March 1, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF PRETRIAL LEGAL BRIEF

Pursuant to the Third Prehearing Conference Order issued by the Atomic Safety and Licensing Board (Board) on January 30, 2002, the Staff of the Nuclear Regulatory Commission (NRC) hereby files this pretrial legal brief addressing the legal issues raised in this proceeding. In that Order, the Board specifically requested the parties to address four legal issues: the definition of protected activity under 10 C.F.R. § 50.7; the standard of proof in dual motive cases; the relevance of remedy case law; and temporal proximity. The Staff addresses each of these issues within the framework of discussing the appropriate standards to be applied in this proceeding.

This proceeding involves a violation of 10 C.F.R. § 50.7 by the Tennessee Valley Authority (TVA) for taking an adverse action against an employee based upon his prior protected activities. The Commission has never adjudicated a section 50.7 case. Therefore, this is a case of first impression in which the Board must determine the proper standards to apply. Since section 50.7 provides no specific standard for what must be proven to establish a violation, the Staff sets forth below a history of the NRC's regulatory involvement in whistleblower protection, and then its position on the appropriate standards to apply in this case. The Staff asserts that the appropriate standard to apply in a case involving a violation of 10 C.F.R. § 50.7 is whether the Staff has proven

by a preponderance of the evidence that the complainant's protected activity was a contributing factor in an unfavorable personnel action.

I. LEGAL BASIS FOR NRC'S PROHIBITION OF DISCRIMINATION AGAINST WHISTLEBLOWERS UNDER 10 C.F.R. § 50.7.

Although no specific provisions of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011 *et. seq.* (AEA), deal with employee protection, subsections 161(c) and 161(o) of the AEA give the Commission broad authority to establish standards as necessary to protect the public health and safety. In 1973, the Atomic Energy Commission promulgated 10 C.F.R. § 19.16(c) under the authority of section 161 of the AEA. This rule provided that:

> (c) No licensee shall discharge or in any manner discriminate against any worker because such worker has filed any complaint or instituted or caused to be instituted any proceeding under the regulations in this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such worker on behalf of himself or others of any option afforded by this part.[1]

However, this provision was limited to complaints dealing with radiological working conditions. 10 C.F.R. § 19.16(a).

In 1977, the NRC Staff became aware of an allegation by a construction worker that he had been fired for bringing a safety issue to the attention of an NRC inspector. The worker was employed by Daniel Construction Company on the Callaway project. Notwithstanding the lack of any regulation covering discrimination against construction workers, the Staff took the position that it had the authority under sections 161(c) and 161(o) of the AEA to investigate the allegation and take appropriate enforcement action if warranted.[2] Union Electric refused to allow the investigation, asserting that the reason for the termination involved a labor dispute not within the purview of the NRC.

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[1] Section 19.16(c) was subsequently replaced by 10 C.F.R. § 19.20.

[2] A construction permit holder was not subject to the regulations in 10 C.F.R. Part 19, and therefore section 19.16(c) was not applicable.

The Staff then issued an order to show cause why the construction of Callaway should not be suspended until such time as the investigation was permitted. Following a hearing on the order held at the licensee's request, the Atomic Safety Licensing Board determined that the AEA provided the NRC with the authority to take action where a licensee, including a contractor of a licensee, discriminated against a worker for raising a safety issue. *Union Electric Company* (Callaway Plant, Units 1 and 2), LBP-78-31, 8 NRC 366 (1978).

The licensee appealed the decision to the Atomic Safety and Licensing Appeal Board. However, prior to the Appeal Board decision, Congress enacted section 210 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851,[3] on November 6, 1978 to fill a gap in the regulatory structure pertaining to whistleblowers. While the AEA provided the Commission with authority to take action against a licensee, it did not address any personal remedy for an employee who had been subjected to discrimination. Section 210 addressed this gap by providing an individual remedy to victims of discrimination through a process administered by the Department of Labor (DOL). During debate on the conference report for section 210, Senator Hart, a principal sponsor of the provision, stated that:

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[3] The pertinent portions of Section 210 as enacted were:

(a) No employer, including a Commission licensee, an applicant for a Commission license, or a contractor, or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges or employment because the employee (or any person acting pursuant to a request of the employee) --

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this Act or the Atomic Energy Act of 1954, as amended;

(2) testified or is about to testify in any such proceeding; or

(3) assisted or participated in or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended.

> [W]hile new Section 210 of the Energy Reorganization Act of 1978 provides the Department of Labor with new authority to investigate an alleged act of discrimination in this context and to afford a remedy should the allegation prove true, it is not intended to in any way abridge the Commission's *current authority* to investigate an alleged discrimination and take appropriate action against a licensee-employer, such as a civil penalty, license suspension or license revocation. Further, the pendency of a proceeding before the Department of Labor pursuant to new Section 210 need not delay any action by the Commission to carry out the purposes of the Atomic Energy Act of 1954.

124 Cong. Rec. S15,318 (daily ed. September 18, 1978) (emphasis added).

In its decision in *Callaway*, the Appeal Board upheld the Staff's position that the Commission had the authority to take enforcement action against a licensee, but declined to decide whether the Commission had the authority to grant an individual remedy to the wronged employee. *Union Electric Company* (Callaway Plant, Units 1 and 2), ALAB-527, 9 NRC 126, 138, 144 (1979). The Appeal Board noted that the remarks of Senator Hart "effectively undercut the idea that Congress passed Section 210 either because it thought the Commission lacked such power or because it wanted to strip away that authority." *Id.* at 144.

While it was clear after the *Callaway* decision and the enactment of Section 210 that the Commission had authority to act in the discrimination arena, there were still no specific regulations prohibiting discrimination, other than 10 C.F.R. § 19.16. Consequently, the Commission promulgated employee protection regulations in Parts 30, 40, 50, 60, 70, and 72 of the regulations to broadly prohibit discrimination against individuals who have engaged in specified protected activities.[4] The regulations were promulgated under the authority of both the section 161 of the

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[4] The text of the rules in each Part was identical. For example, section 50.7 provided in pertinent part:

(a) Discrimination by a Commission licensee, permittee, an applicant for a Commission license or permit, or a contractor or subcontractor of a Commission licensee, permittee, or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, and privileges of employment. The protected activities are established in section 210 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or

(continued...)

AEA and section 210 of the ERA. 47 Fed. Reg. 30452 (July 14, 1982). The Staff believed that the rules were necessary in order to make violations subject to the civil penalty provisions of section 234 of the AEA.

Subsequently, the Commission became aware of the potential for settlement agreements in discrimination cases at the DOL to impose restrictions on the freedom of employees or former employees to raise issues, participate in proceedings, or otherwise provide information to the Commission on issues of potential regulatory concern. Therefore, in 1990, the Commission amended its rules to add a new section in each Part which prohibited such agreements, as well as any agreements which would restrict the exercise of protected activities. 55 Fed. Reg. 10405 (Mar. 21, 1990). The language in each part was identical. For example, 10 C.F.R. § 50.7(f) provides:

> (f) No agreement affecting the compensation, terms, conditions and privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 210 of the Energy Reorganization Act of 1974, may contain any provision which would prohibit, restrict, or otherwise discourage, an employee from participating in protected activity as defined in paragraph (a)(1) of this section, including, but not limited to, providing information to the NRC on potential violations or other matters within NRC's regulatory responsibilities.

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[4](...continued)
enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

(1) The protected activities include but are not limited to --

(i) Providing the Commission information about possible violations of requirements imposed under either of the above statutes;

(ii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements; or

(iii) Testifying in any Commission proceeding.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation . . .

In 1992, Congress replaced Section 210 of the ERA with Section 211. P.L. 102-486 (106 Stat 3123) (Oct. 24, 1992). The new section added three additional areas of protected activity. The new provisions prohibit discrimination against an employee who:

> (A) notified his employer of an alleged violation of this Act or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);
> (B) refused to engage in any practice made unlawful by this Act or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;
> (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this Act or the Atomic Energy Act of 1954. . . .

In addition, section 211 set forth the burden which an employee must meet to establish a violation of the section, and a separate standard for the showing necessary by an employer to avoid the ordering of a remedy for the violation. Specifically, subsections 211(b)(3)(C) and (D) provide, respectively, that a violation is established if the employee demonstrates that protected activity was a contributing factor in an unfavorable personnel action, and that no relief shall be granted to the employee if the employer demonstrates by clear and convincing evidence that it would have taken the same action without regard to the protected activity.[5] 42 U.S.C. §§ 5851(b)(3)(C) and (D). Following the promulgation of Section 211, the Commission amended its employee protection regulations to add the new protected activities. 58 Fed. Reg. 52406 (Oct. 8, 1993).

II. STANDARD OF PROOF IN A 10 C.F.R. § 50.7 VIOLATION CASE

Section 50.7 does not set forth a particular standard of proof for determining whether a violation has occurred. The Staff believes that the Board should adopt the standard of proof under section 211 of the ERA and Title VII, as amended by the Civil Rights Act of 1991. Under these statutes, the appropriate standard of proof to apply in a 10 C.F.R. § 50.7 violation case is proof by

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[5] The significance of this distinction is addressed in section II of this brief.

a preponderance of the evidence that the complainant's protected activity was a contributing factor in the adverse action against the complainant.[6]

The NRC promulgated 10 C.F.R. § 50.7 pursuant to its authority under the AEA. Therefore, neither the Commission nor the Board is bound by DOL's interpretation of section 211 of the ERA when construing section 50.7. Rather, DOL decisions construing section 211 can be instructive when analyzing a violation of 10 C.F.R. § 50.7. DOL decisions regarding what constitutes protected activity under section 211 are especially useful given that section 50.7 specifically references the protected activities identified in section 211. Section 211 is one of seven whistleblower protection statutes administered by the Secretary of Labor prohibiting employment discrimination against individuals who engage in certain protected activities.[7] The operative language of each of the seven employee protection provisions is similar to that set forth in section 211 of the ERA:

> (a)(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee [engaged in protected activity].

42 U.S.C. § 5851. This language is almost identical to that found in section 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, which states that:

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[6] The Staff notes that the preponderance of the evidence standard has already been adopted by the Commission in an enforcement proceeding. In *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285 (1994), the Commission stated that NRC administrative proceedings have generally relied upon the preponderance of the evidence standard in reaching the ultimate merits of an enforcement proceeding. Similarly, the Commission concluded that it had never adopted a clear and convincing evidence standard in an enforcement proceeding, nor does the AEA or the Administrative Procedure Act require it to adopt such a standard. 39 NRC at 302, n.22.

[7] *See* Safe Drinking Water Act, 42 U.S.C. § 300j-9(i); Federal Water Pollution Control Act, 22 U.S.C. § 1367; Toxic Substances Control Act, 15 U.S.C. § 2622; Solid Waste Disposal Act, 42 U.S.C. § 6971; Clean Air Act, 42 U.S.C. § 7622; Energy Reorganization Act of 1974, 42 U.S.C. § 5851; and Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9610. *See also* Federal Aviation Administration Authorization Act of 1994, as amended, 49 U.S.C. § 42121.

> (a) It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2.

The language of section 211 also tracks the language of Title VII with regard to the standard for demonstrating a violation. Congress enacted the Civil Rights Act of 1991, amending Title VII to provide that:

> an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m) (emphasis added). One year after adopting this language in Title VII, Congress enacted the Energy Policy Act of 1992. This act amended then section 210, renumbering it as section 211 and adding the standard for determining whether a violation of the section has occurred:

> The Secretary may determine that a violation of subsection (a) has occurred only if the complainant had demonstrated that any [protected activity] described in subparagraphs (A) through (F) of subsection (a)(1) was *a contributing factor* in the unfavorable personnel action alleged in the complaint.

42 U.S.C. § 5851(b)(3)(C) (emphasis added).

Therefore, the Staff believes that the Board should follow the mandate of these statutes and conclude that the appropriate standard of proof applicable to a 10 C.F.R. § 50.7 case is whether the Staff can prove by a preponderance of the evidence that the complainant's protected activity was a contributing factor in an adverse action.[8]

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[8] The Staff notes that specific intent is not a required element in a 10 C.F.R. § 50.7 case. Section 50.7 only requires that the complainant's protected activity be a contributing factor in the adverse action. Ignorance is not a defense to a section 50.7 violation. For example, if a supervisor took an adverse action against an employee because he had raised a safety concern to the NRC, (continued...)

III. METHODS OF PROOF OF DISCRIMINATION

Because the operative language of the whistleblower protection statutes is similar to the language of Title VII, DOL has generally adopted the case law developed by the Supreme Court under Title VII and other anti-discrimination statutes. The Staff believes that the Board should likewise look to Supreme Court and other relevant case law under Title VII and other anti-discrimination statutes when analyzing a violation of 10 C.F.R. § 50.7. The Supreme Court and DOL have both recognized two methods of proving discrimination in employment discrimination and whistleblower retaliation cases -- proof by direct evidence and proof by circumstantial evidence. The Staff addresses the requirements of each method of proof below.

A. Proof of Discrimination by Circumstantial Evidence

Because a complainant often lacks direct evidence of discrimination, the Supreme Court has adopted a burden shifting method of proving discrimination based on circumstantial evidence. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In order to ensure that a complainant has the opportunity to prove his discrimination claim, despite the absence of direct evidence, the Supreme Court adopted a burden shifting analysis that governs discrimination claims based upon circumstantial evidence. The Court first set forth the appropriate elements and the allocation of the burdens of proof for Title VII discrimination cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The Court further clarified the elements and burdens in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Under the *McDonnell Douglas/Burdine* construct, as applied by DOL to whistleblower discrimination cases, the complainant must initially establish a prima facie case of discrimination by showing: 1) that the complainant engaged in protected activity; 2) that the

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[8](...continued)
the fact that the supervisor lacked knowledge that this constitutes a violation of section 50.7 is not a defense to a violation of that section.

employer took an adverse action against the complainant; 3) that the decision makers had knowledge of the complainant's protected activity; and 4) that there is a nexus between the complainant's protected activity and the adverse action. *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 933-34 (11th Cir. 1995); *Dartey v. Zack Company of Chicago* , 82-ERA-2, 1983 DOL Sec. Labor LEXIS 17 (Apr. 25, 1983).[9] *See also Larry v. Detroit Edison Co.*, 86-ERA-32 (Sec'y June 28, 1991) and *Overall v. Tennessee Valley Authority*, 97-ERA-50, 97-ERA-53, 2001 DOL Ad. Rev. Bd. LEXIS 31 (ARB Apr. 30, 2001).

Once a prima facie case of discrimination has been established, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse action. This is a burden of production, not of persuasion. *Burdine*, 450 U.S. at 254-55. The employer's burden is satisfied if it explains what it did or produces evidence of a legitimate, nondiscriminatory reason for its action. *Id.* at 256. In the context of a section 50.7 case, once the employer meets this burden, the Staff must establish that the reason proffered by the employer is a pretext for discrimination. The Staff may satisfy this burden by producing evidence that a discriminatory reason motivated the employer to take the adverse action or by demonstrating that the proffered reason was false. *Id.*, and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000).

B. Proof of Discrimination by Direct Evidence

In *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985), the Supreme Court considered whether the shifting burdens of proof set forth in *McDonnell Douglas* and *Burdine* applied to cases in which the plaintiff had direct evidence of discrimination. The district court granted summary judgment to the employer on the plaintiffs' Age Discrimination in Employment Act (ADEA) claims because the plaintiffs had failed to establish a prima facie case of discrimination

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[9] In citing to cases from the Department of Labor, the Staff has used a Lexis citation where available. Cases that lack a Lexis cite can be located by case name and ERA case number on the following web site: www.oalj.dol.gov.

under *McDonnell Douglas*. The Second Circuit reversed on the ground that *McDonnell Douglas* does not apply to cases in which the plaintiffs have direct evidence of discrimination. The Supreme Court affirmed the Second Circuit, finding that the plaintiffs had introduced direct evidence that the policy in question discriminated on the basis of age. The Court noted that "the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination." 469 U.S. at 121. DOL has also noted that a complainant is not required to establish a prima facie case of discrimination when he introduces direct evidence of discrimination. *See, e.g., Blake v. Hatfield Electric Co.*, 87-ERA-4, 1992 DOL Sec. Labor LEXIS 144 (Jan. 22, 1992).

Direct evidence of discrimination can include statements by the employer that it took the complainant's protected activity into account when making a decision or that the employer made negative statements about the complainant's protected activity. *See Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1568 (2d Cir. 1989). *See also Talbert v. Washington Public Power Supply System*, 93-ERA-35, 1996 DOL Ad. Rev. Bd. LEXIS 58 (ARB Sept. 27, 1996). In *McCafferty v. Centurion Energy*, 96-ERA-6, 1997 DOL Ad. Rev. Bd. LEXIS 55 (ARB Sept. 24, 1997), the DOL Administrative Review Board (ARB) concluded that the complainants introduced direct evidence of discrimination by their employer by establishing that their access was revoked and they were subsequently laid off after a Centurion official learned that they had filed a civil action. The ARB also noted that a statement by the Centurion official that the complainants should not be placed at any Centurion facility because they were involved in litigation with Centurion constituted direct evidence of discrimination.

Once a complainant establishes through direct evidence that his protected activity was a motivating or contributing factor in an adverse employment decision, he has met his burden of proof and established a violation of the relevant anti-discrimination statute.

IV. ELEMENTS OF A PRIMA FACIE CASE OF DISCRIMINATION

As noted above, under the *McDonnell Douglas/Burdine* construct, the complainant must establish a prima facie case of discrimination by showing: 1) that he engaged in protected activity; 2) that his employer took an adverse action against him; 3) that the relevant decision makers had knowledge of his protected activity; and 4) that there is a causal nexus between the protected activity and the adverse action. *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 933-34 (11th Cir. 1995); *Larry v. Detroit Edison Co.*, 86-ERA-32 (Sec'y June 28, 1991). Two of the questions the Board requested the parties to brief fall within the ambit of the prima facie case of discrimination -- what constitutes protected activity under 10 C.F.R. § 50.7, and what is the relevance of temporal proximity to causation. The Staff addresses each of these issues, as well as other issues related to the prima facie case of discrimination, below.

A. Activities Protected under 10 C.F.R. § 50.7

NRC regulations prohibit a Commission licensee from discriminating against an employee for engaging in certain protected activities. 10 C.F.R. § 50.7. The regulation enumerates five specific areas of protected activity:

> (i) Providing the Commission or his or her employer information about alleged violations of [the AEA or ERA] or possible violations of requirements imposed under either of those statutes;
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> (ii) Refusing to engage in any practice made unlawful under [the AEA or ERA] or under these requirements if the employee has identified the alleged illegality to the employer;
>
> (iii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements;
>
> (iv) Testifying in any Commission proceeding, or before Congress, or at any Federal or State proceeding regarding any provision (or proposed provision) of [the AEA or ERA];
>
> (v) Assisting or participating in, or is about to assist or participate in, these activities.

10 C.F.R. § 50.7(a)(1). The regulation specifies that the protected activities include, but are not limited to, the above areas and specifically refers to the protected activities identified in section 211. 10 C.F.R. 50.7(a)(1). Additionally, these activities are protected even if a formal proceeding is not initiated as a result of the employee's assistance or participation. 10 C.F.R. § 50.7(a)(2).

With respect to activities at issue in this case, filing a section 211 complaint with DOL constitutes protected activity. *See Zinn v. University of Missouri*, 93-ERA-34, 93-ERA-36, 1996 DOL Sec. Labor LEXIS 8 at 17 (Sec'y Jan. 8, 1996) ("Zinn's filing of his complaint under the ERA in April 1993 constitutes protected activity.")

Informing an employer of a safety concern through use of the employer's internal corrective action system also constitutes protected activity under 10 C.F.R. § 50.7. In *Overall v. Tennessee Valley Authority*, 97-ERA-53, 2001 DOL Ad. Rev. Bd. LEXIS 31 (ARB Apr. 30, 2001), the DOL Administrative Review Board (ARB) held that a TVA employee engaged in protected activity when he filed a Problem Evaluation Report (PER), an internal report of a safety problem used as a tracking document, and attempted to take actions in furtherance of the PER. In another case involving a TVA employee, the DOL Administrative Law Judge concluded that the filing of a Significant Corrective Action Report (SCAR) constitutes activity protected by section 211. *Jocher v. Tennessee Valley Authority*, 94-ERA-24 (ALJ May 31, 1996) (ARB June 24, 1996). The ARB has also concluded that the filing of a Radiological Deficiency Report constitutes an internal complaint which is protected by the ERA. *Paynes v. Gulf States Utilities Co.*, 93-ERA-47, 1999 DOL Ad. Rev. Bd. LEXIS 94 (ARB Aug. 31, 1999).

Informing the NRC, either formally or informally, of safety concerns constitutes protected activity under 10 C.F.R. § 50.7. In *Klock v. Tennessee Valley Authority*, 95-ERA-20 (ALJ Sept. 29, 1995) (ARB May 30, 1996), the ALJ concluded that Klock engaged in five acts of protected activity involving an informal discussion with or in the presence of an NRC inspector regarding a safety concern prior to a local leak rate test.

Finally, refusal to engage in activity which would violate the AEA or ERA constitutes protected activity. In *Harrison v. Stone and Webster Engineering Group*, 93 ERA-44, 1995 DOL Sec. Labor LEXIS 125 (Sec'y Aug. 22, 1995), the Secretary of Labor held that the complainant's communications with a work crew, which resulted in the crew's refusal to work without proper fire protection, was protected activity. The Secretary stated that, "[d]iscrimination against [the complainant] because of his role in the crews' work refusal is prohibited. The ERA accords employees the right to refuse 'to engage in any practice made unlawful by [the Act]." *Id.* (citations omitted).

B. Adverse Actions

Adverse action is a shorthand term used to refer to the statutory and regulatory prohibitions against any unfavorable changes in the terms, privileges, or conditions of employment. The term encompasses a broad array of unfavorable personnel actions. Section 50.7 states that an adverse action includes "discharge and other actions that relate to compensation, terms, conditions, or privileges of employment." 10 C.F.R. § 50.7(a). Section 211 of the ERA contains nearly identical language. Title VII explains what an unlawful employment action is in more detail:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(a).

With respect to this case, the involuntary transfer of a TVA employee into the TVA Services Organization or the Employee Transition Program constitutes an adverse action. In *Overall v. Tennessee Valley Authority*, 97-ERA-53, 2001 DOL Ad. Rev. Bd. LEXIS 31 (ARB Apr. 30, 2001), the ARB concluded that the transfer of Overall into the Technical Services Organization as an

at-risk employee constituted an adverse action. Providing an employee with a Reduction in Force (RIF) notice and failing to select him for a new position also constitute adverse actions. See *Riden v. Tennessee Valley Authority*, 89-ERA-49, 1990 DOL Sec. Labor LEXIS 80 (Sec'y Feb. 9, 1990).

C. Knowledge by the Relevant Decision Makers

In establishing that an adverse action was based upon the complainant's protected activity, it must be demonstrated that his employer had knowledge of the protected activity. However, the complainant is not required to prove actual knowledge of the protected activity; constructive knowledge of the protected activity is sufficient to support the complainant's prima facie case. *Simon v. Simmons Foods*, 49 F.3d 386, 389 (8th Cir. 1995). *See also Buettner v. Eastern Arch Coal Sales Co.*, 216 F.3d 707, 715 (8th Cir. 2000), *cert. denied*, 531 U.S. 1077 (2001).

D. Causal Nexus between Complainant's Protected Activity and the Adverse Action

As noted in section IIIB above, a complainant can establish a causal nexus between his protected activity and an adverse action by introducing direct evidence of discrimination. Causal nexus between the complainant's protected activity and the adverse action also can be demonstrated through the use of circumstantial evidence. Disparate treatment of the complainant as compared to a similarly situated employee demonstrates a discriminatory intent. Additionally, temporal proximity between the complainant's protected activity and the adverse action gives rise to an inference of discrimination.

1. Proof of Disparate Treatment

The Supreme Court has recognized that disparate treatment of a complainant may result when an employer commits employment decisions to the subjective discretion of its supervisors. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 988 (1988). The Court has used the disparate treatment theory of discrimination in reviewing employment decisions based upon the application of "inherently subjective criteria." *Id., citing Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978).

The disparate treatment theory of discrimination requires the complainant to show that the defendant employer treated a similarly situated employee differently. In making a prima facie case of discrimination based upon disparate treatment, the complainant must share sufficient employment characteristics with the comparator employee such that they can be considered similarly situated. *McGuinness v. Lincoln Hall*, 263 F.3d 49, 53 (2d Cir. 2001). In *McGuinness*, the court concluded that the plaintiff, who had been terminated from her position and offered two weeks' severance pay, was similarly situated to a co-worker who had also been terminated from his position but offered 12 weeks' severance pay. An employee need not be similarly situated in all respects, but "must be similarly situated in all material respects." *Shumway v. United Parcel Service, Inc.*, 118 F.3d 60, 64 (2d Cir. 1997) (emphasis in original).

The law does not require that a similarly situated individual be in an identical situation to the complainant. *Anderson v. WBMG-42*, 253 F.3d 561, 565 (11th Cir. 2001), *citing Olmstead v. L.C. by Zimring*, 527 U.S. 581 (1999) (Kennedy, J., concurring). The court concluded that when no objective criteria was applied in the employer's decision making process, "similarly situated evidence is particularly relevant because inferences of discriminatory motive depend upon the application of subjective criteria." 253 F.3d at 564. The court also rejected the argument as a matter of law that whenever two different supervisors are involved in the decision-making process, similarly situated evidence could not be demonstrated. *Id.* at 566.

In *Stalter v. Wal-Mart Stores, Inc.*, 195 F.3d 285 (7th Cir. 1999), the court concluded that the plaintiff had raised a genuine issue of material fact regarding his race discrimination claim. The court based its decision in part on similarly situated evidence. The plaintiff had taken food from an open bag in the employees' break room and had been terminated for theft, despite the fact that Wal-Mart's policy did not require termination for theft. However, a Caucasian employee who lied to her supervisor about work absences was counseled and allowed to keep her job, despite a Wal-Mart policy that mandated termination for dishonesty. *Id.* at 291. Although the plaintiff and

the Caucasian employee committed different offenses, the court found that "the leniency exhibited to the Caucasian worker was evidence that race played a role in Stalter's termination." *Id.*

In sum, when considering evidence of disparate treatment, the complainant and the comparator employee do not have to be in identical situations. It is sufficient that they are similarly situated in all material respects. For example, when considering two employees who are subject to a reorganization, it would be sufficient if both employees' positions were eliminated, the same decision makers were involved in determining whether they would be required to compete for a new position, and the same selection policies applied to both employees.

2. Temporal Proximity

Temporal proximity between protected activity and an adverse action may permit an inference that the protected activity was the likely reason for the adverse action. *Kachmar v. Sungard Data Systems, Inc.*, 109 F. 3d 173, 177 (3d Cir. 1997) (*citing Zanders v. National R.R. Passenger Corp.*, 898 F.2d 1127, 1135 (6th Cir. 1990)). The Supreme Court briefly addressed this issue in *Clark County School District v. Breeden*, 523 U.S. 268 (2001). In that case, the Court stated:

> [t]he cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be "very close."

Id. at 273 (citations omitted). The Court noted that an adverse action taken 20 months after the employer became aware of the protected activity, by itself, did not suggest causation between the protected activity and the adverse action. *Id.* at 274. The Court did not state that a 20 month period was, as a matter of law, always insufficient to establish causation, nor did it conclude that an absence of temporal proximity automatically precludes a finding of causation. Instead, the Court simply concluded that a 20 month period, without other evidence of causation, was not sufficient in that case to establish causation.

Although temporal proximity between the complainant's protected activity and the adverse action may provide an inference of causation, "the passage of time is not legally conclusive proof against retaliation." *Robinson v. SEPTA*, 982 F.2d 892, 894 (3d Cir. 1993). The *Kachmar* court succinctly addressed this issue:

> It is important to emphasize that it is causation, not temporal proximity itself, that is an element of plaintiff's prima facie case, and temporal proximity merely provides an evidentiary basis from which an inference can be drawn. The element of causation, which necessarily involves an inquiry into the motives of an employer, is highly content-specific. When there may be valid reasons why the adverse employment action was not taken immediately, the absence of immediacy between the cause and effect does not disprove causation.

Kachmar, 109 F. 3d at 178.

An important factor in considering the temporal proximity between the complainant's protected activity and the adverse action is whether there is a valid reason why the retaliatory action could not have been taken sooner. *Id.* In *Marx v. Schnuck Markets, Inc.*, 76 F.3d 324, 329 (10th Cir.), *cert. denied*, 116 S.Ct. 2552 (1996), the court held that an inference of retaliatory motive may be justified when the adverse action closely follows the complainant's protected activity. However, the court also noted that "the phrase 'closely followed' must not be read too restrictively where the pattern of retaliatory conduct begins soon after the filing of the [claims] and only culminates later in actual discharge." *Id.* In *Bowers v. Bethany Medical Center*, 959 F.Supp. 1385, 1392 (D.Kan. 1997), the court cited *Marx* in finding a causal nexus between a complainant's action and her discharge where one and a half to two years had passed between the protected activity and the discharge. The court noted that the complainant had been absent from work during the relevant time period, and had been discharged within three weeks of her return. *Id.*

The Tenth Circuit reiterated this rationale in an unpublished decision. *Richmond v. Oklahoma University Board of Regents*, 1998 U.S. App. LEXIS 26600 (10th Cir. Oct. 20, 1998) (unpublished) (copy attached). In that case, the complainant argued that her employer did not have the opportunity to retaliate against her until she had been reinstated to employment. In

accepting the complainant's argument, the court cited to the *Kachmar* proposition that there may be valid reasons why the adverse action was not taken immediately. *Id.* at 8.

V. LEGITIMATE NONDISCRIMINATORY BASIS FOR THE ADVERSE ACTION

After the Staff establishes a prima facie case of discrimination, the burden shifts to the employer to produce a legitimate, nondiscriminatory reason for taking the adverse action. This is a burden of production, not of persuasion. *Burdine*, 450 U.S. at 254. The defendant employer meets this burden if the evidence raises a genuine issue of fact as to whether it discriminated against the complainant. The employer must set forth the reasons for the adverse action through the introduction of admissible evidence. *Id.* at 254-55. An articulation of a legitimate reason for the adverse action that has not been admitted into evidence is not sufficient to meet this burden. Therefore, assertions or arguments by counsel in pleadings are not sufficient to meet the employer's burden. *Id.* at 255.

VI. PRETEXT

If TVA produces a legitimate, nondiscriminatory reason for the adverse action, the burden shifts back to the Staff to demonstrate that the proffered legitimate reason for the action is a pretext for discrimination. Pretext can be demonstrated in a number of ways. Pretext can be shown by demonstrating that the employer's explanation for the adverse action is false and therefore discrimination is likely the real reason for the action. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). For example, evidence that an individual other than the complainant was preselected for the position for which the complainant was not selected provides evidence of pretext. *Goostree v. State of Tennessee*, 796 F.2d 854, 861 (6th Cir. 1986). Additionally, pretext can be demonstrated by showing that the employer failed to follow proper procedures in taking the adverse action. *Floyd v. Missouri Dept. of Social Services*, 188 F.3d 932, 937 (8th Cir. 1999).

In *St. Mary's Honor Center*, the Supreme Court held that rejection of the employer's explanation for the adverse action, combined with the evidence set forth in the prima facie case, may be sufficient to show intentional discrimination. 509 U.S. at 511. The Court strengthened this conclusion in *Reeves*. In that case, the Court stated "the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the fact-finder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'" 530 U.S. at 147 (citations omitted). DOL adopted this rationale in *Overall v. Tennessee Valley Authority*, in which the ARB concluded that the complainant refuted each "legitimate" reason posited by TVA for its actions, and therefore found that these reasons were a pretext for discrimination against Overall. 97-ERA-53, 2001 DOL Ad. Rev. Bd. LEXIS 31 (ARB Apr. 30, 2001).

Under *St. Mary's Honor Center* and *Reeves*, the fact-finder is permitted to infer discrimination based on the evidence set forth in the prima facie case and evidence that the employer's proffered legitimate reason for the adverse action is false. *St. Mary's Honor Center* and *Reeves* also raised the issue that, even if the complainant established that his employer's proffered reasons for the adverse action were false, there could be other nondiscriminatory reasons for the action which the defendant did not proffer. This concern is not applicable in a NRC enforcement proceeding. NRC regulations require all licensees to submit complete and accurate information to the Commission. *See* 10 C.F.R. § 50.9.[10] Pursuant to this regulation, a licensee is required to proffer all legitimate reasons for taking the adverse action, and may not provide incomplete or

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[10] A Severity Level IV violation was recently issued to the United States Enrichment Corporation (USEC) for its failure to provide complete and accurate information pursuant to 10 C.F.R. § 76.9 in a letter supplementing its presentation at a predecisional enforcement conference. The language of section 76.9 is identical in all material respects to that language of section 50.9(a). The Staff further warned USEC that future incidents of providing incomplete or inaccurate information may result in escalated enforcement action. *Response to January 3, 2001, Notice of Violation; Notice of Violation; and Alleged Discrimination*, EA-99-256, EA-00-047, EA-00-048, January 17, 2002.

inaccurate information about its reasons. Therefore, if the Staff demonstrates that all of the alleged legitimate reasons are not credible, then the only conclusion left to be drawn is that discrimination was the real reason for the action.

Evidence that another candidate for a position was preselected to the detriment of the complainant may also prove that the employee's legitimate reason for the complainant's nonselection is a pretext for discrimination. *Goostree v. State of Tennessee*, 796 F.2d 854, 861 (6th Cir. 1986). In *Goostree*, the Sixth Circuit held that "[e]vidence of preselection operates to discredit the employer's proffered explanation for its employment decision." *Id.* (citations omitted). *See also Coble v. Hot Springs School District*, 682 F.2d 721, 728 (8th Cir. 1982).

Additionally, a defendant employer's failure to follow its own selection procedures may also constitute evidence of a discriminatory animus. *Floyd v. Missouri Dept. of Social Services*, 188 F.3d 932, 937 (8th Cir. 1999). *See also Landry v. St. James Parish School Board*, 2000 U.S. Dist. LEXIS 14141, at 25 (E.D.La. Sept. 20, 2000), *aff'd* 260 F.3d 621 (5th Cir. 2001). To create an inference of pretext based on an employer's failure to follows its selection procedures, the complainant must establish that the failure to follow procedures affected him differently from other employees involved in the selection. *Floyd*, 188 F.3d at 937.

VII. STANDARD OF PROOF IN A DUAL MOTIVE CASE

The phrase "dual motive" refers to a discrimination case in which both lawful and unlawful motives played a factor in an adverse action against the complaining employee. The Staff asserts that the standard of proof for a dual motive case under 10 C.F.R. § 50.7 is the same standard of proof in a case that does not involve dual motives -- namely that the complainant's protected activity was a contributing factor in an adverse employment action. Whether the employer would have taken the adverse action for legitimate reasons alone is not relevant in this section 50.7 case

for two reasons. First, and most importantly, a dual motive analysis is irrelevant to an NRC enforcement action because taking an adverse action based at least in part on protected activity is sufficient to sustain a violation of 10 C.F.R. § 50.7. Second, TVA has represented that this case is not a dual motive case; TVA asserts that the adverse action was taken solely for legitimate business reasons. Prehearing Conference Transcript, January 9, 2002, p. 128; TVA Reply to Notice of Violation, January 22, 2001, p. E1-5. However, TVA stated during the prehearing conference that it would make an argument based on dual motives if the Licensing Board concluded that the evidence demonstrated dual motives. *Id.* at 128.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court held that when gender plays a motivating part in an employment decision, the employer defendant can avoid a finding of liability under Title VII by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account. Congress specifically overturned *Price Waterhouse* by enacting the Civil Rights Act of 1991 (Pub.L. 102-166), which amended Title VII to provide that it is a violation of the statute if discrimination was a motivating factor in the adverse action even if lawful motives were also used in reaching the decision. Under the amended language of section 703, "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). The legitimate motives for the adverse action become relevant only at the remedy phase of a Title VII dual motive case. Once the complainant establishes a violation under section 703, if the defendant employer demonstrates that it would have taken the same action in the absence of the unlawful motive, then the court is limited to awarding declaratory and/or injunctive relief and attorney's fees, but may not award damages,

reinstatement, hiring, promotion, or payment to the employee. 42 U.S.C. § 2000e-5(2)(B).

The following year, Congress enacted section 2902 of the Energy Policy Act, which amended and renumbered section 210 as section 211. These amendments changed the burdens involved in dual motive cases in a manner similar to the changes Congress had made to Title VII. 42 U.S.C. § 5851(b)(3)(C). The statutory language of section 211 clearly delineates the difference between a violation of the section and the remedies available. A violation of the section occurs "if the complainant has demonstrated that [protected activity] was a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C. § 5851(b)(3(C). However, "[r]elief may not be ordered [to the employee]. . . if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of" the complainant's protected activity. 42 U.S.C. § 5851(b)(3)(D).

The Department of Labor acknowledged the distinction between a violation of section 211 and the ability to award relief to an employee based on that violation in *Overall v. Tennessee Valley Authority*, 97-ERA-53, 2001 DOL Ad. Rev. Bd. LEXIS 31 (ARB Apr. 30, 2001). The ARB concluded that a violation of section 211 occurs if the complainant's protected activity was a contributing factor in the adverse action. However, the ARB noted that, once a violation is found, "[r]elief nevertheless may not be ordered 'if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable employment action in the absence of [protected] behavior." *Id.* at 30 (citations omitted). This distinction was also noted in *Yule v. Burns International Security Service*, 93-ERA-12, 1995 DOL Sec. Labor LEXIS 173 (Sec'y May 24, 1995). In that case, the Secretary concluded that the employer had violated the ERA because the complainant's protected activities were a contributing factor in the decision to discharge her. However, despite the violation, the complainant was not entitled to relief because her employer demonstrated by clear and

convincing evidence that it would have discharged her in the absence of her protected activity.[11] *Id.* at 17. The existence of a legitimate reason for taking the adverse action against the complainant does not carry the employer's burden in a dual motive case. Rather, the record must establish that the employer would have taken the same action for the legitimate reason alone. *See Jocher v. Tennessee Valley Authority*, 94-ERA-24 (ALJ July 31, 1994).

In anticipation of a TVA argument that 10 C.F.R. § 50.7(d) in fact adopts the clear and convincing standard, the Staff submits that section 50.7(d) is inapposite. 10 C.F.R. § 50.7(d) states:

> Actions taken by an employer, or others, which adversely affect an employee may be predicated upon non-discriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by non-prohibited considerations.

This provision does not provide an employer with the opportunity to avoid a violation of section 50.7 in a dual motive case if it establishes that it would have taken the adverse action in the absence of the complainant's protected activity. This regulation simply recognizes that there are legitimate reasons for taking an adverse action and that a complainant is not immune from an adverse action based solely on a legitimate reason just because he has engaged in protected activity. A violation of section 50.7 does occur, however, if the adverse action was taken in part because of that protected activity.

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[11] Federal courts analyzing Title VII cases have also recognized the distinction between a violation of that statute and the availability of remedies. In *Hashimote v. Dalton*, 118 F.3d 671 (9th Cir. 1997), the court held that an adverse employment reference "violated Title VII because it was a 'personnel action' motivated by retaliatory animus. That this unlawful personnel action turned out to be inconsequential goes to the issue of damages, not liability." *Id.* at 676, *citing Smith v. Secretary of Navy*, 659 F.2d 1113, 1120 (D.C.Cir. 1981) ("The questions of statutory violation and appropriate statutory remedy are conceptually distinct. An illegal act of discrimination . . . is a wrong in itself under Title VII, regardless of whether that wrong would warrant an award of [remedies].") *See also EEOC v. L.B. Foster Co.*, 123 F.3d 746, 754 (9th Cir. 1997).

In sum, in a case involving a violation of 10 C.F.R. § 50.7, the determination of whether the employer violated the regulation involves only the first part of the dual motive analysis. Since the NRC is not seeking relief for a wronged employee, but rather a penalty for violation of its regulation, whether a licensee can prove that it would have taken the same action for legitimate reasons alone is not relevant. Whistleblower provisions such as section 211 of the ERA and 10 C.F.R. § 50.7 "are intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals" for engaging in protected activity. *Passaic Valley Sewerage Comm'rs v. Dept. of Labor*, 972 F.2d 474, 478 (3d Cir. 1993). Enforcement action against employers who take an adverse action against an employee based at least in part upon his protected activities is warranted in order to promote such an environment.

VIII. PROPHYLACTIC RULE PROHIBITING ALL IMPROPER REFERENCES TO AN EMPLOYEE'S PROTECTED ACTIVITY

In *Earwood v. Dart Container Corp.*, 93-STA-0016 (Sec'y Dec. 7, 1994), the Secretary of Labor considered whether a negative comment about the complainant's protected activity during an employment reference constituted a violation of the employee protection provision of the Surface Transportation Assistance Act of 1982. The Secretary concluded that "effective enforcement of the Act requires a prophylactic rule prohibiting improper references to an employee's protected activity whether or not the employee has suffered damages or loss of employment activities as a result. *Id.* at 3. The Secretary rejected the employer's argument that *Smith v. Tennessee Valley Authority*, 90-ERA-12 (Sec'y Apr. 30, 1992), a case under the employee protection provision of the ERA, required a complainant to prove that he suffered the loss of an employment opportunity.

The Secretary reaffirmed the finding in *Earwood* in *Gaballa v. The Atlantic Group*, 94-ERA-9 (Sec'y Jan. 18, 1996). In that case, the complainant asserted that his former employer provided an unfavorable reference concerning his employment to an outside party. The Secretary concluded

that "[d]iscriminatory referencing violates the ERA regardless of the recipient of the information." *Id.* The Secretary referenced both *Earwood* and *Gaballa* in "not[ing] that an employer's reference to participation in protected activity in the course of providing an employment reference violates the ERA." *Remusat v. Bartlett Nuclear Inc.*, 94-ERA-36, 1996 DOL Sec. Labor LEXIS 21 at FN 4 (Sec'y Feb. 26, 1994).

The Staff submits that the Board should adopt the rationale set forth by the Secretary of Labor in *Earwood* and *Gaballa* in considering violations of 10 C.F.R. § 50.7. More specifically, the Staff believes that the Board should conclude that an attempt to poison employment opportunities for a complainant by informing a new supervisor of an employee's prior protected activities or informing members of a selection panel about an applicant's protected activities constitutes a violation of section 50.7.

VI. CONCLUSION

Since 10 C.F.R. § 50.7 provides no specific standard for what must be proven to establish a violation, the Staff believes that the Board should follow the Supreme Court's *McDonnell Douglas/Burdine/Reeves* construct, as adapted by DOL to whistleblower retaliation cases. The Commission has generally adopted the preponderance of the evidence standard of proof in an enforcement proceeding. The appropriate standard to apply in a section 50.7 violation case is whether the Staff has proven by a preponderance of the evidence that the complainant's protected activity was a contributing factor in an unfavorable personnel action. The Board should not consider whether the employer can demonstrate by clear and convincing evidence that it would have taken the same action in the absence of the complainant's protected activity. A section 50.7 violation is based on the employer's actual motives; if one of the employer's motives for taking the adverse action was the complainant's protected activity, the employer has violated section 50.7.

Finally, the Board should adopt the prophylactic rule set forth in *Earwood*, prohibiting improper references to an employee's protected activities. The Board should apply this holding to

situations in which an employer attempts to poison either internal or external employment opportunities for the complainant because he has engaged in protected activity.

Respectfully submitted,

Dennis C. Dambly
Counsel for NRC Staff

Jennifer M. Euchner
Counsel for NRC Staff

Dated at Rockville, Maryland
this 1st day of March, 2002

*1998 U.S. App. LEXIS 26600, *; 1998 Colo. J. C.A.R. 5450*

CAROLE RICHMOND, Plaintiff-Appellant, v. OKLAHOMA UNIVERSITY BOARD OF REGENTS; OKLAHOMA UNIVERSITY, d/b/a Oklahoma University Health Sciences Center, Defendants-Appellees.

No. 97-5181

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

1998 U.S. App. LEXIS 26600; 1998 Colo. J. C.A.R. 5450

October 20, 1998, Filed

NOTICE: [*1] RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: 1998 U.S. App. LEXIS 34677.

PRIOR HISTORY: (N.D. Okla.). (D.C. No. 96-CV-340-K).

DISPOSITION: AFFIRMED.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff employee brought suit against defendant employer in the United States District Court for the Northern District of Oklahoma, alleging that the employer retaliated against her in violation of Title VII of the Civil Rights Act of 1964, specifically 42 U.S.C.S. § 2000e-3(a). The district court granted the employer's motion for summary judgment, and the employee appealed.

OVERVIEW: The court held that the employee was required to demonstrate a prima facie case. She had failed to prove a causal connection between her filing a discrimination complaint and the employer's adverse actions. The time delay of four to six months between the complaint and the adverse actions, although not immediate, did not disprove causation. However, even if the delay were not taken into account, the employee still failed to establish the causal connection. As to the employee's claim that the employer failed to assist her in finding another position when one came open a year after she was suspended, the court held that a time lapse of one year was too great to draw a causal connection. Further, this was a gratuitous promise, and therefore did not form part of the employee's "terms and conditions of employment" as required for a retaliation claim. The employer's failure to provide benefits occurred soon after the employee's reinstatement; however, the employer provided a legitimate reason for this failure: the employee did not apply for benefits.

OUTCOME: The court affirmed the judgment of the lower court in favor of the employer.

CORE TERMS: retaliation, adverse action, termination, prima facie case, summary judgment, causal connection, grievance, reinstatement, terminated, conditions of employment, legitimate reason, pretextual, causation, protected activity, cancer, genuine issue of material fact, unlawful employment practice, moving party, gratuitous, retaliate, gap, grievance committee, disability benefits, failure to follow, oral argument, social work, reply brief, recommended, retaliatory, disability

CORE CONCEPTS - ◆ Hide Concepts

Labor & Employment Law : Discrimination : Retaliation

Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. §§ 2000e-2000h, makes it an unlawful employment practice for an employer to discriminate against any of his employees because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. 42 U.S.C.S. § 2000e-3(a). In order to show retaliation, a plaintiff must first establish a prima facie case of retaliation. If a prima facie case is established, then the burden of production shifts to the defendant to produce a legitimate, nondiscriminatory reason for the adverse action. If evidence of a legitimate reason is produced, the plaintiff may still prevail if she demonstrates the articulated reason was a mere pretext for discrimination. The overall burden of persuasion remains on the plaintiff. To make out a prima facie case of retaliation, a plaintiff must prove: (1) protected opposition to discrimination or participation in a proceeding arising out of discrimination; (2) adverse action by the employer; and (3) a causal connection between the protected activity and the adverse action.

Civil Procedure : Summary Judgment : Summary Judgment Standard

Civil Procedure : Appeals : Standards of Review : De Novo Review

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The appellate court reviews a grant of summary judgment de novo, applying the same standard as the district court. The court will examine the record to determine whether any genuine issue of material fact was in dispute; if not, it will determine whether the substantive law was applied correctly, and in doing so it will examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing the motion. However, where the non- moving party will bear the burden of proof at trial on a dispositive issue, that party must go beyond the pleadings and designate specific facts so as to make a showing sufficient to establish the existence of an element essential to that party's case in order to survive summary judgment.

Labor & Employment Law : Discrimination : Retaliation

When there may be valid reasons why an adverse employment action was not taken immediately, the absence of immediacy between the cause and effect does not disprove causation in a retaliation case.

Labor & Employment Law : Discrimination : Retaliation

An employer retaliates against an employee when he takes adverse action which affects the employee's terms and conditions of employment. Gratuitous promises do not form part of the terms and conditions of employment.

COUNSEL: For CAROLE RICHMOND, Plaintiff - Appellant: Patterson Bond, Tulsa, OK.

For OKLAHOMA UNIVERSITY BOARD OF REGENTS, Defendant - Appellee: Fred A. Gipson, Lisa Millington, Joseph Harroz, Jr., University of Oklahoma, Norman, OK.

For OKLAHOMA UNIVERSITY HEALTH SCIENCES CENTER, Defendant - Appellee: Lisa Millington, Joseph Harroz, Jr., University of Oklahoma, Norman, OK.

JUDGES: Before BALDOCK, EBEL, and MURPHY, Circuit Judges.

OPINIONBY: DAVID M. EBEL

OPINION: ORDER AND JUDGMENT *

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - **[*2]**

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff-Appellant Carole Richmond appeals from the district court's order granting summary judgment for the defendants-appellees on her retaliation claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). We affirm the judgment of the district court.

Beginning in 1987, the University of Oklahoma (University) employed Richmond as a licensed clinical social worker at the Women's Clinic of the Health Sciences Center at its College of Medicine at Tulsa. On or about November 1, 1993, Richmond presented a petition to Dean Harold Brooks requesting replacement of a door lock at the Women's Clinic. On November 16, 1993, the University placed Richmond on administrative leave pending an investigation of the petition. Two days later, the University terminated her employment. n1

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n1 In a memorandum dated November 18, 1993, Drew Accardi of Clinic Administration notified Richmond that her employment was terminated based on her "(1) failure to follow the appropriate lines of reporting; (2) [false representation of] the facts regarding the issues addressed; (3) [misrepresentation of] the Clinic staff's support; and (4) [undermining of] the ability of the Clinic Administration to address operational issues within the Clinics in an appropriate manner." Appellant's App. at 94.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - **[*3]**

Richmond asserts that on or before November 16, 1993, she notified the University of her intention to file a complaint with the Health Sciences Center's affirmative action office, and that she did in fact file such a complaint on November 16. This complaint does not appear in the record.

On December 1, 1993, Richmond filed a grievance with the University concerning her discharge. Pending resolution of her grievance, the University changed her status from "terminated" to "administrative leave without pay." On January 31, 1994, before the grievance procedure was complete, Richmond filed a gender discrimination complaint with the Oklahoma Human Rights Commission.

On April 1, 1994, while Richmond's grievance was still pending, Dean Brooks submitted a proposal for a reduction-in-force (RIF) at the Health Sciences Center to Jay Stein, Senior Vice President and Provost. The RIF plan called for the elimination of all social work positions at the Women's Clinic, including Richmond's position.

On April 4, 1994, the University's grievance committee issued its recommendation to Provost Stein. The committee found that Richmond's termination had not been justified, and recommended that she **[*4]** be reinstated to her former position with lost pay and benefits. The committee further recommended that the University make "every effort to assist Ms. Richmond in relocating within the University." Appellant's App. at 206.

On April 14, 1994, the University sent Richmond a letter indicating that her position had been eliminated, and that her last working day would be May 16, 1994. The next day, April 15, 1994, Provost Stein issued a memorandum formally approving the RIF. On April 27, 1994, Provost Stein adopted the grievance committee finding and ordered Richmond's reinstatement. Richmond was thereafter placed on medical leave due to cancer surgery.

The University terminated Richmond's employment on May 16, 1994, pursuant to the RIF. Believing the University had retaliated against her for complaining of discrimination, she filed this suit.

Title VII makes it an unlawful employment practice "for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under **[*5]** this subchapter." 42 U.S.C. § 2000e-3(a). In order to show retaliation,

> [a] plaintiff must first establish a prima facie case of retaliation. If a prima facie case is established, then the burden of production shifts to the defendant to produce a legitimate, nondiscriminatory reason for the adverse action. If evidence of a legitimate reason is produced, the plaintiff may still prevail if she demonstrates the articulated reason was a mere pretext for discrimination. The overall burden of persuasion remains on the plaintiff.

Sauers v. Salt Lake County, 1 F.3d 1122, 1128 (10th Cir. 1993) (quotation omitted). To make out a prima facie case of retaliation, a plaintiff must prove: "(1) protected opposition to discrimination or participation in a proceeding arising out of discrimination; (2) adverse action by the employer; and (3) a causal connection between the protected activity and the adverse action." Id.

The district court found that Richmond failed to satisfy the third element of her prima facie case. Richmond asserted three adverse actions subsequent to her complaint of discrimination: (1) the University's refusal **[*6]** to give effect, after May 16,1994, to the Provost's order directing that she be given all possible assistance in relocating within the University; (2) the University's decision in May 1994 to treat Richmond as an ex-employee rather than giving her short-term disability support after she developed cancer; and (3) the University's failure to allow her to file an untimely grievance regarding its decision to lay her off as part of the RIF. n2 Each of these adverse actions took place in May 1994 or later, nearly six months after Richmond's initial discrimination complaint to the University and nearly four months after she filed her charge with the Oklahoma Human Rights Commission.

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n2 The district court found a fourth possible adverse action: Richmond's termination pursuant to the RIF. Richmond does not assert that the RIF itself was retaliatory, however. See Appellant's App. at 190.

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The district court found that this span of time, standing alone, indicated insufficient causal connection to support a prima facie **[*7]** case. See Conner v. Schnuck Markets, Inc., 121 F.3d 1390, 1395 (10th Cir. 1997) (stating, in FLSA retaliation case, that a four month time lag between the plaintiff's participation in protected activity and his termination was not, by itself, sufficient to support an inference of causation). It further found that Richmond failed to present any other evidence of a causal connection between her protected activity and the adverse employment actions. Alternatively, the district court found that the University had advanced a legitimate reason for its actions, and that Richmond had failed to show that this reason was pretextual.

We review the district court's order of summary judgment as follows:

> Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. We review a grant of summary judgment de novo, applying the same standard as the district court. We examine the record to determine whether any genuine issue of material fact was in **[*8]** dispute; if not, we determine whether the substantive law was applied correctly, and in doing so we examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing the motion. However, where the non moving party will bear the burden of proof at trial on a dispositive issue that party must go beyond the pleadings and designate specific facts so as to make a showing sufficient to establish the existence of an element essential to that party's case in order to survive summary judgment.

McKnight v. Kimberly Clark Corp., 149 F.3d 1125, 1128 (10th Cir. 1998) (quotations and citations omitted).

Richmond acknowledges that there was a four- to six-month delay between the time she filed her discrimination complaints and the alleged adverse actions. She argues, however, that until she was reinstated to employment by Provost Stein's directive of April 27, 1994, the University had no opportunity to retaliate against her. "When there may be valid reasons why the adverse employment action was not taken immediately, the absence of immediacy between the cause and effect does not disprove causation." **Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 178 (3d Cir. 1997); [*9]** see also Bowers v. Bethany Med. Ctr., 959 F. Supp. 1385, 1392 (D. Kan. 1997) (finding causation element of prima facie case satisfied despite gap of between one and one-half and two years between protected action and termination, where plaintiff had been absent from work on disability leave during entire period of gap).

Even if we ignore the time period between Richmond's assertion of her rights and her reinstatement, however, she must still establish a causal connection between her protected conduct and an adverse action by the University. We consider first the University's alleged failure to assist her in finding other employment. She states that the University was obligated to notify her of available jobs which she could fill and to help her to obtain those positions. The earliest such position which she specifically identifies is a social work opening at the Oklahoma City campus. n3 This job did not come open until approximately April 1995, nearly one year after Richmond's reinstatement. A time lapse of one year is too great to draw a causal connection between her protected action and the University's failure to act. See Conner, 121 F.3d at 1395. **[*10]** Richmond's retaliation claim concerning the University's failure to help her find a job fails n4 because she has not demonstrated a causal connection between her assertion of rights and an adverse action. n5

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n3 Connie Gould, the University's director of personnel services, estimated that during the year after Richmond was RIF'd, somewhere between twenty and one hundred positions came open at the University's health sciences center. Richmond contends that the University had a duty to help her find one of these jobs. She presented no evidence, however, concerning what any of the jobs were or whether she was qualified to perform them.

n4 Richmond has also failed to establish the second element of her prima facie case. The University's failure to assist her in finding employment does not fit the definition of retaliation for purposes of Title VII. An employer retaliates against an employee when he takes adverse action which affects the employee's "terms and conditions of employment." Conner, 121 F.3d at 1395 n.4. Gratuitous

promises do not form part of the terms and conditions of employment. Cf. Stiltner v. Beretta U.S.A. Corp., 74 F.3d 1473, 1482-84 (4th Cir. 1996) (holding employer's discontinuation of health care benefits furnished gratuitously after termination of plaintiff's employment did not violate ERISA's anti-retaliation provision). The promise to "make every effort" to help Richmond find another job after her termination was vague and gratuitous and did not affect her terms and conditions of employment. We therefore decline to hold that failure to follow through on it after Richmond's departure constituted retaliatory adverse action against her. **[*11]**

n5 Richmond also argues that the district court ignored her initial termination from employment on November 18, 1993, only two days after she filed her discrimination complaint with the University. We agree with the University, however, that Richmond has waived this argument. In her summary judgment brief, Richmond enumerated the acts of retaliation upon which she relied to support her claim. See Appellant's App. at 190-93. She did not mention her initial termination from employment among these acts. We do not consider arguments made for the first time on appeal. See Walker v. Mather (In re Walker), 959 F.2d 894, 896 (10th Cir. 1992).

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Richmond also asserts that the University retaliated against her by failing to provide her with short-term disability benefits after she fell ill with cancer. Although the University's failure to provide benefits occurred soon after her reinstatement, the University provided a legitimate reason for not granting Richmond disability benefits: she never applied for them. Richmond has failed to create a genuine issue of material fact concerning **[*12]** whether this reason was pretextual. Accordingly, we conclude that summary judgment was proper on this assertion of retaliation.

Richmond claims that the University refused her additional time to pursue a grievance against the RIF decision. The University explained that it simply followed its policies, which did not allow it to provide extra time for filing a grievance. Richmond also failed to show that this reason was pretextual. Summary judgment is proper on this assertion of retaliation.

Finally, Richmond complains that the district court denied her motion to strike the University's summary judgment reply brief. She asserts that the University should not have been allowed to submit new evidence with its reply brief. We have reviewed the summary judgment record, and determine that failure to exclude the additional materials was harmless. See Fed. R. Civ. P. 61. The judgment of the United States District Court for the Northern District of Oklahoma is AFFIRMED.

Entered for the Court

David M. Ebel

Circuit Judge

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF PRETRIAL LEGAL BRIEF in the above-captioned proceeding have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), or by electronic mail as indicated by a double asterisk (**) on this 1st day of March, 2002.

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