LBP-02-10

RAS 4134

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 03/21/02

ATOMIC SAFETY AND LICENSING BOARD

SERVED 03/21/02

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Richard F. Cole
Ann Marshall Young

In the Matter of 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-CivP; 50-327 CivP; 50-328-CivP; 50-259-CivP; 50-260-CivP; 50-296-CivP ASLBP No. 01-791-01-CivP EA 99-234 March 21, 2002

MEMORANDUM AND ORDER
(Denying Motion for Summary Disposition)

This proceeding involves an alleged violation by the Tennessee Valley Authority (TVA) of 10 C.F.R. § 50.7, based on its claimed retaliation against a corporate chemistry manager, Mr. Gary Fiser, for activities that have been asserted by the NRC Staff (Staff) to be "protected activities." The Staff issued a Notice of Violation and imposed a civil penalty of $110,000, for TVA's alleged improper actions in eliminating Mr. Fiser's position and failing to select him for another position. See 66 Fed. Reg. 27,166 (May 16, 2001). On February 1, 2002, TVA filed a motion for summary disposition, pursuant to 10 C.F.R. § 2.749.[1] On February 20, 2002, the

[1]"Tennessee Valley Authority's Motion for Summary Decision," dated February 1, 2002. Among the attachments to that Motion was a "Brief in Support of Tennessee Valley Authority's Motion for Summary Decision" [TVA Brief].

Staff timely filed its response, seeking denial of TVA's motion.[2] On March 1, 2002, TVA filed a reply to the Staff's response,[3] and on March 4, 2002, the Staff filed an objection to our considering the reply.[4] For reasons set forth below, we are denying TVA's summary disposition motion.

1. Standards.

Under 10 C.F.R. § 2.749(a), any party to a proceeding may move for a decision by the presiding officer–here, this Atomic Safety and Licensing Board–in that party's favor as to all or any part of matters involved in the proceeding. The moving party "shall annex to the motion a separate, short, and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard (emphasis supplied)." 10 C.F.R. § 2.749(a). Any other party may serve an answer supporting or opposing the motion. That party similarly shall annex to its answer opposing the motion "a separate, short, and concise statement of the material facts as to which it is contended there exists a genuine issue to be heard." Id.

Under 10 C.F.R. § 2.749(d), the Licensing Board "shall render the decision sought if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of

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[2]NRC Staff Response to Tennessee Valley Authority's Motion for Summary Decision," dated February 20, 2002 [NRC Staff Response]. The NRC Staff Response was accompanied by, inter alia, an "NRC Staff Statement of Material Disputed Facts" [Staff Factual Statement].

[3]"Reply in Support of Tennessee Valley Authority's Motion for Summary Decision," dated March 1, 2002 [TVA Reply]. Reflecting the fact that 10 C.F.R. § 2.749 does not provide for the filing of a reply, TVA included with its reply a motion that we accept it.

[4]"NRC Staff Objection to Tennessee Valley Authority's Motion for Leave to Reply in Support of Motion for Summary Decision." In the interest of the most efficient consideration of all pertinent arguments made by both parties, we are including TVA's reply in our consideration of its motion, as well as the Staff's response to the reply.

law" (emphasis supplied). In considering a motion for summary disposition, we may apply the rules and standards used by the Federal courts for granting or denying summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993). The party seeking summary disposition bears the burden of showing the absence of a genuine issue of any material fact, and the record must be viewed in the light most favorable to the party opposing summary disposition. Id. The party opposing summary disposition must make a sufficient showing of each element of the case on which it has the burden of proof. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L.Ed. 2d 265, 273 (1986).

2. Licensing Board Analysis.

Under applicable standards outlined above, TVA's motion cannot be granted. Initially, we note that TVA has failed to comply with one of the specific mandates of 10 C.F.R. § 2.749(a): that the motion be accompanied by a separate statement of the "material facts as to which the moving party contends that there is no genuine issue to be heard." TVA filed no such separate statement, but claims in its reply that its statement of undisputed facts appears in its brief, at pp. 3-9. See TVA Reply at 1. Whether or not this is sufficient under 10 C.F.R. § 2.749, we need not rest our ruling herein on this arguable procedural deficiency.

TVA in the cited pages of its reply brief focuses on matters in dispute with the Staff, claiming that TVA's version is more accurate than the Staff's. Given the requirement that disputed facts are to be construed in favor of the party opposing summary disposition, TVA's motion must be denied on the ground that significant differences between the parties on material factual issues do in fact exist, thus leaving resolution of such differences for the evidentiary hearing (see further description of significant differences infra).

We base this conclusion on the Staff's demonstration in its statement of material facts that there exist genuine issues to be heard. This statement includes 47 facts asserted to be in dispute.[5] We need not recount them all to conclude that an abundance of disputed factual issues exists and should be heard and resolved through an evidentiary hearing.

For example, TVA asserts that "there is simply no evidence that McGrath was aware of any protected activity by Fiser" (TVA Brief, at 9), whereas, in contrast, the Staff states that "McGrath had knowledge of Fiser's 1993 DOL [United States Department of Labor] Complaint prior to June, 1996" (Staff Factual Statement, ¶ 6; see Staff Response, at 32-33). Similarly, TVA claims that "the new [chemistry program manager specialist] positions were significantly different than the old [generalist chemistry and environmental protection program manager] positions" (TVA Brief, at 8), whereas the Staff states that "[t]he Chemistry and Environmental Protection Program Manager position was substantially similar to the PWR Chemistry Program Manager position (Staff Factual Statement, ¶ 26), relying on depositions of various TVA officials before DOL (Staff Response, at 35-36).

TVA also states (TVA Brief, at 7) that:

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

For its part, the Staff asserts (Staff Factual Statement, ¶¶ 13, 14, 15) that:

> 13. McGrath rejected a reorganization plan in 1996 for the Corporate Chemistry organization that would not have resulted in the elimination of any of the incumbent Chemistry Managers.

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[5]The first five list actions taken by Mr. Fiser which, in the Staff's view, constitute "protected activity." See Staff Factual Statement, ¶¶ 1-5. TVA, through its brief, claims that these actions do not constitute "protected activities." TVA Brief, at 2. Because these statements are a mixture of fact and law, and because the factual elements involved are in dispute, we cannot at this stage determine that, as a matter of law, the actions do not constitute protected activity.

14. McGrath insisted that Grover cut the Chemistry organization to two chemistry managers, ensuring that at least one incumbent would not have a position after the reorganization.

15. The Chemistry organization was the only organization within Operations Support that McGrath mandated the entire 40 percent budget reduction within the first year of a five year organization plan. Only one other organization suffered the same level of cuts as the Chemistry organization.

From our review of the record, we observe that these are not the only facts in dispute, and that, indeed, there is a plethora of disputed facts and factual inferences, on all elements of the Staff's case on which it arguably bears the burden of proof, which precludes a grant of summary disposition. This is particularly the case where, as here, facts may be susceptible of differing interpretations as to intent, and where discriminatory or retaliatory intent behind otherwise routine activities is at issue. See Hunt v. Cromartie, 526 U.S. 541, 553, 143 L. Ed. 2d 731, 742 & n.9 (1999).[6] Moreover, as indicated above, where there are disputes between the parties on factual matters, the record must be viewed in the light most favorable to the party opposing summary disposition. In such circumstances, the grant of summary disposition is inappropriate.[7]

Finally, TVA claims that, as a matter of law, the Staff cannot rely on the temporal proximity of Mr. Fiser's complaints to DOL and the elimination of his job with TVA, as evidence of discrimination, because the period of time between the two events is excessive (TVA Brief at 14). The cases cited by TVA, however, involve situations where proximity is the sole basis for the alleged claim of discrimination. See, e.g., Clark County School District v. Breeden, 532

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[6]As the Court stated, "[s]ummary judgment in favor of the party with the burden of persuasion . . . is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact." Hunt, 546 U.S. at 553, 143 L. Ed. 2d at 742.

[7]TVA, in its reply, attempts to explain why the Staff's version of disputed facts is incorrect. This is a proper argument for the evidentiary hearing, but it is not appropriate at the summary disposition phase of the proceeding, where disputed facts are to be construed in a manner favoring the party opposing summary disposition.

U.S. 268, 273, 149 L. Ed. 2d 509, 515 (2001)("[t]he cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close'"(emphasis supplied, citations omitted)). Here, no reference to temporal proximity is reflected in the Staff's Notice of Violation or its Order Imposing Civil Monetary Penalty, but rather is found only (insofar as we are aware) in the Staff's letter dated February 7, 2000, at 3, transmitting the Order Imposing Civil Monetary Penalty to TVA. The Staff has indicated that it is relying on proximity as only one of several bases for establishing causation for TVA's acts (Staff Brief at 34; see also Tr. 122), citing a case stating that "[t]he mere passage of time is not legally conclusive proof against retaliation" (Robinson v. SEPTA, 982 F.2d 892, 894 (3d Cir. 1993)) and another case declaring that

> [t]he element of causation, which necessarily involves an inquiry into the motives of an employer, is highly context-specific. When there may be valid reasons why the adverse employment action was not taken immediately, the absence of immediacy between the cause and effect does not disprove causation. Kachmar v. Sungard Data Systems, Inc., 109 F.3d 173, 178 (3d Cir. 1997).

In short, it is apparent that the Staff is using several independent bases, including to an extent temporal proximity, to demonstrate causation in this case. As such, the cases cited by TVA that would disallow temporal proximity only when it is the sole basis for a showing of causation are not in point here, and so do not provide any basis for granting summary disposition.

3. Conclusion.

For the reasons set forth herein, the Licensing Board finds sufficient disputed material facts to preclude a grant of summary disposition in this proceeding and, in addition, finds no

legal basis for discarding the Staff's claims in whole or in part as a matter of law. TVA's motion for summary disposition is thus denied.

It is so ORDERED.

The Atomic Safety and Licensing Board

/RA/

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

/RA

Ann Marshall Young
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 21, 2002

[Copies of this Memorandum and Order have been transmitted this date by e-mail to counsel for each of the parties.]

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
TENNESSEE VALLEY AUTHORITY	)	Docket Nos. 50-390-CIVP,
	)	50-327/328-CIVP and
(Watts Bar Nuclear Plant, Unit 1;	)	50-259/260/296-CIVP
Sequoyah Nuclear Plant, Units 1 & 2; and	)	
Browns Ferry Nuclear Plant, Units 1, 2 & 3)	)	
(Order Imposing Civil Monetary Penalty)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DENYING MOTION FOR SUMMARY DISPOSITION) (LBP-02-10) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Charles Bechhoefer, Chairman
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Richard F. Cole
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Ann Marshall Young
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Dennis C. Dambly, Esq.
Susan S. Chidakel, Esq.
Jennifer M. Euchner, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Mark J. Burzynski, Manager
Nuclear Licensing
Tennessee Valley Authority
1101 Market Street
Chattanooga, TN 37402-2801

Docket Nos. 50-390-CIVP
50-327/328-CIVP and
50-259/260/296-CIVP
LB MEMORANDUM AND ORDER (DENYING
MOTION FOR SUMMARY DISPOSITION)
(LBP-02-10)

Thomas F. Fine, Esq.
Assistant General Counsel
Office of the General Counsel, ET 10A-K
Tennessee Valley Authority
400 W. Summit Hill Drive
Knoxville, TN 37902

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 21st day of March 2002