



RESPONSE TO FREEDOM OF INFORMATION ACT (FOIA) / PRIVACY ACT (PA) REQUEST

2000-0305

1

RESPONSE TYPE FINAL PARTIAL

REQUESTER

Kevin R. Doody

DATE

OCT 10 2000

PART I. - INFORMATION RELEASED

- No additional agency records subject to the request have been located.
- Requested records are available through another public distribution program. See Comments section.
- APPENDICES Agency records subject to the request that are identified in the listed appendices are already available for public inspection and copying at the NRC Public Document Room.
- APPENDICES Agency records subject to the request that are identified in the listed appendices are being made available for public inspection and copying at the NRC Public Document Room.
- Enclosed is information on how you may obtain access to and the charges for copying records located at the NRC Public Document Room, 2120 L Street, NW, Washington, DC.
- APPENDICES Agency records subject to the request are enclosed.
- Records subject to the request that contain information originated by or of interest to another Federal agency have been referred to that agency (see comments section) for a disclosure determination and direct response to you.
- We are continuing to process your request.
- See Comments.

PART I.A - FEES

AMOUNT *

\$

- You will be billed by NRC for the amount listed.
- None. Minimum fee threshold not met.
- You will receive a refund for the amount listed.
- Fees waived.

* See comments for details

PART I.B - INFORMATION NOT LOCATED OR WITHHELD FROM DISCLOSURE

- No agency records subject to the request have been located.
- Certain information in the requested records is being withheld from disclosure pursuant to the exemptions described in and for the reasons stated in Part II.
- This determination may be appealed within 30 days by writing to the FOIA/PA Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. Clearly state on the envelope and in the letter that it is a "FOIA/PA Appeal."

PART I.C COMMENTS (Use attached Comments continuation page if required)

Please note that Item 4 of your request, which is identified on the enclosed Appendix B, is dated March 20, 1996, not 1997.

SIGNATURE - FREEDOM OF INFORMATION ACT AND PRIVACY ACT OFFICER

Carol Ann Reed

RESPONSE TO FREEDOM OF INFORMATION ACT (FOIA) / PRIVACY ACT (PA) REQUEST

2000-0305

OCT 10 2000

PART II.A - APPLICABLE EXEMPTIONS

APPENDICES

Records subject to the request that are described in the enclosed Appendices are being withheld in their entirety or in part under the Exemption No.(s) of the PA and/or the FOIA as indicated below (5 U.S.C. 552a and/or 5 U.S.C. 552(b)).

- Exemption 1: The withheld information is properly classified pursuant to Executive Order 12958.
- Exemption 2: The withheld information relates solely to the internal personnel rules and procedures of NRC.
- Exemption 3: The withheld information is specifically exempted from public disclosure by statute indicated.
 - Sections 141-145 of the Atomic Energy Act, which prohibits the disclosure of Restricted Data or Formerly Restricted Data (42 U.S.C. 2161-2165).
 - Section 147 of the Atomic Energy Act, which prohibits the disclosure of Unclassified Safeguards Information (42 U.S.C. 2167).
 - 41 U.S.C., Section 253(b), subsection (m)(1), prohibits the disclosure of contractor proposals in the possession and control of an executive agency to any person under section 552 of Title 5, U.S.C. (the FOIA), except when incorporated into the contract between the agency and the submitter of the proposal.
- Exemption 4: The withheld information is a trade secret or commercial or financial information that is being withheld for the reason(s) indicated.
 - The information is considered to be confidential business (proprietary) information.
 - The information is considered to be proprietary because it concerns a licensee's or applicant's physical protection or material control and accounting program for special nuclear material pursuant to 10 CFR 2.790(d)(1).
 - The information was submitted by a foreign source and received in confidence pursuant to 10 CFR 2.790(d)(2).
- Exemption 5: The withheld information consists of interagency or intraagency records that are not available through discovery during litigation. Applicable privileges:
 - Deliberative process: Disclosure of predecisional information would tend to inhibit the open and frank exchange of ideas essential to the deliberative process. Where records are withheld in their entirety, the facts are inextricably intertwined with the predecisional information. There also are no reasonably segregable factual portions because the release of the facts would permit an indirect inquiry into the predecisional process of the agency.
 - Attorney work-product privilege. (Documents prepared by an attorney in contemplation of litigation)
 - Attorney-client privilege. (Confidential communications between an attorney and his/her client)
- Exemption 6: The withheld information is exempted from public disclosure because its disclosure would result in a clearly unwarranted invasion of personal privacy.
- Exemption 7: The withheld information consists of records compiled for law enforcement purposes and is being withheld for the reason(s) indicated.
 - (A) Disclosure could reasonably be expected to interfere with an enforcement proceeding (e.g., it would reveal the scope, direction, and focus of enforcement efforts, and thus could possibly allow recipients to take action to shield potential wrongdoing or a violation of NRC requirements from investigators).
 - (C) Disclosure would constitute an unwarranted invasion of personal privacy.
 - (D) The information consists of names of individuals and other information the disclosure of which could reasonably be expected to reveal identities of confidential sources.
 - (E) Disclosure would reveal techniques and procedures for law enforcement investigations or prosecutions, or guidelines that could reasonably be expected to risk circumvention of the law.
 - (F) Disclosure could reasonably be expected to endanger the life or physical safety of an individual.
- OTHER (Specify)

PART II.B - DENYING OFFICIALS

Pursuant to 10 CFR 9.25(g), 9.25(h), and/or 9.65(b) of the U.S. Nuclear Regulatory Commission regulations, it has been determined that the information withheld is exempt from production or disclosure, and that its production or disclosure is contrary to the public interest. The person responsible for the denial are those officials identified below as denying officials and the FOIA/PA Officer for any denials that may be appealed to the Executive Director for Operations (EDO).

DENYING OFFICIAL	TITLE/OFFICE	RECORDS DENIED*	APPELLATE OFFICIAL		
			EDO	SECY	IG
James E. Dyer	Regional Administrator, Region III	Appendix B	✓		

Appeal must be made in writing within 30 days of receipt of this response. Appeals should be mailed to the FOIA/Privacy Act Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, for action by the appropriate appellate official(s). You should clearly state on the envelope and letter that it is a "FOIA/PA Appeal."

**APPENDIX A
RECORDS BEING RELEASED IN THEIR ENTIRETY
(If copyrighted identify with *)**

<u>NO.</u>	<u>DATE</u>	<u>DESCRIPTION/(PAGE COUNT)</u>
1.	02/21/96	Letter from Geoffrey Grant, NRC Region III, to Donald Shelton, Centerior Service Company, subjectg: Alleged Discrimination. (4 pages)
2.	08/16/96	Letter from John Stetz, Centerior Energy, to Geoffrey Grant, subject: Response to Apparent Violation - EA 96-253. (48 pages)
3.	11/05/96	Letter from John Stetz to James Lieberman, NRC, subject: Reply to Notice of Violation - EA 96-253. (4 pages)

**APPENDIX B
RECORD BEING WITHHELD IN PART**

<u>NO.</u>	<u>DATE</u>	<u>DESCRIPTION/(PAGE COUNT)/EXEMPTIONS</u>
1.	03/20/96	Letter from Donald Shelton to Geoffrey Grant, re: response of the Cleveland Electric Illuminating Company and Centerior Service Company to 02/21/96 letter from NRC (PY-CEI/NRR-2039L). (70 pages) EX. 6



1-2

UNITED STATES
NUCLEAR REGULATORY COMMISSION

REGION III
801 WARRENVILLE ROAD
LISLE, ILLINOIS 60532-4351

February 21, 1996

EA 96-038

Mr. Donald C. Shelton
Senior Vice President
Centerior Service Company
P. O. Box 97, A200
Perry, OH 44081

SUBJECT: ALLEGED DISCRIMINATION

Dear Mr. Shelton:

On October 26, 1995, the U.S. Department of Labor's Wage and Hour Division in Cleveland Ohio received a complaint from a former employee of Fischbach Power Services, Inc., a Centerior Service Company contractor at the Perry Nuclear Power Plant. The former employee alleged that Centerior Energy discriminated against him by denying his access to the Perry Plant because he was involved in litigation against Centerior regarding an exposure to radioactive materials while working at the Davis Besse Nuclear Plant. The denial of access resulted in his termination from Fischbach Power Services, Inc. In response to that complaint, the Wage and Hour Division conducted an investigation, and in a letter dated January 9, 1996, the District Director of the Wage and Hour Division found that the evidence obtained during the Division's investigation indicated that the employee was engaged in a protected activity within the scope of the Energy Reorganization Act and that discrimination as defined and prohibited by the statute was a factor in the actions which comprised his complaint.

The NRC is concerned that a violation of the employee protection provisions set forth in 10 CFR 50.7 may have occurred and that the actions taken against the former employee may have had a chilling effect on other licensee or contractor personnel.

Accordingly, pursuant to sections 161c, 161o, 182 and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.204 and 10 CFR 50.54(f), in order for the Commission to determine whether your license should be modified, suspended or revoked, or other enforcement action taken to ensure compliance with NRC regulatory requirements, you are required to provide this office, within 30 days of the date of this letter, a response in writing and under oath or affirmation that describes:

1. Your position regarding whether the actions affecting this individual violated 10 CFR 50.7 and the basis for your position, including the results of any investigations you may have conducted to determine whether a violation occurred; and

A/1

2. Actions you have already taken or plan to take to assure that this matter is not having a chilling effect on the willingness of other employees to raise safety and compliance concerns within your organization and, as discussed in NRC Form 3, to the NRC.

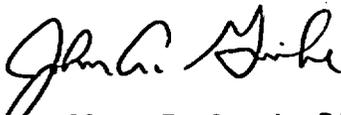
We recognize that you may not believe that unlawful discrimination has occurred. Regardless of your answer to item 1 above, we request that you consider the need to address the *possible* chilling effect that an ongoing issue of this type may have on other employees.

Your response should not, to the extent possible, include any personal privacy, proprietary, or safeguards information so that it can be released to the public and placed in the NRC Public Document Room. If personal privacy information is necessary to provide an acceptable response, then please provide a bracketed copy of your response that identifies the personal privacy-related information and a redacted copy of your response that deletes the personal privacy-related information. Identify the particular portions of the response in question which, if disclosed, would create an unwarranted invasion of personal privacy, identify the individual whose privacy would be invaded in each instance, describe the nature of the privacy invasion, and indicate why, considering the public interest in the matter, the invasion of privacy is unwarranted. If you request withholding on any other grounds, you must specifically identify the portions of your response that you seek to have withheld and provide in detail the bases for your claim of withholding (e.g., provide the information required by 10 CFR 2.790(b) to support a request for withholding confidential commercial or financial information).

After reviewing your response, the NRC will determine whether enforcement action is necessary at this time to ensure compliance with regulatory requirements.

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

Sincerely,


for Geoffrey E. Grant, Director
Division of Reactor Safety

Docket No. 50-440
License No. DPF-58

cc: R. W. Schrauder, Director, Nuclear
Services Department
J. D. Kloosterman, Manager,
Regulatory Affairs
L. W. Worley, Director, Perry Nuclear
Assurance Department
N. L. Bonner, Director, Perry
Nuclear Engineering Dept.
H. Ray Caldwell, General
Superintendent Nuclear Operations
R. D. Brandt, General Manager Operations
Terry J. Lodge, Esq.
State Liaison Officer, State of Ohio
Robert E. Owen, Ohio
Department of Health
C. A. Glazer, State of Ohio,
Public Utilities Commission

D. Shelton

4

Distribution:

Docket File

PUBLIC IE-01

OC/LFDCB

J. Hopkins, NRR

J. Lieberman, OE

R. Zimmerman, NRR

B. Haber, District Director,

Department of Labor

SRI Perry

DRP

RIII PRR

RMB/FEES

A. B. Beach, RIII

D. Funk, RIII

J. Goldberg, OGC

1140

2-K



PERRY NUCLEAR POWER PLANT

10 CENTER ROAD
PERRY, OHIO 44081
(216) 259-3737

Mail Address:
P.O. BOX 97
PERRY, OHIO 44081

August 16, 1996
PY-CEI/NRR-2088L

Attention: Geoffrey E. Grant, Director
Division of Reactor Safety
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Perry Nuclear Power Plant
Docket No. 50-440; License No. NPF-58
Response to Apparent Violation - EA 96-253

Reference: (1) Letter from G. Grant to J. Stetz, Subj. Apparent
Violation of Employee Discrimination Requirements
[U.S. Department of Labor (DOL) Administrative Law
Judge (ALJ) Recommended Decision and Order (Case No.
96-ERA-6)] dated July 18, 1996

(2) Letter from D. Shelton to G. Grant,
PY-CEI/NRR-2039L, dated March 20, 1996

Gentlemen:

The Cleveland Electric Illuminating Company and the Centerior Service Company are responding to your letter dated July 18, 1996, concerning an apparent violation of 10 C.F.R. §50.7. The violation relates to our decision during the last Perry outage not to hire six temporary outage workers who had filed a radiation injury lawsuit against Centerior and who had claimed in that lawsuit that they "have suffered, are suffering, and will continue to suffer harm in the form of serious emotional distress that is both severe and debilitating." While a Department of Labor (DOL) Administrative Law Judge has now interpreted Section 211 of the Energy Reorganization Act (ERA) as protecting this lawsuit -- a novel interpretation that has expanded the protection of Section 211 beyond previously recognized bounds -- we continue to be very concerned with the correctness of the ALJ's decision and with being required to hire individuals who state they are debilitated by severe emotional distress. Consequently, after careful consideration of the importance of these issues, we have decided to pursue review of the ALJ's decision.

While we have decided to pursue our appellate rights, we remain sensitive to the need to ensure our employees are not deterred from communicating safety concerns. We have therefore informed our employees of our decision and at the same time stressed to them that our decision to appeal should not be construed in any way as unreceptiveness to the raising of safety concerns.

per Jean Lee

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CF ADDCK 05000440
CF

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Operating Companies
Cleveland Electric Illuminating
Toledo Edison

Add: OE 1 1
DGC 1 1

See Attachment A. As Mr. Shelton previously emphasized in a prior memorandum to employees (included with reference 2), we have again informed our employees that it is their duty to identify conditions adverse to quality or safety and that they may do so, publicly or confidentially, without any fear of retaliation.

With respect to the specific items in your July 18 letter, we provide the following response:

1. The basis for the apparent violation, or if contested, the basis for disputing the apparent violation.

We are disputing the current violation because we believe that "a public liability action" (i.e., a radiation injury lawsuit) is not conduct protected by the Energy Reorganization Act, and because we believe we had a legitimate basis for declining to hire individuals who profess to be suffering severe and debilitating emotional distress. A copy of our post-hearing brief in the McCafferty case is attached explaining these views and administrative record. See Attachment B. In addition, we will provide you with a copy of our appellate brief before the Department of Labor's Administrative Review Board. That brief is due to be filed on August 22.

If the NRC eventually determines that our action in not hiring the six employees violated Section 50.7, we ask you to recognize that the ALJ's decision in the McCafferty case presents a novel interpretation and expansion of Section 211 which we did not reasonably anticipate. At the time that we decided not to hire the six temporary workers, it did not occur to us that their lawsuit might be considered protected conduct, and there were no prior cases or opinions that might reasonably have alerted us to this issue. Centerior made a judgment in good faith without any indication that the decision might be considered inappropriate under the ERA. In light of these facts, the NRC should consider exercising its discretion to forego or mitigate enforcement action.

2. The corrective steps that have been taken and the results achieved.

Because Centerior disputes the violation and is pursuing review of the ALJ's decision, it does not believe corrective steps are appropriate at this time. It should be noted that the next outage in which these temporary workers might be hired is not scheduled until late 1997.

As discussed above, Centerior has communicated with its employees to make sure the developments in the McCafferty case do not deter employees from raising safety concerns. These communications are of course in addition to the existing programs and procedures employed by Centerior to encourage the identification of concerns.

1. As previously described in our March 20, 1996 letter (ref. 1), Centerior conducts an Ombudsman program at Perry (Plant Admin. Procedure 0217) which provides a mechanism for the reporting and addressing of nuclear safety or quality concerns while providing confidentiality for the employees. We also maintain an Open Door Policy (Policy and Practices Manual M&C-1) to encourage employees to raise issues through the chain of

3. The corrective steps that will be taken to avoid further discrimination.

For the same reasons indicated in response to Item 2 above, Centerior is not planning to take further corrective steps at this juncture. If the ALJ's decision is not overturned on administrative appeal or judicial review, Centerior will implement appropriate corrective action at that time.

4. The date when full compliance will be achieved.

Because Centerior is disputing the violation and appealing the ALJ's decision, it currently believes it is in compliance with the ERA and Section 50.7.

If you have questions or require additional information, please contact Mary O'Reilly at (216) 447-3206.

Very truly yours,



John P. Stetz
Senior Vice President, Nuclear

Attachments

cc:

NRC Project Manager
NRC Resident Inspector
NRC Region III Administrator
Document Control Desk

(Footnote 1 continued from previous page)

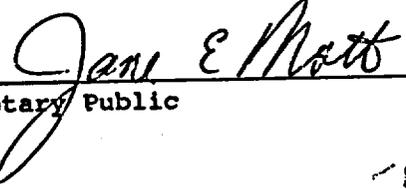
command. We conduct an Industrial Safety Program (Plant Admin. Procedure 0117) to provide yet another process by which employees can report health and safety issues through the use of a Perry Plant Safety Hazard Concern form for documented response by supervision. In addition, our Corrective Actions procedure (Plant Admin. Procedure 1608) establishes a method for employees to identify issues and activities that do not meet requirements or expectations, through use of a Potential Issue Form (PIF) which is subject to tracking and documented resolution. This Corrective Actions procedure includes Radiation Protection Deficiency Identification and Reporting as specified in Plant Admin. Procedure 0124.

I, John P. Stetz, being duly sworn, state that (1) I am Senior Vice President, Nuclear of Centerior Service Company, (2) that I am duly authorized to execute and file this certification on behalf of The Cleveland Electric Illuminating Company and Toledo Edison Company, and as the duly authorized agent for Duquesne Light Company, Ohio Edison Company and Pennsylvania Power Company, and (3) the statements set forth herein are true and correct to the best of my knowledge, information and belief.

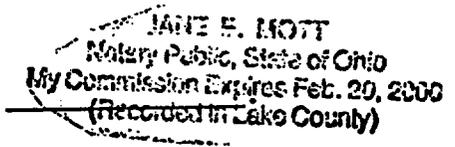


John P. Stetz
Senior Vice President, Nuclear

Subscribed and sworn to before me, this 16th day of August, 1996



Notary Public

My commission expires _____


INTRA-COMPANY MEMORANDUM
ED 8268

TO All Perry Plant Personnel

DATE August 7, 1996

FROM *J. P. Stetz*
J. P. Stetz, Senior Vice President - Nuclear

MAIL STOP DB-3080

SUBJECT Discrimination Lawsuit

PHONE 7129

NVP-96-00032
VP 1.10.10

In March, D. C. Shelton informed you that several contract insulators had alleged Centerior discriminated against them by not allowing them to be hired for the Perry outage. The insulators based this allegation on the fact they were involved in civil litigation against Centerior regarding a minor radiological exposure at Davis-Besse. A Department of Labor Administrative Law Judge recently interpreted the Energy Reorganization Act as protecting this type of lawsuit.

Centerior has decided, after careful consideration, to appeal this decision by the Administrative Law Judge. This is because we do not believe a private lawsuit is protected by Section 211 of the Energy Reorganization Act and 10CFR50.7 (since it does not involve the raising of safety concerns either to the NRC or to Centerior) and because we are concerned with the fitness of these individuals.

While we have decided to pursue an appeal of the Administrative Law Judge's decision due to the specific facts of this case, I want to make sure none of you misinterpret our appeal as any indication of unreceptiveness to safety concerns. I wish to re-emphasize what Mr. Shelton previously stressed: All of Centerior's nuclear employees should understand it is their duty to identify conditions adverse to quality or safety and they may do so, publicly or confidentially, without any fear of retaliation.

We encourage you all to help make our nuclear plants as safe and effective as possible.

MEO:nlf

INTRA-COMPANY MEMORANDUM
ED 8268



TO All Davis-Besse Site Personnel

DATE August 7, 1996

FROM *J. P. Stetz*
J. P. Stetz, Senior Vice President - Nuclear

MAIL STOP 3080

SUBJECT Discrimination Lawsuit

PHONE 7129

NVP-96-00032
VP 1.10.10

In March, D. C. Shelton informed you that several contract insulators had alleged Centerior discriminated against them by not allowing them to be hired for the Perry outage. The insulators based this allegation on the fact they were involved in civil litigation against Centerior regarding a minor radiological exposure at Davis-Besse. A Department of Labor Administrative Law Judge recently interpreted the Energy Reorganization Act as protecting this type of lawsuit.

Centerior has decided, after careful consideration, to appeal this decision by the Administrative Law Judge. This is because we do not believe a private lawsuit is protected by Section 211 of the Energy Reorganization Act and 10CFR50.7 (since it does not involve the raising of safety concerns either to the NRC or to Centerior) and because we are concerned with the fitness of these individuals.

While we have decided to pursue an appeal of the Administrative Law Judge's decision due to the specific facts of this case, I want to make sure none of you misinterpret our appeal as any indication of unreceptiveness to safety concerns. I wish to re-emphasize what Mr. Shelton previously stressed: All of Centerior's nuclear employees should understand it is their duty to identify conditions adverse to quality or safety and they may do so, publicly or confidentially, without any fear of retaliation.

We encourage you all to help make our nuclear plants as safe and effective as possible.

MEO:nlf

April 5, 1996

UNITED STATES OF AMERICA
DEPARTMENT OF LABOR

RECEIVED

Before the Office of Administrative Law Judges

APR 10 1996

MARY E. O'REILLY

In the Matter of)
)
OWEN McCAFFERTY, et al.)
Complainants,)
)
v.)
)
CENTERIOR ENERGY,)
Respondent.)

Case No. 96-ERA-6

CENTERIOR ENERGY'S POST-HEARING BRIEF

Centerior Energy ("Respondent" or "Centerior") hereby submits this Post-Hearing Brief in the above-captioned proceeding, as permitted by the Administrative Law Judge. Tr. 290.¹⁴ For the reasons stated herein, the complaint in this proceeding lacks merit and should be dismissed.

SUMMARY OF ARGUMENT

The Complainants in this proceeding -- Owen McCafferty, Dennis Maloney, Sean Kilbane, Terry McLaughlin, Sean McCafferty and Robert Prohaska ("Complainants") -- allege that Centerior violated section 211 of the Energy Reorganization Act ("ERA") by not allowing them.

¹⁴ The Administrative Law Judge ruled that each party might submit post-hearing briefs within fifteen days after receipt of the hearing transcript. Tr. 290. After receiving the transcripts, the parties agreed that to comply with this ruling, post-hearing briefs should be served by April 5, and would be served on each other by Federal Express.

to be hired for outage work at the Perry Nuclear Power Plant because they had filed a radiation-injury lawsuit ostensibly under the Price-Anderson Act. Such a lawsuit is not a proceeding protected by section 211. As clearly and unequivocally stated by Congress in enacting what is now section 211:²

The Senate Bill amended the Energy Reorganization Act of 1974 to provide protection to employees of Commission licensees, applicants, contractors, or subcontractors, from discharges or discrimination for taking part or assisting in administrative or legal proceedings of the [Nuclear Regulatory] Commission.

H.R. Rep. No. 1796, 95th Cong., 2d Sess. 16-17 (1978), reprinted in 1978 U.S.C.C.A.N. 7307, 7309 (emphasis added). This statement demonstrates that Congress intended to protect participants in Nuclear Regulatory Commission ("NRC") proceedings -- not private tort claimants. Section 211 cannot and should not be applied contrary to this clear Congressional intent.

In any event, irrespective of whether a private radiation-injury lawsuit is protected -- it is not -- Centerior had a valid non-discriminatory motive in refusing to allow the hiring of the Complainants. This is a simple case of workers who have signaled that they are terrified of permissible radiological exposures, and it is therefore neither surprising nor unreasonable that Centerior is now reluctant to allow them to be hired for work in radiation areas. Complainants, in both their civil complaint and in this proceeding, indicate that they are unwilling to accept the radiation protection philosophy upon which the NRC regulations and Centerior's radiation safety program are founded. Complainants also state that they are suffering and will continue to suffer

² The employee protection provisions of the ERA were originally located in § 210 of the Energy Reorganization Act, but because of a mistake in numbering, the ERA had two § 210s. The ERA was amended in 1992 to redesignate the employee protection provision as § 211.

"severe and debilitating" emotional distress from radiological exposures within normal occupational ranges -- exposures within the range that Complainants would again incur if they were hired for outage work at Perry. Where, as here, Centerior perceives that the Complainants may be unwilling or unsuited to work in radiologically-restricted areas, Centerior is under no obligation to hire them. Given the obvious need to ensure the safety of nuclear plants, Centerior's judgment as the licensed operator must be respected.

STATEMENT OF FACTS

Centerior Energy Corporation is the parent holding company of the Cleveland Electric Illuminating Company, The Toledo Edison Company, and Centerior Service Company. Tr. 205. Cleveland Electric and Centerior Service Company are jointly licensed by the NRC as the operator of the Perry Nuclear Power Plant. *Id.* Toledo Edison and Centerior Service Company are jointly licensed by the NRC as the operator of the Davis-Besse Nuclear Power Station. *Id.*

All nuclear power plants contain radioactive materials that emit radiation. The NRC has enacted extensive regulations, at 10 C.F.R. Part 20, that govern the permissible radiation dose levels to which all nuclear workers may be exposed. O'Conner v. Commonwealth Edison Co., 748 F. Supp. 672, 678 (C.D. Ill. 1992), *aff'd*, 13 F.3d 1090 (7th Cir.), *cert. denied*, 114 S. Ct. 2711 (1994). The federal dose limits are set by national and international scientific consensus at a level below which no appreciable risk of harm exists. See Colley v. Commonwealth Edison Co., 768 F. Supp 625, 627 (N.D. Ill. 1991) (Federal dose limits are based on the existing national and international consensus regarding levels of radiation at which no appreciable bodily injury to those exposed is expected); Akins v. Sacramento Mun. Util. Dist., 6 Cal. App. 4th 1620, 1638

n.5, 8 Cal. Rptr. 2d 785, 793 n.5 (1992) (NRC conservatively set permissible dose limits so that no injury will occur unless the limits are exceeded by a significant multiple). These regulations expressly recognize that all nuclear workers "of necessity will receive some low level radiation exposure because some exposure is an unavoidable aspect of working in a radiation area (just as it is an unavoidable aspect of receiving a medical x-ray)." O'Conner, 748 F. Supp. at 678. Thus, when nuclear workers enter radioactive areas to perform their work, they expect to and do receive radiation exposure as a normal, routine part of their work.

Activities at each of Centerior's nuclear plants are governed by a radiation safety program written to ensure compliance with the NRC's regulations at 10 C.F.R. Part 20, as well as requirements imposed in the NRC licenses for operation of these facilities. Tr. 139. The radiation safety program includes detailed procedures and instructions to implement these requirements. Tr. 139-40. Portions of the plant are designated and posted as radiologically-restricted areas to alert workers that entrance into these areas could result in exposure to radiation and that activities in those areas must be in accordance with the radiation protection program. Tr. 140. Radiation work permits are issued by the licensee to provide the worker with information needed to perform work in radiologically-restricted areas, including identification of the radiological hazards, the protective clothing requirements, and any survey or monitoring requirements imposed for the work. *Id.*

The instructions that are included in radiation work permits are determined by the radiation protection group based on an assessment of the radiological conditions of the work area and are selected during the planning process to lower the total dose (the sum of internal and external

dose)² received by the workers and keep it below the 5000 millirem (TEDE) annual occupational exposure limit permitted by the NRC. Tr. 141; 10 C.F.R. § 20.1201. This "total dose" approach was adopted by the NRC in the 1990s in a revision to its Standards for Protection Against Radiation, 10 C.F.R. Part 20, based on recommendations of the International Commission on Radiation Protection and the National Council on Radiation Protection and Measurements ("NCRP").⁴ Tr. 142-43, 145. See 10 C.F.R. §§ 20.1201, 1202. Under this approach, which requires trade-offs between internal and external exposures, minor intakes of radioactive material are permissible if they avoid a greater dose from an external source of radiation. Tr. 143.

This total dose concept is directly reflected in Centerior's respirator policy, which allows the radiation protection group to require workers not to wear respirators if use of respirators would impede workers from conducting their activities in an efficient manner to lower total dose. Tr. 146. That is, since respirators both obstruct vision and may delay completion of the task, the unnecessary use of respirators can expose workers to greater amounts of radiation by prolonging their stay in a radioactive environment. As a result of this new approach required by the NRC's revisions to 10 C.F.R. Part 20, use of respirators has decreased significantly at Centerior's plants. For example, during the 1990 outage at Perry, 12,000 respirators were used, compared to 200 during the current outage. Tr. 147.

² External dose is exposure to a source of radiation outside the individual, such as a beam or field of radiation. Internal exposure occurs when radioactive particles or dust are inhaled or ingested into the body. Tr. 141-42. Internal exposure is measured in terms of a committed effective dose equivalent (CEDE), which takes into account the amount of time the radioactive material remains in the body. Tr. 145-46, 149. See also 10 C.F.R. § 20.1003. External dose is measured in terms of deep dose equivalent (DDE). Tr. 149-50. See also 10 C.F.R. § 20.1003. The sum of these doses is the Total Effective Dose Equivalent (TEDE). Tr. 150. See also 10 C.F.R. § 20.1003. These doses are expressed in units of "rem" or "millirem" (a thousandth of a rem).

⁴ See 56 Fed. Reg. 23360 (1991). Prior to this revision of 10 C.F.R. Part 20, separate limits were imposed on internal and external exposures. Tr. 142.

Centerior is not permitted to deviate from the radiation protection standards in the NRC's regulations and its license. Compliance with the procedures implementing those standards is also mandatory. Tr. 149.

Periodically (approximately every 18 months to two years) nuclear plants are shut down for refueling and maintenance. Tr. 20-21. During these outages, Centerior performs substantial maintenance and modification work that cannot be done while the facility is operating. Tr. 206. Nearly all of this work at Perry is performed in radiologically-restricted areas (areas where there is exposure to radiation). Tr. 60, 214.

These outages are periods of intense activity. They involve very detailed planning, which begins far in advance of the outage.² Tr. 206, 208. During the current outage at the Perry plant, Centerior must manage over 2,000 employees at the site and perform in excess of 5,000 activities in about a two-month period. Tr. 206, 208. To accomplish this enormous amount of work within the scheduled time, a large number of tradesmen are brought into the plant to perform maintenance, through contractors such as Fishbach Power Services, Inc. at Perry.³ Tr. 21, 205-06. Because of the cost of an idle plant, it is very important to complete the outage in a timely and efficient manner. Tr. 24-25.

Before any worker (including temporary outage workers) may perform work in radiologically-restricted areas, each must complete training on Centerior's radiation protection

² Immediately after completing an outage, Centerior begins planning for the next. Tr. 208.

³ Fishbach provides labor for maintenance at Perry, but does not provide any services at Davis-Besse or at any of Centerior's non-nuclear facilities. Tr. 115, 205-06.

program. Tr. 22-23, 65-67. After completion of training, each worker is "badged"^u for work in such areas, and is required to follow the strict procedures and radiation work permits governing all work in radiologically-restricted areas. Tr. 67-68.

The Complainants in this proceeding are insulators who are members of the Union of Asbestos Workers, Heat and Frost Insulators, Local 3 in Cleveland, Ohio. Tr. 17, 115. In the fall of 1994, the Complainants were performing outage work at the Davis-Besse plant.^u Tr. 19-20. During this outage at Davis-Besse, they received a minor but unplanned radiological exposure. Resp. Ex. 2, NRC Inspection Report No. 50-346/94010(DRSS) at 4-5. The event was immediately investigated by Centerior, which identified certain programmatic weaknesses that had led to the exposure. *Id.* at 6. Centerior performed a series of whole-body counts to determine the dose each insulator had received. Tr. 69. The committed effective dose equivalent ranged from 0 to 212 millirem, while deep dose equivalents ranged from 22 to 62 millirem. Resp. Ex. 2, NRC Inspection Report No. 50-346/94010(DRSS) at 5; Tr. 71-72.

Complainants' exposures during this event were minor. They were less than the national average exposure from natural background radiation in the United States, which according to the National Council on Radiation Protection and Measurements (NCRP Report No. 93) is approximately 300 millirem/year (whole body). Tr. 66, 154-55. That is, the average U.S. citizen receives approximately 300 millirem per year naturally, during normal activities of living, and approximately 200 millirem of this natural dose is an internal dose from inhaling radon gas. Tr.

^u A "badge" is a thermoluminescent dosimeter, given to employees to measure their radiation dose. Tr. 193.

^u At the time, Complainants were working for Gem Industrial Services, a contractor at Davis-Besse. Tr. 35.

154. Complainants' exposures were also considerably smaller than doses which the Complainants had received during previous outage work.² Resp. Ex. 1; Tr. 72. Even the largest dose received by any of the Complainants from this 1994 incident was only about one-twentieth of the 5,000 millirem TEDE annual occupational exposure limit permitted by the NRC's regulations. 10 C.F.R. § 20.1201; Tr. 64-65, 72, 194.

The NRC subsequently reviewed this event. Resp. Ex. 2, NRC Inspection Report No. 50-346/94010(DRSS). The NRC assessed Centerior's investigation, verified Centerior's dose calculations, and concluded that the root causes and corrective actions identified by Centerior adequately addressed the event.¹⁰ *Id.* at 5-6. The NRC issued a Notice of Violation for Centerior's having not adequately surveyed the work area prior to the performance of the work. Resp. Ex. 2, Notice of Violation at 1. The NRC classified the violation as "Severity Level IV"¹¹ and proposed no civil penalty. Resp. Ex. 2, Notice of Violation at 1-3. Centerior accepted this enforcement action. Comp. Ex. D.

Complainants continued to work at the Davis-Besse plant until the refueling outage was complete and their job was done. Tr. 27. No discriminatory action was taken against any of the

² Complainants' exposures during prior outage work ranged up to 1,300 millirem. Every one of the Complainants had received total doses during previous outages larger than those incurred in the unplanned intake event. *See generally* Resp. Ex. 1.

¹⁰ During cross-examination of Respondent's Radiation Protection Manager, Complainants' attorney sought to suggest that Centerior changed its respirator policy following the October 1994 event. *See* Tr. 181. This suggestion was incorrect. The Radiation Work Permit for the work being performed by the insulators was changed, not the respiratory policy. Tr. 181, 183, 195-96. The changed RWP indicated that respiratory protection was conditional, dependent on the results of the radiological surveys. Complainants' Ex. D at 3. This is entirely consistent with the total dose concept and Centerior's respiratory policy, as described above.

¹¹ Severity Level IV is the second lowest category of NRC violation. *See* 10 C.F.R. Part 2, App. C (1995) at § IV.

individuals because of the unplanned intake event or subsequent investigation into that event. Id. Indeed, it is clear that Centerior initiated the investigation of and reported the event itself. Resp. Ex. 2, NRC Inspection Report No. 50-346/94010(DRSS) at 5; Tr. 91-92.

Despite having received no exposure exceeding occupational safety limits established by the NRC, nearly a year later, the six Complainants filed a civil complaint in the United States Court for the Northern District of Ohio on August 7, 1995. McCafferty v. Centerior Serv. Co., No. 1:95CV 1732 (N.D. Ohio). Comp. Ex. A; Tr. 32-33. The civil complaint includes multiple counts related to Complainants' exposure to radiation in 1994, including claims of entitlement to a medical monitoring fund under Ohio law, negligence, strict liability, intentional infliction of emotional distress, reckless and wanton misconduct, negligent infliction of emotional distress, and negligent infliction of severe and debilitating emotional distress. Among the various averments in their civil complaint, Complainants stated:

23. Defendants failed to exercise reasonable care by:

* * *

c. prohibiting the use of respiratory protection as Edison's Radiation Work Permit which Plaintiffs were required to obey in accordance with Defendant Toledo Edison's Radiation Protection Program.

* * *

38. Defendants had actual knowledge of the fact that Plaintiffs would perform the dangerous task without respiratory protection and that performing the task would cause an airborne release of the radioactive contamination present beneath the mirror insulation and that Plaintiffs would each receive an internal dose of these radioactive materials into their unprotected lungs by inhalation.

* * *

40. Defendants' conduct was extreme and outrageous, and so beyond the bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society.

* * *

43. By requiring Plaintiffs to perform a dangerous task and prohibiting them from wearing respiratory protection while performing such a dangerous task, Defendants intentionally and knowingly, recklessly and wantonly disregarded the injurious consequences to the Plaintiffs and have acted in a manner presenting a risk of grave injury to the Plaintiffs.

* * *

50. Plaintiffs have each suffered a physical invasion of their bodies by inhaling radioactively-contaminated particulate matter into their lungs and subsequently have suffered a contemporaneous physical injury by exposure to internal doses of radiation.

51. As a direct and proximate result of Defendants' wrongful conduct, Plaintiffs have suffered, are suffering, and will continue to suffer emotional distress.

* * *

57. Notwithstanding the contemporaneous physical injury alleged above . . . , as a direct and proximate result of Defendants' wrongful conduct, Plaintiffs have suffered, are suffering, and will continue to suffer harm in the form of serious emotional distress that is both severe and debilitating.

Comp. Ex. A, ¶¶ 23, 38, 40, 43, 50-51, 57.

In September 1995, one of the Complainants, Dennis Maloney, was hired by Fishbach to perform maintenance work at Perry. Tr. 33-34. Around the 5th or 6th of October, 1995, a staff member in Perry's Radiation Protection group informed the Perry Radiation Protection Manager, Mr. Volza, that Mr. Maloney had requested a copy of the whole-body count performed on incoming personnel prior to badging. Tr. 150-51. This was an unusual request and led someone to

associate Mr. Maloney with the insulator issue (the event addressed in the NRC inspection report) at Davis-Besse. Tr. 151, 176.

Mr. Volza subsequently called his counterpart, Mr. Ron Scott, at Davis-Besse to obtain additional facts concerning what had transpired during the Davis-Besse outage and the issues related to that matter. Tr. 151. Mr. Volza was not aware of the civil complaint, but learned of it during his discussion with Mr. Scott. Id. Mr. Scott informed Mr. Volza of the concerns expressed by the insulators in their complaint, including their identifying emotional distress and concern relative to working in radiation environments without respirators. Id. Mr. Scott also told Mr. Volza that the exposures received by the insulators at Davis-Besse had been on the order of 200 millirem, but that the insulators considered any internal exposure to be "bad." Tr. 153.

Mr. Volza was concerned by this discussion because the radiation protection and respirator policies at Perry were similar to those at Davis-Besse, and Perry had had a bad experience during its previous outage with another worker who had taken issue with instructions not to wear a respirator. Tr. 151-52. Mr. Volza therefore contacted the Director of Nuclear Services at Perry, Mr. Robert Schrauder, and informed Mr. Schrauder that they might have a problem with Mr. Maloney's being able to comply with the radiation-protection programs and policies at Perry. Tr. 152. Based on the information he had received from Mr. Scott, Mr. Volza expressed a primary concern with the insulator's emotional ability to work in a radiation environment. Tr. 168. He also passed on to Mr. Schrauder a secondary concern that Mr. Maloney was making unusual requests for records that might be related to his civil complaint. Id.

Mr. Schrauder understood Mr. Volza's concern that the insulators involved in the civil litigation did not seem inclined or able to adapt to the new radiological practices in the nuclear industry requiring performance of a large number of jobs without respirators and that this could be potentially disruptive to the outage. Tr. 207. Mr. Schrauder obtained and reviewed a copy of the civil complaint filed by the insulators, and accepted at face value the assertion that the Complainants had debilitating emotional distress as a result of a not-uncommon exposure. Tr. 208. Mr. Schrauder became concerned that the Complainants might want to pick and chose the jobs they would perform, and that this would disrupt the outage schedule. *Id.*

Mr. Schrauder therefore asked his contract administration group to inform Fishbach that Centerior did not wish the Complainants to work at the Perry refueling outage. *Id.* Fishbach subsequently requested that Centerior communicate this request in writing, to make it clear that it was Centerior's decision. As a result, Mr. Schrauder wrote a letter to Mr. Richard Cline, the Fishbach representative at Perry. Comp. Ex. B. The letter stated that, due to the litigation, Centerior could not allow any of the Complainants to work at Centerior's facilities. *Id.* The letter asked Mr. Cline to assure that none of these individuals was assigned to the Perry plant, and not to assign any of them to the Perry Plant until the litigation is resolved. *Id.* This led to Mr. Maloney's termination on October 16. Tr. 41, 46. None of the other Complainants had been hired by Fishbach to support the Perry outage.

ARGUMENT

I. A Radiation Injury Lawsuit Is Not A Proceeding Protected by Section 211 of the ERA.

The conduct which Complainants claim resulted in discrimination -- the filing of a radiation injury lawsuit in Federal District Court -- is not a proceeding protected by section 211 of the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851. Section 211 (including its predecessor, Section 210^{12/}) has never been applied, and is not intended, to protect this type of activity. Neither the Secretary of Labor nor any Court^{13/} has ever applied section 211 to protect tort claimants, including claimants under the Price-Anderson Act.^{14/} Nor is a tort claim under the Price-Anderson Act analogous to any activity that has been deemed protected under the ERA. The type of conduct that the Department of Labor and the courts have found to be protected by the ERA involves notifying the NRC or licensee management of safety concerns or regulatory violations, or otherwise protecting the free flow of safety information to government regulators. Complainants' tort action simply does not fit this mold.

^{12/} See note 2 *supra*.

^{13/} The NRC, which also has enforcement responsibility under section 211, has similarly never interpreted section 211 as protecting tort or Price-Anderson claims. The NRC's regulation protecting employees makes no reference to this type of conduct. 10 C.F.R. § 50.7.

^{14/} The Price-Anderson Act, enacted in 1957, added Section 170 to the Atomic Energy Act (42 U.S.C. § 2210) to establish mandatory financial protection, indemnity, and limitation of liability for nuclear incidents (any occurrences causing injury from radioactive material regulated under the Atomic Energy Act). In 1988, the Price-Anderson Amendments Act amended Section 170 and created a federal cause of action, called a "Public Liability Action," for claims arising from a nuclear incident. See generally *In re TMI Litigation Cases Consol. II*, 940 F.2d 832, 852-54 (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1095-96 (7th Cir.), *cert. denied*, 114 S. Ct. 2711 (1994).

Complainants' argument is a superficial one -- that they filed their radiation injury lawsuit ostensibly under the Price-Anderson Act,¹² that the Price-Anderson Act is part of the Atomic Energy Act, and that section 211(a)(1)(D) of the ERA (42 U.S.C. § 5851(a)(1)(D)) prohibits an employer from discriminating against an employee for commencing a proceeding under the Atomic Energy Act. Tr. 11-12. This argument fails because a radiation injury lawsuit, even one where federal jurisdiction is claimed under the Price-Anderson Act, is not the type of proceeding that section 211 is intended to protect. Applying section 211 to such civil litigation would pervert the meaning of the provision, ignore Congress' intent, and protect conduct not serving any purpose of the Atomic Energy Act, Price-Anderson Act, or ERA.

In this case, Congress' intent is clear and explicit with respect to the type of "proceeding" protected by section 211:

The Senate Bill amended the Energy Reorganization Act of 1974 to provide protection to employees of Commission licensees, applicants, contractors, or subcontractors, from discharges or discrimination for taking part or assisting in administrative or legal proceedings of the [Nuclear Regulatory] Commission.

H.R. Rep. No. 1796, 95th Cong., 2d Sess. 16-17 (1978), reprinted in 1978 U.S.C.C.A.N. 7307, 7309 (emphasis added). This statement demonstrates that Congress intended to protect participants in NRC proceedings--not private tort claimants.

A court must reject statutory constructions that are contrary to clear Congressional intent or frustrate the policy that Congress sought to implement. Chevron, U.S.A. v. Natural Resources

¹² The only reference in the civil complaint to the Price-Anderson Act occurs in paragraph 6 of the complaint, asserting Federal jurisdiction under the Act. See Comp. Ex. A, ¶ 6. All of the counts of the complaint are based on Ohio law.

Defense Council, 467 U.S. 837, 843 n.9 (1984). In this case, the statute's legislative intent must be examined, because, as the Courts have repeatedly found, the word "proceeding" in section 211 is ambiguous and undefined.

Here a disagreement has arisen over the extent of protection provided by section 5851 and the exact meaning of the language "proceeding or any other action. . . ."

The meaning of this provision is rendered unclear inasmuch as the statute does not include definitions of the pertinent terms.

Kansas Gas & Elec. Co. v. Brock, 780 F.2d 1505, 1510 (10th Cir. 1985), cert. denied, 478 U.S. 1011 (1986). See also Bechtel Constr. Co. v. Secretary of Labor, 50 F.3d 926, 931 (11th Cir. 1995) (the Act did not define the term "proceeding" or the phrase "any other action to carry out the purposes of this chapter."); Donovan v. Diplomat Envelope Corp., 587 F. Supp. 1417, 1424 (E.D.N.Y. 1984) ("We must look to the purpose of the statute rather than its language alone."), aff'd, 760 F.2d 253 (2d Cir. 1985). Cf. Passaic Valley Sewerage Comm'rs v. United States Dept of Labor, 992 F.2d 474, 478 (3d Cir.) ("The statutory term 'proceeding' within § 507(a) of the Clean Water Act is ambiguous."), cert. denied, 114 S.Ct. 439 (1993).

Here the express purpose of section 211 is to protect employees who participate in the administrative and legal proceedings of the Nuclear Regulatory Commission (H.R. Rep. No. 1796, supra, at 16-17), not other types of proceeding. The fundamental objective is to preserve and promote the flow of information to the regulatory agency.

The purpose of the Act is to prevent employers from discouraging cooperation with NRC investigators. . . . Under this antidiscrimination provision . . . the need for broad construction of the statutory purpose can be well characterized as "necessary to prevent the [investigating agency's] channels of information from being dried up by employer intimidation."

De Ford v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983). See also Lassin v. Michigan State Univ., 93-ERA-31, ALJ Decision at 5 (Sept. 29, 1993), *aff'd*, Secretary's Decision (June 29, 1995) (the "public policy" underlying the ERA is "to facilitate the flow of safety information to the government.") (emphasis added); Remusat v. Bartlett Nuclear Inc., 94-ERA-36, Secretary's Decision at 9 (February 26, 1996) (free flow of information is primary goal).^{16/}

Of course, section 211, as interpreted prior to 1992 and made clear in the 1992 amendments,^{17/} also protects employees who notify their employer of an alleged violation of the ERA or Atomic Energy Act. But here too the objective is to protect the flow of information to the regulatory agency. Internal complaints to an employer (as well as other conduct leading up to an NRC proceeding) are protected because the normal process for raising safety concerns is to approach the employer before contacting the NRC. Thus, internal complaints are viewed both as part of the NRC process and as a first step in the commencement of an NRC proceeding, and are protected as such to prevent "preemptive" retaliation. Bechtel Constr. Co. v. Secretary of Labor, 50 F.3d 926, 932 (11th Cir. 1995); Kansas Gas & Elec. Co., 780 F.2d at 1511. See also Passaic Valley, 992 F.2d at 478.

^{16/} "Uniform" whistleblower bills proposed in Congress in recent years provide further evidence that the term "proceeding," as used in enacted whistleblower statutes such as section 211, was intended to be limited to actions brought before federal agencies entrusted with enforcing health and safety laws. See, e.g., The Uniform Health and Safety Whistleblowers Protection Act of 1987, reprinted in 134 Cong. Rec. S 1449 (Feb. 23, 1988) ("The term 'proceeding' means a trial, hearing, investigation, inquiry, inspection, administrative rulemaking, or adjudication involving a federal agency.") (emphasis added); The Employee Health and Safety Whistleblower Protection Act, reprinted in 135 Cong. Rec. S1833 (daily ed. Feb. 28, 1989) ("The term 'proceeding' means a trial, hearing, investigation, inquiry, inspection, administrative rulemaking, or adjudication involving a federal agency.") (emphasis added).

^{17/} The 1992 amendments provided explicit protection for employees who notify their employer of an alleged violation of the ERA or Atomic Energy Act. See 42 U.S.C. § 5851. This amendment codified existing case law which had previously protected internal complaints under the rationale that such complaints are "the first step in the initiation of an enforcement proceeding." Kansas Gas & Elec. Co., 780 F.2d at 1511.

Moreover, irrespective of whether they are made to the employer or regulator, the communications which section 211 is designed to protect are those made to identify regulatory violations or conditions adverse to nuclear safety, so that such nuclear safety concerns may be corrected.

The ability of nuclear industry employees to come forward to either their employers or to regulators *with safety concerns* without fear of harassment or retaliation is a key component of our system of assuring adequate protection of public health and safety from the inherent risks of nuclear power.

H.R. No. 102-474(VIII), reprinted in 1992 U.S.C.C.A.N. 2282, 2297 (emphasis added).

There are many ways an employee can commence an NRC legal or administrative proceeding. The NRC's regulations allow any person, including an employee, to submit a petition to institute a proceeding to modify, suspend, or revoke a license, or for such other action as may be proper. 10 C.F.R. § 2.206. Section 189 of the Atomic Energy Act also grants any person whose interest might be affected the right to a hearing on the granting, suspending, revoking, amending, or transfer of a license. 42 U.S.C. § 2239(a). Thus, the Act and NRC regulations provide individuals, including employees, direct mechanisms to commence an NRC proceeding.^{12/} Employees can also commence an NRC proceeding indirectly, by providing information either to the NRC^{13/} or to the employer. Indeed, it was on this very basis that the Secretary of Labor and Courts protected internal complaints prior to the 1992 amendments to the ERA. See Kansas Gas

^{12/} Section 189(b) of the Atomic Energy Act, 42 U.S.C. § 2239(b), also allows judicial review of NRC final orders, and thus also enables persons to commence judicial proceedings against the NRC. Unlike some environmental statutes, however, the Atomic Energy Act does not include a "qui tam" provision for private judicial proceedings against licensees to administer or enforce the Atomic Energy Act.

^{13/} NRC "proceedings" protected by section 211 include NRC investigations as well as enforcement actions. Deford v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983).

& Elec. Co. v. Brock, 780 F.2d at 1511 ("The Secretary contends that quality control inspectors initiate a proceeding when they file internal safety reports with their superiors because each inspector is individually charged with enforcing NRC regulations and such a report is a first step in the initiation of an enforcement proceeding."); Mackowiak v. University Nuclear Sys., Inc., 735 F.2d 1159, 1163 (9th Cir. 1984) (actions by quality control inspectors occur "in an NRC proceeding" because of their duty to enforce NRC regulations.).

The tort action filed by Complainants is markedly different from the commencement of or participation in an NRC proceeding. This private litigation lacks any nexus with the regulatory agency. Complainants' civil proceeding does not name the NRC as a party and does not involve any attempt to communicate with or bring matters to the attention of the NRC. In fact, the events underlying the civil litigation (the unplanned intake event at Davis-Besse in 1994) were brought to the NRC's attention by the licensee and resolved to the NRC's satisfaction long before Complainants' lawsuit was ever filed. The unplanned intake event was investigated by both the licensee and NRC in 1994, and was subject to an NRC enforcement proceeding completed in 1994. Since NRC proceedings related to the event were completed in 1994, Complainants' lawsuit (filed nearly a year later) simply cannot be viewed, under any fiction, as any sort of initial step in the initiation of a legal or administrative proceeding of the Commission. And without such a connection, the lawsuit is too remote from the remedial purposes of the whistleblower provisions to be protected activity. See Simon v. Simmons Indus. Inc., 87-TSC-2, Secretary's decision at 6 (April 4, 1994), aff'd, Simon v. Simmons Foods. Inc., 49 F.3d 386, 388 (8th Cir. 1995).

In the same vein, Complainants' tort action cannot be viewed as an internal complaint under section 211(a)(1)(A). First, it is not internal. Second, the civil complaint does not, and is not intended to, notify Centerior of an alleged violation of the ERA or Atomic Energy Act. See section 211(a)(1)(A), 42 U.S.C. § 5851(a)(1)(D). The only reference in the civil complaint to any violation is the historic reference in paragraph 16 to the already completed NRC-enforcement action. See Comp. Ex. A, ¶ 16. Since the NRC notified Centerior of this violation of Centerior's procedures nearly a year before the civil complaint was filed, and (as Complainants are well aware) Centerior admitted the violation at that time, the civil complaint clearly did not and could not notify Centerior of the violation. Further, it is obvious that the purpose of the civil complaint is to obtain personal compensation for the Complainants, and not to identify safety violations.

Nor is there any purpose in the Price-Anderson Act, the Atomic Energy Act, or the Energy Reorganization Act that would be promoted by expanding the interpretation of section 211 beyond its current bounds to protect Complainants' private tort litigation. There is no intent anywhere in these Acts to encourage or protect the filing of radiation injury claims. In this regard, the Price-Anderson Act was originally enacted in 1957 to remove potentially catastrophic liability as a deterrent to private participation in the development of nuclear energy. S. Rep. No. 218, 100th Cong., 2d Sess. 2 (1988), reprinted in 1988 U.S.C.C.A.N. 1476, 1477. It did so by authorizing the federal government to indemnify its licensees and contractors for any liability they might incur as a result of their activities. Pub. L. No. 85-256, § 4, 71 Stat. at 576-77. The government indemnity also served to ensure adequate public compensation in the case of a nuclear accident, by increasing the funds that might otherwise be available for compensating victims. S. Rep. No. 70, 100th Cong., 2d Sess. 13, reprinted in 1988 U.S.C.C.A.N. 1424, 1426. See Lujan v.

Regents of the Univ. of Cal., 69 F.3d 1511, 1514 (10th Cir. 1995).^{20/} But these basic purposes, to limit the liability of nuclear plant operators and to ensure a source of funds for public compensation, in no way seeks to promote, protect, or encourage lawsuits.

Indeed, until amendments in 1988, Price-Anderson did not create any federal cause of action or Federal jurisdiction for injury relating to nuclear incidents.^{21/} See In Re TMI Gen. Pub. Utils. Corp., 67 F.3d 1103, 1105 (3d Cir. 1995), cert. denied, 1996 U.S.LEXIS 1530 (1996). Instead, any claim for injury from a nuclear incident (not amounting to an extraordinary nuclear occurrence) had to be pursued in state court under state laws. Lujan, supra, 69 F.2d at 1514. Thus, when section 211 was first enacted (in 1978),^{22/} Congress could not have intended for section 211 to cover a federal tort suit of the kind filed by Complainants because *no* such suit could have been filed at that time.

Only later, upon passage of the Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, 102 Stat. 1066, did Congress confer jurisdiction on the federal courts for "public liability actions." Even here, Congress' purpose was limited, and was certainly not to encourage litigation or provide employees any greater right of recovery for an alleged radiation injury. The 1988 amendments created a federal cause of action to allow the consolidation of claims in federal court, to avoid inefficiencies resulting from duplicative determinations of similar issues in

^{20/} Through a series of amendments to the Act, government indemnity has now been replaced by financial protection requirements in the form of mandatory insurance requirements. See 42 U.S.C. § 2210(b).

^{21/} A 1966 amendment to Price-Anderson did create federal jurisdiction for an "extraordinary nuclear occurrence" (i.e. a catastrophic nuclear accident, not applicable here). Pub. L. No. 89-645m 80 Stat. at 892 (codified as amended at 42 U.S.C. 2210(n)(2)).

^{22/} Pub. L. 95-601, 92 Stat. 2951 (1978).

multiple jurisdictions that may occur in the absence of consolidation. S. Rep. No. 218, 100th Cong., 2d Sess. 13 (1988), reprinted in 1998 U.S.C.C.A.N. 1476, 1488. The substantive law to be applied in such an action continues to be derived from the law of the state in which the incident occurred, provided such state law is consistent with federal requirements. Id. See also 42 U.S.C. § 2014(hh) (1988); In re TMI, supra, 67 F.3d at 1106; Lujan, supra, 69 F.3d at 1514. Centerior's decision not to allow the hiring of Complainants has absolutely no relationship to or adverse impact on this Congressional purpose (consolidation of claims) underlying the creation of a federal public liability action.

In contrast, there are sound policy reasons for allowing an employer the discretion not to hire individuals embroiled in litigation against it. Litigation creates the potential for significant conflicts of interest. In this case, for example, the insulators might well decide that they cannot work in areas where they might receive internal exposures (or any exposure in the 200 millirem range over a short period) because willingness to incur such doses would be inconsistent with their posture in the litigation. Employees involved in litigation might also use their employment as an opportunity to obtain documents and information to support their case, or engage in conversations intended to elicit admissions that could be used against the employer. In addition, the litigation may create added stress for the managers who must worry whether their comments might somehow be used against their employers, or whether they too will become targets of the litigation. Overall, engaging in litigation for personal gain is simply inconsistent with the duty of loyalty which every employee owes his employer.

In sum, it is clear and undeniable that Congress intended section 211 to protect employees who raise safety concerns with their employers or regulators and never intended section 211 to apply to private radiation-injury lawsuits unrelated to the NRC. Section 211 must be interpreted and applied consistent with this intent, and so, the Complaint in this proceeding must be dismissed.

II. Centerior Had Legitimate, Nondiscriminatory Reasons for its Employment Decision.

Even if pursuing a private tort suit were considered an activity protected by section 211, Complainants are not entitled to relief because -- as a factual matter -- Centerior had legitimate, nondiscriminatory reasons for taking adverse action against Complainants. If a personnel action is motivated by legitimate reasons, rather than retaliatory animus, section 211 is not violated. See Lockert v. United States Dep't of Labor, 867 F.2d 513, 519 (9th Cir. 1989) (only discharge motivated by retaliatory animus violates the ERA).

In this case, Centerior was legitimately concerned that Complainants would be unwilling to work without respirators, that Complainants claimed to be suffering severe and debilitating emotional distress stemming from exposures which the federal regulations specifically permit and which Complainants would likely again receive, that Complainants might therefore seek to pick and choose the work they would perform, and that this could disrupt the busy outage schedule. Tr. 207-08. None of these considerations involves any intent to retaliate against or punish Complainants for their lawsuit. Indeed, there is not one whit of evidence in the record of any hostility towards complainants. Centerior simply had an enormous amount of work to perform

and manage over the short outage period, and because of the significant cost of any delay, was unwilling to accept this potential distraction.

That Centerior's legitimate concerns were prompted by statements in Complainants' civil complaint does not taint or render illegitimate Centerior's decision. Both the Courts and the Secretary have long recognized that an employer must not be precluded from taking legitimate personnel actions designed to assure the effectiveness of their work-force and adherence to applicable regulations, even when there is some link between the decision and some protected activity. Harvey v. Merit Sys. Protection Bd., 802 F.2d 537, 548 (D.C. Cir. 1986).²³ "Management must be able to adjust employment situations so as to carry out its duties." Ray v. Metropolitan Gov't of Nashville and Davidson County and the Urban Observatory of Metro. Nashville-Univ. Ctrs., 80-SWDA-1, ALJ Decision at 11 (Mar. 18, 1980), aff'd, Secretary's Decision (Apr. 14, 1980).²⁴

Thus, that some protected activity is the vehicle by which an employer is alerted to the need for some legitimate personnel action does not render the adverse action retaliatory or

²³ Any other result would mean that:

one in an executive position can never exercise his considered judgment in making personnel recommendations when asked to do so when that judgment is based on anything even tangentially related to the exercise of protected conduct.

Harvey v. Merit Sys. Protection Bd., 802 F.2d 537, 548 (D.C. Cir. 1986).

²⁴ See also Bauch v. Landers, 79-SDWA-1, Secretary's Decision at 2 (May 10, 1979) (employee protection provision in the Safe Drinking Water Act "does not, and should not, preclude management from taking steps to assure and maintain effectiveness by its staff in enforcing the water system requirements"); Lopez v. West Texas Utils., 86-ERA-25, Secretary's Decision at 9 (July 26, 1988) (raising a safety concern, does not "give . . . an employee carte blanche to ignore the usual obligations involved in an employer-employee relationship."); Garn v. Toledo Edison Co., 88-ERA-21, Secretary's Decision at 6 (May 18, 1995) ("certain forms of 'opposition' conduct, including illegal acts or unreasonably hostile and aggressive conduct, may provide a legitimate, independent, and nondiscriminatory basis for adverse action").

discriminatory. Rather, the fact-finder must examine the *motive* of the employer in taking the adverse action.²⁵ Where an employer is motivated by an employee's poor judgment -- rather than spite to punish or "get even" with the employee for exercising protected rights -- the employer's action is not retaliatory. See Harvey, 802 F.2d at 550. Likewise, if an employer takes adverse action because an employee's conduct reveals some undesirable trait that might adversely affect the performance of the job, then the proper conclusion is that the employer has acted with permissible motive.

These basic principles are reflected also in cases decided under a statute analogous to section 211 -- the "anti-retaliation" provision of Title VII of the Civil Rights Act of 1964. In Graham v. Texasgulf, Inc., 662 F. Supp. 1451, 1462 (D. Conn. 1987), aff'd, 842 F.2d 1287 (2d. Cir. 1988), the court recognized that the need to protect individuals asserting their rights under Title VII must be balanced against "an employer's legitimate demands for loyalty, cooperativeness and a generally productive work environment." The same principle appears in Pendleton v. Rumsfeld, 628 F.2d 102 (D.C. Cir. 1980), where the court explained:

The decision to remove any employee must be made primarily in light of that employee's duties. A question of retaliation is not raised by a removal for conduct inconsistent with those duties, unless its use as a mere pretext is clear.

628 F.2d at 108.²⁶

²⁵ For example, suppose an employee testified in an NRC proceeding that he discovered a safety problem while engaging in some illegal and intolerable activity (such as stealing property). Clearly, the employer should be able to discharge the employee for the inappropriate conduct notwithstanding the fact that he learned of such conduct through otherwise protected testimony.

²⁶ Similarly, in Hochstadt v. Worcester Found. for Experimental Biology, 545 F.2d 222 (1st Cir. 1976), the court applied a balancing test to determine whether an employer unlawfully retaliated against an employee for op-

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In this proceeding, Centerior has explained its legitimate, nondiscriminatory motive for its decision -- concern that Complainants would be unwilling to work without respirators or accept radiological decisions based on total dose considerations, concern that Complainants would be unwilling to work in areas where they might receive internal exposures, concern that Complainants might seek to pick and choose their jobs, and concern that all of this could disrupt and delay completion of the outage. Irrespective of Complainants' lawsuit, these concerns justify Centerior's decision and would lead to the same decision even if no lawsuit had been filed.

Based on Complainants' opening statement, Complainants apparently contend that these reasons are pretextual. Since Centerior has articulated legitimate reasons for its decision, it is Complainants' burden to demonstrate, by a preponderance of the evidence, that the reasons articulated by Centerior are a pretext. This Complainants cannot do.

There are a number of factors indicating the legitimacy of Centerior's decision and motive. First, Centerior's concerns have a sound regulatory basis. The NRC regulations recognize that the risk from an internal dose is the same as the risk from an equal external dose and requires a licensee to plan each job in accordance with that precept. The NRC regulations thus require a

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posing alleged discriminatory practices of the employer:

[W]e think courts have in each case to balance the purpose of the Act to protect persons engaging reasonably in activities opposing sexual discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel.

Id. at 231 (footnote omitted). The court further instructed that "[t]he requirements of the job and the tolerable limits of conduct in a particular setting must be explored." *Id.* Also, in *Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1312 (6th Cir. 1989), the court recognized that "[t]here may arise instances where the employee's conduct in protest of an unlawful employment practice so interferes with the performance of his job that it renders him ineffective in the position for which he was employed." In such a case, the court held, the employee's conduct would not be protected. *Id.* at 1312 (emphasis added).

licensee to add internal and external dose in order to calculate the total effective dose equivalent, and to make radiation protection decisions on this basis. Centerior's radiation protection program is based on and obeys these requirements. Accordingly, if the external radiation hazard outweighs the internal hazard (i.e., if wearing a respirator would increase total dose), respiratory protection is inappropriate.²⁷¹ Centerior cannot hire individuals who appear unwilling to accept the NRC's regulations, the radiation protection philosophy underlying those regulations, or Centerior's radiation protection program. Centerior is required to implement its program in accordance with NRC requirements and has no leeway to violate those requirements in order to accommodate an employee's personal views and preferences.

Second, the record in this proceeding shows that Centerior's concerns are reasonable. After the unplanned intake event at Davis-Besse, Centerior's health physicists met with Complainants to explain Centerior's respirator policy, including why it may be inappropriate to wear respirators. Tr. 72-74. The health physicists specifically explained that respirators would not be appropriate if wearing the respirator would increase total dose. Tr. 73. Despite this instruction, when Mr. Maloney was asked in this proceeding whether he agreed with the philosophy that one should not wear a respirator if it increases total dose, he replied "yes and no." Tr. 74. He explained that insulators are used to wearing masks (id.), thereby suggesting that he and his co-workers know better than Centerior's radiation protection professionals and the NRC's considered judgment. He indicated that he might ask to be put on another job. Tr. 75, 80.

²⁷¹ Other process or engineering controls to reduce dose would still be implemented. See 10 C.F.R. § 20.1701.

Mr. Maloney further testified that he is afraid of internal radiation exposures. Tr. 77. Mr. Maloney believes that any instruction to work without a respirator would be negligent if he would receive an internal dose that could be avoided. Tr. 82-83. He acknowledged that radiation protection training indicates that internal and external exposures are the same, but Mr. Maloney states: "there is nobody that I've talked to that really believes that so what you do is try to minimize your risk at receiving internal, and for an insulator the easiest way to do that is to put a mask on." Tr. 78. This testimony shows that Complainants reject the basic premise of the NRC regulations -- that internal and external dose are of equivalent risk -- and instead believe that any internal dose must be avoided under all circumstances, regardless of the NRC regulations to the contrary.

While Mr. Maloney may believe that internal exposures present greater risk than external exposures, it is clear that Centerior (like the NRC) does not. Mr. Volza strongly disagreed with Mr. Maloney's assertion, observing that the body cannot differentiate between radiation from an external or internal source, and that the new regulations require radiation-protection decisions to be based on total-dose considerations. Tr. 144. NRC regulations are based on the premise that internal dose and external dose present the same degree of risk. Tr. 78. This concept is carried into Centerior's radiation safety program and procedures. *Id.* It is therefore clear that, when Mr. Maloney states that nobody really believes that internal and external exposures are the same (Tr. 78), what he in fact means is that he and the other Complainants do not believe and will not accept this basic premise upon which both the NRC regulations and Centerior's radiation safety program are founded.

In the same vein, it is eminently reasonable for Centerior to be concerned if a prospective employee has stated that he has suffered, is suffering, and will continue to suffer serious emotional distress that is severe and debilitating. Mr. Maloney acknowledged stating in his complaint that he has suffered, is suffering, and will continue to suffer serious emotional distress that is both severe and debilitating, based on an exposure in the 0 to 212 millirem range. Tr. 75-76. He also admitted that he would have the same reaction if he were to receive the same magnitude exposure at Perry. Tr. 77. 82. He acknowledged, however, that such an exposure might well be planned for work during an outage. Tr. 83. Mr. Volza testified that it is very possible that if the Complainants were to work at Perry, they would receive a total dose of the same magnitude as that incurred during the 1994 outage at Davis-Besse. Tr. 155. See also Tr. 194.

Similarly, Mr. Maloney testified that he believes a 200 millirem dose, if received over a short period (what Mr. Maloney called "acute"), is unreasonable, ultra-hazardous, and something that distresses him significantly. Tr. 85. In fact, Mr. Volza testified that is not uncommon for workers in high radiation areas to receive 200 to 300 millirem in a single day. Tr. 155. He also pointed out that the NRC's regulations do not impose any additional time frame on the 5 rem (5,000 millirem) annual occupational dose limit. Under the NRC regulations, that entire dose may be received in minutes or over the entire year. Tr. 156. Further, he disagreed that a dose in the 200 millirem range would present any greater risk if received over a short time period. Tr. 156. In fact, there are no studies that indicate adverse health effects stemming from a dose of 200 millirem, delivered either quickly or slowly. Tr. 167. Once more, Mr. Maloney's testimony shows Complainants' unwillingness to accept doses that are both permissible under NRC regulations and typical for workers such as Complainants. It would be unreasonable to expect or

require Centerior to hire individuals under these circumstances, where the workers cannot or do not accept permissible conditions of the workplace.²⁸

Finally, Mr. Schrauder's concerns and motive should be accepted at face value because Mr. Schrauder has absolutely no reason to retaliate against Complainants for their litigation. Mr. Schrauder has no personal stake or involvement in that litigation. There are no allegations in the civil complaint concerning Mr. Schrauder. All Mr. Schrauder is interested in is timely completion of the Perry outage for which he is responsible. There is absolutely no evidence of any animosity toward Complainants.

Complainants' main argument that Centerior's reasons are not legitimate is that these reasons are not articulated in Mr. Schrauder's October 13, 1995 letter to Fishbach. This is a slim reed indeed. Mr. Schrauder did not include the full rationale in his letter, because there was no need to do so. Tr. 209. Fishbach only wanted something in writing indicating that the decision was Centerior's, not theirs. *Id.* Given Fishbach's limited request, one would not expect Mr. Schrauder to launch into a full explanation or to make statements to a third party outside the Company concerning his fear that the insulators might be unwilling to follow instructions, emotionally unsuitable, or disruptive. Nor is the letter's reference to the litigation surprising or sinister, since Mr. Schrauder's concerns over Complainants' willingness to work and abide by

²⁸ Complainants' unwillingness to accept the radiation protection philosophy and doses permitted by the NRC regulations cannot be viewed as any sort of protected refusal to work. Complainants have been fully trained on Centerior's radiation protection program, the exposures permitted by the NRC regulations, and the TEDE concept. Further, after the unplanned intake event at Davis-Besse, Centerior's health physicists again met with Complainants to explain the radiation safety program, the TEDE approach, and the respirator policy. Having received such explanation of Centerior's program and procedures, Complainants have no right to refuse to work on any particular job. Pennsyl v. Catalytic, Inc., 83-ERA-2, Secretary's Decision at 7 (Jan. 13, 1984); Stockdill v. Catalytic Indus. Maintenance Co., 90-ERA-43, Secretary's Decision at 2 (Jan. 24, 1996).

requirements were prompted by the assertions in that litigation, and he felt that these concerns might be resolved by the litigation. Tr. 209. Further, Mr. Volza's testimony clearly shows that the concerns over Complainants' willingness and suitability to work were raised and considered before the letter was issued. Thus, these reasons for Centerior's decision are not post hoc rationalizations.

Complainants have also argued that Centerior's reasons must be viewed as a pretext because the October 13, 1995 letter was not limited to Centerior's nuclear plants. See Tr. 12-13. Upon closer scrutiny, the premise for this argument fails. Mr. Schrauder's letter does not in fact bar Complainants from working at Centerior's non-nuclear plants, or in fact at any plant other than Perry. Fishbach only provides employees for Perry, and thus Mr. Schrauder's letter to Fishbach can have no effect beyond the Perry plant. Further, Mr. Schrauder, who is only the Director of Nuclear Services at Perry, has no authority to preclude Complainants from being employed at any non-nuclear plant, or at Davis-Besse. Tr. 210-11, 217.

Complainants may further argue that a statement attributed to the Perry Ombudsman is evidence of retaliatory animus, but it is not. Mr. Maloney testified that when he was processed for discharge, he told Don Timms, the Ombudsman at Perry, that he did not know why he was being discharged, and that Mr. Timms made a call to someone (Mr. Maloney did not know who but thought it might have been the radiation protection division) to find out. Mr. Maloney testified that after this call, Mr. Timms told him that he was being discharged because of the litigation. Tr. 42. According to Mr. Maloney, he asked Mr. Timms why that would be a reason for discharge, and Mr. Timms replied that it was sort of like biting the hand that feeds you. Id. Mr.

Timms testified, however, that his telephone call was with a representative of Fishbach, who merely informed him of the letter from Centerior to Fishbach. Tr. 274. Thus, Mr. Timms did not speak to Mr. Schrauder or anybody in the radiation protection section concerning the reason for Mr. Schrauder's decision, and whatever personal inference he or the Fishbach representative may have drawn from the letter is irrelevant.

Finally, Complainants seek to discredit Centerior's reasons by suggesting that they were incorrect or ill-informed. This attack misses the mark for two reasons. First, whether Centerior made the best decision, or a fully informed decision, is irrelevant. All that matters is whether Mr. Schrauder was motivated by legitimate concerns rather than retaliatory animus, and not whether Mr. Schrauder's concerns are correct. *Harvey, supra*, 802 F.2d at 537 (it is of no consequence whether the employer is correct in his assessment of the employee's activities because even if he is wrong, motivation is still lacking).²²¹ Second, as shown below, Complainants' attack is based on a misperception or mischaracterization of Centerior's concerns.

For example, attempting to show that Mr. Maloney had not been disruptive, Complainants' counsel asked Mr. Maloney whether he had ever punched anybody, screamed, held a sit-in, or told the plant manager to "go to hell." Tr. 28. He similarly asked Mr. Volza if he had received any reports that Mr. Maloney was "ranting or raving or standing on a desk or foaming at

²²¹ *Accord Dysert v. Westinghouse Electric Corp.*, 86-ERA-39, Secretary's Decision at 4-5 (Oct. 30, 1991) ("An employer's discharge decision is not unlawful even if it was based on a mistaken conclusion about the facts, ... but a decision violates the [Energy Reorganization] Act only if it was motivated by retaliation."); *Bassett v. Niagara Mohawk Power Co.*, 86-ERA-2, Secretary's Decision at 13 (Sept. 28, 1993); *Seraiva v. Bechtel Power Corp.*, 84-ERA-24, ALJ Decision at 8 (July 5, 1984), *aff'd*, Secretary's Decision (Nov. 5, 1985).

the mouth" or of any "emotional outburst" by Mr. Maloney or the other Complainants. Tr. 173-74.

These questions are irrelevant, because Mr. Volza's concern over Complainants' emotional state was not whether they were ranting or raving, but rather related to the emotional distress that the exposures at Davis-Besse had caused them. Tr. 188. Mr. Volza would not expect a reasonable person exposed to 200 millirem to suffer severe and debilitating emotional distress, particularly since workers often receive such doses. Tr. 194. Mr. Volza was not concerned that the insulators might be involved in brawls, but whether they were willing to accept the doses that would be part of their job if they came to work at Perry and what impact their emotional distress might have on their judgment and ability to comply with the requirements of the radiation work permits. Tr. 188, 195.

Mr. Schrauder's concern that Complainants' presence might be disruptive similarly was not that Complainants might be combative or unruly, but that they might want to pick and chose the jobs that they would work.³⁰ Tr. 208. Mr. Schrauder's view of disruptive conduct was conduct that transcends the normal mode of operation and diverts his staff (Tr. 227-29), particularly during the intense and demanding schedule of the outage. In this regard, Mr. Maloney had already been a distraction to plant management, making unusual document requests when he was being processed for employment.³¹ Tr. 150-51, 227.

³⁰ Centerior plans the work ahead of time and will discuss the planned activities with workers and supervisors ahead of time; but in some circumstances after this planning is complete, the conditions cannot be altered and the plan must be implemented as planned to keep total dose low. Tr. 189.

³¹ Complainants' counsel suggested that perhaps it was Centerior's reaction to Mr. Maloney that was disruptive, not Mr. Maloney himself. Tr. 229-30. This is a meaningless distinction. It just signifies that Mr. Maloney's asser-

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In the same vein, Complainants cross-examined Mr. Volza and Mr. Schrauder to show that they had not personally observed or interviewed Mr. Maloney to determine whether he was emotionally stable enough to work at Perry. Tr. 172, 184. Mr. Volza was not the decisionmaker, but instead brought his concerns to Mr. Schrauder so that he could get whatever additional information was necessary. Tr. 168. After obtaining and reviewing the civil complaint, Mr. Schrauder did not see any need to interview Mr. Maloney. He understood from the complaint that Complainants had debilitating emotional distress from a minor exposure. He did not want such a person working at the Perry outage. Tr. 209-10. Individuals granted access to a nuclear plant are required to be fit for duty, and such fitness includes emotional stability. Tr. 211.¹² He would not, today, hire an individual who claimed to be suffering severe and debilitating emotional distress. Tr. 211.

Last, in an attempt to discredit Centerior's reasons, Complainants' counsel cross-examined Mr. Schrauder to establish that Mr. Schrauder did not know the "legal" definition of severe and debilitating emotional distress in Ohio. Tr. 219. Complainants' counsel then suggested that this phrase may mean something entirely different from what Mr. Schrauder thinks. Tr. 220. Again, whether there is some special legal definition different from the plain meaning is irrelevant. Mr. Schrauder's motive is no less proper because he applied a common sense rather than legalistic interpretation of these words. In any event, under Ohio law, severe and

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tions in the civil complaint were sufficiently disturbing to warrant management attention. In any event, Mr. Schrauder's concern was not limited to the initial distraction caused by Mr. Maloney's unusual request for records, but included a concern, based on statements in the civil complaint, that the insulators might disrupt the outage schedule by seeking to pick and chose the jobs they would perform.

¹² See 10 C.F.R. § 73.56(b)(2).

debilitating emotional distress is just what one would expect. Such distress occurs where a person is unable to cope adequately with the distress engendered by the circumstances of the case, and includes neurosis, psychosis, chronic depression, or phobia. Paugh v. Hanks, 451 N.E.2d 759, 765 (Ohio 1983).

Accordingly, none of Complainants' attacks on Centerior's reasons is sufficient to sustain Complainants' burden of proving a pretext, and Centerior's decision must be sustained. Centerior could not allow the hiring of workers whom it believes are unwilling to accept the NRC's radiation protection standards and who profess severe and debilitating emotional distress from exposures in the range specifically permitted by the NRC and routinely received by nuclear workers. A nuclear plant operator cannot, and should not, be required to hire individuals for work in radiologically-restricted areas if those individuals are, by their own admission, debilitated by their fear of radiation. See Mandreger v. The Detroit Edison Co., 88-ERA-17, Secretary's Decision at 17 (Mar. 30, 1994) ("the inherent danger in a nuclear power plant justifies [Respondent's] concern with the emotional stability of the employees who work there"). Nor should an operator be required to hire an individual if he is concerned that the individual might refuse to follow radiation protection instructions in work permits.

Further, if, as they profess, Complainants are indeed suffering from severe and debilitating emotional distress, hiring such individuals would be unfair to the managers and supervisors who would have to assign these individuals to work in radiologically-restricted areas, to the radiation control personnel who might be required to make radiation protection decisions emotionally unacceptable to Complainants, and to fellow workers who might be put at risk if

Complainants were debilitated by fear in the middle of a job. It would likewise be unfair to Centertor, which has a strong interest in the safe and efficient conduct of its outage activities.

Surely Congress never intended to tie an employer's hands in the way Complainants are suggesting with this section 211 action. It would be manifestly unreasonable to conclude that section 211 requires a nuclear plant operator to hire individuals to work in radiologically-restricted areas when those same individuals have alleged they are emotionally distressed by radiological exposures within the NRC-approved range normally incurred by workers in radiologically-restricted areas. Nor would it be reasonable to require a nuclear plant operator to hire individuals who cannot or will not accept respiratory policy designed to conform to NRC radiation-protection standards. Indeed, the Department, in effect, has already so concluded. See, e.g., Pennsylv. v. Catalytic, Inc., 83-ERA-2, Secretary's Decision at 8 (Jan. 13, 1984):

[I]f NRC regulations permit regulated companies to achieve compliance by several different means, management has the prerogative to choose the means it considers appropriate. Employees have no protection under section 5851 for refusing to work simply because they believe another method, technique, procedure or equipment would be better or more effective.

Clearly, if an employer can discharge an employee who refuses to work under permissible and explained rules, it can also decline to hire individuals who signal their unwillingness to work under the same conditions. Moreover, where an employer believes that a prospective employee might refuse to follow its instructions, surely that employer need not hire the worker or wait for him to refuse to comply with the radiation safety program.

III. Complainants Failed to Establish That They Were Qualified For Hiring at Perry.

With the exception of Mr. Maloney, who was discharged in October 1995, all of the other Complainants are alleging a refusal to hire on the part of Centerior. In a refusal-to-hire case, a claimant must also establish, as an element of his prima facie case, that he applied for and was qualified for the job for which the employer was seeking applicants. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Samodurov v. General Physics Corp., 89 ERA-20, Secretary's Decision (Nov. 16, 1993). Thus, Complainants bear the burden of establishing that they are fit to perform work at Centerior's nuclear plants.

It is clear that at least one of the Complainants is not currently qualified to work at Centerior's nuclear plants. Mr. Sean McCafferty was denied access to the Davis-Besse plant in November 1994 because he falsified a self-disclosure questionnaire by failing to disclose a prior positive drug test. Resp. Ex. 5; Tr. 264-65. He also provided conflicting explanations for this violation. He previously told Centerior that the omission of the positive drug test had been an "oversight" (see Resp. Ex. 5, fourth page; Tr. 266), but in this proceeding testified that he had not disclosed the results of the prior positive drug test because he believed that the information would be kept confidential. Tr. 268-69. This testimony indicates that Mr. McCafferty made a deliberate decision to conceal his positive drug test. Centerior would not normally hire such an individual for work at Perry. Tr. 213.

The denial of access from the Davis-Besse plant requires that, before Mr. McCafferty may be considered for reinstatement, he must undergo a professional assessment to determine whether a treatment program is required. Resp. Ex. 5, first page. Mr. McCafferty has not

obtained such an assessment. Tr. 267. Complainants' counsel sought to suggest that Mr. McCafferty would have obtained such an assessment if he had not been barred from working at Perry by Mr. Schrauder's letter. The Davis-Besse denial of access, however, was issued almost a year before Mr. Schrauder's decision in this case, and Mr. McCafferty took no action during this entire interval to obtain such a professional assessment. Tr. 267. Further, it is Mr. McCafferty's burden to prove his qualifications in this proceeding, and if he believed he was qualified to work at Perry, he should have completed the professional assessment and submitted it as evidence in this proceeding. Moreover, one cannot assume that the professional assessment would be favorable. A professional assessment might well demonstrate the need for Mr. McCafferty to undergo a treatment program before being allowed to return to nuclear work, particularly since Mr. McCafferty has two DUI convictions (see Resp. Ex. 5, fifth page) in addition to his positive drug test.

The only evidence of any of the other Complainants' qualifications is testimony by Mr. Scarl, a union representative, that the pending litigation is the only reason that he knows of why the insulators are not eligible to work at the Davis-Besse outage. Tr. 113. Mr. Scarl testified, for example, that none of the insulators had flunked a drug test, and that he was not aware of any disciplinary problem that any of the Complainants had ever had. Tr. 111-12. This testimony was clearly inaccurate and incredible. Mr. Scarl was not aware that Sean McCafferty had been denied access at Davis-Besse. Tr. 120. Further, Mr. Scarl only has local employment records (Tr. 118) and thus is only aware of denials of access at Perry, not other plants. In addition, he has only limited experience in his position. Tr. 120. Mr. Scarl does not even know whether all of the insulators have worked at nuclear plants. Tr. 117. Thus, in view of its inaccuracy and uncertainty, Mr. Scarl's testimony is insufficient to establish Complainants' qualifications.

IV. Complainants' Computation of Lost Wages Is Inaccurate and Inflated

Complainants submitted work sheets (Comp. Ex. E) purporting to show wages lost as a result of Centerior's decision not to allow their hire, but these work sheets are unintelligible and inaccurate. For example, the calculation on the first page of Comp. Ex. E of wages potentially earned at Perry is different from the amount claimed on the individual worksheet for Mr. Maloney on the fourth page of Comp. Ex. E. See Tr. 257. Complainants offered no explanation for this discrepancy. In addition, Mr. Maloney claims lost wages beginning on October 13, despite the fact that his employment was not terminated until October 16.

Even worse, the other five Complainants all assume that, but for Centerior's decision, they would have begun working on October 13 (prior to Mr. Maloney's termination), when there is no evidence that any of these five insulators would have been hired prior to mid-December.¹³¹ In fact, all of the insulators who were working on October 13 had been hired before Centerior made its decision to bar Complainants, and Mr. Maloney was the only one of the Complainants in this group. Further, all six Complainants assume that after Christmas, they all would have begun working on January 1 and worked continuously through April 6, when in fact the record shows that the hiring and discharge of outage workers is performed gradually pursuant to a preestablished schedule. See Tr. 279-82.

In addition, the work sheets include inflated claims of time-and-a-half and double-time, based on nothing more than fourth-hand hearsay and rumor. Compare Tr. 258-59 with Tr. 283.

¹³¹ Complainants' own witness, Mr. Scarl, merely testified that the Complainants would have been sent by the union to work at the current Perry outage. See Tr. 109-11. He provided no testimony that any of the Complainants would have been dispatched to Perry in October.

Moreover, the Complainants seek to charge Centerior their union wage rate for a couple of hours each day spent commuting to other job sites. Since the Complainants generally assume that they would have been working at least 10 hours per day at Perry, versus 8 hours per day at these other job sites, and are already seeking compensation for this extra two hours, Complainants are in effect seeking duplicative recovery through this so-called travel time. Complainants also seek recovery of wages through the end of the outage, but despite the fact that all of them appear to be currently employed, they only credit offsetting wages through February 27. Finally, Complainants seek recovery of their full union wage, even though in the event of an award they would not be required to make contributions for union dues (4.9 percent of taxable wages²⁴), apprenticeship fund, or pension. Tr. 117-18. Thus, Complainants seek windfalls.

In contrast to Complainants' vague, speculative and inflated estimates, Mr. Cline, Fishbach's site manager at Perry, provided clear testimony of Fishbach's hiring and layoff schedule. Based on this testimony, if Mr. Maloney had not been discharged on October 16, he would have worked forty hours per week, straight time, through December 18 (nine weeks). Tr. 278. The other five insulators might have been hired for two weeks in December (Dec. 13 - Dec. 22) for training, working forty hours per week straight time during this period. Tr. 279. Fishbach began hiring insulators again on January 1, and through February 11, the average insulator would have worked 29 straight-time hours and nine time-and-a-half hours per week for this six week period. Tr. 280. From February 11 onwards, the average insulator would have worked 60 hours per week (40 hours straight time and 20 hours time and a half) for four more weeks through March

²⁴ The 4.9% assessment on taxable wages amounts to \$1.12/hour for straight-time earnings and \$1.89/hour for time-and-a-half earnings.

18. Tr. 280-82. Thus, in all, Mr. Maloney would likely have worked at total of 694 straight-time hours and 134 time-and-a-half hours, and the other insulators would have worked a total of 414 straight-time hours and 134 time-and-a-half hours.

These lost hours are partially offset by the hours worked by each of the insulators at other jobs during these periods -- including employment through the outage. For Mr. Maloney, based on Comp. Ex. E, this amounts to 71 8-hours days worked between October 24 and February 27, and an additional 20 8-hour days through March 18, for a total of 728 straight-time hours. For the other insulators, this mitigating employment is tabulated below, again based on Comp. Ex. E.

	Hours from 12/13 to 12/22	Hours from 1/1 to 2/27	Hours from 2/27 to 3/18	Total
R. Prohaska	80	160	160	400
O. McCafferty	24	296	160	480
T. McLaughlin	24	80	160	264
S. Kilbane	80	336	160	576
S. McCafferty	80	336	160	576

Because Complainants would not have to pay union dues or make contributions to the apprenticeship fund or pension, for purposes of computing lost wages, their wage rates should be adjusted to eliminate these windfalls. Proceeding in this manner produces an adjusted straight-time wage rate of \$26.31/hour (\$31.48 - \$4.00 - \$1.12 - \$0.05), and an adjusted time-and-a-half wage rate of \$41.28/hour (\$47.22 - \$4.00 - \$1.89 - \$.05). To be consistent, this adjusted wage rate should be applied to both the lost hours and to the mitigating hours worked elsewhere. This produces the following assessment of net lost wages:

	Lost wages (straight time)	Lost wages (overtime)	Mitigating earnings	Net lost wages
D. Maloney	\$18,259.14	\$5,531.52	\$19,153.68	\$4,636.98
R. Prohaska	\$10,892.34	\$5,531.52	\$10,524.00	\$5,899.86
O. McCafferty	\$10,892.34	\$5,531.52	\$12,628.80	\$3795.06
T. McLaughlin	\$10,892.34	\$5,531.52	\$6,945.84	\$9,478.02
S. Kilbane	\$10,892.34	\$5,531.52	\$15,154.56	\$1,269.30
S. McCafferty	\$10,892.34	\$5,531.52	\$15,154.56	\$1,269.30

If this court concludes that Centerior's decision was improper -- it should not -- only lost wages in the amount calculated above should be awarded.

CONCLUSION

For the reasons stated above, the Administrative Law Judge should find that Centerior did not violate section 211 of the ERA and should recommend dismissal of the Complaint.

Respectfully submitted,



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CENTERIOR ENERGY

Dated: April 5, 1996

SERVICE SHEET

Case Name: OWEN McCAFFERTY, DENNIS MALONEY, SEAN KILBANE, TERRY McLAUGHLIN, SEAN McCAFFERTY AND RICHARD PROHASKA

Case No.: 96-ERA-6

Title of Document: Centerior Energy's Post-hearing Brief

I hereby certify that on April 5, 1996, a copy of the above-captioned document was served by mail, or where indicated by an asterisk by Federal Express, on the persons listed below.

***The Honorable Thomas M. Burke
Administrative Law Judge
U.S. Department of Labor
Office of Administrative Law Judges
7 Parkway Center, Suite 290
Pittsburgh, PA 15220**

**Administrator
Employment Standards Administration
Wage and Hour Division
U.S. Department of Labor
Room S-3502, FPB
200 Constitution Avenue, N.W.
Washington, D.C. 20210**

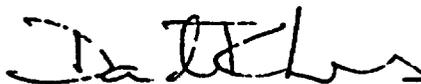
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**U.S. Nuclear Regulatory Commission
801 Warrenville Road
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David R. Lewis



PERRY NUCLEAR POWER PLANT
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PERRY, OHIO 44081
(216) 259-3737

Mail Address:
PO. BOX 97
PERRY, OHIO 44081

November 5, 1996
PY-CEI/NRR-2112L

Attention: James Lieberman, Esq.
Director, Office of Enforcement
United States Nuclear Regulatory Commission
Washington, D. C. 20555

RE: Perry Nuclear Power Plant
Docket No. 50-440; License No. NPF-58
Reply to Notice of Violation - EA 96-253

- Reference:
- (1) Letter from A. Beach to J. Stetz, Subj. Notice of Violation and Proposed Imposition of Civil Penalty - \$160,000 (U. S. Department of Labor (DOL) Administrative Law Judge (ALJ) Recommended Decision and Order (Case No. 96-ERA-6)) dated October 9, 1996.
 - (2) Letter from L. Myers to G. Grant, PY-CEI/NRR-2097L, dated September 30, 1996.
 - (3) Letter from D. Shelton to G. Grant, PY-CEI/NRR-2088L, dated August 16, 1996.
 - (4) Letter from G. Grant to J. Stetz, Subj. Apparent Violation of Employee Discrimination Requirements DOL ALJ Recommended Decision and Order (Case No. 96-ERA-6) dated July 18, 1996.

Dear Mr. Lieberman:

The Cleveland Electric Illuminating Company and Centerior Service Company hereby respond to your letter dated October 9, 1996 (Ref. 1) and to the Notice of Violation (NOV) transmitted by that letter. In our prior letters of August 16, 1996 and September 30, 1996 (Ref. 3 and 2), we provided our basis for denying the violation. As permitted by the NOV, we are deferring any further response to items (1) and (2) of the NOV until 30 days after the decision of the DOL Administrative Review Board (ARB). The remaining items (3)-(5) of the NOV are addressed below.

A/3

Item 3 - The Corrective Steps That Have Been Taken and the Results Achieved

Our August 16 letter (Ref. 3) identifies steps Centerior has taken to ensure employees are not deterred from raising safety concerns. Since Centerior currently believes that its action was permissible and is in the process of appealing the ALJ recommended decision, it has not characterized any additional actions as "correcting" the violation. However, Centerior has taken additional steps to provide interim relief to the Complainants in the DOL proceeding.

On October 16, 1996, the ARB issued an order denying a stay of the Preliminary Order entered in the DOL proceeding. Centerior accepted that decision and has complied with the Preliminary Order by making payment of the back pay and interest awarded by the ALJ and by removing the denial of access flags from the Complainants' records.

Further, prior to both the ARB order and your October 9 letter, Centerior initiated certain settlement discussions with the Complainants. While the substance of those discussions is treated confidentially by both the Complainants and Centerior, and Centerior has not characterized its offers as "corrective action" (since it continues to dispute the violation), Centerior has attempted to reach some accommodation with the Complainants.

In view of these facts, the NRC's escalation of the civil penalty appears inappropriate. In essence, it appears to us that Centerior is being penalized for having sought a stay of the Preliminary Order and for not being in a position at the time of the August 16 letter to disclose settlement interest. If we are correct, this posture could be seen to interfere with our Constitutionally protected adjudicatory rights in the Department of Labor proceeding, and we hope you would reconsider its appropriateness. If you are unwilling, we would like to understand better the basis for escalation of the civil penalty. In either event, given the importance of this issue, we would like a meeting with you to discuss this matter further.

Item 4 - The Corrective Steps That Will Be Taken To Avoid Further Violations

As reflected in our August 16 letter (Ref. 3), Centerior informed its nuclear employees that the DOL ALJ has interpreted the Energy Reorganization Act as protecting radiation injury lawsuits. Thus, all employees should now be aware of this interpretation.

Item 5 - The Date When Full Compliance Will Be Achieved

Centerior has removed the denial of access flags from the Complainants' records and has made payment of back pay required by the ARB's Preliminary Order. Centerior will take any further actions as may ultimately be ordered by the Department of Labor.

PY-CEI/NRR-2112L

November 5, 1996

Page 3 of 3

If you have questions or require additional information, please contact Ms. Mary O'Reilly at (216) 447-3206. In addition, please contact Ms. O'Reilly concerning the meeting requested in response to item 3 above.

Sincerely,

A handwritten signature in black ink, appearing to read "John P. Stetz". The signature is written in a cursive, somewhat stylized font.

John P. Stetz
Senior Vice President - Nuclear

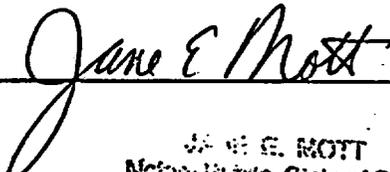
cc: NRC Region III
NRC Resident Inspector
NRC Project Manager
Document Control Desk

I, John P. Stetz, being duly sworn state that (1) I am Senior Vice President, Nuclear of the Centerior Service Company, (2) I am duly authorized to execute and file this certification on behalf of The Cleveland Electric Illuminating Company and Toledo Edison Company, and as the duly authorized agent for Duquesne Light Company, Ohio Edison Company, and Pennsylvania Power Company, and (3) the statements set forth herein are true and correct to the best of my knowledge, information and belief.



John P. Stetz

Sworn to and subscribed before me, the 5th day of November,
1996.



JANE E. MOTT
Notary Public, State of Ohio
My Commission Expires Feb. 20, 2000
(Recorded in Lake County)



**CENTERIOR
ENERGY**

PERRY NUCLEAR POWER PLANT
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PERRY, OHIO 44081
(216) 259-3737

Mail Address:
P.O. BOX 97
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Donald C. Shelton
SENIOR VICE PRESIDENT
NUCLEAR

March 20, 1996
PY-CEI/NRR-2039L

Attention: Geoffrey E. Grant, Director
Division of Reactor Safety
Office of Nuclear Reactor Regulation
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Perry Nuclear Power Plant
Docket No. 50-440; License No. DPF-58; EA 96-038
Letter from G. Grant to D. Shelton, Subj. Alleged
Discrimination, EA 96-038, dated Feb. 21, 1996

Gentlemen:

This letter provides the response of The Cleveland Electric Illuminating Company and Centerior Service Company (Licensees) to your letter dated February 21, 1996, concerning alleged discrimination against a former employee of Fischbach Power Services, Inc. At the outset, we wish to assure you that we are dedicated and committed to ensuring that our employees, and the employees of our contractors, are free to raise safety concerns without fear of discrimination. We have implemented a number of programs to encourage such communications, as described later in this letter, and believe they work well. Further, we do not tolerate any act of retaliation against employees for raising safety concerns within our organization or to the NRC. In this particular case, we do not believe that the former Fischbach employee was discriminated against for raising safety concerns or engaging in any other conduct protected by the Energy Reorganization Act. Our position is set out below in response to the specific questions asked in your letter.

Please note that we are not in receipt of the Department of Labor's investigatory report. We requested a copy of that report, but the District Director of the Wage and Hour Division withheld its investigative materials as predecisional and pertaining to enforcement. Consequently, we do not know the precise rationale for the District Director's conclusion that discrimination occurred, or the evidence that was considered by the investigator in reaching that conclusion.

1. Whether the actions affecting this individual violated 10 CFR 50.7 and the basis for this position, including any investigations conducted to determine whether a violation occurred.

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Operating Companies
Cleveland Electric Illuminating
Toledo Edison

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The January 9, 1996, letter from the District Director of the Wage and Hour Division addresses a complaint by six insulators who claimed that they had been denied employment because they had filed a lawsuit for an alleged radiation injury. These six insulators had been involved in an unplanned intake event while working at Davis-Besse during the 1994 outage (addressed in NRC Inspection Report No. 50-346/94010), and received internal exposures ranging from 0 to slightly over 200 millirem. In August 1995, these individuals filed a civil lawsuit in the United States District Court for the Northern District of Ohio, seeking \$30 million in damages. Subsequently, Centerior decided that these individuals should not be employed at its nuclear plants until this matter is resolved. This decision resulted in Fischbach terminating the employment of one of the insulators (who was performing pre-outage work at Perry) and not hiring the other five.

We do not believe that this decision violated 10 CFR 50.7 for two reasons. First, we do not believe that the civil action filed by the insulators is protected by either 10 CFR 50.7 or Section 211 of the Energy Reorganization Act.¹ These provisions are intended to protect employees who bring safety concerns to their employers or the NRC, not individuals who engage in civil litigation for private gain. Second, the insulators' civil complaint contains a number of assertions indicating that the insulators are not currently suited for work in radiologically restricted areas. This includes statements in the civil complaint indicating to Centerior that these six individuals may be unwilling to work without respirators or to accept decisions based on total dose considerations. It also includes a statement by each of the insulators that he is suffering and will continue to suffer severe and debilitating emotional distress as a result of the unplanned intake at Davis-Besse in 1994. Centerior believes that, irrespective of whether a civil complaint constitutes a protected activity, these statements justify a decision not to hire the individuals for outage work necessarily involving work in radiologically restricted areas of the Perry Nuclear Power Station.

Because we feel our decision was proper, Centerior requested a hearing before the Department of Labor. This hearing was conducted by an Administrative Law Judge on February 26-27. Post-hearing briefs will be submitted in April, and a decision should be issued sometime thereafter. Because the events in question are fairly simple and known, Centerior has not conducted any special investigation of this matter, other than the inquiry of counsel in preparation for the Department of Labor proceedings. The pre-hearing brief submitted by our counsel to the Department of Labor Administrative Law Judge is provided as Attachment A to this response.

1. This is a novel legal issue. We are unaware of any precedents or regulatory guidance addressing this type of situation.

2. Actions taken to assure that this matter does not have a chilling effect on the willingness of employees to raise safety and compliance concerns within your organization and to the NRC.

Because the civil action filed by the insulators in August 1995 is not an action to raise safety and compliance concerns within our organization and to the NRC, Centerior does not believe that its decision will have any effect on the willingness of employees to raise such concerns. It should be recognized that when the unplanned intake event occurred in 1994, Centerior immediately initiated an investigation on its own accord, self-reported the incident to the NRC, and took no action adverse to the employees related to the event.

While we do not believe that our decision not to hire the insulators should have any chilling effect on our employees, Centerior has nevertheless taken steps to ensure our employees understand that it is their duty to identify conditions adverse to quality or safety and that they may do so, publicly or confidentially, without any fear of retaliation. A memorandum to this effect (Attachment B to this response) has been provided to nuclear employees through inclusion in an Outage Update newsletter.

These communications to our nuclear employees are, of course, in addition to the existing programs and procedures employed by Centerior to encourage the identification of concerns. We conduct an Ombudsman program at Perry (Plant Admin. Procedure 0217) which provides a mechanism for the reporting and addressing of nuclear safety or quality concerns while providing confidentiality for the employees. We also maintain an Open Door Policy (Policy and Practices Manual M&C-1) to encourage employees to raise issues through the chain of command. We conduct an Industrial Safety Program (Plant Admin. Procedure 0117) to provide yet another process by which employees can report health and safety issues through the use of a Perry Plant Safety Hazard Concern form for documented response by supervision. In addition, our Corrective Action Program (Plant Admin. Procedure 1608) establishes a method for employees to identify issues and activities that do not meet requirements or expectations, through use of a Potential Issue Form (PIF) which is subject to tracking and documented resolution. This Corrective Action Program includes Radiation Protection Deficiency Identification and Reporting as specified in Plant Admin. Procedure 0124.

-
2. Unrelated to the unplanned intake event, one of the insulators was denied access at Davis-Besse after it was learned (through a report of potential condition adverse to quality filed by another of the insulators) that he had falsified his fitness for duty self-disclosure form by failing to disclose a positive drug test at a prior employer.

PY-CEI/NRR-2029L
March 20, 1996
Page 4 of 4

Our General Employee Training ensures that company and contractor employees are aware of the various programs at Perry for the reporting of safety and quality concerns. The Ombudsman Program, Corrective Actions Program PIF process, and NRC Form 3 processes are specifically addressed in this training. Further, NRC Form 3 and information explaining the Perry Ombudsman are prominently and continuously posted.

These procedures work. Employees regularly report conditions that need to be corrected and concerns that need to be addressed. We are responsive to these reports and do our best to resolve them to the satisfaction of the employees. In sum, we expect and encourage the identification of problems, and are strongly committed to maintaining an open, honest and professional workplace.

If you have questions or require additional information, please contact Ms. Mary O'Reilly at (216) 447-3206.

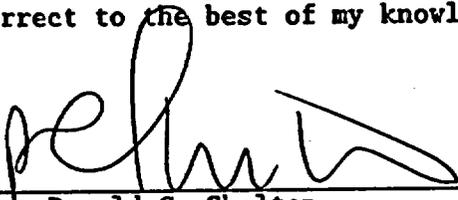
Very truly yours,

A handwritten signature in black ink, appearing to be 'M. O'Reilly', written over the text 'Very truly yours,'.

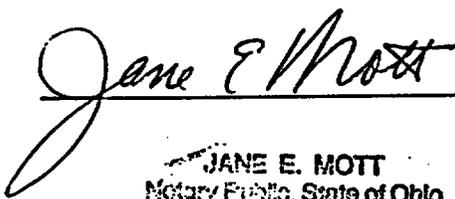
MEO:GMN:sc

cc: NRC Project Manager
NRC Resident Inspectors Office
NRC Region III
Document Control Desk

I, Donald C. Shelton, being duly sworn state that (1) I am Senior Vice President, Nuclear of the Centerior Service Company, (2) I am duly authorized to execute and file this certification on behalf of The Cleveland Electric Illuminating Company and Toledo Edison Company, and as the duly authorized agent for Duquesne Light Company, Ohio Edison Company, and Pennsylvania Power Company, and (3) the statements set forth herein are true and correct to the best of my knowledge, information and belief.


Donald C. Shelton

Sworn to and subscribed before me, the 20th day of March, 1996.


JANE E. MOTT
Notary Public, State of Ohio
My Commission Expires Feb. 20, 2000
(Residence in Lake County)

ATTACHMENT A

RECEIVED

FEB 27 1996

MARY E. O'REILLY

February 23, 1996

UNITED STATES OF AMERICA
DEPARTMENT OF LABOR

Before the Office of Administrative Law Judges

In the Matter of)	
)	
OWEN McCAFFERTY, et al.)	
Complainants,)	
)	Case No. 96-ERA-6
v.)	
)	
CENTERIOR ENERGY,)	
Respondent.)	

CENTERIOR ENERGY'S PREHEARING BRIEF

As permitted by 29 C.F.R. § 24.5(e)(3), Centerior Energy ("Respondent" or "Centerior") submits this Prehearing Brief in response to the complaint filed by Owen McCafferty, Dennis Maloney, Sean Kilbane, Terry McLaughlin, Sean McCafferty and Robert Prohaska ("Complainants") on October 26, 1995. For the reasons discussed below, the complaint lacks merit and should be dismissed.

At issue is Centerior's decision that Complainants should not be hired for work at Centerior's nuclear plants until certain civil litigation between Complainants and Centerior is resolved. The civil litigation, brought in federal court,¹ involves claims for alleged radiation injuries from minor internal exposures to radiation (exposures below occupational safety limits established by the U.S. Nuclear Regulatory Commission), and includes claims that Complainants have suffered,

¹ McCafferty v. Centerior Serv. Co., No. 1:95CV 1732 (N.D. Ohio filed Aug. 7, 1995).

are suffering, and will continue to suffer severe and debilitating emotional distress as a result of these internal exposures and instructions to work in radiologically restricted areas without respiratory protection. Complainants contend that this civil litigation, filed ostensibly under the Price-Anderson Act, 42 U.S.C. § 2210,² is protected by Section 211 of the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851, and therefore that Centerior's decision violates Section 211.

Centerior denies that it discriminated against Complainants for engaging in protected activity. Although a question of first impression, Centerior does not believe that Complainant's civil action is protected conduct. Section 211 of the ERA is intended to protect employees who bring safety concerns to the attention of the Nuclear Regulatory Commission ("NRC"), not individuals engaged in civil litigation for personal gain. Even if such a civil action were generally protected -- it is not -- Centerior's decision would still be justified by Complainants' apparent unreasonable fear of internal radiological exposure, unwillingness to accept radiation protection philosophy, and assertions that radiological exposures within permissible occupational safety limits cause them severe and debilitating emotional distress. Surely, the ERA does not require a nuclear plant operator to hire individuals for work in radiologically restricted areas if those individuals profess to being debilitated by the radiological exposures within the range normally incurred by workers in radiologically restricted areas.

² The Price-Anderson Act, enacted in 1957, added Section 170 to the Atomic Energy Act (42 U.S.C. § 2210) to establish mandatory financial protection, indemnity, and limitation of liability for nuclear incidents (any occurrences causing injury from radioactive material regulated under the Atomic Energy Act). In 1988, the Price-Anderson Amendments Act amended Section 170 significantly and created a federal cause of action, called a "Public Liability Action," for claims arising from a nuclear incident. See generally In re TMI Litigation Cases Consolidated II, 940 F.2d 832, 852-54 (3d Cir. 1991), cert. denied, 503 U.S. 906 (1992); O'Conner v. Commonwealth Edison Co., 13 F.3d 1090, 1095-96 (7th Cir.), cert. denied, 114 S. Ct. 2711 (1994).

The first section of this brief will outline the facts expected to be established by the evidence. The brief will then address the two arguments in support of Centerior's position: (1) that a civil complaint filed ostensibly under the Price-Anderson Act is not an activity protected by Section 211 of the ERA; and (2) that irrespective of any protected activity, Centerior would not, and cannot be expected to, employ individuals for work in radiologically restricted areas if Centerior believes those individuals are unwilling to accept radiation protection philosophy and would claim to be emotionally debilitated by radiological exposures permitted by occupational safety limits.

STATEMENT OF FACTS

Centerior Energy Corporation is the parent company of Cleveland Electric Illuminating Company ("CEI"), The Toledo Edison Company ("TEd"), and Centerior Energy Service Company. CEI and Centerior Energy Service Company are jointly licensed by the NRC as the operator of the Perry Nuclear Power Plant. TEd and Centerior Service Company are jointly licensed by the NRC as the operator of the Davis-Besse Nuclear Power Station.

A nuclear power plant must be periodically shut down for refueling, and during these refueling outages a considerable amount of maintenance activity is conducted. Much of this work is performed in radiologically restricted areas and on equipment that is not readily accessible when the plant is operating. To accomplish this activity within the scheduling constraints, temporary employees are retained to perform outage-related work. These temporary employees are often provided by contractors working at the nuclear plants. Fischbach Power Services, Inc. (Fischbach) is one such contractor that provides outage support for the Perry plant.

Complainants are insulators who are members of Asbestos Workers Local 3 in Cleveland. In October 1994, Complainants were working as temporary employees performing outage-related work at the Davis-Besse plant. During this work, they received a minor but unplanned radiological exposure.³² The event was investigated by the licensee and the NRC, both of which determined that no radiological dose limits had been exceeded. These 1994 events are documented in a letter from W. Axelson, NRC, to J. Stetz, Centerior Service Co. (Nov. 23, 1994) and NRC Inspection Report No. 50-346/94010 enclosed therewith (Exh. A).³³

As the NRC inspection report indicates, dose³⁴ assignments were computed for the workers and ranged from a committed effective dose equivalent ("CEDE") of 0 to 212 millirem. Deep dose equivalents ranged from 22 to 62 millirem. NRC Inspection Report No. 50-346/94010 at 5. The NRC verified these dose calculations. *Id.* at 6.

³² Pursuant to the NRC's Standards for Protection Against Radiation, 10 C.F.R. Part 20, work in radiologically restricted areas at Centerior's nuclear plants is controlled by procedures and Radiation Work Permits. The Radiation Work Permits include instructions to workers to control exposure to radiation in order to limit doses to planned levels. The instructions, which include controls such as limitation of exposure time or use of respiratory protection equipment, are based on knowledge of the levels of radiation and radioactive contamination derived from surveys of the area. The Complainants received an "unplanned exposure" at Davis Besse in 1994 because the radiological conditions under insulation that Complainants were removing had not been surveyed.

³³ The event in which Complainants were involved is the one described as the "Unplanned Intake Event" on pages 4-6 of NRC Inspection Report 50-346/94010(DRSS).

³⁴ "Dose" generally refers to the amount of energy delivered by radiation to an absorbing tissue or organ. The "committed effective dose equivalent" is the cumulative internal dose to organs and tissues that an individual will receive during the 50-year period following an intake of radioactive material. "Deep dose equivalent" is the dose caused by an exposure of the whole body to an external source of radiation. See 10 C.F.R. § 20.1003. These terms were adopted by the NRC in 1991 when the NRC amended its regulations at 10 C.F.R. Part 20, "Standards for Protection Against Radiation," to conform to 1977 recommendations of the International Commission on Radiation Protection (ICRP). See 56 Fed. Reg. 23360 (1991). The method of calculating committed effective dose equivalents takes into account the relative susceptibility and contribution to risk of any one tissue relative to irradiation of the whole body. As a consequence, the committed effective dose equivalent received from an internal exposure presents the same risk as an equal deep dose equivalent received from external exposure.

These exposures were less than the national average exposure from natural background radiation in the United States, which according to the National Council on Radiation Protection and Measurements (NCRP Report No. 93) is approximately 300 millirem/year (whole body). Even the largest dose received by any of the Complainants from this 1994 incident was only about one twentieth of the occupational exposure limit permitted by the NRC's regulations, which establish an annual occupational dose limit of 5 rem (5000 millirem) total effective dose equivalent ("TEDE").⁴² 10 C.F.R. § 20.1201.

Despite the fact that they received no exposure exceeding occupational safety limits established by the NRC, the six Complainants filed a civil complaint in the United States Court for the Northern District of Ohio on August 7, 1995. McCafferty v. Centerior Service Co., No. 1:95CV 1732 (N.D. Ohio) (Exh. B). The civil complaint includes multiple counts related to Complainants' exposure to radiation in 1994, including claims of entitlement to a medical monitoring fund under Ohio law, negligence, strict liability, intentional infliction of emotional distress, reckless and wanton misconduct, negligent infliction of emotional distress, and negligent infliction of severe and debilitating emotional distress. Among the various averments in their civil complaint, Complainants stated:

23. Defendants failed to exercise reasonable care by:

* * *

c. prohibiting the use of respiratory protection as Edison's Radiation Work Permit which Plaintiffs were required to obey in accordance with Defendant Toledo Edison's Radiation Protection Program.

⁴² Total effective dose equivalent is the sum of the committed effective dose equivalent and the deep dose equivalent. See 10 C.F.R. § 20.1003.

* * *

38. Defendants had actual knowledge of the fact that Plaintiffs would perform the dangerous task without respiratory protection and performing that task would cause an airborne release of the radioactive contamination present beneath the mirror insulation and that Plaintiffs would each receive an internal dose of these radioactive materials into their unprotected lungs by inhalation.

* * *

40. Defendants' conduct was extreme and outrageous, and so beyond the bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society.

* * *

43. By requiring Plaintiffs to perform a dangerous task and prohibiting them from wearing respiratory protection while performing such a dangerous task, Defendants intentionally and knowingly, recklessly and wantonly disregarded the injurious consequences to the Plaintiffs and have acted in a manner presenting a risk of grave injury to the Plaintiffs.

Civil Complaint, ¶ 43. The Complaint further stated:

50. Plaintiffs have each suffered a physical invasion of their bodies by inhaling radioactively-contaminated particulate matter into their lungs and subsequently have suffered a contemporaneous physical injury by exposure to internal doses of radiation.

51. As a direct and proximate result of Defendants' wrongful conduct, Plaintiffs have suffered, are suffering, and will suffer emotional distress.

* * *

57. Notwithstanding the contemporaneous physical injury alleged above . . . , as a direct and proximate result of Defendants' wrongful conduct, Plaintiffs have suffered, are suffering, and will continue to suffer harm in the form of serious emotional distress that is both severe and debilitating.

Civil Complaint, ¶¶ 50-51, 57.

In October, 1995, Mr. Robert Schrauder, the Director of Nuclear Service at the Perry Nuclear Plant, learned that one of the Complainants (Maloney) had been hired by Fischbach to support the Perry outage and was one of the plaintiffs who had filed a civil action against Centerior. Mr. Schrauder obtained and reviewed a copy of the civil complaint. Mr. Schrauder was concerned that the presence of the Complainants at Perry would be disruptive and a distraction for management, and would subject Centerior to an undue risk of further liability. Mr. Schrauder did not view the civil litigation as the type of activity protected under the ERA (which he understood from his experience in the nuclear industry to relate to the raising of safety concerns to management and the NRC).

Mr. Schrauder was particularly concerned by Complainants' expression of fear over working without respiratory protection and over internal radiological exposure in general. Mr. Schrauder perceived that Complainants either failed to recognize or were unwilling to accept current radiation protection standards, which requires a licensee to minimize a worker's total radiological dose (the sum of external and internal exposure, not just internal exposure alone). Mr. Schrauder knew that under current radiation protection standards, an internal exposure creates no greater risk than an equal external exposure. Consequently, respiratory protection may be determined to be inappropriate because the increased amount of time it takes for a worker to perform tasks while wearing a respirator increases external exposure and may increase total dose. Mr. Schrauder knew that if Complainants were hired to support the Perry outage, they would again be required to work in radiologically restricted areas and would again receive some radiological dose, including perhaps some internal dose. Given Complainants' expressions of severe and debilitating emotional distress over the radiological exposures they had received (exposures which

were in fact below occupational limits permitted by the NRC and not unusual²¹), Mr. Schrauder was very concerned that if Complainants were hired, they might again be distressed by radiation protection decisions and the possibility of receiving internal radiological exposures, leading to further disputes and possible refusal to obey radiation protection instructions in accordance with NRC requirements.

On October 13, 1995, Mr. Schrauder wrote a letter (Exh. D) to Mr. Richard Cline, the Fischbach representative at Perry. The letter stated that, due to the litigation, Centerior could not allow any of the Complainants to work at Centerior's facilities. The letter asked Mr. Cline to assure that none of these individuals was assigned to the Perry plant, and not to assign any of them to the Perry Plant until the litigation is resolved. This led to Mr. Maloney's termination on October 16. None of the other Complainants had been hired by Fischbach to support the Perry outage.

ARGUMENT

Complainants carry the burden of establishing a *prima facie* case of retaliation based on protected conduct under Section 211 of the ERA. To meet this burden, Complainants must prove:

- (1) that they engaged in protected conduct;
- (2) that Centerior was aware of such conduct;
- (3) that Centerior took adverse action against them; and

²¹ Indeed, the exposure history summaries (Exh. C) for these individuals shows that the October 1994 exposures were less than the exposures that these individuals have received in previous work at nuclear plants.

(4) that the protected conduct was a likely motive for the adverse action.

See Carroll v. Bechtel Power Corp., 91-ERA-46, Secretary's Decision at 9-10 (Feb. 15, 1995). If Complainants establish a *prima facie* case, Centerior can rebut the presumption by articulating a legitimate reason for the adverse action. Yule v. Burns Int'l Sec. Serv., 93-ERA-12, Secretary's Decision at 6 (May 24, 1995).^k Complainants then must demonstrate that the articulated reason was a "pretext" for discrimination. Id.^z

Under these standards, Complainants' whistleblower complaint against Centerior fails for two reasons: (1) Complainants cannot establish a *prima facie* case under Section 211 because they cannot make the threshold showing that they engaged in protected activity; and (2) Centerior's adverse action against Complainants was motivated by a legitimate, nondiscriminatory reason.

I. COMPLAINANTS DID NOT ENGAGE IN ACTIVITY PROTECTED UNDER SECTION 211 OF THE ENERGY REORGANIZATION ACT.

Section 211 of the ERA -- the "whistleblower" provision -- states in pertinent part:

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . .

^k In a refusal-to-hire case, a claimant must also establish that he applied for and was qualified for the job for which the employer was seeking applicants. McConnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Samodurov v. General Physics Corp., 89 ERA-20, SOL Decision (Nov. 16, 1993). Thus, Complainants bear the burden of establishing that they are fit to perform work at Centerior's nuclear plants.

^z If the factfinder concludes that an employer's adverse action was motivated by *both* improper and legitimate concerns, the "dual motive" test applies. Under the "dual motive" test, an employer has the burden to show that it would have reached the same decision even in the absence of the protected conduct. See Yule, 93-ERA-12, Secretary's Decision at 7; Zinn v. University of Mo., 93-ERA-36, ALJ Decision at 31-32 (May 23, 1994).

(A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);

(B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.), if the employee has identified the alleged illegality to the employer;

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.), or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

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

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.).

42 U.S.C. § 5851. Complainants cannot state a claim for relief under any of Section 211's subsections. Subsections A, B, C and F are inapplicable on their face because the only protected activity alleged here is that Complainants filed a tort suit in federal court against Centerior.¹⁰

Subsections D and E, for the reasons that follow, are likewise unavailing for Complainants.

Centerior submits that Complainants are not entitled to relief under Section 211 because Complainants' private tort action seeking money damages is not a protected activity under the

¹⁰ Subsection C is inapplicable here because it is intended to protect testimony before Congress or any federal or state agency. See H.R. No. 102-474(VIII), reprinted in 1992 U.S. Code Cong. & Ad. News 2282, 2296, 2337. It is also, by its express terms, intended to protect testimony regarding provisions of the ERA or Atomic Energy Act.

ERA. Section 211 (including its predecessor, Section 210¹¹¹) has never been applied, and is not intended, to protect this type of activity. No case has ever applied Section 211 to protect tort claims, including claims under the Price-Anderson Act. Nor is a tort claim under the Price-Anderson Act analogous to any activity that has been deemed protected under the ERA. The type of conduct that the Department of Labor and the courts have found to be protected by the ERA involves notifying the NRC or licensee management of safety concerns or regulatory violations, or otherwise protecting the free flow of safety information to government regulators. Complainants' tort action simply does not fit this mold.

Nor should the Court adopt the superficial argument that a "public liability action" under the Price-Anderson Act is protected by Section 211 simply by virtue of the fact that the Price-Anderson Act is incorporated into the Atomic Energy Act. The term "proceeding" as used in Section 211 is ambiguous and undefined. One must therefore examine the statute's legislative history and intent to determine what type of conduct is encompassed by the reference to participation in "proceedings." See, e.g., Donovan v. Diplomat Envelope Corp., 587 F. Supp. 1417, 1424 (E.D.N.Y. 1984), aff'd, 760 F.2d 253 (2d Cir. 1985) ("We must look to the purpose of the statute rather than its language alone."); Kansas Gas & Elec. Co. v. Brock, 780 F.2d 1505, 1510 (10th Cir. 1985), cert. denied, 478 U.S. 1011 (1986) ("The meaning of the provision is rendered unclear inasmuch as the statute does not include definitions of the pertinent terms."); see also Bechtel Constr. Co. v. Secretary of Labor, 50 F.3d 926, 931 (11th Cir. 1995).

¹¹¹ Prior to 1992, the employee protection provisions of the ERA were found in § 210, but because of a mistake in numbering, the ERA had two § 210's. The 1992 amendments renumbered the employee protection provision, making it § 211.

The legislative history of Section 211 makes clear that private tort litigation was not contemplated by Congress as within the scope of the statute's protection:

The Senate Bill amended the Energy Reorganization Act of 1974 to provide protection to employees of Commission licensees, applicants, contractors, or subcontractors, from discharges or discrimination for taking part or assisting in administrative or legal proceedings of the [Nuclear Regulatory] Commission.

H.R. Rep. No. 1796, 95th Cong., 2d Sess. 16-17 (1978), reprinted in 1978 U.S. Code Cong. & Ad. News 7307, 7309 (emphasis added). This statement demonstrates that Congress intended to protect participants in NRC proceedings--not private tort claimants.

This congressional intent is reinforced by the legislative history of the 1992 amendments to Section 211,¹² which shows again that Congress' concern is safeguarding the free flow of information to employers and regulators:

The ability of nuclear industry employees to come forward to either their *employers* or to *regulators* with safety concerns without fear of harassment or retaliation is a key component of our system of assuring adequate protection of public health and safety from the inherent risks of nuclear power.

H.R. No. 102-474(VIII), reprinted in 1992 U.S. Code Cong. & Admin. News 2282, 2297 (emphasis added). As stated in De Ford v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983):

The purpose of the Act is to prevent employers from discouraging cooperation with NRC investigators. . . . Under this antidiscrimination provision . . . the need for broad construction of the statutory purpose can be well characterized as "necessary to prevent the

¹² The 1992 amendments broadened protection for nuclear whistleblowers by explicitly providing protection for employees who (1) notified their employer of an alleged violation of the ERA or Atomic Energy Act, (2) refused to engage in a practice that would be such a violation, or (3) testified before Congress or at any state or federal proceeding regarding any provision of the ERA or Atomic Energy Act. See 42 U.S.C. § 5851. The rationale for protecting internal complaints to employers is that such complaints are simply "the first step in the initiation of an enforcement proceeding." Kansas Gas & Elec. Co., 780 F.2d at 1511.

[investigating agency's] channels of information from being dried up by employer intimidation."

See also Lassin v. Michigan State Univ., 93-ERA-31, ALJ Decision at 5 (Sept. 29, 1993) (the "public policy" underlying the ERA is "to facilitate the flow of safety information to *the government.*") (emphasis added).

Additional facts support the conclusion that a private tort suit under the Price-Anderson Act was not intended by Congress to be protected under Section 211. First, at the time of the enactment of Section 211 in 1978, the Price-Anderson Act did not confer jurisdiction in the federal courts for "public liability actions." See In Re TMI Gen. Pub. Utils. Corp., 67 F.3d 1103, 1105 (3d Cir. 1995), petition for cert. filed, Jan. 16, 1996. Only later, upon passage of the Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, 102 Stat. 1066, did Congress confer jurisdiction on the federal courts for "public liability actions." Thus, Congress could not have intended for Section 211 to cover a federal tort suit of the kind filed by Complainants because *no* such suit could have been filed at the time of Section 211's enactment. Second, "uniform" whistleblower bills¹³ proposed in Congress in recent years provides further evidence that the term "proceeding," as used in enacted whistleblower statutes such as Section 211, was intended to be limited to actions brought before federal *agencies* entrusted with enforcing health and safety laws. See, e.g., The Uniform Health and Safety Whistleblowers Protection Act of 1987, reprinted in 134 Cong. Rec. S 1448 (Feb. 23, 1988) ("The term 'proceeding' means a trial, hearing, investigation, inquiry, inspection, administrative rulemaking, or adjudication *involving a federal*

¹³ Though not yet enacted, these omnibus bills were designed to bring uniformity to federal whistleblower legislation by superseding existing whistleblower statutes and providing one source for whistleblower rights and remedies.

agency.") (emphasis added); The Employee Health and Safety Whistleblower Protection Act, reprinted in 135 Cong. Rec. S1833 (daily ed. Feb. 28, 1989) ("The term 'proceeding' means a trial, hearing, investigation, inquiry, inspection, administrative rulemaking, or adjudication *involving a federal agency.*") (emphasis added).

Similarly, the NRC, which also has enforcement responsibility under Section 211, has never interpreted Section 211 as protecting tort or Price-Anderson claims. The NRC's regulation protecting employees makes no reference to any such conduct. 10 C.F.R. § 50.7.

Nor is there any reason to interpret Section 211 expansively in this case. Giving whistleblower protection to Complainants' tort claims will not further the underlying purposes of the ERA. See Beck v. Daniel Constr. Co., 86-ERA-26, ALJ Decision at 12 (Sept. 17, 1986) (to be protected the activity must relate to the goals of the statute). The incident in this case -- that Complainants received a radiological exposure while performing outage-related work at Centerior's Davis-Besse plant -- was brought to management's attention and was thoroughly investigated by both Centerior and the NRC long before Complainants filed their tort suit in federal court. See W. Axelson, NRC, to J. Stetz, Centerior Service Co. (Nov. 23, 1994) and NRC Inspection Report No. 50-346/94010 enclosed therewith. Clearly, then, Complainants' private tort action was never a vehicle to bring any matter to the NRC's attention. The NRC is not even a party to Complainants' civil action.

II. CENTERIOR HAD A LEGITIMATE, NONDISCRIMINATORY REASON FOR TAKING ADVERSE ACTION AGAINST COMPLAINANTS.

Even if pursuing a private tort suit were considered an activity protected by Section 211, Complainants are not entitled to relief because -- as a factual matter -- Centerior had a legitimate, nondiscriminatory reason for taking adverse action against Complainants. See Lockert v. United States Dep't of Labor, 867 F.2d 513, 519 (9th Cir. 1989) (only discharge motivated by retaliatory animus violates the ERA). Centerior simply could not allow the hiring of workers whom it believes are unwilling to accept radiation protection standards and who profess severe and debilitating emotional distress from exposures in the range that they would be expected to incur if again hired for outage-related work. A nuclear plant operator cannot, and should not, be required to hire individuals for work in radiologically restricted areas if those individuals are, by their own admission, debilitated by their fear of radiation. See Mandreger v. The Detroit Edison Co., 88-ERA-17, Secretary's Decision at 17 (Mar. 30, 1994) ("the inherent danger in a nuclear power plant justifies [Respondent's] concern with the emotional stability of the employees who work there"). Nor should an operator be required to hire an individual if he is concerned that the individual might refuse to follow radiation protection instructions in work permits.

Courts have long recognized that an employer must not be precluded from taking legitimate personnel actions designed to assure the effectiveness of their workforce and adherence to applicable regulations. Indeed, any other result would mean that:

one in an executive position can never exercise his considered judgment in making personnel recommendations when asked to do so when that judgment is based on anything even remotely related to the exercise of protected conduct.

Harvey v. Merit Sys. Protection Bd., 802 F.2d 537, 548 (D.C. Cir. 1986). Raising a safety concern, for example, does not "give . . . an employee carte blanche to ignore the usual obligations involved in an employer-employee relationship." Lopez v. West Texas Utils., 86-ERA-25, Secretary's Decision at 8 (July 26, 1988). See also Bauch v. Landers, 79-SDWA-1, Secretary's Decision at 2 (May 10, 1979) (employee protection provision of Safe Drinking Water Act "does not, and should not, preclude management from taking steps to assure and maintain effectiveness by its staff in enforcing the water system requirements"); Ray v. Metropolitan Gov't of Nashville and Davidson County and the Urban Observatory of Metro. Nashville-Univ. Ctrs., 80-SWDA-1, ALJ Decision at 11 (Mar. 18, 1980) ("Management must be able to adjust employment situations so as to carry out its duties" (quoting Bauch)), aff'd by SOL on Apr. 14, 1980; Garn v. Toledo Edison Company, 88-ERA-21, Secretary's Decision at 6 (May 18, 1995) (certain forms of opposition conduct, including illegal acts or unreasonably hostile and aggressive conduct may provide a legitimate, independent, and nondiscriminatory basis for adverse action).

Thus, even where an adverse action follows a protected activity, the sequence alone does not render the adverse action retaliatory or discriminatory. Rather, the factfinder must examine the *motive* of the employer in taking the adverse action. Where, for example, an employer is motivated by the quality of an employee's judgments -- rather than an improper desire to punish the employee for exercising his rights or to deter him from doing so -- the employer's action is not retaliatory. See Harvey, 802 F.2d at 550. Likewise, if an employer takes adverse action because an employee's conduct reveals some undesirable trait that is necessary for the performance of the job, then the proper conclusion is that the employer has acted with permissible motive.

These basic principles are reflected also in cases decided under a statute analogous to Section 211 -- the "anti-retaliation" provision of Title VII of the Civil Rights Act of 1964.¹⁴ For example, in Hochstadt v. Worcester Found. for Experimental Biology, 545 F.2d 222 (1st Cir. 1976), the court applied a balancing test to determine whether an employer unlawfully retaliated against an employee for opposing alleged discriminatory practices of the employer:

[W]e think courts have in each case to balance the purpose of the Act to protect persons engaging reasonably in activities opposing sexual discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel.

Id. at 231 (footnote omitted). The court further instructed that "[t]he requirements of the job and the tolerable limits of conduct in a particular setting must be explored." Id. In Graham v. Texas-gulf, Inc., 662 F. Supp. 1451, 1462 (D. Conn. 1987), aff'd, 842 F.2d 1287 (2d. Cir. 1988), the court recognized that the need to protect individuals asserting their rights under Title VII must be balanced against "an employer's legitimate demands for loyalty, cooperativeness and a generally productive work environment." The same principle appears in Pendleton v. Rumsfeld, 628 F.2d 102, 108 (D.C. Cir. 1980), where the court explained:

The decision to remove any employee must be made primarily in light of that employee's duties. A question of retaliation is not raised by a removal for conduct inconsistent with those duties, unless its use as a mere pretext is clear.

Similarly, in Booker v. Brown & Williamson Tobacco Co., Inc., 879 F.2d 1304, 1312 (6th Cir. 1989), the court recognized that "[t]here may arise instances where the employee's conduct in

¹⁴ Section 704(a) of Title VII provides, in pertinent part, that it is unlawful for an employer "to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

protest of an unlawful employment practice so interferes with the performance of his job that *it renders him ineffective in the position for which he was employed.*" In such a case, the court held, the employee's conduct would not be protected. *Id.* at 1312.

Here, Complainants are not entitled to relief because Centerior was motivated by legitimate, business and safety concerns in taking adverse action against Complainants. Based on what Complainants disclosed in their tort action, Centerior was properly concerned that Complainants are not emotionally fit to perform work in radiologically restricted areas and might refuse to follow radiation protection instructions in work permits. Complainants' expressed fear of working without respiratory protection and of internal radiological exposure is simply at odds with the NRC's Radiation Protection Standards, on which Centerior's procedures are based.

The NRC recognizes that the risk from an internal dose is the same as the risk from an equal external dose and requires a licensee to plan each job in accordance with that precept. The NRC regulations thus require a licensee to add internal and external dose in order to calculate the total effective dose equivalent, and to make radiation protection decisions on this basis. Centerior's radiation protection program is based on and obeys these requirements. Accordingly, if the external radiation hazard outweighs the internal hazard (*i.e.*, if wearing a respirator would increase total dose), respiratory protection is inappropriate.¹⁵ Centerior cannot hire individuals who appear unwilling to accept the NRC's regulations, the radiation protection philosophy underlying those regulations, or Centerior's radiation protection program. Centerior is required to

¹⁵ Other process or engineering controls to reduce dose would still be implemented. See 10 C.F.R. § 20.1701.

implement its program in accordance with NRC requirements and has no leeway to violate those requirements in order to accommodate an employee's personal views and preferences.

In addition, in view of the fact that their exposures in 1994 were well below occupational limits -- indeed, below the average dose from natural background radiation -- Complainants' expression of severe and debilitating emotional distress appears irrational to the point of being phobic. Hiring such individuals would be unfair to the managers and supervisors who would have to assign these individuals to work in radiologically restricted areas, to the radiation control personnel who might be required to make radiation protection decisions emotionally unacceptable to Complainants, to fellow workers who might be put at risk if Complainants were debilitated by fear in the middle of a job, and to Centerior, which has a strong interest in the safe and efficient conduct of its outage activities.

Surely Congress never intended to tie an employer's hands in the way Complainants are suggesting with this Section 211 action. It would be manifestly unreasonable to conclude that Section 211 requires a nuclear plant operator to hire individuals to work in radiologically restricted areas when those same individuals have alleged they are emotionally distressed by radiological exposures within the approved range normally incurred by workers in radiologically restricted areas. Nor would it be reasonable to require a nuclear plant operator to hire individuals who cannot or will not accept respiratory policy designed to conform to NRC radiation-protection standards. Indeed, the Department, in effect, has already so concluded. *See, e.g., Pennsylv v. Catalytic, Inc.*, 83-ERA-2, Secretary's Decision at 8 (Jan. 13, 1984) ("[I]f NRC regulations permit regulated companies to achieve compliance by several different means, management

has the prerogative to choose the means it considers appropriate. Employees have no protection under Section 5851 for refusing to work simply because they believe another method, technique, procedure or equipment would be better or more effective.").

CONCLUSION

For the reasons stated above, the Administrative Law Judge should find that Centerior did not violate Section 211 of the ERA and should recommend dismissal of the Complaint.

Respectfully submitted,



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Dated: February 23, 1996

SERVICE SHEET

Case Name: OWEN McCafferty, DENNIS MALONEY, SEAN KILBANE, TERRY
McLaughlin, SEAN McCafferty AND RICHARD PROHASKA

Case No.: 96-ERA-6

Title of Document: Centerior Energy's Prehearing Brief

I hereby certify that on February 23, 1996, a copy of the above-captioned document was served by mail, or where indicated by an asterisk by express mail, to the following parties listed below. A copy of the document (without exhibits) was also provided by facsimile to the persons designated by an asterisk.

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A handwritten signature in black ink, appearing to read "D. Lewis", written over a horizontal line.

David R. Lewis, Esq.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

NORTHERN DISTRICT OF OHIO
CLEVELAND

1-950V 1732

OWEN McCAFFERTY, DENNIS MALONEY,
SEAN KILBANE, TERRY McLAUGHLIN,
SEAN McCAFFERTY, AND
ROBERT PROHASKA

Plaintiffs,

v.

CENTERIOR SERVICE COMPANY and
TOLEDO EDISON COMPANY

Defendants.

CASE NO.

JUDGE:

COMPLAINT

(Jury Demand Endorsed Hereon)

Now come plaintiffs OWEN McCAFFERTY, DENNIS MALONEY, SEAN KILBANE, TERRY McLAUGHLIN, SEAN McCAFFERTY, AND ROBERT PROHASKA, and state for their Complaint as follows:

I. PARTIES

1. Plaintiffs OWEN McCAFFERTY, DENNIS MALONEY, TERRY McLAUGHLIN, SEAN McCAFFERTY AND ROBERT PROHASKA are current residents of Cuyahoga County, Ohio.

2. Plaintiff SEAN KILBANE is a current resident of Lorain County, Ohio.

3. Together these plaintiffs bring claims arising out of their unwarranted exposure to radioactive materials at the Davis-Besse Nuclear Power Station in Oak Harbor, Ohio.

4. Defendant Centerior Service Company is a corporation existing under the laws of Ohio with its principal place of business at 6200 Oaktree Boulevard, Independence, Ohio.

5. Defendant Toledo Edison is a corporation organized and existing under the laws of the State of Ohio with its principal place of business at 300 MADISON AVENUE, TOLEDO, OHIO 43652. Toledo Edison owns and operates the Davis-Besse Nuclear Power Station ("Davis-Besse") in Oak Harbor, Ohio.

II. JURISDICTION

6. Jurisdiction over this matter is appropriate pursuant to the Price-Anderson Act, 42 U.S.C. §2210. The Plaintiffs' exposure to radioactive materials, as further described in this Complaint, was a "nuclear incident" as defined by 42 U.S.C. §2014(q). Venue is proper in this Court.

III. STATEMENT OF FACTS

7. All Plaintiffs are insulators working in the Davis-Besse Nuclear Power Station at all times relevant to this Complaint. None of the Plaintiffs were an employee of the Defendant.

8. On and after October 7, 1994, Plaintiffs were working as contractors at Davis-Besse. Their work assignment was to remove insulation from the steam generator.

9. The work activity was delayed at the control point entrance to the radiologically restricted area in the containment building by the radiation protection staff employed and/or controlled by Defendants Toledo Edison and/or Centerior Service Company. The delay was allegedly to collect radiation survey information from the work area so that the radiation protection technician could brief the plaintiffs on safe work

practices prior to entry into a high radiation work area.

10. The pre-entry work safety briefing by the radiation protection technician failed to address and evaluate:

- a. the need to survey underneath the mirror insulation after the first panel was removed;
- b. the need for the radiation protection technician supervision of the work assignment;
- c. the need for engineering controls to minimize radioactive contamination or radiation exposure;
- d. the need for air monitoring of radiation exposure during the work assignment, and;
- e. the need for respiratory protection to prevent inhalation of radioactive contamination and internal radiation exposure.

11. Plaintiffs entered the high radiation work area without radiological respiratory protection and commenced their respective work assignments, which included the removal of insulation.

12. During removal of the insulation panels, highly radioactive contamination from underneath the panels was released into the work area, became airborne, and was taken internally into Plaintiffs by inhalation.

13. Plaintiffs received external and internal exposure to Cobalt-58, Cobalt-60, Cesium-134, and Cesium-137 radioisotopes.

14. Davis-Besse Procedure DB-HP-00208, Revision 2, "Radiation Protection Program", Step 5.6.8 requires all plant workers to obey posted, oral and written Radiation Protection instructions and procedures, including instructions on Radiation Work Permits.

The Radiation Work Permit for the work performed by Plaintiffs expressly prohibited Plaintiffs from using respiratory protection equipment.

15. Defendant Toledo Edison is the Licensee for Davis-Besse under the United States Nuclear Regulatory Commission ("NRC") License No. NPF-3, Docket No. 50-346, effective April 22, 1977.

16. On November, 23, 1994, the NRC issued a Notice of Violation to Defendant Centerior for the unwarranted radiological exposure to the named Plaintiffs described above and more specifically as follows:

On October 7, 1994, the licensee did not perform surveys to assure compliance with 10 CFR 20.1701, which requires the licensees use process or other engineering controls to control the concentration of radioactive material in air. Specifically, an evaluation of the contamination levels underneath insulation on the east once through steam generator hot leg was not performed to determine if engineering controls were required to control the concentration of radioactive material in air.
This is a Severity Level IV violation (Supplement IV)

IV. COUNT ONE

Medical Monitoring Fund

17. The allegations contained in Paragraphs 1 through ___ inclusive are hereby incorporated as though fully rewritten herein.

18. As a result of the internal doses of the radioactive materials Plaintiffs were unwarrantedly exposed to, Plaintiffs are entitled, pursuant to Ohio common law, to the establishment of a fund to effect the medical testing necessary to diagnose and properly treat any adverse human health effects resulting from their exposure to these radioactive materials.

V. COUNT TWO

Negligence

19. The allegations contained in Paragraphs 1 through __ inclusive are hereby realleged as though fully rewritten herein.

20. Through their respective acts and omissions at the Davis-Besse Nuclear Power Station, Defendants Centerior Service Company and Toledo Edison have been negligent, and this negligence has proximately caused each of the plaintiffs to be injured. Although Defendants knew, or should have known, that these Plaintiffs were likely to be injured as a consequence of their exposure to radioactive materials, Defendants failed to conform its conduct to the standard of reasonable care in light of these risks.

21. Defendants owe a duty of care toward the plaintiffs. Defendants have breached that duty by failing to take the necessary precautions to prevent Plaintiffs' unwarranted exposure to radioactive materials, when Defendants knew, or in the exercise of reasonable care should have known, that these radioactive materials presented an actual or potential health hazard to the Plaintiffs.

22. Defendants knew, or in the exercise of reasonable care should have known, that there was radioactive contamination underneath the mirror insulation panels which Plaintiffs removed and/or handled under the work assignment.

23. Defendants failed to exercise reasonable care by:

- a. failing to decontaminate underneath the mirror insulation prior to Plaintiffs implementing the work assignment to remove the mirror insulation panels, and;

- b. failing to perform radiological surveys under the mirror insulation after the first panel was removed.
- c. prohibiting the use of respiratory protection as Edison's Radiation Work Permit which Plaintiffs were required to obey in accordance with Defendant Toledo Edison's Radiation Protection Program,

24. Defendants failed to exercise reasonable care by failing to address and evaluate:

- a. the need to survey beneath the first mirror insulation panel removed;
- b. the need for the radiation protection technician supervision of the work assignment;
- c. the need for engineering controls to minimize radioactive contamination or radiation exposure, and;
- d. the need for air monitoring of radiation exposure during the work assignment, and;
- e. the need for respiratory protection to prevent inhalation of radioactive contamination and internal radiation exposure.

25. Defendants knew, or in the exercise of reasonable care should have known, that by prohibiting the use of respiratory protection, the radioactive contamination underneath the mirror insulation panels presented actual and/or potential health hazards to the plaintiffs, and that by their acts and omissions, it unreasonably exposed the plaintiffs to radiation which increased their risk of contracting illness, and interferes with their comfortable enjoyment of life.

26. As a direct and proximate result of Defendants' wrongful conduct, Plaintiffs have suffered, are suffering, and will continue to suffer harm in the form of:

- a. Emotional distress;
- b. Increased risk of future bodily harm;
- c. Loss of future income;
- d. Economic and financial harm due to additional medical diagnosis and treatment required, and;
- e. Other consequential, incidental, general and special damages, the full extent of which has not yet been determined.

27. Plaintiffs seek money damages to compensate them for these wrongs.

VI. COUNT THREE

Strict Liability in the Conduct of an Ultrahazardous Activity

28. The allegations contained in Paragraphs 1 through __ inclusive are hereby realleged as though fully rewritten herein.

29. From 1977 and continuing until the present, Defendants owned and/or operated the Davis-Besse Nuclear Power Station at Oak Harbor, Ohio.

30. The operation of a nuclear power station or plant is an ultrahazardous activity under Ohio law. The mirror insulation panel removal activity Plaintiffs engaged in at the direction of and under the control of Defendants is an ultrahazardous activity under Ohio law.

31. The release of Toledo Edison's radioactive materials into Plaintiffs' work area by the work activities performed by Plaintiffs at the direction and under the control of Defendants constitutes an ultrahazardous activity for purposes of strict liability, constituting an absolute nuisance or nuisance per se.

32. As a direct and proximate result of Defendants' ultrahazardous activities, Plaintiffs have suffered, are suffering, and will continue to suffer harm. Plaintiffs seek money damages to compensate them for these wrongs.

VII. COUNT FOUR

Intentional Infliction Of Emotional Distress

33. The allegations contained in Paragraphs 1 through ___ inclusive are hereby realleged as though fully rewritten herein.

34. Defendants knew of the existence of a dangerous process, instrumentality or condition within its respective business operation.

35. Defendants knew that if the Plaintiffs were subjected by their work to such dangerous process, instrumentality or condition, then harm or injury to the plaintiffs is a substantial certainty.

36. Defendants, under such circumstances, and with such knowledge, did act to require the Plaintiffs to continue to perform the dangerous task.

37. Defendants had actual knowledge of the presence of and accumulation of radioactive contamination beneath the mirror insulation panels from experience gained during the Refueling Outage in which Plaintiffs were injured (RFO#9), the Refueling

Outage immediately preceding (RFO#8) and prior Refueling Outages.

38. Defendants had actual knowledge of the fact that Plaintiffs would perform the dangerous task without respiratory protection and that performing the task would cause an airborne release of the radioactive contamination present beneath the mirror insulation and that Plaintiffs would each receive an internal dose of these radioactive materials into their unprotected lungs by inhalation.

39. Defendants had actual knowledge of the exact dangers which ultimately caused the plaintiffs' injuries.

40. Defendants' conduct was extreme and outrageous, and so beyond the bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society.

41. As a direct and proximate result of Defendants' intentional, tortious misconduct, Plaintiffs have suffered, are suffering, and will continue to suffer harm in the form of emotional distress. Plaintiffs seek money damages to compensate them for these wrongs and punitive damages so as to deter the defendants from this future reprehensible conduct.

VIII. COUNT FIVE

Reckless and Wanton Misconduct

42. The allegations contained in Paragraphs 1 through ___ inclusive are hereby realleged as though fully rewritten here.

43. By requiring Plaintiffs to perform a dangerous task and prohibiting them from wearing respiratory protection while performing such dangerous task, Defendants intentionally and knowingly, recklessly and wantonly disregarded the injurious consequences

to the Plaintiffs and have acted in a manner presenting a risk of grave injury to the Plaintiffs.

44. As a direct and proximate result of these intentional or reckless activities by Defendants, the Plaintiffs have suffered, are suffering and will continue to suffer harm.

45. The Plaintiffs seek money damages to compensate them for these wrongs, and seek punitive damages to deter the Defendants from this future reprehensible conduct.

IX. COUNT SIX

Negligent Infliction Of Emotional Distress

46. The allegations contained in Paragraphs 1 through __ inclusive are hereby realleged as though fully rewritten herein.

47. Defendants owe a duty of care toward the Plaintiffs. This duty is based in part on the special relationship between the Defendants Centerior and Toledo Edison and the Plaintiffs where Plaintiffs are entitled to some measure of protection from Defendants.

48. Defendants breached that duty by failing to take the necessary precautions to prevent Plaintiffs' unwarranted exposure to radioactive materials, when Defendants knew, or in the exercise of reasonable care should have known, that these radioactive materials presented an unreasonable risk of harm to the Plaintiffs.

49. Through their respective acts and omissions at the Davis-Besse Nuclear Power Station, Defendants have been negligent, and this negligence has proximately caused each of the Plaintiffs to be physically injured.

50. Plaintiffs have each suffered a physical invasion of their bodies by inhaling

radioactively-contaminated particulate matter into their lungs and subsequently have suffered a contemporaneous physical injury by exposure to internal doses of radiation.

51. As a direct and proximate result of Defendants' wrongful conduct, Plaintiffs have suffered, are suffering, and will continue to suffer emotional distress.

52. Plaintiffs seek money damages to compensate them for these wrongs.

X. COUNT SEVEN

Negligent Infliction Of Severe and Debilitating Emotional Distress

53. The allegations contained in Paragraphs 1 through ___ inclusive are hereby realleged as though fully rewritten herein.

54. Defendants owe a duty of care toward the plaintiffs. This duty is based in part on the special relationship between the Defendants and the Plaintiffs where Plaintiffs are entitled to some measure of protection from Defendants.

55. Defendants breached that duty by failing to take the necessary precautions to prevent Plaintiffs' unwarranted exposure to radioactive materials, when Defendants knew, or in the exercise of reasonable care should have known, that these radioactive materials presented an unreasonable risk of harm to the Plaintiffs.

56. Through their respective acts and omissions at the Davis-Besse Nuclear Power Station, Defendants have been negligent, and this negligence has proximately caused each of the plaintiffs to suffer harm.

57. Notwithstanding the contemporaneous physical injury alleged above in Count Seven, as a direct and proximate result of Defendants' wrongful conduct, Plaintiffs have

suffered, are suffering, and will continue to suffer harm in the form of serious emotional distress that is both severe and debilitating.

58. Plaintiffs seek money damages to compensate them for these wrongs.

WHEREFORE, the Plaintiffs pray that:

(A) the Plaintiffs recover from the Defendants their past and future monetary damages and such funds necessary to establish a medical monitoring fund under Ohio law, as alleged in Count One; and

(B) the Plaintiffs recover from the Defendants the general and special compensatory damages as alleged in Counts Three, Four and Five in the amount of Ten Million Dollars (\$10,000,000.00); and

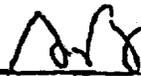
(C) the Plaintiffs recover from the Defendants the general and special compensatory damages as alleged in Counts Two, Six and Seven in the amount of Ten Million Dollars (\$10,000,000.00); and

(D) the Plaintiffs recover from each of the Defendants punitive damages as alleged in Counts Three, Four and Five in the amount of Ten Million Dollars (\$10,000,000.00); and

(E) the Plaintiffs recover from the Defendants the costs of suit, including, without limitation, their attorney's fees and expert witness fees under Ohio law; and

(F) the Court grant such other, further and different relief as may be deemed just and proper.

Respectfully submitted,



Steven D. Bell (0031655)
ULMER & BERNE
Bond Court Building, Suite 900
1300 East Ninth Street 900
Cleveland, Ohio 44114-1583
(216) 621-8400

Counsel for Plaintiffs

JURY DEMAND

Plaintiffs hereby demand a trial by jury.



Steven D. Bell (0031655)

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6-FEB-1996 14:36:52

HPES HEALTH PHYSICS SCREEN - EXPOSURE HISTORY SUMMARY || REVIEW

NAME - KILBANE

SEAN

PATRICK

MONITORING PERIOD YEAR LOGS RECORD

ID : FACILITY FROM TO WHEN TYPE OWNER PSE

1 DAVIS-BESSE NUCLEAR STATION
2 PENNY NUCLEAR POWER PLANT
3 PENNY NUCLEAR POWER PLANT

09/29/94 12/02/94
02/02/96 06/24/96
01/01/93 02/26/93

RECORDS
CRIPEN
CRIPEN

Ex 5

AMS:2

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HPES HEALTH PHYSICS SCREEN - EXPOSURE HISTORY SUMMARY

REVIEW

NAME : PRONASKA

ROBERT

CHARLES

Ex 6

ID : [REDACTED]

MONITORING PERIOD YEAR DOSE RECORD

ROW	FACILITY	FROM	TO	WREN	TYPE	OWNER	PSE
1	DAVIS-BESSE NUCLEAR STATION	09/26/94	12/02/94	[REDACTED]	R	YECOB	
2	PERRY NUCLEAR POWER PLANT	01/01/94	07/22/94	[REDACTED]	R	CEIPER	
3	PERRY NUCLEAR POWER PLANT	09/27/93	12/31/93	[REDACTED]	R	CEIPER	
4	PERRY NUCLEAR POWER PLANT	04/01/92	05/15/92	[REDACTED]	R	CEIPER	
5	PERRY NUCLEAR POWER PLANT	03/16/92	03/31/92	[REDACTED]	R	CEIPER	
6	FERMI 2 NUCLEAR POWER PLANT	04/01/91	06/06/91	[REDACTED]	R	DECEFP	
7	FERMI 2 NUCLEAR POWER PLANT	03/30/91	03/31/91	[REDACTED]	R	DECEFP	
8	PERRY NUCLEAR POWER PLANT	08/20/90	11/30/90	[REDACTED]	R	CEIPER	
9	FERMI 2 NUCLEAR POWER PLANT	11/07/89	12/02/89	[REDACTED]	R	CEIPER	
10	FERMI 2 NUCLEAR POWER PLANT	01/16/89	07/01/89	[REDACTED]	R	CEIPER	
11	PERRY NUCLEAR POWER PLANT	07/03/87	08/01/87	[REDACTED]	R	CEIPER	
12	PERRY NUCLEAR POWER PLANT	01/09/87	03/19/87	[REDACTED]	R	CEIPER	
	THREE MILE ISLAND						

VMS:2

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MPES HEALTH PHYSICS SCREEN - EXPOSURE HISTORY SUMMARY

REVIEW

NAME: MALONEY

DENNIS

MICHAEL

Ex 6

ROW	FACILITY	MONITORING PERIOD		TYPE	OWNER	PSE
		FROM	TO			
1	DAVIS-BESSE NUCLEAR STATION	09/29/94	11/30/94	R	TECOBS	
2	PERRY NUCLEAR POWER PLANT	01/20/94	06/17/94	R	CEIPER	
3	PERRY NUCLEAR POWER PLANT	04/01/92	05/22/92	R	CEIPER	
4	PERRY NUCLEAR POWER PLANT	03/16/92	03/31/92	R	CEIPER	
5	PERRY NUCLEAR POWER PLANT	09/08/90	12/19/90	R	CEIPER	

VMS:2

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NPES HEALTH PHYSICS SCREEN - EXPOSURE HISTORY SUMMARY

REVIEW

NAME / MCCAFFERTY

, OVEN

M

Ex 6

ROW	FACILITY	FROM	TO	WREN	TYPE	OWNER	PSE
1	DAVIS-BESSE NUCLEAR STATION	09/25/94	12/02/94	[REDACTED]	R	TECDBS	
2	COOK NUCLEAR PLANT	08/30/82	09/04/82	[REDACTED]	R	TECDBS	

VMS:2

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MPES HEALTH PHYSICS SCREEN - EXPOSURE HISTORY SUMMARY

|| REVIEW ||

NAME : MC CAFFERTY

, SEAN

EDWARD

Ex 6

NO	FACILITY	NONYORING PERIOD		TYPE	DOSE	RECORD
		FROM	TO			
1	DAVIS-BESSE NUCLEAR STATION	10/07/94	12/07/94	[REDACTED]	R	TECDBS
2	PERRY NUCLEAR POWER PLANT	04/01/92	05/22/92	[REDACTED]	R	CEIPER
3	PERRY NUCLEAR POWER PLANT	03/16/92	03/31/92	[REDACTED]	R	CEIPER
4	PERRY NUCLEAR POWER PLANT	11/01/90	12/01/90	[REDACTED]	R	CEIPER
5	PERRY NUCLEAR POWER PLANT	10/01/90	10/31/90	[REDACTED]	R	CEIPER
6	PERRY NUCLEAR POWER PLANT	09/08/90	09/30/90	[REDACTED]	R	CEIPER

12

6-FEB-1996 14:42:25

HPES HEALTH PHYSICS SCREEN - EXPOSURE HISTORY SUMMARY

REVIEW

Ex 6

NAME : MCLAUGHLIN

TERRENCE

ID	FACILITY	FROM	TO	REN	TYPE	OWNER	PSR
1	DAVIS-BESSE NUCLEAR STATION	09/28/94	12/02/94	[REDACTED]	R	TECDSS	
2	PERRY NUCLEAR POWER PLANT	01/01/94	07/15/94	[REDACTED]	R	CEIPER	
3	PERRY NUCLEAR POWER PLANT	09/21/93	12/31/93	[REDACTED]	R	CEIPER	
4	PERRY NUCLEAR POWER PLANT	09/18/92	09/20/92	[REDACTED]	R	CEIPER	
5	PERRY NUCLEAR POWER PLANT	04/01/92	05/26/92	[REDACTED]	R	CEIPER	
6	PERRY NUCLEAR POWER PLANT	03/05/92	03/31/92	[REDACTED]	R	CEIPER	
7	PERRY NUCLEAR POWER PLANT	08/13/90	12/21/90	[REDACTED]	R	CEIPER	
8	PERRY NUCLEAR POWER PLANT	12/17/87	01/22/88	[REDACTED]	R	CEIPER	
9	PERRY NUCLEAR POWER PLANT	06/26/87	08/01/87	[REDACTED]	R	CEIPER	
10	DOCK NUCLEAR PLANT	08/30/82	09/30/82	[REDACTED]	R	CEIPER	



**CENTERIOR
ENERGY**

PERRY NUCLEAR POWER PLANT

10 CENTER ROAD
PERRY, OHIO 44081
(216) 259-3737

Mail Address:
P.O. BOX 97
PERRY, OHIO 44081

October 13, 1995

Mr. Richard A. Cline
Fishbach Power Services, Inc.
c/o Perry Nuclear Power Plant
10 Center Road, TF-1
Perry, Ohio 44081

Subject Contract: S 137643

Dear Mr. Cline:

Due to the fact that Centerior is currently involved in litigation with the following six individuals we cannot, at this time, allow any one of them to work at any Centerior facility.

<u>Name</u>
McCafferty, Owen
McCafferty, Sean
Kilbane, Sean
McLaughlin, Terrence
Maloney, Dennis
Prohaska, Robert

<u>Social Security Number</u>


ex 6

Please ensure none of these individuals are currently assigned to the Perry Nuclear Power Plant. In addition, please do not assign any one of them to the Perry Plant at least until this litigation is resolved.

Sincerely yours,



Robert W. Schrauder
Director, Perry Nuclear Services Department

RVS/ljb

Operating Companies
Cleveland Electric Illuminating
Toledo Electric

ATTACHMENT B

MEMORANDUMOperating Companies:
Cleveland Electric Illuminating
Toledo Edison**TO: All Nuclear Employees****FROM: Donald C. Shelton**
Senior Vice President
Nuclear**DATE: March 12, 1996**
RAS: 96-0074**SUBJECT: Alleged Discrimination**

Recently, several insulators have alleged that Centerior discriminated against them by not allowing them to be hired for the Perry outage because they are involved in civil litigation against Centerior regarding a minor radiological exposure at Davis-Besse.

The private lawsuit does not involve the raising of safety concerns to either the NRC or Centerior, therefore we do not believe that is an activity that is protected by Section 211 of the Energy Reorganization Act and 10CFR 50.7. This question is currently being considered by an Administrative Law Judge of the Department of Labor.

Regardless of the outcome of this case, Centerior wishes all employees to understand that it is their duty to identify conditions adverse to safety or quality. They may do so, publicly or confidentially, without any fear of retaliation.

We encourage all of you to help make our nuclear plants as safe and effective as possible.



NUCLEAR REGULATORY COMMISSION

REGION III

801 WARRENVILLE ROAD
LISLE, ILLINOIS 60532-4351

November 23, 1994

Centerior Service Company
ATTN: Mr. John P. Stetz
Vice President - Nuclear
Davis-Besse
c/o Toledo Edison Company
300 Madison Avenue
Toledo, OH 43652

RECEIVED 7

DEC 02 1994

TOLEDO EDISON

SUBJECT: SPECIAL RADIATION PROTECTION INSPECTION AT THE DAVIS-BESSE NUCLEAR POWER STATION AND SUBSEQUENT MANAGEMENT MEETING HELD AT THE REGION III OFFICE ON NOVEMBER 14, 1994

Dear Mr. Stetz:

This refers to the special safety inspection conducted by Mr. P. Loudon and Mr. R. Paul of this office on October 24 through November 3, 1994, and the subsequent management meeting held at the Region III Office on November 14, 1994. The inspection included a review of authorized activities at your Davis-Besse facility. At the conclusion of the inspection, the findings were discussed with those members of your staff identified in the enclosed report. These findings were further discussed with you and members of your staff during a management meeting held on November 14, 1994.

Areas examined during the inspection are identified in the report. Within these areas, the inspection consisted of a selective examination of procedures and representative records, interviews, and observation of activities in progress.

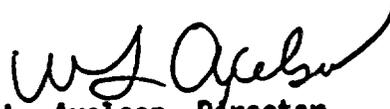
During this inspection, certain of your activities appeared to be in violation of NRC requirements, as specified in the enclosed Notice of Violation (Notice). These violations are of concern because they illustrate certain radiation protection program weaknesses. Although no regulatory dose limits were challenged during the events discussed below, these incidents, which led to the violations, illustrated weaknesses in the station's radiation protection program that necessitate management attention.

During insulation removal on the east steam generator, radiation workers were exposed to unplanned airborne radioactivity conditions. This event exhibited weaknesses within your planning and radiation work permit programs and were contributing factors to the failure to adequately evaluate the radiological hazards incident to the workers involved. This failure to determine radiological conditions led to the accomplishment of work without engineering controls or respirators thus leading to the unplanned intakes.

4412070042 3 PP.

We will gladly discuss any questions you have concerning this inspection or the management meeting.

Sincerely,



W. L. Axelson, Director
Division of Radiation Safety
and Safeguards

Docket No. 50-346

- Enclosures:
1. Notice of Violation
 2. Inspection Report
No. 50-346/94010(DRSS)
 3. Handouts from Management Meeting

cc w/encls:

- D. C. Shelton, Senior
Vice President - Nuclear
- J. K. Wood, Plant Manager
- W. T. O'Connor, Manager
Regulatory Affairs
State Liaison Officer, State
of Ohio
- Robert E. Owen, Ohio
Department of Health
- A. Grandjean, State of Ohio,
Public Utilities Commission

Procedure DB-HP-01109, Revision 3, "High Radiation Area Access Control," Step 4.1.3 states, in part, that personnel shall exit the area immediately if, a pre-set dose limit is reached as evidenced by alarming dosimetry, and/or if, a pre-set dose rate alarm is reached.

Procedure DB-HP-01901, Revision 3, "Radiation Work Permits," Step 4.1.2 states, in part, that all entries into radiologically restricted areas require the use of an RWP. Step 6.5.3 states that workers shall be cognizant of the requirements of their RWP each time they use their RWP.

Procedure DB-HP-00208, Revision 2, "Radiation Protection Program," Step 5.6.8 states that workers obey posted, oral, and written Radiation Protection instructions and procedures including instructions on Radiation Work Permits.

Contrary to the above, the licensee failed to follow written procedures recommended by Appendix A of Regulatory Guide 1.33, November 1972. Specifically,

- a. On October 23, 1994, two workers entered the incore instrumentation tank drain line area of the 565' elevation in the Containment Building on three separate occasions and failed to exit the area when either their electronic dosimeters alarmed for a pre-set dose limit and/or a pre-set dose rate alarm.
- b. On October 23, 1994, one employee worked in the incore instrumentation tank drain line area of the 565' elevation in the Containment Building and was not cognizant of the RWP requirements in that he was signed on an RWP which was not for access into the Containment Building.
- c. On October 23, 1994, two workers entered the incore instrumentation tank drain line area of the 565' elevation in the Containment Building without following posted instructions to notify Radiation Protection before crossing a high radiation area boundary.

This is a Severity Level IV violation (Supplement IV).

Pursuant to the provisions of 10 CFR 2.201, Centor Service Company is hereby required to submit a written statement or explanation to the U.S. Nuclear Regulatory Commission, ATTN: Document Control Desk, Washington D.C. 20555, with a copy to the Regional Administrator, Region III, and a copy to the NRC Resident Inspector at the facility that is the subject of this Notice, within 30 days of the date of the letter transmitting this Notice of Violation (Notice). This reply should be clearly marked as a "Reply to a Notice of Violation" and should include for each violation: (1) the reason for the violation, or, if contested, the basis for disputing the violation, (2) the

U.S. NUCLEAR REGULATORY COMMISSION

REGION III

Report No. 50-346/94010(DRSS)

Docket No. 50-346

License No. NPF-3

Licensee: Toledo Edison Company
Edison Plaza
300 Madison Avenue
Toledo, OH 43652

Facility Name: Davis-Besse Nuclear Power Station

Inspection At: Davis-Besse Site, Oak Harbor, Ohio

Inspection Conducted: October 24 through November 3, 1994

Inspectors:


P. L. Louden
Radiation Specialist

11/28/94
Date


R. A. Paul
Senior Radiation Specialist

11/28/94
Date

Reviewed By:


J. W. McCormick-Barger, Chief
Radiological Programs Section

11/28/94
Date

Approved By:


Cynthia D. Pederson, Chief
Reactor Support Programs Branch

11/28/94
Date

Inspection Summary

Inspection on October 24 through November 3, 1994 (Report No. 50-346/94010 (DRSS))

Areas Inspected: Special radiation protection inspection to review two radiological events which occurred during the current ninth refueling outage. One event involved the unplanned intakes of radioactive material by workers while removing insulation from the east once through steam generator hot leg on October 7, 1994. The second event involved the inadvertent external exposure of radiation workers to unexpectedly high dose rate areas during the draining of the Incore Instrumentation Tank on October 23, 1994.

Results: Two violations of NRC requirements were identified. The first concerned two examples of failure by the licensee to adequately evaluate

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DETAILS

1. Persons Contacted

Toledo Edison Company

- # T. Barton, Corporate Radiological Assessor
- *S. Byrne, Manager, Plant Operations
- # J. Dillich, Manager, Radiation Protection Department
- # J. Feckley, Supervisor, Radiation Protection
- # R. Greenwood, Radiation Protection Manager
- # M. Hale, Supervisor, Radiation Protection Operations
- # L. Harder, Health Physicist
- # L. Lockard, Radiation Protection Training
- # C. McCaken, Radiation Protection Technician
- # D. Miller, Senior Licensing Engineer
- # J. Moyers, Manager, Quality Assurance
- *W. O'Connor, Manager, Regulatory Affairs
- # J. Polyak, Corporate Radiological Assessor
- # A. Rabe, Supervisor, Quality Engineering
- # J. Rogers, Manager, Maintenance
- # D. Schreiner, Supervisor, ISEG
- *R. Scott, Manager, Radiation Protection/Chemistry Departments
- # P. Smith, Supervisor, Licensing Compliance
- # M. Snee, Radiation Protection Technician
- *J. Stetz, Site Vice President, Nuclear
- *J. Wood, Plant Manager

Nuclear Regulatory Commission

- *W. Axelson, Director, Division of Radiation Safety and Safeguards
- *R. DeFayette, Director, Enforcement and Investigation Coordination Staff
- *J. Hopkins, Senior Project Manager, NRR
- *J. House, Senior Radiation Specialist
- *M. Kunowski, Senior Radiation Specialist
- *R. Lanksbury, Chief, Division of Reactor Projects Section 3B
- *R. Lickus, Chief, State and Government Affairs
- # C. Lipa, Resident Inspector
- *T. Martin, Deputy Director, Division of Reactor Projects
- *H. Miller, Deputy Regional Administrator
- #*S. Stasek, Senior Resident Inspector

The inspectors also contacted other licensee personnel during the course of the inspection.

- #Indicates those present at the exit interview on November 3, 1994.
- *Indicates those present at the management meeting held in the Region III office on November 14, 1994.

body friskers located near the decontamination facility. Four of the five crew members alarmed the whole body friskers and all five were instructed to take a shower. The crew was subsequently whole body counted. Four of the five workers displayed positive whole body counts and were instructed to return in twenty-four hours for additional countings. Whole body counts were continued for seven days which indicated the presence of Cobalt-58, Cesium-134, Cesium-137, and very low levels of Cobalt-60 radioisotopes. Dose assignments were computed for the workers which ranged from 0 to 212 mrem (0 to 2.12 mSvs) CEDE. Deep Dose Equivalents for the workers ranged from 22 to 62 mrem (.22 to .62 mSv).

Licensee Response to the Event

The licensee immediately gathered statements and information regarding the event and a full investigation was conducted by the Radiation Protection Manager. The licensee's investigation noted four weaknesses which led to the unplanned intakes. The following briefly summarizes the identified weaknesses:

- a. The radiation work permit (RWP) did not specifically identify areas for insulation removal. Rather, it was a single broad RWP for all insulation work within containment.
- b. Detailed surveys were not recorded of the specific area in question. This area was not decontaminated during the initial containment decontamination which took place at the beginning of the outage.
- c. The RWP did not include instructions for workers to stop work after the first piece of mirror insulation was removed so that RP could perform surveys under the insulation to evaluate the radiological conditions. Had these surveys been performed, the high levels of contamination (later found in the rad (10+ mGy) smearable range) would have prompted the need for engineering controls or the use of respiratory protection.
- d. The lead RPT failed to followup on the insulation removal by sending another RPT into the area. The RPT's statement suggested that the work activity at that time was hectic and he lost track of the workers removing the insulation.

Regional Review of the Event

The inspectors review of the event included an assessment of the licensee's investigation and interviews conducted with licensee personnel involved in the event. Interviews with the cognizant RPT in charge of that area of the containment indicated that he was aware of the potential for higher contamination levels underneath the insulation but failed to ensure that an RPT was assigned to the work crew to evaluate the contamination conditions after the first piece of insulation was removed. The root causes and corrective actions

Op B attempted to close the valve but could feel something binding the valve and never got the valve to close. During this time his ED went into alarm for both dose and dose rate. Op B left the area and went to the containment access point to reset his ED. While resetting his ED he noticed that it was approximately 12 mrem (.12 mSvs) over his alarm set point. This prompted him to approach an RPT and convey his noted dose to the RPT. The RPT offered to accompany him to the area because the dose rates in the area appeared, based on his ED results, to be much higher than anticipated. Op B and an RPT proceeded back to the drain valve area. During this time, plans were being made to flush the drain valve which was sticking during Op B's initial entry to close the valve. As Op B and the RPT approached the area, the RPT was paged and told to report to another area of containment. The RPT told Op B that he would be back in a few minutes and asked if he was "meter qualified". Op B acknowledged that he was "meter qualified" and the RPT handed him his teletector and left the area. Op B entered the area and surveyed the drain line and the valve. The highest dose rate reading Op B noted was a contact reading of about 5 to 8 rem/hr (50 to 80 mSvs/hr) on the drain valve. Op B noted his ED alarming for dose rate during this time. Op B placed the meter in a nearby area and communicated to the decontamination crew to start flushing the valve. While Op B was in the area to communicate to the decontamination crew, he noted that his ED stopped alarming. Op B then went back over to the valve to attempt to close it. During this time the RPT returned to the area and heard Op B's ED alarming. The RPT took his meter and began surveying the drain pipe. At this point he noted contact readings on the pipe in a localized area about 450 rem/hr (4.5 Sv/hr) and immediately motioned to Op B to leave the area. At this time both the RPT's and Op B's EDs were in alarm for dose and dose rate. Followup surveys performed on the pipe indicated a contact reading as high as 650 rem/hr (6.5 Sv/hr) on the bottom of the pipe and a 30 cm measurement as high as 12 rem/hr (.12 Sv/hr). The hot spot was very localized and general area dose rates were in the 1 to 2 rem/hr (10 to 20 mSvs) range.

ED logs for the three individuals involved (Op A, Op B, and the RPT) indicated the following:

	Dose	Highest Dose Rate
Op A	47 mrem (.47 mSvs)	334 mrem/hr (3.3 mSvs/hr)
Op B	110 mrem (1.1 mSvs)	3.3 rem/hr (33 mSvs/hr)
RPT	25 mrem (.25 mSvs)	2.9 rem/hr (29 mSvs/hr)

Licensee Response to the Event

The licensee took immediate corrective actions by excluding the two operators access to the radiologically restricted area (RRA) and provided appropriate controls to the drain line area by designating it a locked high radiation area. The licensee did not immediately perform formal dose evaluations for the workers but performed "back of the

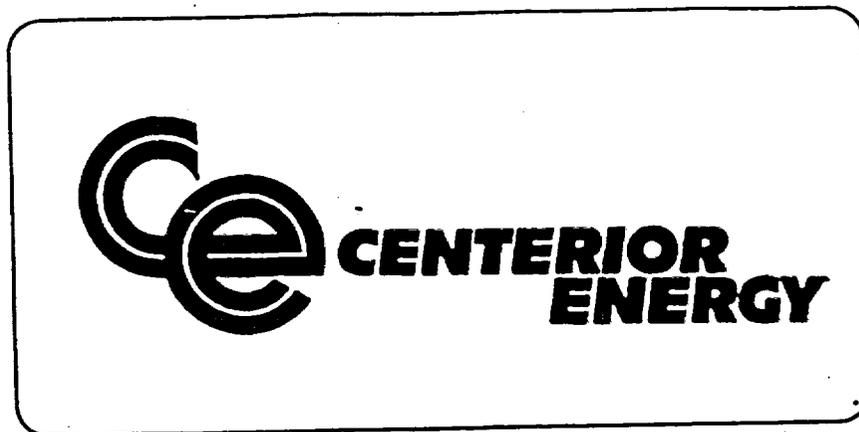
alarm from their ED. The operators would then back out of the high dose rate area if it was previously discussed with R. P. This confusion suggested that the licensee may need to re-think their decision process for establishing appropriate alarm set points for EDs. Additionally, this confusion was compounded by Op B's hearing his alarm but, because he had a dose rate meter with him, believed he understood the radiological hazards and remained in the area.

- Similar to the preceding weakness, confusion was also identified concerning the perception operators may have with respect to not leaving an evolution until it is completed. Apparently, Operations Department supervision has frequently reminded operators of their responsibility to see an evolution through completion. This topic was normally addressed to mitigate spills of radioactive water but appears to have been taken by the operators to include all actions taken within the plant.
- A weakness on the part of the RPT who upon being requested by Op B to accompany him to the drain valve area because he believed dose rates had risen, left the operator and provided him with his meter. This part of the incident also suggests an apparent perception problem with the licensee's meter qualification program for operators. This weakness was further illustrated during Op B's use of the meter. He apparently surveyed the valve and noted higher than expected dose rates but this did not prompt him to recognize anything unusual and leave the area, instead he continued with his assigned task.
- The licensee initially took a less than aggressive approach in investigating the incident. Particularly, regarding ascertaining whole body and extremity doses of the workers involved, and a review of the appropriateness of the ALARA hold point which was used for the draining evolution.
- Both operators apparently did not have confidence in the use of the reach rod which was available to remotely manipulate the valve. At the end of the inspection the functionality of the reach rod was still in question, however, it raised the question as to how effectively ALARA tools, such as reach rods, are used when available.

Two violations of NRC requirements were identified.

4. Management Meeting

A management meeting was held in the Region III Office on November 14, 1994, following the inspection. Licensee management presented the results of their investigations and proposed corrective actions to the two radiological events discussed in Section 3 of this report. A third event was briefly discussed which involved a welder working in containment. The welder received higher than planned external exposures



**TE/NRC
9RFO INFORMATIONAL
MEETING**

NOVEMBER 14, 1994

INSULATION REMOVAL

EVENT

- Insulation removal resulted in unplanned internal contaminations

CAUSES

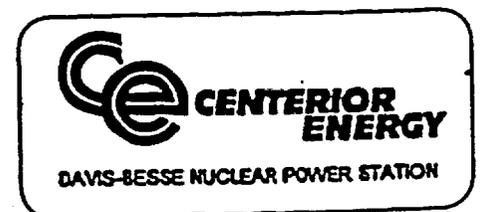
- Planning
 - Radiation Work Permits
 - Decontamination plan
 - Respirators



INSULATION REMOVAL

CORRECTIVE ACTIONS

- Night Orders issued to add additional monitoring and preventive measures
- Meetings with insulators
- Revised RWPs for insulation removal with additional instructions
 - radiological condition assessment
 - protective clothing requirements
 - contamination control requirements
 - continuous RP coverage
- Counseled RP Personnel



INCORE TANK FLUSH

EVENT

- Incore Tank draining and subsequent drain pipe flushing captured a hot particle which resulted in a potential for higher than expected doses

CAUSES

- Incore cutting tool performance
- Planning for potentially changing radiological conditions during the incore tank flush
- Response to actual changing radiological conditions



INCORE TANK FLUSH

LESSONS LEARNED

- Operation of Incore Tank drain valve (DH93)
- Use of electronic alarming dosimeters
- Operations/RP Interface
- RWP control
- Operator radiation meter qualification
- Management sensitivity and response to RP issues



WHIP RESTRAINT MODIFICATION WELDING

EVENT

- Welder working on pressurizer surge line whip restraint received more dose than expected

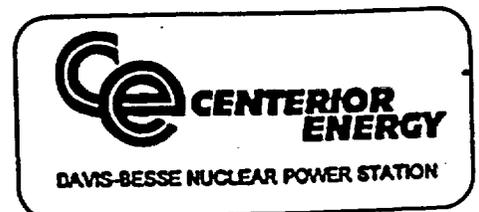
CAUSES

- Job planning
- RP controls



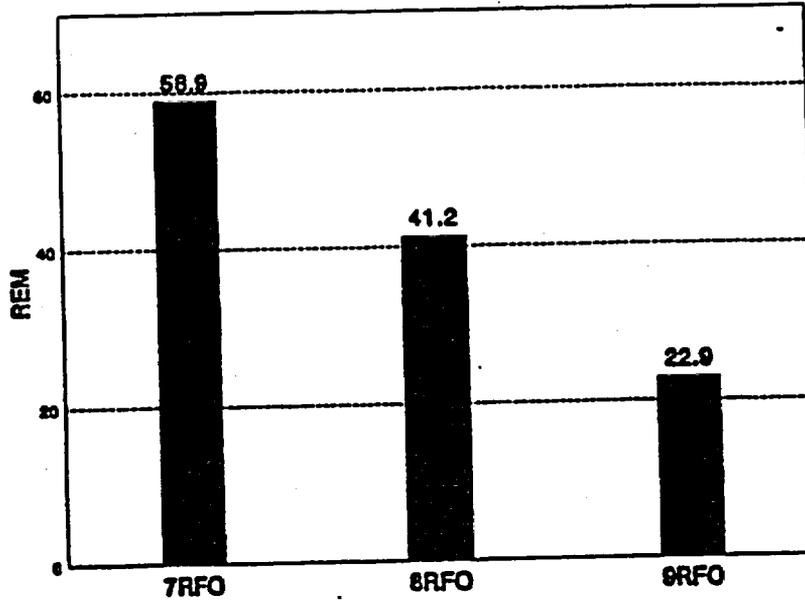
RP OVERVIEW

- Events identified some weaknesses
- Management concerns
- Overall RP performance
 - High quality technical staff
 - Positive contractor feedback
 - 9RFO RP improvements

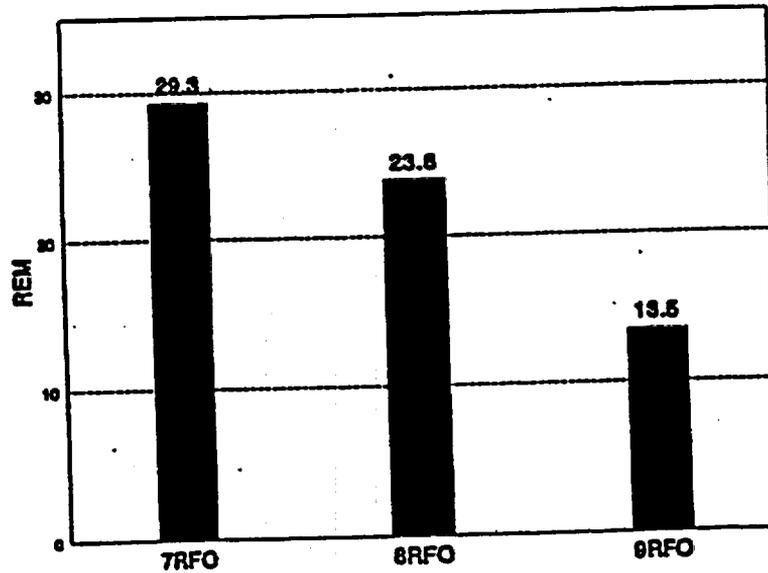


COMPARATIVE DOSES

REACTOR HEAD WORK

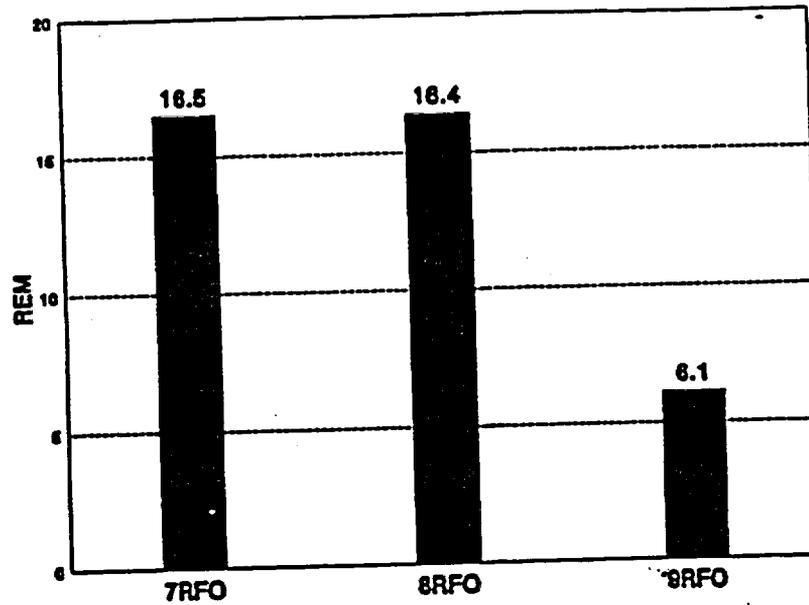


STEAM GENERATOR WORK

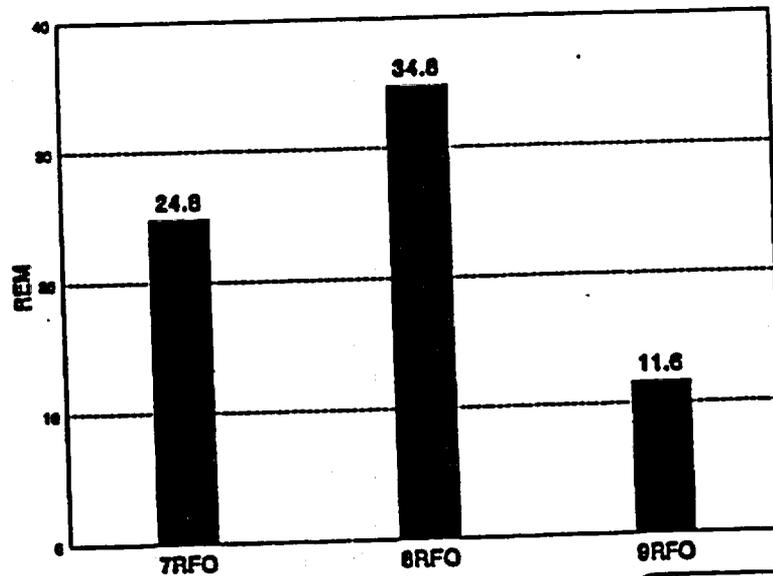


COMPARATIVE DOSES

INSERVICE INSPECTION



SCAFFOLD SUPPORT



ISSUES

EVENT

- One fuel assembly and 3 control rods out of planned positions

CAUSES

- Fuel Assembly indexing error
- Inadequate independent verification

SAFETY SIGNIFICANCE

- Shutdown Margin

Required
 $K_{eff} \leq 0.95$

Actual
 $K_{eff} = 0.91$

- Adequacy of T.S. 3.9.1



ISSUES

- **SPENT FUEL POOL GATE**

- Spent fuel pool gate moved while emergency ventilation inoperable

- **FOREIGN MATERIAL EXCLUSION**

- **REFUELING CANAL CLEANLINESS INSPECTION**

- **NOZZLE DAMS TEMPORARY MODIFICATION**

- Shutdown Risk enhancement by adding computer alarm in addition to annunciator



9RFO OVERVIEW

- **Emergent Issues**

- Polar crane
- Feedwater heaters
- Main steam isolation valve
- Modified core design
- Reactor coolant pump 2-1 seal replacement

- **Results**

- Within one day of schedule
- Outage scope increased by 13% due to emergent work
- Only 3% of originally planned work was deferred

