

August 16, 2021

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of)
)
)

Tennessee Valley Authority)
Chattanooga, Tennessee)
)

) Docket Nos. EA-20-006, EA-20-007

**TENNESSEE VALLEY AUTHORITY'S MOTION FOR
SUMMARY DISPOSITION OF VIOLATIONS 1, 2, AND 3
(LACK OF ADVERSE EMPLOYMENT ACTION)**

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TABLE OF CONTENTS

I. Introduction.....	3
II. Background.....	6
III. Statement of the Law	10
A. Summary Disposition Is Proper in NRC Proceedings Where the Moving Party Is Entitled to a Decision as a Matter of Law	10
B. Discrimination Claims Must Adhere to the ERA Section 211 Statutory Framework	11
IV. Argument	12
A. TVA Is Entitled to Summary Disposition on Violations 1 and 3 As a Matter of Law Because Filing a Complaint Is Not an Adverse Action and Cannot Amount to Discrimination Under ERA Section 211.....	12
B. The Staff’s Erroneous Interpretation of an Adverse Action Would Represent a Broad Expansion of Staff Authority Far Beyond Its Existing Reach and Would Have a Serious Negative Policy Implications.....	18
C. The Staff Is Applying an Incorrect Legal Standard Regarding What Constitutes an Adverse Employment Action.....	25
D. TVA Is Entitled to Summary Disposition on Violation 2 as a Matter of Law Because Placing an Employee on Paid Administrative Leave Is Not an Adverse Action Amounting to Discrimination Under ERA Section 211.....	35
V. Conclusion	38
VI. Certification	38

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Pursuant to 10 C.F.R. § 2.710, the April 2, 2021 Order Granting Joint Motion for Schedule Extension,¹ and the July 29, 2021 Order Providing Case Management Instructions,² the Tennessee Valley Authority (“TVA”) hereby moves the Atomic Safety and Licensing Board (the “Board”) for summary disposition of Violations 1, 2, and 3 set forth in the August 24, 2020 Notice of Violation³ and the October 29, 2020 Order Imposing a Civil Penalty against TVA⁴

¹ Order, Granting Joint Motion for Schedule Extension (Apr. 2, 2021) (ADAMS Accession No. ML21092A057).

² Order, Providing Case Management Instructions (July 29, 2021) (ADAMS Accession No. ML21210A093).

³ Notice of Violation and Proposed Imposition of Civil Penalty to TVA (EA-20-006 & EA-20-007) (Aug. 24, 2020) (ADAMS Accession No. ML20232B803) (“TVA NOV”).

⁴ TVA Order Imposing Civil Monetary Penalty (Oct. 29, 2020) (ADAMS Accession No. ML20297A544) (“Order”); Appendix to the TVA Order (Oct. 29, 2020) (ADAMS Accession No. ML20297A552) (“Order Appendix”).

because those Violations fail to allege that TVA took an adverse employment action cognizable under applicable law.⁵

In brief, and as set forth in more detail below, Violations 1 and 3 should be dismissed because, as a matter of law, the act of an employee filing of a complaint is not an adverse action cognizable under Energy Reorganization Act (“ERA”), Section 211, 42 U.S.C. § 5851 and 10 C.F.R. § 50.7 (“Section 50.7”), and thus an employee complaint cannot amount to an act of discrimination. Violation 2 should likewise be dismissed because, as a matter of law, placing an individual on paid administrative leave is not an adverse action under ERA Section 211 and Section 50.7.

Because TVA seeks summary disposition as a matter of law, and because resolution of Violations 1, 2, and 3 in TVA’s favor would streamline the issues to be litigated at hearing and expedite this proceeding, TVA respectfully requests that the Board direct the NRC Staff to respond to this Motion in accordance with 10 C.F.R. § 2.710(a).⁶

Summary disposition is particularly appropriate here because, in Violations 1 and 3, the Staff has invented an adverse action out of whole cloth in claiming that the act of filing a complaint is akin to tangible adverse employment actions such as discharge and demotion. The

⁵ This Motion is supported by (1) a Statement of Undisputed Material Facts as to which TVA asserts there is no genuine dispute (Attachment 1) and (2) additional supporting Attachments 2 through 16 (TVA’s List of Attachments in Support of Motion For Summary Disposition of Violations 1, 2, and 3). TVA has moved for summary disposition of Violation 4 on the separate and distinct ground that Violation 4 can be resolved without hearing because it is not based on nuclear safety-related protected activity, as required by ERA Section 211. *See* Tennessee Valley Authority Motion for Summary Disposition of Violation 4 (Lack of Nuclear Safety-Related Protected Activity) (EA-20-006, EA-20-007) (Aug. 16, 2021).

⁶ Order, Providing Case Management Instructions at 4–5 (July 29, 2021) (ADAMS Accession No. ML21210A093). *See also* Transcript of TVA Pre-Hearing Teleconference at 138:25–139:10 (July 21, 2021) (ADAMS Accession No. ML21207A251).

Staff's invention is legally unsupported and without precedent. It is also bad policy, as it discourages employees from raising concerns for fear of causing a violation of Section 50.7. In Violation 2, the Staff's claim that paid administrative leave is an adverse action is not new, but that same claim has been rejected by authoritative and controlling judicial precedent from the federal courts.

I. Introduction

In the course of this proceeding, the Staff has issued TVA four violations. In issuing Violations 1, 2, and 3, the Staff has ignored the bounds of its statutory authority under Section 211 of the ERA. The Staff may pursue claims under the ERA only where the employer “discharge[s] any employee or otherwise discriminate[s] against any employee with respect to his *compensation, terms, conditions, or privileges of employment* because the employee” engaged in protected activities.⁷ This discharge or other change in compensation, terms, conditions, or privileges of employment is the adverse action required to sustain a claim of discrimination under Section 211 of the ERA. In this case, the Staff has, however, levied violations against a company because: (1) an employee filed a hostile work environment complaint which the company was obligated to investigate,⁸ and (2) the company placed an individual on paid administrative leave pending further investigation when the nuclear power

⁷ 42 U.S.C. § 5851(a)(1) (emphasis added).

⁸ See *infra* Section IV.B.2.

plant site Vice President was concerned the “bullying, hostile work environment” could “escalate” and “get physical.”⁹

Violations 1 and 3, as issued to TVA on August 24, 2020, state in relevant part,

[O]n March 9, 2018 [the day Erin Henderson filed her complaint],¹⁰ [TVA] discriminated against a former [] employee for engaging in protected activity After becoming aware of this protected activity, the former Director of Corporate Nuclear Licensing (CNL) [Erin Henderson] filed a formal complaint against the former employee. The filing of a formal complaint triggered an investigation by the TVA Office of the General Counsel. This action was based, at least in part, on the former employee engaging in protected activity.¹¹

As a matter of law, Violations 1 and 3 are not adverse actions under ERA Section 211 or Section 50.7. As the Commission has explained, “section 50.7 requires the NRC Staff to show three things: (1) an employee engaged in ‘protected activity’ while working for a licensee, for an applicant, or for a contractor or subcontractor of a licensee or applicant; (2) the employer took adverse personnel action against the employee; and (3) the employer took such action ‘because’ of the protected activity.”¹² As will be detailed herein, the type of adverse personnel actions

⁹ Attach. 2 (Williams Depo. Tr. at 69:15–25) (“We did not look back. I mean I did not really look back on how we got to this point. I looked at here I am now with all this thing -- all these different examples and, you know, the concern of, you know, if this escalates -- and, you know, a lot of stuff when I'm talking about escalation, because this is, you know, bullying, hostile work environment, this could get physical. It could be -- so that was something that, you know, we were concerned about this environment because it could get physical. Mike was emotional about these issues.”).

¹⁰ Attach. 1, ¶ 1 (Statement of Undisputed Material Facts).

¹¹ Compare TVA NOV at 1–2, with Order Appendix at 1–2 (demonstrating that violations were not changed between the TVA NOV and Order). Based on the wording of Violations 1 and 3 (and the focus on March 9, 2018, as the date of the “discrimination,” the Staff is apparently basing Violations 1 and 3 on Ms. Henderson’s filing of a complaint. As a result, Sections IV.A–C, herein, are focused on whether an employee complaint can be considered an adverse action under ERA, Section 211 and Section 50.7. However, to the extent that the Staff attempts to rely on TVA’s investigation as the adverse action to support Violations 1 and 3, that argument is addressed in Section IV.D.

¹² *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Browns Ferry Nuclear Plant, Units 1, 2, and 3), CLI-04-24, 60 NRC 160, 183 (2004).

cognizable as discrimination under ERA Section 211 and Section 50.7 (“adverse actions”) do not include an employee’s filing of a complaint that prompts a company investigation.

Violation 2 is equally flawed because it is based on the premise that placing an employee on paid administrative leave pending an investigation is an adverse action under ERA Section 211 or Section 50.7. TVA Violation 2, as issued on August 24, 2020, states in relevant part,

[O]n May 25, 2018, TVA discriminated against a former Sequoyah employee for engaging in a protected activity After becoming aware of this protected activity, TVA placed the former employee on paid administrative leave until the former employee resigned in August 2018. This action was based, at least in part, on the former employee engaging in protected activity.¹³

It is undisputed that, on May 25, 2018, TVA placed Mr. Michael McBrearty (the former Sequoyah employee referenced in Violation 2) on paid administrative leave.¹⁴ But again, the Staff is wrong as a matter of law that placing an employee on paid administrative leave constitutes an adverse action under Section 50.7 and ERA Section 211. Courts including the Sixth Circuit, whose precedents are controlling here, have found paid administrative leave is not an adverse employment action under the ERA.¹⁵ Absent a legally cognizable act of discharge or other employment action adversely affecting the compensation, terms, conditions, or privileges of employment, Violation 2 also fails as a matter of law.

Violations 1, 2, and 3 thus exceed the Staff’s statutory authority to sanction companies for discharging or discriminating against an employee with respect to their “compensation,

¹³ Compare TVA NOV at 1–2, with Order at 1–2 (demonstrating that violations were not changed between the NOV and Order).

¹⁴ Attach. 1, ¶ 4 (Statement of Undisputed Material Facts).

¹⁵ See cases cited *infra* notes 60–66.

terms, conditions, or privileges of employment.”¹⁶ The Violations instead mark an aggressive expansion of Staff authority beyond statute and existing precedent and will chill future protected activity and licensee compliance with Section 211 of the ERA. For these reasons, Violations 1, 2, and 3 should be dismissed on summary disposition.

II. Background

On March 9, 2018, Ms. Henderson, then TVA’s Director of Corporate Nuclear Licensing, submitted a formal, written complaint (the “Complaint”) to her supervisor (Mr. Joseph Shea, then TVA’s Vice President of Regulatory Affairs and Support Services), and Ms. Amanda Poland (TVA’s Corporate Nuclear Human Resources Director).¹⁷ Ms. Henderson’s Complaint alleged that several individuals in the Corporate Nuclear Licensing organization (including Ms. Beth Wetzel) and one individual in the site licensing organization at the Sequoyah Nuclear Power Plant (“Sequoyah”) (Mr. Michael McBrearty) were creating a hostile work environment for her.¹⁸

Specifically, Ms. Henderson alleged that these individuals “have either directly or indirectly acted in [an] attempt to intimidate and undermine me in my role as a senior regulatory leader.”¹⁹ In particular, Ms. Henderson explained in her Complaint her belief that Mr. McBrearty (the Sequoyah Site Licensing Manager)—had “intentionally targeted” Ms. Henderson because she, “in conjunction with [her] leadership and HR, initiated an investigation” nearly two years prior, in April 2016 into Mr. McBrearty’s relationship with a member of Corporate Nuclear

¹⁶ 42 U.S.C. § 5851(a)(1).

¹⁷ Attach. 4 (Formal Complaint of Erin Henderson (Mar. 9, 2018)).

¹⁸ *Id.* at 1.

¹⁹ *Id.* at 1.

Licensing.²⁰ Ms. Henderson further alleged that her “ability to fully perform the responsibilities outlined in [her] job description ha[d] been impacted.”²¹

Ms. Henderson submitted her Complaint to her supervisor, Mr. Joseph Shea, then TVA’s Vice President of Regulatory Affairs and Support Services, and Ms. Amanda Poland, TVA’s Corporate Nuclear Human Resources Director. TVA determined that its Office of General Counsel (“OGC”) would conduct the investigation into Ms. Henderson’s Complaint. TVA OGC attorney Mr. John Slater then carried out the investigation.

Mr. Slater prepared an initial investigation report dated May 25, 2018, which substantiated Ms. Henderson’s allegations with respect to Mr. McBrearty.²² The report concluded that “Ms. Henderson’s allegation of harassment and retaliation is substantiated, and Mr. McBrearty’s conduct and behavior violated two Federal statutes, a Federal regulation, and three TVA policies.”²³ After reviewing the report, TVA management placed Mr. McBrearty on paid administrative leave pending determination of next steps.

The final investigation report was released on August 10, 2018, and reached the same conclusion with respect to Mr. McBrearty.²⁴ On August 16, 2018, TVA management learned

²⁰ *Id.* at 8. As explained in Section IV.B.2, Ms. Henderson’s 2016 concern was nuclear safety protected activity under the ERA, consistent with a 2009 Staff finding that an allegation of a “manager of being ‘too close to the line organization’ to effectively and independently perform his duties” was protected activity. U.S. Nuclear Regulatory Commission, Office of Public Affairs, Region II, “NRC Reaches Settlement With Tennessee Valley Authority Following Mediation Session” at 1 (Dec. 23, 2009), (ADAMS Accession No. ML093570251).

²¹ *Id.* at 1.

²² Attach. 7 (Report of Investigation of Erin Henderson’s Allegations of Harassment and Hostile Work Environment (May 25, 2018)) (“May 25 Slater Report”).

²³ *Id.* at 32.

²⁴ Attach. 8 at 38 (Report of Investigation of Erin Henderson’s Allegations of Harassment and Hostile Work Environment (Aug. 10, 2018)) (“August 10 Slater Report”).

that Mr. McBrearty resigned to take a position overseas.²⁵ TVA took no personnel action regarding Mr. McBrearty and did not discipline Mr. McBrearty in any way.

The initial investigation report did not reach any conclusions with respect to Ms. Wetzel's actions. The final investigation report, however, addressed actions that Ms. Wetzel took regarding Ms. Henderson *after* Ms. Henderson filed her Complaint.²⁶ The facts leading up to Ms. Wetzel's termination of employment are set forth in the Motion for Summary Disposition of Violation 4.²⁷ Ms. Wetzel's employment was terminated on January 14, 2019.²⁸

On March 2, 2020, the NRC issued a Notice of Apparent Violation to TVA relating to the decisions to place Mr. McBrearty on paid administrative leave and to terminate Ms. Wetzel's employment, and separate notices of apparent violations to three TVA employees, including Ms. Henderson and Mr. Shea. TVA and the three employees disputed the apparent violations in pre-decisional enforcement conferences ("PEC") held on June 23–25 and 30, 2020.

On August 24, 2020, the Staff issued a Notice of Violation and Proposed Imposition of Civil Penalty to TVA, which alleged a total of four violations.²⁹ On that same day, the Staff also issued a notice of violation to Ms. Henderson for allegedly engaging in deliberate misconduct, which the Staff has since unilaterally withdrawn.³⁰ Ms. Henderson's notice of violation stated in

²⁵ Attach. 1, ¶ 5 (Statement of Undisputed Material Facts).

²⁶ See Attach. 8 at 19–20 & n.69 (August 10 Slater Report).

²⁷ Tennessee Valley Authority Motion for Summary Disposition of Violation 4 (Lack of Nuclear Safety-Related Protected Activity) (EA-20-006, EA-20-007) (Aug. 16, 2021).

²⁸ Attach. 1, ¶ 6 (Statement of Undisputed Material Facts).

²⁹ See TVA NOV, *supra* note 3.

³⁰ Cover Letter and Notice of Violation to Ms. Erin Henderson re: Notice of Violation, Nuclear Regulatory Commission Office of Investigations Report Nos. 2-2018-033 and 2-2019-015, at 2 (IA-20-009) (Aug. 24, 2020) (ADAMS Accession No. ML20218A584); Recission of August 24, 2020, Notice of Violation (IA-20-009) (Jan. 22, 2021) (ADAMS Accession No. ML21022A243).

part that the Staff declined to issue Ms. Henderson an order prohibiting her from involvement in NRC-licensed activities “because [she was] not the decisionmaker that placed the former employees on paid administrative leave or terminated the former corporate employee,”³¹ referring to Mr. McBrearty and Ms. Wetzel, respectively.

On September 23, 2020, TVA denied all four of its alleged violations. Specifically— with respect to Violations 1 and 3—TVA disputed that Ms. Henderson’s act of filing a harassment complaint “constitutes an adverse action under 10 C.F.R. § 50.7.”³² TVA also stated it “disagrees that [Ms. Henderson’s] act of filing a harassment complaint was deliberate misconduct or otherwise retaliation for others’ ostensibly protected activity.”³³ With respect to Violation 2, TVA disagreed that placing Mr. McBrearty on paid administrative leave was taken because of protected activity.³⁴

On October 29, 2020, the NRC issued an Order to TVA assessing a Civil Penalty of \$606,942 (the “Order”). The Staff’s Appendix to the Order responded to TVA’s denial.³⁵ On November 30, 2020, TVA filed a request for hearing on the Order, which the Staff did not oppose, and which was subsequently assigned to this Board.³⁶ During discovery on this matter, TVA and the Staff took depositions of 19 relevant individuals. TVA deposed six current and

³¹ Cover Letter and Notice of Violation to Ms. Erin Henderson re: Notice of Violation, Nuclear Regulatory Commission Office of Investigations Report Nos. 2-2018-033 and 2-2019-015, at 2 (IA-20-009) (Aug. 24, 2020) (ADAMS Accession No. ML20218A584).

³² Tennessee Valley Authority Reply to Notice of Violation (EA-20-006 and EA-20-007) at 2, 9 (Sept. 23, 2020) (ADAMS Accession No. ML20274A012).

³³ *Id.* at 1, 8.

³⁴ *Id.* at 5.

³⁵ *See* Order & Order Appendix.

³⁶ Tennessee Valley Authority’s Answer and Request for Hearing (Nov. 30, 2020) (ADAMS Accession No. ML20335A574).

former Staff, including the Office of Investigations and the Office of Enforcement personnel responsible for investigating the McBrearty and Wetzel cases and issuing the Order to TVA.

III. Statement of the Law

A. Summary Disposition Is Proper in NRC Proceedings Where the Moving Party Is Entitled to a Decision as a Matter of Law

To prevail on summary disposition, there must be “no genuine issue as to any material fact” and the moving party must be “entitled to a decision as a matter of law.”³⁷ The party opposing summary disposition must make a sufficient showing of each element of the case on which it has the burden of proof.³⁸

Moreover, “[w]hen a motion for summary disposition is made and supported as described in our regulations, ‘a party opposing the motion may not rest upon . . . mere allegations or denials,’ but must state ‘specific facts showing that there is a genuine issue of fact’ for hearing.”³⁹ Indeed, in the face of well-pled undisputed material facts, an opponent must provide “something more than suspicions or bald assertions as the basis for a material factual dispute,”⁴⁰ and witness testimony that lacks an adequate basis will not suffice to preclude summary judgment.⁴¹ In addition, irrelevant or unnecessary factual disputes are not enough for a genuine

³⁷ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 297 (2010); *Advanced Med. Sys., Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102–03 (1993), *reconsid. denied*, CLI-93-24, 38 NRC 187 (1993).

³⁸ *Tennessee Valley Authority.* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2, & 3), LBP-02-10, 55 NRC 236, 239 (2002) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

³⁹ *Pilgrim*, CLI-10-11, 71 NRC at 297.

⁴⁰ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-40, 54 NRC 526, 536 (2001).

⁴¹ *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-4, 61 NRC 71, 81 (2005).

material issue of fact.⁴² “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.”⁴³

Summary disposition or dismissal of a complaint is particularly appropriate in cases where a complainant (or, in this case, the Staff) fails as a matter of law to establish that an adverse employment action occurred.⁴⁴ Indeed, the ERA mandates such a result, requiring dismissal of a complaint where the complainant fails to make a prima facie showing that protected activity was a contributing factor in an “unfavorable personnel action.”⁴⁵ Accordingly, dismissal through summary disposition is warranted when a complainant or agency alleging discrimination fails to adequately allege that a legally cognizable adverse employment action has occurred.

B. Discrimination Claims Must Adhere to the ERA Section 211 Statutory Framework

The Commission has been unequivocal that when evaluating a claim of discrimination under Section 50.7, the Board must adhere to the ERA’s statutory language. Indeed, in CLI-04-24,⁴⁶ the Commission vacated the Board’s decision for failing to “follow [ERA] section 211’s

⁴² *Safety Light Corp.* (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 449 n.167 (1995) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

⁴³ *Id.*

⁴⁴ Because the Commission’s summary disposition rule borrows extensively from Rule 56 of the Federal Rules of Civil Procedure, it has long been held that federal court decisions interpreting and applying like provisions of Rule 56 are appropriate precedent for interpreting the Commission’s summary disposition rule. *Id.* (citing *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant Units 1 and 2), ALAB-443, 6 NRC 741, 753–54 (1977)); *Savannah River Mixed Oxide Fuel Fabrication Facility*, LBP-05-4, 61 NRC at 79.

⁴⁵ 42 U.S.C. § 5851(b)(3)(A). See also *Tennessee Valley Authority*, CLI-04-24, 60 NRC 160 (citing *Trimmer v. U.S. Dep’t of Labor*, 174 F.3d 1098, 1103 (10th Cir. 1999) (holding that a delay in sending a discharge letter did not constitute an unfavorable personnel action)).

⁴⁶ *Tennessee Valley Authority*, CLI-04-24, 60 NRC 160.

full evidentiary framework.”⁴⁷ There, the Board had attempted to apply an evidentiary framework borrowed from Department of Labor cases.⁴⁸ Instead, the Commission ordered that “authoritative judicial decisions” from federal courts interpreting the ERA would govern the Commission’s ERA cases, rather than “the byzantine doctrines of traditional employment discrimination law.”⁴⁹

IV. Argument

A. TVA Is Entitled to Summary Disposition on Violations 1 and 3 As a Matter of Law Because Filing a Complaint Is Not an Adverse Action and Cannot Amount to Discrimination Under ERA Section 211

TVA is entitled to summary disposition on Violations 1 and 3 because Ms. Henderson’s act of filing a complaint on March 9, 2018, which then triggered an investigation, did not adversely affect any employee’s terms, conditions, or privileges of employment, as required under Section 211 of the ERA and Section 50.7. Accordingly, Ms. Henderson’s Complaint was not an adverse action under Section 211 of the ERA as a matter of law, and no violation of Section 50.7 occurred.

1. Federal Caselaw Demonstrates that Filing a Complaint Is Not Legally Cognizable as an Adverse Action Under ERA Section 211

ERA Section 211 prohibits “discrimination” against an employee for engaging in protected activity and defines “discrimination” as discharge or other adverse actions that impact

⁴⁷ *Id.* at 192–94; *see also id.* at 194 (“Here, section 211 . . . is the obvious place to look for guidance on litigating whistleblower enforcement cases at the NRC.”).

⁴⁸ *Id.* at 191. The Commission specifically rejected Department of Labor (DOL) precedent related to a “pretext” analysis because Congress “rendered such analysis unnecessary” when it enacted the evidentiary framework specified in section 211 of the ERA. *Id.* The Commission “decline[d] to follow DOL on that point . . . nothing in section 211’s language or history suggests an exception for ‘pretext’ cases.” *Id.*

⁴⁹ *Id.* at 191–92.

an employee's "compensation, terms, conditions, or privileges of employment" because of protected activities.⁵⁰ There is no federal caselaw that TVA has found that refers to the mere act of an employee filing a complaint against another employee as an impact to "compensation, terms, conditions, or privileges of employment." Indeed, federal caselaw interpreting this language confirms that discrimination under ERA Section 211 requires some tangible impact on one's employment or an "adverse impact on [the complainant] to constitute an adverse employment action."⁵¹ Under the ERA, "[n]ot everything that makes an employee unhappy is an actionable adverse action,"⁵² and merely "frustrating or unpleasant" matters are insufficient to constitute discrimination.⁵³

There are few cases interpreting the standard for an adverse personnel action under the ERA, and none is analogous to this case. Under ERA Section 211, courts have recognized adverse actions such as termination of employment, failure to hire, demotion, or unwanted

⁵⁰ See 42 U.S.C. § 5851(a)(1).

⁵¹ *Trimmer*, 174 F.3d at 1103 (citing *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 359 (8th Cir. 1997)).

⁵² *Id.* at 1103 (citing *Greaser v. Missouri Dep't of Corrections*, 145 F.3d 979, 984 (8th Cir. 1998)).

⁵³ *Anderson v. U.S. Dep't of Labor*, 422 F.3d 1155, 1182 (10th Cir. 2005) ("Anderson claims *inter alia* that Metro discriminated against her by cutting her off or ruling her out of order at meetings, denying her requests to distribute material and for a special Board meeting, subjecting her to a special disclaimer requirement when making public statements and threatening her with censure if she did not do so, omitting allegedly relevant actions in Board meeting minutes, seeking that she not be reappointed to the Board, and defending its position on Lowry to the media and public, which included defaming her and destroying her personal reputation. We have difficulty understanding how those complaints amount to 'discrimination' from which these statutes afford protection."). Anderson filed suit under seven environmental statutes: the ERA, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Solid Waste Disposal Act (SWDA), the Federal Water Pollution Control Act (FWPCA), the Safe Drinking Water Act (SDWA), the Clean Air Act (CAA) and the Toxic Substances Control Act (TSCA). These seven statutes have related Department of Labor regulations in 29 C.F.R. Part 24. *Id.*

transfers⁵⁴—in other words personnel actions with a direct tangible impact on the person’s employment.

There is no comparison between the kind of “tangible” adverse actions traditionally asserted under ERA Section 211 and Ms. Henderson’s filing of a harassment complaint in furtherance of her own concerns. According to Violations 1 and 3 in the Order, “[o]n March 9, 2018, [TVA] discriminated against” Mr. McBrearty and Ms. Wetzel.⁵⁵ But when Ms. Henderson filed her Complaint on that day, even if it led to an investigation, it did not impact Mr. McBrearty’s or Ms. Wetzel’s employment. The undisputed facts show that on March 9, 2018 there was no change in their compensation, terms, conditions, or privileges of employment. Nor has the Staff even attempted to explain how Ms. Henderson’s Complaint caused such a change

⁵⁴ See, e.g., *English v. General Elec. Co.*, 496 U.S. 72 (1990) (involving termination of employment); *Dysert v. U.S. Sec’y of Labor*, 105 F.3d 607 (11th Cir. 1997) (involving termination of employment); *Kahn v. U.S. Sec’y of Labor*, 64 F.3d 271, 279 (7th Cir. 1995) (involving termination of employment); *Mackowiak v. University Nuclear Sys., Inc.*, 735 F.2d 1159 (9th Cir. 1984) (involving involuntary transfer and ultimately termination); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985) (involving termination of employment); *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984), *superseded in part by regulation on other grounds*, 42 U.S.C. § 5851 (involving termination of employment); *Doyle v. U.S. Sec’y of Labor*, 285 F.3d 243 (3d Cir. 2002) (involving failure to hire); *Bechtel Constr. Co. v. Sec’y of Labor*, 50 F.3d 926 (11th Cir. 1995) (involving termination of employment); *DeFord v. Sec’y of Labor*, 700 F.2d 281 (6th Cir. 1983) (involving a transfer deemed a demotion); *Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568 (11th Cir. 1997), *superseded in part by regulation on other grounds*, 29 C.F.R. § 24.110(b) (involving a demotion and transfer); *Hasan v. U.S. Dep’t of Labor*, 400 F.3d 1001 (7th Cir. 2005) (involving failure to hire); *Hasan v. U.S. Dep’t of Labor*, 298 F.3d 914 (10th Cir. 2002) (involving failure to hire); *Tamosaitis v. URS Inc.*, 781 F.3d 468 (9th Cir. 2015) (involving involuntary transfer with lost compensation); *Consol. Edison Co. of N.Y., Inc. v. Donovan*, 673 F.2d 61 (2d Cir. 1982) (involving termination of employment); *Am. Nuclear Res., Inc. v. U.S. Dep’t of Labor*, 134 F.3d 1292 (6th Cir. 1998) (involving termination of employment).

Courts have also recognized adverse actions in the face of a hostile work environment claims sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. *Williams v. Admin. Review Bd.*, 376 F.3d 471, 476–77 (5th Cir. 2004); *English v. Whitfield*, 858 F.2d 957, 964 (4th Cir. 1988). However, the Staff has never alleged a hostile work environment resulting from Ms. Henderson’s complaint. Nor could it as neither Mr. McBrearty nor Ms. Wetzel was aware of the complaint and the focus of the investigation.

⁵⁵ Compare TVA NOV at 1–2, with Order Appendix at 1–2 (demonstrating that violations were not changed between the TVA NOV and Order).

on March 9, 2018 in their compensation, terms, conditions, or privileges of employment, similar to termination of employment, failure to hire, demotion, or unwanted transfers. Instead, the Staff has merely asserted that an adverse action exists.⁵⁶

In sum, there is no justification for calling Ms. Henderson’s Complaint an adverse action under ERA Section 211 and the cases that have interpreted that statute.

2. Filing a Complaint Is Not Legally Cognizable as an Adverse Action Under Title VII, Which Has the Same Governing Language as ERA Section 211

Even beyond a review of cases under the ERA, it is clear that Ms. Henderson’s Complaint was not an adverse action. The anti-discrimination provision of Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination, is identical to Section 211 of the ERA. Title VII refers to legally cognizable adverse actions as “discharge” or discrimination “with respect to [] compensation, terms, conditions, or privileges of employment.”⁵⁷ As a result, discrimination caselaw under Title VII has been used by the courts to interpret the meaning of an adverse action under Section 211 of the ERA.⁵⁸ When interpreting Title VII’s identical anti-

⁵⁶ Order Appendix at 2–3. To the extent that the Staff is attempting to justify Violations 1 and 3 by relying on a combination of the Complaint, the investigation, and TVA’s actions in Violations 2 (paid administrative leave) and 4 (termination of employment), the Staff has provided no justification for attempting to enforce multiple violations out of a single purported adverse action under 10 C.F.R. § 50.7(a). Nor would that be consistent with Commission precedent in CLI-04-24, which held that to “demonstrate a whistleblower violation . . . , section 50.7 requires the NRC Staff to show . . . the employer took adverse personnel action against the employee.” *Tennessee Valley Authority*, CLI-04-24, 60 NRC at 183. If the Staff could use a single adverse action to justify multiple violations, it would eliminate the Staff’s obligation to prove an adverse action for each asserted violation.

⁵⁷ Compare 42 U.S.C. § 2000e-2(a)(1) (it is unlawful for “an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . .”), with 42 U.S.C. § 5851(a)(1) (it is unlawful to “discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment . . .”).

⁵⁸ See, e.g., *Trimmer*, 174 F.3d at 1103 (regarding the Energy Reorganization Act) (citing *Montandon*, 116 F.3d at 359 (regarding the anti-discrimination standard in Title VII); *English*, 858 F.2d at 964 (comparing the language of

discrimination provision, the Supreme Court has held that the words “‘hire,’ ‘discharge,’ ‘compensation, terms, conditions, or privileges of employment,’ [and] ‘employment opportunities,’” “explicitly limit the scope of [the Title VII anti-discrimination] provision to actions that affect employment or alter the conditions of the workplace.”⁵⁹

Likewise, the Sixth Circuit (which includes Tennessee) has defined an adverse employment action under Title VII’s anti-discrimination provision as an action that entails a “materially adverse change in the terms and conditions of plaintiff’s employment.”⁶⁰ “Under this standard, a ‘materially adverse’ change in employment conditions ‘must be more disruptive than a mere inconvenience or an alteration of job responsibilities.’”⁶¹ Indeed, “*de minimis* employment actions,” or employment actions with minimal impact to an employee, are not considered materially adverse.⁶² That Circuit has further stated: “An adverse employment action is an action by the *employer* that ‘constitutes a *significant change* in employment status, such as

the ERA to the identical language under Title VII) (citing *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64–67 (1986) (regarding hostile work environment claim under Title VII)); *Williams*, 376 F.3d at 476–77 (applying an interpretation of Title VII’s anti-discrimination provision to ERA Section 211) (citing *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764–65 (1998) (regarding hostile work environment claim under Title VII)).

⁵⁹ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62 (2006) (contrasting the Title VII anti-discrimination provision with the anti-retaliation provision in the same statute).

⁶⁰ *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 795 (6th Cir. 2004) (*en banc*), *aff’d in part*, 548 U.S. 53 (2006) (citation omitted) (affirmed as to anti-discrimination claim).

⁶¹ *Mitchell v. Vanderbilt Univ.*, 389 F.3d 177, 181–82 (6th Cir. 2004) (finding no adverse action in a case where complainant alleged “(1) the reduction in his allotted research lab space; (2) the revocation of his mentor status; (3) the loss of his graduate research assistant; (4) the proposed, but unimplemented reduction in pay and appointment to the Bedford County Hospital Laboratories; (5) the forced review of his National Institutes of Health grant applications; (6) his removal from the position of Medical Director of Pathology Services; and (7) his non-selection as Medical Director of Clinical Laboratories.”). *Id.* at 180.

⁶² See, e.g., *Jacklyn v. Schering Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 930 (6th Cir. 1999) (holding that “neither requiring plaintiff to work at home while she was recovering from out-patient surgery, nor rejecting computer expenses that previously had been approved, were materially adverse employment actions”); *Jackson v. City of Columbus*, 194 F.3d 737 (6th Cir. 1999) abrogated on other grounds by *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002) (holding that police chief’s suspension with pay was not an adverse employment action); *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 885 (6th Cir. 1996) (holding that “reassignments without salary or work hour changes do not ordinarily constitute adverse employment decisions in employment discrimination claims”).

hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”⁶³ In addition, the Circuit has stated that “[m]aterially adverse changes in the terms and conditions of employment” include “a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.”⁶⁴

The NRC asserts in Violations 1 and 3 that on March 9, 2018, TVA discriminated against Mr. McBrearty and Ms. Wetzel.⁶⁵ But contrary to the foregoing precedent, there was no “significant change” in the “employment status” of Ms. Wetzel or Mr. McBrearty on March 9, 2018, when Ms. Henderson filed her Complaint. Thus, an employee complaint is not an adverse action under Title VII anti-discrimination provision.

Nor does Ms. Henderson’s Complaint fit within the scope of any other adverse action recognized by the Sixth Circuit arising from a Title VII discrimination case. Indeed, even an investigation into employee wrongdoing (and paid administrative leave, as will be discussed further herein) is not an adverse action in the Sixth Circuit.⁶⁶ If the subsequent investigation and the potential paid administrative leave arising from that investigation fail to constitute an adverse

⁶³ *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 402 (6th Cir. 2008) (quoting *Burlington Indus.*, 524 U.S. at 761) (emphasis added); see also *Crane v. Mary Free Bed Rehab. Hosp.*, 634 F. App’x 518, 523–24 (6th Cir. 2015).

⁶⁴ *Kuhn v. Washtenaw County*, 709 F.3d 612, 625–26 (6th Cir. 2013) (citing *Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 594 (6th Cir. 2007)).

⁶⁵ Compare TVA NOV at 1–2, with Order Appendix at 1–2 (demonstrating that violations were not changed between the TVA NOV and Order).

⁶⁶ *Kuhn*, 709 F.3d at 625–26.

action, it is impossible to see how the mere act of an employee filing a complaint could rise to that level.

Accordingly, Violations 1 and 3 must be dismissed as a matter of law.

B. The Staff’s Erroneous Interpretation of an Adverse Action Would Represent a Broad Expansion of Staff Authority Far Beyond Its Existing Reach and Would Have a Serious Negative Policy Implications

1. The Staff’s Erroneous Interpretation of What Constitutes an Adverse Action Would Represent a Broad Expansion of Authority

Violations 1 and 3 are also a broad overreach by the Staff inconsistent with all prior Staff practice and guidance. The Commission and the Staff have never recognized the filing of a complaint, even one that leads to an investigation, as an adverse employment action.⁶⁷

Nothing in relevant Staff guidance or practice indicates that a complaint (even one that results in an investigation) can be an adverse action under Section 50.7. In particular, the “NRC Enforcement Policy” defines an adverse action as:

any action that may adversely impact the compensation, terms, conditions, or privileges of employment including but not limited to a failure to receive a routine annual pay increase or bonus; demotion or arbitrary downgrade of a position; transfer to a position that is recognized to have a lesser status or be less desirable (e.g., from a supervisory to nonsupervisory position); failure to promote; overall performance appraisal downgrade; verbal or written counseling, or other forms of *constructive discipline*.⁶⁸

⁶⁷ The seminal Commission case on Section 211 of the ERA, *Tennessee Valley Authority*, CLI-04-24, 60 NRC 160, did not address the definition of an adverse action in any great detail because the interpretation was not challenged in that case. Suffice to say that the adverse action for the sole violation in that proceeding was failing to select the complainant (Mr. Fiser) for a continuing position during the 1996 company reorganization. *Id.* at 183.

⁶⁸ NRC Enforcement Policy at 80 (Jan. 15, 2020) (ADAMS Accession No. ML19352E921) (emphasis added). The NRC Enforcement Policy “sets forth the general principles governing the NRC’s enforcement program and the Commission’s expectations regarding the process to be used by the NRC to assess and disposition violations of NRC requirements.” *Id.* at 4.

This guidance is consistent with the NRC Office of Enforcement’s statement to a licensee over two decades ago that it has “no intention of becoming a roving watchdog over the day-to-day workings of employee-management relations,” but is “vitaly concerned where management crosses the line and *disciplines* employees for raising safety concerns.”⁶⁹ The filing of an employee complaint, of course, is the action of an employee and not a form of employer discipline.

The Staff’s attempt to redefine the concept of an adverse action to encompass an employee complaint is also inconsistent with the NRC’s own guidance on internal NRC personnel actions, which focuses on management actions in the form of employee discipline.⁷⁰ Such actions are not remotely similar to the filing of a complaint by one employee alleging wrongdoing by another employee.

The Staff’s attempt to redefine the concept of an adverse action is also inconsistent with prior NRC enforcement actions. TVA has found no enforcement cases where the NRC has alleged that filing a complaint was an adverse action. Rather, actions such as canceling an

⁶⁹ J. M. Taylor (Dir. Office of Inspection and Enforcement) Letter to W. H. Owen (Duke Power Co.), *Employee Protection From Employers for Revealing Safety Violations*, at 7–8 (June 30, 1986) (addressing violation for negative performance appraisals) (emphasis added) (ADAMS Accession No. ML103440204).

⁷⁰ U.S. Nuclear Regulatory Commission Management Directive (MC) 10.99, Discipline and Adverse Actions, DT-20-08, Vol. 10, Personnel Management, Part 4: Labor Relations, Discipline, Grievances, Appeals, RIFs at 4 (July 7, 2020), <https://www.nrc.gov/docs/ML2016/ML20169A245.pdf>.

employee's contract,⁷¹ a negative performance evaluation with an impact on pay,⁷² demotion,⁷³ or not being selected for a certain position,⁷⁴ are the type of actions that the Staff considers adverse. Moreover, although throughout this proceeding TVA has challenged the Staff's claim that a complaint can be an adverse action,⁷⁵ the Staff has failed to identify a single example of a case under the ERA or Section 50.7 where an employee complaint was considered to be an adverse action. Indeed, during their depositions, Staff personnel could not point to *any* prior example where a complaint was treated as the adverse action in an alleged or actual violation of Section 50.7.⁷⁶

Clearly, it would far exceed the NRC's existing precedent and practice for the Board to conclude that licensees could now be subject to NRC violations solely because an employee files a harassment complaint. It would also be an unlawful expansion of power, in light of the Commission's mandate under ERA Section 211 that adverse actions are limited to "discharge . . .

⁷¹ Framatome – Notice of Violation (Office of Investigations Report No. 2-2017-024) (EA-18-119) at 1 (Sept. 12, 2019) (ADAMS Accession No. ML19234A337); St. Lucie Plant – Notice of Violation and Proposed Imposition of Civil Penalty (Office of Investigations Report Nos. 2-2017-024 and 2-2019-009) (EA-18-066 and EA-19-045) (Sept. 12, 2019) (ADAMS Accession No. ML19234A332).

⁷² Dennis L. Koehl, Apparent Violation of Employee Protection Requirements (Office of Investigations Report No. 3-2005-010) (EA-06-178) (Aug. 22, 2006) (ADAMS Accession No. ML070100138).

⁷³ TVA, Confirmatory Order (Effective Immediately) (Office of Investigation Report Nos. 2-2006-025 & 2-2009-003) (Dec. 22, 2009) (EA-09-009 and EA-09-203) (ADAMS Accession No. ML093510121).

⁷⁴ Exelon, Confirmatory Order (Effective Immediately) (Office of Investigation Report No. 3-2001-005) (EA-02-124) (Oct. 3, 2002).

⁷⁵ Tennessee Valley Authority Reply to Notice of Violation (EA-20-006 and EA-20-007) at 2, 9 (Sept. 23, 2020) (ADAMS Accession No. ML20274A012).

⁷⁶ Attach. 10 (Hilton Depo. Tr. at 158:12–20) (Q: "I'm asking if in any prior case, before Ms. Henderson's case, if you've ever issued a violation for an individual filing a complaint?" A: "I don't believe that specific -- I don't recall that specific action. Although for some reason I think that there was one that involved an investigation, but it was more of a director. This has been years ago. But I don't recall a specific one that fit this exact fact pattern, no."); Attach. 11 (Wilson Depo. Tr. at 125:6–13) (Q: "Has the NRC ever previously issued a violation of 50.7 where an adverse action was filing a complaint?" A: "I know we looked at precedents so I do not recall. . . . I do not recall. This could have been the first time that we filed this."); *id.* at 125:22–24 (Q: "Sitting here today, you don't recall that case law; is that correct?" A: "No, I do not recall that case law.").

or . . . discriminat[ion] against any employee with respect to his compensation, terms, conditions, or privileges of employment.”

In summary—the Staff is reaching far beyond the law and its own precedent and guidance in deeming Ms. Henderson’s Complaint an adverse action. The Board should not permit the Staff to exceed its authority in this way, particularly given the serious negative policy implications of such an expansion, as discussed below.

2. A Determination that the Filing of a Complaint and Subsequent Investigation Constitutes an Adverse Action Would Have Serious Negative Policy Implications

The filing of a complaint should never be an adverse action under ERA Section 211. To decide otherwise would potentially chill protected activity and hinder licensee compliance with the ERA and Section 50.7. Yet this appears to be the NRC’s stated goal in pursuing this action: one Staff member, Mr. Hilton, a Senior Enforcement Advisor in the NRC Office of Enforcement,⁷⁷ stated in his deposition that Ms. Henderson, “shouldn’t have filed the [2018] complaint with -- with the protected activity as part of.”⁷⁸ When asked whether TVA should have investigated Ms. Henderson’s Complaint, Mr. Hilton responded, “[t]he question is, should they have investigated. No. In my view, no, they shouldn’t have.”⁷⁹

However, that approach undermines the ERA by penalizing Ms. Henderson for engaging in protected activity under the ERA and TVA for attempting to comply with the statute. In 2016, nearly two years prior to her Complaint, Ms. Henderson referred a concern to TVA’s Human

⁷⁷ Attach. 10 (Hilton Depo. Tr. at 7:3–5).

⁷⁸ *Id.* at 165:15–21.

⁷⁹ *Id.* at 165:22–24.

Resources regarding Mr. McBrearty's relationship with a TVA corporate employee, who was "in a role requiring oversight of the sites including the work of Mike McBrearty."⁸⁰ Ms. Henderson's 2016 concern was nuclear safety protected activity under the ERA, consistent with a 2009 Staff finding that an allegation of a "manager of being 'too close to the line organization' to effectively and independently perform his duties"⁸¹ was protected activity. In fact, in his deposition, George Wilson, the former Office of Enforcement Director who signed the TVA Order, acknowledged that Ms. Henderson's 2016 complaint itself was nuclear safety protected activity.⁸²

Ms. Henderson subsequently filed her Complaint in 2018, which is the basis for Violations 1 and 3, claiming Mr. McBrearty (and others) were creating a "hostile work environment" through numerous actions identified in the Complaint "because of" her protected activity in 2016.⁸³ Such a hostile work environment complaint itself is also clearly protected activity. Both the Fifth Circuit and the Fourth Circuit have recognized a cause of action under the ERA for a hostile work environment claim arising from protected activity.⁸⁴ Thus, Ms. Henderson's 2018 Complaint on its face falls squarely within the bounds of the ERA's definition of protected activity in 42 U.S.C. § 5851(a)(1), as she was "(A) notif[y]ing h[er] employer of an

⁸⁰ Attach. 6 at 8 (Formal Complaint of Erin Henderson (Mar. 9, 2018)).

⁸¹ Press Release, U.S. Nuclear Regulatory Commission, Office of Public Affairs, Region II, "NRC Reaches Settlement With Tennessee Valley Authority Following Mediation Session" at 1 (Dec. 23, 2009) (ADAMS Accession No. ML093570251).

⁸² Attach. 11 (Wilson Depo. Tr. at 113:4-10) (Q: "My question is whether this [2016] allegation is a protected activity regardless of how the investigation comes out, is this allegation – making this allegation a protected activity?" A: "I think making the allegation to whoever they made it to, yes, should be a protected activity.").

⁸³ Attach. 6 at 8 (Formal Complaint of Erin Henderson (Mar. 9, 2018)).

⁸⁴ *Williams*, 376 F.3d at 476-77; *English*, 858 F.2d at 964.

alleged violation of this chapter [the ERA] or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.)” i.e. a hostile work environment actionable under the ERA.

Contrary to Mr. Hilton’s deposition testimony, faced with a protected, hostile work environment complaint filed by an employee, it was incumbent on TVA to act. Under the Supreme Court’s precedent in *Ellerth/Faragher*,⁸⁵ applied to the ERA by the Fifth Circuit in *Williams*,⁸⁶ TVA—to avoid liability for a prospective hostile work environment claim—was compelled to exercise reasonable care to prevent and correct promptly any harassing behavior suffered by Ms. Henderson. In other words, to establish a defense to Ms. Henderson’s potential hostile work environment claim, TVA would have to investigate Ms. Henderson’s Complaint to understand any harassing behavior so that it could prevent and correct any such behavior.

Yet, Violations 1 and 3 now upend the law by turning both Ms. Henderson’s protected activity and TVA’s affirmative defense—investigating the allegation and correcting any misconduct to restore compliance with the ERA—into an adverse action under the ERA. For this reason, the Board should reject Violations 1 and 3 and reject the Staff’s attempts to penalize both Ms. Henderson’s protected activity and TVA’s effort to the comply with the ERA.

In addition, and from a more practical perspective, an employer has no way of knowing whether protected activity is part of the basis for a complaint before investigating it. In fact, in the depositions for this case, members of the Enforcement Staff themselves disagreed on what

⁸⁵ The Supreme Court’s precedent in *Ellerth/Faragher* establishes an employer’s affirmative defense to hostile work environment claims. See *Burlington Indus.*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

⁸⁶ *Williams*, 376 F.3d at 478.

activities are protected,⁸⁷ and were often unable or unwilling to say whether certain actions were protected without first knowing (or “speculating on”) all the facts of each potential scenario.⁸⁸ If the Staff cannot identify protected activity without knowing the facts of the matter, how can it expect any employer to? It is impractical (if not impossible) for employers in the industry to identify whether an investigation or complaint might be based on protected activity *before* even investigating. Yet, the Staff here would turn that necessary investigation into a violation of Section 50.7 itself.

⁸⁷ For example, Mr. David Solorio, the branch chief in the Office of Enforcement’s Concerns Resolution Branch, stated that it would not be prohibitive for a licensee to investigate an HR complaint if it related to protected activity, Attach. 12 (Solorio Depo. Tr. at 167:16–22), whereas Mr. Hilton agreed that “it could be” retaliatory “for a supervisor to ask HR to investigate a concern.” Attach. 10 (Hilton Depo. Tr. at 93:4–9). Similarly, Mr. Wilson readily stated that a number of hypothetical actions constituted protected activity, such as submitting a complaint to ECP, raising concerns to HR about a hostile work environment, and raising nuclear safety concerns. Attach. 11 (Wilson Depo. Tr. at 93–97). However, other Enforcement Staff stated that they would be unable to determine if any of these activities were protected absent an analysis of the specific facts. *See, e.g.*, Attach. 10 (Hilton Depo. Tr. at 53:2–7) (Q: “Is raising a concern about a hostile work environment a protected activity?” A: “That depends on the definition of ‘hostile work environment.’ I don’t know. I’d have to speculate on exactly what that means.”); Attach. 13 (Gifford Depo. Tr. at 47:13–16) (Q: “Is simply raising a concern with an ECP program protected activity?” A: “I would have to know more about the specific ECP complaint. I wouldn’t say definitively one way or the other. I wouldn’t say it is or isn’t, absent more information about the concern that was raised.”).

⁸⁸ Mr. Hilton, for example, said he would need to “speculate” on the facts in order to say whether almost every scenario presented to him would or would not constitute protected activity. *See, e.g.*, Attach. 10 (Hilton Depo. Tr. at 53–56, 61–66, 70); *see also id.* at 52:16–22) (Q: “Is raising a concern about an environment that discourages employees from raising concerns a protected activity?” A: “if I had to make the decision, I don’t -- I don’t know for sure. Again, I’d like to know more of the facts”); *id.* at 53:14–20 (Q: “Is raising a concern about a hostile work environment under 10 § C.F.R. 50.7 a protected activity?” A: “again, I’m not sure. That would depend on the fact pattern that we’re talking about here, I think.”); *id.* at 54:7–10) (Q: “Is raising concerns to HR a protected activity?” A: “Again, it depends on the facts”); *see also* Attach. 13 (Gifford Depo. Tr. at 142:3–6) (Q: “And would the complaints be protected activity even if they were raised in bad faith?” A: “I’m hesitant to provide a definitive answer on a hypothetical.”); Attach. 13 (Gifford Depo. Tr. at 48:1–7) (Q: “Is raising a concern about an environment that discourages employees from raising concerns a protected activity?” A: “In my opinion, it would depend on the content of the concern. Similar thing, I would be hesitant to speak in absolutes.”); *id.* at 48:20–24) (“Is raising a concern about a hostile work environment a protected activity?” A: “Similarly, I would need to know more information before making a determination whether it was protected activity or not.”).

C. The Staff Is Applying an Incorrect Legal Standard Regarding What Constitutes an Adverse Employment Action

As set forth in greater detail *supra*, ERA Section 211 provides the governing legal framework for this case (as buttressed by authoritative judicial rulings interpreting the anti-discrimination provision of Title VII), and under that framework there is no adverse action in Violations 1 and 3. Unfortunately, the Order, Appendix, and Staff’s pleadings in this case do not even begin to explain the legal standards that the Staff applied when it determined in Violations 1 and 3 that an adverse employment action occurred. Yet through discovery, particularly depositions of the Staff, it has become apparent that the Staff is applying a variety of incorrect legal standards to identify an adverse action. Because TVA is not automatically permitted a reply to the Staff’s response to this Motion, the Staff’s various legal theories asserted in depositions are addressed below.

1. The Legal Standard for an Adverse Action Under the ERA Is Not Mere Deterrence

In his deposition, Mr. Hilton stated that “the test for an adverse action is whether or not it would deter future employees from raising protected activity.”⁸⁹ Mr. Hilton is wrong. This is not the *anti-discrimination* standard under the ERA Section 211 and Title VII, described in detail above in Section A.2. Rather, Mr. Hilton appears to have cited the test used for *anti-retaliation* claims under Title VII, which as a matter of law is not applicable here.

In *Burlington Northern*,⁹⁰ the Supreme Court distinguished between Title VII’s anti-discrimination provision (42 U.S.C. § 2000e-2(a)), which is identical to the ERA’s Section 211

⁸⁹ Attach. 10 (Hilton Depo. Tr. at 161:20–25).

⁹⁰ *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 62.

anti-discrimination provision, and Title VII’s separate retaliation standard (42 U.S.C. § 2000e-3(a)). As previously discussed, the Title VII anti-discrimination provision prohibits actions taken against an individual “with respect to his compensation, terms, conditions, or privileges of employment,” just as in the ERA. Title VII’s anti-retaliation standard is different: that separate provision makes it unlawful for an employer to “discriminate against” an employee who participates in Title VII proceedings.⁹¹ Although Title VII’s anti-discrimination provision is explicitly applicable only to impacts on “compensation, terms, conditions, or privileges of employment,”⁹² Title VII’s anti-retaliation standard does not contain similar limiting language.⁹³ As a result, the Supreme Court interpreted Title VII’s anti-retaliation standard more broadly—to prohibit harms that are “materially adverse,” but not “trivial,” that “well might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’”⁹⁴ However, in the instant case, the issue falls under the ERA and the identical language that triggers the narrower interpretation of Title VII’s anti-discrimination provision.⁹⁵

Because (1) ERA Section 211 is identical to the Title VII anti-discrimination provision that prohibits discrimination “with respect to compensation, terms, conditions, or privileges of employment,” (2) the Supreme Court has explicitly distinguished the Title VII anti-discrimination provision from the Title VII anti-retaliation provision, and (3) the Commission has explicitly stated that it would closely adhere to the statutory framework set forth in the

⁹¹ 42 U.S.C. § 2000e-3(a).

⁹² 42 U.S.C. § 2000e-2(a).

⁹³ 42 U.S.C. § 2000e-3(a).

⁹⁴ *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 68.

⁹⁵ 42 U.S.C. § 2000e-2(a).

ERA,⁹⁶ Title VII's anti-retaliation standard and any caselaw derived from that standard do not apply here. To conclude otherwise would render meaningless the ERA's explicit prohibition of discrimination in terms, conditions, and privileges of employment.

2. To the Extent the Staff Is Claiming that TVA's Investigation of Ms. Henderson's Complaint Was an Adverse Action on Its Own, That Claim also Fails as a Matter of Law

As described above, Violations 1 and 3 expressly state that TVA discriminated "on March 9, 2018" when an employee filed a formal complaint that triggered an investigation. Therefore, Ms. Henderson's Complaint is clearly the adverse action at issue in those Violations. The Staff, however, stated in the Appendix accompanying Order imposing the civil penalty for those Violations that,

filing the formal complaint that triggered an investigation is considered an adverse action in this case. When an investigation is so closely related to a personnel action that it could be a pretext for gathering evidence to retaliate, it is an adverse action.⁹⁷

To the extent that the Staff intends to argue in its response to this Motion that the investigation (which took place after March 9, 2018) is a separate adverse action at issue in Violations 1 and 3, that argument likewise fails as a matter of law.

As this Motion has established, discrimination under federal caselaw and Commission precedent must involve a tangible impact to the terms of one's employment—an adverse employment action. Like Ms. Henderson's Complaint, TVA's investigation in and of itself—which had no tangible impact on Mr. McBrearty or Ms. Wetzel's employment⁹⁸—cannot be a

⁹⁶ *Tennessee Valley Authority*, CLI-04-24, 60 NRC at 194.

⁹⁷ Order Appendix at 2, 3–4.

⁹⁸ Attach. 1, ¶ 3 (Statement of Undisputed Material Facts).

discriminatory adverse action as a matter of law. And, to date, the Staff has provided no caselaw to the contrary. In fact, in the Sixth Circuit the opposite is true—an investigation alone is *not* an adverse action where the complainant (in this case the Staff) “has not shown that the investigation, during the time it was open, changed the form or conditions of [complainant’s] employment, let alone effected any change in a ‘materially adverse’ way” and “suffered no disciplinary action, demotion, or change in job responsibilities during the course of the investigation.”⁹⁹ Indeed, even “a suspension with pay and full benefits pending a timely investigation into suspected wrongdoing is not an adverse employment action.”¹⁰⁰

In addition, as this Motion has also established, the Staff cannot rely on cases analyzing Title VII’s anti-retaliation standard, which is inapplicable, to argue that the investigation was discriminatory. ERA Section 211 is identical to Title VII’s anti-discrimination provisions, but not to its retaliation provisions. The depositions in this case made clear that the Staff has ignored this statutory distinction and precedent interpreting it. Mr. Hilton asserted that Mr. McBrearty’s “compensation, terms, conditions, or privileges of employment” had changed after Ms. Henderson filed her Complaint because “[Mr. McBrearty] was then subject to an

⁹⁹ *Kuhn*, 709 F.3d at 626 (“In the present case, Kuhn was never placed on leave, so he challenges only the investigation itself. But he has not shown that the investigation, during the time it was open, changed the form or conditions of his employment, let alone effected any change in a ‘materially adverse’ way. He suffered no disciplinary action, demotion, or change in job responsibilities during the course of the investigation. In addition, Kuhn does not cite, and we cannot locate, any cases that impose a good-faith requirement on the employer regarding internal investigations. Such an inquiry into the employer’s subjective motive would be contrary to the objective analysis of whether an employment action is adverse.”). See also *Dendinger v. Ohio*, 207 F. App’x 521, 527 (6th Cir. 2006) (holding that an employer’s internal investigation of an employee and its failure to notify the employee of the investigation until after it had been completed did not constitute an adverse employment action).

¹⁰⁰ *Peltier v. United States*, 388 F.3d 984, 988 (6th Cir. 2004).

investigation,”¹⁰¹ and “most employees would not view being subject to an investigation as a normal part of their job.”¹⁰² However, regardless of whether an employee subjectively views being investigated “as a normal part” of his or her job, cooperating with and participating in company investigations is a term and condition of TVA employment.¹⁰³ TVA policy explicitly requires employees “to cooperate and comply with any investigation, audit, review, or inquiry,” which cooperation “includes but is not limited to making oneself available in a timely manner for questioning or testimony, providing documents or other recorded information in a timely manner, being truthful, and providing complete responses to any written or verbal questions or other inquiries.”¹⁰⁴ Furthermore, to the extent Mr. Hilton was suggesting that being “subject to” investigation might make an employee unhappy, it is well understood that an act that merely causes a “bruised ego” does not constitute an adverse employment action.¹⁰⁵

The Staff’s statement in the Order’s Appendix is also dependent upon the speculative claim that TVA’s investigation *could* be some sort of “pretext” to retaliate. But the Staff has

¹⁰¹ Attach. 10 (Hilton Depo. Tr. at 158:21–159:3). As noted previously in Section IV.A.1, this appears to be an example of the Staff adding violations on the basis of only downstream impacts to an employee. However, a violation of Section 50.7 requires *an adverse action* and using a single adverse action to generate several violations would have no logical end. In such a case, the Staff could issue a violation for every action leading up to the final adverse action without limit.

¹⁰² *Id.* at 161:11–13.

¹⁰³ Attach. 14 at 3 (Employee Discipline, TVA-SPP-11.316, Rev. 0005 (Effective Date 07-03-2017) Appendix B).

¹⁰⁴ *Id.*

¹⁰⁵ *Kocsis*, 97 F.3d at 886 (citing *Flaherty v. Gas Research Institute*, 31 F.3d 451, 456 (7th Cir. 1994)); *White*, 364 F.3d at 795 (affirmed as to discrimination claim standard but not retaliation claim standard); *Flaherty*, 31 F.3d at 457 (cited in *Burlington Indus.*, 524 U.S. at 761); *Stewart v. Ashcroft*, 352 F.3d 422, 426 (D.C. Cir. 2003); *Somoza v. Univ. of Denver*, 513 F.3d 1206, 1215–16 (10th Cir. 2008); *Kramer v. Wasatch Cnty. Sheriff’s Office*, 743 F.3d 726, 739 (10th Cir. 2014); *Ledergerber v. Stangler*, 122 F.3d 1142, 1145 (8th Cir. 1997).

utterly failed to provide any of the necessary evidence to support this bald assertion,¹⁰⁶ much less make the showing sufficient to survive this motion for summary disposition.¹⁰⁷

As an initial matter, the Staff appears to have lifted its assertion in the Order Appendix that TVA's investigation could be a pretext nearly verbatim from *Russell v. Department of Justice*, 76 M.S.P.R. 317 (1997). There, the Merit Systems Protection Board stated that it "will consider evidence regarding the conduct of an agency investigation when the investigation was so closely related to the personnel action that it could have been a pretext for gathering evidence to retaliate against an employee for whistleblowing activity."¹⁰⁸ But *Russell* does not establish the principle that an investigation could be an adverse action under the ERA. *Russell* was applying the Whistleblower Protection Act, which has a far more expansive list of potential adverse actions than the ERA, which of course is the statute at issue here.¹⁰⁹

Indeed, in a Title VII discrimination case, applying the same statutory language as the ERA, the Sixth Circuit found that allegations of subjective pretext are irrelevant in answering the objective question of whether an adverse action had occurred, contrary to *Russell*. As the Circuit observed, "[Complainant] does not cite, and we cannot locate, any cases that impose a good-faith requirement on the employer regarding internal investigations. Such an inquiry into the employer's subjective motive would be contrary to the *objective analysis of whether an*

¹⁰⁶ See *Private Fuel Storage, L.L.C.*, LBP-01-40, 54 NRC at 536 (Indeed, "in the face of well-pled undisputed material facts," an opponent must provide "something more than suspicions or bald assertions as the basis for a material factual dispute").

¹⁰⁷ See, e.g., 42 U.S.C. § 5851(b)(3)(A); *Trimmer*, 174 F.3d at 1101.

¹⁰⁸ *Russell v. Dep't of Justice*, 76 M.S.P.R. 317, 323–24 (1997).

¹⁰⁹ Compare 5 U.S.C. § 2302(a)(2)(A) (setting forth a detailed list of twelve different types of personnel actions with a further detailed list of prohibited personnel actions), with 42 U.S.C. § 5851 (mentioning only "discharge," "compensation, terms, conditions, or privileges of employment").

employment action is adverse.”¹¹⁰ In addition, the Federal Circuit’s subsequent decision after *Russell* in *Sistek v. Department of Veterans Affairs*, 955 F.3d 948 (Fed. Cir. 2020), held exactly the opposite of Violations 1 and 3. Applying the Whistleblower Protection Act, the Federal Circuit in *Sistek* wrote: “We reject Mr. Sistek’s view that *Russell* somehow makes retaliatory investigations independently actionable under the WPA separate and apart from a qualifying personnel action.”¹¹¹

Moreover, even if a pretextual investigation could form the basis for an ERA claim—it cannot—the undisputed facts show that neither Ms. Henderson’s Complaint nor TVA’s subsequent investigation were based on a pretext. Indeed, the Staff has already recognized that it has insufficient evidence of a pretext when it withdrew its deliberate misconduct violation against Ms. Henderson. Ms. Henderson was initially issued a violation for deliberate misconduct for filing her Complaint (at issue in Violations 1 and 3). However, the Staff withdrew that violation after the Commission clarified (in a ruling related to Mr. Shea’s case) that the Staff would be required to produce evidence of intent to sustain a violation based on the deliberate misconduct rule.¹¹² Indeed, that Commission decision found in part that the Staff failed to produce evidence supporting its claims that OGC’s investigation (triggered by Ms. Henderson’s Complaint) was “window dressing.”¹¹³

¹¹⁰ *Kuhn*, 709 F.3d at 626 (emphasis added).

¹¹¹ *Sistek v. Dep’t of Veterans Affs.*, 955 F.3d 948, 957 (Fed. Cir. 2020).

¹¹² *Joseph Shea* (Order Prohibiting Involvement in NRC-Licensed Activities Immediately Effective), CLI-21-03, 93 NRC __, __ (slip op. at 11–13) (Jan. 15, 2021) (ADAMS Accession No. ML21015A204).

¹¹³ *Id.* slip op. at 10.

Thus, “[u]pon further review of the facts of [Ms. Henderson’s] case and in light of the [Commission’s ruling],”¹¹⁴ the Staff *unilaterally* withdrew the deliberate misconduct violations issued to Ms. Henderson, presumably because it could not provide evidence that she acted with the intent to cause TVA to violate Section 50.7. Because doing something as a pretext obviously requires deliberate behavior, withdrawal of Ms. Henderson’s deliberate misconduct violation demonstrates that the Staff has no evidence of a pretext to support Violations 1 and 3.

Depositions of the Staff only further confirmed that the Staff cannot demonstrate that the Complaint or TVA’s investigation were pretexts for retaliation. For example, when asked during depositions what evidence supported the Staff’s claim that Ms. Henderson’s Complaint and/or TVA’s investigation was a pretext for retaliation, not one member of the Office of Enforcement Staff was able to point to any evidence supporting that allegation. Mr. Wilson, the former Office of Enforcement Director who signed the Order,¹¹⁵ said that such evidence must have existed for him to sign the Order.¹¹⁶ However, when asked, “What evidence do you have that the investigation was a pretext?” he responded that “I don’t recall having that in front of me and it’s been awhile. I don’t know what that is.”¹¹⁷ Thus, despite the fact that Mr. Wilson was the senior member of the NRC enforcement staff, was the chair of the enforcement panel that issued the

¹¹⁴ Recission of August 24, 2020, Notice of Violation (IA-20-009) (Jan. 22, 2021) (ADAMS Accession No. ML21021A368).

¹¹⁵ Attach. 11 (Wilson Depo. Tr. at 11:24–25).

¹¹⁶ *Id.* at 126:21–127:1 (“Obviously we made the case for that in the enforcement panel as I described earlier. The panel is done by consensus. So obviously the panel members agreed with the facts that were laid out at the time and how that was laid out and how it was presented.”).

¹¹⁷ *Id.* at 126:17–21).

Order,¹¹⁸ and signed the Order just nine months prior to his deposition, Mr. Wilson was unable to recall any specific evidence supporting the claim.

For another example, Mr. David Solorio, the branch chief in the Office of Enforcement's Concerns Resolution Branch who concurred with the Order,¹¹⁹ stated at his deposition that he did not know whether the Staff had evidence that the investigation was a pretext.¹²⁰ Similarly, Mr. Nick Hilton, an Office of Enforcement program manager who participated in developing the Order,¹²¹ admitted that he too was unaware of any evidence that Ms. Henderson's Complaint,¹²² or TVA's investigation, were pretexts for retaliation.¹²³

Mr. Ian Gifford, the enforcement specialist who participated in drafting the Order, concurred with the Order,¹²⁴ and who was the lead for preparing the enforcement action worksheet in Ms. Wetzel's case,¹²⁵ also was unable to provide any meaningful basis for the Order's allegation that the Complaint or investigation were pretextual. Mr. Gifford said that he "took 'pretext' to mean . . . that the investigation was being used to gather evidence to retaliate,"¹²⁶ and later tried to explain that it was "[b]oth the filing of the formal complaint and

¹¹⁸ *Id.* at 65:19–66:2).

¹¹⁹ Attach. 12 (Solorio Depo. Tr. at 15:1).

¹²⁰ *Id.* at 166:11–17) (Q: "Do you know whether the NRC had evidence that TVA's investigation was a pretext for gathering evidence to retaliate?" A: "I would say no to that question." Q: "'No,' you don't know, or 'no,' the NRC didn't have evidence of pretext?" A: "No, that I don't know.").

¹²¹ Attach. 10 (Hilton Depo. Tr. at 153–56).

¹²² *Id.* at 185:13–17) ("Q: "Are you aware of any evidence to support that Ms. Henderson filed her complaint based on a pretext?" A: "I am not aware of any direct evidence of that."); *id.* at 185:21–24 ("Q: "Are you aware of any indirect evidence of that?" A: "No. Again, I don't recall that.").

¹²³ *Id.* at 186:8–15) ("Q: "Are you aware of any evidence supporting the theory that the investigation into Ms. Henderson's concerns was a pretext?" A: "Again, I didn't read all the exhibits, so I don't know of anything." Q: "So the answer is, no, you're not aware of any evidence?" A: "I'm not aware."); *id.* at 190:10–18.

¹²⁴ Attach. 13 (Gifford Depo. Tr. at 12:21).

¹²⁵ *Id.* at 29:19–30:13).

¹²⁶ *Id.* at 132:8–10).

the investigation” that was the pretext referred to in the Order.¹²⁷ However, Mr. Gifford was unable to cite to any evidence supporting that claim. Despite extended questioning on this subject, the only explanation Mr. Gifford provided was that, because the Complaint referenced protected activity, and the investigation resulted in action against Mr. McBrearty and Ms. Wetzel, the Complaint and investigation were pretextual.¹²⁸ This circular logic and mere restatement of the Order’s conclusion provides no evidence, much less does it make a prima facie showing, and fails to demonstrate by a preponderance of the evidence, that the Complaint and/or investigation were pretexts for retaliation.

Further, Mr. Gifford and Mr. Solorio both struggled with explaining even the very concept of a “pretext.” When asked about the allegations, Mr. Solorio said that “I -- I -- need input from our lawyers and, you know. For instance, in my vocabulary, I don’t use the word ‘pretext.’ I would have used something else.”¹²⁹ Similarly, when asked by TVA’s counsel for evidence of pretext, Mr. Gifford stated that “I think to help answer your question, it would be helpful if we defined ‘pretext.’”¹³⁰ When reminded that “pretext” was the NRC’s word, not TVA’s, Mr. Gifford responded that “there are a lot of people that [sic] contributed to this document, so we rely on other experts when drafting these sorts of documents.”¹³¹ It is clear that not only were Mr. Gifford and Mr. Solorio—both of whom played critical roles in the enforcement panels that decided to issue the Order¹³² and both of whom concurred in the

¹²⁷ *Id.* at 133:12-13).

¹²⁸ *Id.* at 133:14-17, 135:18-23).

¹²⁹ Attach. 12 (Solorio Depo. Tr. at 165:23-166:1).

¹³⁰ Attach. 13 (Gifford Depo. Tr. at 131:15-16).

¹³¹ *Id.* at 131:19-22).

¹³² *Id.* at 26-27; Attach. 12 (Solorio Depo. Tr. at 52:20-23).

Order¹³³—unable to provide evidence supporting the allegation, they were not even sure what the Order actually alleged.

Accordingly, it is clear the Staff has no evidence supporting the allegation that TVA’s investigation, or Ms. Henderson’s Complaint, were pretexts to retaliate against Mr. McBrearty and Ms. Wetzel. Violations 1 and 3 must be summarily dismissed to the extent that they rely on such unsupported allegations.

For the foregoing reasons, TVA is entitled to summary disposition as a matter of law on Violations 1 and 3.

D. TVA Is Entitled to Summary Disposition on Violation 2 as a Matter of Law Because Placing an Employee on Paid Administrative Leave Is Not an Adverse Action Amounting to Discrimination Under ERA Section 211

TVA is entitled to summary disposition on Violation 2 because TVA’s act of placing Mr. McBrearty on paid administrative leave did not, as a matter of law, adversely affect Mr. McBrearty’s terms, conditions, or privileges of employment.

Violation 2 asserts that, “on May 25, 2018, TVA discriminated against a former Sequoyah employee,” Mr. Michael McBrearty, when “TVA placed the former employee on paid administrative leave until the former employee resigned in August 2018.”¹³⁴ However, Mr. McBrearty was placed on paid leave with full benefits pending the finalization of the investigation into Ms. Henderson’s claims, and federal courts and other adjudicatory authorities

¹³³ Attach. 13 (Gifford Depo. Tr. at 12:21); Attach. 12 (Solorio Depo. Tr. at 15:1–9).

¹³⁴ Order Appendix at 2.

have ruled that such paid administrative leave is not an adverse employment action under ERA Section 211 and under Title VII's anti-discrimination provision.¹³⁵

In a case under the ERA, the Sixth Circuit affirmed a Department of Labor decision holding that, where an employee was sent home with pay while his plant access was placed on routine administrative hold, it is not an adverse action.¹³⁶ Even beyond the ERA, the Sixth Circuit has consistently held that paid administrative leave is not an adverse action as a general matter.¹³⁷ As the Circuit explained, “this court has upheld the employer’s action in numerous cases in which employees have been placed on paid leave pending investigations of complaints against them.”¹³⁸ Indeed, “a suspension *with* pay and full benefits pending a timely investigation into suspected wrongdoing” as in this case “is not an adverse employment action.”¹³⁹ Additionally, “neither an internal investigation into suspected wrongdoing by an employee nor that employee’s placement on paid administrative leave pending the outcome of such an investigation constitutes an adverse employment action.”¹⁴⁰

Other Circuit Courts have also rejected arguments that paid administrative leave is an adverse action for both the anti-discrimination (and even anti-retaliation) provisions of Title VII. The Second Circuit has observed that it was not a term or condition of an individual’s

¹³⁵ Paid administrative leave is not even an adverse employment action under Title VII’s broader anti-retaliation standard. *See, e.g., Singletary v. Mo. Dep’t of Corr.*, 423 F.3d 886, 889, 892 (8th Cir. 2005).

¹³⁶ *See McNeill v. U.S. Dep’t of Labor*, 243 F. App’x 93, 98–99 (6th Cir. 2007) (unpublished) (finding that paid suspension with an administrative hold on access was insufficient to constitute an adverse action).

¹³⁷ *Michael*, 496 F.3d at 594 (6th Cir. 2007); *Peltier*, 388 F.3d at 988; *Bowman v. Shawnee State Univ.*, 220 F.3d 456, 462 (6th Cir. 2000). *See also White*, 364 F.3d at 803 (citing *Jackson*, 194 F.3d at 752) (“[A] suspension *with* pay and full benefits pending a timely investigation into suspected wrongdoing is not an adverse employment action.” (emphasis in original)).

¹³⁸ *Michael*, 496 F.3d at 597.

¹³⁹ *Peltier*, 388 F.3d at 988 (citations and quotations omitted).

¹⁴⁰ *Dendinger*, 207 F. App’x at 527.

employment “to expect that he would be allowed to continue his responsibilities while he was facing serious criminal charges.”¹⁴¹ The Third Circuit has explained that “the terms and conditions of employment ordinarily include the possibility that an employee will be subject to an employer’s disciplinary policies in appropriate circumstances.”¹⁴² Indeed, “[a] paid suspension is neither a refusal to hire nor a termination, and by design it does not change compensation. Nor does it effect a ‘serious and tangible’ alteration of the ‘terms, conditions, or privileges of employment,’ because ‘the terms and conditions of employment ordinarily include the possibility that an employee will be subject to an employer’s disciplinary policies in appropriate circumstances.’”¹⁴³ The Eighth Circuit¹⁴⁴ and the Fourth Circuit¹⁴⁵ have similarly held that paid administrative leave does not constitute an adverse action.

In light of the foregoing precedent, TVA is entitled to summary judgement as a matter of law on Violation 2. TVA’s act of placing Mr. McBrearty on paid administrative leave is not legally cognizable as an act of discrimination—i.e., discharge or other personnel action that adversely affects the terms, conditions, or privileges of his employment—under ERA Section 211 and caselaw interpreting identical statutory language under Title VII.¹⁴⁶ For this reason, the

¹⁴¹ *Joseph v. Leavitt*, 465 F.3d 87, 91 (2d Cir. 2006).

¹⁴² *Jones v. Se. Pa. Transp. Auth.*, 796 F.3d 323, 326 (3d Cir. 2015).

¹⁴³ *Id.* (internal citations omitted).

¹⁴⁴ *Singletary*, 423 F.3d at 889, 891–92 (eighty-nine day suspension pending investigation insufficient for adverse action for both discrimination and retaliation claims as pay, grade, and benefits were maintained during investigation).

¹⁴⁵ *Von Gunten v. Maryland*, 243 F.3d 858, 869 (4th Cir. 2001), *abrogated on other grounds by Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 60 (“placing [an employee] on administrative leave with pay for a short time to allow investigation” is not an adverse action for retaliation purposes).

¹⁴⁶ TVA has identified one enforcement action where the NRC found paid administrative leave to be an adverse employment action. Wolf Creek Nuclear Operating Corp.—Notice of Violation and Proposed Imposition of Civil Penalty - \$232,000 (Office of Investigations Report No. 4-2017-020) (Dec. 17, 2018) (ADAMS Accession No.

Staff has failed to assert even a prima facie case that TVA violated Section 50.7, let alone make any showing that one occurred.

V. Conclusion

For the reasons set forth above, TVA respectfully requests that the Board summarily disposition Violations 1, 2, and 3 for failure to assert an adverse action as a matter of law.

VI. Certification

Undersigned counsel hereby certifies that counsel has made a sincere effort to contact the Staff and to resolve the question raised in this motion, pursuant to 10 C.F.R. § 2.323(b), and that counsel's efforts to resolve the issue have been unsuccessful. The Staff counsel represented that the Staff opposes TVA's filing of this Motion "because there are genuine issues of material fact with respect to each cited violation."

ML18333A043). But that case was not challenged through adjudication and is obviously inconsistent with the authoritative judicial decisions cited herein.

Dated: Washington, DC
August 16, 2021

Respectfully submitted,

/Electronically signed by Anne R. Leidich/

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**TENNESSEE VALLEY AUTHORITY’S LIST OF ATTACHMENTS IN SUPPORT OF
MOTION FOR SUMMARY DISPOSITION OF VIOLATIONS 1, 2, AND 3**

No.	Attachment Title	ADAMS Accession No. / Bates No.
1	Statement of Undisputed Material Facts	N/A
2	Excerpts from Deposition of Tony Williams ¹	N/A
3	Excerpts from Deposition of Michael McBrearty	N/A
4	Excerpts from Deposition of Beth Wetzel	N/A
5	Resignation Letter of Michael McBrearty (Aug. 16, 2018) ²	TVADOC0009127-0001
6	Formal Complaint of Erin Henderson (Mar. 9, 2018) (Exhibit 10 to OI Investigation 2-2019-015) ³	ML21044A069 at PDF pgs. 4–11
7	Report of Investigation of Erin Henderson’s Allegations of Harassment and Hostile Work Environment (May 25, 2018) (Exhibit 17 to OI Investigation 2-2018-033) (May 25 Slater Report)	ML21042A026 at PDF pgs. 31–62
8	Report of Investigation of Erin Henderson’s Allegations of Harassment and Hostile Work Environment (Aug. 10, 2018) (Exhibit 18 to OI Investigation 2-2018-033) (August 10 Slater Report)	ML21042A026 at PDF pgs. 64–101
9	Notice of Termination to Beth Wetzel (Jan. 14, 2019)	ML21042B963 at PDF pgs. 27–28
10	Excerpts from Deposition of Nick Hilton	N/A
11	Excerpts from Deposition of George Wilson	N/A
12	Excerpts from Deposition of David Solorio	N/A
13	Excerpts from Deposition of Ian Gifford	N/A
14	Employee Discipline Policy, TVA-SPP-11.316, Rev. 0005 (Effective Date 07-03-2017) Appendix B	ML21048A396 at PDF pgs. 200–12

¹ Attachments 2–4, 10–13, and 15 are self-authenticating sworn deposition testimony.

² Attachment 5 was authenticated by Mr. McBrearty’s supervisor, Mr. Al Dodds during the course of his sworn deposition testimony on July 20, 2021. *See* Attach. 15 (Dodds Depo. Tr. at 121:13–122:14).

³ Attachments 6–9 and 14 are authenticated by the Declaration of Timothy J.V. Walsh. *See* Attach. 16.

15	Excerpts from Deposition of Al Dodds	N/A
16	Declaration of Timothy J.V. Walsh	N/A

Attachment 1

August 16, 2021

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)
)
)
) Docket Nos. EA-20-006, EA-20-007
Tennessee Valley Authority)
Chattanooga, Tennessee)
)
)

STATEMENT OF UNDISPUTED MATERIAL FACTS

Tennessee Valley Authority (“TVA”) submits this statement of undisputed material facts in support of its Motion for Summary Disposition of Violations 1, 2, and 3 (Lack of Adverse Employment Action).

The relevant material facts underlying this motion not in dispute are the following:

1. Ms. Henderson filed her formal complaint on March 9, 2018.¹
2. Mr. McBrearty and Ms. Wetzel were interviewed by Mr. John Slater as part of a TVA Office of General Counsel (“OGC”) investigation into Ms. Henderson’s Complaint.²
3. At the time of their interviews, Mr. McBrearty and Ms. Wetzel were not aware they were subjects of TVA OGC’s investigation.³
4. TVA placed Mr. McBrearty on paid administrative leave on May 25, 2018.⁴

¹ Attach. 6 (Formal Complaint of Erin Henderson (Mar. 9, 2018)).

² Attach. 3 (McBrearty Depo. Tr. at 257:20–258:7); Attach. 4 (Wetzel Depo. Tr. at 70:12–71:9).

³ Attach. 3 (McBrearty Depo. Tr. at 28:1–24); Attach. 4 (Wetzel Depo. Tr. at 70:16–71:9).

⁴ Appendix to the TVA Order at 2 (Oct. 29, 2020) (ADAMS Accession No. ML20297A552) (“Order Appendix”).

5. On August 16, 2018, TVA management learned that Mr. McBrearty was resigning his position with TVA.⁵
6. TVA terminated Ms. Wetzel's employment on January 14, 2019.⁶
7. The NRC issued Violations 1, 2, and 3 to TVA on August 24, 2020, and issued an Order imposing a Civil Penalty based on those violations on October 29, 2020.⁷
8. Ms. Henderson was not Mr. McBrearty's supervisor.
9. Ms. Henderson was not the decisionmaker who placed Mr. McBrearty or Ms. Wetzel on paid administrative leave.⁸
10. Ms. Henderson was not the decisionmaker who terminated Ms. Wetzel.⁹

Respectfully submitted,

Dated: Washington, DC
August 16, 2021

/Electronically signed by Anne R. Leidich/
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Counsel for TVA

⁵ Attach. 5 (Resignation Letter of Michael McBrearty (Aug. 16, 2018)).

⁶ Attach. 9 (Notice of Termination to Beth Wetzel (Jan. 14, 2019)).

⁷ Notice of Violation and Proposed Imposition of Civil Penalty to TVA (EA-20-006 & EA-20-007) (Aug. 24, 2020) (ADAMS Accession No. ML20232B803) ("TVA NOV"); TVA Order Imposing Civil Monetary Penalty (Oct. 29, 2020) (ADAMS Accession No. ML20297A544) ("Order").

⁸ Cover Letter and Notice of Violation to Ms. Erin Henderson re: Notice of Violation, Nuclear Regulatory Commission Office of Investigations Report Nos. 2-2018-033 and 2-2019-015, at 2 (IA-20-009) (ADAMS Accession No. ML20218A584).

⁹ *Id.*

Attachment 2

Official Transcript of Proceedings
NUCLEAR REGULATORY COMMISSION

Title: Deposition of Anthony Williams

Docket Number: EA-20-006 and EA-20-007

Location: teleconference

Date: Monday, June 28, 2021

Work Order No.: NRC-1568

Pages 1-76

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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IN THE MATTER OF: :

TENNESSEE VALLEY AUTHORITY : Docket Nos. EA-20-006,

: EA-20-007

-----x

Monday,

June 28, 2021

DEPOSITION OF:

ANTHONY WILLIAMS

Called for examination by counsel for the agency,
pursuant to Notice of Deposition, via Videoconference,
when were present on behalf of the respective parties:

1 On Behalf of the Nuclear Regulatory Commission

2 JOSEPH MCMANUS, ESQ.

3 of: Office of the General Counsel

4 Mail Stop - O-14A44

5 U.S. Nuclear Regulatory Commission

6 Washington, DC 20555-0001

7 (301) 415-5356

8 joseph.mcmanus@nrc.gov

9
10 On Behalf of Anthony Williams

11 MICHAEL LEPRE, ESQ.

12 of: Pillsbury Winthrop Shaw Pittman LLP

13 1200 17th St., N.W.

14 Washington, DC 20036

15 (202) 663-8193

16 michael.lepre@pillsburylaw.com

17
18 Also Present:

19 Sara Kirkwood (NRC)

20 Sidney Fowler (Pillsbury)

21 Mike Bernier (TVA)

22

23

24

25

P R O C E E D I N G S

9:57 a.m.

1
2
3 MR. MCMANUS: Good morning. This is a
4 deposition on June 28, 2021 in the matter of Tennessee
5 Valley Authority, docket numbers EA-20-006 and EA-20-
6 007.

7 My name is Joseph McManus, J-O-S-E-P-H
8 M-C-M-A-N-U-S, and I'm an attorney with the NRC staff.

9 The purpose of this meeting is to take
10 deposition of Mr. Anthony Williams of the Tennessee
11 Valley Authority, or TVA.

12 Other attorneys in this meeting are Sara
13 Kirkwood, S-A-R-A K-I-R-K-W-O-O-D, and I'll now turn
14 it over to TVA to enter their appearances.

15 MR. LEPRE: Good morning. This is Mike
16 Lepre -- it's L-E-P-R-E. I'm with the law firm of
17 Pillsbury Winthrop Shaw Pittman, outside counsel for
18 TVA.

19 This matter, we also have Sidney Fowler,
20 F-O-W-L-E-R, from our law firm. And I see that Mike
21 Bernier, B-E-R-N-I-E-R, in-house counsel for TVA, is
22 on the line as well.

23 THE WITNESS: And my name is Anthony
24 Williams, W-I-L-L-I-A-M-S, or Tony Williams, and I'm
25 the Site Vice President of Watts Barr Station at this

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1 time.

2 MR. MCMANUS: Thank you. And could the
3 court reporter please swear in the witness.

4 WHEREUPON,

5 ANTHONY WILLIAMS

6 Was called as a witness by Counsel for the Agency, and
7 after having first been duly sworn, was examined and
8 testified as follows:

9 MR. MCMANUS: Thank you and good morning,
10 Mr. Williams. I'm going to ask you a number of
11 questions. If at any time you don't understand what
12 I'm asking, or can't hear me, or understand the
13 question, please stop me and let me know.

14 Also, let me know if you need a break when
15 you feel the need.

16 DIRECT EXAMINATION

17 BY MR. MCMANUS:

18 Q And I know you just stated this, but
19 just for the record, what is your current
20 position at TVA?

21 A I'm the Site Vice President of Watts
22 Barr Nuclear Station.

23 Q And when did you assume that role?

24 A Around February 2019.

25 Q Okay, and what position did you have

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1 question whether the environment is a caustic
2 environment or not. So most of the examples I get are
3 a specific one-time event, thus the fact finding and
4 the investigation is very precise on that time and
5 that issue. So it's not -- I don't remember seeing
6 ever in my career that it was something drawn out over
7 years of behavioral issues.

8 Q Did that also trouble you that if this
9 behavior had been going on for years that, you know,
10 nothing was -- or that this -- let me restate.

11 Did it trouble you that this behavior had
12 been going -- allegedly been going on for years and
13 Mr. McBrearty was still employed or had not been
14 subjected to discipline?

15 A We did not look back. I mean I did not
16 really look back on how we got to this point. I
17 looked at here I am now with all this thing -- all
18 these different examples and, you know, the concern
19 of, you know, if this escalates -- and, you know, a
20 lot of stuff when I'm talking about escalation,
21 because this is, you know, bullying, hostile work
22 environment, this could get physical. It could be --
23 so that was something that, you know, we were
24 concerned about this environment because it could get
25 physical. Mike was emotional about these issues. So

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C E R T I F I C A T E

This is to certify that the foregoing transcript

Deposition of: Anthony Williams

In the matter of: Tennessee Valley Authority

Before: US NRC

Date: 06-28-21

Place: teleconference

were duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings; and that I am neither counsel for, related to, nor employed by any of the parties to this action in which this deposition was taken; and further that I am not a relative nor an employee of any of the parties nor counsel employed by the parties, and I am not financially or otherwise interested in the outcome of the action.



Court Reporter

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WASHINGTON, D.C. 20005-3701

Attachment 3



Deposition of:
Michael McBrearty

June 29, 2021

In the Matter of:

**In the Matter of Tennessee Valley
Authority**

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1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION

3 ATOMIC SAFETY AND LICENSING BOARD

4 Before Administrative Judges:

5 Paul S. Ryerson, Chairman
6 E. Roy Hawkens
7 Dr. Sue H. Abreu

8 -----
9 :
10 In the Matter of : Docket Nos.
11 : EA-20-006 and
12 : EA-20-007
13 TENNESSEE VALLEY AUTHORITY :
14 : ASLBP No.
15 (Enforcement Action) : 21-969-01-EA-BD01
16 :
17 -----

18 Tuesday, June 29, 2021

19 Deposition of MICHAEL MCBREARTY
20 taken virtually via Zoom, with the witness
21 participating a residence in Springfield,
22 Pennsylvania, beginning at 9:28 a.m., before
23 Ryan K. Black, a Registered Professional
24 Reporter, Certified Livenote Reporter and Notary
25 Public and for the Commonwealth of Pennsylvania.

1 stop and we'll try to remedy the situation.

2 Do you understand?

3 MR. MCBREARTY: Yes.

4 MS. BROWN: Okay. Mr. Black, are you
5 going to swear him in?

6 THE REPORTER: Yes. I'll do that right
7 now.

8 * * *

9 Whereupon --

10 MICHAEL MCBREARTY,
11 called to testify via Zoom videoconference,
12 having been first duly sworn or affirmed, was
13 examined and testified as follows:

14 * * *

15 THE REPORTER: Thank you.

16 Counsel, you may proceed.

17 MS. BROWN: Thank you.

18 EXAMINATION

19 BY MS. BROWN:

20 Q. Mr. McBrearty, where are you --

21 MS. BROWN: Oh, I'm sorry. Sara?

22 MR. STEINFELDT: Excuse me. This is
23 Thomas Steinfeldt with the NRC. Could we
24 introduce ourselves for the record?

25 MS. BROWN: Please do.

1 interviewed you, and, if so -- and I think the
2 answer to that is yes -- what did the attorney
3 for OGC ask you about.

4 And according to this, it was that the
5 OGC person, I believe, is Mr. John Slater, asked
6 you -- or you were asked what Mr. Slater told
7 you was the purpose of this interview. And it
8 appears that what you were told was that he was
9 in -- he was investigating a harassment
10 allegation.

11 Do you recall?

12 A. Yes. My recollection is that is what
13 he told me.

14 Q. And what was the harassment agency you
15 understood him to be investigating?

16 A. I don't recall him telling me any
17 specifics of what the harassment allegation was.
18 It's kind of --

19 Q. Go ahead. I'm sorry to interrupt.

20 A. Yeah. As I read that paragraph, I do
21 recall I assumed I knew what it was about, and
22 I -- I -- I assumed it was about a text message
23 that I had sent, and that they were -- he was
24 interviewing me about harassment of myself.

25 Q. What do you mean, harassment of

1 at TVA?

2 A. I would answer that as Ms. Henderson
3 was involved particularly with the response, or
4 lack thereof, of the two NCVs.

5 Q. Mm-hmm.

6 A. In my opinion, that put me in a
7 difficult position because I was the individual
8 that had to communicate with the NRC as to what
9 we were doing.

10 Q. And that's why I'm asking you
11 specifically, Mr. McBrearty, how did
12 Ms. Henderson's handling of those NCVs violate
13 nuclear safety protocol?

14 A. I -- I don't -- I don't know how to
15 answer that.

16 Q. Why not?

17 A. What do you mean by nuclear safety
18 protocol?

19 Q. You tell me what you think about
20 nuclear safety protocols, what that means. I
21 mean, that's a term of art in your business,
22 correct?

23 A. I'm not familiar with the term. I'm
24 familiar with the term "nuclear safety," but not
25 "nuclear safety protocols."

1 A. Right. The service life issue.

2 Q. Mm-hmm.

3 A. We did a -- we did -- eventually, I
4 think it was December of 2017, --

5 Q. Mm-hmm.

6 A. -- we did eventually submit the denial
7 letter with the backfit appeal.

8 Q. Right. So that eventually got -- I'm
9 sorry. I interrupted you, Mr. McBrearty.

10 A. Yeah. After I had been suspended, I
11 heard that violation had been withdrawn.

12 Q. Right. So at the end of the day, both
13 of those things were resolved favorably for TVA
14 with the NRC?

15 A. That's my understanding.

16 Q. Thank you.

17 One second. I want to make sure we
18 got -- the good news is I'm not showing another
19 document.

20 Is it correct that you were interviewed
21 as part of an investigation by TVA's Office of
22 General Counsel? I think you've already answered
23 this, "yes."

24 A. Yes.

25 Q. And that Mr. Slater interviewed you?

1 A. That's the name I recall.

2 Q. Okay. Do you recall when you were
3 interviewed?

4 A. I'm trying to think. It was sometime
5 after April 15th.

6 Q. Of what year?

7 A. 2018.

8 Q. '18. Okay. That date seems to stick
9 in your mind. Why is that?

10 A. I had taken -- my father had cancer --

11 Q. Oh. I'm so sorry.

12 A. -- and he was going to die.

13 Q. Yeah.

14 A. So I took a leave of absence because I
15 went up to New Jersey to take care of him.

16 Q. Mm-hmm. Mm-hmm.

17 A. And I know, before I left, I had spoken
18 to Ms. Hagins-Dyer, and she had indicated there
19 was going to be some sort of investigation. And
20 I had told her, "You know, I'm going to be gone
21 for an indefinite period of time, but I would
22 like to be interviewed as part of the
23 investigation."

24 Q. Sure.

25 A. And my father passed away on April

1 after Mr. Slater's report was complete. Is that
2 your recollection?

3 A. That's what I thought at the time.
4 But, subsequently, Mr. Dodds informed me that the
5 report was not complete and that they -- he --
6 Mr. Dodds and I had periodic communications and
7 he was communicating to me that there was going
8 to be more investigation.

9 Q. Did he tell you what that investigation
10 -- that additional investigation included?

11 A. No. We -- we had -- we had some
12 communications about meetings that were happening
13 at the site. And when I -- they had -- they
14 originally came up with a return date for me to
15 come back to the site.

16 Q. Mm-hmm.

17 A. And then shortly before I was scheduled
18 to return, Mr. Dodds let me know that they had
19 not approved my returning to the site and there
20 was additional investigation being done.

21 Q. When did you start applying for new
22 jobs?

23 A. I had started looking for new jobs
24 probably earlier in 2018.

25 Q. Before Mr. Slater interviewed you?

1 A. Yeah. I was -- I had become -- I was
2 getting pretty uncomfortable working at TVA.

3 Q. How so?

4 A. Just it was -- there was a lot of
5 tension between Corporate Licensing and the site.
6 It was becoming unpleasant to -- I felt like I
7 could -- I could find a job that would -- I could
8 be more content at.

9 Q. What did you do to -- excuse me. What
10 did you do to alleviative those tensions? What
11 steps did you take?

12 A. I was looking for a new position.

13 Q. But within TVA, what did you do? What
14 steps did you take to alleviative the tension
15 between the site and corporate?

16 A. I don't recall any specific actions.

17 Q. You took the job at UAE. When did you
18 resign from that job?

19 A. I submitted my resignation in December
20 of 2020, and then my final day there was January
21 7th of 2021.

22 Q. Why did you leave that job?

23 A. They had actually given me a very big
24 promotion, and the big promotion coincided with
25 the COVID pandemic.

Attachment 4



Deposition of:
Beth Wetzel

June 16, 2021

In the Matter of:

**In the Matter of Tennessee Valley
Authority**

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

-----)
IN THE MATTER OF) Docket Nos.
TENNESSEE VALLEY AUTHORITY) EA-20-006
CHATTANOOGA, TENNESSEE) EA-20-007
-----)

REMOTE DEPOSITION OF BETH WETZEL
JUNE 16, 2021

REPORTED BY: Tina Alfaro, RPR, CRR, RMR

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JUNE 16, 2021

9:00 A.M.

Deposition of BETH WETZEL taken remotely
by video conference pursuant to notice before Tina
M. Alfaro, a Certified Realtime Reporter and a
Notary Public within and for the District of
Columbia.

1 (Witness sworn.)

2 MS. RIMON: Good morning, Ms. Wetzel.

3 We are here for a deposition of Ms. Beth
4 Wetzel in a matter pending before the Atomic Safety
5 and Licensing Board, Docket Nos. EA-20-006 and
6 EA-20-007. Representing TVA is myself, Laurel
7 Rimon, with the law firm of O'Melveny & Myers and
8 my colleague Sam Lehman and Carly Gibbs and also
9 Tim Walsh with the law firm of Pillsbury.

10 Does the NRC want to state their
11 appearances?

12 MS. KIRKWOOD: Sara Kirkwood with the
13 Office of the General Counsel of the Nuclear
14 Regulatory Commission, and I am accompanied by
15 Kevin Roach and Thomas Steinfeldt also of the
16 Nuclear Regulatory Commission, Office of the
17 General Counsel.

18 WHEREUPON:

19 BETH WETZEL,
20 called as a witness herein, having been first duly
21 sworn, was examined and testified as follows:

22

1 Q. What did you think of Ms. Henderson when
2 she first became your supervisor?

3 A. I'm trying to think what I thought when
4 she first became my supervisor.

5 Q. Yeah. Right.

6 A. I thought she was inexperienced. I
7 thought she was smart, a smart lady, very well
8 organized.

9 Q. Did you think she could do the job?

10 A. I didn't think she had the knowledge and
11 the experience to be good at the job.

12 Q. I want to talk for a second about an
13 interview that you had with John Slater from OGC.
14 Do you recall that?

15 A. Yes.

16 Q. What was your understanding of the purpose
17 of that interview?

18 A. My understanding was that he was
19 interviewing everyone in our group to assess the
20 work environment in our group.

21 Q. And what do you mean by "work
22 environment"?

1 A. I believed we had a poor work environment,
2 and he was assessing that and going to help improve
3 it.

4 Q. When you say "work environment," though,
5 what do you mean by that?

6 A. I believe we had a chilled work
7 environment and people were afraid to speak
8 honestly and share honest information, and that's
9 not good in nuclear power.

10 Q. What was that belief based on?

11 A. Well, that belief was based on, in part,
12 my own fear for my job.

13 Q. Can you describe your fear for your job to
14 us?

15 A. I feared that Ms. Henderson was trying to
16 look for a reason to demote or fire me.

17 Q. And why were you afraid of that?

18 A. Because I was the -- one of the bread
19 winners for my family. I wanted to keep my job.

20 Q. But what made you think that that was what
21 she wanted to do?

22 A. Because over a period of time she slowly

Attachment 5

To: Mr. R. Al Dodds
Director, Plant Support

From: Michael McBrearty
Manager, Site Licensing

Subject: Letter of Resignation

Dear Al,

In follow up to our telephone conversation this morning August 16, 2018, this letter is to notify you of my resignation from TVA effective Thursday August 30, 2018. I enjoyed working with you, my direct reports, the Sequoyah Senior Leadership Team, and with the people at the Sequoyah Nuclear Power Plant, and I wish all of you well in continued success and pursuit of excellence.

Please let me know if there is anything I can do to help out during this transition period.

Best Regards,

A handwritten signature in black ink, appearing to read "Michael McBrearty", with a horizontal line extending to the right.

Michael McBrearty
Manager, SQN Site Licensing

Attachment 6

March 9, 2018

Joe Shea, Vice President Nuclear Regulatory Affairs and Support Services
Amanda Poland, Director Human Resources

FORMAL COMPLAINT

This is a formal complaint related employees (including manager level personnel) who are complicit in workplace bullying and creating a hostile work environment for me. Over the course of multiple years, this behavior has been both repetitive and pervasive. Individuals have either directly or indirectly acted in attempt to intimidate and undermine me in my role as a senior regulatory leader. There are indications that several individuals are contributing to this environment including Mike McBrearty, Michelle Conner, Beth Wetzel, Ed Schroll, and Alesia Justice. Mike McBrearty, the primary instigator, has also allowed, if not encouraged, his own employees to engage with me and my staff in a similar manner. This has resulted in, among other things, repeated investigations and an NRC inspection where the accusations were determined to be unsubstantiated.

In addition to the open hostility and repeated accusations being the source of a great deal of personal stress (to the point of expressing my intention to leave the company) and damage to my professional reputation by people who are aware of the repeated investigations, the behavior of these individuals has resulted in my fear to address or challenge individual or site performance due to the potential repercussions. By my having to limit my interactions with one site in particular and/or not being able to performance manage individuals within my own organization, I perceive that my ability to fully perform the responsibilities outlined in my job description has been impacted. Some relevant background information and specific points supporting the claim are provided below.

Background Information:

- June 2014: I was notified by my supervisor at the time (Gary Mauldin) that I was being moved to SQN to be the Site Licensing Manager. I succeeded Mike in that role. Mike insisted that he continue to have responsibility for interfacing on a technical specification conversion project at SQN, lead by Michelle Conner.
- September 2015: I was promoted to Senior Manager, Corporate Nuclear Licensing. I again succeeded Mike in that role. The organization was viewed as low performing and I was asked to focus on performance management as there were known performance gaps that had gone unaddressed for the past several years. When I started in the organization, I reviewed the previous results to assess the overall organizational health and nuclear safety culture. Many of the organizational scores were very low (November 2014 Synergy Survey, July 2015 Gelfond Survey). Corporate Licensing was an outlier with very low scores in many questions. I conducted one on ones with the entire organization (approx. 20 people at that time) to better understand the results and developed a department improvement plan to improve the organization. Based on the feedback and my review, I concluded there was a significant need to establish clearer roles and responsibilities, improve

communications and take action on individual performance (both recognition and critical performance feedback). There was also feedback about leadership presence because Mike continued to engage on the technical specification conversion while in the corporate senior manager role. ECP pulsings were included in the overall strategy for monitoring effectiveness and included an additional set of questions above the standard ECP template to assess the organizational health questions.

- January 2016: Conducted an ECP pulsing survey (initiated by me as part of a department improvement plan); Results indicated some improvement in communications and performance management; comments indicated a 'wait and see' attitude. Conclusion was that there is no chilled work environment.
- February 2016: I hired a new CFAM, Michelle Conner. In that capacity, Michelle assumed responsibility for providing unbiased oversight of the site regulatory organizations.
- April 2016: an investigation into the nature of the personal relationship between Michelle and Mike was initiated. That investigation concluded in June 2016. Because of ongoing issues with Michelle, I was advised by legal and HR to limit my direct interaction with her. This continued through October 2016.
- May 2016: ECP pulsing survey conducted (initiated by me as part of a department improvement plan); Comments noted overall improvements and conclusion was that there was no chilled work environment.
- October 2016: Michelle was placed on a rotational assignment in another organization and simultaneously placed on a performance improvement plan to be managed by her new manager, Paul DiGiovanna. Jim Polickoski replaced Michelle as the temporary CFAM in the organization and has remained in that capacity since.
- December 2016: Michelle filed a DOJ/NRC complaint which was resolved in November 2017. Michelle then commenced a role in the Small Modular Reactor organization working for Dan Stout and her cubicle is adjacent to (shares a cubicle wall) with individuals in my organization. Settling with Michelle was done, in part, to alleviate some of the challenges I faced with both her and Mike.
- February 2017: At this point in time, I realized that Mike's open hostility toward me was not going to stop and I started to keep notes regarding the various interactions and feedback I was receiving.
- February 2017: Additional ECP pulsing survey conducted which demonstrated improvement in the following areas: the work environment encouraging the voluntary expression of concerns and differing views, perception of CAP, management communications and timely resolution of issues and significant improvement in the

following areas: communicating basis for decisions, holding individuals accountable or recognizing positive performance, engaging in and coaching related to staff work.

- As a result of the challenges in interfacing with Mike, at various points over the past year my supervisor and I agreed to limit both my time spent at SQN and my direct engagement with the peer team (site licensing managers) even though there was a significant need to engage in that forum to improve performance.
- While I have taken some performance management related actions at various points in time, because of ongoing challenges I have not been able to aggressively resolve all of the performance challenges (Beth Wetzel and Ed Schroll). More details can be provided on this.

Specific Examples:

- There have been repeated assertions that I have created a chilled work environment. The assertions have been contrary to independent ECP pulsing survey data, increased Condition Report initiation data since I have been in the organization and a very recent independent SCWE inspection by the Nuclear Regulatory Commission. Several complaints were filed as a means of retaliation/intimidation after addressing individual performance issues or behaviors.
 - 07/16: ECP concern NEC-16-00638 filed asserting harassment and retaliation for protected activity and a chilled work environment within the organization. Report was issued in 09/16 and did not substantiate claims of harassment and retaliation or a chilled work environment within corporate licensing.
 - 12/23/16: received DOJ/NRC complaint related to CFAM; I provided a complete response to each assertion along with documentation (texts, emails, performance noted) as to why the claims were unfounded.
 - 4/21/17: After several months of engaging with site and corporate leadership related to Mike's behaviors, he filed an ECP complaint that I was creating a hostile work environment. I was later briefed that this claim was not substantiated and ECP had found 'the exact opposite' to be true.
 - 7/14/17: Mike contacted ECP regarding a new concern on a CR that I closed.
 - 7/25/17: I was informed of another ECP complaint for retaliation resulting from a meeting with only my direct reports (on 7/21/17), where I discussed the closure of the previous ECP concern as part of SCWE mitigation.
 - 9/18/17- 9/22/18: NRC conducted an inspection at corporate. They conveyed it was part of a follow up to WBN's CWEL and wanted to do a corporate pulsing. During the discussions with inspector and regional

leadership, they conveyed that it was related to issue follow up. They interviewed 100% of my organization and several individuals in corporate engineering. They concluded that there was not a chilled work environment and management encourages the raising of issues and condition report initiation. The NRC documented this conclusion in WBN inspection report 2017003 dated November 22, 2017. (ML17326A222).

- o 3/6/18: Despite the history described above, in a text exchange with one of my direct reports, Mike again asserted that people are scared of me so they will not raise issues and there is a SCWE problem in my organization.

- There are examples of Mike speaking negatively to my direct reports, leaving me off of emails, including individuals on emails that are not involved with the issue so as to intimidate me, and sending emails regarding my performance to a large population including my direct reports. This behavior is the direct result of me 'interfering' with his potentially unprofessional relationship with another manager (Michelle). This behavior became most evident after Michelle was moved to a new role (October 2016). Mike has repeatedly excused his behavior as being due to the corporate handling of two narrow technical issues that are a couple of years old.
 - o 2/13/17: Mike sent an email requesting feedback on a draft CR. I sent my response which he then forwarded my response to a population of people, removing me and his immediate supervisor. He left my supervisor on the email. He then responded abruptly and forwarded my response and his email to a new group of people including individuals that were not at all involved in the discussion. He again left me off of the emails. I received texts from a direct report and my supervisor to let me know that my email was being forwarded.
 - o 2/14/17: During a conversation with my direct report regarding the evening before. He noted that Mike is obviously being childish in a way that he cannot understand. He also noted that Mike is open about his hostility toward me and he had counseled him about it.
 - o 2/16/17: At our licensing counterpart meeting, I was speaking in a room of all of the regulatory personnel in the fleet including all of my managers and most of my individual contributors. I acknowledged work that was done by several individuals in the room to make a point about us all having extraordinary experiences to share. When I was done talking, Mike stated, 'Erin, Michelle Conner lead the ITS conversion and I think that should be acknowledged and recognized.' After he did that, it was noted by multiple people in the room as

being 'irrelevant' and 'unnecessary'. He had previously done this same thing several other times including once via email when I was acknowledging individuals for a positive behavior and he responded that this behavior was the result of good work by Michelle. An additional time he recognized Michelle on the fleet phone call for work that she was not involved in. That fact was noted when I returned from the fleet phone call and an individual asked why he mentioned her as she was not even involved in the fire header recovery issue at SQN. It was odd behavior for someone who was so concerned about an investigation into his relationship with her and it appeared as though he was attempting to openly antagonize me given that Michelle had recently been moved.

- 2/16/17: Received feedback from a direct report that Mike speaks very openly about me and says some 'pretty awful things' about me. He commented that if he s that open with him, he 'can't imagine what Mike says about me to other people'.
- 3/16/17: Received feedback from two directs that Mike was being hostile toward corporate on phone calls. They believed the 'hostility' was directed at me. I asked why and was told that Mike thought 'Michelle Conner was done wrong.' They both agreed and said that he discusses that with them frequently.
- 4/7/17: Received feedback from a direct that Mike indicated I've ruined 'Michelle Conner's career and her life.' I asked why he thought he is so invested in Michelle Conner's situation and he said its obvious 'they are very close.' The individual further stated that Mike only gets one side of the story from Michelle Conner.
- 4/25/17: Received feedback from a direct that it appeared Mike was looking to 'publicly poke you in the eye' and is 'on a rampage against you.'
- 10/4/17: My supervisor noted that Mike was leaving me off of emails again related to security issue.
- 3/2/18: In an email sent to a broad audience including all of my directs, Mike appeared to assert issues related to my performance. This was noted by one of my directs who forwarded the email to Mike's supervisor and discussed the issues with the supervisor over the weekend. There was a follow up email exchange between Mike and my supervisor (addressing me again), which Mike then proceeded to forward to another one of my direct reports.

Joe Shea
Amanda Poland
Page 6
March 9, 2018

- There are some indications that other individuals (Michelle Conner, Beth Wetzel, Ed Schroll, and Alesia Justice) may potentially be contributing to this environment or colluding with each other to facilitate creating a hostile work environment as described below:
 - 04/2016: I challenged Michelle and another one of my directs related to performance at SQN on a specific issue. Michelle had a significant emotional reaction to the challenge related specifically to Mike's performance. Based on follow up discussions with Mike, it became evident quickly that Michelle Conner had very quickly told Mike about the discussion related to his performance.
 - 06/16: After repeatedly prompting and engaging with HR regarding the status of the investigation into the potential ethics violation (nature of Michelle and Mike's relationship), they completed the investigation report. The investigation concluded that it was unclear, although the investigation concluded that they have a very close personal relationship. Michelle was coached regarding managing the perception of the relationship and it's potential effect on impartiality. During the meeting, which included HR, Michelle said she would not change her relationship with Mike for work.
 - 7/25/17: Within a couple of days of having a closed door discussion with only my direct reports (Ed was not present), Mike was informed of this discussion and a new ECP investigation was filed. When I met with ECP on 8/8/17 to discuss the conclusion, ECP noted that she was going to provide feedback to Mike that the information he got from the meeting was 'exaggerated'. It was also evident from the briefing with ECP that one of my direct reports was not honest during her interview where she claimed to have 'coached' me during the meeting on 7/21/17. I had taken notes from the meeting and knew that Beth had not done that in that meeting, as a matter of fact, she indicated she thought the discussion was appropriate. The other attendees also told ECP that they not recall occurring. Nonetheless, she told ECP that had occurred when interviewed. This is indicative that one of my directs passed the information to Mike and was also dishonest during her interview in a way so as to make it appear that she had attempted to intervene during the meeting.
 - 10/2016: Michelle was moved to RMD assignment in different organization based upon her numerous requests. She was also placed on a PIP at this time. I received feedback after the fact that Michelle had been openly complaining about me and her being placed on a PIP with employees. My

- understanding was it included both Beth Wetzel and Alesia Justice and was done in the open office area where other employees were.
- 12/23/16: DOJ/NRC complaint related to CFAM; The complaint also asserted that when Michelle had discussed her PIP with Beth Wetzel she 'exclaimed' that Michelle was being retaliated against.
 - 9/11/17: Received feedback from a direct related to a discussion with a SQN employee, during which the SQN employee (a direct report to Mike) had noticed that there has been a drastic increase in the amount of communications' between Beth and Mike in the past couple of months. (Note, Beth has the least interface with the Site Managers of all of my corporate managers. Her IDP for 2018 includes a developmental area to go to the sites more often.) The SQN employee said he thought they (Mike and Beth) are the reason for the NRC SCWE inspection in my organization.
 - 10/27/18: After a meeting related to seismic submittals, Beth mentioned she had a conflict that would impact her attending the next month's ROP task force meeting. I let Beth know that I would attend in her place as I was actively working to get more involved in industry initiatives. I asked her to forward me the information for that meeting which she said she would. Contrary to that direction to Beth and without any other discussion about it with others, the next day (Saturday morning 10/28) Mike sent an email to both me and my supervisor stating that he understood we needed someone to support the ROPTF meeting and that he would be available to attend, even though his organization had a significant inspection that week. While Beth was not included on the email Mike sent to us, Beth forwarded his email (deleted his forwarding it to her) recommending Mike's attendance at the meeting and that he be our primary for representative and she'd be the back up.
 - 2/21/18: During meeting with ERI, the briefing package included a change where Michelle was recently added to an industry task force. When Beth had previously raised this several times, Joe provided feedback that we would not have TVA support that industry initiative. After the meeting I talked to Dan Stout (Michelle's new supervisor) who explained Michelle came to him because it would provide info related to SMRs. It was evident that Beth had gone to Michelle again, who then went to her supervisor and got him to agree to it without his realizing the history.
 - 2/21/18: During a discussion with one of my directs, he noted that he realizes he needs to watch what he says in the office area. He had said something

Joe Shea
Amanda Poland
Page 8
March 9, 2018

about me during a conversation with another employee and my direct report received a text message from Mike about it 'within 30 minutes'. (Alesia Justice, Beth Wetzel and Michelle Conner sit on opposite sides of the employee.) He assumed it was Michelle Conner who quickly texted Mike McBrearty related to his comment. I did not ask exactly what he said. I noted that others have told me (and I have observed myself), Beth and Michelle Conner or Michelle Conner and Alesia together often. He also stated that he believed Alesia was 'feeding' information to Mike.

- o 3/6/18: In an email exchange over the weekend with Mike McBrearty and my supervisor, Mike continued to assert performance issues. On 3/6/18, I was informed by one of my directs that Mike had also proceeded to forward that email to one of my other directs (Ed Schrull) after they talked on the phone about the email exchange.

In summary, I perceive that there are demonstrating behaviors that are, at the very minimum, inconsistent with TVA competencies and core values in an attempt to continuously undermine, harass and intimidate me. This is resulting in a hostile work environment. I believe that Mike McBrearty has intentionally targeted me because I, as a function of my role and in conjunction with my leadership and HR, initiated an investigation into Michelle Conner's relationship with Mike McBrearty. Michelle, who is married to a SQN Shift Manager, had been in a role requiring oversight of the sites including the work of Mike McBrearty. Despite being a confidential investigation, they were both aware of the investigation from the day it began. After taking action to address Michelle's performance gaps, Mike's tactics primarily escalated. Additionally, Mike has fostered such an environment within his own department making interactions with the SQN Licensing organization extremely challenging. Lastly, additional employees within my organization, whose performance issues I have attempted to address in many cases, have colluded with Mike and Michelle either directly or indirectly, in an attempt to further create a hostile work environment for me and mitigate the potential for me to address their individual gaps.

So as not to create further stress, I would appreciate an expeditious assessment of these issues and timely feedback regarding the timeline to resolve.



Erin Henderson
Director, Nuclear Regulatory Affairs

Attachment 7

IN RE THE COMPLAINT OF)
ERIN HENDERSON)
REPORT BY THE TENNESSEE)
VALLEY AUTHORITY)

Misc. No. _____

**REPORT OF INVESTIGATION OF ERIN HENDERSON'S ALLEGATIONS
OF HARASSMENT AND HOSTILE WORK ENVIRONMENT**

On March 9, 2018, Erin Henderson, Director, Nuclear Regulatory Affairs, submitted a formal complaint to Joseph W. Shea, Vice President, Nuclear Regulatory Affairs & Support Services, and Amanda Elizabeth Poland, Director, Human Resources, alleging that she has been, and continues to be, retaliated against and/or harassed and subjected to a hostile work environment of multiple years. Ms. Henderson reports to Mr. Shea.

Ms. Henderson states (1) that several (b)(6) employees "are complicit in workplace bullying and creating a hostile work environment"; 2) that these employees "either directly or indirectly acted in an attempt to intimidate and undermine [her] in her role as a senior regulatory leader"; and 3) that these employees' conduct is "both repetitive and pervasive."¹ Ms. Henderson's position is in TVA's Corporate Nuclear Licensing and she is responsible, primarily, for formulating and executing fleet governance and oversight strategies and programs to achieve and sustain excellence in all of TVA's operating fleet nuclear regulatory matters, serves as Nuclear Power's expert and final authority in

¹ Complaint at 1.

nuclear regulatory issues, and provides strategic guidance to senior corporate and site leaders on range of nuclear regulatory issues.²

Ms. Henderson alleges that five employees—Michael McBrearty, Manager, Site Licensing (SQN); Terri Michelle Conner, Senior Manager, SMR Ops & Training; Beth A. Wetzel, Manager, Regulatory Programs; Ed Schroll, Manager, Fleet Licensing; and Alesia Cox Justice, Management Analyst—contributed to the hostile work environment.³ Except for Mr. McBrearty, the aforementioned employees work or worked in Corporate Licensing and either reported directly to Ms. Henderson or reported to one of her direct reports.⁴ Ms. Connor was a direct report of Ms. Henderson until November 2017 before she assumed her current position of Senior Manager, SMR Ops & Training, that came about as part of a settlement of a Department of Labor complaint that Ms. Connor filed in December 2016.⁵ Ms. Connor now reports to Daniel P. Stout, Senior Manager, SMR Technology.⁶ Ms. Wetzel reported to Ms. Henderson until April 27, 2018; starting April 30, 2018, she has been on loan to the Nuclear Energy Institute (NEI) for 18 months.⁷

² Henderson PD.

³ Complaint at 1.

⁴ See April 5, 2018, Organizational Chart for Corporate Licensing (Org Chart). Ms. Cox is not a direct report of Ms. Henderson's. She reports to Ms. Wetzel who reports to Ms. Henderson.

⁵ Complaint at 2. Ms. Henderson hired Ms. Conner in February 2016 as the "new CFAM" or Corporate Functional Area Manager. Complaint at 2.

⁶ Org Chart; interviews of Henderson and Shea.

⁷ Interviews of Wetzel, Henderson, and Edmondson.

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As part of the investigation, the undersigned interviewed Ms. Henderson (three times) and her entire staff, consisting of her direct reports—James Polickoski, Manager, Regulatory Compliance, Mr. Schroll, Manager, Fleet Licensing, and Ms. Wetzel and their direct reports—Peggy R. Rescheske, Senior Program Manager, Corporate Nuclear Licensing; Russell Thompson, Senior Program Manager, Corporate Nuclear Licensing; Christopher T. Riedl, Senior Program Manager, Corporate Nuclear Licensing; Gordon Williams, Senior Program Manager, Fleet Licensing; Russell D. Wells, Senior Program Manager, Fleet Licensing; Thomas Hess, Program Manager, Fleet Licensing; Teddy J. Bradshaw, Program Manager, NSRB ; and Alesia Cox Justice, Management Analyst. The undersigned also interviewed Mr. Shea, Vice President, Nuclear Regulatory Affairs & Support Services, and his Management Assistant, Carla Edmondson, as well as the three Site Licensing Managers—Jamie Paul (BFN), Kimberly D. Hulvey (WBN), and Mr. McBrearty (SQN). At the insistence of management, the undersigned did not interview Ms. Conner, Senior Manager, SMR Ops & Training. In addition, the undersigned reviewed emails, text messages, Employee Concerns Program (ECP) reports and related documents, and a Report of Investigation prepared by Human Resources.

Based on the interviews and the review of the documents, the undersigned finds that Ms. Henderson's allegations are substantiated and further finds that she has been, and continues to be, retaliated against in violation of two Federal statutes and three TVA policies, as explained further in this Report.

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Senior Manager, Nuclear Regulatory Affairs

In September 2015, Ms. Henderson was selected to fill the position of Senior Manager, Corporate Nuclear Licensing. Ms. Henderson's selection was not met with acceptance by a number of her subordinates. As Ms. Henderson states in the complaint and confirmed by Mr. Shea, when Ms. Henderson was hired as Senior Manager, the Corporate Licensing staff was viewed as low performing and she was asked to focus on performance management in that there were known performance gaps that had not been addressed for the past few years.⁸ To begin evaluating and addressing these concerns, as well as the Corporate Licensing overall organizational health and nuclear safety culture, Ms. Henderson reviewed the organization's survey results/scores in these areas and held one-on-one sessions with the entire staff "to better understand the results and develop a department improvement plan to improve the organization," and "[b]ased on the feedback and [her] review, [Ms. Henderson] concluded that there was a significant need to establish clearer roles and responsibilities, improve communications and take action on individual performance (both recognition and critical performance feedback)."⁹ To this end, Ms. Henderson sponsored Pulsing Surveys which were conducted by ECP in January 2016, May 2016, and February 2017, which show rapid and marked improvement in the areas of communications, holding employees accountable for their performance (by recognizing and reinforcing positive

⁸ Complaint at 1; Interviews of Henderson and Shea. I did not independently review the respective performance reviews of the Corporate Licensing staff for the years prior to Ms. Henderson assuming the role of Senior Manager

⁹ Complaint at 1.

behaviors and by corrective negative behaviors), involvement of management in observing and coaching employees, confidence in management's decisions, and management taking timely and appropriate corrective actions regarding concerns brought to their attention.¹⁰

Some of Ms. Henderson's staff questioned the wisdom of her selection as Senior Manager, Corporate Nuclear Licensing. For example, there were comments that Ms. Henderson was "too young"; that she was "too inexperienced"; that she "did not have enough nuclear experience"; and/or that she did not have "enough licensing experience."¹¹ It should be noted that, except for Mr. Schrull, these staffers did not apply for the position of Manager, Corporate Nuclear Licensing.¹² Despite these criticisms, Ms. Rescheske stated that she "prejudged" Ms. Henderson; that Ms. Henderson "requested a lot of feedback to make herself a better manager"; that Ms. Henderson has "put in the time and effort" and she "works very hard" to make Corporate Licensing work better; and that Ms. Henderson "has earned her position and the respect, even if not given, of the group."¹³ Mr. Riedl echoed these sentiments, stating that initially he had concerns but "reserved judgment" as to Ms. Henderson's ability to manage the group and describing her as "driven" and as "the most methodical

¹⁰ Nuclear Licensing ECP Pulsing Survey Results (February 2017).

¹¹ E.g., Interviews of Thompson, Rescheske, Wetzel, Schrull, and Riedl.

¹² Interviews of Shea, Schrull, and McBrearty.

¹³ Interview of Rescheske.

and organized person" with "excellent structured organizational skills."¹⁴ Furthermore, Mr. Riedl stated Ms. Henderson "may intimidate some but does not do so intentionally" and he "gives Joe Shea credit for hiring" her.¹⁵ Similarly, Mr. Thompson describes Ms. Henderson as "smart," "ambitious," "a quick learner," "up to performing her job" and is a "person who can go through large volumes of information and digest it."¹⁶ The others who were critical of the hiring of Ms. Henderson as Senior Manager, Corporate Nuclear Licensing, also agreed that Ms. Henderson was a good manager.¹⁷

The Site Licensing organizations likewise had reservations about the hiring of Ms. Henderson as Senior Manager, Corporate Nuclear Licensing. Mr. McBrearty stated that "all three sites had reservations" about the hire because, in their view, Ms. Henderson "lacked experience."¹⁸ Mr. McBrearty further stated that the other interviewees, including Gordon Arent, Gene Cobey, and Mr. Schrull, had far more experience than Ms. Henderson.¹⁹ Similarly, Mr. Paul stated that he was "surprised" that Ms. Henderson was selected, given that "other candidates had more regulatory experience"; that she was "lean" on experience; and that Ms. Henderson did not have,

¹⁴ Interview of Riedl. Similarly, Mr. Lewis noted that, "[a]t first, [he] didn't know what to expect" but she is "professional," "smart," "ambitious," "young," "reasonable," "a good listener and can do the job." Interview of Lewis.

¹⁵ Interview of Riedl.

¹⁶ Interview of Thompson.

¹⁷ Interviews of Thompson, Wetzel, and Schrull.

¹⁸ Interview of McBrearty.

¹⁹ Interview of McBrearty.

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in his view, "the depth of regulatory experience."²⁰ It should be noted that Ms. Hulvey--the current WBN Licensing Manager--was not the WBN Licensing Manager at the time of the selection. Both the WBN and BFN Licensing Managers (Ms. Hulvey and Mr. Paul) informed the undersigned that they have healthy, professional working relationships with Ms. Henderson.²¹ However, as discussed further below, the SQN Licensing Manager--Mr. McBrearty--does not have a healthy, professional working relationship with Ms. Henderson.²²

Director, Nuclear Regulatory Affairs

In January 2018, because of additional, substantial duties and responsibilities, Ms. Henderson's Senior Manager position was upgraded to Director, Nuclear Regulatory Affairs.²³ There does not appear to be significant criticism from Ms. Henderson's staff or from the sites with regard to the upgrade of her position. Indeed, since signing authority with regard to many regulatory products was delegated down from Mr. Shea to Ms. Henderson as part of the upgrade, the upgrade is seen as a plus because it peeled

²⁰ Interview of Paul.

²¹ Interviews of Hulvey and Paul. It should be noted, however, that the BFN Licensing Manager observed that "[i]n the past, Corporate was better at partnering with the sites," and that Corporate has "a desire to be right" and "likes to argue" and he feels as though Corporate "bulldozes over Site Licensing." Interview of Paul.

²² Interviews of McBrearty, Polickoski, and Henderson.

²³ Henderson PD; Interviews of Shea and Henderson.

off at least one layer of review.²⁴ Other than the additional signing authority, staff did not see much of a change in the operation of the group.²⁵

Chilled Work Environment

In July 2016, Mr. McBrearty filed a concern with ECP, alleging that Ms. Henderson had harassed members of her staff and created a chilled work environment in Corporate Licensing.²⁶ However, ECP investigated the concern and the concern was not substantiated.²⁷ Similarly, after Mr. Shea and Ms. Henderson engaged site and corporate leadership with regard to Mr. McBrearty's behavior, Mr. McBrearty filed a second concern with ECP in April 2017, alleging that Ms. Henderson was creating a hostile work environment.²⁸ As ECP confirms, this concern also was not substantiated; rather, ECP informed Ms. Henderson that it had determined that it was Mr. McBrearty who was the harassing party.²⁹ In July 2017, Mr. McBrearty filed a third concern with ECP, alleging that Ms. Henderson retaliated against him when in a meeting with her direct reports she informed them of the closure of a previous concern (raised by Mr. McBrearty) as part of SCWE mitigation.³⁰ ECP investigated, but "could

²⁴ Interview of Paul.

²⁵ E.g., Interview of Hess; Complaint at 3.

²⁶ Complaint at 3.

²⁷ Complaint at 3.

²⁸ Complaint at 3.

²⁹ Complaint at 3; June 13, 2017 Executive Summary (ECP No. NEC-17-00410) at 3; Interview of Henderson. It should be noted that the transmittal memo to Joe Shea from ECP is dated June 12, 2017.

³⁰ Complaint at 3; Final Investigation Report (ECP No. NEC-17-00683) at 1

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find no intent on the part of [Ms. Henderson] to retaliate against [Mr. McBrearty] and believes that [Ms. Henderson] intended to share this information to ensure that employees were aware that she was not found to have created a harassing work environment in the prior concerns.³¹

In addition to the three ECP concerns, in March 2018, Mr. McBrearty engaged in an exchange of text messages with one of Ms. Henderson's direct reports, asserting that her subordinates are afraid of her and will not raise issues and that there is a SCWE problem in Ms. Henderson's organization.³² However, the undersigned interviewed the entire staff of Ms. Henderson on April 23 and 24 and May 3, 2018, and found that they do not fear raising issues or concerns and, in fact, that it is their job to do so and also they are encouraged to do so.³³

Similarly, back in September 2017, the NRC conducted an assessment of "the TVA Nuclear corporate safety-conscious work environment (SCWE) by conducting safety culture interviews of individuals from the engineering, licensing, and operations groups. Inspectors interviewed a total of 22 individuals to determine if indications of a chilled work environment exist, employees are reluctant to raise safety and regulatory issues, and employees are being discouraged from raising safety or regulatory issues. Information gathered during the interviews was used in aggregate to assess the work

³¹ Final Investigation Report (ECP No. NEC-17-00683) at 1.

³² Complaint at 4; Text Messages. As a result of these text messages, ECP has sent out a Pulsing Survey that yet again seeks to gauge whether there is a chilled work environment in Corporate Licensing, despite the facts there have been five findings (including in this Report) to the contrary.

³³ See TVA Standard Programs and Processes (TVA-SPP)-11.8.4 (12-03-2014, rev. 0008).

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environment at TVA Nuclear corporate.³⁴ All members of Ms. Henderson's staff were interviewed.³⁵ "Based on the interviews conducted, the inspectors determined that licensee management emphasized the need for all employees to identify and report problems using the appropriate methods established within the administrative programs, including the CAP and Employee Concerns Program. These methods were readily accessible to all employees. Based on the discussions conducted with a sample of employees from various departments, the inspectors determined that employees felt free to raise safety and regulatory issues, and that management encouraged employees to place issues into the CAP for resolution. The inspectors did not identify any reluctance on the part of the licensee staff to report safety concerns."³⁶

There have been five instances, within the last two years, wherein the issue of whether a chilled work environment exists in Corporate Licensing has been investigated. Consistent with each successive investigation, there was a finding of no chilled work environment. However, the undersigned did find evidence that Mr. McBrearty has made repeated unfounded allegations against Ms. Henderson of harassment and the creation of a hostile work environment.

³⁴ November 22, 2017, NRC Integrated Inspection Report, Nos. 05000390/2017003, 05000391/2017003 (NRC Inspection Report), at 22. The result of the NRC's SCWE assessment of the chilled work environment allegation regarding Corporate Licensing is included in the WBN Inspection Report.

³⁵ Complaint at 3-4.

³⁶ NRC Inspection Report at 22.

Sites' Working Relationship With Corporate

As one staffer describes the relationship, "the sites have a lack of respect for Corporate" and it is referred to as "NRC South."³⁷ The undersigned agrees with ECP's assessment that "[s]ome of that was a general bias that sites might have about Corporate oversight."³⁸ However, there is a palpable feel that there is a deep and wide distrust between Corporate and Site Licensing that goes well beyond "general bias" because of Corporate's oversight role and this distrust, in my view, has fostered an environment for the conduct and behavior of Mr. McBrearty to thrive.

Staff Animosity

Ms. Henderson identified four of her staff--Ms. Conner, Ms. Wetzel, Ms. Justice, and Mr. Schrull--as contributors to the hostile work environment.³⁹ As to Ms. Conner, she was a direct report of Ms. Henderson until November 2017 when she assumed her current position of Senior Manager, SMR Ops & Training, which came about as part of a settlement of a DOL complaint that Ms. Connor filed in December 2016.⁴⁰ Prior to the filing of the DOL complaint, Ms. Henderson was performance managing Ms. Conner due to Ms. Conner not coming to work and not performing when she came to work.⁴¹ Even though Ms. Conner was not interviewed, other interviewees provided insight into

³⁷ Interview of Hess.

³⁸ June 13, 2017, Executive Summary (ECP No. NEC-17-00410) at 2.

³⁹ Complaint at 1.

⁴⁰ Complaint at 2.

⁴¹ Interview of Henderson.

the relationship between Ms. Henderson and Ms. Conner. Mr. Wells noticed that there was "friction" between Ms. Conner and Ms. Henderson and he believed that it was because of Ms. Conner's performance.⁴² Mr. Wells also informed the undersigned that Ms. Conner had an "abrasive personality."⁴³ Similarly, Ms. Wetzel indicated that Ms. Henderson had a problem with Ms. Conner's performance and had Ms. Conner (and Mr. McBrearty) investigated.⁴⁴

As to Ms. Wetzel, she had a problem with Ms. Henderson from the time Ms. Henderson was selected because, in her view, Ms. Henderson was "too young," "too inexperienced," and "did not have enough nuclear experience."⁴⁵ Ms. Wetzel also stated that her working relationship with Ms. Henderson was strained; in fact, she had been placed on a Performance Improvement Plan (PIP).⁴⁶ Ms. Wetzel further noted that she "does not trust" Ms. Henderson and that, in her view, Ms. Henderson is "vindictive," and Ms. Wetzel does not understand what motivates a person to pull people's gate records and have them investigated.⁴⁷ Moreover, Ms. Wetzel describes Corporate Licensing as "toxic" and will "only work better if [Ms. Henderson] is moved out."⁴⁸

⁴² Interview of Wells.

⁴³ Interview of Wells.

⁴⁴ Interview of Wetzel.

⁴⁵ Interview of Wetzel.

⁴⁶ Interview of Wetzel.

⁴⁷ Interview of Wetzel.

⁴⁸ Interview of Wetzel.

Finally, Ms. Wetzel said that she took the NEI loan assignment to get away from Ms. Henderson.⁴⁹

It is evident Ms. Wetzel and Mr. McBrearty talk about Ms. Henderson. For example, Ms. Wetzel stated during her interview that Mr. McBrearty told her that Ms. Henderson “is harmful to TVA’s regulatory relationship.”⁵⁰ Moreover, Ms. Wetzel stated during her interview that she does not know what motivates Ms. Henderson to investigate someone and to pull someone’s gate records.⁵¹ That is information that Ms. Wetzel only could have gotten from McBrearty because, as discussed further below, he was investigated by HR, including review of his gate records, for having an inappropriate relationship with Ms. Conner.⁵²

As to Ms. Justice, while she is “buddies” with Ms. Conner and Ms. Wetzel,⁵³ she does not appear to harbor any animosity toward Ms. Henderson. Ms. Justice stated that she does not interact much with Ms. Henderson; instead, most of her interactions are with her supervisor.⁵⁴ Nevertheless, Ms. Justice described Ms. Henderson as “a good manager.”⁵⁵ Ms. Justice states that she and Ms. Wetzel do not talk much about

⁴⁹ Interview of Wetzel.

⁵⁰ Interview of Wetzel.

⁵¹ Interview of Wetzel.

⁵² Interview of McBrearty.

⁵³ Interview of Edmondson.

⁵⁴ Interview of Justice.

⁵⁵ Interview of Justice.

work.⁵⁶ Ms. Justice did state, however, that Ms. Wetzel complained to her about her performance review as well as about her view that Ms. Henderson was not qualified for the Senior Manager position.⁵⁷

Moreover, Ms. Justice made an observation about Ms. Wetzel's and Ms. Conner's working relationship with Ms. Henderson. Ms. Justice opined that "women are their own worst enemies" and there "may have been some "jealousy" when it came to Ms. Wetzel's and Ms. Conner's opinions and views of Ms. Henderson."⁵⁸

As to Mr. Schrull, like Ms. Wetzel, he had a problem with Ms. Henderson from the time Ms. Henderson was selected because, in his view, Ms. Henderson was "too young," "too inexperienced," and "did not have enough nuclear experience."⁵⁹ Mr. Schrull also applied for the Senior Manager position and felt that he was far more qualified than Ms. Henderson.⁶⁰ Moreover, Mr. Schrull's working relationship with Ms. Henderson was strained because he is being performance managed by Ms. Henderson.⁶¹ Mr. Schrull further believes that he is being marginalized by Ms. Henderson and she is not utilizing his experience.⁶² Mr. Schrull describes himself

⁵⁶ Interview of Justice.

⁵⁷ Interview of Justice.

⁵⁸ Interview of Justice.

⁵⁹ Interview of Schrull.

⁶⁰ Interview of Schrull.

⁶¹ Interview of Schrull.

⁶² Interview of Schrull.

as being frustrated, using the adage "bring me a rock," but whatever rock he brings "is not the right rock."⁶³

It is evident from the interviews of Mr. Schull, Mr. McBrearty, and Ms. Wetzel that they talk about Ms. Henderson. For example, Mr. McBrearty discussed in his interview that Mr. Schull "has expressed a lot of frustration with [Ms. Henderson]."⁶⁴ Similarly, Ms. Wetzel noted that she has discussed with Mr. Schull "his issues" that he has with Ms. Henderson and that Mr. Schull told her that he may be leaving sometime later this year because of his difficulties with Ms. Henderson.⁶⁵

Mr. McBrearty's Relationship With Ms. Henderson

Mr. McBrearty does not mince words about his working relationship with Ms. Henderson, stating emphatically that it "is not a good relationship" and referring to Ms. Henderson as "punitive."⁶⁶ In fact, Mr. McBrearty has filed three ECP concerns, alleging that Ms. Henderson has harassed him and that her actions foster a chilled work environment.⁶⁷ However, none of the ECP concerns has been substantiated.⁶⁸ In fact, as to the concern that Mr. McBrearty raised in April 2017, ECP found that the "motivat[ion] of Mr. McBrearty's filing of this concern "seems to have [been] animosity

⁶³ Interview of Schull.

⁶⁴ Interview of McBrearty.

⁶⁵ Interview of Wetzel.

⁶⁶ Interview of McBrearty.

⁶⁷ Complaint at 3-4.

⁶⁸ Complaint at 3-4.

toward [Ms. Henderson]" due to her interactions with Ms. Conner and thus it was Mr. McBrearty who was harassing Ms. Henderson."⁶⁹

Moreover, Mr. McBrearty stated "[Ms. Henderson] had me investigated" and "had his gate records pulled."⁷⁰ Mr. McBrearty is correct that there was an investigation. Specifically, in April 2016, based on a concern raised by Ms. Henderson, HR began an investigation into whether Mr. McBrearty and Ms. Conner were involved in a personal relationship outside of work that might impact the work environment and the possibility of impropriety and conflict of interest due to Ms. Conner's serving in an oversight role with direct responsibility for the SQN Licensing function.⁷¹ (Specifically, Ms. Conner served as Corporate Functional Area Manager (CFAM) and provided corporate governance and oversight of the site regulatory performance improvement and governance including providing focused leadership to the site regulatory organizations and regulatory leadership to the broader site leadership teams by representing corporate regulatory affairs.) After interviewing Ms. Henderson, Mr. McBrearty, and Ms. Conner,⁷² HR concluded "[i]t is apparent that the parties have a very close personal relationship but it is not clear as to whether the personal relationship is inappropriate or creates

⁶⁹ June 13, 2017, Executive Summary (ECP No. NEC-17-00410) at 2.

⁷⁰ Interview of McBrearty.

⁷¹ HR Investigation Report at 1; Complaint at 1.

⁷² The inaccuracy of Mr. McBrearty's allegation that Ms. Henderson "had his gate records pulled" is discussed below.

a conflict of interest. However, if the perception is that it interferes, management needs to take appropriate action to address the concerns."⁷³

HR's investigation of this concern was not as robust as it could have been. For example, travel records show that Ms. Conner traveled to Florida on TVA business to attend the Significance Determination Process (SDP) Seminar presented by Curtiss-Wright in Clearwater Beach, Florida.⁷⁴ Although Mr. McBrearty "made a big deal that he was going to California [during this period of time] to visit his sons," Ms. Conner's car rental agreement shows that Ms. Conner and Mr. McBrearty traveled together in Florida.⁷⁵ Moreover, HR did not interview any of Mr. McBrearty's direct reports⁷⁶ who informed one of Ms. Henderson's direct reports--Mr. Polickoski--that it is "common knowledge that there is a relationship" between Mr. McBrearty and Ms. Conner.⁷⁷ Similarly, with regard to the investigation of Mr. McBrearty's April 2017 concern alleging harassment on the part of Ms. Henderson, ECP interviewed some of Mr. McBrearty's staff and found that "there have long been rumors of an inappropriate relationship between [Mr. McBrearty] and the former Licensing employee [Ms. Conner] who is his friend."⁷⁸ Moreover, [i]nterviews further confirmed the belief that [Mr. McBrearty] has not

⁷³ HR Investigation Report at 3, emphasis added).

⁷⁴ April 29, 2016, Rental Agreement (Enterprise Rent A Car).

⁷⁵ April 29, 2016, Rental Agreement (Enterprise Rent A Car).

⁷⁶ HR Investigation Report at 1.

⁷⁷ Interview of Polickoski.

⁷⁸ June 13, 2017, Executive Summary (ECP No NEC-17-00410) at 3.

been able to move past actions that occurred to his friend [Ms. Conner] as the result of the friend's conflict with [Ms. Henderson] and "those interviewed indicated the belief that [Mr. McBrearty's] animosity toward [Ms. Henderson] is because of his personal friendship with the former Licensing employee [Ms. Conner]."⁷⁹ In short, with some additional investigation, HR could have gleaned that Ms. Conner and Mr. McBrearty appear to be more than just "close" friends and that Mr. McBrearty harbored ill feelings toward Ms. Henderson because of a conflict between Ms. Henderson and his "close" friend, Ms. Conner.⁸⁰

This additional information, coupled with the admission of Ms. Conner and Mr. McBrearty "that they are very close friends outside of work," reflects that there was more than a mere appearance of a conflict. As Ms. Henderson states in the complaint, she hired Ms. Conner in February 2016 as the "new CFAM" and "[i]n that capacity, [Ms. Conner] assumed the responsibility for providing unbiased oversight of the site regulatory organizations."⁸¹ Given the nature of Ms. Conner's and McBrearty's "very close friends[hip]," Ms. Conner's ability to provide independent, "unbiased oversight" of SQN Licensing, in my view, was compromised.⁸²

⁷⁹ June 13, 2017, Executive Summary (ECP No. NEC-17-00410) at 3. Absent the animus of Mr. McBrearty, Ms. Henderson states that she and Mr. McBrearty "don't disagree much on the regulatory issues." Interview of Henderson.

⁸⁰ June 13, 2017, Executive Summary (ECP No. NEC-17-00410) at 3.

⁸¹ Complaint at 2.

⁸² HR Investigation Report at 1.

Mr. McBrearty incorrectly believes Ms. Henderson “had his gate records pulled.”⁸³ To the contrary, HR, not Ms. Henderson, decided to pull his, as well as Ms. Conner’s, gate records as part of its investigation of the concern raised by Ms. Henderson.⁸⁴ As one of Ms. Henderson’s direct reports stated during his interview, the pulling of “gate records pushed [Mr. McBrearty] over the edge”⁸⁵ and he blames Ms. Henderson⁸⁶ and has asserted to others that Ms. Henderson had his gate records pulled.⁸⁷

Moreover, one of Ms. Henderson’s direct reports—Mr. Polickoski—confirms a number of other allegations in Ms. Henderson’s complaint. For example, Mr. McBrearty “is open about his hostility toward [Ms. Henderson]” and that Mr. Polickoski “counseled him about it”; that Mr. McBrearty “says some pretty awful things about [Ms. Henderson]” and “that if he is that open with [Mr. Polickoski], he can’t imagine what [Mr. McBrearty] says about [Ms. Henderson] to other people”; that Mr. McBrearty discusses with him “frequently” that he thought Ms. Conner was “done wrong” by Ms. Henderson and she has “ruined” Ms. Conner’s “career and life”; and that Mr. McBrearty speaks negatively to Ms. Henderson’s direct reports.⁸⁸

⁸³ Interview of McBrearty.

⁸⁴ HR Investigation Report at 1

⁸⁵ Interview of Polickoski.

⁸⁶ Interview of McBrearty.

⁸⁷ Interview of Wetzel.

⁸⁸ Complaint at 4-5; Interview of Polickoski.

ECP also documented that Mr. McBrearty has a habit of "delet[ing] [Ms. Henderson] from email chains on which [she had] originally been included."⁸⁹ Mr. Polickoski further confirms that Mr. McBrearty sends emails and text messages to others, including Ms. Henderson's direct reports, calling into question Ms. Henderson's performance.⁹⁰ Mr. McBrearty also leaves Ms. Henderson off of some emails on which she, at least, should be copied and he forwards some of her emails without her knowledge, only for Ms. Henderson to learn from a direct report or her supervisor about the forwarding of the emails.⁹¹ Mr. Polickoski has "had discussions with [Mr. McBrearty] to cut out the high school bullshit."⁹² There is no indication that Mr. McBrearty intends to stop such conduct. In any event, this conduct impacts Ms. Henderson's ability to have open and frank email communication directly with Mr. McBrearty and/or others, on which Mr. McBrearty is copied, for fear of Mr. McBrearty forwarding such emails to others (with disparaging commentary) without Ms. Henderson's knowledge.

Management's Response

Although it appears that management took three concrete steps to address Mr. McBrearty's conduct, those steps were ultimately unsuccessful. First, after the issuance of the HR Investigation Final Report in June 2016, management limited Ms. Henderson's "time spent at SQN and direct engagement with the peer team--the

⁸⁹ June 13, 2017, Executive Summary (ECP No. NEC-17-00410) at 3.

⁹⁰ Interview of Polickoski.

⁹¹ Interview of Polickoski.

⁹² Interview of Polickoski.

site Licensing Managers."⁹³ This step was unsuccessful and ineffective as Mr. McBrearty's conduct and behavior continued.⁹⁴ Moreover, this attempt to stem Mr. McBrearty's conduct and behavior effectively has removed a significant piece of Ms. Henderson's duties and responsibilities in that she "[d]irects the governance, oversight, and direction of the Nuclear Power Group (NPG) Corporate and Site Licensing functions in support of the operation of [all] TVA nuclear plants" and "[s]erves as the expert and single point-of-contact for NRC headquarters, interface for licensing issues for [all of] the TVA sites"⁹⁵ (emphasis added).

In addition to being ineffective, step 1 appears punitive. Ms. Henderson stated in her interview that she "just wants to come to work and do my job" but that it is difficult to accomplish when she "cannot adequately challenge the SQN staff."⁹⁶

Second, approximately from April to June 2017, Ms. Henderson's manager-- Mr. Shea--and Ms. Henderson engaged SQN management about Mr. McBrearty's conduct and behavior in an effort to bring an end to Mr. McBrearty's conduct and

⁹³ Complaint at 3; Interviews of Henderson and Shea. Ms. Henderson states in the Complaint that she "agreed" to this limitation of her duties. Complaint at 3.

⁹⁴ Complaint at 1, 3, 8; Interviews of Henderson and Shea.

⁹⁵ Henderson PD.

⁹⁶ Interview of Henderson

behavior.⁹⁷ This step also failed, as Mr. McBrearty's conduct and behavior continued and, in my view, escalated.⁹⁸

The third step was to settle and resolve Ms. Conner's DOL complaint, by acceding to Ms. Conner's request to be removed from Ms. Henderson's supervision and placing her in the new position of Senior Program Manager, SMR Ops & Training under the supervision of Daniel P. Stout, Senior Manager, SMR Technology.⁹⁹ Settling with [Ms. Conner] was done, in part, to alleviate some of the challenges [Ms. Henderson] faced with both [Ms. Conner] and [Mr. McBrearty].¹⁰⁰ This step too did not stop Mr. McBrearty's conduct and behavior.¹⁰¹

It does not appear that management attempted any other measures to stop the offending conduct. Instead, the conduct and behavior have now continued for two years and counting.

Analysis

Ms. Henderson alleges that she has been, and continues to be, harassed or retaliated against by Mr. McBrearty, SQN Licensing Manager, and such harassment is repetitive and pervasive, resulting in a hostile work environment. Complaint at *passim*.

⁹⁷ Interviews of Shea and Henderson; Complaint at 3. They engaged Gregory A. Boersig, Vice President, Nuclear Oversight, Anthony Lawrence Williams IV, Site Vice President, SQN, and Dennis G. Dimopoulos, Director, Plant Operations.

⁹⁸ Interviews of Shea and Henderson; Complaint at 3.

⁹⁹ Complaint at 2; Org Chart; Interviews of Henderson and Shea.

¹⁰⁰ Complaint at 2; Interviews of Henderson and Shea.

¹⁰¹ Complaint at 3; Interviews of Henderson and Shea.

"Harassment is any action or behavior toward a person that has the effect or perceived effect of causing the person to be uncomfortable or afraid of working in the employment environment." *NRC Allegation Manual* (Apr. 23, 2015, rev. 1) at 243. "Harassment covers a wide range of offensive intentional behaviors intended to be disruptive, and is characteristically repetitive, often contributing to a hostile work environment." *Id.*

"Harassment that progresses to the point of establishing a hostile work environment is a form of discrimination." *Id.* Harassment is illegal and prohibited under a number of Federal statutes and regulations. See Part A Below. An employer is automatically liable for harassment by a supervisor that results in an adverse employment action and if the supervisor's harassment results in a hostile work environment, the employer can avoid liability only if it can prove (1) it reasonably tried to prevent and promptly correct the harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. Boca Raton*, 524 U.S. 775, 778 (1998). Similarly, harassment is prohibited under TVA policy. *E.g.*, TVA-SPP-11.8.4 (at 5).

However, petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of actionable harassment. *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people. *Thornton v. Federal Express*, 530 F.3d 451, 455 (6th Cir. 2008); *Hafford v. Seidner*, 183 F.3d 506, 512 (6th Cir. 1999). Offensive conduct may include, among other things,

actions that result in the interference with work performance. *Thornton*, 530 F.3d at 455; *Hafford*, 183 F.3d at 512.

The conduct alleged in this case also gives rise to a claim of retaliation. Retaliation is an action taken against an employee because he or she has engaged in protected activity. *EEOC v. New Breed Logistics*, 783 F.3d 1057, 1066 (6th Cir. 2015). Retaliation is illegal and prohibited under a number of federal statutes and regulations. See Part A below. Likewise, retaliation is prohibited under TVA policy. *E.g.*, TVA-SPP-11.8.4 (at 5).

A. Discrimination

A federal employee may not be discriminated (nor retaliated) against or harassed with respect to the terms, conditions, or privileges of employment on the basis of race, color, religion, sex, national origins, age or disability. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 (2012); The Age Discrimination in Employment Act of 1973, 29 U.S.C. § 633a (2012); The Rehabilitation Act of 1973, 29 U.S.C. §§ 791, 794 (2012). In her interview, Ms. Henderson informed the undersigned that she does not assert that she is (or was) being discriminated or retaliated against or harassed on any of the bases in the above statutes.

B. Retaliation/Harassment (Whistleblower)

The Whistleblower Protection Act, 5 U.S.C. § 2302 (2012), does apply. A Federal employee may not take a personnel action against an employee because of protected whistleblowing. 5 U.S.C. § 2302(b)(8) (2012). Protected whistleblowing is defined, under 5 U.S.C. § 2302(b)(8), as disclosing information which the discloser reasonably believes evidences (1) a violation of law, rule, or regulation; (2) gross

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mismanagement; (3) gross waste of funds; (4) an abuse of authority; or (5) a substantial and specific danger to public health or safety. Personnel action includes, *inter alia*, "any significant change in duties, responsibilities, or working conditions." 5 U.S.C. § 2302(a)(2)(xii) (2012).

Ms. Henderson is a whistleblower. In April 2016, Ms. Henderson raised a concern to HR as to whether Ms. Conner could provide independent and unbiased oversight of the SQN Licensing group due to the nature of the personal relationship between Ms. Conner and Mr. McBrearty. As a general matter, under applicable Federal regulations, Ms. Conner's employment "is a public trust," requiring her to "to place loyalty to," among other things, "ethical standards above private" matters; to "put forth honest effort in the performance of [her] duties"; and to "avoid any actions creating the appearance" that she is "violating" applicable "ethical standards." 5 C.F.R. § 2635.101(b)(1), (5), and (14) (2017). Moreover, under the *TVA Code of Conduct*, "TVA management will act impartially and avoid situations in which an employee or contractor within their scope of supervision or oversight reasonably could be perceived as receiving an unfair advantage, such as because of a romantic, financial, or other personal relationship." *TVA Code of Conduct* at 5 (emphasis added). Of equal significance, "TVA management will ensure that employees understand their affirmative duty to report actual or suspected violations of laws or ethics requirements and the procedures and mechanisms available to them for reporting." *TVA Code of Conduct* at 5 (emphasis added). Ms. Henderson thus had an obligation, and was duty-bound, to raise this concern.

Given the nature of the relationship, Ms. Henderson reasonably believed that Ms. Conner could not exercise independent and unbiased oversight as CFAM over the SQN Licensing organization and the performance of oversight under these circumstances would violate federal and TVA ethical standards as well as pose a substantial and specific danger to public health or safety. Mr. Paul explained that Site Licensing is "the conscious of the station"; "ensures that the site complies with all regulatory requirements, as well as with all the "commitments" it makes and undertakes; serves as "the backstop for Operations"; and determines "what events are reportable or not."¹⁰² Compromised oversight of Site Licensing upsets this dynamic and is a nuclear safety concern. This disclosure is thus protected activity under the WPA.

In order to prove a prima facie case for retaliation for whistleblowing activities, the employee must establish by a preponderance of the evidence that he or she made a disclosure within the meaning of 5 U.S.C. § 2302(b)(8) and that the disclosure was a contributing factor in the personnel action at issue. *Chambers v. Dep't of the Interior*, 116 M.S.P.R. 17, 25 ¶ 12 (2011). "Further, evidence of retaliatory motive, and of the agency officials' knowledge of whistleblowing and the timing of the prohibited personnel action, may properly be considered in deciding both the second and third steps of a whistleblower analysis." *Caddell v. Dep't of Justice*, 61 M.S.P.R. 670, 681 (1994), citing *Marano v. Dep't of Justice*, 2 F.3d 1137, 1141–42 (Fed. Cir. 1993); *Clark v. Dep't of the Army*, 997 F.2d 1466, 1472 (Fed. Cir. 1993).

¹⁰² Interview of Paul.

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Mr. McBrearty was aware of Ms. Henderson's disclosure to HR. In fact, Mr. McBrearty declared in the interview that Ms. Henderson "had me investigated" and "had my gate records pulled."¹⁰³ Both Mr. McBrearty and Ms. Conner, as well as Ms. Henderson, were interviewed by HR in 2016 and Site Security informed Mr. McBrearty that his gate records were being "pulled."¹⁰⁴ HR noted, in its June 2016 Investigation Report, that "[t]he individuals were inappropriately made aware that their gate records were pulled so there was a heightened level of sensitivity during the investigation."¹⁰⁵ This shows that there is no dispute that Mr. McBrearty was/is aware of the concern that Ms. Henderson raised to HR.¹⁰⁶ As a direct result of Mr. McBrearty's conduct and behavior, the evidence shows that Ms. Henderson's management "limit[ed] both [her] time spent at SQN and [her] direct engagement with the peer team (site licensing managers) even though there was a significant need to engage in that forum to improve performance."¹⁰⁷ This restriction severely impacts Ms. Henderson's responsibility "for formulating and executing fleet governance and oversight strategies and programs to achieve and sustain excellence in all of TVA's operating fleet nuclear regulatory matters" and "providing "strategic guidance to senior corporate and site leaders on range of nuclear regulatory issues." Henderson PD (emphasis added). This

¹⁰³ Interview of McBrearty.

¹⁰⁴ HR Investigation Report at 1.

¹⁰⁵ HR Investigation Report at 1.

¹⁰⁶ Moreover, Mr. McBrearty told Ms. Wetzel about the investigation and that his gate records were pulled. Interview of Wetzel.

¹⁰⁷ Complaint at 3.

limitation is a "significant change in duties, responsibilities, or working conditions."

5 U.S.C. § 2302(a)(2)(xii).

The evidence supports a retaliatory motive. Mr. McBrearty remains ticked that Ms. Henderson "had [him] investigated" and "had [his] gate records pulled." He told Ms. Wetzel that Ms. Henderson had him investigated and pulled his gate records. The statement to Ms. Wetzel persuaded her that Ms. Henderson is not a person who can be trusted and she just does not "understand what motivates a person to pull gate records and have people investigated."¹⁰⁸ Some members on his own staff have recognized "that [Mr. McBrearty] has not been able to move past actions that occurred to his friend [Ms. Conner] as the result of the friend's conflict with [Ms. Henderson]."¹⁰⁹ In my view, the grudge Mr. McBrearty has against Ms. Henderson is still alive and well. His conduct and behavior rise to the level of retaliation/harassment under the WPA.

Ms. Henderson also is a whistleblower under Section 211 of the Energy Reorganization Act, 42 U.S.C. § 5851 (2012). Her disclosure/concern reported to HR is protected activity in that, as described above, it involved a nuclear safety-related issue. In addition, Mr. McBrearty was aware of the disclosure/concern and the same retaliatory motive exists as it does in regard to the WPA.

C. Retaliation/Harassment (TVA Policies)

Mr. McBrearty's conduct and behavior fall under and violate three TVA policies. The *TVA Code of Conduct* cannot be any clearer: "TVA management will maintain a

¹⁰⁸ Interview of Wetzel.

¹⁰⁹ June 13, 2017, Executive Summary (ECP No. NEC-17-00410) at 3.

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workplace environment that prevents retaliation or reprisals against an employee who in good faith reports actual or suspected violations of laws or ethics requirements. Retaliation against employees who report perceived violation, or who participate in investigations as witnesses or in other capacities, violates the law and TVA policy.¹¹⁰ Such retaliation is prohibited and will not be tolerated." *TVA Code of Conduct* at 5.

Mr. McBrearty was/is aware of Ms. Henderson's report to HR and has engaged in retaliatory conduct and behavior that is motivated by the fact that he and Ms. Conner were investigated and had their gate records pulled to determine whether Ms. Conner could perform independent and unbiased oversight of SQN Licensing given Mr. McBrearty's and Ms. Conner's close personal relationship outside of work.

Ms. Henderson's report to HR was made in good faith and, indeed, mandated by the *TVA Code of Conduct* (at 5). Mr. McBrearty's conduct "is prohibited" and TVA policy requires it "not be tolerated." *Id.*

TVA's *No Fear Executive Policy* also is plain, clear, and unambiguous. It states that "TVA personnel at every level have the right to work in an atmosphere that is free from harassment or illegal discrimination. Accordingly, retaliation against an employee or applicant who exercised his or her rights under any of the federal antidiscrimination or whistleblower protection laws is prohibited." Under the *No Fear Executive Policy*, TVA informs all employees that "TVA encourages employees, applicants, and contractors to raise concerns without fear of retaliation" and that TVA maintains a zero tolerance policy that prohibits retaliation against any employee for reporting matters

¹¹⁰ In his Appointment Affidavit, Mr. McBrearty subscribed and certified that he understood that his "appointment and subsequent changes in status are subject to the terms and conditions described in this document, and those existing laws and TVA agreements and policies." Appointment Affidavit at 4.

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under this policy or procedure." *No Fear Executive Policy* at 1. Mr. McBrearty's conduct and behavior against Ms. Henderson for raising a concern to HR as to whether Ms. Conner could perform independent and unbiased oversight of SQN Licensing, given Mr. McBrearty's and Ms. Conner's close personal relationship outside of work, violates the *No Fear Executive Policy* for the reasons previously outlined above.

TVA Standard Programs and Processes (TVA-SPP)-11.8.4, *Expressing Concerns and Differing Views*, also comes into play in this matter. TVA-SPP-11.8.4 states (at 4) "TVA encourages the voluntary expression of concerns and differing views" and that employees may do so "without fear of reprisal" and "[t]he ability to freely express differing views and opinions will enhance employee productivity, observance of standards and promote a safety conscious work environment (SCWE)".

Mr. McBrearty's retaliatory conduct and behavior toward Ms. Henderson for raising a concern to HR as to whether Ms. Conner could perform independent and unbiased oversight of SQN Licensing given Mr. McBrearty's and Ms. Conner's close personal relationship outside of work violates TVA-SPP-11.8.4 (at 5) for the reasons previously outlined above.

"Every supervisor [including Mr. McBrearty] has the responsibility to create an environment in which employees can raise concerns without fear of retaliation. Harassment, intimidation, retaliation, or discrimination will not be tolerated. Any person found guilty of such acts will be subject to disciplinary action, up to and including termination," TVA-SPP-11.8.4 (at 5). Similarly, "[c]oncerns should be raised in good faith, *i.e.*, with the belief that the concern raised based on information that is accurate and truthful to the best of the concerned individual's knowledge. Disciplinary action, up to and

including termination, may be taken if it is determined that an issue is raised by one who intentionally provides false information, or with malicious intent to harm the company or another employee." Given that Mr. McBrearty has filed three ECP concerns, with a fourth pending relating matter,¹¹¹ alleging harassment and a chilled work environment, and none of those concerns has been substantiated; and with five separate findings in the last two years that there is not a chilled work environment in Corporate Licensing, there is serious doubt that good faith motivates Mr. McBrearty's repetitive filing of concerns.

It also should be noted that TVA policy obligates TVA management to maintain a workplace environment free of retaliation or reprisals against an employee who in good faith reports actual or suspected violations of laws or ethics requirements as well as for those employees who express differing views and concerns. *TVA Code of Conduct* at 5; TVA-SPP-11.8.4 (at 4-5). TVA management failed to do so here; instead, it allowed harassing and retaliatory conduct and behavior to fester and to continue practically unabated for two years and counting. Just like retaliation itself, the allowance of retaliation—either through inaction or the failure to taken prompt, effective, and adequate corrective action to stop such retaliation—is just as prohibited and must not be tolerated.

¹¹¹ This fourth pending matter is a result of Mr. McBrearty's March 2018 text messages asserting that Ms. Henderson's subordinates are afraid of her and will not raise issues and that there is a SCWE problem in Ms. Henderson's organization. The evidence does not support Mr. McBrearty's assertion, as there have been five findings, including this Report, that there is not a SCWE problem in Ms. Henderson's organization and the employees therein do not believe that their ability to raise issues and concerns is chilled. In light of this evidence, Mr. McBrearty's latest effort does not appear to be motivated by good faith.

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C. Conclusion

Based on the foregoing, Ms. Henderson's allegation of harassment and retaliation is substantiated, and Mr. McBrearty's conduct and behavior violated two Federal statutes, a Federal regulation, and three TVA policies.

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Date: May 25, 2018

66515021

Attachment 8

IN RE THE COMPLAINT OF)
ERIN HENDERSON)
REPORT BY THE TENNESSEE) Misc. No. _____
VALLEY AUTHORITY)
)
)

**REPORT OF INVESTIGATION OF ERIN HENDERSON'S ALLEGATIONS
OF HARASSMENT AND HOSTILE WORK ENVIRONMENT**

On March 9, 2018, Erin Henderson, Director, Nuclear Regulatory Affairs, submitted a formal complaint to Joseph W. Shea, Vice President, Nuclear Regulatory Affairs & Support Services, and Amanda Elizabeth Poland, Director, Human Resources, alleging that she has been, and continues to be, retaliated against and/or harassed and subjected to a hostile work environment of multiple years. Ms. Henderson reports to Mr. Shea.

Ms. Henderson states (1) that several employees "are complicit in workplace bullying and creating a hostile work environment"; (2) that these employees "either directly or indirectly acted in an attempt to intimidate and undermine [her] in her role as a senior regulatory leader"; and (3) that these employees' conduct is "both repetitive and pervasive."¹ Ms. Henderson's position is in TVA's Corporate Nuclear Licensing and she is responsible, primarily, for formulating and executing fleet governance and oversight strategies and programs to achieve and sustain excellence in all of TVA's operating fleet nuclear regulatory matters, serves as Nuclear Power's expert and final

¹ Complaint at 1

authority in nuclear regulatory issues, and provides strategic guidance to senior corporate and site leaders on range of nuclear regulatory issues.²

Ms. Henderson alleges that five employees--Michael McBrearty, Manager, Site Licensing (SQN); Terri Michelle Conner, Senior Manager, SMR Ops & Training; Beth A. Wetzel, Manager, Regulatory Programs; Ed Schrull, Manager, Fleet Licensing; and Alesia Cox Justice, Management Analyst--contributed to the hostile work environment.³ Except for Mr. McBrearty, the aforementioned employees work or worked in Corporate Licensing and either reported directly to Ms. Henderson or reported to one of her direct reports.⁴ Ms. Connor was a direct report of Ms. Henderson until November 2017 before she assumed her current position of Senior Manager, SMR Ops & Training, that came about as part of a settlement of a Department of Labor complaint that Ms. Connor filed in December 2016.⁵ Ms. Connor now reports to Daniel P. Stout, Senior Manager, SMR Technology.⁶ Ms. Wetzel reported to Ms. Henderson until April 27, 2018; starting April 30, 2018, she has been on loan to the Nuclear Energy Institute (NEI) for 18 months.⁷

² Henderson PD.

³ Complaint at 1.

⁴ See April 5, 2018, Organizational Chart for Corporate Licensing (Org Chart). Ms. Cox is not a direct report of Ms. Henderson's. She reports to Ms. Wetzel who reports to Ms. Henderson.

⁵ Complaint at 2. Ms. Henderson hired Ms. Conner in February 2016 as the "new CFAM" or Corporate Functional Area Manager. Complaint at 2

⁶ Org Chart; Interviews of Henderson and Shea.

⁷ Interviews of Wetzel, Henderson, and Edmondson.

As part of the investigation, the undersigned interviewed Ms. Henderson (three times) and her entire staff, consisting of her direct reports—James Polickoski, Manager, Regulatory Compliance, Mr. Schrull, Manager, Fleet Licensing, and Ms. Wetzel and their direct reports—Peggy R. Rescheske, Senior Program Manager, Corporate Nuclear Licensing; Russell Thompson, Senior Program Manager, Corporate Nuclear Licensing; Christopher T. Riedl, Senior Program Manager, Corporate Nuclear Licensing; Gordon Williams, Senior Program Manager, Fleet Licensing; Russell D. Wells, Senior Program Manager, Fleet Licensing; Thomas Hess, Program Manager, Fleet Licensing; Teddy J. Bradshaw, Program Manager, NSRB; and Alesia Cox Justice, Management Analyst. The undersigned also interviewed Mr. Shea, Vice President, Nuclear Regulatory Affairs & Support Services, and his Management Assistant, Carla Edmondson, as well as the three Site Licensing Managers—Jamie Paul (BFN), Kimberly D. Hulvey (WBN), and Mr. McBrearty (SQN). At the insistence of management, the undersigned did not interview Ms. Conner, Senior Manager, SMR Ops & Training. In addition, the undersigned reviewed emails, text messages, Employee Concerns Program (ECP) reports and related documents, and a Report of Investigation prepared by Human Resources.

Based on the interviews and the review of the documents, the undersigned finds that Ms. Henderson's allegations are substantiated and further finds that she has been, and continues to be, retaliated against in violation of two Federal statutes and three TVA policies, as explained further in this Report.

Senior Manager, Nuclear Regulatory Affairs

In September 2015, Ms. Henderson was selected to fill the position of Senior Manager, Corporate Nuclear Licensing. Ms. Henderson's selection was not met with acceptance by a number of her subordinates. As Ms. Henderson states in the complaint and confirmed by Mr. Shea, when Ms. Henderson was hired as Senior Manager, the Corporate Licensing staff was viewed as low performing and she was asked to focus on performance management in that there were known performance gaps that had not been addressed for the past few years.⁶ To begin evaluating and addressing these concerns, as well as the Corporate Licensing overall organizational health and nuclear safety culture, Ms. Henderson reviewed the organization's survey results/scores in these areas and held one-on-one sessions with the entire staff "to better understand the results and develop a department improvement plan to improve the organization," and "[b]ased on the feedback and [her] review, [Ms. Henderson] concluded that there was a significant need to establish clearer roles and responsibilities, improve communications and take action on individual performance (both recognition and critical performance feedback)."⁹ To this end, Ms. Henderson sponsored Pulsing Surveys which were conducted by ECP in January 2016, May 2016, and February 2017, which show rapid and marked improvement in the areas of communications, holding employees accountable for their performance (by recognizing

⁶ Complaint at 1; Interviews of Henderson and Shea. I did not independently review the respective performance reviews of the Corporate Licensing staff for the years prior to Ms. Henderson assuming the role of Senior Manager.

⁹ Complaint at 1.

and reinforcing positive behaviors and by corrective negative behaviors), involvement of management in observing and coaching employees, confidence in management's decisions, and management taking timely and appropriate corrective actions regarding concerns brought to their attention.¹⁰

Some of Ms. Henderson's staff questioned the wisdom of her selection as Senior Manager, Corporate Nuclear Licensing. For example, there were comments that Ms. Henderson was "too young"; that she was "too inexperienced"; that she "did not have enough nuclear experience"; and/or that she did not have "enough licensing experience."¹¹ It should be noted that, except for Mr. Schrull, these staffers did not apply for the position of Manager, Corporate Nuclear Licensing.¹² Despite these criticisms, Ms. Rescheske stated that she "prejudged" Ms. Henderson; that Ms. Henderson "requested a lot of feedback to make herself a better manager"; that Ms. Henderson has "put in the time and effort" and she "works very hard" to make Corporate Licensing work better; and that Ms. Henderson "has earned her position and the respect, even if not given, of the group."¹³ Mr. Riedl echoed these sentiments, stating that initially he had concerns but "reserved judgment" as to Ms. Henderson's ability to manage the group and describing her as "driven" and as "the most methodical

¹⁰ Nuclear Licensing ECP Pulsing Survey Results (February 2017).

¹¹ E.g., Interviews of Thompson, Rescheske, Wetzel, Schrull, and Riedl.

¹² Interviews of Shea, Schrull, and McBrearty.

¹³ Interview of Rescheske.

and organized person" with "excellent structured organizational skills."¹⁴ Furthermore, Mr. Riedl stated Ms. Henderson "may intimidate some but does not do so intentionally" and he "gives Joe Shea credit for hiring" her.¹⁵ Similarly, Mr. Thompson describes Ms. Henderson as "smart," "ambitious," "a quick learner," "up to performing her job" and is a "person who can go through large volumes of information and digest it."¹⁶ The others who were critical of the hiring of Ms. Henderson as Senior Manager, Corporate Nuclear Licensing, also agreed that Ms. Henderson was a good manager.¹⁷

The Site Licensing organizations likewise had reservations about the hiring of Ms. Henderson as Senior Manager, Corporate Nuclear Licensing. Mr. McBrearty stated that "all three sites had reservations" about the hire because, in their view, Ms. Henderson "lacked experience."¹⁸ Mr. McBrearty further stated that the other interviewees, including Gordon Arent, Gene Cobey, and Mr. Schrull, had far more experience than Ms. Henderson.¹⁹ Similarly, Mr. Paul stated that he was "surprised" that Ms. Henderson was selected, given that "other candidates had more regulatory experience"; that she was "lean" on experience; and that Ms. Henderson did not have,

¹⁴ Interview of Riedl. Similarly, Mr. Lewis noted that, "[a]t first, [he] didn't know what to expect" but she is "professional," "smart," "ambitious," "young," "reasonable," "a good listener and can do the job." Interview of Lewis.

¹⁵ Interview of Riedl.

¹⁶ Interview of Thompson.

¹⁷ Interviews of Thompson, Wetzel, and Schrull.

¹⁸ Interview of McBrearty.

¹⁹ Interview of McBrearty.

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in his view, "the depth of regulatory experience."²⁰ It should be noted that Ms. Hulvey--the current WBN Licensing Manager--was not the WBN Licensing Manager at the time of the selection. Both the WBN and BFN Licensing Managers (Ms. Hulvey and Mr. Paul) informed the undersigned that they have healthy, professional working relationships with Ms. Henderson.²¹ However, as discussed further below, the SQN Licensing Manager--Mr. McBrearty--does not have a healthy, professional working relationship with Ms. Henderson.²²

Director, Nuclear Regulatory Affairs

In January 2018, because of additional, substantial duties and responsibilities, Ms. Henderson's Senior Manager position was upgraded to Director, Nuclear Regulatory Affairs.²³ There does not appear to be significant criticism from Ms. Henderson's staff or from the sites with regard to the upgrade of her position. Indeed, since signing authority with regard to many regulatory products was delegated down from Mr. Shea to Ms. Henderson as part of the upgrade, the upgrade is seen as a

²⁰ Interview of Paul.

²¹ Interviews of Hulvey and Paul. It should be noted, however, that the BFN Licensing Manager observed that "[i]n the past, Corporate was better at partnering with the sites," and that Corporate has "a desire to be right" and "likes to argue" and he feels as though Corporate "bulldozes over Site Licensing." Interview of Paul.

²² Interviews of McBrearty, Polickoski, and Henderson.

²³ Henderson PD; Interviews of Shea and Henderson.

plus because it peeled off at least one layer of review.²⁴ Other than the additional signing authority, staff did not see much of a change in the operation of the group.²⁵

Disrespectful Conduct

Mr. McBrearty engaged in disrespectful conduct that was targeted at Ms. Henderson. For example, in March 2018, Mr. McBrearty engaged in an exchange of text messages with one of Ms. Henderson's direct reports, asserting that her subordinates are afraid of her and will not raise issues and that there is a SCWE problem in Ms. Henderson's organization.²⁶ However, the undersigned interviewed the entire staff of Ms. Henderson on April 23 and 24 and May 3, 2018, and found that they do not fear raising issues or concerns and, in fact, that it is their job to do so and also they are encouraged to do so.²⁷ In these text messages, Mr. McBrearty **also** disparages Ms. Henderson who purportedly "blow[s] off procedures" and sweeps "issues . . . under the rug,"²⁸ attempting to sow the seeds of dissent, discontent, and undermine the support and confidence of her direct reports and other subordinates. If he had concerns of this nature about Ms. Henderson, Mr. McBrearty should have directed his complaints

²⁴ Interview of Paul.

²⁵ E.g., Interview of Hess; Complaint at 3.

²⁶ Complaint at 4; Text Messages. As a result of these text messages, ECP has sent out a Pulsing Survey that yet again seeks to gauge whether there is a chilled work environment in Corporate Licensing, despite the facts there have been five findings (including in this Report) to the contrary.

²⁷ See TVA Standard Programs and Processes (TVA-SPP)-11.8.4 (12-03-2014, rev. 0008).

²⁸ Text Messages. In addition to criticizing Ms. Henderson, Mr. McBrearty leveled that accusations against Mr. Shea.

to management above Ms. Henderson (not down the chain to her subordinates) to address his allegations of poor management on the part of Ms. Henderson.²⁹ Of course, these comments were brought to Ms. Henderson's attention (as Mr. McBrearty almost certainly knew would happen); worked only to exacerbate an already tense working relationship between Ms. Henderson and Mr. McBrearty; and dragged Ms. Henderson's subordinates into Mr. McBrearty's two-year grudge against Ms. Henderson.³⁰ This conduct was not only disrespectful but also inappropriate; indeed, Mr. McBrearty put Ms. Henderson's subordinates in the middle of his fight with Ms. Henderson, making it more difficult for Ms. Henderson to manage her employees and undermining her leadership of her group.³¹

Moreover, one of Ms. Henderson's direct reports--Mr. Polickoski--confirms a number of other allegations in Ms. Henderson's complaint. For example, Mr. McBrearty "is open about his hostility toward [Ms. Henderson]" and that Mr. Polickoski "counseled him about it" in February 2017; that Mr. McBrearty "says some pretty awful things about [Ms. Henderson]" and "that if he is that open with [Mr. Polickoski], he can't imagine what [Mr. McBrearty] says about [Ms. Henderson] to other people"; that Mr. McBrearty discusses with him "frequently" that he thought Ms. Conner was "done wrong" by

²⁹ Interview of Polickoski.

³⁰ Interview of Polickoski.

³¹ Interview of Polickoski.

Ms. Henderson and she has “ruined” Ms. Conner’s “career and life”; and that Mr. McBrearty speaks negatively to Ms. Henderson’s direct reports.³²

It has also been documented that Mr. McBrearty has a habit of “delet[ing] [Ms. Henderson] from email chains on which [she had] originally been included”,³³ indeed, Mr. McBrearty has admitted to his management of engaging in this conduct.³⁴ By way of example, on February 8, 2017, Mr. McBrearty forwarded Ms. Henderson’s email that was addressed to Mr. McBrearty only to a number of individuals (including, but not limited to, Mr. Shea, Mr. Polickoski, Ms. Cox, and Jonathan Johnson), after removing Ms. Henderson from the email chain.³⁵ In a second example, on February 17, 2017, Mr. McBrearty forwarded to Mr. Polickoski, as well as to several others, including Ms. Henderson’s manager, Mr. Shea, and at least one of her other subordinates, Ms. Cox, responses in an email chain, without copying Ms. Henderson, as a purported example of Ms. Henderson’s failure to grasp the nature of the issue therein being discussed.³⁶ In a third example, on March 2, 2018 Mr. McBrearty forwarded to Mr. Polickoski Ms. Henderson’s responses in an earlier email chain, without copying Ms. Henderson, as a purported example of Ms. Henderson’s failure to grasp the nature

³² Complaint at 4-5; Interview of Polickoski.

³³ June 13, 2017, Executive Summary (ECP No. NEC-17-00410) at 3.

³⁴ OGC Teleconference with Nuclear Management.

³⁵ January 29, 2017 email chain. Ms. Henderson also “forwarded this email to his supervisor as well because it was a frequent occurrence at that point.” Henderson July 31, 2018 email. Moreover, the subject matter of the email on which that Ms. Henderson was copied “was related to a very time sensitive issue where the site was considering requesting regulatory relief in order to continue operating the plant.” *Id.*

³⁶ February 17, 2017 email chain; Interview of Polickoski.

of the issue therein being discussed.³⁷ Mr. Polickoski also confirms that Mr. McBrearty has sent other emails and text messages to others, including Ms. Henderson's direct reports, calling into question Ms. Henderson's performance.³⁸ Mr. Polickoski further confirms that Mr. McBrearty left Ms. Henderson off of other emails on which she, at least, should be copied and that he forwarded other emails without her knowledge, only for Ms. Henderson to learn from a direct report or her supervisor about the forwarding of the emails.³⁹ As a result, in February 2017, Mr. Polickoski "had discussions with [Mr. McBrearty] to cut out the high school bullshit."⁴⁰ There is no indication that Mr. McBrearty intends to stop such conduct. In any event, this conduct impacts Ms. Henderson's ability to have open and frank email communication directly with Mr. McBrearty and/or others, on which Mr. McBrearty is copied, for fear of Mr. McBrearty forwarding such emails to others (with disparaging commentary) without Ms. Henderson's knowledge.

Similarly, Mr. McBrearty has a habit of not including Ms. Henderson on emails. This conduct has spanned a significant period of time. For example, on December 7, 2016, Mr. Polickoski wryly notes to Ms. Henderson that "You got included!!" on an email from SQN licensing.⁴¹ On January 29, 2017, Mr. Polickoski forwarded to Ms. Henderson an email from Mr. McBrearty that also should have been sent to

³⁷ March 2, 2018 email chain; Interview of Polickoski.

³⁸ Interview of Polickoski.

³⁹ Interview of Polickoski.

⁴⁰ Interview of Polickoski.

⁴¹ December 7, 2016 email chain.

Ms. Henderson prompting Ms. Henderson to directly follow up with and respond to Mr. McBrearty, stating that it "seems I get missed on SQN correspondence more frequently than the other sites and it would be beneficial if you could add me" and that "including me on communications would help ensure the licensing team could be fully aligned."⁴² On October 3 and 4, 2017, Mr. Polickoski forwarded several emails from Mr. McBrearty on which Ms. Henderson had not been included and normally would have received from the other two sites.⁴³ On October 4, 2017, Mr. Shea informed Ms. Henderson that "Mike was leaving me off of emails again" and forwarded Ms. Henderson a teleconference invitation, organized by Mr. McBrearty,⁴⁴ to "[d]iscuss [the] pros and cons of either requesting a Regulatory Conference or providing a written response to a pending Choice Letter"⁴⁵—an issue on which Ms. Henderson was directly involved but was not included on the call.⁴⁶ On October 19, 2017, Mr. McBrearty informed Mr. Shea that he had scheduled a meeting with the Chief Nuclear Officer "to brief him on [the] decision to not request a Regulatory Conference for [the] Security SGI issue" but failed to include Ms. Henderson, even though she was involved in the issue that was to be discussed--Mr. Shea emailed Mr. McBrearty, noting that it was his

⁴² February 8, 2017 email chain.

⁴³ October 3 and 4, 2017 email chains.

⁴⁴ Henderson July 31, 2018 email; Henderson notes.

⁴⁵ October 4, 2017 email chain; Henderson July 31, 2018 email.

⁴⁶ Henderson July 31, 2018 email.

expectation that Ms. Henderson, as well as her peers, would take part in the meeting.⁴⁷ On October 26, 2017, Ms. Henderson complained to Mr. Shea that she continued to be frustrated with the “lack of communication coming out of SQN.”⁴⁸

As the Merit Systems Protection Board (Board) has made clear, “[t]here can be no dispute that disrespectful conduct is a serious offense.” *Suggs v. Dep’t of Veterans Affairs*, 113 M.S.P.R. 671, 674 (2010), citing *Ray v. Dep’t of the Army*, 97 M.S.P.R. 101, ¶ 58 (2004) (“[D]isrespectful conduct is unacceptable and not conducive to a stable working atmosphere, and ... agencies are entitled to expect employees to conduct themselves in conformance with accepted standards.”) (internal citations omitted), *aff’d*, 176 Fed.Appx. 110 (Fed. Cir. 2006). And an agency is entitled to expect its employees to conform to certain accepted standards of civil behavior and decorum. See *Redfeam v. Dep’t of Labor*, 58 M.S.P.R. 307, 316 (1993); *Roberson v. Veterans Administration*, 27 M.S.P.R. 489, 494 (1985); *Murphy v. Dep’t of the Navy*, 25 M.S.P.R. 333, 338 (1984); *Zara v. Dep’t of Labor*, 24 M.S.P.R. 693, 698 (1984).

Typically, the offense of disrespectful conduct arises when a subordinate engages in such conduct toward his or her supervisor. *Lewis v. Dep’t of Veterans Affairs*, 80 M.S.P.R. 472, ¶ 8 (1998) (“[I]nsolent disrespect towards supervisors so seriously undermines the capacity of management to maintain employee efficiency and discipline that no agency should be expected to exercise forbearance for such conduct more than once.”). However, this is not the typical case. Rather, the conduct is much

⁴⁷ October 19, 2019 email chain.

⁴⁸ October 26, 2019 email chain.

more serious and egregious and, as a TVA manager, under the law, Mr. McBrearty is held to a higher standard. *Ray v. Dep't of the Army*, 97 M.S.P.R. at 101, 136 (2004) ("Furthermore, unlike the appellant in the *Johnson* case on which the administrative judge relied, the appellant in this case was a supervisor, and the agency was therefore entitled to hold the appellant to a higher standard of conduct than other employees.), citing *Halper v. U.S. Postal Service*, 91 M.S.P.R. 170, ¶ 11 (2002). In this case, Mr. McBrearty, a manager in a totally different and separate organization (SQN Licensing) engaged in long campaign of inappropriate conduct to undermine and diminish the "capacity of" Ms. Henderson, who is in a totally different organization (Corporate Nuclear Licensing), "to maintain employee efficiency and discipline" and trust with regard to her subordinates. Of even more significance, Mr. McBrearty sought to undermine Ms. Henderson credibility and trust with managers both inside and outside of Corporate Nuclear Licensing.

While the undersigned was not tasked to make any recommendation of possible discipline (and does not do so herein) as part of this investigation, I nevertheless point out that the Board has made it clear that an agency is entitled to take disciplinary action against those employees who engage in "disrespectful conduct." For example, the Board has determined that "a 30-day suspension is the maximum reasonable penalty" for a single charge and specification of disrespectful conduct," where the employee presented "numerous mitigating factors. *Suggs*, 113 M.S.P.R. at 677. The undersigned is unaware of any mitigating factors (other than Mr. McBrearty's clean disciplinary record) that should be considered with regard to the imposition of any penalty in this case.

At the other end of the penalty spectrum, the Board has determined that termination is a reasonable penalty where the employee's disrespectful conduct was "intentional, repeated, and serious." *Kirkland–Zuck v. Dep't of Housing & Urban Development*, 90 M.S.P.R. 12, ¶ 19 (2001); see also *Jefferson v. Dep't of Veterans Administration*, 6 MSPB 297, 6 M.S.P.R. 348, 352 (1981) (penalty of removal was appropriate and reasonable based on two specifications of disrespectful conduct toward supervisors). In this case, Mr. McBrearty's disrespectful conduct was intentional and repeated and sustained over a long period of time. Moreover, undermining a manager with regard to his or her subordinates and superiors, as well as other managers outside of his or her organization, is serious.

Chilled Work Environment

In September 2017, the NRC conducted an assessment of "the TVA Nuclear corporate safety-conscious work environment (SCWE) by conducting safety culture interviews of individuals from the engineering, licensing, and operations groups. Inspectors interviewed a total of 22 individuals to determine if indications of a chilled work environment exist, employees are reluctant to raise safety and regulatory issues, and employees are being discouraged from raising safety or regulatory issues. Information gathered during the interviews was used in aggregate to assess the work environment at TVA Nuclear corporate."⁴⁹ All members of Ms. Henderson's staff were

⁴⁹ November 22, 2017, NRC Integrated Inspection Report, Nos. 05000390/2017003, 05000391/2017003 (NRC Inspection Report), at 22. The result of the NRC's SCWE assessment of the chilled work environment allegation regarding Corporate Licensing is included in the WBN Inspection Report.

interviewed.⁵⁰ “Based on the interviews conducted, the inspectors determined that licensee management emphasized the need for all employees to identify and report problems using the appropriate methods established within the administrative programs, including the CAP and Employee Concerns Program. These methods were readily accessible to all employees. Based on the discussions conducted with a sample of employees from various departments, the inspectors determined that employees felt free to raise safety and regulatory issues, and that management encouraged employees to place issues into the CAP for resolution. The inspectors did not identify any reluctance on the part of the licensee staff to report safety concerns.”⁵¹

Similarly, ECP has addressed concerns of an allegation of a chilled work environment in Corporate Licensing on three separate occasions. In July 2016, Mr. McBrearty filed a concern with ECP, alleging that Ms. Henderson had harassed members of her staff and created a chilled work environment in Corporate Licensing.⁵² However, ECP investigated the concern and the concern was not substantiated.⁵³ Second, after Mr. Shea and Ms. Henderson engaged site and corporate leadership with regard to Mr. McBrearty's behavior, Mr. McBrearty filed a second concern with ECP in April 2017, alleging that Ms. Henderson was creating a hostile work environment.⁵⁴ As

⁵⁰ Complaint at 3-4.

⁵¹ NRC Inspection Report at 22.

⁵² Complaint at 3.

⁵³ Complaint at 3.

⁵⁴ Complaint at 3.

ECP confirms, the second concern also was not substantiated; rather, ECP informed Ms. Henderson that it had determined that it was Mr. McBrearty who was the harassing party.⁵⁵ In July 2017, Mr. McBrearty filed a third concern with ECP, alleging that Ms. Henderson retaliated against him when in a meeting with her direct reports she informed them of the closure of a previous concern (raised by Mr. McBrearty) as part of SCWE mitigation.⁵⁶ ECP investigated, but “could find no intent on the part of [Ms. Henderson] to retaliate against [Mr. McBrearty] and believes that [Ms. Henderson] intended to share this information to ensure that employees were aware that she was not found to have created a harassing work environment in the prior concerns.”⁵⁷

In addition to the NRC assessment and the three ECP findings, the undersigned interviewed Ms. Henderson and her entire staff, as well as her manager, Mr. Shea, and found no evidence of a chilled work environment in Corporate Nuclear Licensing.⁵⁸

There have been five separate instances, within the last two years, wherein the issue of whether a chilled work environment exists in Corporate Licensing has been investigated. Consistent with each successive investigation, there was a finding of no chilled work environment. However, the undersigned did find evidence that

⁵⁵ Complaint at 3; June 13, 2017 Executive Summary (ECP No. NEC-17-00410) at 3; Interview of Henderson. It should be noted that the transmittal memo to Joe Shea from ECP is dated June 12, 2017.

⁵⁶ Complaint at 3; Final Investigation Report (ECP No. NEC-17-00683) at 1.

⁵⁷ Final Investigation Report (ECP No. NEC-17-00683) at 1.

⁵⁸ See page 8, *supra*.

Mr. McBrearty has made repeated unfounded allegations against Ms. Henderson to her subordinates of harassment and the creation of a hostile work environment.

Staff Animosity

Ms. Henderson identified four of her staff--Ms. Conner, Ms. Wetzel, Ms. Justice, and Mr. Schull--as contributors to the hostile work environment.⁵⁹ As to Ms. Conner, she was a direct report of Ms. Henderson until November 2017 when she assumed her current position of Senior Manager, SMR Ops & Training, which came about as part of a settlement of a DOL complaint that Ms. Connor filed in December 2016.⁶⁰ Prior to the filing of the DOL complaint, Ms. Henderson was performance managing Ms. Conner due to Ms. Conner not coming to work and not performing when she came to work.⁶¹ Even though Ms. Conner was not interviewed, other interviewees provided insight into the relationship between Ms. Henderson and Ms. Conner. Mr. Wells noticed that there was "friction" between Ms. Conner and Ms. Henderson and he believed that it was because of Ms. Conner's performance.⁶² Mr. Wells also informed the undersigned that Ms. Conner had an "abrasive personality."⁶³ Similarly, Ms. Wetzel indicated that

⁵⁹ Complaint at 1.

⁶⁰ Complaint at 2.

⁶¹ Interview of Henderson.

⁶² Interview of Wells.

⁶³ Interview of Wells.

Ms. Henderson had a problem with Ms. Conner's performance and had Ms. Conner (and Mr. McBrearty) investigated.⁶⁴

As to Ms. Wetzel, she had a problem with Ms. Henderson from the time Ms. Henderson was selected because, in her view, Ms. Henderson was "too young," "too inexperienced," and "did not have enough nuclear experience."⁶⁵ Ms. Wetzel also stated that her working relationship with Ms. Henderson was strained; in fact, she had been placed on a Performance Improvement Plan (PIP).⁶⁶ Ms. Wetzel further noted that she "does not trust" Ms. Henderson and that, in her view, Ms. Henderson is "vindictive," and Ms. Wetzel does not understand what motivates a person to pull people's gate records and have them investigated.⁶⁷ Moreover, Ms. Wetzel describes Corporate Licensing as "toxic" and will "only work better if [Ms. Henderson] is moved out."⁶⁸ Finally, Ms. Wetzel said that she took the NEI loan assignment to get away from Ms. Henderson.⁶⁹

⁶⁴ Interview of Wetzel.

⁶⁵ Interview of Wetzel.

⁶⁶ Interview of Wetzel.

⁶⁷ Interview of Wetzel.

⁶⁸ Interview of Wetzel.

⁶⁹ Interview of Wetzel. On May 7, 2018, after Ms. Wetzel's interview and after reporting to NEI, Ms. Wetzel sent Mr. Shea an email, proposing that Mr. Shea, not Ms. Henderson, review and approve her travel voucher for the duration of assignment at NEI, because, as she alleges, Ms. Henderson "has used HR to investigate people, reported people to ECP, threatened to have people for cause drug tested, pulled badging gate records and probably a lot more actions that I'm not aware of" and that she "anticipate[s] [Ms. Henderson] using [her] travel vouchers as an investigative tool." Ms. Wetzel made two of these allegations—purportedly inappropriately having people investigated by HR and pulling of gate

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It is evident Ms. Wetzel and Mr. McBrearty talk about Ms. Henderson. For example, Ms. Wetzel stated during her interview that Mr. McBrearty told her that Ms. Henderson "is harmful to TVA's regulatory relationship."⁷⁰ Moreover, Ms. Wetzel stated during her interview that she does not know what motivates Ms. Henderson to investigate someone and to pull someone's gate records.⁷¹ That is information that Ms. Wetzel only could have gotten from McBrearty because, as discussed further below, he was investigated by HR, including review of his gate records, for having an inappropriate relationship with Ms. Conner.⁷²

As to Ms. Justice, while she is "buddies" with Ms. Conner and Ms. Wetzel,⁷³ she does not appear to harbor any animosity toward Ms. Henderson. Ms. Justice stated that she does not interact much with Ms. Henderson; instead, most of her interactions are with her supervisor.⁷⁴ Nevertheless, Ms. Justice described Ms. Henderson as "a

records—during her interview. However, as set out in this Report, HR was justified under, among other things, the TVA Code of Conduct to conduct an investigation into the relationship between Mr. McBrearty and Ms. Conner and HR, not Ms. Henderson, pulled Mr. McBrearty's and Ms. Conner's gate records. The remaining allegations in Ms. Wetzel's email are more of the same, with no details, and do not warrant further follow-up. Evidently, Ms. Wetzel continues to make the same allegations regarding Ms. Henderson to Mr. Shea, to the point that it rises to the level of disrespectful conduct described above.

⁷⁰ Interview of Wetzel.

⁷¹ Interview of Wetzel.

⁷² Interview of McBrearty.

⁷³ Interview of Edmondson.

⁷⁴ Interview of Justice.

good manager."⁷⁵ Ms. Justice states that she and Ms. Wetzel do not talk much about work.⁷⁶ Ms. Justice did state, however, that Ms. Wetzel complained to her about her performance review as well as about her view that Ms. Henderson was not qualified for the Senior Manager position.⁷⁷

Moreover, Ms. Justice made an observation about Ms. Wetzel's and Ms. Conner's working relationship with Ms. Henderson. Ms. Justice opined that "women are their own worst enemies" and there "may have been some 'jealousy' when it came to Ms. Wetzel's and Ms. Conner's opinions and views of Ms. Henderson."⁷⁸

As to Mr. Schrull, like Ms. Wetzel, he had a problem with Ms. Henderson from the time Ms. Henderson was selected because, in his view, Ms. Henderson was "too young," "too inexperienced," and "did not have enough nuclear experience."⁷⁹

Mr. Schrull also applied for the Senior Manager position and felt that he was far more qualified than Ms. Henderson.⁸⁰ Moreover, Mr. Schrull's working relationship with Ms. Henderson was strained because he is being performance managed by Ms. Henderson.⁸¹ Mr. Schrull further believes that he is being marginalized by

⁷⁵ Interview of Justice.

⁷⁶ Interview of Justice.

⁷⁷ Interview of Justice.

⁷⁸ Interview of Justice.

⁷⁹ Interview of Schrull.

⁸⁰ Interview of Schrull.

⁸¹ Interview of Schrull.

Ms. Henderson and she is not utilizing his experience.⁸² Mr. Schrull describes himself as being frustrated, using the adage "bring me a rock," but whatever rock he brings "is not the right rock."⁸³

It is evident from the interviews of Mr. Schrull, Mr. McBrearty, and Ms. Wetzel that they talk about Ms. Henderson. For example, Mr. McBrearty discussed in his interview that Mr. Schrull "has expressed a lot of frustration with [Ms. Henderson]."⁸⁴ Similarly, Ms. Wetzel noted that she has discussed with Mr. Schrull "his issues" that he has with Ms. Henderson and that Mr. Schrull told her that he may be leaving sometime later this year because of his difficulties with Ms. Henderson.⁸⁵

Mr. McBrearty's Relationship With Ms. Henderson

Mr. McBrearty does not mince words about his working relationship with Ms. Henderson, stating emphatically that it "is not a good relationship" and referring to Ms. Henderson as "punitive."⁸⁶ Mr. McBrearty has complained about Ms. Henderson, alleging that Ms. Henderson has harassed him and that her actions foster a chilled work environment.⁸⁷ However, none of those concerns has been substantiated.⁸⁸ In fact, as

⁸² Interview of Schrull.

⁸³ Interview of Schrull.

⁸⁴ Interview of McBrearty.

⁸⁵ Interview of Wetzel.

⁸⁶ Interview of McBrearty.

⁸⁷ Complaint at 3-4.

⁸⁸ Complaint at 3-4.

to the concern that Mr. McBrearty raised in April 2017, ECP found that the "motiv[at]ion] of Mr. McBrearty's filing of this concern "seems to have [been] animosity toward [Ms. Henderson]" due to her interactions with Ms. Conner and thus it was Mr. McBrearty who was harassing Ms. Henderson."⁸⁹

Moreover, Mr. McBrearty stated "[Ms. Henderson] had me investigated" and "had his gate records pulled."⁹⁰ Mr. McBrearty is correct that there was an investigation. Specifically, in April 2016, based on a concern raised by Ms. Henderson, HR began an investigation into whether Mr. McBrearty and Ms. Conner were involved in a personal relationship outside of work that might impact the work environment and the possibility of impropriety and conflict of interest due to Ms. Conner's serving in an oversight role with direct responsibility for the SQN Licensing function.⁹¹ (Specifically, Ms. Conner served as Corporate Functional Area Manager (CFAM) and provided corporate governance and oversight of the site regulatory performance improvement and governance including providing focused leadership to the site regulatory organizations and regulatory leadership to the broader site leadership teams by representing corporate regulatory affairs.) After interviewing Ms. Henderson, Mr. McBrearty, and Ms. Conner,⁹² HR concluded "[i]t is apparent that **the parties have a very close**

⁸⁹ June 13, 2017, Executive Summary (ECP No. NEC-17-00410) at 2.

⁹⁰ Interview of McBrearty.

⁹¹ HR Investigation Report at 1; Complaint at 1.

⁹² The inaccuracy of Mr. McBrearty's allegation that Ms. Henderson "had his gate records pulled" is discussed below.

personal relationship but it is not clear as to whether the personal relationship is inappropriate or creates a conflict of interest. However, if the perception is that it interferes, management needs to take appropriate action to address the concerns."⁹³

HR's investigation of this concern was not as robust as it could have been. For example, travel records show that Ms. Conner traveled to Florida on TVA business to attend the Significance Determination Process (SDP) Seminar presented by Curtiss-Wright in Clearwater Beach, Florida.⁹⁴ Although Mr. McBrearty "made a big deal that he was going to California [during this period of time] to visit his sons," Ms. Conner's car rental agreement shows that Ms. Conner and Mr. McBrearty traveled together in Florida.⁹⁵ Moreover, HR did not interview any of Mr. McBrearty's direct reports⁹⁶ who informed one of Ms. Henderson's direct reports--Mr. Polickoski--that it is "common knowledge that there is a relationship" between Mr. McBrearty and Ms. Conner.⁹⁷ Similarly, with regard to the investigation of Mr. McBrearty's April 2017 concern alleging harassment on the part of Ms. Henderson, ECP interviewed some of Mr. McBrearty's staff and found that "there have long been rumors of an inappropriate relationship between [Mr. McBrearty] and the former Licensing employee [Ms. Conner] who is his

⁹³ HR Investigation Report at 3, (emphasis added).

⁹⁴ April 29, 2016, Rental Agreement (Enterprise Rent A Car).

⁹⁵ April 29, 2016, Rental Agreement (Enterprise Rent A Car).

⁹⁶ HR Investigation Report at 1.

⁹⁷ Interview of Polickoski.

friend.⁹⁸ Moreover, [i]nterviews further confirmed the belief that [Mr. McBrearty] has not been able to move past actions that occurred to his friend [Ms. Conner] as the result of the friend's conflict with [Ms. Henderson] and "those interviewed indicated the belief that [Mr. McBrearty's] animosity toward [Ms. Henderson] is because of his personal friendship with the former Licensing employee [Ms. Conner]."⁹⁹ In short, with some additional investigation, HR could have gleaned that Ms. Conner and Mr. McBrearty appear to be more than just "close" friends and that Mr. McBrearty harbored ill feelings toward Ms. Henderson because of a conflict between Ms. Henderson and his "close" friend, Ms. Conner.¹⁰⁰

This additional information, coupled with the admission of Ms. Conner and Mr. McBrearty "that they are very close friends outside of work," reflects that there was more than a mere appearance of a conflict. As Ms. Henderson states in the complaint, she hired Ms. Conner in February 2016 as the "new CFAM" and "[i]n that capacity, [Ms. Conner] assumed the responsibility for providing unbiased oversight of the site regulatory organizations."¹⁰¹ Given the nature of Ms. Conner's and McBrearty's "very

⁹⁸ June 13, 2017, Executive Summary (ECP No. NEC-17-00410) at 3.

⁹⁹ June 13, 2017, Executive Summary (ECP No. NEC-17-00410) at 3. Absent the animus of Mr. McBrearty, Ms. Henderson states that she and Mr. McBrearty "don't disagree much on the regulatory issues." Interview of Henderson.

¹⁰⁰ June 13, 2017, Executive Summary (ECP No. NEC-17-00410) at 3.

¹⁰¹ Complaint at 2.

close friends[hip]," Ms. Conner's ability to provide independent, "unbiased oversight" of SQN Licensing, in my view, was compromised.¹⁰²

Mr. McBrearty incorrectly believes Ms. Henderson "had his gate records pulled."¹⁰³ To the contrary, HR, not Ms. Henderson, decided to pull his, as well as Ms. Conner's, gate records as part of its investigation of the concern raised by Ms. Henderson.¹⁰⁴ As one of Ms. Henderson's direct reports stated during his interview, the pulling of "gate records pushed [Mr. McBrearty] over the edge"¹⁰⁵ and he blames Ms. Henderson¹⁰⁶ and has asserted to others that Ms. Henderson had his gate records pulled.¹⁰⁷

As discussed above, Mr. McBrearty also engaged in an intentional and sustained campaign of disrespectful conduct and behavior toward Ms. Henderson. Both Mr. Shea and Mr. Polickoski indicated during their interviews that Mr. McBrearty engaged in such to undermine Ms. Henderson with regard to her subordinates and superiors and others outside of Corporate Nuclear Licensing.

¹⁰² HR Investigation Report at 1.

¹⁰³ Interview of McBrearty.

¹⁰⁴ HR Investigation Report at 1.

¹⁰⁵ Interview of Polickoski.

¹⁰⁶ Interview of McBrearty.

¹⁰⁷ Interview of Wetzel.

Management's Response

Although it appears that management took three concrete steps to address Mr. McBrearty's conduct, those steps were ultimately unsuccessful. First, after the issuance of the HR Investigation Final Report in June 2016, management limited Ms. Henderson's "time spent at SQN and direct engagement with the peer team--the site Licensing Managers."¹⁰⁸ This step was unsuccessful and ineffective as Mr. McBrearty's conduct and behavior continued.¹⁰⁹ Moreover, this attempt to stem Mr. McBrearty's conduct and behavior effectively has removed a significant piece of Ms. Henderson's duties and responsibilities in that she "[d]irects the governance, oversight, and direction of the Nuclear Power Group (NPG) Corporate and Site Licensing functions in support of the operation of [all] TVA nuclear plants" and "[s]erves as the expert and single point-of-contact for NRC headquarters, interface for licensing issues for [all of] the TVA sites"¹¹⁰ (emphasis added).

In addition to being ineffective, step 1 appears punitive. Ms. Henderson stated in her interview that she "just wants to come to work and do my job" but that it is difficult to accomplish when she "cannot adequately challenge the SQN staff."¹¹¹

¹⁰⁸ Complaint at 3; Interviews of Henderson and Shea. Ms. Henderson states in the Complaint that she "agreed" to this limitation of her duties. Complaint at 3.

¹⁰⁹ Complaint at 1, 3, 8; Interviews of Henderson and Shea.

¹¹⁰ Henderson PD.

¹¹¹ Interview of Henderson

Second, approximately from April to June 2017, Ms. Henderson's manager—Mr. Shea—and Ms. Henderson engaged SQN management about Mr. McBrearty's conduct and behavior in an effort to bring an end to Mr. McBrearty's conduct and behavior.¹¹² Mr. Shea and Ms. Henderson sought the assistance of Gregory A. Boerschig, Vice President, Nuclear Oversight, Anthony Lawrence Williams IV, Site Vice President, SQN, and Dennis G. Dimopoulos, Director, Plant Operations, to get Mr. McBrearty to stop his inappropriate conduct and behavior toward Ms. Henderson.¹¹³ This step also failed, as Mr. McBrearty's conduct and behavior continued and, in my view, escalated.¹¹⁴ (Moreover, as discussed above (at 11), Mr. Polickoski intervened and counseled Mr. McBrearty but Mr. Polickoski's effort also failed.)

The third step was to settle and resolve Ms. Conner's DOL complaint, by acceding to Ms. Conner's request to be removed from Ms. Henderson's supervision and placing her in the new position of Senior Program Manager, SMR Ops & Training under the supervision of Daniel P. Stout, Senior Manager, SMR Technology.¹¹⁵ Settling with [Ms. Conner] was done, in part, to alleviate some of the challenges [Ms. Henderson]

¹¹² Interviews of Shea and Henderson; Complaint at 3.

¹¹³ Interviews of Shea and Henderson; Complaint at 3.

¹¹⁴ Interviews of Shea and Henderson; Complaint at 3.

¹¹⁵ Complaint at 2; Org Chart; Interviews of Henderson and Shea.

faced with both [Ms. Conner] and [Mr. McBrearty].¹¹⁶ This step too did not stop Mr. McBrearty's conduct and behavior.¹¹⁷

It does not appear that management attempted any other measures to stop the offending conduct. Instead, the conduct and behavior have now continued for two years and counting.

Analysis

Ms. Henderson alleges that she has been, and continues to be, harassed or retaliated against by Mr. McBrearty, SQN Licensing Manager, and such harassment is repetitive and pervasive, resulting in a hostile work environment. Complaint at *passim*. "Harassment is any action or behavior toward a person that has the effect or perceived effect of causing the person to be uncomfortable or afraid of working in the employment environment." *NRC Allegation Manual* (Apr. 23, 2015, rev. 1) at 243. "Harassment covers a wide range of offensive intentional behaviors intended to be disruptive, and is characteristically repetitive, often contributing to a hostile work environment." *Id.* "Harassment that progresses to the point of establishing a hostile work environment is a form of discrimination." *Id.* Harassment is illegal and prohibited under a number of Federal statutes and regulations. See Part A Below. An employer is automatically liable for harassment by a supervisor that results in an adverse employment action and if the supervisor's harassment results in a hostile work environment, the employer can avoid liability only if it can prove (1) it reasonably tried to prevent and promptly correct

¹¹⁶ Complaint at 2; Interviews of Henderson and Shea.

¹¹⁷ Complaint at 3; Interviews of Henderson and Shea.

the harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. Boca Raton*, 524 U.S. 775, 778 (1998). Similarly, harassment is prohibited under TVA policy. *E.g.*, TVA-SPP-11.8.4 (at 5).

However, petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of actionable harassment. *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people. *Thornton v. Federal Express*, 530 F.3d 451, 455 (6th Cir. 2008); *Hafford v. Seidner*, 183 F.3d 506, 512 (6th Cir. 1999). Offensive conduct may include, among other things, actions that result in the interference with work performance. *Thornton*, 530 F.3d at 455; *Hafford*, 183 F.3d at 512.

The conduct alleged in this case also gives rise to a claim of retaliation. Retaliation is an action taken against an employee because he or she has engaged in protected activity. *EEOC v. New Breed Logistics*, 783 F.3d 1057, 1066 (6th Cir. 2015). Retaliation is illegal and prohibited under a number of federal statutes and regulations. See Part A below. Likewise, retaliation is prohibited under TVA policy. *E.g.*, TVA-SPP-11.8.4 (at 5).

A. Discrimination

A federal employee may not be discriminated (nor retaliated) against or harassed with respect to the terms, conditions, or privileges of employment on the basis of race, color, religion, sex, national origins, age or disability. See Title VII of the Civil Rights Act

of 1964, 42 U.S.C. § 2000e-16 (2012); The Age Discrimination in Employment Act of 1973, 29 U.S.C. § 633a (2012); The Rehabilitation Act of 1973, 29 U.S.C. §§ 791, 794 (2012). In her interview, Ms. Henderson informed the undersigned that she does not assert that she is (or was) being discriminated or retaliated against or harassed on any of the bases in the above statutes.

B. Retaliation/Harassment (Whistleblower)

The Whistleblower Protection Act, 5 U.S.C. § 2302 (2012), does apply. A Federal employee may not take a personnel action against an employee because of protected whistleblowing. 5 U.S.C. § 2302(b)(8) (2012). Protected whistleblowing is defined, under 5 U.S.C. § 2302(b)(8), as disclosing information which the discloser reasonably believes evidences (1) a violation of law, rule, or regulation; (2) gross mismanagement; (3) gross waste of funds; (4) an abuse of authority; or (5) a substantial and specific danger to public health or safety. Personnel action includes, *inter alia*, "any significant change in duties, responsibilities, or working conditions." 5 U.S.C. § 2302(a)(2)(xii) (2012).

Ms. Henderson is a whistleblower. In April 2016, Ms. Henderson raised a concern to HR as to whether Ms. Conner could provide independent and unbiased oversight of the SQN Licensing group due to the nature of the personal relationship between Ms. Conner and Mr. McBrearty. As a general matter, under applicable Federal regulations, Ms. Conner's employment "is a public trust," requiring her to "to place loyalty to," among other things, "ethical standards above private" matters; to "put forth honest effort in the performance of [her] duties"; and to "avoid any actions creating the appearance" that she is "violating" applicable "ethical standards." 5 C.F.R.

§ 2635.101(b)(1), (5), and (14) (2017). Moreover, under the *TVA Code of Conduct*, "TVA management will act impartially and avoid situations in which an employee or contractor within their scope of supervision **or oversight** reasonably could be perceived as receiving an unfair advantage, such as because of a romantic, financial, or other personal relationship." *TVA Code of Conduct* at 5 (emphasis added). Of equal significance, "TVA management will ensure that **employees understand their affirmative duty to report actual or suspected violations of laws or ethics requirements** and the procedures and mechanisms available to them for reporting." *TVA Code of Conduct* at 5 (emphasis added). Ms. Henderson thus had an obligation, and was duty-bound, to raise this concern.

Given the nature of the relationship, Ms. Henderson reasonably believed that Ms. Conner could not exercise independent and unbiased oversight as CFAM over the SQN Licensing organization and the performance of oversight under these circumstances would violate federal and TVA ethical standards as well as pose a substantial and specific danger to public health or safety. Mr. Paul explained that Site Licensing is "the conscious of the station"; "ensures that the site complies with all regulatory requirements, as well as with all the "commitments" it makes and undertakes; serves as "the backstop for Operations"; and determines "what events are reportable or not."¹¹⁸ Compromised oversight of Site Licensing upsets this dynamic and is a nuclear safety concern. This disclosure is thus is protected activity under the WPA.

¹¹⁸ Interview of Paul.

In order to prove a prima facie case for retaliation for whistleblowing activities, the employee must establish by a preponderance of the evidence that he or she made a disclosure within the meaning of 5 U.S.C. § 2302(b)(8) and that the disclosure was a contributing factor in the personnel action at issue. *Chambers v. Dep't of the Interior*, 116 M.S.P.R. 17, 25 ¶ 12 (2011). "Further, evidence of retaliatory motive, and of the agency officials' knowledge of whistleblowing and the timing of the prohibited personnel action, may properly be considered in deciding both the second and third steps of a whistleblower analysis." *Caddell v. Dep't of Justice*, 61 M.S.P.R. 670, 681 (1994), citing *Marano v. Dep't of Justice*, 2 F.3d 1137, 1141–42 (Fed. Cir. 1993); *Clark v. Dep't of the Army*, 997 F.2d 1466, 1472 (Fed. Cir. 1993).

Mr. McBrearty was aware of Ms. Henderson's disclosure to HR. In fact, Mr. McBrearty declared in the interview that Ms. Henderson "had me investigated" and "had my gate records pulled."¹¹⁹ Both Mr. McBrearty and Ms. Conner, as well as Ms. Henderson, were interviewed by HR in 2016 and Site Security informed Mr. McBrearty that his gate records were being "pulled."¹²⁰ HR noted, in its June 2016 Investigation Report, that "[t]he individuals were inappropriately made aware that their gate records were pulled so there was a heightened level of sensitivity during the investigation."¹²¹ This shows that there is no dispute that Mr. McBrearty was/is aware of

¹¹⁹ Interview of McBrearty.

¹²⁰ HR Investigation Report at 1.

¹²¹ HR Investigation Report at 1.

the concern that Ms. Henderson raised to HR.¹²² As a direct result of Mr. McBrearty's conduct and behavior, the evidence shows that Ms. Henderson's management "limit[ed] both [her] time spent at SQN and [her] direct engagement with the peer team (site licensing managers) even though there was a significant need to engage in that forum to improve performance."¹²³ This restriction severely impacts Ms. Henderson's responsibility "for formulating and executing fleet governance and oversight strategies and programs to achieve and sustain excellence in all of TVA's operating fleet nuclear regulatory matters" and "providing "strategic guidance to senior corporate **and site leaders** on range of nuclear regulatory issues." Henderson PD (emphasis added). This limitation is a "significant change in duties, responsibilities, or working conditions." 5 U.S.C. § 2302(a)(2)(xii).

The evidence supports a retaliatory motive. Mr. McBrearty remains ticked that Ms. Henderson "had [him] investigated" and "had [his] gate records pulled." He told Ms. Wetzel that Ms. Henderson had him investigated and pulled his gate records. The statement to Ms. Wetzel persuaded her that Ms. Henderson is not a person who can be trusted and she just does not "understand what motivates a person to pull gate records and have people investigated."¹²⁴ Some members on his own staff have recognized "that [Mr. McBrearty] has not been able to move past actions that occurred to his friend

¹²² Moreover, Mr. McBrearty told Ms. Wetzel about the investigation and that his gate records were pulled. Interview of Wetzel.

¹²³ Complaint at 3.

¹²⁴ Interview of Wetzel.

[Ms. Conner] as the result of the friend's conflict with [Ms. Henderson].¹²⁵ In my view, the grudge Mr. McBrearty has against Ms. Henderson is still alive and well. His conduct and behavior rise to the level of retaliation/harassment under the WPA.

Ms. Henderson also is a whistleblower under Section 211 of the Energy Reorganization Act, 42 U.S.C. § 5851 (2012). Her disclosure/concern reported to HR is protected activity in that, as described above, it involved a nuclear safety-related issue. In addition, Mr. McBrearty was aware of the disclosure/concern and the same retaliatory motive exists as it does in regard to the WPA.

C. Retaliation/Harassment (TVA Policies)

Mr. McBrearty's conduct and behavior fall under and violate three TVA policies. The *TVA Code of Conduct* cannot be any clearer: "TVA management will maintain a workplace environment that prevents retaliation or reprisals against an employee who in good faith reports actual or suspected violations of laws or ethics requirements. Retaliation against employees who report perceived violation, or who participate in investigations as witnesses or in other capacities, violates the law and TVA policy.¹²⁶ Such retaliation is prohibited and will not be tolerated." *TVA Code of Conduct* at 5. Mr. McBrearty was/is aware of Ms. Henderson's report to HR and has engaged in retaliatory conduct and behavior that is motivated by the fact that he and Ms. Conner were investigated and had their gate records pulled to determine whether Ms. Conner could perform independent and unbiased oversight of SQN Licensing given

¹²⁵ June 13, 2017, Executive Summary (ECP No. NEC-17-00410) at 3.

¹²⁶ In his Appointment Affidavit, Mr. McBrearty subscribed and certified that he understood that his "appointment and subsequent changes in status are subject to the terms and conditions described in this document, and those existing laws and TVA agreements and policies." Appointment Affidavit at 4.

Mr. McBrearty's and Ms. Conner's close personal relationship outside of work.

Ms. Henderson's report to HR was made in good faith and, indeed, mandated by the *TVA Code of Conduct* (at 5). Mr. McBrearty's conduct "is prohibited" and TVA policy requires it "not be tolerated." *Id.*

TVA's *No Fear Executive Policy* also is plain, clear, and unambiguous. It states that "TVA personnel at every level have the right to work in an atmosphere that is free from harassment or illegal discrimination. Accordingly, retaliation against an employee or applicant who exercised his or her rights under any of the federal antidiscrimination or whistleblower protection laws is prohibited." Under the *No Fear Executive Policy*, TVA informs all employees that "TVA encourages employees, applicants, and contractors to raise concerns without fear of retaliation" and that TVA maintains a zero tolerance policy that prohibits retaliation against any employee for reporting matters under this policy or procedure." *No Fear Executive Policy* at 1. Mr. McBrearty's conduct and behavior against Ms. Henderson for raising a concern to HR as to whether Ms. Conner could perform independent and unbiased oversight of SQN Licensing, given Mr. McBrearty's and Ms. Conner's close personal relationship outside of work, violates the *No Fear Executive Policy* for the reasons previously outlined above.

TVA Standard Programs and Processes (TVA-SPP)-11.8.4, Expressing Concerns and Differing Views, also comes into play in this matter. TVA-SPP-11.8.4 states (at 4) "TVA encourages the voluntary expression of concerns and differing views" and that employees may do so "without fear of reprisal" and "[t]he ability to freely express differing views and opinions will enhance employee productivity, observance of standards and promote a safety conscious work environment (SCWE)."

Mr. McBrearty's retaliatory conduct and behavior toward Ms. Henderson for raising a concern to HR as to whether Ms. Conner could perform independent and unbiased oversight of SQN Licensing given Mr. McBrearty's and Ms. Conner's close personal relationship outside of work violates TVA-SPP-11.8.4 (at 5) for the reasons previously outlined above.

"Every supervisor [including Mr. McBrearty] has the responsibility to create an environment in which employees can raise concerns without fear of retaliation. Harassment, intimidation, retaliation, or discrimination will not be tolerated. Any person found guilty of such acts will be subject to disciplinary action, up to and including termination." TVA-SPP-11.8.4 (at 5). It also should be noted that TVA policy obligates TVA management to maintain a workplace environment free of retaliation or reprisals against an employee who in good faith reports actual or suspected violations of laws or ethics requirements as well as for those employees who express differing views and concerns. *TVA Code of Conduct* at 5; TVA-SPP-11.8.4 (at 4-5). TVA management failed to do so here; instead, it allowed harassing and retaliatory conduct and behavior to fester and to continue practically unabated for two years and counting. Just like retaliation itself, the allowance of retaliation--either through inaction or the failure to taken prompt, effective, and adequate corrective action to stop such retaliation--is just as prohibited and must not be tolerated.

D. Disrespectful Conduct

Mr. McBrearty's intentional, repeated, and serious behavior toward Ms. Henderson also is characterized as disrespectful conduct and, as a manager, Mr. McBrearty is held to a higher standard than other employees. *Ray v. Dep't of the*

Army, 97 M.S.P.R. at 101, 136 (2004) ("Furthermore, unlike the appellant in the *Johnson* case on which the administrative judge relied, the appellant in this case was a supervisor, and the agency was therefore entitled to hold the appellant to a higher standard of conduct than other employees.). As discussed on pages 8 through 13 above, the Board has determined that a penalty of range of a 30-day suspension to termination is reasonable and appropriate for an agency to impose, given the particular circumstances of the case, for such conduct.

E. Conclusion

Based on the foregoing, Ms. Henderson's allegation of harassment and retaliation is substantiated, and Mr. McBrearty's conduct and behavior violated two Federal statutes, a Federal regulation, and three TVA policies.

/s/ John E. Slater
John E. Slater
Senior Attorney
Tennessee Valley Authority
400 West Summit Hill Drive
Knoxville, Tennessee 37902-1401
Telephone No. (865) 632-7878
jeslater@tva.gov

Date: August 10, 2018

66641059

Attachment 9



Tennessee Valley Authority, 1101 Market Street, Chattanooga, Tennessee 37402-2801

January 14, 2019

Beth A. Wetzel


NOTICE OF TERMINATION

This is notification that you are being terminated from your position as Manager, Regulatory Programs, effective immediately.

The reason for this action is your violation of TVA's Code of Conduct, the TVA No Fear Executive Policy, TVA's SPP-11.8.4, Expressing Concerns and Differing Views," the Whistleblower Protection Act and Section 211 of the Energy Reorganization Act. TVA-SPP-11.316, Employee Discipline, including Appendix B, Section 1.5, Respectful Workplace, and Section 1.1.1, Violation of Ethical Laws or TVA Code of Conduct, describes work conduct expectations of employees and provides guidelines on the application of disciplinary actions.

Specifically, an independent investigation was conducted by TVA's Office of the General Counsel into allegations that you, and others, were engaged in a campaign of harassment, retaliation, and disrespectful conduct toward your supervisor. These included allegations that you have been engaged in a pattern of disrespectful conduct toward your supervisor intended to undermine your supervisor's authority and position in the TVA Nuclear organization as a result of your supervisor having engaged in protected activity in 2016. With regard to you, the investigation substantiated that you deliberately spread false information and pursued allegations that were known to be false and unfounded, even during the course of the investigation and up to and including the present, in an attempt to undermine your supervisor's credibility and standing in the organization.

It should be noted that multiple reviews and investigations have been conducted since 2016, the investigation concluded that the allegations and innuendo spread by you and others were unfounded, yet you have continued to persist in harassing and retaliating against your supervisor by spreading those disproven theories out of a desire to undermine and discredit your supervisor.

These behaviors are a violation of TVA-SPP-11.316, Employee Discipline, Appendix B, Section 1.5, Respectful Workplace, including subparts 1.5.1, Harassment/ Intimidation/ Retaliation/Discrimination (HIRD), 1.5.2, Abusive or Unprofessional Language or Conduct, and 1.5.3, Insubordination; and Section 1.1.1, Violation of Ethical Laws or TVA Code of Conduct; TVA Code of Conduct, TVA No Fear Executive Policy; as well as the Whistleblower Protection Act and Section 211 of the Energy Reorganization Act. Everyone at TVA is responsible for helping maintain a safe, professional, and respectful workplace. It is core to our TVA Values and it is what we expect of each other each and every day.

Beth A. Wetzel
Page 2
January 14, 2019

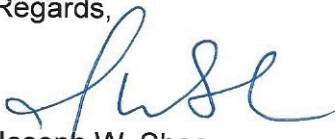
As an organization, TVA is committed to providing a professional and respectful work environment that is free from harassment and retaliation. The list below captures training and expectations you have been given to ensure that you are aware of your responsibilities as both a Manager and an employee:

- Employee Rights and Responsibilities for Supervisors and Managers – 10/27/17
- Prohibition of Discrimination in the Workplace: Principles of Conduct for TVA Managers & Supervisors – 8/29/17
- Professional and Respectful Workplace Behavior – 4/26/16
- Employee Handbook – 7/11/16
- Management Actions to Promote a Safety Conscious Work Environment – 6/18/18

TVA must be able to rely upon its employees to act in a safe, trustworthy, and responsible manner. Your conduct and behavior, as outlined above, do not meet minimum acceptable standards.

Please be aware that you are eligible to use TVA's Employee Assistance Program, Espyr, up to 90 days after termination of employment. To utilize these services, you may call Espyr, the administrator of TVA's Employee Assistance Program at 1-866-570-3480.

Regards,



Joseph W. Shea
Vice President, Nuclear Regulatory Affairs & Support Services

cc: J. L. Grace, WT 6A-K
A. E. Poland, LP 3A-C
HR Support, BR 3A-C (868DUYKOM)

Attachment 10



Planet Depos[®]
We Make It *Happen*[™]

Transcript of Nicholas Dale Hilton

Date: July 7, 2021

Case: Tennessee Valley Authority, In re:

Planet Depos

Phone: 888.433.3767

Email: transcripts@planetdepos.com

www.planetdepos.com

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD
Docket Nos. EA-20-006 and EA-20-007

- - - - - x
In the Matter of : ASLBP No.
TENNESSEE VALLEY AUTHORITY : 21-969-01-EA-BD01
(Enforcement Action) :
- - - - - X

Deposition of
NICHOLAS DALE HILTON
Conducted Virtually
Wednesday, July 7, 2021
8:02 a.m. EDT

Job No.: 379707
Pages 1 - 219
Reported by: Debra A. Whitehead

1 P R O C E E D I N G S

2 NICHOLAS DALE HILTON,

3 having been duly sworn, testified as follows:

4 MS. LEIDICH: I'm Anne Leidich with the
5 law firm Pillsbury Winthrop Shaw Pittman, and I'm
6 outside counsel for Tennessee Valley Authority, or
7 TVA.

8 We are here for the deposition of
9 Mr. Nick Hilton in a matter currently pending
10 before the NRC Nuclear Regulatory Commission
11 Atomic Safety and Licensing Board, Docket Numbers
12 EA-20-006 and EA-20-007.

13 Joe, do you want to introduce yourself?

14 MR. GILLESPIE: Sure thing.

15 My name is Joe Gillespie. I'm
16 representing the NRC staff, along with Kevin
17 Roach. And that's G-I-L-L-E-S-P-I-E, and then
18 R-O-A-C-H, and the deponent today is Mr. Nick
19 Hilton.

20 EXAMINATION BY COUNSEL FOR DEFENDANT TENNESSEE

21 VALLEY AUTHORITY:

22 BY MS. LEIDICH:

23 Q Mr. Hilton, would you please state your
24 full name, for the record.

25 A Nicholas Dale Hilton.

1 Q And would you please state the name of
2 your employer and your job title?

3 A U.S. Nuclear Regulatory Commission, I'm a
4 senior enforcement advisor in the Office of
5 Enforcement.

6 Q Have you ever testified under oath
7 before?

8 A No.

9 Q Do you understand what it means to
10 testify under oath?

11 A Yes.

12 Q Have you ever been deposed before?

13 A No.

14 Q Do you understand how depositions work?

15 A Basically.

16 Q We'll go over some ground rules then.

17 This, like all depositions, is in a
18 question-and-answer format. I ask questions, and
19 you answer them to the best of your ability.

20 Do you understand that?

21 A Yes.

22 Q It is typical for the attorney taking a
23 deposition to go over some standard ground rules.
24 Your counsel has likely gone over some ground
25 rules with you as well. But I'm just going to go

1 protected activity?

2 A Again, I haven't read the evidence, so I
3 don't know the details behind it. But as I
4 understand it, yes. I did not -- I was aware that
5 was the raised -- the protected activity. I
6 didn't object to that.

7 Q Do you know whose protected activity in
8 this case was raising a concern about a chilled
9 work environment?

10 A Ms. Wetzel's, I believe.

11 Q Okay. Is raising a concern about an
12 environment that discourages employees from
13 raising concerns a protected activity?

14 MR. GILLESPIE: Objection. Form.

15 A Could you repeat that question, please.

16 Q Sure. Is raising a concern about an
17 environment that discourages employees from
18 raising concerns a protected activity?

19 MR. GILLESPIE: Same objection.

20 A Again, if I had to make the decision, I
21 don't -- I don't know for sure. Again, I'd like
22 to know more of the facts, but ...

23 To the extent that -- to the extent that
24 that is an assertion of people's unwillingness to
25 raise concerns, I would call that a protected

1 activity, yes.

2 Q Is raising a concern about a hostile work
3 environment a protected activity?

4 MR. GILLESPIE: Objection. Form.

5 A That depends on the definition of
6 "hostile work environment." I don't know. I'd
7 have to speculate on exactly what that means.

8 Q Are you unfamiliar with the phrase
9 "hostile work environment"?

10 A No; but I know that there's different
11 reasons that you can have a hostile work
12 environment, so that -- that would cause -- it
13 would be the basis for those reasons.

14 Q Is raising a concern about a hostile work
15 environment under a 10 CFR 50.7 a protected
16 activity?

17 MR. GILLESPIE: Objection. Form.

18 A I have not -- again, I'm not sure. That
19 would depend on the fact pattern that we're
20 talking about here, I think.

21 I'm not sure I understand the question.
22 So could you -- could you repeat the situation?

23 Q I think I'll move on, actually, instead.

24 Is raising concerns to one's supervisor a
25 protected activity?

1 MR. GILLESPIE: Objection. Form.

2 A I'd have to speculate on the facts.

3 Q If one raises concerns to their
4 supervisor about nuclear safety concerns, is it
5 protected activity?

6 A I believe so, yes.

7 Q Is raising concerns to HR a protected
8 activity?

9 MR. GILLESPIE: Objection. Form.

10 A Again, it depends on the facts.

11 Q So is the primary -- strike that.

12 Is the primary question whether the
13 content of the concern and not where it is
14 raised --

15 MR. GILLESPIE: Objection.

16 Q -- in determining whether or not it's
17 protected activity?

18 MR. GILLESPIE: Sorry. Same objection.

19 A Is the question the content, not where
20 it's raised?

21 Q When you determine whether or not
22 something is protected activity, are you primarily
23 evaluating the content of the concern or how it is
24 raised?

25 A Primarily the content.

1 Q Okay.

2 A That's not the entire story, obviously,
3 as -- as it goes to awareness of that, of raising
4 that. But primarily the content initially, yes.

5 Q What's the rest of the story?

6 A Well, we -- sometimes it's the awareness.
7 So those -- if an individual takes an adverse
8 action and they -- and they're not aware of any of
9 that protected activity, then -- then it does --
10 it may matter where it was raised.

11 So your last question you ask about HR.
12 If -- if the concern was raised to a personnel
13 specialist and they did nothing with it, and then
14 a line manager who doesn't normally communicate
15 with a piece of HR, it may not have.

16 So -- so the content is the first
17 derivative, the first consideration, obviously.
18 But at some point you have to take that second
19 step, and that is awareness of -- of the issue.

20 Q Is it a protected activity to allege a
21 concern about a supervisor being too close to his
22 or her subordinates to effectively perform their
23 duties?

24 A I'd have to speculate on specific facts.
25 I don't -- I don't -- on its face, it doesn't

1 sound so, but I would have to speculate on that.

2 Q What specific facts might make it
3 protected activity?

4 A Well, I don't know the specific duties
5 we're talking about, that's the ...

6 Again, if we're talking about cutting the
7 grass, no. If we're talking about an operator in
8 the control room, there may be a fact pattern that
9 gets there.

10 Q What is retaliation?

11 MR. GILLESPIE: Objection. Form.

12 A Any change in terms and conditions of
13 employment based on a -- based on a protected
14 activity.

15 Q What does it mean when one employee
16 retaliates against another employee?

17 MR. GILLESPIE: Objection. Form.

18 A Are we talking about an employee or the
19 company?

20 Q No. Just employees against one another.

21 Can an employee retaliate against another
22 employee?

23 A One staff member against another staff
24 member?

25 Q Yeah.

1 Q Can you describe for me a circumstance in
2 which case it would be a protected activity?

3 MR. GILLESPIE: Objection. Form.

4 A If you -- I'd have to create the facts.
5 But a simple statement of "I don't like my boss"
6 on its face, simplistically, would not be
7 protected activity. Obviously there are --
8 there's a reason that statement is made, and the
9 reason could become protected activity. Every
10 time I raise a safety concern, they dock my pay.
11 I raise concerns, so I never get overtime, so I
12 don't like my boss, that kind of thing.

13 Q Is saying that you are afraid of your
14 boss a protected activity?

15 MR. GILLESPIE: Objection. Form.

16 A I think it could be, yes. But, again,
17 speculation depending on the nature of the case.

18 Q Is saying that your boss is vindictive a
19 protected activity?

20 MR. GILLESPIE: Objection. Form.

21 A I don't know.

22 Q Would it again depend on the facts of the
23 case?

24 A It would.

25 Q Is saying that you are afraid your boss

1 might investigate you if you do something illegal
2 a protected activity?

3 MR. GILLESPIE: Objection. Form.

4 A I don't know what the illegal part is, so
5 I'd have to speculate.

6 Q Is there a case in which saying that
7 you're afraid your boss might investigate you if
8 you do something illegal, is there a case in which
9 it would be a protected activity?

10 MR. GILLESPIE: Objection. Form.

11 A I think if the -- if the issue is in
12 terms of a nuclear safety concern, it very well
13 could be, yes.

14 Q How do you square that with the part of
15 the Energy Reorganization Act that says that
16 individuals performing illegal activities are not
17 protected?

18 MR. GILLESPIE: Objection. Form.

19 A Whose illegal activity? I'm sorry, maybe
20 I cross-connected. Whose illegal activity? What
21 was the original question?

22 Q Yes. This is an individual saying that
23 they are afraid that their boss might investigate
24 them if they do something illegal.

25 If the individual does something illegal.

1 MR. GILLESPIE: Same objection.

2 A I don't -- I don't know what the facts
3 are. I don't know if it would be or not.

4 What -- what are we talking about? I
5 don't know what we're talking about. If they're
6 afraid that the boss would -- would investigate
7 them if they did something illegal? In the boss's
8 mind or in their mind, or is that a statement of
9 fact?

10 Q Is it objectively a protected activity?

11 MR. GILLESPIE: Objection. Form.

12 A I'm not sure. Again, that sounds very
13 unusual. I don't really understand the rest of
14 the story.

15 Q Okay. Is raising unsubstantiated
16 concerns a protected activity?

17 MR. GILLESPIE: Objection. Form.

18 A It could be, depending on what the
19 unsubstantiated concern was.

20 Q Are we going back to whether or not it's
21 a nuclear safety concern?

22 A And whether --

23 MR. GILLESPIE: Objection to form.

24 A And whether they believed it was -- was
25 or not, yes.

1 Q Is raising a concern in bad faith a
2 protected activity?

3 MR. GILLESPIE: Objection. Form.

4 A Yes, it is, actually.

5 Q Why?

6 A Because it's still of concern. The
7 motive doesn't matter.

8 Q So an individual can submit unlimited
9 concerns in bad faith without fear of discharge or
10 other employment action?

11 MR. GILLESPIE: Objection. Form.

12 A It's much more complicated than that.
13 But said simply, yes.

14 Q Can it ever be the case that repeatedly
15 raising concerns in bad faith would be the basis
16 for discharge or another employment action?

17 MR. GILLESPIE: Objection. Form.

18 A Again, I'd speculate. But, yes, you
19 could get there.

20 Q In what circumstances do you think you
21 might get there?

22 MR. GILLESPIE: Objection. Form.

23 A It -- a lot of examples of clearly
24 frivolous and -- not even frivolous --
25 inappropriate after some training and awareness

1 and knowledge and education of the individual.

2 So an individual has the right to raise
3 the concerns. The manner in which they do it and
4 the frequency is not relevant to whether it's a
5 protected activity or not. That's a different
6 question.

7 Q Can it ever be the case that repeatedly
8 raising concerns in bad faith against the same
9 co-worker could be viewed as unprofessional
10 conduct?

11 MR. GILLESPIE: Objection. Form.

12 A Can it ever be? I don't know. I'd have
13 to speculate.

14 It depends on the actions taken between
15 the rest of the fact pattern and the rest of the
16 story.

17 Q Could it ever be the case that repeatedly
18 raising concerns in bad faith against the same
19 co-worker could be viewed as harassing?

20 MR. GILLESPIE: Objection. Form.

21 A I'd have to speculate. Again, I don't
22 know what "ever" is and the rest of the facts.
23 It's possible, but it's also not necessarily.

24 Q But it's theoretically possible, would
25 you agree?

1 MR. GILLESPIE: Objection. Form.

2 A Based on the facts, it's theoretically
3 possible.

4 Q If one engages in belligerent or abusive
5 behavior while also engaging in protected
6 activity, can a company take action against that
7 individual without violating 10 CFR 50.7?

8 MR. GILLESPIE: Objection. Form.

9 A Again, calls for speculations for the
10 facts of the case.

11 Q What other information would you need to
12 know beyond that the individual is engaging in
13 belligerent or abusive behavior while also
14 engaging in protected activity to determine
15 whether or not a violation has occurred?

16 MR. GILLESPIE: Objection. Form.

17 A The length, the nature, the character,
18 the significance. There's -- engaging in
19 protected activity does not render a person immune
20 from disciplinary action. However, the bar is
21 fairly high in order to ensure that individuals
22 can raise safety concerns.

23 So there needs to be clear -- clear
24 evidence that -- that, you know, the behavior
25 has -- has been identified and dealt with

1 MR. GILLESPIE: Objection. Form.

2 A I'm not sure I understand the scenario,
3 even. So again I would have to speculate on the
4 basis and the whys.

5 Q Do you think there's any circumstances in
6 which management should not be allowed to take an
7 adverse action against an employee that they think
8 might become violent?

9 MR. GILLESPIE: Objection. Form.

10 A I'm a little confused by the question
11 because I'm not sure the -- the basis in the
12 question. I'd be speculating on a fact pattern.

13 It's -- certainly if an individual is
14 about to become violent, then -- but the basis of
15 that manager's belief and the legitimacy of it
16 would certainly be part of the question.

17 There's many cases, again, where -- that
18 goes to behavior, and the behavior does influence
19 the action.

20 Q Are there any historical cases that you
21 can think of that fit that description?

22 A Well, I don't -- it's the --

23 MR. GILLESPIE: Objection to form.

24 A A lot -- a lot of it is in the definition
25 of violent. There are -- there are times when --

1 Again, you have to know what -- what was
2 said, who said it, what they said, when. Again,
3 I'd -- and that's facts that we don't have. So it
4 would be fact-based.

5 Q Is engaging in poor, rude, or
6 uncommunicative behavior while also raising
7 concerns protected activity?

8 MR. GILLESPIE: Objection. Form.

9 A Engaging in rude behavior is not
10 protected activity; it's raising the concern. So
11 it doesn't make it a not protected activity by
12 being rude.

13 Q But the rude behavior itself can be
14 separated from the protected activity, and it's
15 not protected. Correct?

16 MR. GILLESPIE: Objection. Form.

17 A It's -- it's co-mingled. And -- and you
18 still can raise the concern. And if you're rude,
19 you're rude. But -- but that's not -- yes, it
20 will still be protected activity.

21 Q Could an employer fire the individual who
22 is being rude while also raising concerns for
23 being rude?

24 MR. GILLESPIE: Objection. Form.

25 A Again, a hypothetical. Based on more

1 personal relationship outside of work that may
2 impact the work environment and the possibility of
3 impropriety and conflict of interest due to her,
4 which would be Michelle Conner, serving in an
5 oversight role with direct responsibility for the
6 site licensing function.

7 And you're saying that that is not --
8 that concern, as it's stated here, is not
9 protected activity?

10 MR. GILLESPIE: Objection. Form.

11 A Given this is the first time I've seen
12 this document, I don't believe so. Again, without
13 more, I don't believe so.

14 Q So are you saying that it is not
15 protected activity to allege a concern about a
16 supervisor being too close to her subordinates to
17 effectively and independently perform her duties?

18 MR. GILLESPIE: Objection. Form.

19 A As stated, I do not believe so.

20 MS. LEIDICH: Still want that break,
21 Mr. Gillespie?

22 MR. GILLESPIE: Whenever you're ready, I
23 could use one.

24 MS. LEIDICH: All right. I think this
25 would be a good time.

1 after that would be that she was not blocked.

2 Q Can you identify for me the protected
3 activity in this e-mail?

4 A I don't know that there is any protected
5 activity in this e-mail alone as it stands.

6 Q Do you see any nuclear safety concerns in
7 this e-mail?

8 A Not in this e-mail.

9 MS. LEIDICH: Next we'll be moving on to
10 Tab 10, which will be marked Exhibit 6.

11 A/V TECHNICIAN: Stand by.

12 (Hilton Deposition Exhibit 6 marked for
13 identification and is attached to the transcript.)

14 Q And this is another e-mail from
15 Ms. Wetzel to Mr. Shea, or a series of e-mails,
16 rather, around May 7, 2018.

17 You can take a moment to look at this
18 document and then answer, do you recognize it?

19 A I do not recognize this document.

20 Q Did you consider this document when
21 determining whether or not there was a violation
22 in this case?

23 A No, I did not.

24 Q Okay.

25 A Again, I didn't make that determination.

1 actual basis. It doesn't tell the whole story.
2 It would require speculation to -- to guess as to
3 whether that's the entire story.

4 Q Is it retaliatory for a supervisor to ask
5 HR to investigate a concern?

6 MR. GILLESPIE: Objection. Form.

7 A It could be. It would depend on the
8 circumstances. That would be a hypothetical
9 question.

10 Q When would it be retaliatory?

11 A If it's based on -- if it's -- if the
12 actual reason is at least in part on protected
13 activity, then it would be retaliatory.

14 Q So a concern based in part on protected
15 activity is retaliatory and not protected itself?

16 MR. GILLESPIE: Objection. Form.

17 A That's not the case we're talking about
18 here. We didn't investigate that case at all.
19 We've talked about Ms. Henderson -- or
20 Ms. Wetzel's case and the actions that
21 Ms. Henderson took.

22 Q So you didn't investigate at all in this
23 case whether or not there was any retaliation for
24 protected activity?

25 A That's not what I said.

1 yes, after she received Ms. Henderson's response,
2 yes.

3 Q Do you see any nuclear safety concerns in
4 this e-mail?

5 A Nothing articulated in the e-mail.

6 MR. GILLESPIE: Objection. Form.

7 A Do you see any protected activity in this
8 e-mail?

9 MR. GILLESPIE: Objection. Form.

10 A Not in the e-mail.

11 Q Do you see any chilled work environment
12 concerns in this e-mail?

13 MR. GILLESPIE: Objection. Form.

14 A I do not in this e-mail.

15 MS. LEIDICH: First of all, can we close,
16 actually, Tab 7 and Tab 8. You can go ahead and
17 close those.

18 And the next tab we will open is Tab 11,
19 which should be Exhibit 7.

20 A/V TECHNICIAN: Stand by.

21 (Hilton Deposition Exhibit 7 marked for
22 identification and is attached to the transcript.)

23 Q And this is another Beth Wetzal e-mail to
24 Joe Shea. It occurs about a month after the last
25 e-mail.

1 Ms. Henderson's HR complaint?

2 A I -- that's speculation. Again, I don't
3 know whether they should or shouldn't have. But
4 based on what the protected activity and the
5 investigation that we have, and as the evidence as
6 I understand it, my answer would be no.

7 Q Your answer would be, no, TVA should not
8 have investigated Ms. Henderson's HR complaint?

9 A Again, speculation on -- on the totality
10 of it, which I may not be aware of all of it. But
11 that's my understanding.

12 Q Are you aware of any mistakes that were
13 made during the Office of Investigation's
14 investigation?

15 A I am not.

16 Q Are you aware of any mistakes that were
17 made during the Office of Enforcement review into
18 these violations?

19 A I am not. If you'd like to define
20 "mistakes," but I'm not aware of any mistakes.

21 Q Are you aware of any mistakes of fact in
22 the Office of Enforcement process?

23 A I'm not aware of any mistakes of fact. I
24 know we've changed our conclusion, but I
25 haven't -- I wouldn't call that a mistake.

1 anything that caused me concern in terms of
2 objecting to it.

3 So, yes, it was when the statement was
4 made this happened, I assumed that the people that
5 made that statement, in this case mostly Ian, or
6 when it was written down, that there -- there's
7 evidence to support that. And then I participated
8 in the discussion about going forward from that
9 point in terms of what the appropriate action
10 would be at that point.

11 Q Can you provide an example of some of the
12 perspectives that you supplied in this case?

13 A The only thing that I -- that I -- well,
14 as I mentioned earlier, there's one -- one piece.
15 That there was a -- some discussion about
16 Mr. Czufin and potential deliberate misconduct. I
17 did read that. I did read his transcript a little
18 more closely because I knew that was -- that was a
19 little more later in the game, and we -- we looked
20 at that a little closer at that point. So I did
21 participate that -- in that a little bit more
22 directly.

23 And then the other -- the other thing
24 that I -- I know I participated in was the -- the
25 formatting and the severity level and the

1 sanctions as applied in the policy.

2 Q Did you volunteer your perspectives, or
3 did Ian Gifford ask for them throughout the
4 proceeding?

5 A Both.

6 Q Can you provide any examples of what he
7 may have asked you for?

8 A He may have sent me a draft and said,
9 Does this look reasonable? And I would read it
10 and -- you know, this is what I see, and he would
11 take that.

12 Q Did he ask you to opine on the
13 application of 10 CFR 50.7 to these cases?

14 A I don't recall the question exactly like
15 that, or phrased that way. I guess that would be
16 implicit in -- in the write-ups in terms of, you
17 know, given -- given this -- given this summary
18 that I have, does this look like the case.

19 That's not the language he used, of
20 course, nor the specific question, but that was
21 the fundamental discussion, yes.

22 Q What historical cases did you discuss
23 with Mr. Gifford or Mr. Wilson?

24 A I don't -- my immediate reaction is, I
25 don't believe we referenced any particular cases.

1 Q Are you aware of any historical basis
2 there might be for issuing the violations in this
3 case?

4 MR. GILLESPIE: Objection. Form.

5 A Historical -- I'm not sure I understand
6 the question, to tell you the truth. Historical
7 basis? To my knowledge, there's not a case
8 exactly like this, and there's never -- there's no
9 two cases are the same. They're all
10 fact-dependent.

11 Q I'm wondering because you said you
12 provided sort of a historical perspective. And
13 I'm trying to determine what your historical
14 perspective is that you're providing.

15 A Oh. Based on my -- based on my
16 experience in terms of, for example, when we got
17 into the -- citing the four violations,
18 determining the severity level, did Ms. Henderson
19 fit in the general term of a supervisor or more of
20 a manager, did that -- did that fit more of a
21 Severity Level 3 or a 2, and how -- how did we
22 apply it, the policy, in terms of how we've
23 treated individuals and the -- and the
24 organizational structure in the past to try to get
25 consistency with -- with our general practice and

1 where individuals fit in terms of the -- both the
2 significance of the adverse action versus, you
3 know, termination is one thing, written counseling
4 is another, a comment is another. So where does
5 that fit in the -- in the scale of significance.

6 There's fear of influence, and how they
7 fit, and how the people involved fit in the
8 organization. So that -- that's where there is --
9 you know, an assignment has to be made, and I
10 participate in those kind of discussions.

11 Q Since we're discussing adverse actions
12 and their historical basis, is there any
13 historical basis for considering a complaint to be
14 a violation of NRC regulations?

15 A A complaint to be a -- are you referring
16 to Ms. Henderson's harassment complaint?

17 Q Yes.

18 A Yes, there's been -- we've been -- in
19 terms of a manager not taking what you might call
20 a classic adverse action like termination or pay
21 or something, there have been other examples of
22 taking an action that, you know, is known to yield
23 a result in something down the line.

24 So -- and I referenced Mr. Fiser's case
25 this morning. A big part of that case was the

1 others as a negative action, would be considered
2 by us as an adverse action.

3 Q So would moving someone's office to a
4 less preferential location be an adverse action?

5 A Yes, it could be. In fact, we've had
6 cases like that.

7 Q Have you ever previously issued a
8 violation for an individual filing a complaint?

9 A Again, an individual, are you talking
10 about the filing the harassment complaint that
11 Ms. Henderson filed?

12 Q Yes. I'm asking if in any prior case,
13 before Ms. Henderson's case, if you've ever issued
14 a violation for an individual filing a complaint?

15 A I don't believe that specific -- I don't
16 recall that specific action. Although for some
17 reason I think there was one that involved an
18 investigation, but it was more of a director.
19 This has been years ago. But I don't recall a
20 specific one that fit this exact fact pattern, no.

21 Q On the day after Ms. Henderson filed her
22 harassment complaint, what was the impact to the
23 terms and conditions of Mr. McBrearty's
24 employment?

25 MR. GILLESPIE: Objection. Form.

1 A On the next day?

2 Q Yes.

3 A He was then subject to an investigation.

4 Q And is being subject to an investigation
5 an impact to the terms and conditions of someone's
6 employment?

7 A Could be.

8 Q So is every investigation that's
9 undertaken an adverse action?

10 A No.

11 Q In what case is it not an adverse action?

12 A When there is no protected activity that
13 serves as part of the basis for moving that
14 investigation.

15 Q So do you first determine whether or not
16 there is a nexus to protected activity with an
17 action, and then decide whether or not it's an
18 adverse action?

19 A I never really viewed it as determining
20 them all in a very specific order. So that
21 question is a little different.

22 It goes to the -- any change in terms and
23 conditions of your employment could be an adverse
24 action, if the reason is taken in part because of
25 protected activity.

1 A If it's a change in conditions of terms
2 of employment, yes, it could, if it could result
3 in a -- if it could result in a -- an
4 environment -- I was trying to figure out the
5 right word I want to use -- an environment where
6 others would be deterred from raising a concern,
7 we would generally consider that as an adverse
8 action.

9 The severity level varies immensely, of
10 course, depending on what that action is. But,
11 yes, if an employee -- most employees would not
12 view being subject to an investigation as a normal
13 part of their job. And so when you're subjected
14 to an investigation, then that becomes -- and it
15 is done at least in part because of raising
16 protected activity, then that would become an
17 adverse action.

18 That's why sometimes it is and sometimes
19 it isn't.

20 Q So you're saying that the test for an
21 adverse action is whether or not it would deter
22 future employees from raising protected activity?

23 Is that correct?

24 A In a theoretical sense, that's what --
25 yes.

1 personnel action that it could be a pretext for
2 gathering evidence to retaliate, it is an adverse
3 action."

4 Do you see that, Mr. Hilton?

5 A Yes, I do. And that's what I'm trying to
6 say.

7 Q Okay.

8 A It says it better than I was saying it.

9 Q So is it correct to say that the
10 complaint and the investigation together are the
11 adverse action in Violation 1 here?

12 A I would say that the filing of the
13 complaint that triggered the investigation is the
14 adverse action, yes.

15 Q Okay. The filing of the complaint that
16 triggered the investigation is the adverse action.

17 So should TVA not have investigated
18 Ms. Henderson's complaint?

19 A Well, because Ms. Henderson is part of
20 TVA, she shouldn't have filed the complaint
21 with -- with the protected activity as part of.

22 The question is, should they have
23 investigated. No. In my view, no, they shouldn't
24 have.

25 Q Is it the case that employees can never

1 Q Is it your understanding that
2 Mr. McBrearty was not being unprofessional?

3 MR. GILLESPIE: Objection. Form.

4 A I don't know enough of the details to
5 reach a personal conclusion of that. I know
6 there's some discussion about the degree of which
7 his behavior may or may not have influenced that,
8 but I don't -- I don't know enough of the -- of
9 the exact details and the basis of that to reach a
10 conclusion as to whether that was appropriate for
11 the circumstances or inappropriate for the
12 circumstances.

13 Q Are you aware of any evidence to support
14 that Ms. Henderson filed her complaint based on a
15 pretext?

16 A I am not aware of any direct evidence of
17 that. That's not to say it does --

18 Q Are you aware --

19 A That's not to say it doesn't exist; I'm
20 just not aware of that.

21 Q Are you aware of any indirect evidence of
22 that?

23 MR. GILLESPIE: Objection. Form.

24 A No. Again, I don't recall that -- I just
25 don't recall that part of the conversation one way

1 or the other.

2 Q Are you aware of any evidence supporting
3 that the investigation into Ms. Henderson's
4 concerns was a pretext?

5 MR. GILLESPIE: Objection. Form.

6 A The investigation -- oh. It was -- it
7 was a response to her complaint, yes.

8 Q Are you aware of any evidence supporting
9 the theory that the investigation into
10 Ms. Henderson's concerns was a pretext?

11 A Again, I didn't read all the exhibits, so
12 I don't know of anything.

13 Q So the answer is, no, you're not aware of
14 any evidence?

15 A I'm not aware.

16 Q Do you know what factual evidence
17 supports a finding that Ms. Henderson filed her
18 complaint because of protected activity?

19 A I don't recall. It was probably
20 discussed at the time, but I don't recall what it
21 was.

22 Q Did you evaluate whether or not it is
23 possible that Ms. Henderson filed her complaint
24 because of Mr. McBrearty's not protected
25 behaviors?

1 nonparticipating, I think that was in one e-mail
2 in terms of not included, that type of -- that
3 type of behavior.

4 Q One more thing to ask, and then we'll
5 pull up an exhibit.

6 Well, actually, I have two more things to
7 ask before we pull up an exhibit. So just to
8 clarify, you don't have any evidence supporting
9 that -- and I think I already asked this, so
10 forgive me if this is a repeat. You don't have
11 any evidence supporting that the investigation
12 into Ms. Henderson's complaint is a pretext?

13 A I don't personal --

14 MR. GILLESPIE: Objection to form.

15 A I don't personally know of that evidence.

16 Q Okay.

17 A There may be evidence, but I don't know
18 of it.

19 Q Okay. Are you aware of the adverse
20 action in Violation 2?

21 A Yes.

22 Q And it's putting Mr. McBrearty on paid
23 leave. Correct?

24 A Yes.

25 Q How does putting Mr. McBrearty on paid

Attachment 11



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Transcript of George Wilson

Date: June 25, 2021

Case: Tennessee Valley Authority, In re:

Planet Depos

Phone: 888.433.3767

Email: transcripts@planetdepos.com

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Paul S. Ryerson, Chairman

E. Roy Hawkens

Dr. Sue H. Abreu

----- x

In the Matter of :
: Docket Nos.
TENNESSEE VALLEY : EA-20-006 and EA-20-007
AUTHORITY, : ASLBP
(Enforcement Action) No. 21-969-01-EA-BD01

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Virtual Deposition of GEORGE WILSON
Friday, June 25, 2021
6:13 a.m. CST

Job No.: 379701
Pages: 1 - 157
Reported by: THERESA A. VORKAPIC,
CSR, RMR, CRR, RPR

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Virtual deposition of George Wilson taken pursuant to notice before Theresa A. Vorkapic, a Certified Shorthand Reporter, Registered Merit Reporter, Certified Realtime Reporter, Registered Professional Reporter and a Notary Public in and for the State of Illinois.

1 P R O C E E D I N G S

2 THE REPORTER: Will counsel please
3 stipulate that in lieu of formally swearing in the
4 witness, the reporter will instead ask the witness
5 to acknowledge that their testimony will be true
6 under the penalties of perjury, that counsel will
7 not object to the admissibility of the transcript
8 based on proceeding in this way, and that the
9 witness has verified that he is, in fact, George
10 Wilson.

11 MR. LEPRE: Yes.

12 MS. KIRKWOOD: That's fine.

13 THE REPORTER: Would you raise your right
14 hand, please.

15 (The witness was duly sworn.)

16 GEORGE WILSON,
17 called as a witness herein, having been first duly
18 sworn, was examined and testified as follows:

19 EXAMINATION

20 BY MR. LEPRE:

21 Q Good morning. My name is Mike Lepre. I'm
22 outside counsel for TVA. I'm with the law firm of
23 Pillsbury Winthrop Shaw Pittman, and in the room
24 with me are Tim Walsh, Brendan Hennessy, Sid
25 Fowler from our law firm.

1 very much.

2 You understand you can't engage in
3 communication with your counsel while we're on the
4 record that are not recorded by the court
5 reporter?

6 A Yes.

7 Q And also do you understand that you can't
8 read sidebar chat messages or communicate with
9 anyone other than your lawyer at the appropriate
10 times during this deposition?

11 A Yes.

12 Q Great. Now that we have all that out of
13 the way, I'd like to ask you a few questions about
14 your preparation for today.

15 Without getting into any of the details of
16 any of your conversations with an NRC lawyer, what
17 did you do to prepare for today's deposition?

18 A Reached out, got parking, and went over
19 really what the protocol would be, how this would
20 be set up.

21 Q Did you talk to anyone other than NRC
22 lawyers in preparing for the deposition today?

23 A No.

24 Q Did anyone suggest what your testimony --

25 A Well, correction, I've interviewed people

1 from the NRC for positions with my company, but
2 that had nothing to do with this.

3 Q Okay. Had nothing to do with -- when you
4 say "this," had nothing to do with the subject --

5 A Testimony, that is correct.

6 Q Did anyone suggest what your testimony
7 today should include or exclude?

8 A No.

9 Q Did you review any documents to prepare
10 for this deposition?

11 A No.

12 MR. LEPRE: Kyle, actually we have Tab 1,
13 can we pull up Tab 1, please. That's ML21039A881.
14 Thank you.

15 BY MR. LEPRE:

16 Q Mr. Wilson, you can see this is a letter
17 from the NRC dated October 29, 2020.

18 Are you familiar with this document?

19 A Did I sign it out, I mean, I know that I
20 would have did the -- I need to see the whole
21 document, not just the part that you're --

22 Q Sure. Sure. Let's look at the bottom of
23 Page 2. Let's go to the bottom of Page 2.

24 A Yeah, so I signed it out. It's an order
25 imposing the civil penalty, so, yes.

1 Q That's your digital signature at the
2 bottom there?

3 A Yes.

4 Q Great. At PDF Page 4, let's go to PDF
5 Page 4, please. And that's the order imposing
6 civil monetary penalty in this proceeding; is that
7 right?

8 A It looks like it, right. That's correct.

9 Q If we can go to Page 10 of the PDF.
10 Sorry, yes, it's Page 10 of the PDF, please.
11 That's your digital signature at the bottom?

12 A Yes.

13 Q If we go to PDF Page 11, please. Do you
14 see that page?

15 A Yes.

16 Q And is that the appendix that's attached
17 to the letter and order that you signed?

18 A By the computer, yes. I don't have the
19 document pulled out, but, yes, it looks like
20 that's the appendix.

21 Q Great. Thank you.

22 Is there anything you disagree with in the
23 letter, the order or the appendix?

24 A No or I wouldn't have signed it.

25 Q Do you understand that today's deposition

1 A All enforcement cases are under my
2 purview, were under my purview as the director of
3 the Office of Enforcement. So once a case was
4 presented to the Office of Enforcement or to
5 another region and we would go to a panel, I would
6 get briefed and that's how I would become aware of
7 the enforcement cases, the potential enforcement
8 cases.

9 Q When you say --

10 A It's the normal process.

11 Q Are you speaking about an enforcement
12 panel? You said panel.

13 A Enforcement panel or as soon as something
14 would get sent over and we would get assigned, so
15 like with the discrimination case, OI would be
16 sending it up through OGC. OGC then it would come
17 to OE and then it would be talked about.
18 Potential discrimination enforcement is a large
19 resource on the office so that would be something,
20 hey, look, we got some potential enforcement
21 cases, potential discrimination enforcement cases
22 so we would have to staff up for that because
23 those don't happen very often.

24 So I would have known we were potentially
25 getting one and I would have been pre-briefed in

1 but not on the facts, just, hey, there might be
2 some more coming your way.

3 Q At what point would you be notified that
4 there might be some work coming your way?

5 A After some -- after conclusions has been
6 made and things have been substantiated that we
7 thought that the case was going to be ours just in
8 preparation. I wouldn't have any specifics at
9 that time. So I would guesstimate probably two
10 months before we thought we were going to get
11 something we would say, hey, look, something is
12 working through the path. You might have to have
13 work on this.

14 Q Would that be after the OI's investigation
15 is complete? Would that be the first time you'd
16 know about this?

17 A It would be after OI has made -- they've
18 wrapped everything up and they were going to go to
19 OGC, I would start getting notified, hey,
20 something is coming.

21 Q Just so I'm clear, after the investigation
22 report was completed; is that when you'd first
23 hear about this?

24 A On this particular case I know that OI --
25 and my opinion based on what I can recollect OI

1 would have completed something and let me know
2 they completed the investigation. This was their
3 preliminary, and then I would have, hey, you've
4 potentially got something coming to you.

5 Q Similar process for the Wetzel matter?
6 Was there a similar process for the Wetzel matter?

7 A That would be the process for any matter.

8 Q Thank you. As director of enforcement,
9 how many people do you manage?

10 A Directly I think it was 32. But at
11 different times based on different caseload, I'd
12 have to supplement that workforce.

13 Q Did you ever deal with personnel issues
14 while you were the director of enforcement?

15 A Yes, I had to deal with personnel issues.

16 Q So what would have been your typical
17 course of action if a manager you were responsible
18 for said negative things about another manager
19 behind his back and you became aware of that?

20 A I would have sat down and had a discussion
21 with the individual, and then I would have sat
22 down and had a discussion with their supervisor
23 because the managers did not work directly for me.

24 Q Thank you. After those conversations
25 suppose the behavior didn't get any better, it

1 PECs would have happened we would have got back
2 together with a panel and had another panel.
3 After we evaluated all the additional data that
4 came from the transcripts or any additional
5 information that was added after the PECs, so
6 there would be another set of panels after all
7 that to weigh any of the evidence that we received
8 from the PECs before the final decisions would
9 have been made.

10 Q The February 19, 2020 panel would have
11 been the initial panel?

12 A That would have been the of initial, that
13 is correct.

14 Q What was your role on the panel?

15 A I listen to the panel, the outcome that
16 comes, the evidence that's laid out, proposed
17 enforcement actions, and that's my role in the
18 panel.

19 Q Is there a chairperson of the panel,
20 somebody in charge?

21 A Normally the lead enforcement specialist
22 runs the panels. I would have been the senior
23 person in the panel so by my title and my fact
24 that I was in the panel, I would have been the
25 senior person. So I would have been the chair

1 just because I would have been in the panel
2 setting, but the enforcement panel is actually ran
3 by the enforcement specialist and then there's
4 questions asked. So who really runs the panel is
5 the lead enforcement specialist.

6 Q Does the panel vote? How do you make a
7 decision? Do you actually have a vote?

8 A You have to vote, yes. You actually have
9 to have a vote. Everyone says I agree or you can
10 say I disagree and if there is a disagree, you
11 state reasons why and then have you to address the
12 concerns of that panel member. So you have
13 another panel to address the concerns of that
14 panel member. If they still don't agree, then
15 it's elevated.

16 Q I know we've been over this, but just for
17 the record, everyone voted I agree in both of
18 these enforcement --

19 A I do -- yes, I do not recall, Mr. Lepre,
20 that these why elevated. I do not know if we had
21 to have a repanel to address questions or
22 concerns, but these were not elevated.

23 Q You don't recall if there was a repanel;
24 is that correct?

25 A I just know that there was at least two

1 panels for each one. That's all I can remember.

2 Q I just want to make sure I understand, two
3 panels --

4 A There is an initial panel and there would
5 have been another panel after the PECs to reweigh
6 the information and all the material that you have
7 to see if anything has changed because that is the
8 person of the PEC to see if any additional
9 information has changed and will that change the
10 enforcement decision.

11 Q What documents did the initial enforcement
12 panel rely on?

13 A One of them would have been the worksheets
14 that were developed by the enforcement specialist
15 when they had that and then everyone in the panel
16 actually has access to all the documents. So they
17 can read those. So they should read those
18 documents before they come in what with a list of
19 questions. So there is a file -- all the
20 documents that the enforcement specialist and
21 everyone has, everyone in the panel has access to
22 those. So they should be reading the OI
23 summaries, going back and then getting their
24 questions addressed prior to the panel.

25 Q How about the OI reports, would that be --

1 from doing their job specifically with safety at a
2 plant, and you can do that by disciplinary actions
3 or so someone would come in and they would want to
4 raise safety concerns or you're not following this
5 regulation and you don't -- and you're not
6 allowing them -- or you're taking adverse actions
7 against person for doing that protected activity,
8 but it's actually defined in the codes. It lays
9 it out. I don't have them in front of me.

10 Q Is raising a nuclear -- maybe I'll just
11 ask some specific questions.

12 Is raising a nuclear safety concern a
13 protected activity?

14 A Yes.

15 Q Is submitting a complaint to a licensee
16 employee concerns program a protected activity?

17 A In my opinion, yes.

18 Q Is raising a concern that's not
19 substantiated a protected activity?

20 A Yes. You have the right to raise
21 concerns. Just because it's not substantiated --
22 you have the right to raise concerns. You have to
23 have that right. That has to be an open pathway.

24 Q Is raising a concern in bad faith a
25 protected activity?

1 A Raising the concern would be but if you
2 were doing it and using the program wrong, I would
3 say after an investigation I would have to say
4 that -- that would be in a gray area for me if you
5 were using the program wrong.

6 Q What do you mean by a gray area?

7 A You have the right -- it's a protected
8 activity to raise concerns so that has to be an
9 open pathway. If you're telling me that someone
10 is just -- to me it's like calling 911. You only
11 call 911 when there's an emergency, but still it
12 is a protected activity to have the right to raise
13 the concern.

14 Q Is raising concerns to one's supervisor a
15 protected activity?

16 A Based on what the concern is, yes.

17 Q How about raising concerns to human
18 resources, is that a protected activity?

19 A Yes.

20 Q How about raising concerns to human
21 resources about workplace bullying, is that a
22 protected activity?

23 A I would have to go back and pull by the
24 definition. Most of the time when I look at
25 protected activities, I look at how they comply

1 with nuclear safety. So I would have to turn
2 around to see, you know, that might not apply to
3 nuclear safety, that would be personnel conduct.
4 So I would have to go back and look at the
5 regulations. Normally they deal with the safe
6 operations of the plant.

7 Q Are you saying that a protected and
8 difficulty has to raise a nuclear safety concern?

9 A It has to be something about that -- that
10 could drastically impact -- like I said, I need to
11 read the codes again to refresh. I haven't read
12 50.7 in quite a while, so if you'd like to pull it
13 up so I can read it to better inform the answer,
14 I'm good with that. I do not have it in front of
15 me and that's how I would do it.

16 So my answer is I look at 50.7, I look at
17 the manual, I look at the policy. If I have any
18 other concerns, then I would talk to OGC. So if
19 you would like to give me a list and give me some
20 time to look at it, I could answer the question
21 more fully.

22 MR. LEPRE: Let's pull up Tab 7, please.

23 (A certain document was marked Wilson
24 Deposition Exhibit 8 for identification,
25 as of 06/25/2021.)

1 BY MR. LEPRE:

2 Q Let me know when you have it, Mr. Wilson.

3 AV TECH BROCKWAY: It should be in the
4 folder.

5 BY MR. LEPRE:

6 Q Do you have it, Mr. Wilson?

7 A Okay. Thank you.

8 Q Just for the record, there is 10 CFR 50.7
9 Employee Protection. We took this off of the NRC
10 website.

11 Does this look like the regulation you're
12 referring to, Mr. Wilson?

13 A Yes, it does.

14 Q Can you take a quick read through this,
15 please, or as much time as you want, and let me
16 know when you're ready for a few questions,
17 please.

18 A Okay.

19 Q Is raising concerns to HR about workplace
20 bullying a protected activity?

21 A If it caused a person to do -- so I could
22 fit it in here if it was causing a person to do
23 something against their will or against the rules
24 which is what that states there.

25 Q How about raising a concern to HR about

1 someone creating a hostile work environment, is
2 that a protected activity?

3 A I could potentially put it in there if
4 it's affecting my workplace and my inability to do
5 my job properly to keep safety, yes.

6 Q Ms. Henderson's complaint in this case
7 that the TVA investigated that's reflected in the
8 notice of violation, et cetera, are you familiar
9 with Ms. Henderson's -- with that complaint?

10 A That she made a complaint about that, yes.
11 I was familiar with it. I don't recall exactly
12 what it was word for word, but, yes, I do realize
13 she made a complaint, yes.

14 Q Have you seen that complaint?

15 A I do not recall if I read the complaint
16 verbatim. I do recall her PEC where she went over
17 the process she went to file the complaint.

18 Q You may not have read Ms. Henderson's --

19 A I do not remember everything that's in the
20 complaint. I would have it read it. I don't have
21 a recollection right now of everything that she
22 would have stated in that complaint. I do
23 remember the process. I do remember more -- I
24 recollect more from the PEC the process that she
25 went about doing it is what I stated.

1 relationship outside of work that may impact the
2 work environment and possibility of impropriety
3 and conflict of interest due to her serving in an
4 oversight role with direct responsibility for the
5 site licensing function."

6 MR. GILLESPIE: Mr. Lepre, could you
7 repeat the date of the investigation on this
8 report just to make it clear? I think you may
9 have misstated it.

10 MR. LEPRE: Sure. What I see here on Page
11 2, it says investigation initial report June 17,
12 2016.

13 MR. GILLESPIE: Thank you.

14 MR. LEPRE: My apologies if I misstated
15 it.

16 BY MR. LEPRE:

17 Q Is that allegation a protected activity?

18 A It could be. I would have to have a
19 little bit information of what's there and consult
20 with OGC. That looks like directly it's a
21 potential against the company policy but just
22 because someone has a work relationship as I'm
23 reading it, it says it may impact. I would have
24 to evaluate that and do an investigation. I think
25 raising the concern, yes, that should be protected

1 and then you have to follow up on the concern.

2 But I'd also see -- I'd like to see a little bit
3 more on what the impact would be.

4 Q My question is whether this allegation is
5 a protected activity regardless of how the
6 investigation comes out, is this allegation --
7 making this allegation a protected activity?

8 A I think making the allegation to whoever
9 they made it to, yes, should be a protected
10 activity.

11 Q Just two more questions on the protected
12 activity concept.

13 Can an employee say whatever he wants
14 about a supervisor without fear of employment
15 action against him as long as he previously
16 submitted a concern that the supervisor created an
17 a chilled work environment?

18 (Reporter clarification).

19 BY THE WITNESS:

20 A No. The company has conduct issues and
21 they would document it in accordance with their
22 conduct issues.

23 BY MR. LEPRE:

24 Q So is a person --

25 A I don't know what TVA's conduct issues

1 Q Is that your testimony, Mr. Wilson?

2 A Yes.

3 Q That when the complaint triggered an
4 investigation it was an adverse action?

5 A That is correct.

6 Q Has the NRC ever previously issued a
7 violation of 50.7 where an adverse action was
8 filing a complaint?

9 A I know we looked at precedents so I do not
10 recall. I know we looked at precedents and we
11 evaluate conditions associated with this. I do
12 not recall. This could have been the first time
13 that we filed this. We would have looked to make
14 sure there was case law elsewhere that did this,
15 but I do not recollect. This could have been the
16 first time that we filed this. I do not know
17 clearly. I do not know clearly. This might have
18 been the first time that we filed an enforcement
19 action this way, but there was -- I think we had
20 talked about that there was case law elsewhere
21 that we could file it this way.

22 Q Sitting here today, you don't recall that
23 case law; is that correct?

24 A No, I do not recall that case law.

25 Q Let's take a look at the last sentence of

1 this paragraph when -- again, when an
2 investigation so closely related to a personal
3 action that it could be a pretext for gathering
4 evidence to retaliate, it is an adverse action.

5 Are you saying in this sentence that
6 filing the complaint was a pretext?

7 A It's actually saying when an investigation
8 is so closely related it's talking about the
9 investigation.

10 Q So this sentence is saying --

11 A That's how I read, Mr. Lepre, that's how I
12 read that sentence. It says when an investigation
13 is so closely related to a personnel action that
14 it could be a pretext for gathering evidence to
15 retaliate, it is an adverse action. So that is
16 talking about the investigation.

17 Q What evidence do you have that the
18 investigation was a pretext?

19 A Mr. Lepre, I don't recall having that in
20 front of me and it's been awhile. I don't know
21 what that is. Obviously we made the case for that
22 in the enforcement panel as I described earlier.
23 The panel is done by consensus. So obviously the
24 panel members agreed with the facts that were laid
25 out at the time and how that was laid out and how

1 it was presented, that's what it was. I don't
2 recall right now in detail what that is. But at
3 the time we had the evidence to make that -- at
4 the time everything was laid out to make that
5 call.

6 Q You signed this letter so what did you
7 mean -- what do you mean by the use of the term
8 pretext here?

9 A I don't recall exactly. How I would read
10 it now is that this can be -- you could use an
11 investigation to get additional information and
12 then that information would be used to retaliate.
13 So it's pretext. You're using it to get
14 additional information to get additional evidence
15 to retaliate against somebody. That's how I would
16 view it now. I think that's how I viewed it back
17 then, but I don't recollect. Like I said I had --
18 everything was very fresh in my mind at the time
19 and I knew exactly what each word meant and I have
20 looked at these documents in a long time.

21 Q You don't recall today what evidence you
22 relied on when you signed this letter that said
23 that the investigation could be a pretext; is that
24 correct?

25 A Right. I felt confident in my decision

1 and the panel's decision or I wouldn't have signed
2 the letter. I knew the evidence at that time. I
3 just don't recall exactly what it was. Like I
4 said, we looked at the entire circumstances, what
5 happened, the outcome and looked at all the pieces
6 of the puzzle and made the decision.

7 Q Is it your position that TVA should have
8 just ignored Ms. Henderson's complaint and not
9 conducted an investigation?

10 A No. As I stated earlier, Mr. Lepre,
11 anybody has the right if they're feeling harassed
12 or intimidated that they should file something and
13 the employer should do a follow up inspection on
14 it.

15 Q A follow-up investigation?

16 A They need to follow up on the complaint
17 that is filed by the employee whatever means their
18 procedures or policies lay out.

19 Q I don't want to but the words in your
20 mouth, but are you saying it was proper for TVA to
21 follow up on Ms. Henderson's complaint with an
22 investigation?

23 A If that's what their policies and
24 procedures laid out for them to do, they needed to
25 follow up in accordance with -- like I said, I do

1 Q If we could mark this as an exhibit and
2 also this is do you see on the first page this is
3 Mr. Shea's PEC presentation Exhibit No. JF 11.

4 A Okay.

5 Q Have you seen this document before?

6 A I recall reading something like this, yes.
7 I don't know if it's the exact document, but I
8 know I did read e-mail exchange between Ms. Wetzel
9 and Mr. Shea.

10 Q Do you know if this e-mail was part of the
11 protected activity that was -- we were discussing
12 with respect to Ms. Wetzel's case back when we
13 were looking that in Tab 1 just a minute ago?

14 A I can remember reading this and evaluating
15 this. This was part of the overall evidence that
16 we used to make our determination for the
17 enforcement action. I don't know if that answers
18 your question. Because I was reading it so can
19 you repeat your question. I apologize. I was
20 reading it and trying to comprehend it when I was
21 listening to you.

22 Q Is this part of the protected activity
23 that Ms. Wetzel engaged? This e-mail?

24 A I would say that she's raising concerns
25 about Mrs. Henderson's behavior and that would

1 have been part -- in my recollection this would
2 have been part that we would have used where
3 Ms. Wetzel was using the open door policy and
4 talking to her supervisor about potential issues,
5 yes.

6 Q Does this e-mail mention anything about
7 nuclear safety?

8 A No but they could have the potential of
9 nuclear safety, as I had stated earlier Mr. Lepre,
10 if it's not black and white, I will go to OGC to
11 get additional opinion on the protected activity.
12 In this case, this e-mail here has potential to
13 have an impact on safety and I when we talked to
14 OGC was at the panel.

15 Q But it doesn't mention anything
16 specifically about nuclear safety?

17 A No, it does not. It just says a lot of
18 actions but it could put a chill -- you're
19 correct, there's nothing out there. It just has
20 the intention of other issues that could have an
21 impact, like I said --

22 Q I'm sorry?

23 A Once again, like I said, OGC set the panel
24 and OGC is in there and we asked and they can
25 explain more from a regulatory perspective on how

1 this fits the definition of 50.7.

2 Q Does it mention it anything -- I'm sorry.
3 Does it mention anything about a chilled work
4 environment?

5 A No. You know, there's not a lot super
6 specific there. It just makes you -- it leads to
7 a perception that there's issues there and we
8 talked about -- this we talked about and evaluated
9 and like I said, we rely upon OGC's determination
10 for the impact on 50.7 and they set the panels.

11 Q If you were worried about two people in
12 your organization having a relationship that could
13 impact their ability to do their jobs in an
14 independent manner, would you ask somebody to look
15 into that?

16 A If the people were doing stuff and they
17 were not doing it correctly within the procedures
18 and it has an impact and they weren't doing that
19 job, yes, I would have to look at that.

20 Q Would it have been unreasonable for
21 Ms. Henderson to have done so?

22 MS. KIRKWOOD: That's a very vague
23 question. I know we're rushing, but I'm not sure
24 Mr. Wilson knows what you're talking about.

25 BY MR. LEPRE:

Attachment 12



Planet Depos[®]
We Make It *Happen*[™]

Transcript of David Solorio

Date: July 2, 2021

Case: Tennessee Valley Authority, In re:

Planet Depos

Phone: 888.433.3767

Email: transcripts@planetdepos.com

www.planetdepos.com

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD
Docket Nos. EA-20-006 and EA-20-007

- - - - -x
In the Matter of : ASLBP No.
TENNESSEE VALLEY AUTHORITY : 21-969-01-EA-BD01
(Enforcement Action) :
- - - - -x

DEPOSITION OF DAVID SOLORIO
CONDUCTED VIRTUALLY
Friday, July 2, 2021
6:13 a.m. PST

Job No.: 379705
Pages: 1 - 174
Reported By: Charlotte Lacey, RPR, CSR No. 14224

1 P R O C E E D I N G S

2 THE REPORTER: Will counsel please stipulate
3 that in lieu of formally swearing in the witness, the
4 reporter will instead ask the witness to acknowledge
5 that their testimony will be true under the penalties of
6 perjury, that counsel will not object to the
7 admissibility of the transcript based on proceeding in
8 this way, and that the witness has verified that he is,
9 in fact, David Solorio.

10 MR. HENNESSEY: Brendan Hennessey for TVA.
11 We -- we agree to the stipulation.

12 MR. STEINFELDT: Thomas Steinfeldt for the NR
13 C. We agree as well.

14 THE REPORTER: Mr. Solorio, do you hereby
15 acknowledge that your testimony will be true under the
16 penalties of perjury?

17 THE WITNESS: Yes.

18 THE REPORTER: Thank you.

19 Proceed, Counsel.

20 EXAMINATION

21 BY MR. HENNESSEY:

22 Q Good morning, Mr. Solorio. Would you please
23 state your full name for the record.

24 A David Leopold Solorio.

25 Q And what is the name of your employer and job

1 A Yeah, I concurred on it on October 29th, yeah.

2 Q And -- and what does it mean to have concurred
3 on it?

4 A You've read it. You don't have any comments,
5 and you agree with it.

6 Q Okay. When you concurred in this document,
7 did you understand the contents of the letter and the
8 order and the appendix to the order?

9 A Yeah. Yes.

10 Q And do you understand that today's deposition
11 is related to this order and the violations contained in
12 the order?

13 A I guess no. I didn't read all the documents
14 you filed, so I wouldn't...

15 Q Sure. Okay. Well, when -- throughout the
16 day --

17 A Yeah.

18 Q When I refer to the NRC's claims or the case
19 or the violations, can we agree that I'm referring to
20 the violations that are laid out in particular in the
21 appendix to the order?

22 A Okay. Yes.

23 Q Just to make sure we're on the same page of
24 what we're talking about today.

25 A Okay.

1 dealing with that. It's too much work clicking all over
2 the place, so...

3 Q Are you familiar with the term "alignment
4 meeting"?

5 A Yeah, I think so. I'm trying to remember.

6 Q What is your understanding of what an
7 alignment meeting is?

8 A I believe that's something that my office
9 director will have with peers is -- depending on the
10 situation and -- and/or his boss up in the executive
11 director of operations. I think that's when they --
12 these things have occurred.

13 Q So who attends an alignment meeting then?

14 A I can't remember personally being invited to
15 many or any, but it would be my office director, maybe
16 the office director of the region or the program office
17 that would be involved, and my office director's boss, I
18 believe. Since I haven't been called to many, I can't
19 really be sure who's there.

20 Q Okay. Were you a participant in the
21 enforcement panel in this case?

22 A Yes. I would always be for the investigation,
23 yes.

24 Q And -- and were there multiple enforcement
25 panels or just one in this case?

1 travel vouchers as an investigative tool?

2 A I don't -- I don't believe so, because I don't
3 think she was reviewing them. I think Shea ended up
4 reviewing them is what I thought was discussed at some
5 point or I read about.

6 Q Does Ms. Henderson -- strike that. Excuse me.
7 Does Ms. Wetzel explain in this e-mail chain
8 what she is concerned Ms. Henderson may investigate her
9 for?

10 A Like, she doesn't state it like that. She
11 says, based on all these other behaviors of
12 Ms. Henderson, I'm worried she -- I'm worried she will
13 use my vouchers to get at me. That's all I can see
14 here. Therefore, will you do -- oversee my trip.

15 Q Is the submission of travel vouchers a
16 protected activity?

17 A Not -- I don't believe it would be. I
18 don't -- I mean, maybe a lawyer could get there, but I
19 can't see how.

20 Q Do you -- does Ms. Wetzel raise a nuclear
21 safety issue in this e-mail?

22 A Well, she raises a concern about how Henderson
23 is creating an environment that seems retaliatory
24 towards people. So it is kind of like information
25 related to a chilling environment, you know, be careful

1 Q The second paragraph of that reads "The NRC
2 staff determined that filing the formal complaint that
3 triggered an investigation is considered an adverse
4 action in this case. When an investigation is so
5 closely related to a personnel action that it could be a
6 pretext for gathering evidence to retaliate, it is an
7 adverse action." Would you please elaborate and explain
8 to me what those two sentences mean?

9 A Well, a formal complaint is being filed by
10 Ms. Henderson, and then the investigation is OGC.
11 Because she, in her complaint, lists, you know, going to
12 the NRC. Just make a simple example there. And then
13 after the OGC investigation is complete, people are put
14 on admin leave. I think in both cases, it was admin
15 leave. So it appears to the NRC that that investigation
16 was conducted to find evidence to take those personnel
17 actions.

18 Q And so it was TVA's investigation that was a
19 pretext for gathering evidence? Is that what this says?

20 A That's what I believe it says.

21 Q And that's what you understand it to say when
22 you concurred in this letter?

23 A Yes. I -- I -- need input from our lawyers
24 and, you know. For instance, in my vocabulary, I don't
25 use the word "pretext." I would have used something

1 else, but...

2 Q What evidence did the NRC have, or has, that
3 TVA's investigation was a pretext for gathering evidence
4 to retaliate?

5 A Please just ask the question again.

6 Q Of course.

7 What evidence has the NRC considered that
8 indicates that TVA and its investigation was a pretext
9 for gathering evidence to retaliate?

10 A Yeah, I'm not recalling what that would be.

11 Q Do you know whether the NRC had evidence that
12 TVA's investigation was a pretext for gathering evidence
13 to retaliate?

14 A I would say no to that question.

15 Q "No," you don't know, or "no," the NRC didn't
16 have evidence of pretext?

17 A No, that I don't know.

18 Q In your evaluation of this case, did you
19 determine whether Ms. Henderson filed her complaint in
20 good faith?

21 A I'm not sure we -- I can't remember having a
22 discussion like that, talking about that. Doesn't mean
23 it didn't happen. I just can't remember.

24 Q Do you have an opinion, after your review of
25 this case, whether Ms. Henderson believed that she was

1 facing a hostile work environment?

2 A Well, she definitely felt stressed out by her
3 colleagues. Seems like -- you know, my view of whether
4 or not it was hostile, I can't say I agree with her,
5 based on my adult life and what I've experienced. But
6 she had issue -- concerns that she wrote down.

7 Q And so, based on your review of this case and
8 the PEC testimony, would you agree that Ms. Henderson
9 filed her complaint because she had concerns about a
10 hostile work environment?

11 A Yes.

12 Q Is it the enforcement staff's position that an
13 individual cannot file an HR complaint if the complaint
14 is somehow potentially related to a protected activity?

15 A No. We have similar processes here, so...

16 Q Is it the enforcement staff's position that a
17 licensee cannot investigate an HR complaint if it
18 relates to protected activity?

19 A It's not my view they can't. I can't speak
20 for everyone here, but I would say that's allowed, in my
21 book, because you have to have a good work environment
22 no matter where you are.

23 Q How would a licensee determine when -- whether
24 a harassment investigation is not potentially, as this
25 NOV says, "closely related to a personnel action"?

Attachment 13



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Transcript of Ian Gifford

Date: June 30, 2021

Case: Tennessee Valley Authority, In re:

Planet Depos

Phone: 888.433.3767

Email: transcripts@planetdepos.com

www.planetdepos.com

1 DEPOSITION OF IAN GIFFORD

2 Wednesday, June 30 2021

3

4 STENOGRAPHER: The attorneys participating
5 in this deposition acknowledge that I will be
6 reporting this deposition remotely and that the
7 witness has verified that he is Ian Gifford. In lieu
8 of an oath administered in person, the witness will
9 verbally declare his testimony in this matter is under
10 penalty of perjury.

11 The parties and their counsel consent to
12 this arrangement and waive any objections to this
13 manner of reporting or admissibility of the
14 transcript. Please indicate your agreement by stating
15 your appearance and your agreement on the record,
16 starting with scheduling counsel.

17 MR. HENNESSEY: Brendan Hennessy, we agree.
18 Counsel for TGI.

19 MR. GILLESPIE: Joe Gillespie for the NRC,
20 we also agree.

21 STENOGRAPHER: Mr. Gifford, would you
22 please raise your right hand?

23 Do you swear or affirm the testimony you
24 are about to give in this matter will be the truth,
25 the whole truth, and nothing but the truth?

1 MR. GIFFORD: Yes.

2 STENOGRAPHER: Thank you. You may proceed.

3 IAN GIFFORD,

4 was thereupon called as a witness herein, and after
5 having first been duly sworn to testify to the truth,
6 the whole truth and nothing but the truth, was
7 examined and testified as follows:

8 EXAMINATION

9 BY MR. HENNESSEY:

10 Q. So, Mr. Gifford, starting out, I'd like you to state
11 the name of your employer and your job title.

12 A. The United States Nuclear Regulatory Commission. I'm
13 a program manager.

14 Q. And have you ever testified under oath before?

15 A. I have not.

16 Q. Do you understand what it means to testify under oath?

17 A. I do.

18 Q. And I guess that means you haven't been deposed
19 before; is that right?

20 A. That's correct.

21 Q. So I think it makes sense for us to go over some of
22 the ground rules. I'm sure your counsel has talked to
23 you a little bit about how this works, but I'd still
24 like to go over the rules for today just so that we're
25 on the same page.

1 because I find that's easier for you to sort of track
2 on your end. If you could go to pdf page 5. Do you
3 see the box above where it says "Official Record
4 Copy"?

5 A. Yes.

6 Q. Can you explain to me what that box is and what the --
7 it lists a bunch of names -- what those names
8 represent?

9 A. The box is a concurrent block, and it indicates the
10 individuals that reviewed the letter before it was
11 issued. So their office and, in some cases, branch.
12 Where they work is listed on the top line, the names
13 of the individuals is on the second line, and the
14 date that they provided their concurrence is on the
15 third line.

16 Q. Okay. And the -- I guess it's the, sort of, second
17 column there, is that your name there?

18 A. Yes, IGifford is me.

19 Q. Okay. And so you issued concurrence in this -- in the
20 issuance of this letter; is that right?

21 A. Correct.

22 Q. Did you participate in the drafting of this order and
23 its appendices?

24 A. I did.

25 Q. So you're familiar with the contents of the appendix

1 A. It's how the NRC decides whether to move forward with
2 an apparent violation.

3 Q. And how many enforcement panels were there in this
4 case?

5 A. There was an enforcement panel prior to the apparent
6 violations being issued. There was a panel following
7 the preliminary enforcement conferences. And I
8 believe there was a panel after TVA had responded to
9 the notice of violation and proposed civil penalty
10 before issuing the order imposing civil penalty.

11 Q. And do you recall how long each of these panels -- the
12 discussion of these panels, rather, lasted each time?

13 A. Each was different, but my recollection is that they
14 were around an hour or two.

15 MR. HENNESSEY: Can we pull up -- this is
16 going to be Tab 3, please. I think this will be
17 Exhibit 3 now.

18 MARKED FOR IDENTIFICATION:

19 EXHIBIT 3

20 9:40 a.m.

21 MR. HENNESSEY: Austin, could you also
22 put -- while we're looking at 3, put 4 in the DropBox
23 as well?

24 PLANET DEPOS TECH: Sure. 3 just uploaded.
25 You should refresh the folder and it should be there.

1 One moment on 4.

2 MR. HENNESSEY: Okay. And then 4 will be
3 marked Exhibit 4.

4 MARKED FOR IDENTIFICATION:

5 EXHIBIT 4

6 9:41 a.m.

7 BY MR. HENNESSEY:

8 Q. Mr. Gifford, tell me whenever you've been able to look
9 at Exhibit 3 and get it on your computer.

10 A. We have Exhibit 3.

11 MR. GILLESPIE: Take a look at it.

12 BY MR. HENNESSEY:

13 Q. Yeah, take a moment to look at it.

14 A. Okay, I've looked at it.

15 Q. Great. Can you tell me what -- what this document is?

16 A. It's an email that I sent to the discovery capture
17 box that contains four attachments related to
18 Enforcement Action 20-007. There's also an
19 enforcement notification and a TVA Enforcement Action
20 Worksheet.

21 Q. Okay. So the first -- I just want to make sure I
22 understand this document. The first attachment is the
23 Enforcement Action Strategy Form; is that right?

24 A. That's correct.

25 Q. And that was approved -- if you look at -- it's -- I'm

1 Q. Okay. And then after that, the fourth attachment is
2 the "Enforcement Action Worksheet." Correct?

3 A. What page would that be on?

4 Q. Pdf page 15.

5 A. Yes.

6 Q. And this was created for the February 19th, 2020,
7 enforcement panel; is that accurate?

8 A. I don't see the exact date the Enforcement Action
9 Worksheet was generated.

10 Q. Okay. I'm looking -- if you look at the -- again, pdf
11 page 15, it says -- the first row there, it says EA #,
12 and then below that, it says Date of Panel, and it
13 says February 19, 2020. Does that indicate that this
14 form was used for that panel?

15 A. That just indicates that that is the date that the
16 panel occurred.

17 Q. Do you have any recollection of -- well, let me strike
18 that.

19 Did you create this Enforcement Action
20 Worksheet?

21 A. I have to review. There were two enforcement
22 specialists that were working on this case. We often
23 collaborated on documents. Sometimes we would each
24 individually write a document. I would have to
25 review it more carefully to determine if this is one

1 that I wrote by myself or if it was in collaboration
2 with another enforcement specialist or if the other
3 enforcement specialists drafted this particular
4 action worksheet.

5 Q. Okay. Explain to me how that breakdown works between
6 you and this other enforcement specialist.

7 A. There were two OI reports related to this case. One
8 was for McBrearty and one was for Wetzel. So two
9 separate enforcement specialists were tasked as the
10 lead for each respective OI report. I was the lead
11 for the OI report related to Wetzel, and Catherine
12 Thompson was the enforcement specialist with the lead
13 for McBrearty.

14 Because the two cases were so closely
15 intertwined with individuals involved, the Office of
16 Enforcement decided to combine those two OI reports
17 into a single case, and so we collaborated in
18 drafting those documents.

19 Q. How long after beginning your work on this case was
20 the decision made to make one -- combine the two
21 investigations into one -- how did you put it -- case,
22 I guess?

23 A. From my involvement when I came onto this case, it
24 appeared as if that discussion had already started,
25 so I believe there are -- there had already been

1 were issued; is that correct?

2 A. Yes.

3 Q. As an enforcement specialist reviewing or processing a
4 case, is evaluating whether 50.7 has been violated
5 part of your responsibilities?

6 A. Yes.

7 Q. Can you tell me how an enforcement specialist goes
8 about determining whether specific activities are in
9 violation of 50.7?

10 A. I'm sorry, could you repeat the question?

11 Q. Yeah. So as an enforcement specialist, how do you go
12 about determining whether the information you are
13 presented with constitutes a violation of this
14 regulation?

15 A. So you would review the OI report to understand the
16 circumstances of the case, and you would compare the
17 facts that you read in the OI report to the
18 regulation 50.7.

19 Q. And is that what you did in this case?

20 A. Yes.

21 Q. Can you give me what you understand "protected
22 activity" to be? Tell me what you understand
23 "protected activity" to be.

24 A. Protected activity is something that an employee does
25 for which they cannot be discriminated against based

1 on.

2 Q. Is raising a safety concern a protected activity?

3 A. Yes.

4 Q. Does the safety concern have to be a nuclear safety
5 concern to be protected activity?

6 A. Yes.

7 Q. Is submitting a complaint to an Employee Concerns
8 Program, or ECP for shorthand, a protected activity?

9 A. I'm hesitant to say -- to speak in absolute terms.
10 It would depend on the context of the ECP complaint,
11 but generally I would agree with under, you know,
12 most circumstances, yes.

13 Q. Is simply raising a concern with an ECP program
14 protected activity?

15 A. I would have to know more about the specific ECP
16 complaint. I wouldn't say definitively one way or
17 the other. I wouldn't say it is or isn't, absent
18 more information about the concern that was raised.

19 Q. Is raising a concern about a chilled work environment
20 protected activity?

21 A. Yes.

22 Q. Is raising a concern about an environment that
23 discourages employees from raising concerns,
24 protected?

25 A. Could you repeat that?

1 Q. Is raising a concern about an environment that
2 discourages employees from raising concerns a
3 protected activity?

4 MR. GILLESPIE: Objection. Form.

5 A. In my opinion, it would depend on the content of the
6 concern. Similar thing, I would be hesitant to speak
7 in absolutes.

8 BY MR. HENNESSEY:

9 Q. So there might be -- it's possible that an employee at
10 a nuclear facility could raise a concern about
11 environment that they're in that discourages employees
12 from raising concerns and it might not be protected
13 activity?

14 MR. GILLESPIE: Objection. Form.

15 A. I would have to know the exact circumstances, but --
16 I think you'd have to know more to make that
17 determination of whether it was a protected activity
18 or not.

19 BY MR. HENNESSEY:

20 Q. Is raising a concern about a hostile work environment
21 a protected activity?

22 A. Similarly, I would need to know more information
23 before making a determination whether it was
24 protected activity or not.

25 Q. So I guess the inverse of that is that there could be

1 a concern about a hostile work environment that would
2 not be a protected activity is what you're saying.

3 Correct?

4 A. There could be. I wouldn't eliminate that as a
5 possibility without knowing more.

6 Q. Is an employee at a nuclear facility raising concerns
7 to their supervisors a protected activity?

8 A. It would depend on the nature of the concerns being
9 raised and the circumstances surrounding that
10 concern.

11 Q. If the concern was related to safety, would it be a
12 protected activity?

13 A. Again, I'm hesitant to answer in absolutes, but
14 raising a safety concern would be a strong candidate
15 for a protected activity.

16 Q. And would you say that raising a nuclear safety
17 concern to one's supervisor is protected under 50.7?

18 A. Yes.

19 Q. Is an employee's raising concerns to their company's
20 HR protected?

21 A. It would depend on the content of the concern.

22 Q. Is it a protected activity to allege a concern about a
23 supervisor being too close to his or her subordinates
24 to effectively perform their responsibilities?

25 A. Could you repeat the question, please?

1 Q. All right. So is it a protected activity if someone
2 alleges that they have a concern about a supervisor
3 being too close to their subordinates to effectively
4 perform their job?

5 A. It would depend on the -- on the jobs and -- and,
6 kind of, the circumstances surrounding it.

7 Q. So if you had somebody that was working at a nuclear
8 power plant and somebody else alleged that they
9 thought that they were too close to their subordinates
10 to effectively provide oversight of those
11 subordinates, would that complaint be a protected
12 activity?

13 MR. GILLESPIE: Objection. Form.

14 A. It would depend on the roles that those individuals
15 played and what the individual filing the complaint
16 was concerned about.

17 BY MR. HENNESSEY:

18 Q. If the individual was concerned that that other
19 employee could not perform their duties at the nuclear
20 facility, would that be sufficient to create a
21 protected activity?

22 MR. GILLESPIE: Objection. Form.

23 A. Could you repeat the question, please?

24 BY MR. HENNESSEY:

25 Q. All right. So if one employee at a nuclear power

1 plant is concerned that another employee can't -- that
2 has a responsibility at that nuclear power plant
3 cannot perform their duties because of a relationship
4 with somebody else, would raising that type of concern
5 constitute protected activity under 50.7?

6 MR. GILLESPIE: Repeat my objection.

7 A. It could depend on what the duties were that were
8 involved.

9 BY MR. HENNESSEY:

10 Q. Okay. Is it protected activity to speak openly about
11 the behavior of one's colleagues?

12 A. It would depend on what that behavior was and what
13 activities that was related to.

14 Q. Okay. Do you have an understanding of what
15 retaliation in the nuclear workplace constitutes?

16 A. Yes.

17 Q. Is raising a concern about someone else engaging in
18 protected activity retaliation?

19 A. Could you repeat the question, please?

20 Q. Is raising a concern about someone else engaging in
21 protected activity retaliation?

22 A. Is raising a concern about somebody engaging in
23 protected activity retaliation? Is that the
24 question?

25 Q. That's the question.

1 Violation 3 the same discrimination that occurred in
2 Violation 1? If you scroll up, that's on page 13.

3 A. When we say discrimination --

4 Q. Adverse action.

5 A. Excuse me. What did you say?

6 Q. Yeah. Or let's use adverse action. Is the adverse
7 action the same?

8 A. Yes.

9 Q. So if we look at Violation 3, at the bottom of pdf
10 page 15, it says, "The NRC staff determined that
11 filing the formal complaint that triggered an
12 investigation is considered an adverse action in this
13 case. When an investigation is so closely related to
14 a personnel action that it could be a pretext for
15 gathering evidence to retaliate, it is an adverse
16 action."

17 Do you see that?

18 A. I do.

19 Q. Can you explain to me what the pretext is in these two
20 sentences, I guess?

21 A. The pretext is the adverse action. The pretext is
22 filing the formal complaint that triggers an
23 investigation.

24 Q. So the pretext is -- Ms. Henderson's filing of the
25 complaint was the pretext in this complaint.

1 A. It was filing of the complaint that triggered an
2 investigation. We did not separate into two separate
3 adverse actions. We considered that in its entirety
4 as the adverse action, so that, in entirety, was the
5 pretext.

6 Q. So was TVA's investigation a pretext to firing
7 Ms. Wetzel for protected activity?

8 A. It was part of it. It was included in the adverse --
9 the adverse action was pretext, and the investigation
10 was part of the adverse action.

11 Q. I'm not sure that really answered my question. My
12 question is, did you conclude in your work reviewing
13 this case that TVA's investigation was a pretext for
14 firing Ms. Wetzel for protected activity?

15 A. I think to help answer your question, it would be
16 helpful if we defined "pretext."

17 Q. Well, it's your letter. I don't -- how would you
18 define pretext?

19 A. Well, it's the NRC's letter, and there are a lot of
20 people that contributed to this document, so we rely
21 on other experts when drafting these sorts of
22 documents, so...

23 Q. So are you not familiar with the -- what the use of
24 "pretext" in this letter is?

25 A. I'm familiar with the use of "pretext," but when

1 we're asking whether something was considered part of
2 pretext, it would be helpful if we defined what
3 exactly we're referring to in pretext.

4 Q. Well, when you -- as we reviewed earlier, you were one
5 of the people that approved this letter. What did you
6 consider "pretext" to mean when you approved this
7 letter?

8 A. I took "pretext" to mean, in the context of this,
9 that the investigation was being used to gather
10 evidence to retaliate.

11 MR. GILLESPIE: Brendan, I apologize.
12 Could we move on the share screen to page 15?

13 MR. HENNESSEY: Oh, yeah. Austin, would
14 you mind doing that?

15 MR. GILLESPIE: Thank you.

16 MR. HENNESSEY: Joe, feel free to pipe in
17 and direct them if you need to throughout.

18 MR. GILLESPIE: Okay. All right. Thank
19 you.

20 THE WITNESS: You would need to scroll down
21 because it goes onto the first sentence of page 4.
22 There we go. That's the one. Thank you.

23 MR. HENNESSEY: Can I ask the court
24 reporter to read back Mr. Gifford's last answer before
25 this interlude about the document?

1 (The requested portion of the record was
2 read as follows by the reporter at
3 2:28 p.m.)

4 STENOGRAPHER: Question: "I took pretext
5 to mean, in the context of this, that the
6 investigation was being used to gather evidence to
7 retaliate."

8 BY MR. HENNESSEY:

9 Q. So it's your position that TVA's investigation was a
10 pretext for firing Ms. Wetzel for protected activity.
11 Correct?

12 A. Both the filing of the formal complaint and the
13 investigation.

14 Q. And what evidence did you use to determine that TVA's
15 investigation was a pretext?

16 A. The evidence that was gathered as part of the
17 investigation was used to retaliate.

18 Q. "The evidence that was gathered as part of the
19 investigation was used to retaliate." I'm not sure I
20 understand that. Could you expand upon that for me?

21 So my question is, you -- you say that your
22 determination was that TVA used their investigation as
23 a pretext for firing Ms. Wetzel for protected
24 activity. And my question is, what specific evidence
25 did you rely upon in determining that that

1 investigation was pretextual?

2 A. My position -- this document here is the NRC's
3 position, and particularly in this instance it's
4 referring to a legal understanding of pretext. So we
5 relied on the other staff involved in processing this
6 case. My specific personal knowledge of pretext was
7 not the -- the deciding opinion as to why this was an
8 adverse action.

9 Q. So you cannot point to any specific evidence and
10 you're not aware of any specific evidence that TVA's
11 investigation was a pretext. Correct?

12 MR. GILLESPIE: Objection. Form.

13 A. There was evidence that the investigation was used
14 and relied upon in the adverse actions for these
15 employees.

16 BY MR. HENNESSEY:

17 Q. Right. And what in the investigations indicated that
18 TVA's investigation was a pretext for firing
19 Ms. Wetzel for protected activity?

20 A. The formal complaint that triggered the investigation
21 is what was the adverse action specifically for this
22 Violation 3. So I don't want to -- I don't want to
23 start blending Violation 4. I guess I'm unclear kind
24 of what the -- what question you're asking.

25 Q. So I -- yeah, I think it's a simple question. Your

1 statement was that this violation is based on TVA
2 conducting an investigation that was a pretext for
3 firing Ms. Wetzel for protected activity.

4 And my question was, what evidence did you
5 rely on -- you, the person who prepared -- helped sign
6 off on this and worked on this case and the other NRC
7 employees, in determining that the investigation was
8 pretextual?

9 A. My understanding is that -- what's that?

10 Q. Sorry. I was going to say, if you can't point to any
11 specific evidence that TVA's investigation was
12 pretextual right now, you can tell me that and we'll
13 move on.

14 A. I think I'm hesitant to answer a question that I'm --
15 for some reason, we aren't -- for some reason, it's
16 not clear to me what question you're asking, so I'm
17 having a tough time answering.

18 The adverse action here was filing a
19 formal complaint that triggered an investigation.
20 There is no dispute that a formal complaint was filed
21 and an investigation was conducted, so I am having
22 trouble with thinking of evidence that that happened
23 when, to me, it's clear that it did happen.

24 Q. Right. And -- I'm looking for the evidence that TVA
25 fired Ms. Wetzel because she reported a chilled work

1 Q. And how do those fall within the definition of
2 protected activity in 50.7 that we reviewed earlier?

3 A. We'll go -- I guess we'll go by each one?

4 Q. Sure.

5 A. So chilled work environment concerns relate to a
6 hesitation to raising nuclear safety concerns.

7 The -- it would basically be the content of the
8 concerns raised in the Employee Concerns Program.

9 And then raising concerns in response to non-cited
10 violations, that's raising a nuclear safety concern.

11 Q. And what factual evidence did you have to support the
12 existence of these protected activities?

13 A. So Catherine Thompson was the enforcement specialist
14 that was assigned to the cases related to Violations
15 1 and 2, so she would have had more detailed
16 knowledge of the specifics, but I would say that we
17 would have used information in the OI reports,
18 information shared during the PEC, and documents
19 provided to support the PEC when making that
20 determination.

21 Q. The filing of ECP complaints, would that still be
22 protected activity if those ECP complaints were
23 eventually found to be unsubstantiated -- could not be
24 substantiated?

25 A. Ability to -- the status of substantiated or

1 unsubstantiated, by itself, doesn't define whether
2 something is a protected activity.

3 Q. And would the complaints be protected activity even if
4 they were raised in bad faith?

5 A. I'm hesitant to provide a definitive answer on a
6 hypothetical.

7 Q. If TVA had concluded that Mr. McBrearty's concerns
8 were raised in bad faith, would that be a legitimate
9 reason for taking adverse action against him?

10 A. I'm not sure what TVA's policies are on taking of
11 adverse actions, but I would have to know the
12 specifics of how they came to determine that they
13 were made in bad faith, kind of why they felt that
14 way, and I would need to know more detail about the
15 nature of the concerns.

16 Q. What evidence did the NRC rely on, or did -- let me
17 strike that.

18 Did the NRC develop or did you review any
19 evidence demonstrating that Mr. McBrearty's complaints
20 were based on fact and legitimate?

21 A. It's my understanding that the NRC reviewed documents
22 from TVA related to these ECP complaints, but
23 Catherine Thompson would be more appropriate to
24 answer the exact specifics. As -- as I mentioned,
25 she was the enforcement specialist for this case.

1 Q. Okay. So you're not as familiar with the facts of
2 Mr. McBrearty's case?

3 A. That's correct.

4 Q. But you collaborated with Ms. Thompson on the
5 enforcement worksheets that formulated the apparent
6 violations. Correct?

7 A. Correct.

8 Q. So you do have some familiarity with what would have
9 formed the basis for finding violations against TVA
10 related to Mr. McBrearty. Correct?

11 A. Yes, I have some familiarity.

12 Q. Were you at the enforcement -- was there more than one
13 enforcement panel that discussed Mr. McBrearty and the
14 violations associated with him?

15 A. Yes.

16 Q. And were you present for all of those enforcement
17 panels?

18 A. I believe so.

19 Q. Do you get a vote on -- do you have a vote when you're
20 at one of those enforcement panels?

21 A. It's not necessarily a vote. You're allowed to
22 express your opinion, but ultimately it's the
23 director of the Office of Enforcement that decides
24 the path forward; they're the decisionmaker for
25 enforcement actions.

Attachment 14

TVA Standard Programs and Processes	Employee Discipline	TVA-SPP-11.316 Rev. 0005 Page 14 of 27
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**Appendix B
(Page 1 of 13)**

Disciplinary Guidelines: Range of Penalties*

SUMMARY OF DISCIPLINARY GUIDELINES

Offense	**Verbal Warning	Written Warning	Suspension	Discharge
<u>1. Ethical Violation</u>				
1.1 Violation of Ethical Laws or TVA Code of Conduct	X	X	X	X
1.2 Refusal or Failure to Cooperate with Investigation	X	X	X	X
1.3 Violation of Equal Opportunity (EO) Policy or Remedial Actions	X	X	X	X
1.4 Mishandling of Classified Information, Privacy Information, and Security Incidents	X	X	X	X
1.5 Misuse of Government Property	X	X	X	X
1.6 Misuse of Work Time	X	X	X	X
1.7 Theft or Unauthorized possession of property			X	X
1.8 Falsification of Quality Assurance (QA) or Other Safety-Related Documents				X
1.9 Falsification or Failure to Correct TVA Documents		X	X	X
<u>2. Employment Standards</u>				
2.1 Fighting, Violence, or Threats of Violence			X	X
2.2 Deliberate Misconduct Causing TVA to Violate NRC Regulations or Plant License				X
2.3 Inattentiveness to Duty	X	X	X	X
2.4 Recording in the Workplace		X	X	X
2.5 Possession of Firearms/Weapons or Other Unauthorized Substances			X	X
2.6 Failure to Report Criminal Charges or Off Duty Misconduct		X	X	X
2.7 Violation of Fitness for Duty Requirements			X	X
2.8 Policy and Procedure Violation	X	X	X	X
2.9 Personnel Error	X	X	X	X
<u>3. Violation of Safety Standards</u>				
3.1 Critical Unsafe Work Practices			X	X
3.2 General Unsafe Work Practices	X	X	X	X

TVA Standard Programs and Processes	Employee Discipline	TVA-SPP-11.316 Rev. 0005 Page 15 of 27
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**Appendix B
(Page 2 of 13)**

Disciplinary Guidelines: Range of Penalties*

4. Leave Misuse				
4.1 Arriving Late or Leaving Early Without Approval	X	X	X	X
4.2 Leave Misuse	X	X	X	X
5. Respectful Workplace				
5.1 Harassment/Intimidation/Retaliation/ Discrimination (HIRD)		X	X	X
5.2 Abusive or Unprofessional Language or Conduct		X	X	X
5.3 Insubordination		X	X	X

* Reference Appendix A

** Proper documentation should be maintained for all verbal warnings.

NOTES

- 1) The disciplinary action indicated for the offenses is a range of action; however, TVA management may modify the steps as warranted based on the offense(s) and circumstances surrounding the offense(s). The guidelines are not intended to cover all potential disciplinary offenses. Human Resources should be consulted for review on a case-by-case basis to assist in determining the appropriate action to be administered for offenses not listed herein.
- 2) Some offenses may lead to additional consequences including criminal prosecution or restrictions on future employment with TVA or within the Nuclear industry.

TVA Standard Programs and Processes	Employee Discipline	TVA-SPP-11.316 Rev. 0005 Page 16 of 27
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**Appendix B
(Page 3 of 13)**

Disciplinary Guidelines: Range of Penalties*

2.0 DISCIPLINARY GUIDELINES

2.1 Ethical Violation

Employees must adhere to federal ethical laws and standards of conduct and TVA related ethics policies. Employee should not engage in activity including but not limited to gambling, theft, misuse of work time, political activity in the workplace. In general, employees should avoid any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct or other conduct prejudicial to the Government. [R.2]

2.1.1 Violation of Ethical Laws or Standards

- A. Employees must adhere to ethical laws and standards of conduct, including, but not limited to those limiting gifts from outside sources and gifts between employees; avoiding conflicting financial interests; impartiality in performing official duties; and avoiding any criminal, infamous, dishonest, immoral, or notorious disgraceful conduct or other conduct prejudicial to the Government.
- B. The level of discipline for this offense will be commensurate with the seriousness of the charge and the connection to TVA employment.
- C. Specific information regarding Ethical Conduct requirements are contained in the United States Code of Federal Regulations, TVA Code of Conduct, and TVA Executive Code of Conduct, and TVA ethics related policies.

2.1.2 Refusal or Failure to Cooperate with Investigation

- A. Employees are required to cooperate and comply with any investigation, audit, review, or inquiry by the Office of the Inspector General, TVA Equal Opportunity Compliance Office, TVA Employee Concerns, or any other groups with oversight or investigatory responsibility as provided by law or as directed by management. Here, "cooperate" includes but is not limited to making oneself available in a timely manner for questioning or testimony, providing documents or other recorded information in a timely manner, being truthful, and providing complete responses to any written or verbal questions or other inquiries.
- B. Employees are also required to cooperate and comply with requests by security personnel. TVA employees, including their persons, vehicles, and personal belongings are subject to visual or hands-on search when entering or exiting the sites. Failure to comply with search requests may subject the employee to denial of access to the sites and/or disciplinary action up to and including termination.

TVA Standard Programs and Processes	Employee Discipline	TVA-SPP-11.316 Rev. 0005 Page 17 of 27
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**Appendix B
(Page 4 of 13)**

Disciplinary Guidelines: Range of Penalties*

2.1.3 Violation of Equal Opportunity (EO) Policy or Remedial Actions

Every TVA employee must actively support TVA's EO policy and help ensure a working environment free from all types of discrimination (overt or inadvertent) and hostility or harassment or retaliation that may result. Items or words such as racial slurs, offensive symbols (e.g., nooses or swastikas), ethnic jokes, or sexually explicit and/or offensive jokes, comments, or photos will not be tolerated.

Failure to comply with the TVA EO policy or with required remedial actions resulting from an Equal Opportunity Compliance case, or retaliation for raising an EO concern will result in disciplinary action up to and including termination.

2.1.4 Mishandling of Classified Information, Privacy Information, and Security Incidents

- A. Employees are prohibited from the unauthorized disclosure of classified information and are required to appropriately safeguard classified materials. In addition to being subject to TVA disciplinary action for a violation of this section, those who willfully and knowingly furnish, communicate, transmit or otherwise make available classified information to an unauthorized person are subject to prosecution for violation of Title 18, U.S. Law.
- B. Employees are required to protect the security of personal information, especially Personally Identifiable Information (PII) and Restricted Personally Identifiable Information (RPII). In addition to being subject to TVA disciplinary action for a violation of this section, persons who willfully disclose information protected by the Privacy Act of 1974 to any person or agency not entitled to receive it may be subject to prosecution.
- C. The following are examples of mishandling privacy information:
 - 1. Leaving PII/RPII unsecured, unattended, or unlocked in desks, tables, filing cabinets, or elsewhere in work areas open to the general employee or visitor population either during or after normal working hours.
 - 2. Storing or transmitting PII/RPII on TVA systems or applications in violation of TVA-SPP-12.002, TVA Information Management Policy.
 - 3. Publically posting PII/RPII.
 - 4. Disseminating PII/RPII information to unauthorized persons in any manner.
- D. TVA employees are also subject to discipline for unauthorized dissemination of certain other types of information, including but not limited to nuclear safeguards information and any other information that an employee knows or should know is confidential or sensitive, either by markings on the information or by the subject matter content.

TVA Standard Programs and Processes	Employee Discipline	TVA-SPP-11.316 Rev. 0005 Page 18 of 27
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**Appendix B
(Page 5 of 13)**

Disciplinary Guidelines: Range of Penalties*

2.1.4 Mishandling of Classified Information, Privacy Information, and Security Incidents (continued)

- E. For additional information, see TVA-SPP-12.002, "TVA Information Management Policy" and NPG-SPP-14.3 "Safeguards and Security Sensitive Information."

2.1.5 Misuse of Government Property

- A. TVA tools, equipment, and other property are provided for the use of TVA employees for the conduct of TVA's business. TVA tools, equipment, and vehicles are for business use only, unless prior approval has been obtained. Unauthorized use of TVA property is prohibited. Employees are responsible for the proper care and accountability of tools, equipment, and other property assigned to them during or after normal work hours. TVA tools, equipment, and property may include but are not limited to TVA vehicles, copiers, computers, office phones, cell phones, TVA-issued credit cards, physical security components, etc.
- B. Physical Access credentials (employee badges) are the property of the U.S. Government and are issued for the official and exclusive use of the designated holder to gain access to TVA facilities and may be used as proof of identity for official TVA business purposes. Use or possession of TVA issued access credentials by individuals other than the designated holder is considered misuse and unlawful. Anyone suspected of misuse of TVA issued access credentials is subject to penalty under 18 U.S.C. 499, 506, and 701, and TVA-SPP-14.200, Physical Access and Visitor Management policy.
- C. Vehicles, both leased and rental, are provided for the use of TVA employees for the conduct of TVA's business. Unauthorized use of vehicles is prohibited. Employees are responsible for the proper care and accountability for vehicles assigned or provided to them during or after normal work hours. Willful misuse of a TVA vehicle will result in a minimum of a 30 day suspension. Refer to 31 U.S.C. Section 1349. [R.1]

2.1.6 Misuse of Work Time

Employees are expected to be productive in their work assignments. Loafing or wasting time while on working hours will not be tolerated. Employees without a work assignment are to contact their supervisor immediately.

2.1.7 Theft or unauthorized possession or removal of TVA property

- A. Theft or attempted theft of TVA property, or the property of TVA employees, visitors or contractors, will not be tolerated. An employee who steals is subject to the maximum disciplinary action of discharge for a single offense. Attempted theft includes, but is not limited to, the staging of material for later retrieval.

TVA Standard Programs and Processes	Employee Discipline	TVA-SPP-11.316 Rev. 0005 Page 19 of 27
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**Appendix B
(Page 6 of 13)**

Disciplinary Guidelines: Range of Penalties*

2.1.7 Theft or unauthorized possession or removal of TVA property (continued)

- B. Unauthorized possession or removal of TVA property, or the property of TVA employees, visitors or contractors, will not be tolerated. Unauthorized possession or removal includes instances where it cannot be substantiated that theft was intended or performed.
- C. Supervisors should contact their HR Generalist before implementing discipline for this offense.

2.1.8 Falsification of Quality Assurance (QA) or Other Safety-Related Documents

This includes falsification of any documents that are designated as Quality Assurance Records (QA). This also includes falsification of any documents related to industrial safety that could result in jeopardizing the safety of employees, contractors, or visitors to TVA sites.

2.1.9 Falsification or Failure to Correct TVA Documents

This includes falsification of any documents not covered above (e.g., employment or other work documents). It also includes failing to promptly correct records (e.g., leave or pay records) which the employees knows, or should know, to be in error.

2.2 Employment Standards

Employment standards are necessary to guide our work activities and assure a safe and orderly work environment. The standards by which we operate apply to all employees and contractors. Employment standards include, but are not limited to, policy and procedure adherence, fighting, threats of violence, inattentiveness to duty, and possession of unauthorized substances.

2.2.1 Fighting, Violence, or Threats of Violence

Fighting, violence, and threats of violence, including but not limited to physical or verbal acts that threaten aggression toward people or property will not be tolerated and will result in disciplinary action up to and including termination.

See TVA Workplace Violence policy TVA-SPP-14.100 "Workplace Violence Prevention and Prohibited Items."

TVA Standard Programs and Processes	Employee Discipline	TVA-SPP-11.316 Rev. 0005 Page 20 of 27
-------------------------------------	---------------------	--

**Appendix B
(Page 7 of 13)**

Disciplinary Guidelines: Range of Penalties*

2.2.2 Deliberate Misconduct Causing TVA to Violate NRC Regulations or Plant License

An employee who deliberately and/or maliciously causes TVA to violate Nuclear Regulatory Commission (NRC) regulations or plant license requirements shall be terminated.

2.2.3 Inattentiveness to Duty

- A. Inattentiveness to duty is prohibited and serious incidents may result in termination of employment. Employees are expected to be fully alert and cognizant of their work environment. Employees who are not fully alert and attentive to their work assignments or duty station responsibilities cannot be tolerated. Employees found in any physical position or location which precludes them from performing their job duties and responsibilities will be considered to be inattentive to duty. This includes but is not limited to being asleep or physically being in a state or bodily position from which a work assignment cannot be effectively carried out.
- B. Employees are subject to immediate suspension if they are found to be inattentive to duty while performing work that does not affect personnel safety or safe operation of the plant. However, a repeated instance of being inattentive to duty may result in termination of employment, regardless of the nature of the work being performed or its effect on plant operation.
- C. Employees are subject to immediate termination if they are found to be inattentive to duty while performing safety-related work such as fire watch, operation of equipment, or any activity which could affect the safety of the employee, other employees, contractors, visitors, or the safe operation of the plant. Additionally, employees are subject to immediate termination if they have taken efforts to conceal or pre-plan being inattentive to duty.

2.2.4 Recording in the Workplace

- A. TVA prohibits the recording of confidential, proprietary or personal information and personal images or voices belonging to TVA employees, contractors and/or visitors unless approved by management. Employees are also prohibited from recording any aspect of TVA's facilities or properties without prior management approval. Employees are required to provide consent for personal images to be captured.
- B. "Recording" means the use of any device, whether work-issued or personal, to capture images or voices, regardless of whether in person, by telephone or by other means. This prohibition applies at TVA facilities and properties, while operating TVA owned, leased or rented vehicles, as well as off-site or during travel while in work status.
- C. Employees who record in violation of this prohibition will be subject to disciplinary action up to and including termination.

TVA Standard Programs and Processes	Employee Discipline	TVA-SPP-11.316 Rev. 0005 Page 21 of 27
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**Appendix B
(Page 8 of 13)**

Disciplinary Guidelines: Range of Penalties*

2.2.5 Possession of Firearms/Weapons and Other Unauthorized Substances

- A. The possession, use, or sale of alcohol and/or illegal drugs (including prescription drugs for which the employee does not have a current, valid prescription) on TVA property is prohibited and may result in termination of employment. Employees who use or are suspected of use of alcohol or illegal drugs on TVA property are subject to investigation, medical examination, testing, and disciplinary action.
- B. Unauthorized firearms, weapons, explosives, or fireworks shall not be permitted on TVA property. For additional information, see TVA-SPP-14.100 "Workplace Violence Prevention & Prohibited Items."
- C. Specific information regarding the Fitness for Duty Program requirements are contained in TVA-SPP-11.511 "Fitness for Duty Program for Non-Nuclear Organizations" and NPG-SPP-14.1 "Fitness for Duty and Fatigue Management."

Fitness for Duty requirements for employees required to possess a Commercial Drivers License as a condition of employment are contained in TVA SPP 11.512 "TVA Department of Transportation (DOT) Alcohol and Drug (A&D) Testing Program." (To the extent this document establishes standards above the DOT policy, this document is controlling.)

2.2.6 Failure to Report Criminal Charges and Off Duty Misconduct

- A. Employees who engage in conduct away from TVA property which, because of its illegality, notoriety, or impact upon the agency's reputation, results in the need to deter such conduct in the future by the employee or other employees, will be subject to disciplinary action up to and including termination. These determinations are made in conjunction with the Employment Suitability standards.
- B. Employees are required under TVA's personnel security procedures to report via form TVA 9871 "Data on Convictions" upon arrival the next business day whenever they are arrested or charged with any criminal act. Specific information regarding the reporting requirements are contained in TVA's personnel security procedure, TVA-SPP 14.410 "Adjudication of Employee Criminal Charges".
- C. Determinations on level of discipline for failing to report arrests or charges will consider the seriousness of the charge and the connection to TVA employment.

2.2.7 Violation of Fitness for Duty Requirements

- A. Employees who are suspected of use or being under the influence of illegal drugs or alcohol on TVA property or on TVA work time are subject to investigation, medical and/or psychological examination, and disciplinary action. Employees working at a TVA nuclear site will be subject to termination for first offense violations of Fitness for Duty Program requirements regarding "For Cause" testing.

TVA Standard Programs and Processes	Employee Discipline	TVA-SPP-11.316 Rev. 0005 Page 22 of 27
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**Appendix B
(Page 9 of 13)**

Disciplinary Guidelines: Range of Penalties*

2.2.7 Violation of Fitness for Duty Requirements (continued)

- B. Fitness for Duty requirements for employees required to possess a Commercial Drivers License as a condition of employment are contained in TVA-SPP-11.511 "Fitness for Duty Program for Non-Nuclear Organizations." (To the extent this document establishes standards above the DOT policy, this document is controlling.)
- C. Employees who fail or refuse to fully cooperate with any part of a Fitness for Duty assessment or refuse, tamper/attempt to tamper with or subvert an alcohol/drug test will be terminated.
- D. Specific information regarding the Fitness for Duty Program requirements and consequences are contained in TVA-SPP-11.511 "Fitness for Duty Program for Non-Nuclear Organizations" and NPG-SPP-14.1 "Fitness for Duty and Fatigue Management."

NOTE

Violations of fitness for duty requirements may result in additional consequences beyond these disciplinary actions. Consequences may include restrictions on future employment with TVA and/or within the nuclear industry. Consult the fitness for duty procedures for additional information.

2.2.8 Policy and Procedure Violation

Policy and Procedure violation includes willful violations of known or established TVA policies or subset of those policies (TVA Safety Manual, NPG policies, site specific procedures, etc). This includes but is not limited to policies such as Vehicle Safety, Cyber Security, NERC standards, etc. Failure to comply with these policies can place TVA's employees, network, information, the public, etc. at risk.

2.2.9 Personnel Error

Personnel error occurs when an employee has the procedures, knowledge, and equipment to properly perform an assignment and fails to do so. Personnel errors may be intentional or unintentional. Personnel errors may result in disciplinary action up to and including termination. Personnel errors that result in incidents such as reportable events, violations of technical specifications, nuclear regulatory identified violations, or other procedures, etc., may also be a basis for disciplinary action. An attempt to conceal or failure to report a personnel error may result in disciplinary action up to and including termination. HR Generalist should be consulted for review on a case-by-case basis to assist in determining the appropriate action to be taken.

2.3 Violation of Safety Standards

Employees are accountable for working safely each and every day. Employees are expected to follow safe work practices. If an employee violates our safe work practices, progressive discipline will apply.

TVA Standard Programs and Processes	Employee Discipline	TVA-SPP-11.316 Rev. 0005 Page 23 of 27
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**Appendix B
(Page 10 of 13)**

Disciplinary Guidelines: Range of Penalties*

2.3.1 Critical Unsafe Work Practice

Critical unsafe work practices include, but are not limited to behaviors that violate TVA safety procedures and lead to or have high potential to lead to death or serious injury to personnel or significant damage that might impair the performance of a TVA plant or TVA equipment.

- Energy clearance boundaries / lockout-tag out and protective grounding requirements must be followed
- Confined space entry requirements must be met
- Fall protection requirements must be met
- Radiation boundaries must not be violated
- Protective barriers for suspended loads must not be breached
- Arc-flash protective requirements (de-metal, protective clothing, proper tooling, stand off distances) must be met

2.3.2 General Unsafe Work Practice

General unsafe work practices are violations of those Safety Expectations, Procedures, Policies, and/or OSHA rules which are not designated as Critical Safety Rules. These behaviors include, but are not limited to, behaviors that lead to or have the potential to lead to injury to personnel or damage to TVA equipment. It also includes an employee's failure to notify his/her supervisor or appropriate TVA medical staff of any medication or changes in medication that might impact the employee's ability to work safely. Managers and supervisors should consider the risk and intentions to determine the appropriate level of discipline.

Level I - Safety violation that could cause an accident or illness that would most likely result in serious physical harm. Risk is medium to high and intent may have been willful in nature. The list below contains examples only and is not all inclusive. Level I safety violations will be addressed through the progressive discipline process, ranging from a written warning to termination.

- Use of unapproved climbing devices
- Misuse of tools/using the wrong tool for the job
- Failure to complete or review an approved safety briefing or plan prior to beginning high hazard work

TVA Standard Programs and Processes	Employee Discipline	TVA-SPP-11.316 Rev. 0005 Page 24 of 27
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**Appendix B
(Page 11 of 13)**

Disciplinary Guidelines: Range of Penalties*

2.3.2 General Unsafe Work Practice (continued)

- Use of cell phones other electronic devices, other than in hands free mode, while driving a TVA owned or rented vehicle or while driving a personal vehicle on TVA business. (Executive Order 13513 "Federal Leadership on Reducing Text Messaging While Driving, 10/01/2009) [R.3]

Level II - Safety violation that has a direct relationship to job safety and health, but not serious in nature. Risk is very low and intent may or may not have been willful in nature. The list below contains examples only and is not all inclusive. Level II violations use the progressive discipline policy and normally begin at verbal warning as a first step.

- Failure to wear PPE (gloves, hard hat, hearing protection, safety glasses, etc) as required by safety rules or regulations
- Failure to maintain a neat and clean work area adversely impacting work safety
- Failure to meet established safe work expectations

2.4 Leave Misuse

Employees are expected to be at work unless they have previously-approved leave, a bona fide emergency exists, or valid medical reasons dictate an absences from work.

2.4.1 Arriving Late or Leaving Early Without Approval

All employees are required to gain approval from their supervisor when arriving late, including returning from lunch or breaks late, or leaving from their scheduled shift early. Situations may arise where an employee will have to come in late or leave early in order to attend to personal business. Employees are required to provide notice and obtain approval as soon as possible when they have to attend a scheduled appointment during work hours. If requested by the supervisor, employees must state the specific need for the absence before approval may be given. For non-prearranged absences, where an employee must arrive late or leave early, or when the employee is going to leave the work area or job site, it is the employee's responsibility to ensure they are approved by providing satisfactory information to their supervisor/manager as soon as he/she reports to work. If appropriate, as determined by a supervisor or manager, employees must enter leave for the time.

TVA Standard Programs and Processes	Employee Discipline	TVA-SPP-11.316 Rev. 0005 Page 25 of 27
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**Appendix B
(Page 12 of 13)**

Disciplinary Guidelines: Range of Penalties*

2.4.2 Sick Leave and Annual Leave Misuse

Employees shall report to their supervisor or up to an appropriate level of management when employee is scheduled to be at work unless the employee has a previously approved leave, a bona fide emergency exists, or valid medical reasons dictate their absence from work. The supervisor may, at his/her discretion, inform the employee that administratively acceptable documentation, i.e. doctor's note associated with one's medical condition or other appropriate documentation is required for the absence to be approved. For absences that are ≥40 consecutive hours, or ≥48 consecutive hours for employees working 12-hour shifts, the employee will be required to provide acceptable medical evidence supporting the absence and the circumstances must be evaluated by an assigned medical case manager.

- A. If the supervisor suspects sick leave abuse/misuse, the supervisor will review the sick leave report(s) and document the days in question.
- B. If the supervisor suspects potential sick leave abuse/misuse, the supervisor will meet with the employee to express the concern and ask for an explanation. If, as a result of this discussion, the supervisor identifies misuse/abuse or questionable use of sick leave, the supervisor will proceed immediately, or after further investigation and discussion with HR, with a formal counseling session. If, following formal counseling, the employee fails to follow sick leave expectations or if they continue to have questionable leave usage, the supervisor shall issue a Leave Control Letter/verbal warning. If the employee continues to violate the leave control restrictions and/or receives additional unapproved absence(s), more progressive discipline will ensue, up to and including termination.
- C. Managers/Supervisors should contact their HR Generalist prior to taking disciplinary action and for assistance in preparing proper documentation.
- D. An unapproved absence is one in which the supervisor or manager was not contacted and/or given an acceptable reason for the absence, or the employee did not provide acceptable documentation to support the absence. For non-prearranged absences, it is the employee's responsibility to ensure approval by contacting their supervisor as soon as possible at the beginning of the work day/period for which they are absent and by providing satisfactory information to the supervisor/manager as soon as practical at the beginning of the work day/period for which they are absent and by providing acceptable and satisfactory evidence to the medical case manager as soon as he/she returns to work. Prior to initiating disciplinary action a supervisor/manager must ensure the employee's absence was not approved.

2.5 Respectful Workplace

Everyone at TVA is responsible for helping maintain a safe, professional, and respectful workplace. It is core to our TVA Values and it is what we expect of each other each and every day.

TVA Standard Programs and Processes	Employee Discipline	TVA-SPP-11.316 Rev. 0005 Page 26 of 27
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**Appendix B
(Page 13 of 13)**

Disciplinary Guidelines: Range of Penalties*

2.5.1 Harassment/Intimidation/Retaliation/Discrimination (HIRD)

Incidents involving HIRD of any nature are strictly prohibited. Individuals who engage in any form of HIRD will be subject to disciplinary action up to and including termination.

2.5.2 Abusive or Unprofessional Language or Conduct

Abusive or unprofessional language and/or behavior directed toward other employees or others, or abusive or unprofessional conduct that adversely affects the work environment will result in disciplinary action up to and including termination.

2.5.3 Insubordination

Insubordination by an employee will not be tolerated. A willful failure or refusal to carry out or comply with a direct order, verbal/written instruction, or TVA policy is classified as insubordination. Abusive or unprofessional language or behavior toward an employee's supervisor or others in the chain of management is also considered insubordination.

* Reference Appendix A

** Proper documentation should be maintained for all verbal warnings.

Attachment 15

Official Transcript of Proceedings
NUCLEAR REGULATORY COMMISSION

Title: Deposition of Ralph Dodds

Docket Number: EA 20-006 and EA 20-007

Location: teleconference

Date: Tuesday, July 20, 2021

Work Order No.: NRC-1593

Pages 1-132

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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IN THE MATTER OF: : Docket Nos.
TENNESSEE VALLEY AUTHORITY : EA 20-006
: EA 20-007

-----x

Tuesday,
July 20, 2021

DEPOSITION OF: RALPH DODDS

called for examination by Counsel for the Nuclear
Regulatory Commission, pursuant to notice of
deposition, via Videoconference, when were present on
behalf of the respective parties:

P-R-O-C-E-E-D-I-N-G-S

10:36 a.m.

1
2
3 MS. KIRKWOOD: Thank you so much. Why
4 don't you go ahead and start by swearing the witness
5 in, and then we'll take appearances. And Mr. Dodds,
6 I'm going to ask you a few questions sort of
7 specifically about your ability to review documents
8 before we proceed with the rest of the deposition,
9 okay? So, go ahead and swear in the witness.

10 WHEREUPON,

11 RALPH DODDS

12 was called as a witness by Counsel for the Agency and,
13 having been first duly sworn, was examined and
14 testified as follows:

15 MS. KIRKWOOD: Thank you. Mr. Dodds, I'm
16 Sara Kirkwood. I'm a senior attorney at the Nuclear
17 Regulatory Commission. and I'm accompanied by my co-
18 counsel Kevin Roach. And I will let Ms. Rimon
19 introduce the TVA counsel.

20 MS. LOOMIS RIMON: Thanks Sara, Mr. Dodds,
21 this is Laurel Loomis Rimon representing TVA, and with
22 me I have Sam Lehman, Mary Pat Brown, Andrew
23 Churchill, and Carly Gibbs. Thank you.

24 MS. KIRKWOOD: And Mr. Dodds, is anyone
25 else in the room with you now?

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1 I wouldn't stand behind. I might have made a mistake
2 or two, but none of this is signed.

3 Q What about your --

4 A I don't know how else to put it. Which
5 email?

6 Q Any email. Emails don't have a
7 handwritten signature, so I'm wondering how we would
8 know. Any of the emails that we've looked at, would
9 you stand behind those?

10 A As a general matter, yes. There may be
11 one or two that were strawmen for lack of a better
12 word. If there's a particular one you want me to look
13 at, I'm happy to do that.

14 Q Well, why don't we turn to another subject
15 and this is my -- probably the last document -- well,
16 I think two documents I'm going to show you.

17 MS. KIRKWOOD: Laurel, I don't want to
18 interrupt you if you have another document, but we've
19 been going like an hour and 45 minutes. I don't know
20 if Mr. Dodds wants a break or if you're getting toward
21 the end, if you would just rather push on through?

22 MS. LOOMIS RIMON: I'm happy to it either
23 way. I am going to ask to take a break when I finish
24 these two documents just to make sure we have covered
25 everything, so ten minutes or so and then I may be

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1 done, but we don't have a lot more.

2 But yes, Mr. Dodds, if you'd like a break
3 now, that's completely fine.

4 THE WITNESS: No, I'm okay.

5 MS. LOOMIS RIMON: Are you good, Sara?

6 MS. KIRKWOOD: I'm okay. I might like a
7 three-minute break.

8 MS. LOOMIS RIMON: Okay. No problem.
9 We'll take a five-minute break and go off the record.
10 Thank you.

11 (Whereupon, the above-entitled matter went
12 off the record at 3:48 p.m. and resumed at 3:52 p.m.)

13 MS. LOOMIS RIMON: Thank you. Mr. Dodds,
14 I'd like to show you -- we're going to send you a
15 document. We'll mark it as TVA Exhibit -- is it 3?
16 Exhibit 3. And we'll send it to the NRC as well.

17 (Whereupon, the above-referred to document
18 was marked as TVA Exhibit 3 for identification.)

19 MS. LOOMIS RIMON: Okay. It's on the way.
20 Please let me know when you get it.

21 (Pause.)

22 THE WITNESS: Okay.

23 BY MS. LOOMIS RIMON:

24 Q Do you recognize this document?

25 A Yes, I do.

1 Q The subject is titled Letter of
2 Resignation, and it's from Mr. McBrearty.

3 A Yes.

4 Q Do you recall Mr. McBrearty advising you
5 of his resignation on August 16th, 2018, as
6 referenced?

7 A Yes, ma'am. Yes, ma'am.

8 Q Did you know whether Mr. McBrearty was
9 seeking other employment while he was out on paid
10 administrative leave?

11 A I'd heard that he was from one of the guys
12 in his department, that he was interviewing with an
13 overseas nuclear utility. That was probably two weeks
14 before this.

15 Q Okay. Thank you. Did you have any
16 conversations with Mr. McBrearty about him seeking
17 other employment?

18 A No. He probably called me three times in
19 the period between his suspension and his resignation,
20 said, hey, you know, what's going on? Is there
21 anything you can tell me? You know, I had to tell
22 him, stay patient. We've got to get this right. It's
23 more important to get it right than to get it quick.
24 So I promise I'll let you know the minute that I can.

25 And he took that, you know, in pretty good

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Attachment 16

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

_____)
In the Matter of)

Tennessee Valley Authority)
Chattanooga, Tennessee)
_____)

) Docket Nos. EA-20-006, EA-20-007

DECLARATION OF TIMOTHY J.V. WALSH

I, Timothy J.V. Walsh, hereby state and declare as follows:

1. I am a partner in the law firm Pillsbury Winthrop Shaw Pittman LLP. I represent the Tennessee Valley Authority (“TVA”) in this matter. I submit this declaration in support of TVA’s Motion for Summary Disposition of Violations 1, 2, and 3 (“TVA’s Motion”).

2. Attachment 6 to TVA’s Motion is a true and correct copy of the Formal Complaint of Erin Henderson dated March 9, 2018, that was produced by the NRC Staff at ADAMS Accession No. ML21044A069 at PDF pages 4–11. This same copy was used by the NRC Staff as Exhibit 10 of Office Investigation Report 2-2019-015 (the Wetzel OI Report).

3. Attachment 7 to TVA’s Motion is a true and correct copy of the Report of Investigation of Erin Henderson’s Allegations of Harassment and Hostile Work Environment, written by Mr. John Slater, dated May 25, 2018, and produced by the NRC Staff at ADAMS Accession No. ML21042A026 at PDF pages 31–62. This same copy was used by the NRC Staff as Exhibit 17 of Office Investigation Report 2-2018-033 (the McBrearty OI Report).

4. Attachment 8 to TVA’s Motion is a true and correct copy of the Report of Investigation of Erin Henderson’s Allegations of Harassment and Hostile Work Environment, written by Mr. John Slater, dated August 10, 2018, and produced by the NRC Staff at ADAMS

Accession No. ML21042A026 at PDF pages 64–101. This same copy was used by the NRC Staff as Exhibit 18 of Office Investigation Report 2-2018-033 (the McBrearty OI Report).

5. Attachment 9 to TVA’s Motion is a true and correct copy of Ms. Beth Wetzel’s Notice of Termination dated January 14, 2019, and produced by the NRC Staff at ADAMS Accession No. ML21042B963 at PDF pages 27–28.

6. Attachment 14 to TVA’s Motion is a true and correct copy of Appendix B of TVA’s Employee Discipline Policy, TVA-SPP-11.316, Rev. 0005 with the effective date of July 3, 2017 that was produced by the NRC Staff at ADAMS Accession No. ML21048A396 at PDF pages 200–212. This same copy was used by the NRC Staff as a portion of Exhibit 4 for Office Investigation Report 2-2018-033 (the McBrearty OI Report).

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Accord with 10 C.F.R. § 2.304(d)
Timothy J. V. Walsh
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Executed on August 16, 2021.

August 16, 2021

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

_____)	
In the Matter of)	
)	
)	Docket Nos. EA-20-006, EA-20-007
Tennessee Valley Authority)	
Chattanooga, Tennessee)	
_____)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Tennessee Valley Authority's Motion for Summary Disposition of Violations 1, 2, and 3 (Lack of Adverse Employment Action) has been served through the E-Filing system in the above-captioned proceeding this 16th day of August, 2021.

/Electronically signed by Anne R. Leidich/
Anne R. Leidich
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