RAS 3877

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

IN THE MATTER OF	)	Docket Nos. 50-390-CivP;
	)	50-327-CivP; 50-328-CivP;
TENNESSEE VALLEY AUTHORITY	)	50-259-CivP; 50-260-CivP;
	)	50-296-CivP
	)	
(Watts Bar Nuclear Plant, Unit 1;	)	ASLBP No. 01-791-01-CivP
Sequoyah Nuclear Plant, Units 1 & 2;	)	
Browns Ferry Nuclear Plant,	)	EA 99-234
Units 1, 2, & 3)	)	

BRIEF IN SUPPORT OF TENNESSEE VALLEY AUTHORITY'S MOTION FOR SUMMARY DECISION

STATEMENT

Introduction

In this proceeding, Tennessee Valley Authority (TVA) has requested a hearing with respect to a May 4, 2001, order (Attachment A) from the NRC Staff imposing a civil monetary penalty of $110,000. The order is based on a February 7, 2000, notice of violation (NOV; Attachment B) against TVA for allegedly violating 10 C.F.R. § 50.7 by discriminating against Gary L. Fiser, a former TVA employee, for engaging in "protected activities." According to the NOV, TVA eliminated Fiser's position as part of a 1996 reorganization and took actions to ensure that he was not selected for a new position in retaliation for his identification of chemistry related nuclear safety concerns in 1991-93 and the filing of a Department of Labor (DOL) complaint in 1993 based on those concerns. The February 7, 2000, letter transmitting

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the NOV, indicates that, in the view of the NRC Staff, Fiser's first and second level management superiors in 1996, Thomas J. McGrath and Dr. Wilson C. McArthur, were knowledgeable and critical of his 1991-93 concerns and his 1993 DOL complaint and were responsible for undertaking the adverse action against Fiser.

Pursuant to 10 C.F.R. § 2.749, TVA has now moved for summary decision on the grounds that there is no genuine issue as to any material fact and that it is entitled to a decision in its favor as a matter of law.[1] The bases of TVA's motion are twofold. First, contrary to the NRC Staff's assertion that McGrath was "knowledgeable and critical" of Fiser's protected activity, there is absolutely no evidence that he had any awareness that Fiser had purportedly raised concerns in 1991-93 or filed a 1993 DOL complaint prior to 1996. Indeed, NRC Staff indicates that its assertion that McGrath was aware of the 1993 DOL complaint is based solely on the Staff's speculation. Furthermore, the "concerns" identified by Fiser in his 1993 DOL complaint were not protected activity but management's perception of his performance problems. Second, the NRC Staff infers discrimination based in part upon the "temporal proximity between the appointment of [McGrath and McArthur] as Mr. Fiser's supervisors and his non-selection in July 1996" (Feb. 7, 2000, letter at 3). The basis for that inference is contrary to law. The courts allow an inference of discrimination based on temporal proximity between protected activity and adverse action. Further, temporal proximity must be measured in terms of mere days or weeks, not three years as is present here.

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1 The facts upon which TVA's motion is based are set forth in the declarations of James E. Boyles, Sam L. Harvey, Wilson C. McArthur, Ph.D., Phillip L. Reynolds, and Milissa W. Westbrook, portions of NRC Office of Investigations (OI) file No. 2-1993-068, which includes interviews with Gary L. Fiser, portions of OI file No. 2-98-013, and excerpts from the deposition of Thomas J. McGrath. These documents are annexed to TVA's motion.

Facts

1. Fiser's previous positions with TVA. From 1988 until 1993, Fiser's official position was Chemistry and Environmental Superintendent at TVA's Sequoyah Nuclear Plant (Sequoyah). From April 1991 until about January 1992, Fiser was given a temporary assignment in the Outage Management group at Sequoyah for the Unit 1 Cycle 5 outage. He was returned to his Chemistry and Environmental Superintendent position in January 1992, but beginning in March 1992, he was given a one-year rotational assignment to the Corporate Chemistry organization, a constituent organization of Operations Support, in Chattanooga, Tennessee, because of deficiencies in the Sequoyah chemistry program. Initially, Fiser was assigned as the Acting Corporate Chemistry Manager and his immediate supervisor was Dr. McArthur. Later in 1992, he was removed as Acting Corporate Chemistry Manager and was assigned as a Chemistry Program Manager within Corporate Chemistry, and Dr. McArthur was his second-level supervisor.[2] When Fiser's one-year rotational assignment in Corporate Chemistry was concluding during early 1993, Sequoyah was undergoing a reorganization in which the Chemistry and Environmental organization was combined with the Radiological Control organization under one manager. As a result of that reorganization, Fiser's Chemistry and Environmental Superintendent position was eliminated and, rather than being returned to his position at Sequoyah, he was surplused

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2 Somewhere in this time frame, Fiser began surreptitiously tape-recording various TVA employees. He later made those tape-recordings available to both the NRC Staff and TVA's Office of Inspector General (OIG). Fiser also provided to the NRC's Office of Investigations (OI) an 85-page document entitled "Sequence of Events," purportedly compiled from his notes, memory, and the tape recordings, which he claimed provided all of the details of his 1993 DOL complaint. OI file No. 2-1993-068, ex. 18

and assigned to the Employee Transition Program (ETP).[3] Reynolds decl., McArthur decl., OI file No. 2-1993-068, ex. 4.

2. **Fiser's 1993 DOL complaint.** On September 23, 1993, Fiser filed a complaint under Section 211 of the Energy Reorganization Act of 1978, 42 U.S.C. § 5851 (ERA), alleging discrimination in his removal from the Sequoyah Chemistry and Environmental Superintendent position.[4] OI file No. 1-1993-068, ex. 2. TVA entered into an April 7, 1994, settlement with Fiser of his ERA complaint by officially placing him in the lower level, nonsupervisory Chemistry Program Manager staff position in the Corporate Chemistry organization located in Chattanooga, to which he had previously been assigned. OI file No. 2-1993-068, ex. 3. After the settlement, Dr. McArthur continued to be Fiser's second level supervisor until an August 1994 reorganization. As a result of the settlement, there was no decision in that case at any administrative level by the DOL, nor is TVA aware that DOL undertook any investigation of the complaint.[5]

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3 At that point in time, TVA attempted to avoid the harsh result of terminating employees in a reduction in force by assigning "surplus" employee to ETP where they could search for a new job, internal or external to TVA, while remaining on the payroll.

4 Section 211 of the ERA prohibits an NRC-licensed employer from discriminating against an employee for engaging in certain defined protected activities. The NRC's employee protection provision, 10 C.F.R. § 50.7, is based upon Section 211 (see 47 Fed. Reg. 30452, July 14, 1982) and in fact expressly incorporates the ERA's definition of protected activities.

5 In 1993, the administrative process for ERA complaints was initiated by the filing of a complaint with DOL's Wage and Hour Division (Wage and Hour) followed by an investigation and a decision by Wage and Hour. If either party was dissatisfied, they could then appeal for an evidentiary hearing before a DOL administrative law judge, who was responsible for issuing a recommended decision. The final DOL decision would be issued by the Secretary of Labor. 29 C.F.R. pt. 24.

3. **Fiser's claimed protected activity.** The NRC's employee protection rule, 10 C.F.R. § 50.7, adopts the meaning of protected activities as "established in Section 211 of the Energy Reorganization Act." The ERA includes as a protected activity commencing or causing to be commenced a proceeding "under this chapter or the Atomic Energy Act of 1954." Thus, the filing of a complaint under Section 211 of the ERA, commencing a proceeding under that chapter, constitutes protected activity, and Fiser's 1993 DOL complaint was by definition protected activity. However, the matters described by Fiser in his 1993 DOL complaint were not protected activities by him. For example, he stated "that one of the reasons that he [the plant manager] did not want me back at Sequoyah . . . was because of '[t]he radmonitor effluent calculations not accounting for the vacuum'" (OI file No. 2-1993-068, ex. 2, at 4). That issue dealt with the failure of Sequoyah personnel to consider the effect of pressure in a noble gas chamber on radiation monitor setpoints. A second reason that managment did not want Fiser to return to Sequoyah, according to Fiser, was "'[t]he filter change-out scenario'" (*id.* at 4). That issue involved a technician who may have improperly closed a valve while conducting some sampling activities. In neither case was Fiser responsible for identifying or reporting the matter. Indeed, his complaint makes it clear that the events happened and were reported while he was elsewhere. Fiser's complaint takes issue with the fact that management was holding him accountable for the underlying problem: "even though I was not directly responsible for either of the underlying conditions leading to those situations, I was charged with them by [the plant manager]" (*id.* at 5). The third matter mentioned in Fiser's 1993 DOL complaint deals with his claim that he determined and reported that Sequoyah chemistry personnel were unable to conduct post-accident sampling analyses (PASS) in the prescribed time (*id.* at 5-6). In fact, Exhibit C to Fiser's complaint is his February

19, 1992, response to TVA's Nuclear Safety Review Board (NSRB)[6] which was concerned about whether Sequoyah Chemistry personnel was adequately trained to meet PASS requirements. As shown by the minutes of NSRB meetings, the NSRB had raised this issue on a number of occasions, but Sequoyah Chemistry had not addressed the issue (McArthur decl., ex. 1 at 14, ex. 2 at 14-15, ex. 3 at *i*, 3-4, 23).

There is no dispute that in Fiser's 1993 DOL complaint he was denying his responsibility for those performance issues; he was not claiming responsibility for their identification or reporting. The NRC's OI investigated the allegations raised by Fiser's 1993 DOL complaint and "concluded that there was not sufficient evidence developed during this investigation to substantiate the allegation of discrimination for reporting safety concerns" (OI Rep No. 2-93-068 at 1). The NRC's Regional Counsel also reviewed the matter and concluded in an April 15, 1995, memorandum:

> I have reviewed an 85 page document entitled "Sequence of Events" and a TVA Inspector General Report of Interview of Gary Fiser. On the basis of this review, I could not conclude that Mr. Fiser was pursuing an underlying safety issue or other concern such that his demotion and subsequent RIF were a consequence of his having engaged in "protected activity". ***The "Sequence of Events" document and the TVA IG Report of Interview seem to reflect that there were performance based issues with Mr. Fiser nothing more*** [OI File No. 2-1993-068, ex. 20].

Curiously, OI report and investigation No. 2-1998-013, referenced in the February 7, 2000, NOV, do not include a copy of the 1993 DOL complaint or the analysis showing that Fiser was not "pursuing an underlying safety issue."

4. The 1996 reorganization of corporate Nuclear Power. In October 1995, the General Manager of Operations Support, the organization in which the Corporate Chemistry function was located, became ill and McGrath was designated

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6 TVA's NSRB is a blue-ribbon committee of experts from within and outside TVA that operates outside the chain of command, critically reviews TVA nuclear programs and operations, and reports its findings to top management. The NSRB's reports are provided as a matter of course to line management so that they can act on the NSRB's recommendations. McArthur decl.

as the Acting General Manager. McGrath depo. at 17-18. During the time that Fiser had worked at Sequoyah and in Corporate Chemistry, McGrath served as the Chairman of the NSRB and various Corporate positions, but had not been a part of the Operations Support organization. McGrath depo. at 8-15. This was the first time that McGrath was a part of Fiser's management chain.

Between 1986 and 1996, TVA upgraded its nuclear program, restarting Sequoyah Units 1 and 2 and Browns Ferry Units 2 and 3 and completing the initial startup of Watts Bar Unit 1. As work on those five nuclear units was completed and they were placed in full service, the large numbers of nuclear employees and contractors who were working on the upgrade, restart, and construction programs were no longer necessary. Accordingly, TVA adjusted the size of its nuclear workforce as it changed from a construction and modifications organization to a much smaller operations organization. In addition, TVA is attempting to hold down electric rates by improving productivity and reducing costs. McArthur decl.; Westbrook decl.

As a result of both efforts, TVA has reorganized and reduced the number of employees in its Nuclear Power organization. The changes in the workforce have not occurred all at once; rather, the reductions were implemented over time. Thus, during 1994-1997, a number of TVA employees in TVA's Nuclear Power organization lost their old positions. While some employees were successful in being selected for new positions created as a result of the reorganizations, many TVA employees involuntarily lost their positions and employment with TVA. Westbrook decl.

As part of the workforce planning effort for the year 2001 and the budget planning process for Fiscal Year 1997, corporate Nuclear Power underwent a reorganization and reduction in the summer and fall of 1996. The goal for the year 2001 was for the overall corporate organization budget to be reduced by about 40 percent. Reynolds decl.

McGrath requested his subordinates to propose an organization supporting the year 2001 goal, including specific functional activities, and a fiscal year 1997 budget and organization which was a logical step in achieving the 2001 goals. The organizational structure which McGrath ultimately approved included a proposal to create two chemistry program manager specialist positions, in place of the three existing generalist chemistry and environmental protection program manager positions, one of which was occupied by Fiser. Those positions were separate Boiling Water Reactor (BWR), and Pressurized Water Reactor (PWR) Chemistry Program Manager positions which would enable the corporate organization to provide the sites with in-depth expertise to the plants.[7] McArthur decl.

Fiser helped draft the job description for the new PWR Chemistry Program Manager position. Harvey decl. Based on Human Resources' evaluation of the new job descriptions, it was determined that the new positions were significantly different than the old positions, and that the incumbents of the old positions did not have a right to rollover into the new positions.[8] Accordingly, it was decided to post announcements for the positions and to allow employees to apply and compete for the jobs. Boyles decl.

The three best qualified applicants for the position, including Fiser, were interviewed by a selection review board. Each of those three candidates were asked the same questions by the review board, and their answers were scored separately by each

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7 The idea was to have a chemistry specialist for TVA's two BWRs at Browns Ferry and a chemistry specialist for TVA's three PWRs at Watts Bar and Sequoyah (McArthur decl. ¶ 7).

8 As a Federal agency, TVA's personnel actions are governed by regulations promulgated by the Office of Personnel Management. Under those regulations, the incumbents of positions being eliminated are entitled to "rollover" into newly created positions if the positions are sufficiently similar. When the positions are dissimilar, TVA fills vacancies on a competitive basis.

member of the board. Fiser was scored lower than the other two applicants. Westbrook decl. Based on the cumulative scores, the review board ranked Fiser lowest of the three applicants. Based on these rankings, on July 1, 1996, Dr. McArthur, who had been made the Radiological Control and Chemistry Manager, selected the two highest evaluated applicants for the two Chemistry Program Manager positions. McArthur decl.

When it was announced that the new Chemistry Program Manager position would be advertised for competition and even prior to the selection process, Fiser filed a June 25, 1996, complaint with DOL under Section 211 of the ERA, claiming that the creation of new Chemistry Program Manager positions was intended to discriminate against him. OI File No. 2-1998-013, ex. 2. That complaint was the genesis for NRC OI's investigation which gave rise to this proceeding. The February 7, 2000, NOV asserts that TVA discriminated against Fiser by eliminating his position and taking action to ensure that he was not selected for one of the two new positions. As discussed above, the NRC Staff has inferred discrimination based on the "temporal proximity between the appointment of [Mr. McGrath and Dr. McArthur] as Mr. Fiser's supervisors and his non-selection in July 1996." The NRC Staff also stated that these individuals were knowledgeable and critical of Mr. Fiser's 1991-93 protected activity involving chemistry related safety concerns and their actions in this regard were part of the information developed associated with the 1993 DOL case. Moreover, given his position in the organization and the number of TVA employees who were involved in the various DOL and TVA IG interviews, the NRC also considers it more likely than not that [McGrath] was aware that Mr. Fiser filed a 1993 DOL complaint prior to 1996" (Feb. 7, 2000, letter at 3).

It is TVA's position that there is simply no evidence that McGrath was aware of any protected activity by Fiser and that discrimination cannot properly be inferred here based on "temporal proximity."

ARGUMENT

I

The Applicable Legal Standard for Summary Decision

TVA is entitled to summary decision on the merits as to the NRC Staff's claim that TVA discriminated against Fiser because he had engaged in some form of protected activity. Under the Supreme Court's decisions in *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the NRC Staff must prove the essential elements of a prima facie case of discrimination.

The United States Supreme Court clarified the standards for summary judgment under Rule 56 in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 242 (1986); and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The Sixth Circuit adopted that trilogy of cases in the context of discrimination law in *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989), as establishing a "new era" for summary judgment. Under *Celotex*, a "moving party is '***entitled*** to a judgment as a matter of law'" when "the nonmoving party ***has failed to make a sufficient showing of an essential element of [its] case*** with respect to which [it] has the burden of proof" (477 U.S. at 323). Under *Anderson*, a properly supported summary judgment motion can be defeated only by the non-moving party's presenting "affirmative evidence" (477 U.S. at 257).

The claim that a case may involve issues of good-faith belief, or "state of mind," or "motive," does not any longer provide any basis to defer summary judgment (*id.; Anderson*, 477 U.S. at 245-46, 256-57; *Matsushita*, 475 U.S. at 595, 597). That the non-moving party might protest that he might ultimately cause a factfinder to "disbelieve the defendant[]" or render the defendant's testimony "discredited" is no

basis for denial of summary judgment (*Anderson*, 477 U.S. at 256). Indeed, a "plaintiff must present ***affirmative evidence*** in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery" (*id.* at 257). *See also Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F.3d 1382, 1387-90 (6th Cir. 1993); *Mauro v. Borgess Med. Ctr.*, 886 F. Supp. 1349 (W.D. Mich. 1995); *Hall v. Martin Marietta Energy Sys., Inc.*, 856 F. Supp. 1207 (W.D. Ky. 1994).

Such affirmative evidence "must do more than simply show that there is some metaphysical doubt as to the material facts" (*Matsushita*, 475 U.S. at 586). Summary judgment should be granted where, on "the record taken as a whole . . . there is no '***genuine*** issue for trial'"; that is, where "the factual context renders . . . [a] claim ***implausible***" and complainant does not "come forward with more persuasive evidence" (*id.* at 587), dismissal is proper. If the non-moving party's "evidence is merely colorable . . . or is not ***significantly*** probative, . . . summary judgment may be granted" (*Anderson*, 477 U.S. at 249-50; citations omitted).

The summary judgment standards worked out by the Supreme Court and the Sixth Circuit apply with full vigor to proceedings claiming discrimination for the raising of nuclear safety concerns. In *Howard v. TVA*, No. 90-ERA-24 (July 3, 1991), *aff'd sub nom. Howard v. United States Dep't of Labor*, 959 F.2d 234 (6th Cir. 1992), the Secretary adopted Sixth Circuit summary judgment law under Rule 56 and made it applicable to summary dispositions in ERA proceedings. In applying that law, the Secretary has also made it clear that, when an ERA complainant fails to make the required showing in responding to a motion for summary judgment, the employer is "entitled" to summary judgment dismissing the claim. *Gore v. CDI Corp.*, No. 91-ERA-14 (July 8, 1992). *See also Treiber v. TVA*, No. 87-ERA-25, at 11 (Sept. 9, 1993) (Where complainant "has not met his burden of presenting affirmative evidence

to defeat the properly supported motions for summary judgment . . . [r]espondents are entitled to judgment as a matter of law.").

II

The NRC Staff Cannot Bear Its Burden of Proving A Claim of Discrimination.

In this case, the NRC Staff cannot make a "prima facie showing" (42 U.S.C. § 5851(b)(3)(A), (B) (1994)) of any nexus between Fiser's claimed protected activity and any adverse action. Further, the evidence is undisputed that the reorganization which eliminated his position was Nuclear Power wide and was undertaken without regard to any protected activity in which Fiser may have engaged. Moreover, the evidence is clear that he was not selected because, in the opinion of the selection review board, he was not the best candidate. Since the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the [employee] ***remains at all times*** with the [employee]" (*Burdine*, 450 U.S. at 253), the NRC Staff's discrimination claims about the reorganization and Fiser's nonselection fail as a matter of law.

The NRC Staff cannot establish an essential element of its prima facie case--that Mr. McGrath and Dr. McArthur, the persons it has named responsible for the adverse actions respecting Fiser, were motivated by his protected activity. The Secretary of Labor's decision in *Bartlik v. TVA*, No. 88-ERA-15 (Dec. 6, 1991, and Apr. 7, 1993), *aff'd sub nom. Bartlik v. United States Dep't of Labor,* 73 F.3d 100 (6th Cir. 1996), expressly holds that the complainant must prove "that responsible managers knew" of his "protected activity" and were driven by "discriminatory motive[s]" by evidence of "the record" (Apr. 7, 1993, slip op. at 2). Here, there is no evidence that McGrath knew of Fiser's protected activity. *See also Robinson v. Adams,*

847 F.2d 1315, 1316 (9th Cir. 1987) ("An employer cannot intentionally discriminate against a job applicant based on race unless the employer knows the applicant's race."); *Gibson v. Frank,* 785 F. Supp. 677, 682 (S.D. Ohio 1990); *Dodson v. Marsh,* 678 F. Supp. 768, 772 (S.D. Ind. 1988) ("The plaintiff cannot prove that she was a victim of [race] discrimination . . . when the selecting official did not even know the plaintiff's race."). Further, the NRC Staff asserts "speculative assumptions," or "illogical, unsupported, inferences," or "suppositions" (*Bartlik*, slip op. at 4, 8-10, 19), about McGrath's awareness of Fiser's claimed protected activity which cannot serve to prove its prima facie case.

The NRC Staff asserts that McGrath was "knowledgeable and critical of Mr. Fiser's 1991-93 protected activity" and his "actions in this regard were part of the information developed associated with the 1993 DOL case. Moreover given his position in the organization and the number of TVA employees who were involved in the various DOL and TVA Inspector General interviews, the NRC also considers it more likely than not that [Mr. McGrath] was aware that Mr. Fiser filed a 1993 DOL complaint prior to 1996." That is demonstrably wrong. Because it was settled, there was no decision and no public hearing in the 1993 DOL case and we are unaware of a single TVA employee interviewed by DOL. The employees who were interviewed by TVA's IG were not in McGrath's organization and the NRC Staff does not even contend that "McGrath was informed of any" of those interviews (NRC Staff's response to Interrogatory No. 9 (c) of TVA's second set of interrogatories).

The only "information developed associated with the 1993 DOL case" dealt with the performance issues that Fiser felt that Sequoyah plant management was unfairly holding him responsible for. The February 7, 2000, NOV asserts that the purported violation had been identified as a "result of an NRC Office of Investigations (OI) report issued on August 4, 1999." However, that OI report and the underlying investigation do not even include a copy of Fiser's 1993 DOL complaint or the analysis

of the issues raised therein. Instead, when Fiser filed his 1996 DOL complaint he recharacterized the basis of his 1993 complaint. Apparently based on that recharacterization, OI and the NRC Staff determined that Mr. McGrath and Dr. McArthur "were named as culpable parties in the employee's 1993 DOL complaint" (Sept. 20, 1999, letter, Enc. 2 Summary of OI report 2-98-013; A copy of the letter is attached reproduced as Attachment C hereto). The NRC Staff apparently did not realize until after TVA provided a copy of Fiser's 1993 DOL complaint, that McGrath and Dr. McGrath were not named as "culpable parties" and that the complaint was instead directed at Sequoyah management (see Feb. 7, 2000, letter).

The inference of discrimination that the NRC Staff would draw based on the "temporal proximity between the appointment of [Mr. McGrath and Dr. McArthur] as Mr. Fiser's supervisor and his non-selection in July 1996" (Feb. 7, 2000, letter at 3), is factually and legally flawed. First, the Supreme Court has held that where "temporal proximity" is relied upon to infer discrimination, it is the time between the "employer's knowledge of protected activity and an adverse employment action" that is subject to measurement. *Clark County Sch. Dist. V. Breeden*, 532 U.S. 268, 121 S.Ct. 1508, 1511 (2001). The Court went on to hold that "the temporal proximity must be 'very close'" (*id.*) citing two cases in which a 3-month and 4-month period was deemed insufficient to support an inference of discrimination. *See also TVA v. Sec'y of Labor*, No. 96-3831, 134 F.3d 372 (table) (6th Cir. 1998; copy attached) holding that a finding of discrimination by the Secretary of Labor was "not supported by substantial evidence" where the finding was based on "'an inference of retaliatory motive based on temporal proximity'" (slip op. at 5) and the period between protected activity and adverse action was seven or eight months. The Sixth Circuit also held that "the more appropriate date to use" in measuring temporal proximity is the date of the earlier DOL complaint (slip op. at 5, n. 1). *See also Hafford v. Seidner,* 183 F.3d 506 (6th Cir. 1999) ("loose temporal proximity is insufficient to create a triable issue" where

disciplinary actions were taken beginning five and ten months after plaintiff filed charges); *Warren v. Ohio Dep't of Pub. Safety*, 2001 U.S. app. Lexis 21664 at *12 (6th Cir. 2001; copy attached) ("Temporal proximity alone in the absence of other direct or compelling circumstantial evidence is generally not sufficient to support a finding of causal connection. . . . Cases addressing this issue have said that temporal proximity may establish a *prima facie* case only if the temporal proximity is 'very close'".)

Second, the NRC Staff's invocation of temporal proximity based on when McGrath and McArthur became Fiser's superiors is factually flawed. As we pointed out above, when Fiser settled his 1993 DOL complaint on April 7, 1994, he returned to Corporate Chemistry where Dr. McArthur continued to be his second level supervisor until a reorganization in August 1994. Thus, more than two years passed from the date that Fiser returned to Dr. McArthur's supervision and the 1996 reorganization which is alleged to be discriminatory. Further, McGrath became the Acting General Manager of Operations Support in October 1995, nearly eight months before the purported discrimination. Under those circumstances, even if temporal proximity was measured from the date they assumed supervision over Fiser, no inference of discrimination could be drawn. If either McGrath or Dr. McArthur had been motivated to discriminate against Fiser, they had ample time to do so much earlier.

Instead, the NRC Staff assumes they waited in the bushes for years and constructed a Rube Goldberg-like scheme to retaliate against Fiser. As the Supreme Court has held, where as here, the non-moving party can only "show that there is some metaphysical doubt as to the material facts" and where "the factual context renders . . . [a] claim ***implausible***" dismissal is proper (*Matsushita*, 475 U.S. at 586, 587). Further if the non-moving party's "evidence is merely colorable . . . or is not ***significantly*** probative, . . . summary judgment may be granted" (*Anderson*, 477 U.S. at 249-50; citations omitted).

CONCLUSION

Based on the foregoing reasons and upon the authorities cited, TVA's motion for summary decision should be granted, and a decision entered in TVA's favor.

Respectfully submitted,

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LEXSEE 2001 U.S. App. LEXIS 21664

FLORENCE A. WARREN, Plaintiff-Appellant, v. OHIO DEPARTMENT OF PUBLIC SAFETY, WILLIAM L. VASIL, Defendants-Appellees.

No. 00-3560

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

2001 U.S. App. LEXIS 21664

October 3, 2001, Filed

NOTICE:
[*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

PRIOR HISTORY:
On Appeal from the United States District Court for the Southern District of Ohio. 97-00460. Marbley. 3-28-00.

DISPOSITION:
AFFIRMED.

JUDGES:
Before: GUY and MOORE, Circuit Judges; and HULL, District Judge. *

> * The Honorable Thomas G. Hull, United States District Judge for the Eastern District of Tennessee, sitting by designation.

OPINIONBY:
RALPH B. GUY, JR.

OPINION:

RALPH B. GUY, JR., Circuit Judge. Plaintiff, Florence A. Warren, appeals from the order granting summary judgment in favor of defendants, Ohio Department of Public Safety (ODPS) and William L. Vasil. Plaintiff argues that the district court erred in finding (1) that she did not participate in protected activity under the retaliation provisions of Title VII, (2) that there was no causal connection between protected activity and her termination, and (3) that plaintiff's speech did not address [*2] a matter of public concern under the First Amendment. n1 For reasons different than those given by the district court, we affirm the grant of summary judgment.

> n1 Plaintiff does not pursue and, therefore, has abandoned on appeal the dismissal of her other *42 U.S.C. § 1983* and state law claims.

I.

Plaintiff was the senior EEO compliance officer and Chief of Human Resources at ODPS. At the relevant times in this case, plaintiff reported to defendant Vasil, the Assistant Director of ODPS.

Plaintiff's duties included supervising personnel matters; providing advice to the Director and the Assistant Director regarding personnel matters; drafting pamphlets and handbooks concerning work rules, disciplinary procedures, and other matters related to EEO compliance. Plaintiff also investigated or supervised the investigation of sexual discrimination and harassment complaints by ODPS employees.

There were a large number of sexual discrimination and harassment complaints within ODPS during [*3] plaintiff's tenure. Three specific internal investigations were the focus of plaintiff's Title VII claim. The first involved Bessie Smith, a Human Resources employee, who was disciplined in May 1995 for neglect of duty and malfeasance. As a result of Bessie Smith's mishandling of the termination of another employee, the terminated employee was awarded back pay. There were no allegations of discrimination under Title VII in that

internal investigation. In the second, Rebecca Gustamente complained of sexual harassment by her supervisor. In November 1994, the supervisor was reassigned within ODPS. Gustamente testified that she was not subjected to further harassment thereafter. Warren testified that her last involvement with the Gustamente complaint was in mid to late 1994 and no later than February 1995. Julie Smith was the subject of the third investigation. Julie Smith was disciplined in August 1995, after she was charged with sexual harassment by another female employee.

Plaintiff subsequently heard that the union was considering filing an unfair labor practices complaint or class action litigation with respect to discrimination complaints. She then arranged to meet with Maria J. [*4] Armstrong, the Deputy Chief Legal Counsel for the Governor of Ohio, on the morning of November 9, 1995. Plaintiff states that she informed Armstrong of the threatened union action and discussed plaintiff's concerns that Vasil acted illegally in his direct handling of several discrimination issues, including the Julie Smith matter. In the afternoon of that same day, Vasil gave plaintiff notice of termination of her employment with ODPS. While he did not have prior knowledge, Vasil learned of the morning meeting between plaintiff and Armstrong in the afternoon of the day that plaintiff's employment was terminated.

Vasil stated that he terminated plaintiff's employment because of complaints about the ineffectiveness of the Human Resources division and lack of confidence in her judgment and reliability. Defendants offered evidence that Vasil decided to discharge plaintiff and took steps to initiate the discharge before plaintiff's meeting with Armstrong. In anticipation of discharging plaintiff, Vasil discussed transferring plaintiff's duties to another employee. Vasil talked to Warren Davies about having John Demaree assume responsibility for all human resource matters for ODPS. Davies [*5] stated in his affidavit that this discussion occurred approximately two weeks before November 9. While they did not specifically discuss plaintiff's termination, Davies understood that Vasil was going to transfer all of plaintiff's responsibilities to Demaree. The transfer of those responsibilities became effective on November 9.

Vasil did specifically discuss plaintiff's termination with Armstrong. Armstrong testified in her affidavit and during her deposition that Vasil told her several weeks before the November 9 meeting that Vasil intended to discharge plaintiff and restructure the Human Resources functions within ODPS. Finally, Demaree testified that several days before November 9, 1995, Vasil asked him to prepare the paperwork for terminating plaintiff's employment.

The district court granted summary judgment in favor of defendants. Plaintiff appealed.

II.

We review *de novo* the district court's grant of summary judgment. *See, e.g., Smith v. Ameritech, 129 F.3d 857, 863 (6th Cir. 1997).* We may affirm the grant of summary judgment on other grounds, even one not considered by the district court. *Boger v. Wayne County, 950 F.2d 316, 322 (6th Cir. 1991).* [*6] Summary judgment is appropriate when there are no issues of material fact in dispute, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). In deciding a motion for summary judgment, the court must view the factual evidence and draw all reasonable inferences in favor of the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).*

A. Title VII Retaliation

Title VII prohibits an employer from retaliating against an employee who has "opposed" any practice by an employer made unlawful under Title VII. It also prohibits retaliation against an employee who has "participated" in any manner in an investigation under Title VII. *42 U.S.C. § 2000e-3*(a). These two provisions are known as the opposition clause and the participation clause. *See Johnson v. Univ. of Cincinnati, 215 F.3d 561, 578* (6th Cir.), *cert. denied, 531 U.S. 1052, 121 S. Ct. 657, 148 L. Ed. 2d 560 (2000).*

To establish a claim under either the opposition or the participation clause, plaintiff must show that (1) she engaged in activity [*7] protected by Title VII, (2) this exercise of protected activity was known to defendants, (3) defendants took an adverse employment action, and (4) there was a causal connection between the protected activity and the adverse employment action. If plaintiff establishes this *prima facie* case, the burden shifts to defendants to articulate legitimate, nondiscriminatory reasons for plaintiff's discharge. Plaintiff must then demonstrate that the proffered reasons were a mere pretext for discrimination. *Id.* The plaintiff bears the burden of persuasion throughout the entire process. *See Morris v. Oldham County Fiscal Court, 201 F.3d 784, 793 (6th Cir. 2000).*

Plaintiff argues that she was retaliated against in violation of both the participation and the opposition clauses because she complained about Vasil to Armstrong at the November 9 meeting. The district court

in this case found that plaintiff did not engage in protected activity under the participation clause and that she failed to show a causal connection between her alleged opposition activities and her termination. We find that summary judgment was appropriate on both plaintiff's opposition and participation [*8] claims because she failed to show a causal connection between the alleged protected activity and her termination.

1. Participation Claim

The district court concluded that plaintiff failed to establish a claim of retaliation with respect to the Bessie Smith internal investigation because there were no allegations of violation of Title VII rights. We agree. Section 2000e-3(a) requires participation in proceedings under Title VII or opposition to unlawful employment practices under Title VII. *Holden v. Owens-Illinois, Inc., 793 F.2d 745, 748 (6th Cir. 1986).* There were no Title VII allegations involved in the Bessie Smith matter, and it cannot form the basis of a retaliation claim under Title VII.

With respect to the Julie Smith and Rebecca Gustamente internal investigations, the district court found that there was no protected activity under the participation clause because plaintiff did not participate in an EEOC proceeding. Plaintiff argues on appeal that internal investigations by an employer's EEO compliance officer are protected activity under the participation clause. This Court has not directly addressed the question of whether participation in internal [*9] investigations constitutes protected activity under the participation clause. n2 Other courts, however, have held that protected activity under the participation clause does not include participation in internal investigations. *See EEOC v. Total Sys. Servs., Inc., 221 F.3d 1171, 1174 (11th Cir. 2000); Brower v. Runyon, 178 F.3d 1002, 1006 (8th Cir. 1999);* and *Vasconcelos v. Meese, 907 F.2d 111, 113 (9th Cir. 1990).*

n2 *See Davis v. Rich Prods. Corp., 2001 U.S. App. LEXIS 7114, 2001 WL 392036* (6th Cir. Apr. 9, 2001) (unpublished disposition).

These decisions comport with the plain language of *42 U.S.C. § 2000e-3*(a): "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing *under this subchapter.*" (Emphasis added.) They also are consistent with our decision in *Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1313 (6th Cir. 1989),* where we stated that [*10] the purpose of the participation clause is "to protect access to the machinery available to seek redress for civil rights violations and to protect the operation of that machinery once it has been engaged." In *Booker*, we examined the participation clause under Title VII in interpreting similar provisions under the Michigan Elliott Larsen Civil Rights Act. We concluded that the language must be read literally and, therefore, the instigation of proceedings leading to the filing of a complaint or a charge, including a visit to a government agency to inquire about filing a charge, is a prerequisite to protection under the participation clause. *Id.*

It is not necessary, however, for us to decide whether an internal investigation is protected activity under the participation clause. To do so would not fully resolve the case because plaintiff's participation in the internal investigations and her meeting with the Governor's office may have been protected activity under the opposition clause. *See Booker, 879 F.2d at 1313 n.3; Laughlin v. Metro. Wash. Airports Auth., 149 F.3d 253, 259 (4th Cir. 1998).* Whether plaintiff's participation in the Julie Smith [*11] and Rebecca Gustamente internal investigations is considered protected activity under the participation clause or the opposition clause, as discussed in the next section, plaintiff failed to show the requisite causal connection.

2. Opposition Claim.

Under the opposition clause, the person opposing apparently discriminatory practices must have a good faith belief that the practice is unlawful. There is no qualification on who the individual doing the complaining may be or on who the party to whom the complaint is made. Thus, the fact that the plaintiff is a human resource director who may have a "contractual duty to voice such concerns" does not defeat a claim of retaliation; and the complaint may be made to a co-worker, a newspaper reporter, or anyone else. *Johnson, 215 F.3d at 579-80.*

To defend against summary judgment, plaintiff was required to show the existence of a causal connection between her protected activities and her termination. Temporal proximity alone in the absence of other direct or compelling circumstantial evidence is generally not sufficient to support a finding of causal connection. *See Nguyen v. City of Cleveland, 229 F.3d 559, 566 (6th Cir. 2000).* [*12] Cases addressing this issue have said that temporal proximity may establish a *prima facie* case only if the temporal proximity is "very close." *Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 121 S. Ct. 1508, 1511, 149 L. Ed. 2d 509 (2001). See also, Hafford v. Seidner, 183 F.3d 506, 515 (6th Cir. 1999)* (absent additional evidence, two to five months insufficient to

create a triable issue of causation); *Cooper v. City of North Olmsted, 795 F.2d 1265, 1272 (6th Cir. 1986)* (four months insufficient to support an inference of retaliation).

The district court found that plaintiff failed to show a causal connection between her alleged oppositional activity and her termination because the Gustamente matter had been resolved almost 11 months before plaintiff met with Armstrong. Plaintiff does not argue that there was a causal connection between her involvement with the internal investigations and her termination under the participation or the opposition clauses. She relies wholly on the temporal proximity of her meeting in the morning with Armstrong and her termination in the afternoon of November 9 to establish causation. n3 Defendants [*13] claim that there was no causal connection because Vasil decided to terminate plaintiff's employment before the meeting. Plaintiff argues that Vasil's statements should be discredited because in his deposition he could provide little detail about his reasons for terminating her employment, and he did not ask that complaints about plaintiff's performance be made in writing. This is not relevant or responsive to the testimony of Vasil, Armstrong, and other employees that Vasil took steps to transfer plaintiff's duties to Demaree and asked Demaree to prepare paperwork to terminate plaintiff's employment *before* Vasil learned of the meeting with Armstrong. Employers need not suspend previously contemplated employment actions upon learning of protected activity by the employee. *See Alexander, 121 S. Ct. at 1511* (no evidence of causality where employer planned to transfer employee before learning Title VII suit had been filed). Here, plaintiff offered no evidence, other than mere temporal proximity, that she was terminated because of the Armstrong meeting. Plaintiff has failed to raise a genuine issue of material fact of causation. Accordingly, she has failed to establish [*14] a *prima facie* case of retaliation under Title VII, and summary judgment in favor of defendants is appropriate.

n3 The issue of causation as it related to the internal investigations was briefed by the defendants before the district court and on appeal. Plaintiff, therefore, has not been denied the opportunity to respond, and it is appropriate for us to affirm summary judgment on this other ground. *See Carver v. Dennis, 104 F.3d 847, 849 (6th Cir. 1991).* Plaintiff's involvement in the Gustamente sexual harassment investigation was resolved by November 1994, or at the latest February 1995; and the Julie Smith internal investigation was completed by August 1995. Plaintiff offered no evidence to show a causal connection between these investigations and her termination. In the absence of any other evidence of retaliatory conduct, the single fact that plaintiff was discharged two to eleven months after she was involved in internal discrimination investigations does not establish a causal connection between protected activity and her termination.

[*15]

B. First Amendment

A public employee has the constitutionally protected right to comment on matters of public concern without fear of reprisal from the government as employer. n4 *See Connick v. Myers, 461 U.S. 138, 147, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983).* A public employee does not forfeit his protection against governmental abridgement of freedom of speech if he decides to express his views privately rather than publicly. *Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 412, 58 L. Ed. 2d 619, 99 S. Ct. 693 (1979).*

n4 Defendants argue that plaintiff's § 1983 action is precluded by Title VII. The district court did not address this argument. An employee may sue a public employer under both Title VII and § 1983 when the § 1983 violation rests on a claim of infringement of rights guaranteed by the Constitution. *Day v. Wayne County Bd. of Auditors, 749 F.2d 1199, 1205 (6th Cir. 1984). See also, Johnson, 215 F.3d at 583.* Defendants also argue that plaintiff abandoned her First Amendment claim by not briefing it in response to the motion for summary judgment. The district court, however, ruled on the First Amendment claim, and plaintiff is not relying on facts or arguments that were not considered by the district court in making that ruling.

[*16]

To establish a § 1983 claim for violation of her right to free speech, plaintiff must first establish that her speech was protected because it was directed toward an issue of public concern, and her interest in making the speech outweighs the public employer's interest in promoting the efficiency of the public services. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977); Bailey*

v. Floyd County Bd. of Educ., 106 F.3d 135, 144 (6th Cir. 1997). Matters only of personal interest are not afforded constitutional protection. Speech upon matters of public concern relates to "any matter of political, social, or other concern to the community." *Connick, 461 U.S. at 146.* It is a question of law for the court to decide whether an employee's speech is a matter of public concern. *Johnson, 215 F.3d at 583.* "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick, 461 U.S. at 147-48.*

Once she establishes that her speech is protected, **[*17]** plaintiff must present sufficient evidence to create a genuine issue that her speech caused her discharge. The speech must have been a substantial or motivating factor in defendants' decision to terminate her employment. *See Mt. Healthy, 429 U.S. at 287.* While causation ordinarily is a question of fact for the jury, a court may "nevertheless grant summary judgment on the issue of causation when warranted." *Bailey, 106 F.3d at 145.*

If the protected speech was a substantial or motivating factor in an employee's termination, the employer may present evidence that the employee would have been terminated in the absence of the protected speech. *Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1186 (6th Cir. 1995).*

Plaintiff argues that her discussion with Armstrong about improper handling of discrimination claims was protected speech, and that she was terminated because of that speech in violation of the First Amendment. The district court found plaintiff's discussion with Armstrong was not protected speech because it was nothing more than the "quintessential employee beef: management has acted incompetently."

Allegations of racial and sexual **[*18]** discrimination are inherently matters of public concern even if they are tied to personal employment disputes. *See, Connick, 461 U.S. at 148 n.8* (allegations of racial discrimination by a public employer are a "matter inherently of public concern" discussing *Givhan, 439 U.S. at 415-16); Strouss v. Mich. Dept. of Corr., 250 F.3d 336, 346 n.5 (6th Cir. 2001)* (sexual harassment is a matter of public concern); *Boger, 950 F.2d at 322* (response to reporter's question about racial discrimination addressed matter of public concern); *Matulin v. Vill. of Lodi, 862 F.2d 609, 612-13 (6th Cir. 1988)* (sexual and handicap discrimination in the workplace are matters of public concern). Whether the motive behind complaining of discrimination is civic mindedness or an individual employee concern is not relevant. What is relevant is the subject of the complaint, discrimination, which is a matter "inherently of public concern." *Perry v. McGinnis, 209 F.3d 597, 608 (6th Cir. 2000).*

While plaintiff offered somewhat differing accounts of her meeting with Armstrong, at one point in her deposition she testified **[*19]** that she informed Armstrong of a potential problem relating to the handling of discrimination complaints, that Vasil had told plaintiff not to be concerned because they were "just passing through," and that the Governor's office needed to do something about it. On this record, plaintiff presented sufficient evidence that her discussion with Armstrong was about the improper handling of sexual discrimination complaints, which is inherently a matter of public concern. The district court erred, therefore, in finding that the discussion with Armstrong was not protected speech under the First Amendment.

Defendants nonetheless are entitled to summary judgment. In order for plaintiff to prevail on her § 1983 claim, she must prove that her speech was a substantial or motivating factor in defendants' decision to terminate her employment. As discussed in the previous section, the evidence clearly shows that Vasil decided and took steps to effectuate plaintiff's termination before the meeting with Armstrong occurred and before he learned of the meeting. There being no material fact in dispute on causation, defendants were entitled to summary judgment on plaintiff's First Amendment claim.

[*20] AFFIRMED.

Tennessee Valley Authority v. Frady, No. 96-3831 (6th Cir. 1998)(per curiam)(unpublished) (table case at 134 F.3d 372; unpublished decision available at 1998 WL 25003)(ALJ Case Nos. 92-ERA-19 and 34)

No. 96-3831

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

TENNESSEE VALLEY AUTHORITY,
Petitioner,

v.

RANDOLPH FRADY,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

ON PETITION FOR REVIEW OF THE DECISIONS AND ORDERS OF THE UNITED STATES DEPARTMENT OF LABOR

BEFORE: RYAN, SUHRHEINRICH, and COLE, Circuit Judges.

PER CURIAM. This appeal arises from claims by Randolph Frady under the whistleblower protection provision of the Energy Reorganization Act of 1974(ERA), as amended, 42 U.S.C. § 5851 (1988), which prohibits licensees of the Nuclear Regulatory Commission (NRC) from discriminating against employees who engage in protected activity, such as identifying nuclear safety concerns or making complaints under the ERA. Pursuant to the ERA, Plaintiff Frady filed complaints with the U.S. Department of Labor (DOL), alleging that his non-selection for fourteen different positions was the result of unlawful retaliation for his protected activities while working as a nuclear inspector for Defendant Tennessee Valley Authority (TVA). The case ultimately reached the Secretary of Labor (hereinafter Secretary), who found for Plaintiff with regard to three of the fourteen allegations.

Petitioner TVA appeals the Secretary's decision for Plaintiff on those three allegations. The issues raised by Petitioner on appeal ask whether "the Secretary was arbitrary and

[slip op. at 2]

capricious in disregarding the ALJ's credibility determinations," and whether his "decision was supported by substantial evidence." We find that the Secretary's decision with regard to the three contested allegations is not

supported by substantial evidence. We, therefore, **REVERSE** that decision.

I. Facts

Plaintiff Frady was employed by TVA from 1978 until 1992. From 1983 on, he worked as a nuclear inspector at the Sequoyah and Watts Bar nuclear plants. While working as an inspector, he raised safety concerns with the NRC and TVA management on several occasions. In December 1990, Frady received notice that he would be terminated due to a reduction in force. In response, Frady filed a complaint under the ERA. The complaint resulted in a settlement agreement which extended Frady's employment with TVA until January 1992. As part of that agreement, Frady was placed in the Employee Transition Program from June 1991 until his termination. The program allowed him to seek a new position within TVA, which he did. However, Frady was not selected for any of the positions he applied for, and he filed ERA complaints challenging these non-selections.

After an investigation by the DOL's Wage and Hour Division found no merit to Frady's complaints, he filed a request for a hearing. An administrative law judge (hereinafter AU), charged with making recommendations to the Secretary, conducted the hearing and thereafter dismissed eight of the fourteen allegations upon TVA's motion for summary judgment. The AU issued a written opinion discussing the remaining six allegations and recommended that they all be decided in TVA's favor. The Secretary adopted the ALJ's recommendations concerning the eight dismissed allegations and three of the six allegations decided on the merits, but found for Frady on the remaining three allegations, which are the only ones contested here. While on remand to the ALJ for determination of Plaintiffs remedy, the parties reached agreement on the

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[slip op. at 3]

appropriate remedy, contingent upon this appeal. The resulting "Joint Stipulation" was recommended for approval by the ALJ, and the Administrative Review Board of the DOL issued an order approving it.

Two of the three contested allegations concern Frady's application for machinist trainee positions at both the Watts Bar and Sequoyah nuclear plants, as well as for a steamfitter trainee position at Sequoyah. Applicants for each of these three positions were considered by a different three-person committee, consisting of a TVA representative, a member of the applicable union, and Kevin Green, a human resources manager for TVA. The TVA and union representatives were charged with ranking the applicants and making the hiring decisions, while Green was assigned to be a facilitator. Each of the committees ranked Frady below the applicants who were ultimately selected. The third contested allegation concerns Frady's application for a quality control inspector position at the Sequoyah facility. Shortly after the vacancy for this position was announced, a staffing study conducted by an outside consultant recommended that staffing levels at the facility be reduced. Roy Lumpkin, Frady's former supervisor and the supervisor for the open position, ultimately decided to cancel the vacancy without hiring anyone for it.

II. Applicable Law

We review the Secretary's decision to ensure that it is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Ohio v. Ruckelshaus, 776 F.2d 1333, 1339 (6th Cir.1985) (quoting 5 U.S.C. § 706(2)(A)(Administrative Procedure Act)). As part of our review, "we must determine whether [the decision] is supported by substantial evidence, which is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " Moon v. Transport Drivers, Inc., 836 F.2d 226, 229 (6th Cir.1987) (quoting Richardson v. Perales, 402 U.S. 389. 401 (1971)). The substantial evidence standard requires

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us to consider evidence in the record that is contrary to the Secretary's findings and conclusions. Tel Data Corp. v. National Labor Relations Bd., 90 F.3d 1195, 1198 (6th Cir.1996).

Although the ALJ only recommends a decision, the evidentiary support for the Secretary's conclusions "may be

diminished, however, when the administrative law judge has drawn different conclusions." National Labor Relations Bd. v. Brown-Graves Lumber Co., 949 F.2d 194, 196-97 (6th Cir.1991). In particular, this court "will not normally disturb the credibility assessments of ... an administrative law judge, who has observed the demeanor of the witnesses." Litton Microwave Cooking Prods. Div., Litton Sys., Inc., 868 F.2d 854, 857 (6th Cir.1989) (reversing National Labor Relations Board, which declined to follow ALJ's recommendation to dismiss complaint) (internal quotes omitted); accord Curran v. Dept. of the Treasury, 714 F.2d 913, 915 (9th Cir.1983) ("Special deference is to be given the AL's credibility judgments"). Given the conflicts in this case between the conclusions of the ALJ and the Secretary, we must examine the record with particular scrutiny. Tel Data, 90 F.3d at 1198.

The law governing Frady's proof of his claims was carefully laid out by the Secretary:

> a complainant ... must first make a *prima facie* case of retaliatory action by the [defendant], by establishing that he engaged in protected activity, that he was subject to adverse action, and that the [defendant] was aware of the protected activity when it took the adverse action. Additionally, a complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. If a complainant succeeds in establishing the foregoing, the [defendant] must produce evidence of a legitimate, nondiscriminatory reason for the adverse action. The complainant bears the ultimate burden of persuading that the [defendant's] proffered reasons ... are a pretext for discrimination. At all times, the complainant bears the burden of establishing by a preponderance of the evidence that the adverse action was in retaliation for protected activity.

Frady v. Tennessee Valley Authority, Nos. 92-ERA-19 & 92-ERA-34, slip op. at 5-6 (Secretary of Labor Oct. 23, 1995) (citations omitted) (hereinafter Secretary's Opinion); accord Moon, 836 F.2d at 229. The Secretary went on to state that, as part of the establishment of a prima facie case, "Frady must establish that he was qualified for such position; that, despite his qualifications, he was rejected; and that TVA continued to seek and/or select similarly qualified

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[slip op. at 5]

applicants." Secretary's Opinion at 18 (adopted from McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). The Secretary concluded that, for each of the three contested allegations, Frady established all the elements of a prima facie case discussed above and met his ultimate burden of proving that TVA's proffered reasons for its personnel decisions were a pretext for retaliation.

III. Trainee Positions

Two of the three contested allegations involve the machinist and steamfitter trainee positions. The record contains little to support the Secretary's finding that Plaintiff established a prima facie case of retaliation with regard to these positions. As to the knowledge element of a prima facie case, we agree with the ALJ's finding that there is no evidence that members of the selection committees knew about Plaintiff's protected activity, including his earlier ERA complaint. (J.A. at 73). As to the inference element of a prima facie case, the Secretary found that Plaintiff "established an inference of retaliatory motive based on temporal proximity." Secretary's Opinion at 24. Where adverse employment action follows rapidly after protected activity, common sense and case law allows an inference of a causal connection. See Moon v. Transport Drivers, Inc., 836 F.2d 226, 229 (6th Cir.1987) (stating, in a case where the plaintiff was fired less than two weeks after making a complaint, that "the proximity in time between protected activity and adverse employment action may give rise to an inference of a causal connection"). However, because seven or eight months elapsed between Frady's most recent protected activity, namely the filing of the earlier ERA complaint, and the decisions by the selections committees, the Secretary's inference is a weak one.[1]

[slip op. at 6]

Even if we were to overlook the scarcity of evidence supporting the knowledge and inference elements of Plaintiffs prima facie case, we would still be forced to conclude that the Secretary's decision regarding the trainee positions was not supported by substantial evidence. Assuming arguendo that Plaintiff established a prima facie

case, Defendant must produce evidence of a legitimate, nondiscriminatory reason for the non-selection. The Secretary conceded that Defendant met this burden of production by presenting testimony that the people selected for the trainee positions had qualifications superior to those of Plaintiff. Secretary's Opinion at 24. However, the Secretary found that Plaintiff met his ultimate burden of proving that this legitimate reason was a pretext for discrimination. The Secretary discussed several evidentiary reasons why he reached this conclusion, id. at 26-31, but none of them amount to substantial evidence.

The most direct reason cited by the Secretary was that he did "not find the testimony indicating that the selectees ... were found by each committee to be better qualified than Frady based on their 'hands on' experience to be persuasive." Id. at 26. In reaching this conclusion, the Secretary did not give any deference, as required, to the AL's implicit finding that this testimony was credible. Moreover, the Secretary substituted his judgment for that of the selection committees at an inappropriate level of detail, when he determined that Frady's experience using calibration tools and building a log home was equivalent to other applicants' experience with automobile engines and heating and air-conditioning equipment. Id. at 20-21.

The other reasons cited by the Secretary for his conclusion that Frady proved pretext are speculative at best. For example, the Secretary concludes that "other candidates could have been 'primed' in advance to assist them in answering the standard questions that were asked

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[slip op. at 7]

of each applicant." The Secretary bases this hypothesis solely on committee member Green's off-hand comment during his testimony that "I have no knowledge that [the candidate] was primed or anything." Id. at 27-28. The Secretary also cites, as evidence of pretext, that eleven of the eighteen applicants selected by the committees were from outside TVA, despite a TVA policy of filling vacancies from within the ranks of TVA employees. Id. at 29. However, the Secretary fails to explain how discrimination against Frady can explain more than one of the eleven selections from outside TVA.

As further evidence of pretext, the Secretary cites the fact that TVA "relied almost entirely on [committee member] Green's testimony concerning the relevant qualifications." Id. at 30. The Secretary concludes that this indicates that Green was less than honest when he indicated that he was a facilitator on the selection committees, rather than a decision maker. Even if we ignore the problems with citing a defendant's strategy as evidence of a witness's credibility, Defendant's reliance on Green's testimony about qualifications can be explained by the fact that Green was the personnel representative on the committees and was the only person to serve on all the relevant selection committees.

Finally, the Secretary cites evidence "that Frady was the subject of a considerable degree of animus from supervisory personnel ... at TVA" Id. at 31. However, the Secretary cites no evidence that the animus was due to Frady's protected activity. In fact, there is evidence pointing in the opposite direction. For example, TVA employee Michael Miller, a witness vouched for by Frady, (J.A. at 492-93), attributed the animus from one supervisor to personality conflicts rather than Frady's whistleblowing. (J.A. at 662-4). Without evidence that the animus was based on protected activity, the animus does not suggest retaliation for such activity.

We also note that one of the two decision makers on each selection committee was a union representative, rather than a representative of TVA. Frady never alleged, and the

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[slip op. at 8]

Secretary never found, that the there was any reason why the union representatives would discriminate against Frady. Thus, it is significant that the TVA and union representatives ranked Frady at about the same level, as he concedes. (J.A. at 487). This appears to us to be compelling evidence that the TVA representatives were not biased by Plaintiffs protected activity. Moreover, the fact that the union representatives gave Plaintiff a relatively low ranking indicates that they too believed there was a legitimate reason for not selecting him.

For all the reason discussed above, we conclude that the Secretary's decision regarding the machinist and steamfitter trainee positions is not supported by substantial evidence.

IV. Quality Control Inspector Position

One of the three contested allegations involves a quality control inspector position at the Sequoyah facility. Unlike the trainee positions, this position was canceled rather than being filled by other applicants. However, after Roy Lumpkin canceled the inspector vacancy, two inspectors "returned to their positions as nuclear inspectors at the Sequoyah plant pursuant to the terms of a settlement agreement." Secretary's Opinion at 36. The Secretary, therefore, "conclude[d] that TVA, in effect, filled the announced nuclear inspector vacancy with similarly qualified candidates," thus establishing one element of a prima facie case. Id.

We find, however, that this conclusion is not supported by substantial evidence for a number of reasons. First, the two inspectors returned to their positions almost a year after the vacancy was canceled. Id. at 36 n. 26. Second, Roy Lumpkin, the manager who canceled the vacancy, moved to an unrelated position four months before the inspectors returned, (J.A. at 600), and was uninvolved in their return. Third, the two inspectors returned based on settlement agreements, whereas Plaintiff sought the position through regular application channels.[2] For

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[slip op. at 9]

all these reasons, Plaintiff cannot show that he was treated any differently than similarly qualified candidates. See White v. General Motors Corp. Inc., 908 F.2d 669, 671 (10th Cir.1990) ("to maintain an action for wrongful discharge, [plaintiffs] must demonstrate that they were treated differently because of their whistleblowing activity").

The Secretary also concludes that Plaintiff met the prima facie requirement of raising an inference that his protected activity was the likely reason for the adverse action, namely the vacancy cancellation. The Secretary bases this conclusion on two factors. One factor is the temporal proximity between the cancellation and Frady's protected activity. Secretary's Opinion at 38. However, as discussed with regard to the trainee positions, the Secretary's inference based on temporal proximity is a weak one, because seven months elapsed between Frady's earlier ERA complaint and the cancellation of the vacancy. 'The second factor cited by the Secretary is his "conclu [sion] that Lumpkin strongly suspected, if he did not have certain knowledge, that Frady had applied for the position." Id. This is by no means a forgone conclusion, given that Lumpkin canceled the vacancy before he received the applications from Human Resources. Yet the Secretary explicitly bases his conclusion on the following summary of Lumpkin's testimony: "although [Lumpkin] was unsure whether he had been told ... that Frady had applied for the job, he was 'reasonably certain if [Frady] wanted the inspector job at Sequoyah, he would have applied.' " Id. We fail to see how this testimony leads to the conclusion that Lumpkin strongly suspected or knew for sure that Frady had applied.

In summary, substantial evidence is lacking with regard to at least two elements of a prima facie case of retaliation involving the canceled inspector position. Plaintiff cannot show that the canceled vacancy was filled with similarly qualified candidates, and the Secretary's finding that Plaintiff successfully raised an inference of discrimination lacks adequate support. We conclude, therefore, that the Secretary's decision regarding the inspector position fails to

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[slip op. at 10]

meet the substantial evidence standard. In addition, we note that the consultant's study, which recommended a reduction in staff, appears to be the legitimate reason for the cancellation, as Defendant contends. However, we need not reach this issue, because a defendant's obligation to proffer a legitimate reason for an adverse employment decision is not triggered until a prima facie case of discrimination is established, Moon v. Transport Drivers, Inc., 836 F.2d 226, 229 (6th Cir.1987), which Plaintiff failed to do here.

V. Conclusion

The Secretary's decision for Plaintiff with regard to each of the three contested allegations is unsupported by substantial evidence. We, therefore, **REVERSE** that decision and **VACATE** the orders of the Secretary and Administrative Review Board. The Secretary's decision for Defendant regarding Plaintiff's other eleven allegations is undisturbed.

[ENDNOTES]

[1]The Secretary chose to determine temporal proximity based on Frady reaching a settlement agreement with TVA in June 1991, two or three months before his non-selection by the committees. We believe that the date of the complaint, January 1991, is the more appropriate date to use, because 1) unlike a settlement agreement, a complaint is clearly a protected activity under the ERA, and 2) common sense dictates that employees are much more likely to be retaliated against for filing a complaint against their employer than for resolving the dispute with their employer by reaching a settlement agreement.

[2]Plaintiff's earlier settlement agreement guaranteed only that he would be placed in the Employee Transition Program.

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

May 4, 2001

EA-99-234

Tennessee Valley Authority
ATTN: Mr. J. A. Scalice
Chief Nuclear Officer and
Executive Vice President
6A Lookout Place
1101 Market Street
Chattanooga, TN 37402-2801

SUBJECT: ORDER IMPOSING CIVIL MONETARY PENALTY - $110,000
TENNESSEE VALLEY AUTHORITY

Dear Mr. Scalice:

This refers to your letters dated January 22, 2001, and March 9, 2001, in response to the Notice of Violation and Proposed Imposition of Civil Penalty (Notice) sent to you by our letter dated February 7, 2000. Our letter and Notice described one violation of 10 CFR 50.7, "Employee Protection," which was described in NRC Office of Investigations (OI) Report No. 2-98-013. To emphasize the importance of a safety conscious work environment that is free of discriminatory employment actions, a civil penalty of $110,000 was proposed.

In your response of January 22, 2001, you denied the violation and protested the proposed civil penalty. You contended that the reorganization of Tennessee Valley Authority (TVA) Nuclear in 1996, the elimination of the position of Chemistry and Environmental Protection Program Manager, Operations Support, and the selection of individuals to fill new positions were made solely for legitimate business reasons, and were not in any part taken as retaliation for the Chemistry and Environmental Protection Program Manager's engagement in protected activity.

Your letter of March 9, 2001, provided a supplemental response to our Notice, related to comments submitted to the NRC's Discrimination Task Group by a former NRC Office of Enforcement (OE) staff member. As background, on July 27, 2000, the NRC established a management-level review group to evaluate the NRC's processes used in the handling of discrimination allegations and violations of employee protection standards. The Discrimination Task Group is an ongoing effort whose overall objective is to develop recommendations for revisions to the regulatory requirements, the Enforcement Policy, or other Agency guidelines as appropriate. The former OE staff member's comments involve his perceptions that the NRC has lowered its threshold for taking enforcement action for discrimination, and fails to properly consider a licensee's position that adverse actions taken against their employees were done for legitimate business reasons. TVA considers these comments to be significant because the

ATTACHMENT A

AB001003

former OE staff member was involved in the subject escalated action taken against TVA, and because TVA's response of January 22, 2001, also raised these two issues.

After considering your responses, for the reasons given below and in the February 7, 2000, letter and Notice, we have concluded that the violation occurred as stated and that neither an adequate basis for withdrawing the violation, reducing the severity level, or mitigating or rescinding the civil penalty has been provided. In July 1996, TVA eliminated the Chemistry and Environmental Protection Program Manager's position in Operations Support, as part of a reorganization, and took subsequent actions to ensure that he was not selected for one of two new positions within Operations Support. TVA took these actions, at least in part, in retaliation for his involvement in protected activities. These activities included the identification of chemistry related nuclear safety concerns in 1991-1993, and the subsequent filing of a Department of Labor (DOL) complaint in September 1993 based, in part, on these chemistry related nuclear safety concerns. Certain TVA managers were aware of his protected activity when the selection process, designed by these same managers, failed to select him for one of the two new positions.

The selection process for the newly created Chemistry Program Manager positions in Operations Support was not in accordance with TVA's normal process. TVA's rationale for posting the Chemistry Program Manager position and requiring individuals to compete for selection, while filling the Radcon Chemistry Manager position without posting it in 1996, were inconsistent. In both cases, the individuals had previously performed the functions of the new positions they were seeking, yet in the case of the former Chemistry and Environmental Program Manager, he was not permitted to fill the position noncompetitively as had the Radcon Chemistry Manager. Moreover, TVA's explanations with respect to the decision making process for the filling of the Radcon Chemistry Manager position changed over time.

Regarding TVA's supplemental response of March 9, 2001, the NRC welcomes and intends to consider all information provided to the Discrimination Task Group by internal and external stakeholders in accomplishing the overall objective of developing recommendations for revisions to the regulatory requirements, the Enforcement Policy or other agency guidelines as appropriate. However, the NRC has concluded that your response provides no new information related to the specific circumstances of the Notice that would warrant a change in the subject enforcement action.

Accordingly, we hereby serve the enclosed Order on Tennessee Valley Authority imposing a civil monetary penalty in the amount of $110,000. As provided in Section IV of the enclosed Order, payment should be made within 30 days in accordance with NUREG/BR-0254. In addition, at the time payment is made, a statement indicating when and by what method payment was made, is to be mailed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852-2738. We will review the effectiveness of your corrective actions during a subsequent inspection.

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice", a copy of this letter and the enclosures will be made available electronically for public inspection in the NRC Public Document Room or from the Publicly Available Records (PARS) component of NRC's document system (ADAMS). ADAMS is accessible from the NRC Web site at http://www.nrc.gov/NRC/ADAMS/index.html (the Public Electronic Reading Room).

Sincerely,

William F. Kane
Deputy Executive Director
for Regulatory Programs

Docket Nos. 50-390, 50-327, 50-328,
50-269, 50-260, 50-296
License Nos. NPF-90, DPR-77, DPR-79,
DPR-33, DPR-52, DPR-68

Enclosures: 1. Order Imposing Civil Monetary Penalty
2. NUREG/BR-0254 Payment Methods (Licensee only)

cc w/o encl 2:

Karl W. Singer, Senior Vice President
Nuclear Operations
Tennessee Valley Authority
6A Lookout Place
1101 Market Street
Chattanooga, TN 37402-2801
Electronic Mail Distribution

Jack A. Bailey, Vice President
Engineering and Technical Services
Tennessee Valley Authority
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cc w/o encl 2 (con't):

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N. C. Kazanas, General Manager
Nuclear Assurance
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Mark J. Burzynski, Manager
Nuclear Licensing
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Edward L. Nanney, Director
Division of Radiological Health
TN Dept. of Environment and
Conservation
3rd Floor, LNC Annex
401 Church Street
Nashville, TN 37243-1532
Electronic Mail Distribution

County Executive
Hamilton County Courthouse
Chattanooga, TN 37402-2801

UNITED STATES
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
	)	
Tennessee Valley Authority	)	Docket Nos. 50-390, 50-327, 50-328,
Watts Bar Nuclear Plant, Unit 1	)	50-269, 50-260, 50-296
Sequoyah Nuclear Plant, Units 1 & 2	)	License Nos. NPF-90, DPR-77, DPR-79,
Browns Ferry Nuclear Plant, Units 1, 2 & 3	)	DPR-33, DPR-52, DPR-68
	)	EA 99-234

ORDER IMPOSING CIVIL MONETARY PENALTY

I

Tennessee Valley Authority (Licensee) is the holder of Operating License Nos. NPF-90, DPR-77, DPR-79, DPR-33, DPR-52, DPR-68, issued by the Nuclear Regulatory Commission (NRC or Commission) on February 7, 1996, September 17, 1980, September 15, 1981, December 20, 1973, August 2, 1974, and July 2, 1976. The licenses authorize the Licensee to operate Watts Bar Nuclear Plant, Unit 1, Sequoyah Nuclear Plant, Units 1 and 2, and Browns Ferry Nuclear Plant, Units 1, 2, and 3, in accordance with the conditions specified therein.

II

An investigation of the Licensee's activities was completed on August 4, 1999. The results of this investigation indicated that the Licensee had not conducted its activities in full compliance with NRC requirements. A written Notice of Violation and Proposed Imposition of Civil Penalty (Notice) was served upon the Licensee by letter dated February 7, 2000. The Notice states the nature of the violation, the provision of the NRC's requirements that the Licensee had violated, and the amount of the civil penalty proposed for the violation.

The Licensee responded to the Notice in letters dated January 22, 2001, and March 9, 2001. In its response, the Licensee denied the violation and protested the proposed imposition of a civil penalty.

III

After consideration of the Licensee's response and the statements of fact, explanation, and argument for mitigation contained therein, the NRC staff has determined that the violation occurred as stated and that the penalty proposed for the violation designated in the Notice should be imposed.

IV

In view of the foregoing and pursuant to Section 234 of the Atomic Energy Act of 1954, as amended (Act), 42 U.S.C. 2282, and 10 CFR 2.205, IT IS HEREBY ORDERED THAT:

The Licensee pay a civil penalty in the amount of $110,000 within 30 days of the date of this Order, in accordance with NUREG/BR-0254. In addition, at the time of making the payment, the Licensee shall submit a statement indicating when and by what method payment was made, to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852-2738.

V

The Licensee may request a hearing within 30 days of the date of this Order. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be made in writing to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and include a statement of good cause for the extension. A request for a hearing should be clearly marked as a "Request for an Enforcement Hearing" and shall be submitted to the Secretary, U.S. Nuclear Regulatory Commission, ATTN: Rulemakings and Adjudications Staff, Washington, DC 20555. Copies also shall be sent to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, to the Assistant General Counsel for Materials Litigation and Enforcement at the same address, and to the Regional Administrator, NRC Region II, 61 Forsyth Street, SW, Suite 23T85, Atlanta, Georgia, 30303-8931.

If a hearing is requested, the Commission will issue an Order designating the time and place of the hearing. If the Licensee fails to request a hearing within 30 days of the date of this Order (or if written approval of an extension of time in which to request a hearing has not been granted), the provisions of this Order shall be effective without further proceedings. If payment has not been made by that time, the matter may be referred to the Attorney General for collection.

In the event the Licensee requests a hearing as provided above, the issues to be considered at such hearing shall be:

(a) whether the Licensee was in violation of the Commission's requirements as set forth in the Notice referenced in Section II above, and

(b) whether, on the basis of such violation, this Order should be sustained.

FOR THE NUCLEAR REGULATORY COMMISSION

William F. Kane
Deputy Executive Director
for Regulatory Programs

Dated at Rockville, Maryland
this 4th day of May 2001

UNITED STATES
NUCLEAR REGULATORY COMMISSION
REGION II
SAM NUNN ATLANTA FEDERAL CENTER
61 FORSYTH STREET, SW, SUITE 23T85
ATLANTA, GEORGIA 30303-8931

Office of the General Counsel

FEB 10 00

ESC		
JEF		
EJV	✓	

February 7, 2000

EA 99-234

Tennessee Valley Authority
ATTN: Mr. J. A. Scalice
Chief Nuclear Officer and
Executive Vice President
6A Lookout Place
1101 Market Street
Chattanooga, TN 37402-2801

SUBJECT: NOTICE OF VIOLATION AND PROPOSED IMPOSITION OF CIVIL PENALTY - $110,000 (NUCLEAR REGULATORY COMMISSION'S OFFICE OF INVESTIGATIONS REPORT NO. 2-98-013)

01558

Dear Mr. Scalice:

This letter refers to the investigation initiated by the Nuclear Regulatory Commission's (NRC) Office of Investigations (OI) on April 29, 1998, and completed on August 4, 1999. Based on the findings of the investigation, an apparent violation was identified involving discrimination by Tennessee Valley Authority (TVA) against Mr. Gary L. Fiser, a former corporate employee, for engaging in protected activities. The synopsis of the OI report and report summary were provided to TVA by letter dated September 20, 1999. A closed, predecisional enforcement conference was conducted at the NRC Region II office in Atlanta, Georgia, on December 10, 1999, to discuss the apparent violation. At NRC's request, TVA submitted supplemental information by letters dated December 15 and 20, 1999. A list of conference attendees, and copies of the NRC's presentation material, TVA's presentation material and supplemental correspondence (excluding the December 20, 1999 personnel related information), and information presented by Mr. Fiser at the conference are enclosed.

After a review of the information obtained during and subsequent to the predecisional enforcement conference and the information developed during the OI investigation, the NRC has determined that a violation of NRC requirements occurred. The violation is cited in the enclosed Notice of Violation and Proposed Imposition of Civil Penalty (Notice), and the circumstances surrounding it are described in detail in the previously provided summary of the OI investigation report.

The violation involves employment discrimination in contravention of the Commission's requirements in 10 CFR 50.7, Employee Protection, in that TVA caused the non-selection of Mr. Fiser to a competitive position in 1996, due, at least in part, to his engagement in protected activity. Specifically, in 1993, Mr. Fiser filed a discrimination complaint with the Department of Labor (DOL), in which he alleged that TVA discriminated against him, in part, for raising nuclear safety concerns related to his activities as Chemistry and Environmental Superintendent at the Sequoyah Nuclear Power Plant. The nature of the nuclear safety concerns included his

identification of various chemistry related issues at the Sequoyah facility in the 1991 to 1993 time frame. Individuals who were knowledgeable of Mr. Fiser's 1993 DOL complaint and/or the chemistry related safety concerns at that time included the Nuclear Safety Review Board (NSRB) Chairman and an NSRB committee member. As part of their NSRB responsibilities, these two individuals were critical of the existence and timely resolution of chemistry related issues in Mr. Fiser's department, and were outspoken in their dissatisfaction with Mr. Fiser's ability to implement effective corrective action.

After the 1993 DOL complaint was settled and Mr. Fiser was reinstated to a position in TVA, a corporate reorganization occurred in mid-1994, and Mr. Fiser was selected to the position of Chemistry and Environmental Protection Program Manager within the Operations Support corporate organization. Subsequent to his selection to this position, in approximately early to mid 1996, the individuals who served as NSRB Chairman and NSRB committee member (in 1993) were placed in the corporate positions of General Manager, Operations Support, and Radcon Chemistry Manager, respectively. These positions represented Mr. Fiser's first and second level management superiors. Thereafter, in July 1996, the Operations Support group was again reorganized. As part of this reorganization, the three Chemistry and Environmental Protection Program Manager positions, one of which Mr. Fiser held, were eliminated, and two new Chemistry Program Manager positions were created and competitively posted.

At that time, Mr. Fiser informed TVA of his intent to file a DOL complaint should TVA decide to competitively post these positions. In June 1996, Mr. Fiser filed a DOL complaint which was based on his belief that posting these positions constituted discrimination for his engagement in previous protected activity. Mr. Fiser believed that his previous position description and experience warranted his transfer into one of the two newly created positions. Subsequently, Mr. Fiser applied for one of the two new positions, but was not selected. The NRC concluded that Mr. Fiser's engagement in the protected activities outlined above was a factor in his eventual non-selection to the position for which he applied.

At the conference, TVA representatives indicated that the 1996 reorganization which resulted in the elimination of Mr. Fiser's Chemistry and Environmental Protection Program Manager position was implemented for legitimate business reasons. TVA representatives also stated that the decision to competitively post these and other positions, while filling other positions without competitively posting, was based on TVA's understanding of applicable law. In addition, TVA representatives presented information indicating that the selection process for the newly posted positions of Chemistry Program Manager was as impartial as possible, and in accordance with TVA policies and procedures. TVA also stated that the former NSRB Chairman was unaware of Mr. Fiser's 1993 DOL complaint until June of 1996, and that the individuals involved in the selection process were unbiased with respect to Mr. Fiser's DOL activities. TVA took exception to the statements in the NRC's September 20, 1999, letter, that the 1993 NSRB Chairman and Committee Member were named as culpable parties in Mr. Fiser's 1993 DOL complaint.

The NRC recognizes that licensees may implement reorganizations for legitimate business reasons, which may result in adverse personnel actions against its employees. However, the NRC does not agree with TVA that the actions which ultimately resulted in Mr. Fiser's non-selection to the Chemistry Program Manager position were based solely on non-discriminatory,

business reasons. The NRC agrees with TVA that the former NSRB Chairman and committee member were not named as culpable parties in Mr. Fiser's 1993 DOL complaint, as misstated in our September 20, 1999 letter. However, the NRC notes that these individuals were knowledgeable and critical of Mr. Fiser's 1991-1993 protected activity involving chemistry related safety concerns and their actions in this regard were part of the information developed associated with the 1993 DOL case. Moreover, given his position in the organization and the number of TVA employees who were involved in the various DOL and TVA Inspector General interviews, the NRC also considers it more likely than not that the former NSRB Chairman was aware that Mr. Fiser filed a 1993 DOL complaint prior to 1996.

Shortly after these two individuals were named as General Manager, Operations Support, and Radcon Chemistry Manager, in 1996 (Mr. Fiser's first and second level management superiors), a reorganization was implemented at the direction of the General Manager of Operations Support that ultimately resulted in the elimination of one of the Chemistry and Environmental Manager positions and the non-selection of Mr. Fiser to the newly created Chemistry Program Manager positions. The temporal proximity between the appointment of these two individuals as Mr. Fiser's supervisors and his non-selection in July 1996, and the disparate treatment of Mr. Fiser with respect to the new Chemistry Program Manager position led the NRC to conclude that the reasons for Mr. Fiser's non-selection, as articulated by TVA at the conference, were pretextual. As to the disparate treatment issue, TVA's rationale for posting the Chemistry Program Manager position and requiring Mr. Fiser to compete for the job, while filling the Radcon Chemistry Manager position without posting it in 1996, were inconsistent. In both cases, the individuals had previously performed the functions of the new positions they were seeking, yet in the case of Mr. Fiser, he was not permitted to fill the position noncompetitively as had the Radcon Chemistry Manager. Moreover, TVA's explanations with respect to the decision making process for the filling of the Radcon Chemistry Manager position changed over time.

The NRC also considered it likely that an individual was pre-selected to one of the Chemistry Program Manager positions. In addition, at least two of the three individuals on the selection review board, and the selecting official, had knowledge of Mr. Fiser's 1993 DOL complaint. Of particular relevance to the NRC is the fact that certain selection review board members discussed the existence of Mr. Fiser's prior protected activity just prior to conducting interviews for the position of Chemistry Program Manager. This conduct casts further doubt on the impartiality of the selection process. Based on these and other reasons, the NRC has concluded that discrimination was at least a factor in Mr. Fiser's non-selection.

Therefore, the NRC has concluded that the actions taken against the former corporate employee were due in part to his participation in activities protected by 10 CFR 50.7. Since the adverse employment action was taken by individuals the NRC considers to be mid-level management officials, this violation has been categorized in accordance with the "General Statement of Policy and Procedures for NRC Enforcement Actions" (Enforcement Policy), NUREG-1600, at Severity Level II.

In accordance with the Enforcement Policy, a base civil penalty in the amount of $88,000 is considered for a Severity Level II violation. Because this violation is characterized at Severity Level II, the NRC considered whether credit was warranted for Identification and Corrective

Action in accordance with the civil penalty assessment process described in Section VI.B.2 of the Enforcement Policy. No credit was determined to be warranted for Identification, because this violation was identified by the NRC. Corrective actions presented by TVA at the conference included various employee training on building and maintaining a safety conscious work environment, and issuance of an employee bulletin reinforcing TVA's policy against discrimination. However, in that you denied the occurrence of a violation, to date you have not taken any specific corrective actions to address the root and contributing causes, nor taken actions to prevent recurrence, resulting in no credit for the factor of Corrective Action.

Therefore, to emphasize the importance of a safety conscious work environment that is free of discriminatory employment actions and the need for prompt identification and comprehensive correction of violations, I have been authorized, after consultation with the Director, Office of Enforcement, and the Deputy Executive Director for Reactor Programs, to issue the enclosed Notice. In this case, because credit was not warranted for the factors of Identification and Corrective Action, the NRC normally would propose a civil penalty at twice the base civil penalty of $88,000. However, in accordance with the Enforcement Policy, I have been authorized to assess a civil penalty at the maximum daily amount for a single violation of $110,000 for this Severity Level II violation.

You are required to respond to this letter and should follow the instructions specified in the enclosed Notice when preparing your response. The NRC will use your response, in part, to determine whether further enforcement action is necessary to ensure compliance with regulatory requirements.

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice," a copy of this letter, its enclosures, and your response will be placed in the NRC Public Document Room.

Sincerely,

Luis A. Reyes
Regional Administrator

Docket Nos. 50-390, 50-327, 50-328,
50-269, 50-260, 50-296
License Nos. NPF-90, DPR-77, DPR-79,
DPR-33, DPR-52, DPR-68

Enclosures and cc: See Page 5

Enclosures:
1. Notice of Violation and Proposed Imposition of Civil Penalty
2. Conference Attendees
3. NRC Presentation Material
4. TVA Presentation Material
5. Presentation Material provided by the former corporate employee
6. NUREG/BR-0254

cc w/o encl 6:
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Nuclear Operations
Tennessee Valley Authority
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Electronic Mail Distribution

Jack A. Bailey, Vice President
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Electronic Mail Distribution

General Counsel
Tennessee Valley Authority
ET 10H
400 West Summit Hill Drive
Knoxville, TN 37902
Electronic Mail Distribution

N. C. Kazanas, General Manager
Nuclear Assurance
Tennessee Valley Authority
5M Lookout Place
1101 Market Street
Chattanooga, TN 37402-2801
Electronic Mail Distribution

cc: Con'td on Page 6

cc (Cont'd):
Mark J. Burzynski, Manager
Nuclear Licensing
Tennessee Valley Authority
4X Blue Ridge
1101 Market Street
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Edward L. Nanney, Director
Division of Radiological Health
TN Dept. of Environment and
Conservation
3rd Floor, LNC Annex
401 Church Street
Nashville, TN 37243-1532
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County Executive
Hamilton County Courthouse
Chattanooga, TN 37402-2801

NOTICE OF VIOLATION
AND
PROPOSED IMPOSITION OF CIVIL PENALTY

Tennessee Valley Authority
Watts Bar Nuclear Plant, Unit 1
Sequoyah Nuclear Plant, Units 1 & 2
Browns Ferry Nuclear Plant, Units 1, 2 & 3

Docket Nos. 50-390, 50-327, 50-328, 50-269, 50-260, 50-296
License Nos. NPF-90, DPR-77, DPR-79, DPR-33, DPR-52, DPR-68
EA 99-234

As a result of an NRC Office of Investigations (OI) report issued on August 4, 1999, a violation of NRC requirements was identified. In accordance with the "General Statement of Policy and Procedures for NRC Enforcement Actions,"(Enforcement Policy), NUREG-1600, the Nuclear Regulatory Commission proposes to impose a civil penalty pursuant to Section 234 of the Atomic Energy Act of 1954, as amended (Act), 42 U.S.C. 2282, and 10 CFR 2.205. The particular violation and associated civil penalty is set forth below:

> 10 CFR 50.7 prohibits discrimination by a Commission licensee against an employee for engaging in certain protected activities. Discrimination includes discharge or other actions relating to the compensation, terms, conditions, and privileges of employment. The activities which are protected include, but are not limited to, providing a Commission licensee with information about nuclear safety at an NRC licensed facility or testifying at any Federal proceeding regarding any provision related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.
>
> Contrary to the above, the Tennessee Valley Authority (TVA) discriminated against Mr. Gary L. Fiser, a former corporate employee, for engaging in protected activities. Specifically, in July 1996, TVA eliminated Mr. Fiser's position of Chemistry and Environmental Protection Program Manager, Operations Support, as part of a reorganization, and took subsequent actions to ensure that he was not selected for one of two new positions within Operations Support. TVA took these actions, at least in part, in retaliation for Mr. Fiser's involvement in protected activities. Mr. Fiser's protected activities included the identification of chemistry related nuclear safety concerns in 1991-1993, and the subsequent filing of a Department of Labor (DOL) complaint in September 1993 based, in part, on these chemistry related nuclear safety concerns. (01012)

This is a Severity Level II violation (Supplement VII).
Civil Penalty - $110,000

Pursuant to the provisions of 10 CFR 2.201, the Tennessee Valley Authority (Licensee) is hereby required to submit a written statement or explanation to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, within 30 days of the date of this Notice of Violation and Proposed Imposition of Civil Penalty (Notice). This reply should be clearly marked as a "Reply to a Notice of Violation" and should include for each alleged violation:
(1) admission or denial of the alleged violation; (2) the reasons for the violation if admitted, and if denied, the reasons why; (3) the corrective steps that have been taken and the results achieved;

(4) the corrective steps that will be taken to avoid further violations; and (5) the date when full compliance will be achieved. If an adequate reply is not received within the time specified in this Notice, an order or a Demand for Information may be issued as why the license should not be modified, suspended, or revoked or why such other action as may be proper should not be taken. Consideration may be given to extending the response time for good cause shown.

Within the same time as provided for the response required above under 10 CFR 2.201, the Licensee may pay the civil penalty proposed above, in accordance with NUREG/BR-0254 and by submitting to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, a statement indicating when and by what method payment was made, or may protest imposition of the civil penalty in whole or in part, by a written answer addressed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission. Should the Licensee fail to answer within the time specified, an order imposing the civil penalty will be issued. Should the Licensee elect to file an answer in accordance with 10 CFR 2.205 protesting the civil penalty, in whole or in part, such answer should be clearly marked as an "Answer to a Notice of Violation" and may: (1) deny the violation listed in this Notice, in whole or in part, (2) demonstrate extenuating circumstances, (3) show error in this Notice, or (4) show other reasons why the penalty should not be imposed. In addition to protesting the civil penalty in whole or in part, such answer may request remission or mitigation of the penalty.

In requesting mitigation of the proposed penalty, the factors addressed in Section VI.B.2 of the Enforcement Policy should be addressed. Any written answer in accordance with 10 CFR 2.205 should be set forth separately from the statement or explanation in reply pursuant to 10 CFR 2.201, but may incorporate parts of the 10 CFR 2.201 reply by specific reference (e.g., citing page and paragraph numbers) to avoid repetition. The attention of the Licensee is directed to the other provisions of 10 CFR 2.205, regarding the procedure for imposing a civil penalty.

Upon failure to pay any civil penalty due which subsequently has been determined in accordance with the applicable provisions of 10 CFR 2.205, this matter may be referred to the Attorney General, and the penalty, unless compromised, remitted, or mitigated, may be collected by civil action pursuant to Section 234c of the Act, 42 U.S.C. 2282c.

The response noted above (Reply to Notice of Violation, statement as to payment of civil penalty, and Answer to a Notice of Violation) should be addressed to: Richard W. Borchardt, Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852-2738, with a copy to the Regional Administrator, U.S. Nuclear Regulatory Commission, Region II, 61 Forsyth St, SW, Suite 23T85, Atlanta, GA 30303-3415.

Because your response will be placed in the NRC Public Document Room (PDR), to the extent possible, it should not include any personal privacy, proprietary, or safeguards information so that it can be placed in the PDR without redaction. If personal privacy or proprietary information is necessary to provide an acceptable response, then please provide a bracketed copy of your response that identifies the information that should be protected and a redacted copy of your

response that deletes such information. If you request withholding of such material, you must specifically identify the portions of your response that you seek to have withheld and provide in detail the bases for your claim of withholding (e.g., explain why the disclosure of information will create an unwarranted invasion of personal privacy or provide the information required by 10 CFR 2.790(b) to support a request for withholding confidential commercial or financial information). If safeguards information is necessary to provide an acceptable response, please provide the level of protection described in 10 CFR 73.21.

In accordance with 10 CFR 19.11, you may be required to post this Notice within two working days.

Dated this 7th day of February 2000.

Enclosure 1

UNITED STATES
NUCLEAR REGULATORY COMMISSION
REGION II
ATLANTA FEDERAL CENTER
61 FORSYTH STREET, SW, SUITE 23T85
ATLANTA, GEORGIA 30303-3415

General Counsel
SEP 27 '99

ESC		
JEF		
FMY	V	
Power		
File		

September 20, 1999

EA 99-234

Tennessee Valley Authority
ATTN: Mr. J. A. Scalice
Chief Nuclear Officer and
Executive Vice President
6A Lookout Place
1101 Market Street
Chattanooga, TN 37402-2801

SUBJECT: APPARENT VIOLATION OF EMPLOYEE DISCRIMINATION REQUIREMENTS
(NRC OFFICE OF INVESTIGATIONS REPORT NO. 2-98-013)

014073

Dear Mr. Scalice:

This is in reference to an apparent violation of Nuclear Regulatory Commission (NRC) requirements prohibiting discrimination against employees who engage in protected activities, i.e., 10 CFR 50.7, Employee Protection. The apparent violation involves actions taken by Tennessee Valley Authority (TVA) against a former corporate employee. This apparent violation was discussed with Mr. Carl Singer, Senior Vice President, Nuclear Operations, on September 9, 1999.

The apparent violation is based on an investigation initiated by the NRC's Office of Investigations (OI) on April 29, 1998, and completed on August 4, 1999. The evidence developed during the investigation indicated that discrimination by two corporate level TVA managers was intentional and deliberate and was a factor in the non-selection of the employee for a position in 1996. Furthermore, the OI investigation found that discrimination was substantiated through a showing of disparate treatment of the employee. TVA took these actions, in part, in retaliation for the employee's protected activity, i.e., the filing of a Department of Labor (DOL) complaint in September 1993. A copy of the synopsis to OI Report No. 2-98-013 is included as Enclosure 1 to this letter.

The NRC staff's review of this matter indicates that the action taken against this individual was in apparent violation of 10 CFR 50.7. Therefore, this apparent violation is being considered for escalated enforcement action in accordance with the "General Statement of Policy and Procedures for NRC Enforcement Actions" (Enforcement Policy), NUREG-1600. A summary of the OI report, which forms the basis for the NRC's conclusion that an apparent violation occurred, is included as Enclosure 2. The NRC is not issuing a Notice of Violation at this time; you will be advised by separate correspondence of the results of our deliberations on this matter. Also, please be aware that the characterization of the apparent violation may change as a result of further NRC review.

As discussed with Mr. Singer of your staff, the NRC will conduct a closed predecisional enforcement conference at a time and date to be determined. You will be contacted in the future

to determine a mutually agreeable time and date for the conference. This conference will be closed to public observation in accordance with the Commission's program as discussed in the Enforcement Policy, and will be transcribed. The decision to hold a predecisional enforcement conference does not mean that the NRC has determined that violations have occurred or that enforcement action will be taken. This conference is being held to obtain information to enable the NRC to make an enforcement decision, such as a common understanding of the facts, root causes, missed opportunities to identify the apparent violation sooner, corrective actions, significance of the issues, and the need for lasting and effective corrective action. In addition, this is an opportunity for you to point out any errors in our investigation findings and for you to provide any information concerning your perspectives on 1) the severity of the apparent violation, 2) the application of the factors that the NRC considers when it determines the amount of a civil penalty that may be assessed in accordance with Section VI.B.2 of the Enforcement Policy, and 3) any other application of the Enforcement Policy to this case, including the exercise of discretion in accordance with Section VII.

In accordance with the Enforcement Policy, the employee who was the subject of the alleged discrimination will be provided an opportunity to participate in the predecisional enforcement conference. This participation will be in the form of a complainant statement and comment on the licensee's presentation, followed in turn by an opportunity for the licensee to respond to the complainant's presentation. The purpose of the employee's participation is to provide information to the NRC to assist in its enforcement decision.

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice," a copy of this letter and its enclosures will be placed in the NRC Public Document Room.

Should you have any questions concerning this letter, please contact me at (404) 562-4501.

Sincerely,

Loren R. Plisco, Director
Division of Reactor Projects

Docket Nos. 50-390, 50-327, 50-328,
50-269, 50-260, 50-296
License Nos. NPF-90, DPR-77, DPR-79,
DPR-33, DPR-52, DPR-68

Enclosures: 1. OI Report Synopsis
2. Summary of OI Report

cc: (see page 3)

cc w/ encls:
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SYNOPSIS

On April 29, 1998, the Office of Investigations, U.S. Nuclear Regulatory Commission, Region II, initiated this investigation to determine whether a former Tennessee Valley Authority (TVA) Corporate Chemistry manager was forced to resign from his position in 1996, as a result of engaging in protected activities.

Based upon the evidence developed during this investigation, it was determined that discrimination by two corporate level TVA managers was intentional and deliberate and was a factor in the nonselection of the alleger for a Chemistry position in 1996. Furthermore, discrimination was substantiated through a showing of disparate treatment of the alleger.

SUMMARY OF OFFICE OF INVESTIGATIONS (OI) REPORT 2-98-013

OI Report 2-98-013 involves a former Tennessee Valley Authority (TVA) Corporate Chemistry and Environmental Specialist (employee), who was not selected to fill one of two Chemistry Program Manager positions created during a 1996 reorganization at TVA. The employee allegedly was not selected to fill the position for engaging in protected activity.

The protected activity involved the employee's filing of a discrimination complaint with the Department of Labor (DOL) in September 1993, in which he alleged that TVA discriminated against him for raising safety concerns related to his activities as Chemistry and Environmental Superintendent at the Sequoyah Nuclear Power Plant. In his DOL complaint, the employee named as parties to his discrimination the individuals who served as Committee Member, Nuclear Safety Review Board (NSRB) and Chairman, NSRB in 1993.

The employee settled his 1993 DOL action with TVA prior to completion of a DOL fact finding investigation. As part of his settlement, the employee was appointed to the position of Corporate Program Manager, Technical Support in April 1994. During a July 1994 reorganization, this position was eliminated. However, the employee applied for and was selected to fill the position of Chemistry and Environmental Protection Program Manager, Operations Support at TVA corporate.

In late 1995 and early 1996, the two individuals who served as NSRB Committee Member and Chairman in 1993 and who were named as culpable parties in the employee's 1993 DOL complaint were placed as Radcon Chemistry Manager and Manager, Operations Support, the employee's first and second level management superiors.

Thereafter, in July 1996, the Operations Support group was reorganized. The three Chemistry and Environmental Protection Program Manager positions were eliminated. Two new Chemistry Program Manager positions were created and competitively posted. The employee applied for one of the two positions, but was not selected.

The evidence indicated that the selection process was contrived to preclude the selection of the employee to one of the Chemistry Program Manager positions. Further, the evidence revealed that the individual selected for the position of PWR, Chemistry Program Manager, was preselected for this position, and that this same individual could have been placed in a vacant site chemistry position. Such a placement would have resulted in all employees affected by the reorganization retaining their jobs. The evidence revealed that the request for placement of this individual at the site was rejected by the Manager, Operations Support.

The evidence also indicated that TVA subjected the employee to disparate treatment. In this regard, the evidence reflected that the individual appointed to the position of Radcon Chemistry Manager (a position created in mid-1996) was transferred to this position without competition in contravention of TVA policy, while the employee was required to compete for one of the two Chemistry Program Manager positions that were also created in 1996.

Enclosure 2