RAS 4048

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)	)	

TENNESSEE VALLEY AUTHORITY'S PREHEARING BRIEF

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 (2000) by discriminating against Gary L. Fiser, a former TVA employee, for engaging in "protected activities." This prehearing brief is submitted in accordance with the February 13, 2002, prehearing conference order and (a) provides an overview of what TVA anticipates the evidence will show and (b) addresses the legal issues that TVA expects to be relevant to a proper outcome in this case.

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

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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 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.

The evidence presented in this hearing will show that management—and in particular Mr. McGrath and Dr. McArthur—did not discriminate against Fiser for engaging in protected activities. The decisions made, and cited by the NRC Staff in the enforcement action, were in reality organizational decisions involving many matters transcending Mr. Fiser and involving many people and organizations beyond two immediate supervisors accused by the NRC Staff. The decisions made in connection with the reorganization of TVA Nuclear (TVAN) in July 1996—and in connection with the related elimination of Fiser's position of Chemistry and Environmental Protection Program Manager, Operations Support and the selection of individuals to fill new positions—all were made solely for legitimate business reasons. Notwithstanding the Staff's perceptions of inferences otherwise, these actions were not taken even in part as retaliation for Fiser's engaging in protected activity. Moreover, contrary to any Staff perceptions otherwise, there is nothing pretextual about these legitimate reasons.

Several points will be developed in the evidence presented in the hearing. For example:

- Contrary to the NRC Staff's assertion that McGrath and McArthur were "knowledgeable and critical" of Fiser's protected activity, there is absolutely no evidence that McGrath had any awareness that Fiser had purportedly raised concerns in 1991-93 or filed a 1993 DOL complaint prior to 1996. As pointed out in the brief in support of TVA's Motion for Summary Decision, the NRC Staff assertion that McGrath was even aware of the 1993 DOL complaint is based solely on the Staff's speculation.

- While McArthur had knowledge that Fiser had filed a DOL complaint in 1993, there is no evidence that either he or McGrath were motivated by that complaint to discriminate against Fiser. Indeed, in 1994, at a time much closer in proximity to the alleged protected activity, McArthur was responsible for selecting Fiser for a position. Indeed there is no evidence that either McGrath or McArthur were ever even critical of any protected activity by Fiser.

- Moreover, the 1993 DOL complaint (the "protected activity") was patently baseless. It did not allege that Fiser ever raised any safety issue. Rather, it simply highlighted Fiser's own performance deficiencies and his desire to escape accountability for those deficiencies. There was nothing in this complaint that would create a motivation on either McGrath's or McArthur's part to retaliate against Fiser at any time—much less years later in 1996.

- Although 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), nearly three years lapsed between even the filing of the 1993 DOL complaint and the alleged adverse action. As discussed below and in the brief in support of TVA's Motion for Summary Decision, an inference of retaliatory motive based on such attenuated "proximity" is contrary to law. The courts allow an inference of discrimination based on temporal proximity between protected activity and adverse action only if the proximity is measured in terms of mere days or weeks, not three years.

- The NRC Staff infers discrimination because of "temporal proximity" between McGrath and McArthur becoming Fiser's supervisors and his nonselection for a position in 1996. There is no basis in law to draw such an inference. Moreover, in fact, such an inference is not credible. McArthur was in Fiser's chain of command for several years prior to the nonselection, so this temporal proximity does not exist. And there is no factual basis to support an inference that either McGrath or McArthur was simply waiting for an opportunity for, literally, years to discriminate against Fiser for a 1993 DOL complaint that did not even raise any safety issues.

- The facts will show that a TVAN-wide reorganization (that had nothing to do with Fiser other than that he was affected) eliminated Fiser's position. The reorganization clearly was undertaken for nondiscriminatory reasons and affected numerous other employees in Fiser's organization and throughout TVAN.

- The elimination of Fiser's job and his subsequent nonselection for a new position was in accordance with normal TVAN practices and he was not treated differently than similarly situated employees. The NRC Staff's attempt to infer disparate treatment based on how McArthur's position was handled at another time is both wrong and inapposite.

- Fiser's nonselection for a new position was based on objective nondiscriminatory reasons. For example, he was the lowest rated of the three candidates by a Selection Review Board that was staffed by three individuals other than McGrath and McArthur.

- Finally, contrary to the NRC Staff's inferences and allegations, the selection process was fair and impartial. Notwithstanding the Staff's attempt to show flaws in this process, those alleged flaws are in reality nothing more than normal variations that enter any human process. The facts are that no other employee was preselected.

- In sum, the NRC Staff has attempted to make a case against TVA—and in particular against McGrath and McArthur—that is based on a potpourri of inferences and allegations that strains any reasonable credulity. The NRC Staff cannot show by a preponderance of reliable and credible evidence that these two longstanding nuclear managers discriminated against Fiser. The facts are that Fiser's nonselection in 1996 was based solely on legitimate reasons.

Facts

1. **Background.** In order to understand the context in which this complaint arose, some background information is necessary about two major TVA efforts. The first effort relates to major improvements to TVA's nuclear power program.[1] In 1985, TVA voluntarily shut down its Sequoyah Nuclear Plant

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1 TVA is a federal agency and government corporation created by the TVA Act of 1933, 16 U.S.C. §§ 831, 831r (2000). TVA v. Hill, 437 U.S. 153, 157 (1978) (TVA is "a wholly owned public corporation of the United States."); Ashwander v. TVA, 297 U.S. 288 (1936); Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939). "Actually the TVA is the United States in action, 'an arm of the government', and an agency performing wholly governmental service." Ramsey v. UMWA, 27 F.R.D. 423, 425 (E.D. Tenn. 1961).

(Sequoyah) and Browns Ferry Nuclear Plant (Browns Ferry) and voluntarily ceased pursuing an operating license for Unit 1 at Watts Bar Nuclear Plant (Watts Bar) in order to address major issues in TVA's nuclear program. Many of these issues were identified as a result of the accident at Three Mile Island (TMI), and TVA's efforts were aimed at ensuring that its nuclear plants would not be susceptible to similar accidents.

TVA's efforts to upgrade its nuclear program, to restart Sequoyah and Browns Ferry, and to perform the initial startup of Watts Bar required large numbers of TVA employees and contractors. As its nuclear program was upgraded, TVA successfully restarted Sequoyah Units 1 and 2 and Browns Ferry Units 2 and 3. Most recently, TVA has successfully completed the initial startup and continued operation 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. As those programs were winding down, TVA adjusted the size of its nuclear workforce to reflect the changes from a construction and modifications organization to a much smaller operations organization.

The second effort at TVA is an ongoing effort to hold down electric rates by improving productivity and reducing costs. This effort is driven by the need to become more competitive with other electric utilities in anticipation of deregulation of the electric utility industry.

As a result of both efforts, TVA has reorganized and reduced the number of employees in TVAN. The changes in the workforce did not occur all at once; rather, the reductions were implemented in a deliberate step-wise fashion year by year. Thus, during 1994-1997, a large number of TVA employees in TVAN 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.

2. Fiser's previous positions with TVA. From 1988 until 1993, Fiser's official position was Chemistry and Environmental Superintendent at Sequoyah in Soddy-Daisy, Tennessee, and his management reporting chain was through plant operations. During 1991-93, Fiser's position was classified as a grade PG-9 on TVA's management and specialist schedule.[2] 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.

Because of deficiencies in the Sequoyah chemistry program and because Fiser was perceived by management as having weak management skills, 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.[3] During his rotational assignment, Fiser's official position was still the Sequoyah Chemistry and Environmental Superintendent. While on rotation, Fiser was initially assigned as the Acting Corporate Chemistry Manager and his immediate supervisor was Dr. Wilson C. McArthur. In about November 1992, he was removed

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2 As a federal agency, TVA is in the executive branch (5 U.S.C. § 105 (2000)). It is specifically exempted by Section 3 of the TVA Act, 16 U.S.C. § 831b (2000), from the competitive or classified civil service. As a result, "TVA employees are in the excepted service, not the competitive service" (Dodd v. TVA, 770 F.2d 1038, 1040 (Fed. Cir. 1985)). Consequently, TVA classifies its employees to schedules unique to TVA. At the time, management and specialist positions at TVA were classified from PG-1 to PG-11 on TVA's PG schedule or as Senior Managers, who were above the PG schedule.

3 Not only did Sequoyah plant management perceive that the Sequoyah chemistry program had deficiencies, but TVA's Nuclear Safety Review board (NSRB) and the Institute of Nuclear Power Operations (INPO) provided reports to plant management describing long-term chemistry problems at Sequoyah.

as Acting Corporate Chemistry Manager and was assigned as a Chemistry Program Manager within Corporate Chemistry, and McArthur was his second-level supervisor.[4]

During early 1993, Sequoyah was undergoing a reorganization in which its Chemistry and Environmental organization was taken out of plant operations and combined with the Radiological Control organization. In the new RadChem organization Radiological Control, RadWaste, Chemistry, and Environmental all reported to one manager, Charles E. Kent, who reported directly to the Plant Manager. Part of the rationale for the reorganization was to improve the performance of the Sequoyah chemistry program. In the reorganization, Fiser's Chemistry and Environmental Superintendent position was eliminated and, at the outset, the Sequoyah chemistry program was supervised directly by Kent. Early on, Kent offered Fiser a technical support position in Sequoyah RadChem, which he refused. Later, TVAN determined that each nuclear plant site should have a Chemistry Manager, grade PG-10, reporting to the site RadChem Manager. Kent then entered into discussions with Fiser about offering him that position. However, Fiser put an end to Kent's consideration of him for that job by telling him that upper management did not think highly of him based on his previous stint as Chemistry and Environmental Superintendent.

Thus, when Fiser's one-year rotational assignment in Corporate Chemistry was concluded, he could not return to his official position as Sequoyah Chemistry and Environmental Superintendent because the position was being

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4 Somewhere in this timeframe, 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.

eliminated. Although his position had been eliminated, Fiser was not reduced in force.[5] Instead, TVA assigned him to the Employee Transition Program (ETP).

3. 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 (1994) (ERA), alleging discrimination in his removal from the Sequoyah Chemistry and Environmental Superintendent position.[6] 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. After the settlement, McArthur continued to be Fiser's second-level supervisor until an August 1994 reorganization.

Somewhere in this timeframe, McArthur was informed that Fiser had surreptitiously tape recorded him and various other employees in connection with his complaint. McArthur was counseled that he should not take any action against Fiser for having done so, but that he should assume that any future conversations with Fiser were also being recorded. McArthur may have related this cautionary note to other pertinent managers. There is no evidence that McArthur or anyone else ever undertook any action against Fiser for having made surreptitious tape recordings.

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

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5 Although TVA is excepted from the competitive service, it is required by the Veterans' Preference Act of 1944, 5 U.S.C. §§ 3501, 3502 (2000), to conduct reductions in force in accordance with Office of Personnel Management found at 5 C.F.R. part 351 (2001).

6 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. 30,452, July 14, 1982) and in fact expressly incorporates the ERA's definition of protected activities.

investigation of the complaint.[7] Both TVA's OIG and the NRC's OI investigated the allegations of Fiser's 1993 DOL complaint. TVA's OIG did not substantiate that Fiser was subjected to any adverse action due to his having raised any nuclear safety-related concerns. A number of people including McArthur and Kent were interviewed in the course of the TVA OIG's investigation. The NRC OI closed its investigation after determining that it could not substantiate that Fiser had engaged in any protected activity.

4. **The 1994 reorganization.** In 1994, at the time of the settlement of Fiser's 1993 ERA complaint, the corporate chemistry, environmental, and radiological control functions were separate with each reporting to a different manager who in turn reported to McArthur, the Manager of Technical Programs. Although the April 8, 1994, agreement provided that Fiser would be officially placed in a Chemistry Program Manager position, it did not guarantee the continued existence of that position, did not guarantee him continued employment, and did not guarantee that his position or organization would never be subject to a reorganization. Indeed, in the summer of 1994, as a result of a reorganization, a decision was made to combine the corporate Chemistry and Environmental organizations into one organization under one manager. By combining the two organizations, the Chemistry Manager and the Environmental Manager positions were replaced with a single Chemistry and Environmental Manager position. In addition, the Chemistry Program Manager positions and the Environmental Protection Program Manager positions were

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7 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 (1993).

eliminated. In their place, Chemistry and Environmental Protection Program Manager positions were created.

Because the new positions were significantly different than the existing program manager positions, the incumbents of the old Chemistry Program Manager and Environmental Protection Program Manager positions were not entitled to rollover into the new positions by virtue of Federal regulations.[8] Accordingly, TVA posted a vacant position announcement (VPA) for the new positions and held a competitive bidding process. Fiser applied for and was a selected candidate for one of those new positions. Thus, in the fall of 1994, Fiser voluntarily left the position designated in the settlement (which was then eliminated) and entered into a new position. McArthur was one of the persons responsible for selecting Fiser for that new position. As a result of that reorganization McArthur was assigned to serve as the Manager of Radiological Control. However, he was never officially appointed to that position nor was an approved position description ever placed in his official personal history record.

5. Fiser's claimed protected activity. Fiser claimed that his 85-page "Sequence of Events," which he wrote allegedly based on his notes and purported transcripts of his tape recordings, supported his 1993 DOL complaint. Far from supporting his complaint, the "Sequence of Events" shows that Sequoyah plant management did not want Fiser back as the Chemistry and Environmental Superintendent because of longstanding problems in the chemistry program for which they believed Fiser was accountable. Furthermore, Fiser did not claim to have identified or raised any concerns about the problems. On the contrary, in his DOL complaint he simply argued that it was unfair to blame him for not fixing the problems.

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8 The effect of regulations promulgated by the Office of Personnel Management on TVA reorganizations is discussed below at 23-25.

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" (42 U.S.C. § 5851(a)(1)(D)). 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.

While there is no dispute that Fiser's 1993 DOL complaint constitutes protected activity, the matters described in that 1993 DOL complaint were not themselves protected activities by him. In fact, they were examples of performance issues for which Sequoyah plant management held him accountable as a manager. 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'" (at 2). That issue dealt with the failure of Sequoyah personnel to consider the effect of pressure in a noble gas chamber on radiation monitor setpoints. Although the issue had been identified years before, the setpoints were not corrected during the entire time Fiser was the Sequoyah Chemistry and Environmental Superintendent. A second reason that management did not want Fiser to return to Sequoyah, according to Fiser, was "'[t]he filter change-out scenario'" (*id.* at 2). That issue involved a chemistry technician who may have improperly left a valve closed while conducting some sampling activities. Management's concern was that the lack of training led to that mistake. In neither case was Fiser responsible for identifying or reporting the matter or any safety issue. His complaint makes it clear that, rather than raising a safety issue, he merely thought he was blameless because the events happened and were reported while he was elsewhere. Fiser's complaint takes issue with no more than 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 3).

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 3-4). However, this was not a case of Fiser raising a safety issue; it was a case of Fiser making an excuse for not doing something which he had been asked to do. In fact, Exhibit C to Fiser's complaint, shows that he was responding to TVA's NSRB[9] which had raised the issue about whether Sequoyah Chemistry personnel were adequately trained to meet PASS requirements. Further 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.

It is clear 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" (Report of Investigation, No. 2-93-068 at 1). The NRC's Regional Counsel also reviewed the matter and concluded in an April 12, 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

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9 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.

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].[10]

Curiously, OI Report and Investigation No. 2-1998-013, relied upon 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."

Fiser's 1996 DOL complaint and the NRC Staff's brief in response to TVA's motion for summary decision assert that Fiser's telling the NSRB in 1992 of his inability to provide certain data was protected activity. They assert athat the NSRB insisted on formal procedures requiring Sequoyah Chemistry to issue daily trend data and that Fiser refused because, as he told them, it would put him in the circumstance of being unable to comply with the procedure and consequently in violation of an NRC requirement. A review of the NSRB minutes shows no mention of formal procedures. In the fiirst place, this did not happen as asserted. In the second place, Fiser's inability to provide trending data is not protected activity. As Fiser admitted in his complaint ("Sequence of Events" at 1-2), the chemistry organization at Sequoyah discontinued providing daily information to the Sequoyah plant operators which the NSRB felt would contribute to safe operation. Fiser refused to resume providing that information, not because he felt it would cause a safety problem, but because of the perceived difficulty of the task and the administrative inconvenience to him. According to the Secretary of Labor, management is entitled to establish job responsibilities and work schedules, and an employee's lack of performance to meet those responsibilities is not protected by simply claiming an inability to meet those expectations. *Skelly v. TVA*, No. 87-ERA-8, slip op. at 10 (ALJ Feb. 22, 1989), *adopted* (Sec'y Mar. 21, 1994) ("[T]he complaints Skelly voiced to his co-workers and supervisors related to the

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10 Emphasis added unless otherwise noted.

quantity of work Skelly was required to produce," "was not at the expense of safety and thus no safety issue is involved," and "cannot conceivably be perceived as being protected by Section 5851.").[11]

Fiser was not entitled to refuse to provide the requested data simply because he felt it was inconvenient or difficult. The Secretary of Labor has held time and again that an employee's refusal to work loses any protected quality it may have had once it has been determined that no *work* hazard exists. *Sutherland v. Spray Sys. Envtl.*, No. 95-CAA-1, slip op. at 3 (Sec'y Feb. 26, 1996) ("Management has the prerogative to determine which means it deems to be most effective provided such means comport with requisite safety and health standards. There is no requirement for management to engage in a dialog with the refusing workers as to which procedure would be most efficacious."). In this case, of course, Fiser never even told the NSRB that there was any nuclear safety hazard in providing the requested data. *See Crosby v. United States Dep't of Labor*, 53 F.3d 338 (table), 1995 U.S. App. LEXIS 9164 (9th Cir. Apr. 20, 1995), *aff'g Crosby v. Hughes Aircraft Corp.*, No. 85-TSC-2 (Sec'y Aug. 17, 1993),[12] in which the court affirmed the Secretary's determination that the complainant was discharged for proper reasons when he refused to work on a project because he did not like the protocol. In this case, it would indeed be anomalous if an employee such as Fiser could excuse his poor performance in refusing to provide information helpful to safely operate a nuclear plant and then claim that his refusal to fulfill his job responsibilities entitled him to immunity under the ERA.

6. McGrath had no prior knowledge of Fiser's 1993 DOL complaint, and McArthur was not critical of Fiser's chemistry-related safety concerns. The evidence will show that McGrath had no prior knowledge of Fiser's

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11 DOL cases can be viewed at http://www.oalj.dol.gov/public/wblower/decsn.

12 Copies of unpublished cases cited to Westlaw or LEXIS are attached.

1993 DOL complaint and that he was not motivated in any way by Fiser's alleged chemistry-related concerns. Similarly, while McArthur was aware of the 1993 DOL complaint, there is no evidence that McArthur was critical of chemistry-related concerns in 1991-1993, that he attributed those concerns to Fiser, or that he was motivated in any way to retaliate against Fiser for raising those concerns.

On the other hand, the record shows that in issuing the NOV, the NRC Staff failed to critically evaluate the evidence or even gather all of the pertinent evidence. The summary of OI's Report states that Fiser's protected activity was the "filing of a discrimination complaint" in 1993 (NRC's Sept. 20, 1999, letter, enclosure 2 (Attachment C)). Apparently OI did not review that complaint, since it was not an exhibit to OI's report.[13] Instead, OI seems to have accepted the DOL investigator's characterization of Fiser's 1993 DOL complaint. The DOL investigator's report, which was included as an exhibit to OI's investigation, states that Fiser's 1993 "complaint named Tom McGrath, NSRB Chairman." However, DOL's investigative file shows that the DOL investigator did not review or even obtain a copy of Fiser's 1993 DOL complaint either. Instead, he apparently relied upon the characterization by Fiser in his 1996 DOL complaint of his 1993 DOL complaint.

The failure to examine Fiser's 1993 DOL complaint as part of OI's investigation is particularly egregious since Fiser's 1996 DOL complaint inaccurately recharacterizes his 1993 DOL complaint. In the 1993 complaint, Fiser identified a number of persons by name, none of whom were McGrath. And at that time, he named McArthur, not as a culpable party, but as an ally. Based on the compounded failures by the DOL and OI investigators to review the 1993 DOL complaint, the summary of the OI Report provided by NRC concluded that McGrath and McArthur

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13 The only analysis of that complaint by OI is a reference which states only that a 1993 complaint filed by Fiser "was unsubstantiated due to lack of protected activity."

"were named as culpable parties in [Fiser's] 1993 DOL complaint" (NRC's Sept. 20, 1999 letter, enclosure 2 at 1). Only after TVA provided a copy of the 1993 DOL complaint did the NRC acknowledge that error (NRC's Feb. 7, 2000 letter at 3).

OI's failure to review Fiser's 1993 DOL complaint also led it to conclude that the matter giving rise to Fiser's 1993 DOL complaint was that "McGrath recommended to the Sequoyah plant management that FISER should be terminated because of his refusal to implement new Chemistry procedures" (OI Report at 17).[14] To the contrary, Fiser's 1993 DOL complaint did not involve new Chemistry procedures or trending plots; instead, it alleged he was unfairly being held accountable for the three problems in Sequoyah Chemistry discussed above: (1) radiation monitor setpoints that did not account for vacuum and or negative pressure; (2) a containment radiation monitor that was improperly aligned; and (3) the inability of Sequoyah chemistry personnel to properly conduct post-accident sampling analyses.[15] Since OI apparently did not review Fiser's 1993 DOL complaint, they could not have known that

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14 Likewise, the DOL investigator mistakenly concluded that the 1993 DOL complaint "named Tom McGrath" and involved "issues surrounding the generation of trend plots at SQNP." (OI report, ex 4 at 1).

15 Fiser's 1993 DOL complaint did not show that he had engaged in any protected activity. Indeed, OI's status report, which is an exhibit in the OI Investigation, shows that his 1993 complaint was "unsubstantiated due to lack of protected activity." He did not allege that he had identified or documented any of the problems in these areas. To the contrary, he complained that he was being unfairly blamed for the existence of these problems which were identified and documented by others. As to the first two, he claimed that "even though I was not directly responsible for either of the underlying conditions leading to those situations, I was charged with them" (Sept. 23, 1993, compl. at 3). Thus, with respect to radiation monitor setpoints, he claimed that he was not responsible since the evaluation which was not adequately performed occurred before he came to Sequoyah and that he was later assured that the readings were correct. With respect to the misaligned radiation monitor, he admitted that the problem was discovered and reported by others, but that at the time he was on another temporary assignment. With respect to the proficiency of chemistry technicians to perform post-accident sampling analysis, he blamed management for the lack of ongoing training and a lack of budget (Sept. 23, 1993, compl. at 3-4).

in 1996 Fiser had misstated the protected activity which he claimed as the basis for his 1993 complaint and identified different managers who were allegedly responsible.[16] Of course, all this bears directly on the credibility of Fiser and OI's report.

We agree that the act of filing a DOL complaint in 1993 is protected activity. However, when a claim of retaliation based upon the filing of an earlier DOL complaint is made, it is important to look at the motives of the managers who are alleged to have retaliated. It is clear that different inferences can be drawn depending on whether the managers who are alleged to have engaged in retaliation were identified as responsible for the previous discrimination and whether those managers were identified as being adversely affected by the protected activity identified in the first complaint. While it is undisputed that Fiser filed a 1993 DOL complaint, NRC Staff made an erroneous finding that implies that McGrath and McArthur had an additional motive to retaliate against Fiser-the finding 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*" (NRC's Feb. 7, 2000, letter at 3). The NRC Staff further reasons that "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 [McGrath] was aware that Mr. Fiser filed a 1993 DOL complaint prior to 1996" (*id.*). Those conclusions are in error.

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16 Under the Administrative Procedures Act, 5 U.S.C. § 706(2) (2000), a reviewing court must set aside an administrative decision which is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . [or] unsupported by substantial evidence." We think a reviewing court would find that OI's failure to obtain a copy of Fiser's 1993 DOL complaint and NRC's misreading of that complaint warrants setting aside the NRC's NOV.

First, Fiser's 1993 DOL complaint, which TVA provided to the NRC, did not accuse either McGrath or McArthur of any discriminatory act, and it did not claim that he had raised any issues for which they were responsible.

Second, DOL's investigation of the 1993 DOL case did not develop any information with respect to Fiser's protected activity. As stated in the summary of OI's Report (NRC's Sept. 20, 1999, letter; enclosure 2), Fiser "settled his 1993 DOL action with TVA prior to completion of a DOL fact finding investigation." Consequently, there was no decision in that case at any administrative level by DOL, and we are unaware that DOL's investigation even proceeded to the point that any interviews were actually conducted. Since DOL did not investigate the 1993 complaint, the NRC is simply wrong when it concludes that McGrath's or McArthur's knowledge and criticism of Fiser's protected activity "were part of the information developed associated with the 1993 DOL case" (Feb. 7, 2000, letter at 3). Given OI's apparent failure to review either DOL's or the TVA OIG's file on the 1993 complaint, we do not understand how the NRC could arrive at such a conclusion.

Third, given McGrath's position in the organization, he had no reason to learn of Fiser's 1993 DOL complaint. During the pendency of that complaint, McGrath was not in TVAN's Nuclear Operations, which included both Sequoyah and Corporate Chemistry. As a result, he was not informed and had no reason to learn of Fiser's 1993 DOL complaint.[17]

Fourth, given the number of TVA employees who were actually interviewed by DOL and OIG, there was no reason for McGrath to learn of Fiser's 1993 DOL complaint. As stated above, we are not aware of a single interview by DOL in connection with the 1993 complaint. Furthermore, neither McGrath nor

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17 It is not TVAN's practice to inform managers of pending DOL cases if they are in different organizations and have no involvement in the issues in the case.

anyone in his chain of supervision above or below him was interviewed by the OIG in connection with its investigation of the allegations in that case.[18] Under those circumstances, there is every reason to credit McGrath's testimony that he had no prior knowledge of Fiser's 1993 DOL complaint and no reason to make an unsupported assumption to the contrary.[19]

OI found that in connection with Fiser's 1993 DOL complaint, "McGrath recommended to the Sequoyah plant management that FISER should be terminated" (OI Report at 17). That finding could only have been made by relying on Fiser's testimony (ex. 3 at 32-33) and disregarding McGrath's categorical denial (ex. 9 at 12). The NRC Staff is required to explain why it chose to credit Fiser's version, which is clearly hearsay, over McGrath's unequivocal denial.[20] That error is doubly compounded. First, if OI had reviewed the 1993 DOL complaint, it would have had to make an adverse credibility finding against Fiser based on his mischaracterization of his 1993 claims. Not only is the claim against McGrath absent from Fiser's 1993 DOL complaint, but Fiser also failed to mention it when he was interviewed by OIG in connection with that complaint and had an opportunity to expound. Second, Fiser

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18 Since OI did not review DOL's file on Fiser's 1993 DOL complaint, it did not learn that there were no investigative interviews by DOL. Likewise, there is nothing in OI's Report to show that it reviewed the OIG's investigation of that complaint. If it had done so, it would have learned that nowhere in that file, including Fiser's interview, is McGrath even mentioned as being involved in the alleged discrimination.

19 The United States Supreme Court rejected suspicion and surmise as a basis for an agency decision in Universal Camera Corp. v. NLRB, 340 U.S. 474, 484 (1951). Thus, in the context of a Section 211 case, DOL may not simply assume that the responsible manager was told of the complainant's protected activity, there must be substantial evidence in the record to support a finding of such knowledge. Bartlik v. TVA, No. 88-ERA-15 (Sec'y Dec. 6, 1991, Apr. 7, 1993), aff'd, 73 F.3d 100 (6th Cir. 1996).

20 An agency determination bases on "selective analysis" must be set aside. N.L.R.B. v. Cutting, Inc., 701 F.2d 659, 665 (7th Cir. 1983).

claimed he was informed of McGrath's recommendation by Rob Beecken (Beecken), the former plant manager at Sequoyah. There is nothing in OI's record of investigation to show that OI made any attempt to interview Beecken to ask him to confirm or deny Fiser's version. Furthermore, there is no mention of McGrath's purported recommendation to Beecken in the OIG's 1993 interview of Beecken. However, OI failed to review the OIG's record of interview for either Fiser or Beecken.

The OI Report, citing to Ronald Grover, states that McGrath and McArthur made negative comments about Fiser (at 11). However, Grover does not state in fact what the comments related to, only an assumption. OI also failed to take into consideration that Grover did not work for TVA until well after Fiser had filed his 1993 DOL complaint and the fact that Grover was disgruntled over the same TVAN reorganization and the elimination of his position. Further, the OI Report states (at 11 ¶ 1) that Jocher said that McArthur told him that Sequoyah management "wanted [an unnamed person] to fire Fiser," citing exhibit 15 at 14. The OI Report concluded that Sequoyah wanted to fire Fiser because he "refused to implement Chemistry procedures requested by MCGRATH" (OI Report at 11 ¶ 1). That conclusion is not supported by the testimony cited by the OI Report (ex. 15 at 14), and OI cites no other basis in the record for that conclusion.[21] This amounts to character assassination of McGrath based solely on hearsay, innuendo, and error.

The NRC's finding that McArthur was "critical of Mr. Fiser's 1991-93 protected activity" and that his "actions in this regard were part of the information developed associated with the 1993 DOL case" is even more farfetched (NRC's Feb. 7, 2000, letter at 3). Rather than criticize Fiser for his protected activity, McArthur was

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21 Findings of discrimination may not be based upon gossip and talk of discrimination in the workplace. Chappell v. GTE Prods. Corp., 803 F.2d 261, 268 n.2 (6th Cir. 1986); Schrand v. Fed. Pac. Elec. Co., 851 F.2d 152, 156-57 (6th Cir. 1988).

viewed by Fiser himself as an ally. Thus, in his 1993 DOL complaint, Fiser states that McArthur was "very dismayed about the decision" to surplus him, expressed his "disagreement with this decision publicly" (1993 compl. at 1), and "had me rated very high" (*id.* at 4). As with McGrath, DOL did not develop any information regarding McArthur in connection with the 1993 DOL case. Similarly, there is nothing in the OIG's investigative file that suggests that McArthur was involved in any alleged discrimination.

In contrast, McArthur maintains (and his OIG interview from 1994 is consistent) that NSRB had raised performance problems in the Sequoyah Chemistry program and that Fiser was looked upon as part of the problem, not that Fiser had raised safety concerns. NRC's conclusion that McArthur's criticism of Fiser's protected activity was part of the information developed associated with the 1993 DOL case is just wrong. There is no evidence at all to support the ludicrous conclusion that McArthur was so incensed by these events that he would wait literally years to retaliate against Fiser.

7. 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 too ill to fulfill his responsibilities and McGrath was designated as the Acting General Manager. 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. This was the first time that McGrath was a part of Fiser's management chain.

As part of the workforce planning effort for the year 2001 and the budget planning process for FY 1997, corporate TVAN 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. Although the

short-term goal for FY 1997 was to reduce the budget by 17 percent, the reductions were not to be limited to that amount. Because the corporate budget was primarily salaries and not capital expenses, reductions necessitated corresponding reductions in headcount. Further, top TVAN management and McGrath were of the opinion that for purposes of workforce morale a single large reduction was preferable to annual reductions.

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. McGrath also requested that the Radiological Control and Chemistry Services organizations be combined into a single organization, like the sites, under the existing but then vacant RadChem Manager position. During the 1996 reorganization, McArthur was placed in the RadChem Manager position consistent with TVA's understanding of applicable OPM regulations. In place of the three existing generalist Chemistry and Environmental Protection Program Manager positions, which were occupied by Fiser, Sam Harvey, and E. S. Chandrasekaran ("Chandra"), the proposal included the creation of two Chemistry Program Manager positions. 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.[22]

There is no evidence from which a reasonable person could infer that discrimination was a motivating factor for the reorganization of Operations Support or the elimination of the Chemistry and Environmental Protection Program Manager positions, or the creation of new Chemistry Program Manager positions. Any

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22 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.

inference otherwise, based on alleged knowledge of past protected activity or on any other factor, is simply unsupportable. These were ongoing organizational decisions clearly made in furtherance of legitimate TVAN-wide objectives to downsize the organization.

Fiser helped draft the position description for the new PWR Chemistry Program Manager position. In fact, rather than being drafted in a way to facilitate eliminating Fiser, TVAN Human Resources (HR) first received a complaint from Harvey, Fiser's coemployee, that the position description had been written in such a way as to favor Fiser for the job.

8. TVA's process for establishing competitive levels. TVAN HR evaluated the new PWR and BWR Chemistry Program Manager positions and determined that as written, the new positions were significantly different from the existing positions. The process and criteria for evaluating these position descriptions was the same as that used for all other positions in Operations Support and the rest of Corporate TVAN which was impacted by the reorganization. That determination meant that under federal regulations, as applied by TVA, the incumbents of the existing positions did not have retention standing for the new positions and that under TVA practice, the new positions would be advertised to allow employees to apply and compete for the jobs.

As a federal agency, RIFs from TVA employment are governed by regulations promulgated by the Office of Personnel Management, 5 C.F.R. pt. 351. Thus, when conducting a reorganization which involves the establishment of positions with new job descriptions, TVA's practice is to first determine whether any such position should or should not be placed in the same competitive level as existing positions, 5 C.F.R. § 351.403. If the new position is in the same competitive level as an existing position, an incumbent could have retention standing with respect to the new position. Conversely, if a new position is not in the same competitive level as an

existing position, an incumbent would not have retention standing for the new position. An individual whose position is declared to be surplus, but who successfully competes for a different position would not remain in the same competitive level and would not be subject to a RIF. An individual who is unsuccessful in finding another position, would remain on the retention register and could be subject to a RIF. Generally, when a new position is on a different competitive level than an existing position, TVA treats the new position as vacant and fills such vacancies on a competitive basis.

TVA reads the OPM regulations as establishing the standard that TVA must use to determine which positions should be included in a competitive level (5 C.F.R. § 351.403). TVA reads the regulations to require it to use a test for inclusion which involves whether the positions are mutually interchangeable and the focus is "based on each employee's official position, not the employee's personal qualifications" (5 C.F.R. § 351.403(a)(1) and (2)). *Kline v. TVA*, 805 F. Supp. 545, 548 (E.D. Tenn. 1992), *aff'g* 46 M.S.P.R. 193 (1990) ("Whether two jobs are similar enough, in the respects specified by the regulation, to be in the same competitive level is determined by the position descriptions (PDs) which state the qualifications and duties required by those jobs."); *Estrin v. Social Security Admin.*, 24 M.S.P.R. 303, 307 (1984) ("[A]ppellant's ability to perform the duties of a specific position does not establish that the position is interchangeable, since it is the qualifications set forth in the official position description, not the qualifications of an employee, which determine the composition of the competitive level."); *Holliday v. Dep't of Army*, 12 M.S.P.R. 358, 362 (1982) ("The fact that appellant may have been able to perform the duties of both positions adequately does not establish their mutual interchangeability for it is the qualifications required by the duties of the position as set forth in the official position description, and not the personal qualifications possessed by a specific incumbent, that determine the composition of a competitive level. *See* FPM Chapter 351, subchapter 2-3a(2). Therefore, as noted by the presiding official, while the two

positions may function almost identically, the fact that one of them requires different and greater skills and training justifies separate competitive levels.").

Based on its interpretation of Merit Systems Protection Board (MSPB) cases, it is TVA's practice to use the last position description of record in determining an employee's competitive level. In *Townsel v. TVA*, 36 M.S.P.R. 356, 360 (1988), the employee, who had been reduced in force as an M-3 General Foreman, argued that he was actually "performing the duties of a Planner, M-3, a position not affected by the reduction in force, and that his competitive level should have been determined by his actual duties rather than his official position description." The MSPB upheld TVA's RIF of the employee, stating:

> The Board has long held that it is the official position occupied by an individual which determines the competitive level in which he is properly placed [36 M.S.P.R. at 360].

See generally PETER BROIDA, A GUIDE TO MERIT SYSTEMS PROTECTION BOARD LAW AND PRACTICE 1928-33 (1999) (copies of the cited pages are attached.). As discussed below at 57-58, even if TVA's interpretation was in error, what is important here is that TVA consistently and in good faith applied that interpretation.

9. The new PWR Chemistry Program Manager position. In this case, HR compared the position descriptions for the new PWR and BWR Chemistry Program Manager positions with the position descriptions for the existing Chemistry and Environmental Protection Program Manager positions. Ben Easley, the HR Consultant with responsibility for the Radiological Control and Chemistry and Environmental organizations, made the initial determination that they were significantly different than the old positions and were not on the same competitive level and that the incumbents did not have retention standing for the new positions, i.e., they did not have the right to rollover into the new jobs. He passed on the results of his evaluation to James E. Boyles, the HR Manager, who concurred. The consequence of HR's

determination that the new positions were not on the same competitive level as the old positions was that the new positions would be advertised for competitive selection on a VPA. The determination that the new positions were not on the same competitive level as the existing positions and that they should be posted for competitive selection was made solely by TVAN HR, and neither McGrath nor McArthur was responsible for making that decision.

At the December 10, 1999, predecisional enforcement conference the NRC Staff asked whether the PWR Chemistry Program Manager position should not be in the same competitive level as the previous Chemistry and Environmental Protection Program Manager position since the qualifications and responsibilities of the new position appeared to be a subset of the previous position. TVA pointed out that in order to be on the same competitive level the OPM standard as applied by TVA requires that the two positions must be mutually interchangeable. The fact that one position may include fewer responsibilities but more specialized qualifications defeats that interchangeability. The TVA Instruction on reductions defines competitive level and states:

> "Interchangeability" is a two-way street. The incumbent of one job must be able to perform satisfactorily the duties of the interchangeable job and vice versa. . . .
>
> This determination is made by comparing for each position the qualifications as stated in the official job description, the principal duties, and the standards for fully adequate performance of these elements. . . .
>
> In setting competitive levels, determinations are not based on the personal qualifications or performance levels of individual employees. The determinations must be based solely on the content of accurate, up-to-date job descriptions [at 14-15].

TVA's application of the test of mutual interchangeability in determining competitive levels has been upheld by the MSPB, the agency with responsibility for

reviewing the correct application of OPM's RIF regulations. For example in *Trahan v. TVA*, 31 M.S.P.R. 391 (1986), a TVA employee with the position description of Civil Engineer, SC-4, argued that his position should have been placed in the same competitive level as the position of Civil Engineer (Hanger), SC-4. The MSPB noted that the two positions were similar but that the latter position required additional specialized training. Based on its review of the position descriptions, the MSPB held that TVA had properly established the employee's competitive level (*id.* at 393). *See also Holliday v. Dep't of Army*, 12 M.S.P.R. at 362 holding that "mutual interchangeability" is required for positions to occupy the same competitive level.

Thus while an individual who possessed the qualifications required by the position description for the Chemistry and Environmental Protection Program Manager position might meet the qualifications set forth in the PWR Chemistry Program Manager position description position, the converse is not true. The fact that an individual met the qualifications in the PWR Chemistry Program Manager position description would not necessarily mean that individual had all of the qualifications required by the Chemistry and Environmental Protection Program Manager position description. That lack of mutual interchangeability between the two position descriptions precludes a finding that the positions were sufficiently similar to be on the same competitive level.

The lack of mutual interchangeability between the PWR Chemistry Program Manager and Chemistry and Environmental Protection Program Manager positions is further demonstrated by the history of those job functions. During a 1994 reorganization, the functions of the existing Chemistry Program Manager and Environmental Protection Program Manager positions were combined to create a new Chemistry and Environmental Protection Program Manager position. That new position was determined to be on a different competitive level than the existing positions and was advertised for competitive selection, *without objection by Fiser.*

Therefore, the requirement of mutual interchangeability would require that the Chemistry and Environmental Protection Program Manager position be on a different competitive level as the new PWR and BWR Chemistry Program Manager positions which were created in 1996.

Prior to a VPA for the new positions being posted, Fiser talked with Easley and Boyles in TVAN HR and threatened to file an ERA complaint with DOL if a VPA was posted for the new PWR Chemistry Program Manager position. He told them that the proposed position was the one he had been given as a result of the settlement of his 1993 DOL complaint and that he should not have to compete for the job.

As a result of Fiser's threat to file a DOL complaint, Boyles and Easley of TVAN HR again compared the new PWR Chemistry Program Manager position descriptions with the position descriptions for the existing Chemistry and Environmental Program Manager position. That evaluation confirmed their earlier determination that the new job was not on the same competitive level as the existing positions and should be posted for competitive selection. In addition, Boyles consulted with TVAN Labor Relations staff member Katherine J. Welch as to whether the settlement agreement of Fiser's 1993 DOL complaint guaranteed him continued employment or gave him any right to the proposed new position. Welch in turn consulted with TVA's Office of General Counsel (OGC) as to whether the settlement agreement gave Fiser a legal right to the new position. Both Welch and OGC advised that the settlement agreement did not guarantee Fiser that specific job or even continued employment. Further, Fiser had voluntarily abandoned the job awarded him by the settlement agreement when he applied for and was selected for a different job in 1994.

10. McArthur's placement into the RadChem Manager position. The NRC's February 7, 2000, letter states (at 3) that the rationale for placing

McArthur in the RadChem Manager position without posting was inconsistent with requiring Fiser to compete for the PWR Chemistry Program Manager position. That is incorrect. The NRC Staff recognized that McArthur "had previously performed the functions of the new position[ ]" (NRC Feb. 7, 2000, letter at 3). The decision that McArthur was entitled to the position was made by TVA HR and communicated to McGrath based on the fact that TVA's official personnel records show that McArthur's last official position description of record was in fact a position interchangeable with the RadChem Manager position description.

Although McArthur had been assigned as the Manager of Radiological Control in 1994, he was not issued a position description for that job. During the 1996 reorganization, TVAN HR used his most recent position description of record, Manager of Technical Programs, to establish his competitive level. TVA's practice of using the most recent position description of record is consistent with TVA's reading of MSPB precedent. *Bjerke v. Dep't of Educ.*, 25 M.S.P.R. 310 (1994), is on point. In that case, the appellant Bjerke was reduced from a GS-15 to a GS-14 in a RIF. He argued that Kermoian, who had greater length of service, was improperly placed in his GS-15 competitive level. Prior to the RIF, a classification survey determined that Kermoian, who was officially assigned as a GS-15, should have been classified at the GS-14 level. Before he could be reclassified, a moratorium was placed on downgrades. Both Kermoian and Bjerke "were detailed to various positions with unclassified duties while remaining in their official position descriptions of record at the GS-15 grade level" (*id.* at 311-12). The MSPB found both employees were properly placed in the same competitive level since "In the absence of some positive action by the proper authority to change his *official assignment of record*, Kermoian's position remained at the GS-15 level" (*id.* at 313). The MSPB also held that his assignment to other duties did not affect his competitive level since "*an employee,*

while detailed, as here, remains the official incumbent of his most recent position of record" (id.).

Griffin v. Dep't of Navy, 64 M.S.P.R. 561 (1994), is also directly on point. In that case the agency RIFed an employee it had placed in a competitive level based on the duties being performed by the employee while on a temporary promotion, rather than the duties of his permanent position. The MSPB held the RIF improper:

> An employee's competitive level in a RIF is based on his *official position of record* [citation omitted]. When an employee is detailed to or acting in a position, his competitive level is determined by his permanent position, and not the one to which he is detailed or in which he is acting [*id.* at 563].

See also Jicha v. Dep't of Navy, 65 M.S.P.R. 73, 77 (1994) ("Where an employee is detailed to or acting in a position, his competitive level is not determined by the position to which he is detailed or in which he is acting. . . . The competitive level in which an employee is placed is determined by the duties and qualifications required of the incumbent, as set forth in the official position description.").

Further, the Staff's argument about how McArthur was treated is also inapposite. As discussed below, how McArthur was treated says nothing regarding how Fiser was treated and does not create a logical inference of discrimination.

11. **The competitive selection for the PWR Program Chemistry Manager.** Based on the advice from Labor Relations and OGC and their own reevaluation of the new job description, TVAN HR posted a VPA for the Chemistry Program Manager PWR position. In addition to the VPA for that position, VPAs were posted for all five of the RadChem Staff positions on June 13, 1996, with a closing date of June 25, 1996. In accordance with TVA practice, they were physically posted on official bulletin boards and were electronically available on the TVA-wide network. Likewise, VPAs were posted for every new position created in the reorganization of Operations Support which was on a different competitive level than the existing

positions. Thus, Fiser was treated the same as every other employee in Operations Support whose position was not on the same competitive level as a new position.

In 1996, TVAN HR was using a process for selecting candidates for management and specialist positions that involved interviews of qualified candidates using structured job-related selection criteria. Accordingly, selection review boards (SRB) were used to make recommendations for a number of the management and specialist vacancies in Operations Support. With respect to the five new Corporate RadChem Staff positions, McArthur was the selecting supervisor as the Corporate RadChem Manager. McArthur, in conjunction with the RadChem managers from each of TVA's nuclear sites, Charles Kent from Sequoyah, Jack Cox from Watts Bar, and John Corey from Browns Ferry, proposed to use an SRB comprised of the three site RadChem managers to conduct interviews and make recommendations for the five Corporate RadChem Staff positions. That proposal was concurred in by TVAN HR and McGrath.

Their rationale was that the site RadChem organizations would be the customers of the Corporate RadChem staff and that as the site RadChem managers with responsibility for chemistry, radiological control, and radwaste functions at the plants, they would have the best insight as to the sites RadChem needs from the corporate organization. Contrary to the assertion in the Staff's brief in response to the motion for summary decision, their decision was not founded upon having a representative from each plant as an advocate for Fiser, Harvey, and Chandra.

Although six individuals, including Fiser, applied for the PWR Chemistry Program Manager position, McArthur determined that only three met the minimum qualifications for the job, Harvey, Chandra, and Fiser. Those three were the incumbents of the Chemistry and Environmental Protection Program Manager, PG-9, positions. Although all three were responsible for providing assistance as needed to all

three sites, at the time, each of them was assigned to provide assistance to primarily one site – Fiser to Watts Bar, Harvey to Sequoyah, and Chandra to Browns Ferry.

Since the SRB was to convene in Chattanooga and because of the difficulty in coordinating the schedules of the site RadChem managers, a decision was made to convene the SRB immediately following the monthly peer group meeting of the site and corporate RadChem managers. In addition, in order to coordinate the candidates' schedules, some of whom had applied on more than one of the RadChem staff positions, it made sense to have the SRB conduct all of the interviews for the five RadChem staff positions on the same day.

Several days before the SRB could convene, Cox, the Watts Bar RadChem Manager, informed McArthur of his inability to participate on the SRB because he could not stay late to complete the interviews. In addition, Cox indicated to McArthur his feeling that Fiser should be selected as the PWR Chemistry Program Manager. It was not feasible to reschedule the SRB because of the difficulties in coordinating the schedules of the RadChem managers and all of the candidates. Further, rescheduling the SRB to a different day would not have resolved Cox's conflict which was due in part to the fact that he had a farm near Watts Bar where he had to attend to daily chores after normal business hours.

McArthur informed McGrath of Cox's inability to serve on the SRB and of Cox's comment preferring Fiser's selection. Although McGrath thought that Cox's comment might have indicted a predisposition which could have precluded him from being unbiased if he had served on the SRB, it was not necessary to pursue that issue given Cox's schedule conflict. McArthur initially attempted to obtain the Watts Bar assistant plant manager as a replacement for Cox. When it was determined that Cox was unavailable, McGrath suggested that Heyward R. Rogers be asked to serve on the SRB. At the time, Rogers was a Technical Support Manager in Operations Support and was McArthur's peer. He had earlier worked at Sequoyah as the Technical

Support Manager and had interfaced with Fiser when he worked as the Chemistry and Environmental Superintendent. Based on Rogers' previous interactions with Fiser, he felt that Fiser was qualified for the position and would do well in the interview. When the SRB convened, Rogers had no knowledge of Fiser's 1993 DOL complaint, of Fiser's claimed protected activities in 1991-93, or of Fiser's 1996 DOL complaint. In short, Rogers was unaware of any protected activity by Fiser.

On July 18, 1996, after lunch and after the morning peer group meeting of the site and corporate RadChem managers, the SRB convened. Corey, Kent, and Rogers were each provided notebooks which included, among other things, the application of each candidate to be interviewed for the five RadChem staff positions and a list of proposed interview questions. McArthur, as the selecting supervisor, and Easley, the responsible HR consultant, had assembled the notebooks, and McArthur had identified questions he felt were pertinent to each of the new positions. Prior to the interviews actually taking place, the SRB members met and selected questions to use from those proposed by McArthur. With respect to the PWR Chemistry Program Manager selection, the SRB chose to ask eight of the sixteen questions proposed by McArthur and added a ninth question regarding molar ratio control.

In their brief in response to TVA's motion for summary decision, the NRC Staff asserted that the questions were selected to unfairly weight the selection towards someone with expertise in secondary chemistry as opposed to someone with expertise in primary chemistry. The NRC Staff claims this was done to favor Harvey who was an acknowledged expert in secondary chemistry and to discriminate against Fiser who was purportedly better in primary chemistry. They are wrong for two reasons. First, to the extent management was interested in secondary chemistry, it was because it is the more difficult area to maintain properly and is currently receiving attention in the industry due to its impact on steam generator longevity. Second, an examination of the questions posed by the SRB shows that they were not unfairly

weighted towards secondary chemistry. Fiser's claim that certain questions unfairly focused on Harvey's expertise in secondary chemistry only underscores the disparity between his qualifications and Harvey's. For example, Fiser identified the very first question—"What strengths do you have that will benefit this position?"—as favoring secondary chemistry and Harvey. His rationale was that such a question allowed Harvey to shine since he serves on industry groups and was involved in promulgating new standards and techniques for secondary chemistry that help protect steam generators.

After selecting the interview questions, the SRB interviewed the candidates for each of the RadChem staff positions. Each of the candidates was asked the same questions by the SRB. In fact, the same question was posed to each candidate by the same SRB member. The candidates' answers were scored separately by each SRB member without consulting the other members. After the interviews, the scores were totaled for all of the candidates. Based on the cumulative scores for the PWR Chemistry Program Manger position, the SRB ranked Fiser significantly lower than the other two candidates, Harvey and Chandra.[23] In fact, each SRB member ranked Fiser lower than the other two candidates on every single answer. Based on these rankings, on July 1, 1996, McArthur selected the two highest evaluated candidates, Harvey and Chandra, for the PWR and BWR Chemistry Program Manager positions, respectively.

It is significant that Rogers also rated Fiser lower than the other two candidates, and his ratings of Fiser were as low or lower relative to the other two SRB members. Since Rogers had no knowledge of Fiser's purported protected activity and no reason to discriminate against Fiser, his ratings are compelling evidence that the other SRB members were not biased by Fiser's protected activity. Further, the fact

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23 Harvey and Chandra also applied and were interviewed by the SRB for the BWR Chemistry Program Manager position. When the scores were totaled by the SRB, Chandra was the highest rated candidate, closely followed by Harvey.

that Rogers gave Fiser a relatively low ranking indicates that he too believed there was a legitimate reason not to select him. The law is clear in this regard. *TVA v. Frady*, 134 F.3d 372 (table), 1998 WL 25003, at 5 (6th Cir. Jan. 12, 1998) ("[I]t is significant that the TVA and union representatives ranked Frady at about the same level, as he concedes. . . . This appears to us to be compelling evidence that the TVA representatives were not biased by Plaintiff's 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.").

12. Fiser was not subjected to an adverse action. Although Fiser was not selected for one of the new positions and his previous position was to be eliminated effective the beginning of FY 1997, his TVA employment was not terminated. Instead, in accordance with TVA policy, he was given an August 30, 1996, memorandum notifying him that he would be reassigned to TVA's Services Organization. That organization was a relatively new organization within TVA intended to allow employees whose positions had been eliminated to continue their TVA employment. The Services Organization provided job opportunities both within and outside TVA in a manner similar to a contractor. The same memorandum that notified him that he was being reassigned to the Services Organization also notified Fiser that he would continue to have a TVA job at least through the end of FY 1997, September 30, 1997.

Even though TVA had decided to downsize its Corporate Chemistry organization and even though Fiser was only the third-ranked candidate for the PWR Chemistry Program Manager position, TVA made an unconditional offer of that position to him on September 27, 1996. However, Fiser rejected that position and chose to resign his employment and by doing so became eligible to receive a lump-sum payment equal to his salary for the entire 1997 fiscal year ending September 30, 1997, severance pay, and lump-sum payment for annual leave, totaling more than $100,000. If Fiser had accepted TVA's offer, he would have retained his employment in the

position he claimed and would not have lost even one day's salary. Thus, Fiser did not suffer any adverse action as a result of TVA's action, but instead chose to resign and receive large cash benefits.

13. **Fiser's 1996 DOL Complaint.** When Fiser learned that the new PWR Chemistry Program Manager position would be advertised for competition and even prior to the selection process, he filed a new DOL complaint. The thrust of that complaint was that the new PWR position is the same position which he then held and also is the position guaranteed to him by virtue of the agreement settling his earlier complaint. He was clearly wrong on both counts. First, as discussed above, TVAN HR had twice compared the new PWR Chemistry Manager position with the existing Chemistry and Environmental Protection Program Manager position and determined that they were significantly different. There is no question that in 1994 TVA did place Fiser in a Chemistry Program Manager position as required by the settlement agreement. However, as discussed above, only months after being confirmed in that position, Fiser vacated the agreed-upon position when he applied on and was selected for a different position, Chemistry and Environmental Protection Program Manager. Thus, by his own actions, the position Fiser occupied when he filed his 1996 DOL complaint was clearly not the same position set forth in the settlement agreement. Moreover, the settlement agreement made no guarantees that the position would continue in existence nor are there any guarantees of job security in the federal employment sector.

Fiser also failed to take into account the role he played in designing the new organization. He was responsible for drafting the position description for the PWR Chemistry Program Manager position and did so with an eye to his own qualifications. At the time that he did so, he was under the impression that Harvey, one of his principal competitors for the position, would be accepting a position to work at Sequoyah and therefore would not be applying for the corporate PWR Chemistry

Program Manager position. Fiser did not object to the creation of the new position until after he learned that Harvey would not be going to Sequoyah and also would be competing for the corporate PWR Chemistry Program Manager position.

14. Fiser was not subject to disparate treatment in the posting of the Chemistry Program Manager position for competition. The NRC Staff states that "the disparate treatment" of Fiser was a reason that "led the NRC to conclude" that TVA's articulated reasons for Fiser's nonselection "were pretextual" (NRC's Feb. 7, 2000, letter at 3). NRC Staff states that TVA's posting of the Chemistry Program Manager position for competition while filling the RadChem Manager position without posting "were inconsistent" since both "individuals had previously performed the functions of the new positions they were seeking" (*id.*). That is not the proper standard to determine if an employee has retention standing for a position.

As stated above, in order to determine if a position description should be posted, TVA is required to perform a determination of competitive level. That determination must be made by comparing an employee's position description of record with the new position description. In this case, there was no question that the Chemistry Program Manager position description was not sufficiently interchangeable with the position description of the incumbents of the Chemistry and Environmental Protection Program Manager positions so as to give them a right to the new job. That decision was made by TVAN HR, and neither McGrath nor McArthur was responsible for making that decision.

In addition, both TVA's OGC and TVAN Labor Relations were consulted with respect to whether TVAN should proceed with posting the position. None of these crucial facts were mentioned or in any way dealt with by NRC Staff in its finding of a violation in this case.[24] Furthermore, evidence will show that no one

24 This type of "selective analysis"—disregarding evidence which conflicts with the agency conclusions—"is prohibited under the standard set forth in Universal

in management prevailed on TVAN HR to write the position description so that posting and competition would be required. The fact that Fiser had *once* held a position similar to the new position is irrelevant since during the intervening years he was selected for and issued a position description for the noninterchangeable job.

The Staff asserts that Fiser was treated disparately than McArthur who was placed in the RadChem Manager position without competition. That claim is irrelevant and unavailing. First, as discussed above, TVAN HR evaluated the RadChem Manager position and determined it was substantially similar to McArthur's last official position description of record so as to give him retention standing. That determination was made using the same OPM regulations. The fact that McArthur's position was a senior management position meant that the comparison of management functions as opposed to technical qualifications was more important. The NRC Staff's argument that Grover could have been placed in that position simply because he was a minority is nonsense. TVA policy allowed a *qualified* minority to be selected for a position without competition, it does not provide for *any* minority to be selected without regard to qualifications. Second, even if the RadChem Manager's position should have been advertised, that is not evidence that the PWR Chemistry Program Manager position should not have been advertised. Third, even if the RadChem Manager's position should have been advertised, that does not establish that Fiser was subject to disparate treatment when more than twenty new jobs in Operations Support were advertised and many more were eliminated.

15. Harvey was not preselected to one of the Chemistry Program Manager positions. The NRC states that it was "likely that an individual was pre-selected" for the Chemistry Program Manager (PWR) position (NRC's Feb. 7, 2000,

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(. . . continued) Camera Corp. v. NLRB, 340 U.S. 474 (1951)]." N.L.R.B. v. Cutting, Inc., 701 F.2d at 665.

letter at 3). That conclusion based on two unrelated events in the spring of 1996 is contrary to the evidence and is also contrary to the selection process that was actually employed.

In early June 1996, Harvey and David Voeller, the Watts Bar Chemistry Manager, had a conversation in which Harvey said he would be working a lot closer with him in the future. Voeller, who may have borne some animosity toward Harvey, telephoned Fiser and informed him of the conversation. Based on nothing more, Fiser assumed that Harvey had been assured that he would be selected. Fiser complained of the matter to Grover who assured him that he knew of no preselection of Harvey. When the story got back to Harvey, he called Voeller and told him he would be working a lot closer with him, if he got the job, or not at all, if he did not get the job, in which case he said he would be contacting him for employment references. Harvey explains that his earlier remark to Voeller was based on his assumption he was the best candidate and his confidence in his abilities. Harvey denies that anyone ever assured him that he would be selected. Curiously, the OI investigation and report on which the NOV is based failed to include an interview with Harvey or to consider his explanation.

The Staff also asserts that the Sequoyah chemistry organization sought to have Harvey transferred to Sequoyah, that if the transfer had taken place neither Harvey nor Fiser would have lost their jobs, and McGrath blocked Harvey's transfer to keep him in the corporate organization and to ensure that he Fiser would have to compete against him. The Staff's argument conveniently ignores a number of undisputed facts. First, Sequoyah chemistry did not have a vacancy which it had been approved to fill. Second, any vacancy would have been required to have been posted for competitive selection. Third, McGrath checked with TVAN HR and learned that neither Harvey nor his position could be transferred to Sequoyah consistent with OPM regulations. Fourth, McGrath did indicate that if Sequoyah had an approved vacancy,

it could advertise the position and select Harvey, if he was the best qualified applicant. Finally, McGrath was concerned that giving Harvey a job at Sequoyah shortly before the reorganization could have been viewed as preselection of Harvey since he would have been protected from the possible impact of the reorganization of Operations Support. Even if Harvey had been transferred to a position at Sequoyah, the two corporate positions were still subject to competition, and were open to all qualified candidates in TVAN, including Harvey. Thus, there was no guarantee that Fiser would have been selected for the PWR Chemistry Program Manager position.

16. Discussion of Fiser's DOL complaint did not violate Section 50.7. In its February 7, 2000, letter, the NRC Staff indicated (at 3) that two of the three individuals on the SRB and the selecting official, McArthur, had knowledge of Fiser's 1993 DOL complaint. The letter also stated that the fact that certain of the SRB members discussed Fiser's protected activity prior to conducting the interviews cast "doubt on the impartiality of the selection process" (*id.*). Now the NRC Staff has apparently changed its position, arguing in its brief (at 56-57) in response to TVA's motion for summary decision that the mention of Fiser's DOL complaint prior to the SRB interviews is a per se violation of Section 50.7. Given the undisputed facts alluded to by the Staff, far from violating Section 50.7, the comment showed a sensitivity to being fair to Fiser and a lack of animus.

The evidence will show that Kent, one of the SRB members, remarked to McArthur that he should not participate in the SRB evaluations because Fiser had filed a DOL complaint implicating him. This situation is totally unlike the case cited by the NRC Staff (br. at 57), *Earwood v. Dart Container Corp.*, 93-STA-16 (Sec'y Dec. 7, 1994). In that case, the Secretary of Labor found that the employer made "improper references" (at 3) to the complainant and that there was "direct evidence that Dart acted with a retaliatory motive toward Complainant based on the STAA complaint he filed against them" (at 2). The Secretary distinguished *Smith v. TVA*,

90-ERA-12 (Sec'y Apr. 30, 1992), on the ground that the "alleged blacklist" in that case "did not contain 'language or instructions detrimental to Complainant' and was not used for a discriminatory purpose" (at 4 n.1). Thus, instead of standing for the proposition that mere mention of protected activity is a per se violation, *Earwood* underscores that there must be "discriminatory purpose" with "language or instructions detrimental to the Complainant."

To our knowledge, the NRC has not previously taken the position that mere mention of protected activity is a per se violation of Section 50.7. Indeed, the NRC has recommended against Section 50.7 enforcement where management examines the situation of an employee who has engaged in protected activity in order to ensure fairness. The March 12, 1999, *Report of Review* by the Millstone Independent Review Team (MIRT), analyzes NRC OI Case No. 1-96-007. The report concluded that there was not sufficient evidence to support a finding of a violation of Section 50.7. That case involved a workforce reduction in which management reviewed the situation of certain employees who had engaged in protected activity "to ensure that they had not been targeted specifically for reduction" (OI Report at 13). As in the MIRT report, Kent's comment was intended to ensure fairness to Fiser. He did not relate any information that was not already known. Instead, his suggestion that McArthur not participate as an SRB evaluator was made without "discriminatory purpose" to improve the fairness of the process.

It is TVA's position, based on the evidence to be introduced at the hearing, that the NRC Staff will be unable to meet its burden to prove discrimination or a violation of Section 50.7.

ARGUMENT

I

The Governing Legal Standards Under 10 C.F.R. § 50.7

A. This is a *de novo* proceeding in which the NRC Staff has the burden of proof.

In an NRC hearing on an enforcement action, the NRC Staff has the burden to establish by a preponderance of the evidence that the enforcement order (imposing the civil penalty) is justified. *See* 10 C.F.R. § 2.732 (2001). This is by its nature a *de novo* review. The process was explained by the NRC's Appeal Board in *Radiation Tech., Inc.,* ALAB-567, 10 NRC 533, 536-37 (1979):

> The Director [of Enforcement] is not the ultimate fact finder in civil penalty matters. Commission regulations afford one from whom a civil penalty is sought the right to a hearing on the charges against it. 10 CFR 2.205(d) and (e). At that hearing, the Director must prove his allegations by a preponderance of the reliable, probative, and substantial evidence [footnote omitted, citing 5 U.S.C.§ 556(d) and 10 C.F.R. § 2.732]. It is the presiding officer at that hearing, not the Director, who finally determines on the basis of the hearing record whether the charges are sustained and civil penalties warranted. 10 CFR 2.205(f) [footnote omitted, explaining that the presiding officer's decision is also subject to review by the Commission]. *Cf., Brennan v. Occupational Safety and Health Review Com'n*, 487 F.2d 438, 441-42 (8th Cir. 1973) (Secretary of Labor's proposed civil penalties under the Occupational Safety and Health Act final where accepted but subject to an administrative hearing and *de novo* review if contested).

B. Section 211 burdens should apply.

In an enforcement case, the NRC Staff is a party and carries the burden of persuasion to establish that the enforcement order is justified. *See Radiation Tech., Inc.,* ALAB-567, 10 NRC 533, 536-37. In the case of an order imposing a civil penalty, the NRC Staff must establish that the violation cited occurred and that the civil penalty is consistent with NRC's Enforcement Policy. According to the Appeal Board in *Radiation Technology,* the Staff must prove its allegations by a preponderance of the

reliable, probative, and substantial evidence. *See also* 10 C.F.R. § 2.732. Consistent with this burden, under established federal employment discrimination law and NRC regulations, the Staff bears the ultimate burden in this case to prove by a preponderance of the evidence that a violation of 10 C.F.R. § 50.7 occurred. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 (1980) (in cases under Title VII of the Civil Rights Act of 1964, plaintiff bears ultimate burden); 10 C.F.R. 2.732 ("the proponent of an order has the burden of proof").

The legal standard used to determine if the NRC Staff has met this ultimate burden raises a matter of first impression: No Licensing Board has previously interpreted the legal standards applicable in a hearing on an enforcement action under Section 50.7. Nevertheless, a substantial body of federal law concerning discrimination in employment has developed in recent decades. This precedent should govern and inform this Board's decisionmaking under Section 50.7, a point with which the NRC Staff—judging from its Response to TVA's Motion for Summary Decision—does not disagree. In particular, precedent developed under Section 211 (known at the time of the promulgation of Section 50.7 in 1982 as "Section 210") of the Energy Reorganization Act of 1974, *as amended*, 42 U.S.C. § 5851, is particularly persuasive as to the legal standards applicable in this Section 50.7 proceeding.

Indeed, Section 50.7 was promulgated in 1982 to "implement" Section 210" (the statutory predecessor to what is now Section 211), to "complement" the DOL's processing of discrimination claims, and to "announce the statutory prohibition of discrimination of the type described in Section 210." 47 Fed. Reg. 30,452 (July 14, 1982). Indeed, Section 50.7 tracks the language of the original Section 210. *See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, 21 NRC 1759, 1764, DD-85-9 (1985) ("The Commission's current employee protection rules, including § 50.7, are

derived from § 210 of the [ERA].")[25] The NRC expressly cited Section 210 as authority for the regulation. 47 Fed. Reg. 30,452, at 30,456 (final rule); 45 Fed. Reg. 15,184, at 15,187 (Mar. 10, 1980) (proposed rule). Further, in at least one specific instance, the Commission acknowledged that it could not depart from Section 210 because it lacked authority to do so. The NRC rejected the suggestion that it penalize employees who supply false information about a discrimination claim because "the statutory authority of the Commission under Section 210" did not so provide. 47 Fed. Reg. 30,452, 30,454. At least at that time, the Commission acknowledged that it was barred from departing from what Section 210 expressly authorized.[26]

As a matter of law, the NRC cannot incorporate Section 210/211 into its own regulations and then apply that provision inconsistently with the statute. In particular, the NRC cannot apply the law (via a regulation) in a manner that results in different ultimate outcomes—*i.e.*, in a way that subjects licensees to Federal civil sanctions where it otherwise escapes has no liability under Section 211.

Where, as in Section 211, Congress has entrusted the administration of a remedial scheme to an agency (DOL) for addressing employment discrimination, another federal agency (NRC) has no authority to extend that scheme by providing new

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25 Congress' enactment of 210, which is now Section 211, raises two important issues concerning the implementation of Section 50.7. First, the fact that Congress entrusted DOL, the expert in employment matters, to apply the standards in Section 210/211, suggests that Congress did not intend for the NRC to apply more restrictive employment standards. Second, as a matter of administrative procedure law, the NRC may not adopt the substance of Section 210/211 as a regulation and then apply some other standard without the use of a rulemaking. The Staff appears to suggest, erroneously, that it may interpret Section 50.7 regardless of how the statute is applied.

26 The NRC Staff has also previously recognized and applied Sections 210/211. In its 1994 "Review Team Report, Reassessment of NRC's Program for Protecting Allegers Against Retaliation," the Review Team wrote (at App. B-5): "The NRC Staff's position is that the same burden of proof that would apply in DOL proceedings either under Section 210 or Section 211 (depending on which statute was in effect at the time of the violation) apply in NRC proceedings."

remedies or imposing new burdens on the regulated parties. Addressing the most familiar of the federal employment discrimination laws, Title VII of the Civil Rights Act of 1964, the Supreme Court has emphasized that the "comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent" that the scheme not be modified by the addition of new rights or remedies. *Northwest Airlines v. Transp. Workers Union*, 451 U.S. 77, 93-94 (1981) (refusing to alter statutory scheme by reading into Title VII a right of a defendant to seek contribution from a third party who participated in discrimination); *Brown v. GSA*, 425 U.S. 820, 828 (1976) (comprehensive remedial statutes are given preclusive effect which bars plaintiffs from seeking relief outside the remedial framework). Section 211's comprehensive scheme—its precise application to NRC licensees, specific proof mechanisms, delegation to DOL to adjudicate claims, enumeration of available remedies, and substantive terms drawn from long-standing federal labor and employment law—precludes any other federal body, including the NRC, from imposing greater burdens upon licensees by eliminating substantive elements or altering the statutorily mandated burdens of proof.

C. Section 50.7 and Section 211 require more than inferences.

Section 50.7 was expressly based upon the original Section 210 and federal employment discrimination law. Like other federal law, Section 50.7(a) establishes a causal requirement by proscribing "[d]iscrimination . . . against an employee for engaging in certain protected activities . . . ." 10 C.F.R. § 50.7(a). Section 50.7(d) even more explicitly provides that a violation occurs only "when the adverse action occurs ***because*** the employee has engaged in protected activity." Section 50.7 accordingly requires proof of intent by the employer to take adverse action against an employee in retaliation for engaging in protected activity, and proof that the adverse action was the result of such intent.

Section 50.7(d) further recognizes that "[a]ctions taken by an employer, or others, which adversely affect an employee ***may be predicated*** upon non-discriminatory grounds." This provision establishes that employers are not precluded from taking employment actions for legitimate, business reasons. Accordingly, Section 50.7 as applied may not impede an employer's right, preserved under subsection 50.7(d), to take appropriate employment actions when there is a legitimate reason for such actions.

Like the complainant in a Section 211 case, or even a Title VII case, the NRC Staff here may attempt to prove discrimination because of protected activity by using one of two paths: (1) by putting forward "direct evidence" that the defendant had a discriminatory motive in carrying out its adverse employment action; or (2) if no direct evidence exists, by using the indirect or circumstantial burden shifting approach. *Bartlik v. Dep't of Labor*, 73 F.3d 100, 103 (6th Cir. 1996) (holding that to state a claim under the ERA, an employee must establish that the employer retaliated "because" the employee engaged in a protected activity). Just this week, the Supreme Court has reaffirmed that a plaintiff must prove a discrimination case using either "the *McDonnell Douglas* framework" or through the use of "direct evidence of discrimination" (*Swierkiewicz v. Sorema N.A.*, 534 U.S. __, slip op. at 5 (Feb. 26, 2002) (copy attached)). ("With direct evidence, the existence of unlawful discrimination is 'patent.'") (*Id.* at 103 n.5; internal quotations and citations omitted). The NRC Staff in this case does not maintain there is direct evidence of unlawful discrimination. Thus, the NRC must rely on the indirect method of proof.

Under the *McDonnell Douglas* or indirect evidence method, the NRC Staff must first establish a prima facie case of discrimination. *Bartlik*, 73 F.3d at 103. To establish a prima facie case of discrimination, the Staff must establish that (1) TVA is governed by Section 50.7; (2) the employee, Fiser, engaged in protected activity as defined in Section 50.7; (3) which was known to the pertinent TVA decisionmakers;

and (4) because of engaging in such activity, the employee's terms and conditions of employment were adversely affected. *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926 (11th Cir. 1995). The Staff has the burden to prove a prima facie case by a preponderance of the evidence. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. at 252-53; *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510 & n.3 (1993). The NRC Staff cannot meet its burden to prove that the adverse action was motivated by the protected activity by the mere fact that the decisionmaker is aware of the protected activity. As held in *Kelly v. Drexel Univ.*, 94 F.3d 102, 109 (3d Cir. 1996):

> [T]he mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that that perception caused the adverse employment action. . . . If we held otherwise, then by a parity of reasoning, a person in a group protected from adverse employment actions *i.e.*, anyone, could establish a *prima facie* discrimination case merely by demonstrating some adverse action against the individual and that the employer was aware that the employee's characteristic placed him or her in the group, *e.g.*, race, age, or sex.

See also Sutton v. Lader, 185 F.3d 1203, 1208 n.6 (11th Cir. 1999). In addition, in a pretext case, a finding of discrimination requires more than mere inference drawn from circumstantial evidence, such as temporal proximity. *Dysert v. Florida Power Corp.*, 93-ERA-21, at 4 (Sec'y Aug. 7, 1995), *aff'd sub nom. Dysert v. Sec'y of Labor*, 105 F.3d 607 (11th Cir. 1997).

Once the Staff establishes a prima facie case, the burden of production (but not the burden of persuasion) shifts to TVA to *articulate* a nondiscriminatory reason for its adverse employment action. If TVA provides such a reason, the NRC Staff then must show by a preponderance of the evidence that the proffered reason for discharge actually is a pretext intended to hide unlawful discrimination. As noted, while the burden of production shifts back and forth between the parties under this indirect proof framework, the ultimate burden of proving that the employer

discriminated against the employee because of his or her protected activity remains at all times with the NRC Staff. *See St. Mary's Honor Ctr.*, 509 U.S. at 511 ("the Title VII plaintiff at all times bears the 'ultimate burden of persuasion.'").

To show pretext, the NRC must prove *by a preponderance of the evidence* that TVA's proffered legitimate reason for taking the adverse employment action is pretextual. In the Sixth Circuit, the court with jurisdiction to review any decision in this proceeding, a plaintiff may prove pretext in one of three ways—by showing that the proffered reason either (1) had no basis in fact, (2) did not actually motivate its decision, or (3) was insufficient to motivate the decision. *See Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994); *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 883 (6th Cir. 1996). In effect, the NRC "must demonstrate that the employer's reasons (*each of them,* if the reasons independently caused [the] employer to take the action it did) are not true." *Smith v. Chrysler Corp.*, 155 F.3d 799, 809 (6th Cir. 1998) (*quoting Kariotis v. Navistar Int'l Trans. Corp.*, 131 F.3d 672, 676 (7th Cir. 1997)). Further, where the plaintiff claims that the employer's reason is not the "actual or true reason for the adverse action, the plaintiff cannot rely on evidence used to make a prima facie showing, but must introduce additional evidence of discrimination". (*Lovas v. Huntington Nat'l Bank*, No. 99-3213, 2000 WL 712355 (6th Cir. May 22, 2000)). *See Manzer*, 29 F.3d at 1084.

The Staff's legal analysis in this case is fundamentally flawed. The Staff's response to TVA's motion for summary decision analyzes this case as a "pretext case"—*i.e.*, that the reasons offered by TVA for the actions it took regarding Fiser were not the real motive. However, the NOV issued in this case was based on a lesser finding-that the actions against Fiser "were due in part to his participation in protected activities" (Feb. 7, 2000, letter at 3). The NOV's analysis at least inferentially admits that TVA's articulated motives were indeed true, but not the sole reason for its actions

with respect to Fiser. *See* NOV ("TVA eliminated Mr. Fiser's position of Chemistry and Environmental Protection Program Manager, Operations Support. TVA took these actions 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, at least in part, in retaliation for Mr. Fiser's involvement in protected activities" (at 1)). This analysis is inconsistent with the *McDonnell Douglas* analysis since discrimination cannot be found unless the employer's articulated nondiscriminatory reason is found to be pretextual, *i.e.,* the acceptance of the employer's reason precludes a finding of discrimination. The NRC Staff's analysis is also inconsistent with the second approach of proving discrimination by "direct evidence" since there is no "direct evidence" of discrimination to support such a finding.

However, even if the NRC Staff could prove, which it cannot, that protected activity was a "part" of the reason for the adverse action, that is not the end of the analysis. Instead, even with such a finding, TVA has the opportunity to establish that it would have taken the same actions for its articulated reasons despite some individuals somewhere in the organization having been motivated "in part" by protected activity. 10 C.F.R. § 50.7(d). The "in part" test, used in the NOV and the NRC Staff's insistence that TVA prove that the adverse action was based "solely" on nondiscriminatory reasons, erroneously *compels* the conclusion that an employer violates Section 50.7 if someone in the decisionmaking chain is motivated in part by a discriminatory animus, even if the employer would have taken the same adverse employment action regardless. Such a rule minimizes the NRC's true burden in the case: to prove that the adverse actions truly did occur "because of protected activity," and it also reads Section 50.7(d) out of the regulation.

Indeed, under Section 211 as it existed at the time Section 50.7 was promulgated by the NRC, an employer could escape liability, not just avoid monetary relief, by proving that it would have taken the action regardless of the protected

activity. Although Section 211 was amended in 1992 by the Energy Policy Act of 1992, Pub. L. 102-486, 106 Stat. 3124, to change this result, the NRC has not undertaken a rulemaking to amend Section 50.7. Therefore, the burdens and interpretations of Section 211 prior to its 1992 amendments are the appropriate standard by which to measure Section 50.7.[27]

Thus, even if the NRC proves by a preponderance of the evidence that protected activity was a reason for the adverse action, TVA escapes liability if it proves that it would have taken the action regardless of the protected activity. Thus, there would be no violation because the adverse action was "predicated on non-discriminatory grounds," as allowed under Section 50.7(d). *See Price Waterhouse v. Hopkins,* 490 U.S. 228, 258 (1989) ("defendant may avoid a *finding of liability*" if it proves by a preponderance of the evidence that it would have made the decision without regard to the protected characteristic).

This is consistent with the NRC's decision in a proceeding involving Northern States Power. In the Section 211 case of *Yule v. Burns Int'l Sec. Serv.*, No. 93-ERA-12 (June 24, 1993), the DOL Administrative Law Judge initially determined that the employer, a subcontractor for Northern States Power Co., had

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27 The APA, 5 U.S.C. § 553(c), requires that administrative agencies publish a notice of a proposed rulemaking in the Federal Register and give interested persons an opportunity to comment on the rulemaking. The NRC cannot effectively amend its regulations without complying with these notice and comment requirements and may not change published regulations in ad hoc enforcement proceedings (Harley v. Lyng, 653 F. Supp. 266, 276-77 (E.D. Pa. 1986)). Stated another way, an agency must follow its own rules; a failure to do so may be challenged under the standards set forth in 5 U.S.C. § 706 (2000). Webster v. Doe, 486 U.S. 592, 602 n.7 (1988); Service v. Dulles, 354 U.S. 363 (1957). Moreover, where an interpretation of a regulation is made for the first time, fair notice must be given before subjecting a party to enforcement. Under such circumstances, fair notice means that "by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform." Gen. Elec. Co. v. U.S. Envt'l Prot. Agency, 53 F.3d 1324, 1329 (D.C. Cir. 1995).

discriminated against a security guard. The NRC then issued a Section 50.7 NOV against Northern States Power (EA-93-192, issued on January 26, 1994). On appeal at DOL, the Secretary of Labor held that, while the employer may have been motivated in part by the guard's engagement in protected activity, the employer showed that it nevertheless would have terminated the guard (Final Decision and Order, May 24, 1995). The NRC subsequently withdrew its NOV on September 11, 1995, on the grounds that in the DOL case, the employer, Burns, "proved that it legitimately would have discharged [Yule] even if she had not raised any concerns about nuclear safety." See letter of Hubert J. Miller, NRC Regional Administrator, Region III, dated September 11, 1995, to Northern States Power Company.

II

The NRC Staff Cannot Bear Its Burden To Prove Discrimination.

In this case, the NRC Staff cannot make a "prima facie showing" (42 U.S.C. § 5851(b)(3)(A), (B)) 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 TVAN-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 McGrath and 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, 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*, Apr. 7, 1993, at 3, 10), 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" (Feb. 7, 2000, letter at 3) 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" (*id.*). 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 Sixth Circuit has upheld the dismissal of a retaliation case based on the plaintiff's failure to any direct evidence to prove that the employee knew of the plaintiff's protected activity. In that case, plaintiff attempted to prove that the employer must have known based on the "'gossipy' work environment." *Peterson v. Dialysis Clinic, Inc.*, No. 96-6093, 1997 U.S. App. LEXIS 26254, at *8 (6th Cir. Sept. 8, 1997). *See also McKenzie v. BellSouth Telecomm., Inc.*, 219 F.3d 508, 518 (6th Cir. 2000) ("McKenzie has alleged no evidence that supports that her employer, BellSouth, was aware of her protected activity").

There is no evidence whatsoever, direct, circumstantial, or inferential, to support a notion that McArthur harbored a retaliatory animus towards Fiser. Although McArthur was aware of Fiser's 1993 DOL complaint no later than May 1994, an inference based on proximity between that DOL complaint and adverse action cannot stand as a matter of law. The Supreme Court held in *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 121 S.Ct. 1508, 1511 (2001), that where "temporal proximity" is relied upon, "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. Frady*, 134 F.3d 372 (table) 1998 WL 25003, at 5 (6th Cir. Jan. 12, 1998), 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. *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'"). The Secretary of Labor has held that the proximity in time of the protected activity and the adverse action can give rise to an inference of discriminatory intent. In *Mandreger v. Detroit Edison Co.*, No. 88-ERA-17 (Sec'y Mar. 30, 1994), the Secretary held that six months between an initial internal complaint and a job transfer constituted a sufficient temporal nexus between protected activity and adverse action to raise the inference of causation. However, the Secretary has gone on to hold that where nearly a year had elapsed between a complainant's filing of several reports and the decision to terminate his employment, the evidence was insufficient to establish that the termination decision was inspired by the protected activity. *Evans v. Washington Pub. Power Supply Sys.*, No. 95-ERA-52 (ARB July 30, 1996). *See also Varnadore v. Oak Ridge Nat'l Lab.*, Nos. 92-CAA-2 and 5 and 93-CAA-1, slip op. at 87 (Sec'y Jan. 26, 1996) ("A finding that adverse action closely followed protected activity gives rise to a reasonable presumption that the protected activity caused the adverse action. However, if the adverse action is distant in time from the protected activity, doubt arises as to whether the alleged retaliator could have still been acting out of retaliatory motives."). In a case against TVA, the Secretary has also held that the passage of a year and a half between the protected activity and the adverse action is too long to give rise to an inference of discrimination. *Dillard v. TVA*, No. 90-ERA-31 (Sec'y July 21, 1994). In this case, more than four years had passed between Fiser's claimed protected activity, his January 1992 default, and the 1996 reorganization and elimination of his position. Clearly, the passage of time negates any inference of discrimination. In the present case there is insufficient temporal proximity to draw any inference of discrimination.

The inference of discrimination that the NRC Staff would draw based on the "temporal proximity between the appointment of [McGrath and McArthur] as Fiser's supervisors and his non-selection in July 1996" (Feb. 7, 2000, letter at 3), is also factually and legally flawed. The Supreme Court in *Clark County Sch. Dist. v. Breeden* 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 (121 S. Ct. at 1511). *See also TVA v. Frady*, 1998 WL 25003, at *5 n.1, holding that "the more appropriate date to use" in measuring temporal proximity is the date of the earlier DOL complaint. We are not aware of any employment law case inferring retaliatory motive based on "temporal proximity" by, in effect allowing the suspension of the measurement of time while an alleged discriminating official is not in the chain of command. It strains credulity to believe that either McGrath or McArthur was so strongly motivated, yet so patient, in their alleged retaliatory animus to wait as long as the Staff assumes they did.

The NRC Staff's measurement of temporal proximity based on when McGrath and McArthur became Fiser's superiors is also factually flawed. As we pointed out above, when Fiser settled his 1993 DOL complaint on April 7, 1994, he returned to Corporate Chemistry where McArthur continued to be his second level supervisor until a reorganization in August 1994. During that time, McArthur also served on an SRB that selected Fiser for the Chemistry and Environmental Protection Program Manager position. Thus, more than two years passed from the date that Fiser returned to McArthur's supervision and the 1996 reorganization which is alleged to be discriminatory. Further, McGrath was officially designated the Acting General Manager of Operations Support in October 1995, more than 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 McArthur had been motivated to

discriminate against Fiser, they had ample opportunity to do so much earlier. Moreover, even where there is a "temporal proximity" between protected activity and adverse action, it is evidence of a cause and effect relationship; it is not evidence that management's articulated reason is pretextual. There simply is no evidence and the NRC cannot prove by a preponderance of evidence that TVA's stated reasons for the employment decisions are pretext.

Next, there is no evidence that the independent SRB's decision was motivated by discrimination. As discussed above, the fact that Rogers knew nothing of Fiser's DOL complaint or other claimed protected activity and scored him lower than the other two candidates shows that the other members of the SRB were acting without discriminatory animus.

III

TVA Had Legitimate Nondiscriminatory Reasons for Its Actions.

Finally, even if the Staff could prove a prima facie case, TVA had legitimate nondiscriminatory reasons for the actions it took. TVA's 1996 reorganization and Fiser's nonselection were undertaken without regard to any 1992 protected activity in which he may have engaged. Even where a complainant has engaged in protected activity, that does not obligate TVA to confer special privileges upon him. Rather, his alleged protected activity is irrelevant where TVA's decisionmakers had nondiscriminatory reasons for their actions, as they did here.

Here, the facts are indisputable that TVA was reorganizing its entire Nuclear Power organization, including its corporate Chemistry organization, to be more productive, hold rates stable, and be competitive in the electric utility industry. "Where the employer has a legitimate management reason for taking adverse action

against the employee, the employer is not required to hold off such action simply because the employee is engaged in a protected activity." *Ashcraft v. University of Cincinnati*, No. 83-ERA-7, dec. at 18 (Nov. 1, 1984); *Dunham v. Brown & Root, Inc.*, No. 84-ERA-1, rec. dec. at 13 (Nov. 30, 1984), *adopted by the Secretary* (June 21, 1985), *aff'd,* 794 F.2d 1037 (5th Cir. 1986). In defending to the Eleventh Circuit the Secretary's final order in TVA's favor in *Sellers v. TVA*, No. 90-ERA-14 (Apr. 18, 1991), *aff'd sub nom. Sellers v. Martin & TVA*, No. 91-7474 (Mar. 30, 1992), the Deputy Solicitor of Labor stated to the court:

> An "employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all as long as its action is not for a discriminatory reason." The employee who is incompetent, or insubordinate, or has become inefficient cannot use his protected activity as a shield against a discharge for non-discriminatory reasons [br. at 22; citations omitted].

The Deputy Solicitor added:

> In enacting anti-discrimination provisions such as the one involved here, Congress did not seek "to tie the hands of employers in the objective selection and control of personnel" [br. at 30; citations omitted; cited pages attached].

Since protected activity does not shield an employee against a "discharge for non-discriminatory reasons," it is clear that reorganizing a workforce, as was done here, is not wrongful discrimination. Simply stated, the record does not contain any facts to support an inference that the legitimate reasons for TVA's reorganization and nonselection of complainant were a pretext for discrimination under the two-prong test set by *St. Mary's Honor Ctr.*, 509 U.S. at 515: "[A] reason cannot be proved to be 'a pretext ***for discrimination***' unless it is shown ***both*** that the reason was false, ***and*** that discrimination was the real reason" (emphasis by the Court).

Indeed, whether TVA in fact needed one fewer Chemistry Program Manager, measured by "objective" standards or the standards of another decisionmaker, is irrelevant. "What is relevant is that TVA, in fact, acted on its good

faith belief" in the need for its actions, and there is no evidence to the contrary. *Pesterfield v. TVA*, 941 F.2d 437, 443 (6th Cir. 1991). Other decisions are in accord. *See, e.g., Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1186-87 (11th Cir. 1984); *Jones v. Orleans Parish Sch. Bd.*, 679 F.2d 32, 38, *modified on other grounds*, 688 F.2d 342 (5th Cir. 1982), *cert. denied*, 461 U.S. 951 (1983) ("Whether the Board was wrong in believing that Jones had abandoned his job is irrelevant to the Title VII claim as long as the belief, rather than racial animus, was the basis of the discharge."); *Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025, 1036 (5th Cir. 1980) ("[W]hether HCCAA was wrong in its determination that Jefferies acted in violation of HCCAA guidelines . . . is irrelevant. . . . [W]here an employer ***wrongly*** believes an employee has violated company policy, it does not discriminate in violation of Title VII if it acts on that belief" (emphasis in original).); *Williams v. Southwestern Bell Tel. Co.*, 718 F.2d 715, 718 (5th Cir. 1983) ("The trier of fact is to determine the defendant's intent, not adjudicate the merits of the facts or suspicions upon which it is predicated."); *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1116 (2d Cir. 1988) ("[T]he reasons tendered need not be well-advised, but merely truthful."); *Fahie v. Thornburgh*, 746 F. Supp. 310, 315 (S.D.N.Y. 1990) ("[T]he Bureau's honestly held, although ***erroneous***, conviction that [plaintiff] was not a good employee is a legitimate ground for [his] dismissal.").

CONCLUSION

Based on the foregoing, the NRC will be unable to carry its burden of proof and, following the introduction of all of the evidence, a decision should be entered in TVA's favor dismissing the NOV and denying the imposition of a civil penalty.

Respectfully submitted,

March 1, 2002

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief, together with the identified attachments, has been served by regular mail on the persons listed below. Copies of the brief only have also been sent by e-mail to those persons listed below with e-mail addresses.

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This 1st day of March, 2002.

Brent R. Marquand
Attorney for Tennessee Valley Authority

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

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)

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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

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)

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

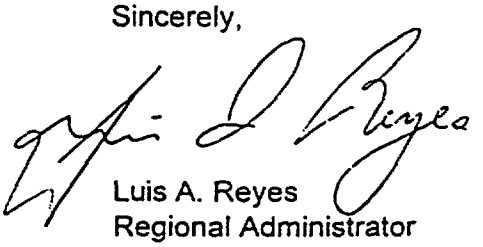
Action in accordance with the civil penalty assessment process described in Section VI.B.2 of the Enforcement Policy. No credit was determined to be warranted for Identification, because this violation was identified by the NRC. Corrective actions presented by TVA at the conference included various employee 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:
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
6A Lookout Place
1101 Market Street
Chattanooga, TN 37402-2801
Electronic Mail Distribution

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

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		
FTV	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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Hamilton County Courthouse
Chattanooga, TN 37402-2801

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

(Cite as: 2000 WL 712355 (6th Cir.(Ohio)))

Only the Westlaw citation is currently available.

United States Court of Appeals, Sixth Circuit.

Marie A. LOVAS, Plaintiff-Appellant,
v.
HUNTINGTON NATIONAL BANK, Defendant-Appellee.

No. 99-3213.

May 22, 2000.

On Appeal from the United States District Court for the Northern District of Ohio.

Before NORRIS, MOORE, and COLE, Circuit Judges.

OPINION

COLE, Circuit Judge.

*1 Plaintiff, Marie A. Lovas, was terminated in a reduction-in-force by the defendant, Huntington National Bank ("Huntington"). Lovas alleged that Huntington discriminated against her based on age and sex in violation of the Age Discrimination in Employment Act, 29 U.S .C. § 621 et seq.; Title VII, 42 U.S.C. § 2000(e) et seq.; Ohio Rev.Code § § 4112 and 4101.17 and alleged several breaches of Ohio contract and tort law. The district court granted summary judgment in favor of Huntington, finding that Lovas failed to establish a prima facie case of age or sex discrimination and also failed to show that Huntington's proffered reason for the termination was pretextual. For the following reasons, we AFFIRM the district court's grant of summary judgment in favor of Huntington.

I.

Lovas began working at First National Bank of Burton ("FNB") in the bookkeeping and operations areas on February 12, 1967. In January 1981, FNB merged with Huntington and Lovas was promoted to Operations Manager, an officer position. As Operations Manager, Lovas managed accounting employees and created operational plans and audits. Lovas received consistent performance evaluations of "meets expectations" throughout her employment at Huntington.

Following the 1981 merger, Huntington transferred operations-related functions from the individual bank branches to centralized centers, reducing the need for operations-related staff at each branch. In addition, computer systems reduced the need for processing staff at each branch. By 1991, the necessary operations' staff in the Burton office fell from over a dozen employees to one--Lovas.

In 1991, William Hoag was assigned as City Executive for Huntington in Burton overseeing the five branches within Geauga County. Also in 1991, Hoag installed Charles Bixler as Manager of retail banking operations, supervising operations in the Huntington branches. Although Lovas frequently worked with Hoag, she reported directly to Bixler, who evaluated her performance.

In 1994, due to the reduction in operations-related work, Lovas was assigned the position of City Office Compliance Officer/Operations Specialist in charge of reports for installment loans and the remaining operations' functions in the Burton office. On internal Huntington forms, Bixler designated Lovas's new position as a demotion. Although Lovas's salary remained the same, her salary grade was lowered and she considered the new position a demotion. Hoag considered Lovas's new duties an alternative to eliminating her position.

In 1995, Huntington moved the installment loan compliance process from the Burton branch to a centralized center in Dover, Ohio. Huntington's removal of the compliance process eliminated the "city compliance" portion of Lovas's position, leaving only the "operations specialist" duties. Huntington also instructed Hoag to reduce salary,

advertising expenses, and charitable contributions within the Geauga County offices. As part of this reduction, Hoag entirely eliminated Lovas's " operations specialist" position due to a lack of work.

*2 Hoag spoke with Human Resources representative Sandra Clarke about eliminating Lovas's position and indicated that he and Bixler would assume Lovas's remaining operations specialist duties. Although Hoag designated Lovas's position for elimination, the human resources department deemed both Lovas and Bixler as candidates for the reduction-in-force ("RIF") because they were the employees involved in the operations' function of the bank.

Clarke, following the instructions of Huntington's vice-president of Human Resources, Cheri Webb, used Huntington's method of ranking employees competing for a particular position to determine which employee would be terminated in the reduction. Clarke scored Lovas and Bixler in five performance categories, with the scores compiled from their two most recent performance evaluations. The five performance categories were assigned numbers based on information from the performance evaluations. Lovas's performance evaluations used in the analysis had been completed by Bixler prior to the RIF, and no other personnel information was used in the evaluation. After Clark completed the comparison process, Bixler received a score of 22 and Lovas received a score of 18.05.

On September 6, 1995, Clarke presented the results to Hoag, who made the final decision to terminate Lovas and transfer her remaining duties to himself, Bixler, and a temporary employee. Later that day, Hoag and Webb informed Lovas of her termination. Lovas participated in a transition program offered by Huntington, but did not obtain a new position within the transition period. Lovas was officially terminated on March 6, 1995.

On April 4, 1996, Lovas filed a charge of discrimination with the Equal Employment Opportunity Commission. The EEOC issued a notice of right to sue on April 11, 1997. Lovas filed suit in federal court on July 8, 1997, alleging that Huntington: (1) violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq.; (2) discriminated on the basis of sex in violation of Title VII, 42 U.S.C. § 2000(e) et seq.; (3) discriminated on the basis of sex and age in violation of Ohio Rev.Code §§ 41001.17, 4112.02 and 4112.99; and (4) violated Ohio law by breach of implied contract, promissory estoppel and infliction of emotional distress.

Huntington moved for summary judgment on July 17, 1998. The district court granted Huntington's motion for summary judgment on January 29, 1999, finding that Lovas failed to establish a prima facie case of age discrimination under the ADEA and Ohio law or sex discrimination under Title VII and Ohio law. Pursuant to 28 U.S.C. § 1367(c)(3), the district court dismissed Lovas's remaining state-law claims without prejudice. Lovas filed a timely notice of appeal.

II.

We review de novo a district court's grant of summary judgment, using the same Rule 56(c) standard as the district court. See Godfredson v. Hess & Clark, Inc., 173 F.3d 365, 370-71 (6th Cir.1999). Under Rule 56(c), summary judgment is appropriate when "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." Fed.R.Civ.P. 56(c). In deciding the motion, a court must view the evidence and draw all reasonable inferences in favor of the nonmoving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). If the moving party shows this absence, the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial See Matsushita, 475 U.S. at 587. Merely alleging the existence of a factual dispute is insufficient to defeat a summary judgment motion; rather, there must exist in the record a genuine issue of material fact. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-50 (1986).

III.

*3 The McDonnell Douglas/Burdine framework is applicable to claims brought under Title VII, the ADEA, and claims of discrimination under Ohio

state law, Ohio Rev.Code §§ 4112.02 and 4112.99. See Mitchell v. Toledo Hosp., 964 F.2d 577, 582 (6th Cir.1992) (applying McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1972) and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981)); Little Forrest Med. Ctr. of Akron v. Ohio Civil Rights Comm'n, 575 N.E.2d 1164, 1167-68 (Ohio 1991) (same). Thus, the plaintiff's ADEA, Title VII and Ohio state-law discrimination claims all arising from the same set of facts, can be properly analyzed together.

A.

"A plaintiff who brings a claim under the [ADEA] must prove that age was a determining factor in the adverse employment action taken against him or her." See Phelps v. Yale Sec , Inc., 986 F.2d 1020, 1023 (6th Cir.1993) (citing Kraus v. Sobel Corrugated Containers, Inc., 915 F.2d 227, 229-30 (6th Cir.1990)). To establish a prima facie case of age discrimination the plaintiff must show by a preponderance of the evidence that (1) she was a member of the protected class, (2) she was subjected to an adverse employment action, (3) she was qualified for a particular position, and (4) she was replaced by a younger person. See Godfredson, 173 F.3d at 365; see also O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311 (1996); Skalka v. Fernald Envtl. Restoration Mgmt. Corp., 178 F.3d 414, 420 (6th Cir.1999). When the employee is discharged in the context of a RIF, however, the final requirement of a prima facie case is modified because the employee is not, in fact, replaced. See Godfredson, 173 F.3d at 365 (citing Scott v. Goodyear Tire & Rubber Co., 160 F.2d 1121, 1126 (6th Cir.1991)). Instead, the fourth element of the prima facie case requires that a plaintiff discharged due to a RIF offer some "direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons." Skalka, 178 F.3d at 420 (quoting Barnes v. GenCorp. Inc., 896 F.2d 1457, 1465 (6th Cir.1990)).

In the present case, the district court correctly determined that Lovas failed to establish the fourth element of a prima facie case of age discrimination. Lovas contends that as "the only forty-eight year old officer" who was demoted in 1994 and later terminated in 1995, she established the fourth element of the prima facie case. Huntington's evidence, however, shows that five employees older than Lovas in the bank's Geauga County branches were retained in the RIF. Thus, the fact that Lovas was the "only forty-eight year old officer" demoted or terminated does not establish that she was singled out because of her age when placed in context.

Lovas does not dispute that older employees were retained, but contends that the isolated nature of her termination is sufficient to establish a prima facie case. The evidence, however, also shows that the operations' positions within the Geauga County offices were declining. Moreover, Huntington eliminated Lovas's city compliance duties. Lovas's isolated position was due to the reduction in operations-related duties within the Huntington branches. Lovas has offered no evidence showing that the elimination of her operations' duties was motivated in part by age or that she was singled out for impermissible reasons. Although Lovas contends that Hoag made derogatory comments about her age, we find no reference to ageist comments by Hoag in our review of the record. Further, the comments noted by the district court--such as "your pension will be jeopardized if you don't shape up"--do not establish circumstantial evidence that age motivated Lovas's termination or that she was singled out for termination. Accordingly, the district court correctly found that Lovas failed to establish a prima facie case of age discrimination under the ADEA.

B.

*4 Huntington contends that even if Lovas established a prima facie case of age discrimination, she failed to show that Huntington's non-discriminatory reason for the termination was pretextual. We agree. Once a plaintiff has established a prima facie case of age or sex discrimination, the burden of production shifts to the defendant to articulate legitimate, nondiscriminatory reasons for the adverse employment action. See Kline v. Tennessee Valley Authority, 128 F.3d 337, 346 (6th Cir.1998). Huntington contends that the employee comparison process administered by the human resources department determined the employee to be terminated after Hoag eliminated Lovas's position. Because Huntington has set forth a legitimate, non-discriminatory reason, Lovas must show that their proffered reasons are pretextual. See Saint Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993). There are three ways a plaintiff may

establish that a proffered explanation is pretextual. See Kline, 128 F.3d at 346. A plaintiff can establish pretext by showing by a preponderance of the evidence that the given reason is factually false, by showing that the stated reason is insufficient to explain the adverse employment action or finally, by showing that the stated reason was not the actual reason. See id. In cases in which the employer's explanation is challenged as not being the actual or true reason for the adverse action, the plaintiff cannot rely on evidence used to make a prima facie showing, but must introduce additional evidence of discrimination. See Manzer v. Diamond Shamrock Chemicals Co., 29 F.3d 1078, 1084 (6th Cir.1994).

Lovas failed to show that Huntington's employee comparison process was not the motivating cause of her termination. Lovas contends that Hoag's alleged derogatory statements and the 1993 memorandum indicate that Huntington's reason was pretextual. Although Hoag's alleged comments are indicative of distinctions on the basis of sex, and the memorandum indicates that Hoag clearly disapproved of Lovas's past performance, the evidence does not support that the comparison process was pretextual. The memorandum did not address Lovas's sex or age and only discussed Lovas's failure to report to work during a 1993 weather-related outage and potential discipline for the infraction. Moreover, the comments and memorandum lack any temporal proximity to the steady reduction in operations' personnel and Huntington's elimination of Lovas's compliance duties. Lovas has not shown that Huntington's elimination of her position and its employee comparison process were false, or motivated by age.

Lovas also contends that Hoag's statements to Clarke that he and Bixler would assume Lovas's duties constituted bias in the RIF comparison process. Lovas argues that her performance evaluations used in the ranking process were conducted by Bixler, her supervisor, and were inherently biased. In addition, the process was tainted because there was no interview or other evaluation of the employees' skills. Although it is troubling that Hoag appears to have assumed that Lovas would be terminated prior to the human resource process of eliminating her position, it remains unchallenged that the decision to eliminate Lovas's compliance officer duties was not made by Hoag.

*5 In addition, Huntington's human resource department determined the candidates for the RIF based upon the position eliminated. Hoag's statements assuming that the position elimination meant that Lovas would be terminated did not alter Huntington's formulaic approach to comparing employees and determining who would be terminated in the RIF. Huntington followed internal procedures to determine the candidates for termination and the comparison of those candidates. Lovas has not shown that the employee comparison process was influenced or controlled by Hoag's input or past disciplinary action. Lovas's evaluations used in the comparison process were completed by Bixler prior to the RIF and no evidence shows that the evaluations were biased. Finally, as the district court noted, interviews are not required in RIF terminations. See Kline, 128 F.3d at 351. Huntington has also established that the human resources employee, Clarke, had limited discretion to assign scores based on information in Bixler's and Lovas's employee evaluations. The scores assigned to each employee were determined by current job descriptions and performance evaluations. The employee comparison process has not been shown to be false or tainted.

Without further evidence showing that the RIF was not the true reason for Lovas's termination, the district court correctly determined that Lovas failed to rebut Huntington's proffered reasons for her termination.

C.

Lovas claims that she was terminated because of her sex in violation of Title VII. A prima facie case of sex discrimination under Title VII requires a plaintiff to demonstrate by a preponderance of the evidence that (1) she was a member of a protected class, (2) she was qualified for the position, (3) she suffered an adverse employment action, and (4) she was replaced by a person outside of the protected class. See Mitchell, 964 F.2d at 582-83 (citing McDonnell Douglas, 411 U.S. at 802). "[A] plaintiff can also make out a prima facie case by showing ... that a comparable non-protected person was treated better," in a claim of disparate treatment. Mitchell, 964 F.2d at 582; see also Hollins v. Atlantic Co., Inc., 188 F.3d 652, 658 (6th Cir.1999).

In a RIF, this court stated that an employee is not replaced when their duties are assigned to others doing related work in addition to the plaintiff's duties. See Barnes, 896 F.2d at 1465. [FN1] In the present case, Lovas contends that no other male was demoted and terminated. "To prevail on a claim of disparate treatment a plaintiff must show that her employer intentionally discriminated against her." Lynch v. Freeman, 817 F.2d 380 (6th Cir.1987); see also Huguley v. General Motors Corp., 52 F.3d 1364, 1370 (6th Cir.1995). Intent can be established by proof of "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act." ' Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978) (quoting International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 (1977)); see also Shah v. General Elec. Co., 816 F.2d 264, 267 (6th Cir.1987) (stating that proof of discriminatory motive can be inferred from differences in treatment). Accordingly, Lovas must show that similarly situated individuals were treated differently, producing evidence that the comparable employees are similarly situated with regard to relevant aspects of employment. See Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 352 (6th Cir.1998) (discussing similarly situated in context of employment and position).

> FN1. In Barnes, this court explained:
> A work force reduction situation occurs when business considerations cause an employer to eliminate one or more positions within the company. An employee is not eliminated as part of work force reduction when he or she is replaced after his or her discharge. However, a person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work. A person is replaced only when another employee is hired or reassigned to perform the plaintiff's duties.
> 896 F.2d at 1465. The court required direct, circumstantial or statistical evidence in a RIF termination because without such evidence the plaintiff's prima facie case has not raised an inference that the workforce reduction was not the reason for the discharge. See id. at 1464-65.

***6** Because Lovas has failed to rebut Huntington's proffered reasons for her termination, however, we need not reach Lovas's prima facie case of sex discrimination. See Kline, 128 F.3d at 346. Assuming that Lovas established a prima facie case of sex discrimination, she has failed to show that Huntington's reasons were not the actual or true reasons for her termination. The alleged comments by Hoag--"there's a woman for you" and "what do you expect from a woman"--do not demonstrate that Huntington's reduction of operations' personnel and comparison process were not the reasons for Lovas's termination. In addition, Hoag's memorandum does not refer to Lovas's sex at all, but merely addresses a potential disciplinary action arising from a particular incident three years prior to Lovas's dismissal. Moreover, Hoag's memorandum and comments are not temporally connected to the elimination of Lovas's position in the RIF or Huntington's comparison process. Because Lovas has failed to demonstrate that Huntington's reasons were not the actual or true reasons for the termination, we affirm the district court's grant of summary judgment on Lovas's sex discrimination claim in favor of Huntington.

IV.

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment in favor of Huntington on Lovas's discrimination claims.

END OF DOCUMENT

1 of 100 DOCUMENTS

MARTHA J. PETERSON, Plaintiff-Appellant, v. DIALYSIS CLINIC, INC., Defendant-Appellee.

No. 96-6093

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1997 U.S. App. LEXIS 26254

September 18, 1997, Filed

NOTICE:
[*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 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.

SUBSEQUENT HISTORY:
Reported in Table Case Format at: *124 F.3d 199, 1997 U.S. App. LEXIS 30684.*

PRIOR HISTORY:
On Appeal from the United States District Court for the Eastern District of Tennessee.

DISPOSITION:
AFFIRMED.

COUNSEL:
For MARTHA J. PETERSON, Plaintiff - Appellant: Robert D. Bradshaw, Chattanooga, TN.

For DIALYSIS CLINIC INC, Defendant - Appellee: Tim K. Garrett, Bass, Berry & Sims, Nashville, TN.

JUDGES:
BEFORE: NELSON and RYAN, Circuit Judges; QUIST, District Judge. *

* The Honorable Gordon J. Quist, United States District Judge for the Western District of Michigan, sitting by designation.

OPINIONBY:
RYAN

OPINION:

RYAN, Circuit Judge. Martha J. Peterson filed suit against Dialysis Clinic, Inc. (DCI), pursuant to *42 U.S.C. § § 2000e*-2000e-17, Title VII of the Civil Rights Act of 1964, alleging that DCI fired her in retaliation for her decision to testify on behalf of a coworker who had filed a charge of race discrimination. DCI moved for and was granted summary judgment. **[*2]** The district court concluded that Peterson could neither establish a prima facie case of unlawful retaliation nor prove that DCI's proffered reason for the discharge was a pretext for such retaliation. We agree that Peterson has not produced evidence sufficient to permit a reasonable jury to find the elements of the prima facie case. Accordingly, we will affirm.

I.

A.

DCI is a not-for-profit corporation which provides dialysis treatment at multiple locations. Pam Bethune is the administrator of several DCI facilities, including the "Broad Street" facility in Chattanooga, Tennessee. Mickey Chumley is the head nurse at the Broad Street location. As head nurse, Chumley supervises daily operations and reports to Bethune.

Peterson, a registered nurse, was hired by DCI in June 1993. After completing training, Peterson was assigned to the Broad Street facility. According to Peterson, almost immediately after she began working at Broad Street, Chumley made racially hostile remarks regarding a black nurse, Sharon Parks. Peterson stated in her deposition that Chumley indicated that Bethune had "gotten rid of" or "run off" two other black employees.

In October 1993, Parks filed [*3] a charge of race discrimination in response to a suspension. According to Parks, she asked Peterson to testify on her behalf several times, beginning in November 1993. Both Peterson and Parks agree that it was sometime in December when Peterson agreed to testify for Parks.

Explaining her decision to testify, Peterson stated that, although she had initially complained to Chumley about Parks's attitude and work ethic, she eventually came to think of Parks as a good worker and a friend. Peterson added that she had been goaded into complaining about Parks by Chumley. According to Peterson, Chumley was aware that Peterson and Parks became friends, and Chumley was "furious" about the friendship.

On January 21, 1994, Peterson was permitted to take time off from work in order to attend a meeting regarding Peterson's plan to donate a kidney to her sister. After returning to work that same day, Peterson told Chumley that she had a second appointment with a transplant coordinator at 1:00 p.m., on February 23, 1994. Peterson asked Chumley for permission to attend the appointment, and offered to give up one of her vacation days, scheduled for February 18-22, 1994. According to Peterson, Chumley [*4] told her that she did not need to give up a day of vacation, and that they would "work it out" so that Peterson could keep the appointment.

Chumley testified, however, that she subsequently told Peterson that, although Peterson could keep her scheduled vacation, she would have to reschedule her February 23 appointment because the Broad Street facility was experiencing unexpected staffing shortages. Peterson does not dispute that Chumley made some statement to this effect, but Peterson contends that, in context, Chumley appeared to be joking.

Peterson and Chumley apparently continued to have difficulty communicating about the February 23 appointment. According to Peterson, although Chumley made vague statements suggesting that Peterson's appointment was an inconvenience, Chumley never told Peterson that she could not keep her appointment or that she would be fired if she did so. Chumley testified in her deposition, however, that she made it clear to Peterson that Peterson did not have permission to leave, and that, if Peterson left, she would not have a job when she returned. Peterson left for her appointment sometime shortly before 1:00 p.m. After consulting with Bethune, Chumley [*5] fired Peterson when Peterson returned to work later that afternoon.

Peterson went immediately to Bethune's office to dispute her termination. Bethune agreed to place Peterson on suspension and conduct an investigation. Upon review, however, Bethune concluded that Peterson had left work without permission and she informed Peterson that her termination would not be rescinded.

Louise Roberson, a nurse who works at the DCI facility where Bethune's office is located, testified in her deposition that she was asked at 8:40 a.m., on February 23, 1994, by the head nurse at her facility, if she would be able to fill in at the Broad Street facility the following week. Roberson explained that she asked, "Who's quit now?" because Broad Street "has had a bad reputation for many years of not being able to keep staff." Roberson was told that "Martha [Peterson]" had quit. When Peterson arrived to speak to Bethune later that afternoon, Roberson told Peterson that she was sorry to hear that Peterson had quit. Roberson testified that Peterson told her that she had not quit, but, rather, had been fired.

B.

On July 12, 1995, Peterson filed a complaint, pursuant to *42 U.S.C. § § 2000e*-2000e-17, [*6] alleging that she had been discharged in retaliation for agreeing to testify on behalf of Parks. On April 22, 1996, DCI moved for summary judgment, arguing that Peterson could neither establish a prima facie case nor prove that DCI's reason for firing Peterson was a pretext for unlawful retaliation. With specific regard to the prima facie case, DCI argued that Peterson could not prove that DCI knew of Peterson's intent to testify for Parks, or that there was a connection between Peterson's protected activity and her discharge.

Both Bethune and Chumley denied having knowledge of Peterson's decision to testify on behalf of Parks. Peterson herself acknowledged that she had not shared her decision with any representative of DCI, because she "did not think that [it] was in [her] best interests" to do so. Parks likewise testified that she did not tell anyone about Peterson's decision.

However, both Parks and Peterson submitted affidavits in which they averred that they had discussed Peterson's decision to testify "on several occasions in the breakroom at DCI's Broad Street facility." They explained that the employees at Broad Street were prone to gossip, and that "once one [*7] employee learned information about another employee, it was repeated until all of the employees knew about it." Another nurse, Connie Bedwell, who was herself discharged for excessive absenteeism, submitted an affidavit in which she averred that she overheard two other employees discussing the fact "that Martha Peterson was going to support [Parks's] complaint with her testimony."

On May 16, 1996, the district court concluded that Peterson had failed to establish a prima facie case of unlawful retaliation under Title VII, and it granted DCI's motion for summary judgment. Specifically, the district court concluded that Peterson had failed to submit evidence sufficient to establish either that DCI knew she had engaged in protected activity or that there was a causal connection between her protected activity and her discharge. The district court also concluded that Peterson could not succeed at the pretext stage because "she has utterly failed to produce evidence that DCI was motivated to fire her for her involvement with Parks rather than because of her leaving the facility without permission."

Peterson filed a motion for reconsideration, relying heavily on Roberson's testimony, **[*8]** which the district court had not discussed in its opinion. The district court denied Peterson's motion, stating that she had failed to present any evidence, direct or indirect, that DCI knew that she had agreed to testify on Parks's behalf.

II.

Peterson argues that the district court erred when it granted DCI's motion for summary judgment. Specifically, Peterson argues that the totality of the circumstances, including: the "gossipy" work environment; Bedwell's testimony; Chumley's hostility to Peterson's friendship with Parks; Chumley's awareness that Peterson knew of racial hostility directed at Parks; Peterson's otherwise unblemished work record; the timing of Peterson's discharge; and Roberson's testimony, is sufficient to permit a reasonable jury to conclude that DCI knew of Peterson's decision to testify and that DCI discharged Peterson because of this knowledge. We disagree.

This court "review[s] a district court's grant of summary judgment de novo, examining the record and drawing all inferences in the light most favorable to the non-moving party." *Woythal v. Tex-Tenn Corp., 112 F.3d 243, 245-46 (6th Cir. 1997).*

In order to establish a prima facie case **[*9]** of unlawful retaliation under Title VII, a plaintiff must prove, by a preponderance of the evidence that: 1) she engaged in a protected activity; 2) this protected activity was known to defendant; 3) she was thereafter subjected to an adverse employment action; and 4) there was a causal connection between the protected activity and the adverse employment action. *Canitia v. Yellow Freight Sys., Inc., 903 F.2d 1064, 1066 (6th Cir. 1990).* The "central inquiry in evaluating whether the plaintiff has met [her] initial burden is whether the circumstantial evidence presented is sufficient to create an inference" of unlawful retaliation. *Shah v. General Elec. Co., 816 F.2d 264, 268 (6th Cir.1987);* see *EEOC v. Avery Dennison Corp., 104 F.3d 858, 861 (6th Cir. 1997).*

Once the plaintiff establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the challenged employment action. *St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-07, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993).* The plaintiff then has the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant **[*10]** were not its true reasons, but were a pretext for" unlawful retaliation. *Id. at 515* (quoting *Texas Dep't of Community Affairs v. Burdine 450 U.S. 248, 253, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981)).* Evidence sufficient to permit a reasonable jury to conclude that the defendant's proffered reasons were not its true reasons, together with evidence sufficient to establish the elements of the prima facie case, is sufficient to create a jury question as to the "ultimate fact" of unlawful retaliation. Id. at 511; *EEOC v. Yenkin-Majestic Paint Corp., 112 F.3d 831, 834 (6th Cir. 1997).*

In the light most favorable to Peterson, Roberson's testimony that she was told that Peterson had quit several hours before Peterson committed the act which allegedly led to her discharge, and Peterson's testimony that she was led to believe that she had permission to attend her appointment, could permit a reasonable jury to conclude that DCI manipulated Peterson so that it would have an excuse to fire her. In other words, this testimony could support the conclusion that DCI's proffered reason for discharging Peterson was a pretext--the critical question being: "a pretext for what?" If Peterson **[*11]** has produced sufficient evidence to prove the elements of the prima facie case, a reasonable jury could conclude that DCI's proffered reason was a pretext for unlawful retaliation.

After a careful and thorough consideration of all the evidence in the record, however, we find that we are in agreement with the district court's conclusion that Peterson has not produced evidence sufficient to establish the third or fourth elements of a prima facie case of unlawful retaliation. On the record before us, we simply cannot conclude that it would be reasonable, as distinguished from speculative, for a jury to conclude that DCI knew of Peterson's protected activity and that this knowledge was causally connected to Peterson's discharge.

Although the paradigm established by *McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973),* was designed to accommodate discrimination claims based on circumstantial evidence, see *Burns v. City of Columbus, Dep't of Pub. Safety, Div.*

of Police, 91 F.3d 836, 843 (6th Cir. 1996), a plaintiff relying on this paradigm to prove unlawful retaliation typically has direct evidence that the defendant was aware of the plaintiff's **[*12]** protected activity. See, e.g., *Harrison v. Metropolitan Gov't of Nashville and Davidson County, Tenn., 80 F.3d 1107, 1118* (6th Cir.), cert. denied, *136 L. Ed. 2d 111, 117 S. Ct. 169 (1996); Jackson v. RKO Bottlers of Toledo, Inc., 743 F.2d 370, 377 n.3 (6th Cir. 1984).* In such cases, the difficult question is whether the defendant's knowledge of the plaintiff's protected activity motivated the adverse employment action.

Here, however, there is no direct evidence that DCI knew that Peterson had agreed to testify on behalf of Parks. Although we do not intend to suggest that such direct evidence is always necessary, this case highlights how difficult it is to create an inference of unlawful retaliation where the basic question of knowledge is itself in doubt.

Both Peterson and Parks indicated that they endeavored to keep their arrangement secret, and both Bethune and Chumley denied that they were aware of Peterson's decision to testify. Although Bedwell's testimony might establish that Peterson's decision became grist for the office rumor mill, and Peterson's testimony might establish that Chumley was aware of and hostile to Peterson's friendship with Parks, there is nothing **[*13]** in these circumstances which suggests that DCI actually learned of and acted on the basis of Peterson's protected activity.

Any inference of unlawful intent which might arise from the timing of Peterson's discharge, an inference which is of questionable strength to begin with, see, e.g., *Cooper v. City of North Olmsted, 795 F.2d 1265, 1272-73 (6th Cir. 1986),* is significantly blunted by the fact that there is no evidence that DCI knew of Peterson's protected activity, cf. *Polk v. Yellow Freight Sys., 876 F.2d 527, 531 (6th Cir. 1989).* The fact that Peterson was discharged roughly two months after deciding to testify is hardly sufficient to reasonably raise both an inference that DCI knew of Peterson's decision to testify and an inference that there was a causal connection between such knowledge and Peterson's discharge.

In the end, then, although we accept that Roberson's testimony may suggest that something was afoul, we cannot conclude that the evidence permits the reasonable inference that this something was DCI's knowledge of Peterson's decision to testify on Parks's behalf.

III.

Accordingly, we **AFFIRM** the judgment of the district **[*14]** court.

SUPREME COURT OF THE UNITED STATES

No. 00–1853

AKOS SWIERKIEWICZ, PETITIONER *v.*
SOREMA N. A.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[February 26, 2002]

JUSTICE THOMAS delivered the opinion of the Court.

This case presents the question whether a complaint in an employment discrimination lawsuit must contain specific facts establishing a prima facie case of discrimination under the framework set forth by this Court in *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792 (1973). We hold that an employment discrimination complaint need not include such facts and instead must contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).

I

Petitioner Akos Swierkiewicz is a native of Hungary, who at the time of his complaint was 53 years old.[1] In April 1989, petitioner began working for respondent Sorema N. A., a reinsurance company headquartered in New York and principally owned and controlled by a

[1] Because we review here a decision granting respondent's motion to dismiss, we must accept as true all of the factual allegations contained in the complaint. See, *e.g.*, *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U. S. 163, 164 (1993).

French parent corporation. Petitioner was initially employed in the position of senior vice president and chief underwriting officer (CUO). Nearly six years later, François M. Chavel, respondent's Chief Executive Officer, demoted petitioner to a marketing and services position and transferred the bulk of his underwriting responsibilities to Nicholas Papadopoulo, a 32-year-old who, like Mr. Chavel, is a French national. About a year later, Mr. Chavel stated that he wanted to "energize" the underwriting department and appointed Mr. Papadopoulo as CUO. Petitioner claims that Mr. Papadopoulo had only one year of underwriting experience at the time he was promoted, and therefore was less experienced and less qualified to be CUO than he, since at that point he had 26 years of experience in the insurance industry.

Following his demotion, petitioner contends that he "was isolated by Mr. Chavel . . . excluded from business decisions and meetings and denied the opportunity to reach his true potential at SOREMA." App. 26. Petitioner unsuccessfully attempted to meet with Mr. Chavel to discuss his discontent. Finally, in April 1997, petitioner sent a memo to Mr. Chavel outlining his grievances and requesting a severance package. Two weeks later, respondent's general counsel presented petitioner with two options: He could either resign without a severance package or be dismissed. Mr. Chavel fired petitioner after he refused to resign.

Petitioner filed a lawsuit alleging that he had been terminated on account of his national origin in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. §2000e *et seq.* (1994 ed. and Supp. V), and on account of his age in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U. S. C. §621 *et seq.* (1994 ed. and Supp. V). App. 28. The United States District Court for the Southern District of New York dismissed petitioner's

complaint because it found that he "ha[d] not adequately alleged a prima facie case, in that he ha[d] not adequately alleged circumstances that support an inference of discrimination." *Id.*, at 42. The United States Court of Appeals for the Second Circuit affirmed the dismissal, relying on its settled precedent, which requires a plaintiff in an employment discrimination complaint to allege facts constituting a prima facie case of discrimination under the framework set forth by this Court in *McDonnell Douglas*, *supra*, at 802. See, *e.g.*, *Tarshis* v. *Riese Organization*, 211 F. 3d 30, 35–36, 38 (CA2 2000); *Austin* v. *Ford Models, Inc.*, 149 F. 3d 148, 152–153 (CA2 1998). The Court of Appeals held that petitioner had failed to meet his burden because his allegations were "insufficient as a matter of law to raise an inference of discrimination." 5 Fed. Appx. 63, 65 (CA2 2001). We granted certiorari, 533 U. S. 976 (2001), to resolve a split among the Courts of Appeals concerning the proper pleading standard for employment discrimination cases,[2] and now reverse.

II

Applying Circuit precedent, the Court of Appeals required petitioner to plead a prima facie case of discrimination in order to survive respondent's motion to dismiss. See 5 Fed. Appx., at 64–65. In the Court of Appeals' view, petitioner was thus required to allege in his complaint: (1)

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[2]The majority of Courts of Appeals have held that a plaintiff need not plead a prima facie case of discrimination under *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), in order to survive a motion to dismiss. See, *e.g.*, *Sparrow* v. *United Air Lines, Inc.*, 216 F. 3d 1111, 1114 (CADC 2000); *Bennett* v. *Schmidt*, 153 F. 3d 516, 518 (CA7 1998); *Ring* v. *First Interstate Mortgage, Inc.*, 984 F. 2d 924 (CA8 1993). Others, however, maintain that a complaint must contain factual allegations that support each element of a prima facie case. In addition to the case below, see *Jackson* v. *Columbus*, 194 F. 3d 737, 751 (CA6 1999).

membership in a protected group; (2) qualification for the job in question; (3) an adverse employment action; and (4) circumstances that support an inference of discrimination. *Ibid.*; cf. *McDonnell Douglas*, 411 U. S., at 802; *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 253–254, n. 6 (1981).

The prima facie case under *McDonnell Douglas*, however, is an evidentiary standard, not a pleading requirement. In *McDonnell Douglas*, this Court made clear that "[t]he critical issue before us concern[ed] the order and allocation *of proof* in a private, non-class action challenging employment discrimination." 411 U. S., at 800 (emphasis added). In subsequent cases, this Court has reiterated that the prima facie case relates to the employee's burden of presenting evidence that raises an inference of discrimination. See *Burdine, supra,* at 252–253 ("In [*McDonnell Douglas,*] we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination" (footnotes omitted)); 450 U. S., at 255, n. 8 ("This evidentiary relationship between the presumption created by a prima facie case and the consequential burden of production placed on the defendant is a traditional feature of the common law").

This Court has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss. For instance, we have rejected the argument that a Title VII complaint requires greater "particularity," because this would "too narrowly constric[t] the role of the pleadings." *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U. S. 273, 283, n. 11 (1976). Consequently, the ordinary rules for assessing the sufficiency of a complaint apply. See, *e.g.*, *Scheuer* v. *Rhodes*, 416 U. S. 232, 236 (1974) ("When a

federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims").

In addition, under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case. For instance, if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case. See *Trans World Airlines, Inc.* v. *Thurston,* 469 U. S. 111, 121 (1985) ("[T]he *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination"). Under the Second Circuit's heightened pleading standard, a plaintiff without direct evidence of discrimination at the time of his complaint must plead a prima facie case of discrimination, even though discovery might uncover such direct evidence. It thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered.

Moreover, the precise requirements of a prima facie case can vary depending on the context and were "never intended to be rigid, mechanized, or ritualistic." *Furnco Constr. Corp.* v. *Waters,* 438 U. S. 567, 577 (1978); see also *McDonnell Douglas, supra,* at 802, n. 13 ("[T]he specification . . . of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations"); *Teamsters* v. *United States,* 431 U. S. 324, 358 (1977) (noting that this Court "did not purport to create an inflexible formulation" for a prima facie case); *Ring* v. *First Interstate Mortgage, Inc.,* 984 F. 2d 924, 927 (CA8 1993)

("[T]o measure a plaintiff's complaint against a particular formulation of the prima facie case at the pleading stage is inappropriate"). Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case. Given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases.

Furthermore, imposing the Court of Appeals' heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief." Such a statement must simply "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley* v. *Gibson,* 355 U. S. 41, 47 (1957). This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. See *id.*, at 47–48; *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U. S. 163, 168–169 (1993). "The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court." 5 C. Wright & A. Miller, Federal Practice and Procedure §1202, p. 76 (2d ed. 1990).

Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake.[3] This Court, however, has declined to

[3]"In all averments of fraud or mistake, the circumstances constitut-

extend such exceptions to other contexts. In *Leatherman* we stated: "[T]he Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under §1983. *Expressio unius est exclusio alterius.*" 507 U. S., at 168. Just as Rule 9(b) makes no mention of municipal liability under Rev. Stat. §1979, 42 U. S. C. §1983 (1994 ed., Supp. V), neither does it refer to employment discrimination. Thus, complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a).[4]

Other provisions of the Federal Rules of Civil Procedure are inextricably linked to Rule 8(a)'s simplified notice pleading standard. Rule 8(e)(1) states that "[n]o technical forms of pleading or motions are required," and Rule 8(f) provides that "[a]ll pleadings shall be so construed as to do substantial justice." Given the Federal Rules' simplified standard for pleading, "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon* v. *King & Spalding,* 467 U. S. 69, 73 (1984). If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before respond-

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ing fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

[4]These requirements are exemplified by the Federal Rules of Civil Procedure Forms, which "are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate." Fed. Rule Civ. Proc. 84. For example, Form 9 sets forth a complaint for negligence in which plaintiff simply states in relevant part: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway."

ing. Moreover, claims lacking merit may be dealt with through summary judgment under Rule 56. The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim. See *Conley, supra,* at 48 ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits").

Applying the relevant standard, petitioner's complaint easily satisfies the requirements of Rule 8(a) because it gives respondent fair notice of the basis for petitioner's claims. Petitioner alleged that he had been terminated on account of his national origin in violation of Title VII and on account of his age in violation of the ADEA. App. 28. His complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination. *Id.,* at 24–28. These allegations give respondent fair notice of what petitioner's claims are and the grounds upon which they rest. See *Conley, supra,* at 47. In addition, they state claims upon which relief could be granted under Title VII and the ADEA.

Respondent argues that allowing lawsuits based on conclusory allegations of discrimination to go forward will burden the courts and encourage disgruntled employees to bring unsubstantiated suits. Brief for Respondent 34–40. Whatever the practical merits of this argument, the Federal Rules do not contain a heightened pleading standard for employment discrimination suits. A requirement of greater specificity for particular claims is a result that "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Leatherman, supra,* at 168. Furthermore, Rule 8(a) establishes a

pleading standard without regard to whether a claim will succeed on the merits. "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Scheuer*, 416 U. S., at 236.

For the foregoing reasons, we hold that an employment discrimination plaintiff need not plead a prima facie case of discrimination and that petitioner's complaint is sufficient to survive respondent's motion to dismiss. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

(Cite as: 134 F.3d 372, 1998 WL 25003 (6th Cir.))
C

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.

TENNESSEE VALLEY AUTHORITY, Petitioner,
v.
Randolph FRADY, United States Department of Labor, Respondents.

No. 96-3831.

Jan. 12, 1998.

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

PER CURIAM.

**1 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 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 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.

**2 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 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.

**3 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 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. [FN1]

> FN1. 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.

**4 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 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.

**5 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 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. [FN2] For 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").

FN2. Plaintiff's earlier settlement agreement guaranteed only that he would be placed in the Employee Transition Program.

**6 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 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.

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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.

A Guide To Merit Systems Protection Board Law and Practice

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Citing Byrd [32 MSPR 300 (1987)] . . . the agency correctly asserts that the administrative judge erred by confusing the requirements for the rating assigned to the appellant's individual critical element and the summary rating assigned to the appellant's overall performance.

In *Byrd*, the Board explained that under 5 CFR § 430.204 an agency is required to develop: (1) a minimum of three rating levels for each critical element and (2) five summary rating levels for the employee's performance derived from the ratings on the critical elements and, at the agency's discretion, from the ratings on the noncritical elements. The Board also stated that the administrative judge had correctly relied on *Donaldson v. Department of Labor*, 27 MSPR 293 (1985), in stating that (1) where the agency has chosen to create a five-level evaluation system for each critical element, it must inform its employees of what level of performance is required to earn a "minimally satisfactory" evaluation and (2) agency performance appraisal plans that require extrapolating the performance rating on a critical element more than one level below the only level for which there is a written standard violated the statutory requirements of objectivity. . . . Upon review, we find that the opinion in *Byrd* misstated that Board's holding in *Donaldson* regarding extrapolation of performance ratings.

In *Donaldson*, the issue was whether an agency's extrapolation of a performance rating more than one level above or below the written standard conclusively established that the standard failed to meet statutory requirements and warranted reversal of the action. Although the appellants in *Donaldson* argued that the Board should be bound by the requirements of Federal Personnel Manual Letter 430-4 (March 24, 1981) which stated that performance rating systems requiring extrapolating more than one level above or below the written standard failed to satisfy the requirement for objectivity . . . the Board rejected that argument. Rather, it stated:

> We find that the agency's system contravenes the cited FPM Letter, and we agree with OPM's analysis that such a system generally will violate the statutory requirement of objectivity. However, we find that an employee's substantive rights to a *bona fide* opportunity to demonstrate acceptable performance and to communication of the standards he is expected to meet may be met otherwise than by a performance standard which meets OPM's requirement for extrapolation only one level above or below the written standard. Thus, we hold that an agency may satisfy the employee's rights . . . by communicating to the employee the standards he must meet in order to be evaluated as demonstrating performance at a level which is sufficient for retention. . . . Such communication may occur in the PIP . . . in counseling sessions, in written instructions, or in any manner calculated to apprise the employee of the requirements against which he is to be measured.

Donaldson, 27 MSPR at 297-98.

In both appeals involved in *Donaldson*, the Board found that the agency's performance standards did not comply with OPM's restrictions on extrapolating standards. Nevertheless, the Board considered whether the agencies had otherwise adequately informed the appellants of the appropriate level of performance that was expected of them. . . .

Thus, the initial decision and the Board's decision in *Byrd* are inconsistent with *Donaldson* to the extent that they imply that a performance rating under standards that do not meet OPM's extrapolation restrictions could never meet the statutory requirements. . . .

In this case, however, as in *Byrd*, the evidence supports the agency's claim that although it had the required five-level rating system for its summary rating of the appellant's performance, it did not have a five-level rating system for the individual critical element in issue. The appellant's performance standards for the critical element are identified as "far exceeds," "exceeds," or "met." Thus, in finding the appellant's performance unacceptable, the agency did not extrapolate the performance rating on the appellant's critical element more than one level below a level for which there was a written standard, and the administrative judge erred in finding that the agency had an improper performance rating system.

In the event that *Cochran* is not entirely clear, in *Donaldson* it was held that the agency may avoid the problem of lack of formal distinctions between levels of performance in a five-tier system by communicating to the employee, through a PIP, counseling sessions, written instructions, or other means, the requirements that he must meet to retain employment. Standards, if set at only one level for a five-level review system, are inadequate, but statutory requirements may be met if the standard that is satisfactory is communicated in a performance improvement plan, in counseling sessions, in written instructions, or in any manner calculated to apprise the employee of the requirements. *Adams v. Dept. of Navy*, 28 MSPR 589 (1985) (Table).

The Board tried again in *Luscri v. Dept. of Army*, 39 MSPR 482, 489 (1989), coming right out and holding, in plain language, that "the agency did not need to establish a separate level for 'minimally acceptable' performance":

> The appellant notes that the performance improvement plan references only the standards that the appellant must meet for "fully successful performance" in the critical elements. The agency correctly held the appellant to these standards, however, because it did not have a "minimally acceptable" level of rating for the critical elements. Rather, the agency had only one defined performance standard — the fully successful level — and three levels of rating for each critical element — exceeded, met, and not met. Under 5 CFR § 430.204(e), a system with three rating levels for each critical element is acceptable; the agency did not need to establish a separate level for "minimally acceptable" performance in the critical elements. *See Cochran v. Veterans Administration*, 35 MSPR 555, 556-58 (1987).
>
> That the agency had five rating levels against which to judge the appellant's *overall* performance, including a minimally acceptable level, is irrelevant. Under 5 CFR § 430.204(h), agencies are required to develop five summary rating levels for the employee's performance derived from the ratings on the critical elements and, at the agency's discretion, from the ratings on the noncritical elements. *Cochran*, 35 MSPR at 556. Here, the agency had the necessary 5-level plan, but it required the appellant to meet the defined performance standards in all critical elements to be rated even marginally acceptable. The appellant has not identified any error in this requirement, because an employee may be removed for failing to meet the

established performance standards in one or more of the critical elements of his position. *See* 5 USC §§ 4301(3) and 4302(b)(6).

The Board also attempted to explain (through indirection) the difference between a performance action based on single-level standards and multiple-level summary ratings in *Seplavy v. VA*, 41 MSPR 251, 252-54 (1989), involving a demotion:

> The agency charged the appellant with failing to satisfy the critical elements of Grounds Maintenance and Safety. Each of these elements only specified one level of performance. Relying on the Board's decision in *Donaldson* . . . the administrative judge found that these standards were invalid because "any assessment of performance must be extrapolated from the one set of performance guidelines." The administrative judge also found that this need to extrapolate adds a measure of subjectivity to the assessment of the employee's performance which is contrary to the mandate of 5 USC Chapter 43 that performance be judged, to the maximum extent feasible, on the basis of objective criteria. . . .
>
> We find, however, that the present case is distinguishable from *Donaldson*. In *Donaldson*, the Board found that a performance appraisal plan that requires the rating on an individual critical element to be extrapolated more than one level above and below the written standard may violate the objectivity requirement. . . . This holding, however, applies to the rating assigned to individual critical elements, and not to summary ratings of an employee's overall performance. *See Byrd v. Department of the Army*, 32 MSPR 300, 302 (1987), *as modified by Cochran v. Veterans Administration*, 35 MSPR 555 (1987).
>
> In the present case, there is no evidence supporting the administrative judge's finding that the agency established a system that requires extrapolation more than one level above or below the written standard for each critical element. The appellant's performance appraisal indicates that the written performance standards describe the "fully successful" levels of achievement. The appraisal also establishes that the appellant is rated on each critical element as "exceptional," "fully successful," or "less than fully successful." Thus, the performance plan does communicate the minimally acceptable level for the employee's retention in his position — performance at the level described in the standard itself. Although the appraisal does have a five-level evaluation system to determine the appellant's overall rating, this five-level system was not used to evaluate his performance on each critical element. We, therefore, conclude that the administrative judge erred in finding that the performance standards at issue are invalid. . . .

See also Sherrell v. Dept. of Air Force, 47 MSPR 534 (1991); *Clifford v. Dept. of Agric.*, 50 MSPR 232 (1991).

c. Two-Level, or Pass/Fail Rating System

Although a rating system may have but two levels (pass or fail), the standards supporting the system must still be objective and not absolute. *Johnson v. Dept. of Interior*, 87 MSPR 359 (2000), faulted an agency for absolute standards that did no more than describe, and did not measure, job performance. The Board's decision began by setting out the performance standards, id. at 363-64:

> QUALITY
>
> Knowledge of the Field or Profession: Maintains and demonstrates technical competence and/or expertise in areas of assigned responsibility.
>
> Accuracy and Thoroughness of Work: Plans, organizes, and executes work logically. Anticipates and analyzes problems clearly and determines appropriate solutions. Work is correct and complete.
>
> Soundness of Judgment and Decisions: Assesses task objectively and researches and documents assignments carefully. Weighs alternative courses of action, considering long and short term implications. Makes and executes timely decision.
>
> Effectiveness of Written Documents: Written work is clear, relevant, concise, well organized, grammatically correct, and appropriate to audience.
>
> Effectiveness of communications: Presentation meets objectives, is persuasive, tactful, and appropriate to audience. Demonstrates attention, courtesy, and respect for other points of view.
>
> Timeliness of Meeting Deadlines: Completes work in accordance with established deadlines.
>
> TEAMWORK
>
> Participation: Willingly participates in group activities, performing in a thorough and complete fashion. Communicates regularly with team members. Seeks team consensus.
>
> Leadership: Provides encouragement, guidance, and direction to team members as needed. Adjusts style to fit situation.
>
> Cooperation: Support team initiatives. Demonstrates respect for team members, accepts the views of others, and actively support team decisions.
>
> CUSTOMER SERVICE
>
> Quality of Service: Delivers high quality products and service to both external and internal customers. Initiates and responds to suggestions for improving service.
>
> Timeliness of Service: Delivers quality products and services in accordance with time schedules agreed upon with customer.
>
> Courtesy: Treats external and internal customers with courtesy and respect. Customer satisfaction is high priority.
>
> OTHER: No more than 4 validated customer complaints [will] be allowed.

Johnson continued describing the development of the performance standards, 87 MSPR at 364:

The agency further explained that the appellant's PIP gave content to these standards by instructing her to perform the following:

> Provide each requisitioner with a calendar/timeline outlining the estimated time from receipt of requisition through the solicitation process to award and delivery. In addition keep the requisitioner apprised of the status of the acquisition on a regular basis appropriate to the nature of the acquisition.
>
> Follow through with customers on promises made and explanations for any delays that may occur.
>
> Assure accuracy and thoroughness of work by reviewing incoming and outgoing documents.
>
> Assure that requisitioner receives copies of the fully executed acquisition documents.
>
> Provide clear concise instructions to requisitioners either orally or in writing on the preparation of agreements documents. When you need additional or specific information from your customer, you must be able to articulate the requirement, often in the most rudimentary terms. Especially with agreements, the process is one that is very different than other acquisition processes. If you are unable to do so, the customer questions your competency and will often seek other sources for services.
>
> Provide approved examples for requisitioners to follow and skeleton (fill in the blank) agreements in order to streamline the process for the requisitioner.

Johnson concluded that the standards were impermissibly absolute, 87 MSPR at 364–66:

> We find that, with the exception of the performance standard providing that no more than 4 validated customer complaints would be allowed, the performance standards, even as amended by the PIP notice, are invalid because they are improperly absolute. *See Callaway,* 23 MSPR at 597–600. In reaching this conclusion, we acknowledge that a two–tier performance system is permitted under the Office of Personnel Management's regulations. *See* 5 CFR § 430.208(d). We disagree, however, with the agency's claim that the generic performance standards it has developed under its two–tier system are valid.[1]
>
> > [1] Our conclusion, however, is limited to the specific standards at issue in this appeal, and we do not reach the question of the general validity of all generic performance standards (or performance indicators).
>
> The Office of Personnel Management (OPM) has provided guidance regarding the proper method for promulgating valid performance plans, including two–tier plans. *See* Office of Personnel Management, A Handbook for Measuring Employee Performance: Aligning Employee Performance Plans with Organizational Goals (1999) <http: // apps. opm. gov/ perform / wppdf / handbook. pdf>. This handbook[2] explains that all critical elements for a position must have performance standards, and it defines performance standards as "management approved expressions of the performance thresholds, requirements, or expectations that employees must meet to be appraised at particular levels of performance." *See also* 5 CFR § 430.203. It further states that each critical element must have a fully successful or equivalent standard, and that, in a two–level appraisal program, the fully successful standard describes a single point of performance, rather than a range. Any performance at or above that single point s fully successful, and any performance below is unacceptable. *Id.* at Chapter 3, Step 6, at 50.
>
> > [2] While OPM's guidance in this handbook is not entitled to the force and effect of law, we find that it is entitled to weight in construing OPM's regulations concerning two–tier performance appraisal systems. *See Special Counsel v. Malone,* 84 MSPR 342, 356 n.9 (1999).
>
> OPM also warned agencies, however, that the level of performance necessary for the employee to be retained in the job, such as the fully successful level in the present two–tier system, must not be impermissibly absolute, and must allow for some error. *Id.* at 51–52. It then provided the following examples of fully successful standards that would be considered improper absolute retention–level standards if used in a two–level appraisal program: "Work is timely, efficient, and of acceptable quality"; and "[c]ommunicates effectively within and outside of the organization." OPM explained that these standards are considered absolute because they appear to require that work is always timely, efficient and of acceptable quality, and that the employee always communicates effectively. *Id.* at 52.
>
> All but one of the standards in the instant case suffer from this very deficiency. For example, they state the appellant must plan, organize and execute work "logically," that her work be "correct and complete," that her written work be "clear, relevant and concise," and that she complete work "in accordance with established deadlines." As written and fleshed out in the PIP notice, these standards are absolute because the appellant must always meet these requirements.
>
> We further note that the standards at issue differ from the examples OPM cites as acceptable standards in Appendix C to its handbook. The Appendix provides examples of elements and standards that were written specifically for two–tier performance appraisal programs. One of the examples includes standards that, like the standards in the present case, require that tasks be "correctly" performed. Unlike the present standards, however, those acceptable standards further provide that the employee's supervisor is "routinely satisfied" that the tasks are correctly performed. It further states that, to meet the fully successful standard, the employee only need satisfy a majority of the specific items that need to be accurately performed. In contrast, the standards at issue in the present case do not provide for a supervisor's "routine satisfaction," or that work be correctly performed a "majority" of the time in order to successfully perform. Instead, the agency's standards require the appellant to correctly perform all but one of them all of the time.
>
> Another example of acceptable standards contained in the Appendix requires that all of the tasks be accomplished to be fully successful. The standards, however, also state that the supervisor is "routinely" satisfied that the work is done properly. They further provide that some work is "generally" done by a certain date. As stated above, the appellant's standards here,

with one exception, instead require her to perform all of the work properly all of the time, without qualifying terms such as "generally" or "routinely." . They are, therefore, impermissibly absolute. *See Callaway,* 23 MSPR at 599 (absolute standards are those that fail to provide a basis for evaluating an employee as exceeding required performance); *see also Bronfman v. General Services Administration,* 40 MSPR 184, 187–88 (1989) (performance standards deemed improperly absolute where they described job duties without including the level of performance necessary for acceptable performance).

13. Standards Development

5 USC 4302(a)(2) provides that each agency shall encourage employee participation in developing performance standards. The Federal Labor Relations Authority stripped the requirement of significance when it ruled that labor unions could not require negotiation of performance standards. *NTEU and Dept. of Treasury, Bureau of the Public Debt,* 3 FLRA 768 (1980). The MSPB has done nothing to improve the situation. Many agencies do ask employees for their comments on standards, but comments can be disregarded, and some agencies do not bother to ask for comments at all. Once the standards are established, they may be supplemented, according to MSPB, by all types of communications from supervisors. What are the effects of the failure of an agency to solicit or provide a reasoned rejection of employee suggestions for standards? What constraints are there on the development of standards?

a. Employee Participation

If an employee defends against a performance–related action, including the denial of a step increase, on the basis that he was not given the opportunity to participate in the development of his performance standards, the defense asserted is an affirmative one. The employee bears the burden of proof on the issue. *Lim v. Dept. of Agric.,* 10 MSPR 129 (1982). The issue is then the right of the employee to participate in standards development. The answer, under *Beverly v. DLA, post,* is that there is no statutory or regulatory requirement that each employee have an opportunity to participate in the development of performance standards. 5 USC 4302(a)(2) does not require the agency to offer the appellant an opportunity to participate in the development of established standards prior to taking an action for unacceptable performance under Chapter 43. The statute does not create any substantive right for each employee to participate in the development of performance standards; it does establish that the encouragement of employee participation in the development of standards is a statutory requirement that cannot be overlooked by government agencies. *Beverly v. DLA,* 27 MSPR 600, 603–04 (1985), found unobjectionable standards developed 10 months before the appellant entered the position:

> [A]ppellant claims that the agency erred in not providing her with an opportunity to participate in the establishment of the performance standards for her position. 5 USC § 4302(a)(2) provides that *agencies* shall develop performance appraisal systems which encourage employee participation in establishing performance standards. However, there is no statutory or regulatory requirement that each employee have an actual opportunity to participate in the development of performance standards. The agency established performance standards for appellant's GS–5 Voucher Examiner position in March of 1982, almost 10 months before appellant entered the position in January, 1983. We cannot interpret 5 USC § 4302(a)(2) as requiring that the agency offer appellant an opportunity to participate in the development of established standards prior to taking an action for unacceptable performance under Chapter 43. Appellant fails to cite any precedent or theory which supports a finding that 5 USC § 4302(a)(2) creates such a right for an employee assuming a position for which standards have already been set with employee participation. Therefore, appellant fails to show any error in this regard.[6]
>
> > [6] While 5 USC § 4302(a)(2) does not create any substantive right for each employee to have an actual opportunity to participate in the development of performance standards, it does establish that the encouragement of employee participation in the development of standards is a statutory requirement which cannot be overlooked by government agencies.

The Board found that an appellant submitted detailed comments on his standards before they were issued; the Board commented that "an employee's right to comment on proposed performance standards does not amount to veto power . . . ." *Smith v. Dept. of Agric.,* 64 MSPR 46, 58 (1994).

b. Personal Characteristics: Initiative, Reliability

The Board provided some guidance to agencies concerning standards development in *Callaway v. Dept. of Army,* 23 MSPR 592, 601 (1984), endorsing OPM guidance in (the now abolished) FPM Ch. 430, Subch. 2–4(a) (1980) discouraging use of performance standards to measure traits such as dependability, interest, reliability, and initiative, unless they are clearly job–related and capable of being documented and measured.

14. Changes in Standards

An agency may modify performance requirements as long as it does so according to a reasonable standard and makes the employee aware of the modifications. The agency is not required to alter the employee's position description to reflect changed requirements. *Archuleta v. DHHS,* 38 MSPR 648, 654 (1988); *Alexander v. Dept. of Commerce,* 30 MSPR 243, 248 (1986); *Smallwood v. Dept. of Navy,* 52 MSPR 678, 685 (1992) ("The only requirement imposed on an agency in changing a performance standard is that the agency communicate the standard to the employee at or before the beginning of the appraisal period which forms the basis of the action against the employee."). But agencies may not use a performance improvement period either to reduce or to increase the standards of performance established at the beginning of the appraisal period. *Brown v. VA,* 44 MSPR 635, 643 (1990) (allowing, however, that when standards are set for annual performance it is reasonable to establish a proportional numerical standard for the PIP, except in cases where seasonal or other variations in work load would make a

proportional standard unfair and inaccurate); *Smallwood v. Dept. of Navy*, 52 MSPR 678 (1992) (standard developed for measure of work over one year properly modified to measure work for the 90-day PIP). An agency may change performance standards for the employee at the point in time she is placed on a performance improvement plan, as long as the employee is given a *bona fide* opportunity to demonstrate acceptable performance, and as long as the changes do not unduly change performance requirements. *See Anthony v. Dept. of Army*, 27 MSPR 271, 273 n.* (1985) ("Here, as the presiding official found the changes in appellant's performance standards neither materially changed the performance expected nor posed any additional burdens on appellant."); *Boggess v. Dept. of Air Force*, 31 MSPR 461 (1986), *post*.

If an agency does make acceptable material changes in standards, the employee must be given an opportunity to perform under those standards before being rated and placed on a performance improvement period, assuming the agency ultimately desires to use the changed standards to support what may become an unacceptable performance action. In *Boggess v. Dept. of Air Force*, 31 MSPR 461 (1986), the appellant, a housing manager, was removed for unacceptable performance after the agency presented him with revised performance standards substantially different from prior standards and notified him that his performance was unacceptable and that he had 30 days to improve. The Board concluded that the agency was required to evaluate appellant's performance under the revised standards before it could give him a reasonable opportunity period to improve his performance under those standards. It was immaterial that the agency could have removed the appellant for unacceptable performance under his original standards. He had earlier been given a notice of unacceptable performance and an opportunity to improve under those standards. The new performance plan did not encompass the one performance standard earlier identified as warranting an unacceptable performance rating; accordingly, it could not be said that the new standards and opportunity period carried forward the deficiencies noted in the prior plan and opportunity period. The Board noted that under regulations then (and no longer) prevailing, 5 CFR 430.204(m) (1986), the agency was required to provide the appellant 90 days to demonstrate the quality of his work under the new standards and critical elements before rating him on his performance during that period. The Board distinguished the *Anthony* case, discussed earlier, observing that there the employee was not denied an opportunity to demonstrate acceptable performance, notwithstanding that standards were changed when she was placed on an improvement plan; the changed standards neither materially changed the performance expected nor posed added burdens on the employee.

If a standard is changed, the fairness of the revised standard may be challenged. That problem was explored in *Walker v. Dept. of Treasury*, 28 MSPR 227 (1985). The appellant was removed under Chapter 43 as a GS-4 Accounting Clerk for failure to meet one critical element entitled "controlled work." Appellant was required under the standard to screen, log, and distribute 400-700 pieces of correspondence each month. She was highly successful with but one error, fully acceptable with two errors, and marginal with three monthly errors. The standards were in effect for about six months, with an average error rate of nine per month, for the six months before appellant received an unacceptable rating. She was then given 30 days to improve but made ten errors during that month. Before the standard came into being, the appellant's performance requirements consisted of a percentage standard stating that errors above 14% of the correspondence constituted unacceptable performance. In the past the appellant met the old standard. Of these circumstances, the Board concluded that there had been an abuse of discretion, holding in *Walker*, 28 MSPR at 229:

> The agency's numerical performance standard in this case was clearly objective and set forth in writing. We do not believe, however, that the agency has demonstrated by substantial evidence that it was realistic or reasonably attainable. While an agency may properly decide to increase the quality and quantity of the performance it will require of its employees, it must do so according to a reasonable standard so that its application will not denigrate their rights. Here, under the previously acceptable percentage-based standard, the affected employees were held to an 86% efficiency requirement — equivalent to an average of approximately 77 errors per month — for acceptable performance. Under the current 3-error[s]-per-month numerical system, they are held to an approximately 99.5% efficiency standard. The agency attempted to demonstrate the reasonableness of the numerical standard by arguing, *inter alia*, that it had determined that the old error rate, based upon a percentage of the number of pieces of correspondence handled, "was not workable because the volume of work was not constant." As the appellant aptly notes in her petition, however, logic dictates that the fluctuation in the volume of correspondence handled would render a percentage-based standard significantly more objective and equitable than a fixed-number standard. . . .

As to the agency argument that it was important to have error-free work, the Board stated in *Walker*, 28 MSPR at 230-31:

> Finally, the agency argued that because of the potential impact of the appellant's errors on the efficiency of her supervisors' labors, as well as on the investors whom they served, it was "extremely important that [her] work be as error free as possible." However a review of the record does not reveal that the agency was able to show that the commission of what are essentially clerical errors in the performance of this critical element had nearly as grave a result as could be considered to warrant the imposition of the performance standard at issue. . . .
>
> We conclude that the agency abused its discretion in instituting and implementing the particular standard for the critical element at issue in this case. The requirement of near perfection in this critical element fails to provide a reasonable basis for rewarding an employee, but instead allows the agency to remove an employee, as it did here, on the basis of an extremely low monthly error rate. We therefore find that this contravention of 5 USC § 4302(b)(1) renders the performance standard invalid as a basis for measuring performance, and the appellant cannot be removed based on the invalid standard.

Revised performance standards cannot be retroactively applied. To do so would run afoul of the requirement that the standards be communicated to the employee at or before the beginning of the appraisal period that forms the basis of the action. *Talbot v. DHHS*, (Fed. Cir. 1989 nonprecedential No. 88-3237). *Cf. VA and AFGE Local 1765*, 43 FLRA 216 (1991) (standards not to be retroactively applied).

Assuming the appellant is on notice of standards and extensions of those standards through "performance indicators," a performance action is not invalidated because the agency did not modify the standards in accordance with its internal guidance to supervisors. *Mouser v. DHHS*, 32 MSPR 543 (1987).

a. Changes Through PIP

The PIP is not the time to materially change performance standards. *Betters v. FEMA*, 57 MSPR 405, 409–10 (1993), also noted that agencies generally ought not to use details to assess performance and held that:

> [I]n *Boggess v. Dept. of Air Force*, 31 MSPR 461, 462–63 (1986), the Board held that by simultaneously presenting the appellant with revised performance standards that were substantially different from the prior standards and notifying him both that his performance was unacceptable and that he had thirty days to improve, the agency failed to fulfill the substantive requirement of 5 USC 4303 to provide the appellant with a reasonable opportunity to improve. The Board found further that the appellant was entitled to an appraisal period under the revised standards and to a reasonable opportunity to improve *after* his performance was rated as deficient under those standards before the agency could properly initiate an action based on an unacceptable performance. . . .
>
> The administrative judge found that the agency's failure in this regard went further when the agency gave the appellant a new performance plan when he was placed on the PIP. This plan, too, differed significantly from that for the appellant's official position of record. Agencies may not use a PIP either to reduce or increase the standards of performance established at the beginning of the appraisal period. *See Brown v. Veterans Administration*, 44 MSPR 635, 643 (1990). Accordingly, we find no error in the administrative judge's finding that the agency improperly used a PIP to change the appellant's performance standards.

The Board cautioned against making improper changes in standards during a PIP in *Clifford v. Dept. of Agric.*, 50 MSPR 232, 236 (1991):

> In *Brown v. Veterans Administration*, 44 MSPR at 643, the Board held that an employee's performance pursuant to a PIP must always be reviewed in the context of the employee's performance plan, and that agencies may not use a PIP either to reduce or to increase the standards of performance established at the beginning of the appraisal period. In the present case, the initial decision's discussion . . . did not address the appellant's contention that his detail resulted in additional duties that prevented him from successfully completing his PIP. The initial decision should, therefore, discuss this matter on remand.

D. OPPORTUNITY TO IMPROVE

Unlike the adverse action based on poor performance, the unacceptable performance action is preconditioned upon notice of performance deficiencies and a fair chance to improve. The right to a meaningful opportunity to improve is one of the most important substantive rights in the entire Chapter 43 performance appraisal framework. *Adorador v. Dept. of Air Force*, 38 MSPR 461, 464 (1988) (relying upon *Zang v. Defense Investigative Serv.*, 26 MSPR 155 (1985)); *Thompson v. Farm Credit Admin.*, 51 MSPR 569, 578 (1991); *Vines v. Dept. of Defense*, 67 MSPR 667, 671 (1995) (nonprecedential opinion; Opinion of Chairman Erdreich). If the employee demonstrates acceptable performance during the improvement period or PIP provided by the agency, the agency is precluded from removing or demoting the employee solely on the basis of deficiencies that preceded and triggered the PIP. If the employee's performance is unacceptable during the PIP, the agency may base its action on that deficiency and need not also show deficient performance prior to the PIP. *Brown v. VA*, 44 MSPR 635, 640–41 (1990). It is the removal or downgrading that is appealable, not the PIP; that the appellant may be subjected to an appealable action as a result of his performance under a PIP is speculative and not a proper basis for the current assertion of jurisdiction. *Shaishaa v. Dept. of Army*, 58 MSPR 450, 454 (1993). But a PIP may be a threatened personnel action for purposes of an Individual Right of Action appeal, discussed in Chapter 13. *See Gonzales v. DHUD*, 64 MSPR 314 (1994) (a performance improvement period plan involves a threatened personnel action, such as a reduction in grade or removal).

In practice, the PIP often translates into detailed performance requirements and deadlines, coupled with periodic counseling or work reviews. Improvement during the performance improvement period ("PIP") as a result of the individual development plan ("IDP"), as the opportunity period and notice of deficiencies are sometimes called, can salvage the employee. The improvement period is a significant step: An agency can properly consider an appellant's performance following its issuance of a requirement letter to determine whether his performance fell short of satisfactory for any targeted critical element of his position, and to determine whether performance-based action is warranted. *O'Hearn v. GSA*, 41 MSPR 280 (1989). But an agency cannot remove an employee for substandard performance prior to the opportunity period if the employee's performance during the opportunity period is adequate. *See Siedle v. Dept. of Interior*, 35 MSPR 241, 251 n.14 (1987) (not addressing the situation of the employee whose performance slips to unsatisfactory following the close of the opportunity period). In some organizations opportunity periods are no more than formalities preceding a termination that is preordained. Some agencies ensure that managers make a sincere effort to secure an employee's improvement. Whatever the philosophy, if it can be called that, of a particular agency, the Board has established a few requirements for agencies to follow as to the statutorily-required improvement period.

1. Prerequisite of Unsatisfactory Performance

It is unacceptable performance that triggers the unacceptable performance action through the notice of an opportunity to improve. An agency that rates an employee's performance as marginal may not give the employee an improvement period, then rate the employee and take action on the basis of subsequent unacceptable performance. If the action taken is removal, it must be reversed. The employee has not been given a reasonable opportunity to demonstrate acceptable performance. *Colgan v. Dept.*

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-7474

JOHN R. SELLERS,
Petitioner,

v.

LYNN MARTIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
and TENNESSEE VALLEY AUTHORITY,
Respondents.

On Petition for Review of a Final
Decision and Order of the
Secretary of Labor

BRIEF FOR THE SECRETARY OF LABOR

STATEMENT OF JURISDICTION

The Secretary of Labor had jurisdiction of this matter pursuant to Section 210(b), the employee protection provision of the Energy Reorganization Act of 1974 ("ERA" or "Act"), as amended, 42 U.S.C. 5851(b). The Secretary of Labor issued her final decision and order on April 18, 1991, and Petitioner has filed a timely appeal from the Secretary's order. Section 210(c)(1) of the ERA, 42 U.S.C. 5851(c)(1), grants this Court jurisdiction to review the Secretary's decision.

clearly not protected activity. See Rollins v. State of Florida Department of Law Enforcement, 868 F.2d 397, 400 (11th Cir. 1989) (Title VII's anti-retaliation provision shields an employee regardless of the merits of her complaint, only if she can show a good faith, reasonable belief that the challenged practice violates Title VII). Thus, the Secretary properly regarded January 24, 1989, the date of the NRC complaint, as the critical date in her analysis of the record.

2. Even assuming arguendo that Sellers' January 5, 1989 complaint was protected activity, the record still amply demonstrates that the TVA had legitimate, nondiscriminatory reasons for Sellers' termination

An "employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all as long as its action is not for a discriminatory reason." Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1187 (11th Cir. 1984) (citation omitted). Accord Ad Art, Inc. v. NLRB, 645 F.2d 669, 679 (9th Cir. 1981); L'Eggs Products, Inc. v. NLRB, 619 F.2d 1337, 1341 (9th Cir. 1980). The employee who is incompetent, or insubordinate, or has become inefficient cannot use his protected activity as a shield against a discharge for non-discriminatory reasons. Ad Art, Inc. v. NLRB, supra; L'Eggs Products, Inc. v. NLRB, supra; NLRB v. Red Top, Inc., 455 F.2d 721, 726-728 (8th Cir. 1972); see also NLRB v. Knuth Brothers, Inc., 537 F.2d 950, 953 (7th Cir. 1976) (The statute "does not immunize an employee from discharge for acts of ... misconduct merely because those acts were associated with protected

instruction of his supervisor, Smith, arguing that it was not in compliance with the work plan (T. 32). Sellers' co-worker Billy Tidwell, who was Sellers' work partner at the intake pump that day, testified, however, that Smith's instruction to the crew was not in any way a violation of the work plan or any TVA procedure, nor out of the ordinary (T. 144). Yet, in Tidwell's words, Sellers became "outraged" and used "abusive language" because Smith had directed them to build their hangar like a hangar already constructed by another member of the crew (DX 12-1). As already discussed (see supra p. 23) on that same day, upon Smith's return to the work site after the earlier argument, yet another confrontation occurred, this time concerning the lack of progress in the work. Sellers again became belligerent and used profanity (T. 103, 107, 187, 188).

The record facts regarding this incident make it very clear that, on this occasion, as on many others both before and after January 1989, Sellers resented supervision (see T. 188), and this resulted in repeated conflicts with management. In enacting anti-discrimination provisions such as the one involved here, Congress did not seek "to tie the hands of employers in the objective selection and control of personnel." Hochstadt v. Worcester Foundation For Experimental Biology, 545 F.2d at 231. The "protective mantle" of such provisions must be "tempered by the employer's right to exact a day's work for a day's pay and to maintain discipline ...." Caterpillar Tractor Co. v. NLRB, 230 F.2d 357, 358 (7th Cir. 1956). See also TRW, Inc. v. NLRB, 654