOE AL Order 5631.2B, Attachment III-1.C.1.(b) and 5631.2B, Attachment III-1.E.1.(a)(b).

In November of 1987, it came to the attention of AlliedSignal that Plaintiff was hospitalized at the Charter Hospital of Overland Park, Kansas, from November 3, 1987, through November 25, 1987, for treatment of a mental illness. (Pl.'s Personnel Security File, 12-22-87 Memorandum from L.K. Williams [FN10] to Tom Uko [FN11]). Plaintiff was under the care of Dr. Billingsley, a psychiatrist, and was treated for a major depression. Id. A Fitness for Duty Statement, dated December 16, 1987, was received from Dr. Billingsley, in which he stated that continuing treatment was required but that Plaintiff did not, in his opinion, have a mental illness which would cause a defect in judgment or reliability. Id. Based on the Fitness for Duty Statement and an examination by Bendix Medical Staff, Plaintiff returned to work on December 1, 1987. Pursuant to DOE AL Order 5631.2B, Attachment III-1.C.1.(b) and Attachment III-1.E.1.(a)(b), all the preceding information regarding this hospitalization, as ***1486** well as the hospitalization at Truman Medical Center from September 2, 1985, to September 11, 1985, [FN12] was furnished by AlliedSignal security personnel to DOE security personnel in a memorandum dated December 22, 1987. Id.

FN10. L.K. Williams was the Director of Human Resources at AlliedSignal until April of 1988.

FN11. Tom Uko was the DOE Chief of the Administrative Branch for the Kansas City Area Office at this time.

FN12. There is no evidence before the Court that this particular hospitalization was reported before this time to DOE security personnel.

By memorandum dated September 18, 1989, AlliedSignal security personnel notified DOE security personnel, as required by DOE AL Order 5631.2B, Attachment III-2.B.3 and III-2.C.1(b), of Plaintiff's arrest for driving while intoxicated and a burned-out taillight, his guilty plea to these charges, and the sentence imposed. (Def.'s Mot. Sum. Judg., App. A, ¶ 3). The memorandum attached a signed statement by Plaintiff that summarized the charges and the sentence. Id.

On January 14, 1991, Plaintiff formally was notified in person that his security clearance authorization was suspended by the authority of Rush O. Inlow, Assistant Manager for Safeguards and Security, Albuquerque Operations Office. (Pl.'s Personnel Security File, 1-14-91 Memorandum from J.E. McLaury to File). Plaintiff's blue badge was confiscated and he was issued a red badge pending final resolution of his security clearance eligibility. Id.

Following this suspension, it came to the attention of

AlliedSignal that Plaintiff was hospitalized from January 21, 1991, through February 21, 1991, at the Charter Hospital, under the care of Dr. Kirubakaran, Psychiatrist, for alcoholism. (Pl.'s Personnel Security File, 4-30-91 Memorandum from C.D. Miller [FN13] to Charles Ross [FN14]). A Fitness for Duty Statement, dated April 23, 1991, was received from Dr. Kirubakaran, in which he stated that continuing treatment was required but that Plaintiff did not, in his opinion, suffer from a mental illness which would cause a defect in judgment or reliability. Id. Pursuant to DOE AL Order 5631.2B, Attachment III-1.C.1. (b) and Attachment III-1.E.1.(a)(b), this hospitalization information was furnished by AlliedSignal security personnel to DOE security personnel in a memorandum dated April 30, 1991. Id.

FN13. C.D. Miller was the Director of Human Resources at AlliedSignal at this time.

FN14. Charles Ross was the Acting DOE Chief of the Administrative Branch for the Kansas City Area Office at this time.

On May 29, 1992, Rush Inlow sent Mr. McDaniel a letter concerning the status of his security clearance. (Def.'s Mot. Sum. Judgment, App. A, ¶ 6). Mr. Inlow states in an affidavit that he "provided a copy of Title 10 Code of Federal Regulation (C.F.R.) Part 710, 'Criteria and Procedures for Determining Eligibility for Access to Classified Matters or Significant Quantities of Special Nuclear Material' and advised Mr. McDaniel of his right to a hearing on the issue of his eligibility for continuation of his security clearance." Id.

Mr. McDaniel exercised his right to a hearing on this matter and one was scheduled for October 29, 1992, at the Kansas City Plant. Id. at ¶ 7. The hearing was abbreviated due to Mr. McDaniel's inability to participate in the hearing. Id. Another hearing was scheduled for August 12, 1993, and then rescheduled to August 18, 1993, at the same location. Id. By memorandum signed August 4, 1993, however, Mr. McDaniel withdrew his request for a hearing and submitted documentary evidence from three physicians on his behalf. Id.

Mr. Inlow states that he confirmed with Mr. McDaniel by letter dated September 7, 1993, his election not to have a hearing and advised him that DOE would review the case on the basis of all information submitted. Id. at ¶ 8. He then referred the case to the Director, Office of Security Affairs, DOE, Washington, DC, who by DOE Regulation 10 C.F.R. § 710.22(h) (1987), is charged with making the final decision on continuance of a security clearance. Id.

Mr. McDaniel was notified by letter on November 15, 1993, that his security clearance was revoked and the reasons in support of that decision. Id. at ¶ 9. The President of AlliedSignal was also notified by letter by the Director of the Personnel Security Division ***1487** of this revocation but without specification of the reasons in support of that decision. Id.

ISSUES BEFORE THE COURT

At a meeting before the Court on October 17, 1994, counsel for Defendant and counsel for Plaintiff agreed that the legal issues raised in this action are:

(1) Is a security clearance a "qualification" for Plaintiff's job under the ADA?
(2) Is a security clearance an "essential function" of Plaintiff's job under the ADA?
(3) When an employer knows that a disability will result in the loss of a security clearance, does an employer have a duty to accommodate that disability by providing medical care that cures or mitigates the disability to the extent that a security clearance would be assured?

(Def.'s Mot. Sum. Judgment, App. D).

STANDARD OF REVIEW

To decide whether summary judgment is appropriate the Court must satisfy Fed.R.Civ.P. 56(c). Pursuant to the rule, summary judgment is proper only if "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." "[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

[1] The moving party bears the burden of proving that no genuine issue of material fact exists. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). To determine whether the moving party has satisfied the burden, the Court must consider all inferences drawn from the underlying facts in a light most favorable to the party opposing the motion, and must resolve all reasonable doubts against the moving party. Anderson, 477 U.S. at 255, 106 S.Ct.

at 2514; see Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356- 57, 89 L.Ed.2d 538 (1986). Notably, "Rule 56(e) ... requires that the nonmoving party go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' [plaintiff must] designate 'specific facts showing there is a genuine issue for trial.' " Id. at 324, 106 S.Ct. at 2553.

DISCUSSION

The general rule under the ADA is that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Relevant to this action, the term "discriminate" includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee." 42 U.S.C. § 12112(b)(5)(A). It is this provision that Defendant contends Plaintiff does not satisfy, asserting that Plaintiff is not a "otherwise qualified individual" for purposes of the ADA.

The statute itself defines the term "qualified individual with a disability" to mean "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds." 42 U.S.C. § 12111(8).

1. Is a security clearance an essential function of Plaintiff's employment position?

As a preliminary matter, legislative history strongly indicates that Congress intended retention of a government security clearance to qualify as an essential job function under the ADA:

> The Committee also notes that the federal government, in granting national security clearances, takes into account current or *1488 former drug or alcohol use in denying or terminating such clearances. The Committee recognizes that any function of any employment position that requires a security clearance is an essential function of the employment position.

H.R.Rep. No. 485(II), 101st Cong., 2nd Sess. 57, reprinted in 4 U.S.C.C.A.N. 339 (1990).

Notably, the ADA specifically requires consideration to be given to "the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(n)(3)(i).

Plaintiff does not dispute that AlliedSignal, in its capacity as a contractor for the DOE, has always considered a security clearance to be an essential function of all employment positions at the Kansas City Plant. That AlliedSignal considers this to be so is evidenced by the following examples.

First, Defendant's Employee Handbook explicitly states that "[i]t is a condition of employment that [an employee] must be able to obtain and retain a government Q-level security clearance." AlliedSignal Employee Handbook at p. 26. The Handbook further states that "[i]f the government denies or revokes [an employee's] security clearance, [ ] employment will be terminated." Id. See 29 C.F.R. § 1630.2(n)(3)(ii) (evidence of whether a particular function is essential includes "[w]ritten job descriptions prepared before advertising or interviewing applicants for the job.")

Next, the collective bargaining agreement negotiated between AlliedSignal and the labor union to which Plaintiff was a paid member ["Agreement"] further provides evidence that Defendant considers a security clearance to be an essential function of all employment positions at AlliedSignal:

> The Union agrees that, where Government security regulations are placed upon [AlliedSignal], such regulations will govern the acceptance or rejection of an employee for work coming under those regulations. The Union agrees that it will not file a grievance where the Company has removed from the payroll any employee who has not received a security clearance or whose security clearance has been revoked. This provision does not affect any rights or remedies available through Government procedures.

Agreement at pp. 73-74. See 29 C.F.R. § 1630.2(n)(3)(v) (evidence of whether a particular function is essential includes "[t]he terms of a collective bargaining agreement.").

Lastly, the required distribution of AlliedSignal's new hire "security packet," containing United States Government and DOE security documents, forms and

information, which must be provided to and completed by all AlliedSignal employees in order for the Government to process and issue security clearances, is further evidence that Defendant considers a security clearance to be an essential function of all employment positions at AlliedSignal.

As additional support for the finding that a government security clearance is an essential function of the employment position from which Plaintiff was terminated, this Court finds the case of Guillot v. Garrett, 970 F.2d 1320 (4th Cir.1992) to be persuasive authority in that direction. In Guillot, the Fourth Circuit Court of Appeals explicitly found that under section 501 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ["The Rehabilitation Act"], a required security clearance issued by the United States Navy was an essential function of a civilian computer specialist position. [FN15] Id. at 1327.

> FN15. Since the Americans with Disabilities Act did not become effective for employers of 25 or more employees until July 26, 1992, there is a paucity of cases interpreting the ADA. Therefore, in attempting to construe the language of the statute, the Court must look to the legislative history of the ADA. The legislative history indicates that Congress intended that the terms and regulations issued under the ADA should track those of section 501 of the Rehabilitation Act. The Equal Employment Opportunity Commission ("EEOC") states that: "The range of employment decisions covered by this nondiscrimination mandate is to be construed in a manner consistent with the regulations implementing [ ] the Rehabilitation Act of 1973." EEOC Interpretive Guidance on Title I of the ADA, 29 C.F.R.App. § 1630.4.
>
> Notably, the Rehabilitation Act of 1973 is a close relative of the ADA. The Rehabilitation Act prohibits discrimination against handicapped individuals and requires covered employers to make reasonable accommodation to those handicapped individuals who are otherwise qualified to perform the job duties of a particular position. The Rehabilitation Act, however, is limited to federal agencies, federal grant recipients and federal government contractors. When these protections were extended to employees of private employers through the ADA, Congress drew heavily from the language, definitions and concepts of the Rehabilitation Act of 1973. H.R.Rep. No. 485(II), 101st Cong., 2nd Sess. 23, reprinted in 4 U.S.C.C.A.N. 304-305 (1990).

*1489 [2] Based on the legislative history of the ADA, the mandatory consideration of evidence involving "the employer's judgment as to what functions of a job are essential," and relevant case law on this subject under the Rehabilitation Act, this Court FINDS that a security clearance under the facts here are an essential function of the employment position Plaintiff held. Based on this finding, the Court must now determine whether Plaintiff could have performed the essential function of maintaining his government security clearance with reasonable accommodation from Defendant.

2. Reasonable Accommodation

Plaintiff asserts that AlliedSignal was obligated under the ADA to provide him a reasonable accommodation that would cure or mitigate his alleged disability to the extent that his required security clearance, found by this Court to be an essential function of his employment, would not be revoked by the United States Government.

[3][4][5] To establish a prima facie case under the ADA, a plaintiff must show that: (1) he was "disabled" as defined by the ADA; (2) he was qualified, with or without accommodation, to do the job; and (3) his termination amounted to unlawful discrimination based on his disability. White v. York Int'l Corp., 45 F.3d 357, 360-61 (10th Cir.1995); Tyndall v. Nat'l Educ. Ctrs., 31 F.3d 209, 212 (4th Cir.1994). Since a plaintiff must show that he was "qualified" as part of the prima facie case, and since that term has been defined to include the concept of "reasonable accommodation," a plaintiff must, in order to make out a prima facie case, show that he can perform the essential functions of the job in spite of the disability either (a) with no need for accommodation, or (b) with a reasonable accommodation. [FN16]

> FN16. Although in the context of a discrimination action brought pursuant to the Rehabilitation Act, the Eighth Circuit Court of Appeals also has held that in order to make a prima facie case of discrimination on the basis of handicap, a plaintiff must initially meet the burden of providing evidence sufficient to make at least a facial showing that reasonable accommodation is actually possible. Arneson v. Heckler, 879 F.2d 393, 396 (8th Cir.1989). See also Gilbert v. Frank, 949 F.2d 637, 642 (2d Cir.1991); White v. York Int'l Corp., 874 F.Supp. 342, 344 (W.D.Ok.1993). Because of the similarities between the ADA and the Rehabilitation Act of 1973, and their implementing regulations, cases brought under the Rehabilitation Act are instructive. Compare 29 C.F.R. § 1630.2(m) with 45 C.F.R. § 84.3(k)(1).

[6] As a preliminary matter, Plaintiff seems to concede that he cannot perform the essential function of his job (maintaining a security clearance) unless he receives some sort of accommodation from AlliedSignal.

There is absolutely no evidence in the record from which to presume, however, that AlliedSignal would have the power to make certain that Plaintiff's required security clearance would not be revoked by the DOE. [FN17] Even if *1490 AlliedSignal provided Plaintiff with the resources to cure or mitigate his alleged disability, [FN18] this accommodation of Plaintiff's alleged disability does not guarantee that Plaintiff's government security clearance would not be revoked by the DOE. Nor would curing or mitigating Plaintiff's alleged disability affect AlliedSignal's duty to report to the Government information regarding any employee mental illness which may cause a significant defect in judgment or reliability or the duty to report alcohol or drug-related arrests of an employee.

FN17. Plaintiff contends that AlliedSignal "participated in the decision to revoke [Plaintiff's] security clearance." Plaintiff's Opposition at p. 4. In support of this contention, Plaintiff states that in letters dated December 3 and December 22, 1987, AlliedSignal specifically asks Plaintiff's treating psychiatric physicians to "assist them in making decisions regarding a security clearance." Id. Based on this language alone, Plaintiff asserts AlliedSignal was "very involved in the daily decisions regarding the revocation of [Plaintiff's] security clearance." Id.
Conversely, Defendant asserts, and in fact files the sworn affidavit of Rush Inlow, DOE Acting Assistant Manager for National Defense Programs, that while information and medical records relating to Plaintiff were obtained from AlliedSignal personnel pursuant to DOE AL Order 5631.2B, Attachment III-1.C.1.(b) and Attachment III-1.E.1.(a)(b), it was the DOE, and only the DOE, that conducted the security clearance investigation. (Def.'s Mot.Sum.Judg., App. A, ¶ 5). Mr. Inlow further stated under oath in his affidavit that it is the DOE, and only the DOE, that is charged with making the final decision on continuance of a security clearance. Id. at ¶ 8 (citing 10 C.F.R. § 710.22(h)).
Based on the evidence submitted to the Court in support of the instant motion, Plaintiff's conclusory allegation that AlliedSignal was "very involved in the daily decisions regarding the revocation of security clearance" fails to create a genuine issue of material fact to survive summary judgment.

FN18. The notion that an employer is obligated to cure or mitigate an employee's disability as part of its duty to "reasonably accommodate" may be unreasonable in and of itself. Although a broad and flexible concept, the Court can find no guidance stating that "reasonable accommodation" is anything but changes to job requirements or working conditions that better enable an employee to perform the essential functions of the job, in spite of his disability. Although certainly not an exhaustive list, examples of reasonable accommodations in the statute include "job restructuring, part- time or modified work schedules; reassignment to a vacant position, acquisition or modifications of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, ... and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9)(B). It is clear that the focus of reasonable accommodation is the employee's job, not the employee's disability.

In a nutshell, Plaintiff's claim demands that government contractors such as AlliedSignal be able to effect and assure the outcome of security clearance decisions and to guarantee that an employee's disability does not influence that outcome as part of the employer's duty to "reasonably accommodate" under the ADA. Because the security clearance process is committed by law to federal agency discretion, however, this Court finds that AlliedSignal cannot effect and assure the outcome of the Government's security clearance decisions.

The United States Supreme Court has held that an agency's decision to grant, deny, or revoke a security clearance is not open to further review. Department of Navy v. Egan, 484 U.S. 518, 108 S.Ct. 818, 98 L.Ed.2d 918 (1988). The Egan Court noted that the authority to protect national security information is granted to the President by the U.S. Constitution.

> His authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant.

Egan, 484 U.S. at 527, 108 S.Ct. at 824. [FN19]

FN19. The Egan Court also specifically found that the general presumption of judicial review "runs aground when it encounters concerns of national security, as in this case, where the grant of security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch." Id.

In Egan, the issue was whether the Merit Systems Protections Board ["MSPB"] had authority to review the decision of the Secretary of the Navy to revoke Egan's Department of Navy security clearance. However, the decision in Egan was not based on any specific grant of authority to the MSPB or the military capacity of the defendant. Rather, Egan was based on

the President's constitutional authority to make the final call as to who has access to national security information. The Secretary of the Navy has that authority for the Department of Navy by direct grant from the President, who obtains his authority directly from the Constitution. The Secretary of Energy [FN20] has the same direct grant of power from the President for security clearances from DOE. See Exec. Order No. 10290, 16 Fed.Reg. 9795 (1951). See also Exec. Order No. 10865, 25 Fed.Reg. 1583 (1960).

> FN20. The delegation of power from the President to "the Commissioners of the Atomic Energy Commission" (AEC) is now a grant to the Secretary of Energy, to whom the functions of the AEC Commissioners were transferred by Congress pursuant to 42 U.S.C. §§ 5814, 7151, 7293.

Because the decision to revoke a security clearance is solely the Government's, AlliedSignal *1491 cannot assure that even the total elimination of an employee's disability would result in the Governments' decision to continue an employee's security clearance. As the court explains in the corresponding circumstances of Guillot, because a security clearance is a requirement of the position and the Government has revoked this clearance, "it is evident that no amount of accommodation ... will render him able to 'perform the essential functions of the position in question.' " Guillot at 1327.

[7] In sum, the Court finds that AlliedSignal cannot accommodate the essential function of maintaining a government security clearance. [FN21] As the EEOC determined in its investigation of Plaintiff's claim, "there is insufficient evidence that [AlliedSignal] denied [Mr. McDaniel] a reasonable accommodation for his disability. [AlliedSignal] discharged [Mr. McDaniel] because of his inability to retain his 'Q' clearance, which is a condition of employment imposed by the U.S. Government." (Def.'s Mot. Sum. Judg., App. C).

> FN21. Even if an accommodation was feasible, it may not be reasonable. An accommodation is unreasonable if it would necessitate modification of the essential nature of the program or place undue burdens on the employer. Reigel v. Kaiser Foundation Health Plan, 859 F.Supp. 963 (E.D.N.C.1994); see also Larkins v. CIBA Vision Corp., 858 F.Supp. 1572 (N.D.Ga.1994) (citing EEOC Interpretive Guidance on Title I of the ADA, 29 C.F.R.App. § 1630.2) (where the court held that a defendant is not required to eliminate an essential function of the employment position in order to accommodate plaintiff). The essential nature of the work being done at AlliedSignal concerns the protection of national security. Elimination of the required security clearance invariably may necessitate modification, and perhaps even elimination, of the essential nature of the AlliedSignal program. Further, this may obviously place an undue burden, as defined by the ADA, upon AlliedSignal.

[8] Based on the above discussion, the Court cannot find Plaintiff to be an individual with a disability who, even with reasonable accommodation in the form of curing or mitigating his alleged disability, can perform the essential function of maintaining a government security clearance pursuant to 42 U.S.C. § 12111(8). [FN22] Therefore, Plaintiff is not a "qualified individual" with a disability within the meaning of the statute. Because Plaintiff is not a "qualified individual" under the ADA, he his not covered by the Act and thus AlliedSignal does not have a duty to accommodate Plaintiff's disability by providing medical care that cures or mitigates Plaintiff's disability to the extent that a security clearance would be assured. [FN23]

> FN22. The ADA specifically states that "[i]t may be a defense to a charge of discrimination [that] ... performance [of an essential function of the job] cannot be accomplished by reasonable accommodation." 42 U.S.C. § 12113(a).

> FN23. Based on the precise language of the ADA, the Court finds it unnecessary to address whether a security clearance is a "qualification" for Plaintiff's job under the ADA.

Plaintiff also seems to allege that AlliedSignal has discriminated against him by using qualification standards that screen out an individual with a disability in violation of 42 U.S.C. § 12112(b)(6). According to EEOC regulations implementing the ADA, "qualification standards mean the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired." 29 C.F.R. § 1630.2(q).

[9] The ADA specifically states, however, that an employer can utilize even those qualification standards that screen out individuals with disabilities on the basis of disability as long as the qualification standard is "job-related and consistent with business necessity." 42 U.S.C. § 12112(b)(6); see also 42 U.S.C. §

12113(a) (may be a defense to a charge of discrimination where job qualification is shown to be job-related and consistent with business necessity). Because the Court finds a security clearance to be an essential function of Plaintiff's employment position, it seems to go without saying that a security clearance is both job-related and consistent with business necessity. Accordingly, the Court finds that the qualification standard requirement of a security clearance to maintain Plaintiff's employment does not violate this section of the ADA.

*1492 Based on the above discussion, it is hereby ORDERED that Defendant's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

END OF DOCUMENT

119 S.Ct. 2162
527 U.S. 555, 144 L.Ed.2d 518, 67 USLW 3683, 67 USLW 4560, Fed. Carr. Cas. P 84,097, 9 A.D. Cases 694,
15 NDLR P 129, 99 Cal. Daily Op. Serv. 4846, 1999 Daily Journal D.A.R. 6243, 1999 CJ C.A.R. 3740,
12 Fla. L. Weekly Fed. S 443
(Cite as: 119 S.Ct. 2162)

Supreme Court of the United States

ALBERTSON'S, INC., Petitioner,
v.
Hallie KIRKINGBURG.

No. 98-591.

Argued April 28, 1999.
Decided June 22, 1999.

Former employee, who was fired from his job as a truck driver after he failed to meet the Department of Transportation's basic vision standards and was not rehired even though he had obtained a waiver of the DOT standards, brought action against former employer under the Americans with Disabilities Act (ADA). The United States District Court for the District of Oregon, Owen M. Panner, J., entered summary judgment for former employer. Former employee appealed. The Court of Appeals for the Ninth Circuit, Reinhardt, Circuit Judge, 143 F.3d 1228, reversed and remanded. Certiorari was granted. The Supreme Court, Justice Souter, held that: (1) individuals with monocular vision are not per se "disabled" within meaning of the ADA but, rather, must prove their disability on a case-by-case basis by offering evidence that the extent of the limitation on a major life activity in terms of their own experience is substantial, and (2) former employer could use its compliance with applicable DOT safety regulations to justify its visual-acuity job qualification standard, despite existence of experimental program by which DOT standard could be waived in an individual case.

Reversed.

Justice Thomas filed a concurring opinion.

Justice Stevens' and Justice Breyer's partial concurrences were noted.

West Headnotes

[1] Civil Rights ⚿173.1
78k173.1

Employee's amblyopia, that is, poor vision caused by abnormal visual development secondary to abnormal visual stimulation, was a "physical impairment" within meaning of the ADA. Americans with Disabilities Act of 1990, § (3)(A), as amended, 42 U.S.C.A. § 12102(2)(A); 29 C.F.R. § 1630.2(h)(1).

[2] Civil Rights ⚿173.1
78k173.1

Seeing was one of employee's major life activities, for purposes of the ADA. Americans with Disabilities Act of 1990, § (3)(A), as amended, 42 U.S.C.A. § 12102(2)(A); 29 C.F.R. § 1630.2(i).

[3] Civil Rights ⚿107(1)
78k107(1)

One fundamental statutory requirement of the ADA is that only impairments causing substantial limitations in individuals' ability to perform major life activities constitute disabilities. Americans with Disabilities Act of 1990, § (3)(A), as amended, 42 U.S.C.A. § 12102(2)(A).

[4] Civil Rights ⚿107(1)
78k107(1)

While the ADA addresses substantial limitations on major life activities, not utter inabilities, it concerns itself only with limitations that are in fact substantial, and not merely different. Americans with Disabilities Act of 1990, § (3)(A), as amended, 42 U.S.C.A. § 12102(2)(A).

[5] Civil Rights ⚿107(1)
78k107(1)

In judging whether an individual possesses a "disability" within meaning of the ADA, mitigating measures must be taken into account, including both measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems. Americans with Disabilities Act of 1990, § (3)(A), as amended, 42 U.S.C.A. § 12102(2)(A).

[6] Civil Rights ⚿107(1)
78k107(1)

Existence of disabilities under the ADA is determined on a case-by-case basis. Americans with Disabilities Act of 1990, § 3(2), as amended, 42 U.S.C.A. §

12102(2); 29 C.F.R. § 1630.2(j).

[7] Civil Rights ⚿107(1)
78k107(1)

While some impairments may invariably cause a substantial limitation of a major life activity, individuals with monocular vision are not per se "disabled" within meaning of the ADA but, rather, must prove their disability on a case- by-case basis by offering evidence that the extent of limitation on a major life activity in terms of their own experience is substantial. Americans with Disabilities Act of 1990, § (3)(A), as amended, 42 U.S.C.A. § 12102(2)(A).

[8] Civil Rights ⚿107(1)
78k107(1)

Individuals with monocular vision ordinarily will meet the ADA's definition of "disability." Americans with Disabilities Act of 1990, § (3)(A), as amended, 42 U.S.C.A. § 12102(2)(A).

[9] Civil Rights ⚿107(1)
78k107(1)

When Congress enacted the ADA, it recognized that federal safety rules would limit application of the ADA as a matter of law. Americans with Disabilities Act of 1990, § (3)(A), as amended, 42 U.S.C.A. § 12102(2)(A).

[10] Civil Rights ⚿173.1
78k173.1

In context of determining whether former employee, a truck driver with monocular vision, was a "qualified" individual with a disability under the ADA, former employer could use its compliance with applicable Department of Transportation (DOT) safety regulations to justify its visual-acuity job qualification standard, despite existence of experimental program in which DOT vision standard could be waived in an individual case. Americans with Disabilities Act of 1990, §§ 101(8), 102(a), as amended, 42 U.S.C.A. §§ 12111(8), 12112(a); 49 C.F.R. § 391.41(b)(10).

***2163** Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Before beginning a truckdriver's job with petitioner, Albertson's, Inc., in 1990, respondent, Kirkingburg, was examined to see if he met the Department of Transportation's basic vision standards for commercial truckdrivers, which require corrected distant visual acuity of at least 20/40 in each eye and distant binocular acuity of at least 20/40. Although he has amblyopia, an uncorrectable condition that leaves him with 20/200 vision in his left eye and thus effectively monocular vision, the doctor erroneously certified that he met the DOT standards. When his vision was correctly assessed at a 1992 physical, he was told that he had to get a waiver of the DOT standards under a waiver program begun that year. Albertson's, however, fired him for failing to meet the basic DOT vision standards and refused to rehire him after he received a waiver. Kirkingburg sued Albertson's, claiming that firing him violated the Americans with Disabilities Act of 1990. In granting summary judgment for Albertson's, the District Court found that Kirkingburg was not qualified without an accommodation because he could not meet the basic DOT standards and that the waiver program did not alter those standards. The Ninth Circuit reversed, finding that Kirkingburg had established a disability under the Act by demonstrating ***2164** that the manner in which he sees differs significantly from the manner in which most people see; that although the ADA allowed Albertson's to rely on Government regulations in setting a job-related vision standard, Albertson's could not use compliance with the DOT regulations to justify its requirement because the waiver program was a legitimate part of the DOT's regulatory scheme; and that although Albertson's could set a vision standard different from the DOT's, it had to justify its independent standard and could not do so here.

Held:

1. The ADA requires monocular individuals, like others claiming the Act's protection, to prove a disability by offering evidence that the extent of the limitation on a major life activity caused by their impairment is substantial. The Ninth Circuit made three missteps in determining that Kirkingburg's amblyopia meets the ADA's first definition of disability, i.e., a physical or mental impairment that "substantially limits" a major life activity, 42 U.S.C. § 12101(2)(A). First, although it relied on an Equal Employment Opportunity Commission regulation that defines "substantially limits" as requiring a "significant restrict[ion]" in an individual's manner of performing a major life activity, see 29 CFR § 1630.2(j)(ii), the court actually found that there was merely a significant

"difference" between the manner in which Kirkingburg sees and the manner in which most people see. By transforming "significant restriction" into "difference," the court undercut the fundamental statutory requirement that only impairments that substantially limit the ability to perform a major life activity constitute disabilities. Second, the court appeared to suggest that it need not take account of a monocular individual's ability to compensate for the impairment, even though it acknowledged that Kirkingburg's brain had subconsciously done just that. Mitigating measures, however, must be taken into account in judging whether an individual has a disability, Sutton v. United Airlines, Inc., 527 U.S. 471, 119 S.Ct. 2139, 144 L.Ed.2d 450, whether the measures taken are with artificial aids, like medications and devices, or with the body's own systems. Finally, the Ninth Circuit did not pay much heed to the statutory obligation to determine a disability's existence on a case-by-case basis. See 42 U.S.C. § 12101(2). Some impairments may invariably cause a substantial limitation of a major life activity, but monocularity is not one of them, for that category embraces a group whose members vary by, e.g., the degree of visual acuity in the weaker eye, the extent of their compensating adjustments, and the ultimate scope of the restrictions on their visual abilities. Pp. 2167-2170.

2. An employer who requires as a job qualification that an employee meet an otherwise applicable federal safety regulation does not have to justify enforcing the regulation solely because its standard may be waived experimentally in an individual case. Pp. 2169-2174.

(a) Albertsons' job qualification was not of its own devising, but was the visual acuity standard of the Federal Motor Carrier Safety Regulations, and is binding on Albertson's, see 49 CFR § 391.11. The validity of these regulations is unchallenged, they have the force of law, and they contain no qualifying language about individualized determinations. Were it not for the waiver program, there would be no basis for questioning Albertsons' decision, and right, to follow the regulations. Pp. 2169-2171.

(b) The regulations establishing the waiver program did not modify the basic visual acuity standards in a way that disentitles an employer like Albertson's to insist on the basic standards. One might assume that the general regulatory standard and the regulatory waiver standard ought to be accorded equal substantive significance, but that is not the case here. In setting the basic standards, the Federal Highway Administration, the DOT agency responsible for overseeing the motor carrier safety regulations, made a considered determination about the visual acuity level needed for safe operation of commercial motor vehicles in interstate commerce. In contrast, the regulatory record made it plain that the waiver program at issue in this case was simply an experiment proposed as a means of obtaining data, resting ***2165** on a hypothesis whose confirmation or refutation would provide a factual basis for possibly relaxing existing standards. Pp. 2171-2174.

(c) The ADA should not be read to require an employer to defend its decision not to participate in such an experiment. It is simply not credible that Congress enacted the ADA with the understanding that employers choosing to respect the Government's visual acuity regulation in the face of an experimental waiver might be burdened with an obligation to defend the regulation's application according to its own terms. P. 2174.

143 F.3d 1228, reversed.

SOUTER, J., delivered the opinion for a unanimous Court with respect to Parts I and III, and the opinion of the Court with respect to Part II, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, THOMAS, and GINSBURG, JJ., joined. THOMAS, J., filed a concurring opinion.

Corbett Gordon, Portland, OR, for petitioner.

Scott N. Hunt, for respondent.

Edward C. DuMont, Washington, DC, for United States as amicus curiae, by special leave of the Court.

For U.S. Supreme Court Briefs See:

1999 WL 133026 (Pet.Brief)

1999 WL 164438 (Resp.Brief)

1999 WL 176963 (Resp.Brief)

1999 WL 373887 (Reply.Brief)

1999 WL 86500 (Amicus.Brief)

1999 WL 86569 (Amicus.Brief)

1999 WL 86617 (Amicus.Brief)

1999 WL 86618 (Amicus.Brief)

1999 WL 161033 (Amicus.Brief)

1999 WL 161035 (Amicus.Brief)

1999 WL 161037 (Amicus.Brief)

1999 WL 176238 (Amicus.Brief)

For Transcript of Oral Argument See:

1999 WL 281334 (U.S.Oral.Arg.)

Justice SOUTER delivered the opinion of the Court. [FN*]

FN* Justice STEVENS and Justice BREYER join Parts I and III of this opinion.

The question posed is whether, under the Americans with Disabilities Act of 1990, 104 Stat. 327, as amended, 42 U.S.C. § 12101 et seq. (1994 ed. and Supp. III), an employer who requires as a job qualification that an employee meet an otherwise applicable federal safety regulation must justify enforcing the regulation solely because its standard may be waived in an individual case. We answer no.

I

In August 1990, petitioner, Albertson's, Inc., a grocery-store chain with supermarkets in several States, hired respondent, Hallie Kirkingburg, as a truckdriver based at its Portland, Oregon, warehouse. Kirkingburg had more than a decade's driving experience and performed well when Albertsons' transportation manager took him on a road test.

Before starting work, Kirkingburg was examined to see if he met federal vision standards for commercial truckdrivers. 143 F.3d 1228, 1230-1231 (C.A.9 1998). For many decades the Department of Transportation or its predecessors has been responsible for devising these standards for individuals who drive commercial vehicles in interstate commerce. [FN1] Since 1971, the basic vision regulation has required corrected distant visual acuity of at least 20/40 in each eye and distant binocular acuity of at least 20/40. See 35 Fed.Reg. 6458, 6463 (1970); 57 Fed.Reg. 6793, 6794 (1992); 49 CFR § 391.41(b)(10) (1998). [FN2] Kirkingburg, however, suffers from amblyopia, an uncorrectable condition that leaves him with 20/200 vision in his left eye and *2166 monocular vision in effect. [FN3] Despite Kirkingburg's weak left eye, the doctor erroneously certified that he met the DOT's basic vision standard, and Albertson's hired him. [FN4]

FN1. See Motor Carrier Act, § 204(a), 49 Stat. 546; Department of Transportation Act, § 6(e)(6)(C), 80 Stat. 939-940; 49 CFR § 1.4(c)(9) (1968); Motor Carrier Safety Act of 1984 § 206, 98 Stat. 2835, as amended, 49 U.S.C. § 31136(a)(3); 49 CFR § 1.48(aa) (1998).

FN2. Visual acuity has a number of components but most commonly refers to "the ability to determine the presence of or to distinguish between more than one identifying feature in a visible target." G. von Noorden, Binocular Vision and Ocular Motility 114 (4th ed.1990). Herman Snellen was a Dutch ophthalmologist who, in 1862, devised the familiar letter chart still used to measure visual acuity. The first figure in the Snellen score refers to distance between the viewer and the visual target, typically 20 feet. The second corresponds to the distance at which a person with normal acuity could distinguish letters of the size that the viewer can distinguish at 20 feet. See C. Snyder, Our Ophthalmic Heritage 97-99 (1967); D. Vaughan, T. Asburg, & P. Riordan-Eva, General Ophthalmology 30 (15th ed.1999).

FN3. "Amblyopia," derived from Greek roots meaning dull vision, is a general medical term for "poor vision caused by abnormal visual development secondary to abnormal visual stimulation." K. Wright et al., Pediatric Ophthalmology and Strabismus 126 (1995); see id., at 126-131; see also Von Noorden, supra, at 208-245.

FN4. Several months later, Kirkingburg's vision was recertified by a physician, again erroneously. Both times Kirkingburg received certification although his vision as measured did not meet the DOT minimum requirement. See 143 F.3d 1228, 1230, and n. 2 (C.A.9 1998); App. 49- 50, 297-298, 360-361.

In December 1991, Kirkingburg injured himself on the job and took a leave of absence. Before returning to work in November 1992, Kirkingburg went for a further physical as required by the company. This time, the examining physician correctly assessed Kirkingburg's vision and explained that his eyesight did not meet the basic DOT standards. The physician, or his nurse, told Kirkingburg that in order to be legally qualified to drive, he would have to obtain a waiver of its basic vision standards from the DOT. See 143 F.3d, at 1230; App. 284-285. The doctor was alluding to a scheme begun in July 1992 for giving DOT certification to applicants with deficient vision who had three years of recent experience driving a commercial vehicle without a license suspension or revocation, involvement in a reportable accident in which the

applicant was cited for a moving violation, conviction for certain driving- related offenses, citation for certain serious traffic violations, or more than two convictions for any other moving violations. A waiver applicant had to agree to have his vision checked annually for deterioration, and to report certain information about his driving experience to the Federal Highway Administration, the agency within the DOT responsible for overseeing the motor carrier safety regulations. See 57 Fed.Reg. 31458, 31460-61 (1992). [FN5] Kirkingburg applied for a waiver, but because he could not meet the basic DOT vision standard Albertson's fired him from his job as a truckdriver. [FN6] In early 1993, after he had left Albertson's, Kirkingburg received a DOT waiver, but Albertson's refused to rehire him. See 143 F.3d, at 1231.

FN5. In February 1992, the FHWA issued an advance notice of proposed rulemaking to review its vision standards. See 57 Fed.Reg. 6793. Shortly thereafter, the FHWA announced its intent to set up a waiver program and its preliminary acceptance of waiver applications. See id., at 10295. It modified the proposed conditions for the waivers and requested comments in June. See id., at 23370. After receiving and considering the comments, the Administration announced its final decision to grant waivers in July.

FN6. Albertson's offered Kirkingburg at least one and possibly two alternative jobs. The first was as a "yard hostler," a truckdriver within the premises of Albertsons' warehouse property, the second as a tire mechanic. The company apparently withdrew the first offer, though the parties dispute the exact sequence of events. Kirkingburg turned down the second because it paid much less than driving a truck. See App. 14-16, 41-42.

Kirkingburg sued Albertson's, claiming that firing him violated the ADA. [FN7] Albertson's moved for summary judgment solely on the ground that Kirkingburg was "not 'otherwise qualified' to perform the job of truck driver with or without reasonable accommodation." App. 39-40; see id., at 119. The District Court granted the motion, ruling that Albertson's had reasonably concluded that Kirkingburg was not qualified without an accommodation because he could not, as admitted, meet the basic DOT vision standards. The court held that giving Kirkingburg time to get a DOT waiver was not a required reasonable accommodation because the waiver program was "a flawed experiment that has not altered the DOT vision requirements." Id., at 120.

FN7. The ADA provides: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

A divided panel of the Ninth Circuit reversed. In addition to pressing its claim that Kirkingburg was not otherwise qualified, Albertson's for the first time on appeal took the position that it was entitled to summary *2167 judgment because Kirkingburg did not have a disability within the meaning of the Act. See id., at 182-185. The Court of Appeals considered but rejected the new argument, concluding that because Kirkingburg had presented "uncontroverted evidence" that his vision was effectively monocular, he had demonstrated that "the manner in which he sees differs significantly from the manner in which most people see." 143 F.3d, at 1232. That difference in manner, the court held, was sufficient to establish disability. Ibid.

The Court of Appeals then addressed the ground upon which the District Court had granted summary judgment, acknowledging that Albertson's consistently required its truckdrivers to meet the DOT's basic vision standards and that Kirkingburg had not met them (and indeed could not). The court recognized that the ADA allowed Albertson's to establish a reasonable job-related vision standard as a prerequisite for hiring and that Albertson's could rely on Government regulations as a basis for setting its standard. The court held, however, that Albertson's could not use compliance with a Government regulation as the justification for its vision requirement because the waiver program, which Albertson's disregarded, was "a lawful and legitimate part of the DOT regulatory scheme." Id., at 1236. The Court of Appeals conceded that Albertson's was free to set a vision standard different from that mandated by the DOT, but held that under the ADA, Albertson's would have to justify its independent standard as necessary to prevent " 'a direct threat to the health or safety of other individuals in the workplace.' " Ibid. (quoting 42 U.S.C. § 12113(b)). Although the court suggested that Albertson's might be able to make such a showing on remand, 143 F.3d, at 1236, it ultimately took the position that the company could not, interpreting Albertsons' rejection of DOT waivers as flying in the face of the judgment about safety already embodied in the DOT's decision to grant them, id., at 1237.

Judge Rymer dissented. She contended that Albertson's had properly relied on the basic DOT

vision standards in refusing to accept waivers because, when Albertson's fired Kirkingburg, the waiver program did not rest upon "a rule or a regulation with the force of law," but was merely a way of gathering data to use in deciding whether to refashion the still-applicable vision standards. Id., at 1239.

II

[1][2] Though we need not speak to the issue whether Kirkingburg was an individual with a disability in order to resolve this case, that issue falls within the first question on which we granted certiorari, [FN8] 525 U.S. 1064, 119 S.Ct. 791, 142 L.Ed.2d 654 (1999), and we think it worthwhile to address it briefly in order to correct three missteps the Ninth Circuit made in its discussion of the matter. Under the ADA:

> FN8. "Whether a monocular individual is 'disabled' per se, under the Americans with Disabilities Act." Pet. for Cert. i (citation omitted).

"The term 'disability' means, with respect to an individual--
"(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
"(B) a record of such an impairment; or
"(C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

We are concerned only with the first definition. [FN9] There is no dispute either that Kirkingburg's amblyopia is a physical impairment within the meaning of the Act, see 29 CFR § 1630.2(h)(1) (1998) (defining "physical impairment" as "[a]ny physiological disorder, or condition ... affecting one or more of the following body systems: ... special sense organs"), or that seeing is one of his major life activities, see § 1630.2(i) (giving seeing as an example of a major life activity). [FN10] The *2168 question is whether his monocular vision alone "substantially limits" Kirkingburg's seeing.

> FN9. The Ninth Circuit also discussed whether Kirkingburg was disabled under the third, "regarded as," definition of "disability." See 143 F.3d, at 1233. Albertson's did not challenge that aspect of the Court of Appeals's decision in its petition for certiorari and we therefore do not address it. See this Court's Rule 14.1(a); see also, e.g., Yee v. Escondido, 503 U.S. 519, 535, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992).

> FN10. As the parties have not questioned the regulations and interpretive guidance promulgated by the EEOC relating to the ADA's definitional section, 42 U.S.C. § 12102, for the purposes of this case, we assume, without deciding, that such regulations are valid, and we have no occasion to decide what level of deference, if any, they are due, see Sutton v. United Airlines, Inc., 527 U.S., at --- - ----, 119 S.Ct., at 2138-2139.

In giving its affirmative answer, the Ninth Circuit relied on a regulation issued by the Equal Employment Opportunity Commission, defining "substantially limits" as "[s]ignificantly restrict[s] as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." § 1630.2(j)(ii). The Ninth Circuit concluded that "the manner in which [Kirkingburg] sees differs significantly from the manner in which most people see" because, "[t]o put it in its simplest terms [he] sees using only one eye; most people see using two." 143 F.3d, at 1232. The Ninth Circuit majority also relied on a recent Eighth Circuit decision, whose holding it characterized in similar terms: "It was enough to warrant a finding of disability ... that the plaintiff could see out of only one eye: the manner in which he performed the major life activity of seeing was different." Ibid. (characterizing Doane v. Omaha, 115 F.3d 624, 627-628 (1997)). [FN11]

> FN11. Before the Ninth Circuit, Albertson's presented the issue of Kirkingburg's failure to meet the Act's definition of disability as an alternative ground for affirmance, i.e., for a grant of summary judgment in the company's favor. It thus contended that Kirkingburg had "failed to produce any material issue of fact" that he was disabled. App. 182. Parts of the Ninth Circuit's discussion suggest that it was merely denying the company's request for summary judgment, leaving the issue open for factual development and resolution on remand. See, e.g., 143 F.3d, at 1232 ("Albertson's first contends that Kirkingburg failed to raise a genuine issue of fact regarding whether he is disabled"); ibid. ("Kirkingburg has presented uncontroverted evidence showing that ... [his] inability to see out of one eye affects his peripheral vision and his depth perception"); ibid. ("if the facts are as Kirkingburg alleges"). Moreover the Government (and at times even Albertson's, see Pet. for Cert. 15) understands the Ninth Circuit to have been simply explaining why the company was not entitled to summary judgment on this score. See Brief for United States et al. as Amici Curiae 11, and n. 5 ("The Ninth Circuit therefore correctly declined to grant summary judgment to petitioner on the ground that monocular vision is not a disability"). Even if that is an accurate reading, the statements the Ninth Circuit made setting out the standards governing the finding of disability would have largely dictated the outcome. Whether one views the Ninth Circuit's opinion as

merely denying summary judgment for the company or as tantamount to a grant of summary judgment for Kirkingburg, our rejection of the sweeping character of the Court of Appeals's pronouncements remains the same.

[3][4] But in several respects the Ninth Circuit was too quick to find a disability. First, although the EEOC definition of "substantially limits" cited by the Ninth Circuit requires a "significant restrict[ion]" in an individual's manner of performing a major life activity, the court appeared willing to settle for a mere difference. By transforming "significant restriction" into "difference," the court undercut the fundamental statutory requirement that only impairments causing "substantial limitat[ions]" in individuals' ability to perform major life activities constitute disabilities. While the Act "addresses substantial limitations on major life activities, not utter inabilities," Bragdon v. Abbott, 524 U.S. 624, 641, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998), it concerns itself only with limitations that are in fact substantial.

[5] Second, the Ninth Circuit appeared to suggest that in gauging whether a monocular individual has a disability a court need not take account of the individual's ability to compensate for the impairment. The court acknowledged that Kirkingburg's "brain has developed subconscious mechanisms for coping with [his] visual impairment and thus his body compensates for his disability." 143 F.3d, at 1232. But in treating monocularity as itself sufficient to establish disability and in embracing Doane, the Ninth Circuit apparently adopted the view that whether "the individual had learned to compensate for the disability by making subconscious adjustments to the manner in which he sensed depth and perceived peripheral objects," 143 F.3d, at 1232, was irrelevant to the determination *2169 of disability. See, e.g., Sutton v. United Air Lines, Inc., 130 F.3d 893, 901, n. 7 (C.A.10 1997) (characterizing Doane as standing for the proposition that mitigating measures should be disregarded in assessing disability); EEOC v. Union Pacific R. Co., 6 F.Supp.2d 1135, 1137 (D.Idaho 1998) (same). We have just held, however, in Sutton v. United Airlines, Inc., 527 U.S., at —, 119 S.Ct., at 2139, that mitigating measures must be taken into account in judging whether an individual possesses a disability. We see no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems.

[6][7][8] Finally, and perhaps most significantly, the Court of Appeals did not pay much heed to the statutory obligation to determine the existence of disabilities on a case-by-case basis. The Act expresses that mandate clearly by defining "disability" "with respect to an individual," 42 U.S.C. § 12102(2), and in terms of the impact of an impairment on "such individual," § 12102(2)(A). See Sutton, 527 U.S., at —, 119 S.Ct. 2139; cf. 29 CFR pt. 1630, App., § 1630.2(j) (1998) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual"); ibid. ("The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis"). While some impairments may invariably cause a substantial limitation of a major life activity, cf. Bragdon, supra, at 642, 118 S.Ct. 2196 (declining to address whether HIV infection is a per se disability), we cannot say that monocularity does. That category, as we understand it, may embrace a group whose members vary by the degree of visual acuity in the weaker eye, the age at which they suffered their vision loss, the extent of their compensating adjustments in visual techniques, and the ultimate scope of the restrictions on their visual abilities. These variables are not the stuff of a per se rule. While monocularity inevitably leads to some loss of horizontal field of vision and depth perception, [FN12] consequences the Ninth Circuit mentioned, see 143 F.3d, at 1232, the court did not identify the degree of loss suffered by Kirkingburg, nor are we aware of any evidence in the record specifying the extent of his visual restrictions.

FN12. Individuals who can see out of only one eye are unable to perform stereopsis, the process of combining two retinal images into one through which two-eyed individuals gain much of their depth perception, particularly at short distances. At greater distances, stereopsis is relatively less important for depth perception. In their distance vision, monocular individuals are able to compensate for their lack of stereopsis to varying degrees by relying on monocular cues, such as motion parallax, linear perspective, overlay of contours, and distribution of highlights and shadows. See Von Noorden, n. 1, supra, at 23-30; App. 300-302.

This is not to suggest that monocular individuals have an onerous burden in trying to show that they are disabled. On the contrary, our brief examination of some of the medical literature leaves us sharing the Government's judgment that people with monocular vision "ordinarily" will meet the Act's definition of disability, Brief for United States et al. as Amici Curiae

11, and we suppose that defendant companies will often not contest the issue. We simply hold that the Act requires monocular individuals, like others claiming the Act's protection, to prove a disability by offering evidence that the extent of the limitation in terms of their own experience, as in loss of depth perception and visual field, is substantial.

III

Albertsons' primary contention is that even if Kirkingburg was disabled, he was not a "qualified" individual with a disability, see 42 U.S.C. § 12112(a), because Albertson's merely insisted on the minimum level of visual acuity set forth in the DOT's Motor Carrier Safety Regulations, 49 CFR § 391.41(b)(10) (1998). If Albertson's was entitled to enforce that standard as defining an "essential job functio[n] of the employment position," see 42 U.S.C. § 12111(8), that is the end of the *2170 case, for Kirkingburg concededly could not satisfy it. [FN13]

FN13. Kirkingburg asserts that in showing that Albertson's initially allowed him to drive with a DOT certification, despite the fact that he did not meet the DOT's minimum visual acuity requirement, he produced evidence from which a reasonable juror could find that he satisfied the legitimate prerequisites of the job. See Brief for Respondent 36, 37; see also id., at 6. But Albertsons' argument is a legal, not a factual, one. In any event, the ample evidence in the record on Albertsons' policy of requiring adherence to minimum DOT vision standards for its truckdrivers, see, e.g., App. 53, 55-56, 333, would bar any inference that Albertsons' failure to detect the discrepancy between the level of visual acuity Kirkingburg was determined to have had during his first two certifications and the DOT's minimum visual acuity requirement raised a genuine factual dispute on this issue.

Under Title I of the ADA, employers may justify their use of "qualification standards ... that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability," so long as such standards are "job-related and consistent with business necessity, and ... performance cannot be accomplished by reasonable accommodation ... ." 42 U.S.C. § 12113(a). See also § 12112(b)(6) (defining discrimination to include "using qualification standards ... that screen out or tend to screen out an individual with a disability ... unless the standard ... is shown to be job-related for the position in question and is consistent with business necessity"). [FN14]

FN14. The EEOC's regulations implementing Title I define "[q]ualification standards" to mean "the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired." 29 CFR § 1630.2(q) (1998).

Kirkingburg and the Government argue that these provisions do not authorize an employer to follow even a facially applicable regulatory standard subject to waiver without making some enquiry beyond determining whether the applicant or employee meets that standard, yes or no. Before an employer may insist on compliance, they say, the employer must make a showing with reference to the particular job that the waivable regulatory standard is "job-related ... and ... consistent with business necessity," see § 12112(b)(6), and that after consideration of the capabilities of the individual a reasonable accommodation could not fairly resolve the competing interests when an applicant or employee cannot wholly satisfy an otherwise justifiable job qualification.

The Government extends this argument by reference to a further section of the statute, which at first blush appears to be a permissive provision for the employer's and the public's benefit. An employer may impose as a qualification standard "a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace," § 12113(b), with "direct threat" being defined by the Act as "a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation," § 12111(3); see also 29 CFR § 1630.2(r) (1998). The Government urges us to read subsections (a) and (b) together to mean that when an employer would impose any safety qualification standard, however specific, tending to screen out individuals with disabilities, the application of the requirement must satisfy the ADA's "direct threat" criterion, see Brief for United States et al. as Amici Curiae 22. That criterion ordinarily requires "an individualized assessment of the individual's present ability to safely perform the essential functions of the job," 29 CFR § 1630.2(r) (1998), "based on medical or other objective evidence," Bragdon, 524 U.S., at 649, 118 S.Ct. 2196 (citing School Bd. of Nassau Cty. v. Arline, 480 U.S. 273, 288, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987)); see 29 CFR § 1630.2(r) (1998) (assessment of direct threat "shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence"). [FN15]

FN15. This appears to be the position taken by the EEOC in the Interpretive Guidance promulgated under its authority to issue regulations to carry out Title I of the ADA, 42 U.S.C. § 12116, see 29 CFR pt. 1630, App., §§ 1630.15(b) and (c) (1998) (requiring safety-related standards to be evaluated under the ADA's direct threat standard); see also App. § 1630.10 (noting that selection criteria that screen out individuals with disabilities, including "safety requirements, vision or hearing requirements," must be job-related, consistent with business necessity, and not amenable to reasonable accommodation); EEOC v. Exxon Corp., 1 F.Supp.2d 635, 645 (N.D.Tex.1998) (adopting the EEOC's position that safety-related qualification standards must meet the ADA's direct-threat standard). Although it might be questioned whether the Government's interpretation, which might impose a higher burden on employers to justify safety-related qualification standards than other job requirements, is a sound one, we have no need to confront the validity of the reading in this case.

*2171 Albertson's answers essentially that even assuming the Government has proposed a sound reading of the statute for the general run of cases, this case is not in the general run. It is crucial to its position that Albertson's here was not insisting upon a job qualification merely of its own devising, subject to possible questions about genuine appropriateness and justifiable application to an individual for whom some accommodation may be reasonable. The job qualification it was applying was the distant visual acuity standard of the Federal Motor Carrier Safety Regulations, 49 CFR § 391.41(b)(10) (1998), which is made binding on Albertson's by § 391.11: "a motor carrier shall not ... permit a person to drive a commercial motor vehicle unless that person is qualified to drive," by, among other things, meeting the physical qualification standards set forth in § 391.41. The validity of these regulations is unchallenged, they have the force of law, and they contain no qualifying language about individualized determinations.

If we looked no further, there would be no basis to question Albertsons' unconditional obligation to follow the regulation and its consequent right to do so. This, indeed, was the understanding of Congress when it enacted the ADA, see infra, at 2172-2173. [FN16] But there is more: the waiver program.

FN16. The implementing regulations of Title I also recognize a defense to liability under the ADA that "a challenged action is required or necessitated by another Federal law or regulation," 29 CFR § 1630.15(e) (1998). As the parties do not invoke this specific regulation, we have no occasion to consider its effect.

The Court of Appeals majority concluded that the waiver program "precludes [employers] from declaring that persons determined by DOT to be capable of performing the job of commercial truck driver are incapable of performing that job by virtue of their disability," and that in the face of a waiver an employer "will not be able to avoid the [ADA's] strictures by showing that its standards are necessary to prevent a direct safety threat," 143 F.3d, at 1237. The Court of Appeals thus assumed that the regulatory provisions for the waiver program had to be treated as being on par with the basic visual acuity regulation, as if the general rule had been modified by some different safety standard made applicable by grant of a waiver. Cf. Conroy v. Aniskoff, 507 U.S. 511, 515, 113 S.Ct. 1562, 123 L.Ed.2d 229 (1993) (noting the " 'cardinal rule that a statute is to be read as a whole' " (quoting King v. St. Vincent's Hospital, 502 U.S. 215, 221, 112 S.Ct. 570, 116 L.Ed.2d 578 (1991))). On this reading, an individualized determination under a different substantive safety rule was an element of the regulatory regime, which would easily fit with any requirement of 42 U.S.C. §§ 12113(a) and (b) to consider reasonable accommodation. An employer resting solely on the federal standard for its visual acuity qualification would be required to accept a waiver once obtained, and probably to provide an applicant some opportunity to obtain a waiver whenever that was reasonably possible. If this was sound analysis, the District Court's summary judgment for Albertson's was error.

But the reasoning underlying the Court of Appeals's decision was unsound, for we think it was error to read the regulations establishing the waiver program as modifying the content of the basic visual acuity standard in a way that disentitled an employer like Albertson's to insist on it. To be sure, this is not immediately apparent. If one starts with the statutory provisions authorizing regulations by the DOT as they stood at the time the DOT began the waiver program, one would reasonably presume that the general regulatory standard and the regulatory waiver standard ought to be accorded equal substantive significance, so that the content of any general regulation would as a matter of law be deemed modified by the terms of any *2172 waiver standard thus applied to it. Compare 49 U.S.C.App. § 2505(a)(3) (1988 ed.) ("Such regulation shall ... ensure that ... the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely"), [FN17] with 49 U.S.C.App. § 2505(f) (1988 ed.) ("After notice and an opportunity for comment, the Secretary may waive, in whole or in part, application of any regulation

issued under this section with respect to any person or class of persons if the Secretary determines that such waiver is not contrary to the public interest and is consistent with the safe operation of commercial motor vehicles"). [FN18] Safe operation is supposed to be the touchstone of regulation in each instance.

FN17. This provision is currently codified at 49 U.S.C. § 31136(a)(3).

FN18. Congress recently amended the waiver provision in the Transportation Equity Act for the 21st Century, Pub.L. 105-178, 112 Stat. 107. It now provides that the Secretary of Transportation may issue a 2-year renewable "exemption" if "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." See § 4007, 112 Stat. 401, 49 U.S.C.A. § 31315(b) (Oct.1998 Supp.).

As to the general visual acuity regulations in force under the former provision, [FN19] affirmative determinations that the selected standards were needed for safe operation were indeed the predicates of the DOT action. Starting in 1937, the federal agencies authorized to regulate commercial motor vehicle safety set increasingly rigorous visual acuity standards, culminating in the current one, which has remained unchanged since it became effective in 1971. [FN20] When the FHWA proposed it, the agency found that "[a]ccident experience in recent years has demonstrated that reduction of the effects of organic and physical disorders, emotional impairments, and other limitations of the good health of drivers are increasingly important factors in accident prevention," 34 Fed.Reg. 9080, 9081 (1969) (Notice of Proposed Rule Making); the current standard was adopted to reflect the agency's conclusion that "drivers of modern, more complex vehicles" must be able to "withstand the increased physical and mental demands that their occupation now imposes." 35 Fed.Reg. 6458 (1970). Given these findings and "in the light of discussions with the Administration's medical advisers," id., at 6459, the FHWA made a considered determination about the level of visual acuity needed for safe operation of commercial motor vehicles in interstate commerce, an "area [in which] the risks involved are so well known and so serious as to dictate the utmost caution." Id., at 17419.

FN19. At the time the FHWA promulgated the current visual acuity standard, the agency was acting pursuant to § 204(a) of the Interstate Commerce Act, as amended by the Motor Carrier Act, 49 U.S.C. § 304(a) (1970 ed.), see n. 1, supra, which likewise required the agency to regulate to ensure "safety of operation."

FN20. The Interstate Commerce Commission promulgated the first visual acuity regulations for interstate commercial drivers in 1937, requiring "[g]ood eyesight in both eyes (either with or without glasses, or by correction with glasses), including adequate perception of red and green colors." 2 Fed.Reg. 113120 (1937). In 1939, the vision standard was changed to require "visual acuity (either without glasses or by correction with glasses) of not less than 20/40 (Snellen) in one eye, and 20/100 (Snellen) in the other eye; form field of not less than 45 degrees in all meridians from the point of fixation; ability to distinguish red, green, and yellow." 57 Fed.Reg. 6793-6794 (1992) (internal quotation marks omitted). In 1952, the visual acuity standard was strengthened to require at least 20/40 (Snellen) in each eye. Id., at 6794.

[9] For several reasons, one would expect any regulation governing a waiver program to establish a comparable substantive standard (albeit for exceptional cases), grounded on known facts indicating at least that safe operation would not be jeopardized. First, of course, safe operation was the criterion of the statute authorizing an administrative waiver scheme, as noted already. Second, the impetus to develop a waiver program was a concern that the existing substantive standard might be more demanding than safety required. When Congress enacted the ADA, it recognized that federal safety rules would limit application of the ADA as a matter of law. The Senate Labor and Human Resources Committee Report on the ADA stated that "a person with a disability applying for or currently holding a job subject to *2173 [DOT standards for drivers] must be able to satisfy these physical qualification standards in order to be considered a qualified individual with a disability under title I of this legislation." S.Rep. No. 101-116, pp. 27-28 (1998). The two primary House Committees shared this understanding, see H.R.Rep. No. 101-485, pt. 2, p. 57 (1990) (House Education and Labor Committee Report); id., pt. 3, at 34 (House Judiciary Committee Report). Accordingly, two of these Committees asked "the Secretary of Transportation [to] undertake a thorough review" of current knowledge about the capabilities of individuals with disabilities and available technological aids and devices, and make "any necessary changes" within two years of the enactment of the ADA. S.Rep. No. 101-116, supra, at 27-28; see H.R.Rep. No. 101-485, pt. 2, at 57; see also id., pt. 3, at 34 (expressing the expectation that the Secretary of Transportation would "review these requirements to determine whether they are valid under this Act"). Finally, when the FHWA instituted the

waiver program it addressed the statutory mandate by stating in its notice of final disposition that the scheme would be "consistent with the safe operation of commercial motor vehicles," just as 49 U.S.C.App. § 2505(f) (1988 ed.) required, see 57 Fed.Reg. 31460 (1992).

And yet, despite this background, the regulations establishing the waiver program did not modify the general visual acuity standards. It is not that the waiver regulations failed to do so in a merely formal sense, as by turning waiver decisions on driving records, not sight requirements. The FHWA in fact made it clear that it had no evidentiary basis for concluding that the pre- existing standards could be lowered consistently with public safety. When, in 1992, the FHWA published an "[a]dvance notice of proposed rulemaking" requesting comments "on the need, if any, to amend its driver qualification requirements relating to the vision standard," id., at 6793, it candidly proposed its waiver scheme as simply a means of obtaining information bearing on the justifiability of revising the binding standards already in place, see id., at 10295. The agency explained that the "object of the waiver program is to provide objective data to be considered in relation to a rulemaking exploring the feasibility of relaxing the current absolute vision standards in 49 CFR part 391 in favor of a more individualized standard." Ibid. As proposed, therefore, there was not only no change in the unconditional acuity standards, but no indication even that the FHWA then had a basis in fact to believe anything more lenient would be consistent with public safety as a general matter. After a bumpy stretch of administrative procedure, see Advocates for Highway and Auto Safety v. FHWA, 28 F.3d 1288, 1290 (C.A.D.C.1994), the FHWA's final disposition explained again that the waivers were proposed as a way to gather facts going to the wisdom of changing the existing law. The waiver program "will enable the FHWA to conduct a study comparing a group of experienced, visually deficient drivers with a control group of experienced drivers who meet the current Federal vision requirements. This study will provide the empirical data necessary to evaluate the relationships between specific visual deficiencies and the operation of [commercial motor vehicles]. The data will permit the FHWA to properly evaluate its current vision requirement in the context of actual driver performance, and, if necessary, establish a new vision requirement which is safe, fair, and rationally related to the latest medical knowledge and highway technology." 57 Fed.Reg. 31458 (1992). And if all this were not enough to show that the FHWA was planning to give waivers solely to collect information, it acknowledged that a study it had commissioned had done no more than " 'illuminat[e] the lack of empirical data to establish a link between vision disorders and commercial motor vehicle safety,' " and " 'failed to provide a sufficient foundation on which to propose a satisfactory vision standard for drivers of [commercial motor vehicles] in interstate commerce,' " Advocates for Highway Safety, supra, at 1293 (quoting 57 Fed.Reg., at 31458).

In sum, the regulatory record made it plain that the waiver regulation did not rest on any final, factual conclusion that the waiver scheme would be conducive to public safety in the manner of the general acuity standards and did not purport to modify the *2174 substantive content of the general acuity regulation in any way. The waiver program was simply an experiment with safety, however well intended, resting on a hypothesis whose confirmation or refutation in practice would provide a factual basis for reconsidering the existing standards. [FN21]

FN21. Though irrelevant to the disposition of this case, it is hardly surprising that two years after the events here the waiver regulations were struck down for failure of the FHWA to support its formulaic finding of consistency with public safety. See Advocates for Highway and Auto Safety v. FHWA, 28 F.3d 1288, 1289 (C.A.D.C.1994). On remand, the agency "revalidated" the waivers it had already issued, based in part on evidence relating to the safety of drivers in the program that had not been included in the record before the District of Columbia Circuit. See 59 Fed.Reg. 50887, 50889-50890 (1994); id., at 59386, 59389. In the meantime the FHWA has apparently continued to want things both ways. It has said publicly, based on a review of the data it collected from the waiver program itself, that the drivers who obtained such waivers have performed better as a class than those who satisfied the regulation. See id., at 50887, 50890. It has also recently noted that its medical panel has recommended "leaving the visual acuity standard unchanged," see 64 Fed.Reg. 16518 (1999) (citing F. Berson, M. Kuperwaser, L. Aiello, and J. Rosenberg, Visual Requirements and Commercial Drivers, Oct. 16, 1998), a recommendation which the FHWA has concluded supports its "view that the present standard is reasonable and necessary as a general standard to ensure highway safety." 64 Fed.Reg. 16518 (1999). The waiver program in which Kirkingburg participated expired on March 31, 1996, at which point the FHWA allowed all still-active participants to continue to operate in interstate commerce, provided they continued to meet certain medical and other requirements. See 61 Fed.Reg. 13338, 13345 (1996); 49 CFR § 391.64 (1998). The FHWA justified this

decision based on the safety record of participants in the original waiver program. See 61 Fed.Reg. 13338, 13345 (1996). In the wake of a 1996 decision from the United States Court of Appeals for the Eighth Circuit requiring the FHWA to justify the exclusion of further participants in the waiver program, see Rauenhorst v. United States Dept. of Transportation, FHWA, 95 F.3d 715, 723 (1996), the agency began taking new applicants for waivers, see, e.g., 63 Fed.Reg. 66226 (1998). The agency has now initiated a program under the authority granted in the Transportation Equity Act for the 21st Century, Pub.L. No. 105-178, 112 Stat. 107, to grant exemptions on a more regular basis, see 63 Fed.Reg. 67600 (1998) (interim final rule implementing the Transportation Equity Act for the 21st Century). The effect of the current exemption program has not been challenged in this case, and we have no occasion to consider it.

[10] Nothing in the waiver regulation, of course, required an employer of commercial drivers to accept the hypothesis and participate in the Government's experiment. The only question, then, is whether the ADA should be read to require such an employer to defend a decision to decline the experiment. Is it reasonable, that is, to read the ADA as requiring an employer like Albertson's to shoulder the general statutory burden to justify a job qualification that would tend to exclude the disabled, whenever the employer chooses to abide by the otherwise clearly applicable, unamended substantive regulatory standard despite the Government's willingness to waive it experimentally and without any finding of its being inappropriate? If the answer were yes, an employer would in fact have an obligation of which we can think of no comparable example in our law. The employer would be required in effect to justify de novo an existing and otherwise applicable safety regulation issued by the Government itself. The employer would be required on a case-by-case basis to reinvent the Government's own wheel when the Government had merely begun an experiment to provide data to consider changing the underlying specifications. And what is even more, the employer would be required to do so when the Government had made an affirmative record indicating that contemporary empirical evidence was hard to come by. It is simply not credible that Congress enacted the ADA (before there was any waiver program) with the understanding that employers choosing to respect the Government's sole substantive visual acuity regulation in the face of an experimental waiver might be burdened with an obligation to defend the regulation's application according to its own terms.

The judgment of the Ninth Circuit is accordingly reversed.

It is so ordered.

Justice THOMAS, concurring.

As the Government reads the Americans With Disabilities Act of 1990, 104 Stat. 327, *2175 as amended, 42 U.S.C. § 12101 et seq. (1994 ed., and Supp. III), it requires that petitioner justify the Department of Transportation's visual acuity standards as job related, consistent with business necessity, and required to prevent employees from imposing a direct threat to the health and safety of others in the workplace. The Court assumes, for purposes of this case, that the Government's reading is, for the most part, correct. Ante, at 2170-2171 and n. 15. I agree with the Court's decision that, even when the case is analyzed through the Government's proposed lens, petitioner was entitled to summary judgment in this case. As the Court explains, ante, at 2174, it would be unprecedented and nonsensical to interpret § 12113 to require petitioner to defend the application of the Government's regulation to respondent when petitioner has an unconditional obligation to enforce the federal law.

As the Court points out, though, ante, at 2169-2170, DOT's visual acuity standards might also be relevant to the question whether respondent was a "qualified individual with a disability" under 42 U.S.C. § 12112(a). That section provides that no covered entity "shall discriminate against a qualified individual with a disability because of the disability of such individual." § 12112(a). Presumably, then, a plaintiff claiming a cause of action under the ADA bears the burden of proving, inter alia, that he is a qualified individual. The phrase "qualified individual with a disability" is defined to mean:

"an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." § 12111(8) (emphasis added).

In this case, respondent sought a job driving trucks in interstate commerce. The quintessential function of that job, it seems to me, is to be able to drive a commercial truck in interstate commerce, and it was respondent's burden to prove that he could do so.

As the Court explains, ante, at 2171, DOT's Motor Carrier Safety Regulations have the force of law and bind petitioner--it may not, by law, "permit a person to drive a commercial motor vehicle unless that person is qualified to drive." 49 CFR § 391.11 (1999). But by the same token, DOT's regulations bind respondent who "shall not drive a commercial motor vehicle unless he/she is qualified to drive a commercial motor vehicle." Ibid.; see also § 391.41 ("A person shall not drive a commercial motor vehicle unless he/she is physically qualified to do so"). Given that DOT's regulation equally binds petitioner and respondent, and that it is conceded in this case that respondent could not meet the federal requirements, respondent surely was not "qualified" to perform the essential functions of petitioner's truckdriver job without a reasonable accommodation. The waiver program might be thought of as a way to reasonably accommodate respondent, but for the fact, as the Court explains, ante, at 2171-2174, that the program did nothing to modify the regulation's unconditional requirements. For that reason, requiring petitioner to make such an accommodation most certainly would have been unreasonable.

The result of this case is the same under either view of the statute. If forced to choose between these alternatives, however, I would prefer to hold that respondent, as a matter of law, was not qualified to perform the job he sought within the meaning of the ADA. I nevertheless join the Court's opinion. The Ninth Circuit below viewed respondent's ADA claim on the Government's terms and petitioner's argument here appears to be tailored around the Government's view. In these circumstances, I agree with the Court's approach. I join the Court's opinion, however, only on the understanding that it leaves open the argument that federal laws such as DOT's visual acuity standards might be critical in determining whether a plaintiff is a "qualified individual with a disability."

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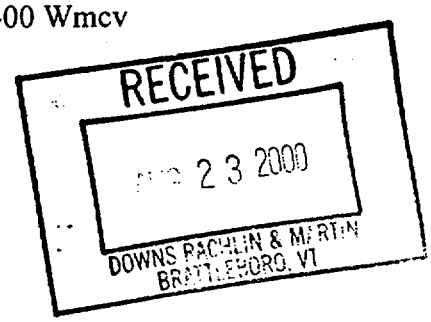
STATE OF VERMONT
COUNTY OF WINDHAM

WINDHAM SUPERIOR COURT
DOCKET NO. 304-7-00 Wmcv



IN THE MATTER OF:

STATE OF VERMONT,)
Complainant,)
)
v.)
)
VERMONT YANKEE)
NUCLEAR POWER CORP.)
Respondent)

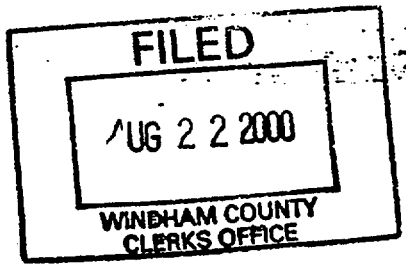
ORDER

Respondent's Motion to Stay is granted. This proceeding is stayed pending resolution of Vermont Yankee Nuclear Power Corporation and Dr. George Idelkope v. United States Equal Opportunity Commission and William Sorrell, Attorney General of the State of Vermont, Docket No. 1:00cv254, a previously filed action now pending in United States District Court for the District of Vermont.

The Court further orders that until further notice any records responsive to the Attorney General of Vermont's Civil Investigative Demands dated June 21, 2000 are to be maintained.

August 18, 2000

Richard W. Norton
Judge



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