U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

CURTIS C. OVERALL,

COMPLAINANT,

v.

TENNESSEE VALLEY AUTHORITY,

RESPONDENT.

ARB CASE NOS. 98-111
98-128

ALJ CASE NO. 97-ERA-53

DATE: APR 30 2001

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

Appearances:

For the Complainant:
Lynne Bernabei, Esq., Debra S. Katz, Esq., Michael C. Subit, Esq., *Bernabei & Katz, Washington, D.C.*

For the Respondent:
Thomas F. Fine, Esq., Brent R. Marquand, Esq., *Tennessee Valley Authority, Knoxville, Tennessee*

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. §5851 (1994), and implementing regulations at 29 C.F.R. Part 24 (2000). The issues are whether Complainant Curtis C. Overall timely filed a complaint of unlawful discrimination and whether he proved that Respondent Tennessee Valley Authority (TVA) intentionally discriminated against him, the specific issue in contention being whether Overall demonstrated causation, *i.e.*, that his protected activity motivated TVA to take

---

[1/] This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

Template OGC 002

ERDS OGC01

adverse employment action against him. The Administrative Law Judge (ALJ) decided each issue in favor of Overall. We adopt the ALJ's findings as modified below.[2]

BACKGROUND

The ALJ's Recommended Decision and Order (R.D.O.) issued on April 1, 1998, contains a comprehensive factual statement and findings of fact which derive support from the record. R.D.O. at 4-27.

Briefly, Complainant Overall worked for TVA from 1979[3] until being laid off in September 1996. When hired initially by TVA Overall worked in the Fossil and Hydro Division on coal-firing power plants and dams. Between 1981 and 1984 he worked as an engineering aide at power plants including the Sequoyah nuclear power plant, and in 1984 he transferred to the Watts Bar nuclear power plant to work as an associate engineer in the mechanical maintenance section. In 1989 Overall transferred to Technical Support Services as a power maintenance specialist.

As of 1994 Overall was working as a power plant specialist in the Nuclear Steam Supply System Engineering section of the Watts Bar Technical Support organization and was responsible primarily for the ice condenser system. Overall became singularly accomplished in managing this

---

[2] The parties have moved to supplement the record with new and material evidence which recently became available and which was not readily available prior to the closing of the record before the ALJ. Most of this evidence bears on findings generated by the Nuclear Regulatory Commission (NRC) between 1998 and 2000 which aid in understanding Overall's protected activity. *See* section captioned "Subsequent NRC Activity," *infra*. The parties' motions are granted and the evidence is accepted for filing. 29 C.F.R. §18.54(c) (2000); *Mosbaugh v. Georgia Power Co.*, Case Nos. 91-ERA-1/11, Sec. Dec. and Rem. Ord., Nov. 20, 1995.

The parties also have moved to remand the case to the ALJ. Overall subsequently withdrew his motion in which he requested a remand limited to the propriety of ordering reinstatement given the occurrence of certain intervening events. Only TVA's motion remains before us. TVA requests a remand for purposes of developing the record further to address whether evidence generated by TVA during an investigation conducted after the close of the record bears on Overall's credibility. We can divine no basis for ordering such an unusual undertaking, and TVA has provided us none. The ALJ accorded the parties abundant opportunity to pursue discovery in preparation for the hearing and to present their respective cases after which he closed the record. His findings derive from witness demeanor and from the evidence adduced prior to the record's close. The parties, in other words, have been accorded the process due them. The motion is denied.

[3] Overall previously had obtained a two-year degree in architectural pre-engineering and had worked between 1973 and 1979 as an engineering draftsman for the Department of Public Works, Roads and Streets for the city of Chattanooga, Tennessee. R.D.O. at 23 (ALJ finding no. 6).

system. *See* R.D.O. at 23-24 (ALJ findings nos. 2-5, 9) ("[t]hroughout his tenure with TVA, Overall maintained an impressive work record receiving numerous and consistent favorable job appraisals;" management "recognized Overall as a dedicated and conscientious ice condenser expert requiring no supervision and possessing good forethought regarding ice condenser problems and their solutions"). Overall's duties included "maintenance, operation, construction and design of the ice condenser . . . system with additional duties as project manager on capital projects and backup systems engineer on other plant systems in the absence of [the] engineer primarily assigned to these systems." *Id.* at 23 (finding no. 4).

The ice condenser system plays a critical role in preventing over-pressurization of containment in the event of a loss-of-coolant accident or a high energy line break at a nuclear power plant. R.D.O. at 24 (finding no. 10). Within the ice condenser system, sheet metal screws secure rings supporting perforated baskets which hold borated ice (three million pounds of ice held in 1,944 baskets, each 48 feet in height and 12 inches in diameter), which are arrayed outside of the reactor but inside the containment vessel and which provide 300 degrees of containment. Ice basket segments are coupled together by means of screws arranged in pairs. The system requires five rings on each basket and 12 screws on each ring. The screws are installed at coupling joints. In the event of an accident steam is emitted through the ice and condenses, thus serving to cool the reactor. In short, the ice cools the steam which reduces the pressure. *Id.* at 7.

The sheet metal screws that secure the ice condenser baskets must be maintained according to the ice condenser system description contained in the Final Safety Analysis Report under TVA's license to operate the nuclear power plant. The object of the description is to distribute the ice uniformly throughout each basket so that any steam "behaves" through the ice rather than through the path of least resistence. Failure of the system could result in over-pressurized containment and a break in the containment vessel, thereby releasing radioactive gases into the atmosphere. Missing or defective screws at particular coupling joints can allow ice baskets to separate and become a missile hazard with the potential of damaging the system.

Overall's Concerns Regarding the Ice Condenser System Screw Failure

Overall loaded and weighed the ice condenser at the Watts Bar plant between December 1994 and February 1995. On April 12, 1995, he discovered 171 ice basket screw heads and 32 complete ice basket screws in an ice melt tank (R.D.O. at 24, finding no. 11), which meant that the screw heads and screws had been flushed from the floor of the building through the tank and had been retained in a sieve or trap.[4/] Overall reported the condition to first-line supervisor Landy

---

[4/] Overall had designed the ice melt tank as a means to contain debris ice. As water melted off, any solids present in the ice remained at the bottom of the tank. On two occasions preceding installation of the

(continued...)

McCormick and at McCormick's direction issued Problem Evaluation Report 9500246 (PER 246). R.D.O. at 24 (finding no. 11). A "PER" is an internal report of a safety problem used as a tracking document. It identifies a problem, lays out corrective action and affords a means of verifying that the problem has been resolved. The Nuclear Regulatory Commission (NRC) examines PERs during its audits of power plants.

Overall forwarded ten screw heads and a whole screw to TVA's central laboratories for analysis and arranged for a remote camera inspection of the ice condenser system because the tight configuration of the system components made direct visual inspection impossible. Hearing Transcript (T.) 116-119. The camera inspection would reveal the number of missing screws and their former location and arrangement. T. 111-113. Overall recommended a multi-faceted procedure for evaluating the screw failure. This procedure entailed (1) a referral to TVA nuclear engineering to perform metallurgical tests and evaluation, (2) a referral to TVA technical support to coordinate an inspection with the TVA mechanical maintenance group to determine the condition of randomly selected ice baskets, and (3) a referral to Westinghouse Electric Corporation (Westinghouse), the supplier of the ice condenser screws, to evaluate the results of TVA's tests and inspections and to provide recommendations. Depending on Westinghouse's evaluation and recommendation, TVA technical support would revise existing procedures or write new ones.

In a May 11, 1995 meeting TVA management (particularly Dennis Koehl, Overall's second-line supervisor) emphasized to employees the importance of proceeding toward targeted fuel load and start up dates at Watts Bar after nearly 20 years of construction. The plant was over budget and years behind schedule. Management emphasized closing out extant PERs and discouraged PERs and other such actions which were not fuel load and start up related. R.D.O. at 24 (finding no. 12).

On June 2 the TVA central laboratories engineers issued a metallurgical report which found the mode and mechanism of screw failure to be intergranular separation and stress overload, respectively, and identified seven probable causes of screw failure. R.D.O. at 24 (finding no. 13). Overall faxed the report to Westinghouse on June 8. On June 14 TVA management convened a meeting with employees. TVA metallurgical supervisor Terry Woods announced that the screw failure did not constitute an NRC-reportable issue and rescinded the June 2 report. *Id.* (finding no. 14). TVA issued a modified report on June 19 in which it found the mode of failure to be intergranular separation. TVA deleted the seven probable causes of screw failure identified in the June 2 report and figure (7) of that report which showed cracks in unused (new) screws. TVA also adjusted a portion of the narrative addressing figure (7). Two

---

[4/](...continued)
tank TVA had engaged in ice loading and drainage but had not inspected the ice for foreign objects. Hearing Transcript (T.) 92-98.

of the seven probable causes of failure identified in the June 2 report and deleted in the June 19 report were (i) stresses higher than design limits, specifically at the screw thread roots and (ii) the presence of quench cracks in the screws upon receipt from the manufacturer.

On June 22 J.W. Irons, the Westinghouse manager for the TVA Watts Bar project, declared the ice condenser operable. Based on a statistical projection, Westinghouse had concluded that the conditions associated with the screws did not affect the function or structural adequacy of ice condenser containment. R.D.O. at 24-25 (finding no. 16). TVA system engineers certified that the condenser was functioning properly on the following day.

On July 7 Overall met with TVA nuclear engineers in an attempt to develop a method to avoid recurrence of the screw failure (*i.e.*, "recurrence control"). TVA removed Overall from PER 246 on July 10 and transferred the PER from Technical Support to Nuclear Engineering on July 12. R.D.O. at 25 (finding no. 17). Any contact by Overall with PER 246 ended on July 10. Overall testified that he maintained at least a liaison status through closure on all other PERs that he initiated.

Nuclear Engineering closed out PER 246 expeditiously (August 10) without conducting recommended testing and inspections and without reporting the circumstances to the NRC. R.D.O. at 25 (finding no. 18). PER closure was attributable primarily to engineering managers Tom McCollum, James Adair and Larry Katchum.

At the hearing before the ALJ Overall testified as to his understanding of Westinghouse's and TVA's actions upon being notified of the ice condenser screw failure. T. 135-172. A later NRC investigation in 1998 validated Overall's testimony in large measure. *See* discussion *infra*. According to Overall, Westinghouse limited its inquiry to a statistical evaluation purporting to establish the probability of screws *missing* in any single ice basket connection based on random occurrence. Westinghouse neglected to consider the possibility and consequences of broken or cracked screws as documented in the June 2 TVA metallurgical report. Westinghouse also neglected to determine the cause of screw failure, but merely concluded that the integrity of the baskets likely would be maintained if at least ten of every 12 screws remained. Even this limited projection lacked significance. Overall testified that because TVA never conducted a camera inspection, no basis existed for determining whether or to what extent additional screws actually were missing. In the event that a camera inspection had revealed the consistent presence of less than ten screws on the rings, the plant's fuel load and start up dates could have been delayed.[5/] TVA disposed of the PER on an "accept as is" basis, meaning that the ice condenser system was judged adequate as installed and that no design modification was required.

[5/] The ALJ found that "[h]ad a proper ice basket screw inspection been conducted Watts Bar could easily have been shut down for a period of 6 to 12 months." R.D.O. at 26-27 (finding no. 32).

Overall testified that PER 246 contained misrepresentations. Complainant's Exhibit (CX) 23 is the closure package for tracking PER 246. It includes a nuclear assurance statement and a corrective action verification. This information was subject to review in determining that the PER "is ready for closure as all of the corrective actions are complete." CX 23 at 24. The third corrective action specified that TVA Nuclear Engineering would request Westinghouse to evaluate the data collected from the first and second corrective actions, namely (1) the performance of metallurgical testing and evaluation of the failed ice basket screws in determining the mode of failure, and (2) the performance of comparison testing and analysis of installed screws and unused (new) screws from warehoused stock. *Id.* at 22. The corrective action verification represented (incorrectly) that the Westinghouse evaluation of items 1 and 2 had been completed and documented. *Id.*

The corrective action verification also represented (incorrectly) that no field inspection was performed for closure of the PER *because the ice baskets were inaccessible. Id.* Overall testified rather that the baskets in fact were accessible for purposes of camera inspection. R.D.O. at 25 (finding no. 18) (TVA closed out "PER 246 without taking any corrective action and inaccurately concluding that the ice baskets in question were inaccessible whereas the credible testimony of Overall showed that the ice baskets were accessible"). Finally, the corrective action verification stated that "[a]s the result of Westinghouse's evaluation and the fact that all ice condenser screws are in place and the task is complete . . . no implementing procedures need to be revised." CX 23 at 23. Again, Westinghouse had conducted no responsive evaluation and absent inspection could have reached no determination about screw placement.

The NRC approved the Watts Bar ice condenser system on November 3, 1995, without reference to the screw failure.

Overall's Employment from 1995 through 1997

Overall issued PER 246 in late April 1995. On June 1 Rich Miller, a supervisor with TVA's Technical Services Organization (Services) based in Chattanooga, Tennessee, telephoned Overall about creating a permanent, *i.e.*, "secure," position for him as project administrator and advised him that he (Miller) would contact him about an interview. Miller stated that he considered Overall to be highly marketable. Prior to the call, Overall had never heard of Miller. R.D.O. at 14. Services was a relatively new organization at TVA which competed with outside contractors for project work at TVA as well as retrained displaced TVA employees. Respondent's Exhibit (RX) 14 at 33. Although most TVA employees passed through Services in an "at-risk" status, Services maintained a core of managers who "sold" their expertise and that of at-risk employees to TVA or to external organizations. These managers held "permanent" positions, *i.e.*, they retained the same status as every other TVA employee who had not received notification of at-risk reclassification. T. 196-197, 299, 306, 562-570. The funding for Services

was limited. Koehl, who had prevailed on Miller to create the position for Overall, was aware of the funding limitation; Overall was not. T. 308-310, 658-659.

On June 16, two days after TVA rescinded the June 2 metallurgical report (June 14) and several days before it issued the modified report (June 19), Koehl served Overall with a written notification of involuntary transfer to Services as an at-risk employee subject to termination within 12 months. R.D.O. at 25 (finding no. 22). The written notification bore the date June 23, however.[6] TVA transferred at-risk employees to Services either for training and reassignment or as a precursor to layoff. Koehl, who both signed and served the notification, testified that he had approved Overall's transfer because Overall's position of ice condenser systems specialist did not constitute a full-time (2,000 man-hour) position. Koehl additionally endorsed McCormick's asserted rationale that he (McCormick) preferred the flexibility afforded by an allegedly more versatile systems "engineer" as opposed to systems "specialist" in filling the ice condenser position. *Id.* at 26 (finding no. 29).[7] Faced with imminent at-risk transfer, Overall on June 16 applied for the permanent position of project administrator that Miller had offered to create on June 1st.

On June 21 Overall discussed the at-risk transfer decision with TVA human resources manager Howard Cutshaw, objecting that Koehl's inadequate man-hour rationale was false. CX 24, p. 27; T. 195.

On June 28 Miller again telephoned Overall to request that Overall submit an outline detailing the services that he could provide nuclear power plants pertaining to ice condenser systems.

On August 24 Overall met with TVA labor relations specialist A.V. Black and union representative Caren Mullins to contest TVA's at-risk transfer decision. TVA denied Overall's contest on September 18. CX 26.

TVA transferred Overall at-risk to Services effective September 18, 1995, but at McCormick's direction Overall remained physically in Technical Support beyond that date completing paperwork and training his replacement. TVA did not transfer other employees at-

---

[6] The ALJ credited Overall's testimony that he received the notification on June 16 based in part upon contemporaneous notes in Overall's Franklin Planner daily diary and the timing of three events – an anonymous harassing telephone call, Overall's action in boxing up his possessions and Overall's action in confronting McCormick about the transfer. R.D.O. at 16 (Overall's "specific testimony, exhibits and demeanor" compared with Koehl's "vague" testimony and demeanor; ALJ rejected Koehl's testimony that he served the notification on June 23).

[7] Although classified as a "specialist," Overall was qualified to operate a number of systems in addition to the ice condenser system. R.D.O. at 26 (finding no. 30).

risk to Services who possessed qualifications equal or inferior to those possessed by Overall.[8] R.D.O. at 17, 21, 22, 24 (finding no. 8), 31, 33.

In early October 1995, TVA formally offered Overall the permanent position of project administrator in Services. Overall accepted. R.D.O. at 25 (findings nos. 23-25).

Overall received a notice of layoff from Services on July 24, 1996, and was laid off effective September 30, 1996. The reason advanced by Services for the layoff was a shortage of funds. Overall's supervisor Gary Pitzel previously had advised Overall that his (Overall's) position had been budgeted for the 1997 fiscal year and that he (Overall) need not worry about layoffs because his services remained in demand. Overall testified that Pitzel attributed these assurances to TVA Services manager James Swindell. R.D.O. at 18, 26 (finding no. 26), 33-34; T. 309. TVA did not produce Pitzel to testify.

TVA continued to need persons with ice condenser expertise during plant outages, but in May and June 1997 TVA refused to re-employ Overall. Ulysses White, task manager for the TVA modifications group, contacted Overall by telephone on May 7, 1997, about the prospect of working on the ice condenser system at Watts Bar during a pre-outage and scheduled outage, which would guarantee Overall nearly full forty-hour workweeks during the entire summer. White suggested that Overall also might provide support services following the outage. T. 626-628. However, after several weeks White advised Overall that TVA would not be requiring his services. Instead, TVA engaged a contractor, Stone and Webster Engineering Corporation (Stone and Webster), to work the outage despite its use of engineers who had no experience with the ice condenser system. R.D.O. at 26 (finding no. 27).

Subsequent NRC Activity[9]

In 1998 the D.C. Cook nuclear power plant, located in Michigan and operated by American Electric Power (AEP), underwent maintenance after having been taken off-line. In February 1998 AEP notified the NRC that its inspection of the ice condenser system had revealed

---

[8] TVA promoted one of these employees, John Ferguson, to engineer "equivalency" status by virtue of a point rating derived as the result of his education and experience. Ferguson and Overall had received "the same overall [equivalency] evaluation of 1325 points . . . ." R.D.O. at 17. The ALJ noted, "TVA failed to call [the rating official] to explain either the rating system or how Ferguson, who possessed no formal engineering training, was able to be classified as a system engineer." *Id.* Overall, in contrast, had received some formal engineering training.

[9] The exhibits discussed below document the NRC activity. With the exception of CX 48, the Board accepted all referenced exhibits for filing after the close of the record before the ALJ. *See* n.1 *supra.* The ALJ admitted the remaining exhibit, CX 48, which Overall submitted during post-hearing briefing. R.D.O. at 2-3 n.3.

screw failure, namely "missing sheet metal screws from ice condenser ice basket coupling rings." CX 48 at 1. AEP explained that it had begun the inspection "[a]s a result of industry experience at the Watts Bar plant" and that it already had discovered instances where "ice baskets with more than four missing screws at a coupling would not have been capable of withstanding design loads." *Id.* at 1-2. AEP represented to the NRC that "[i]ce basket repairs will be completed, and any as-left conditions which are not consistent with current design basis requirements will be reconciled prior to declaring the ice condensers operable." *Id.* at 3.

Apparently as the result of the Watts Bar ice condenser sheet metal screw failure being brought to the NRC's attention via AEP's notification, the NRC investigated the ice condenser system at Watts Bar in June 1998. It found that Westinghouse had neglected to address in its June 22, 1995 report to TVA any evaluation of broken and cracked ice condenser screws which had been the subject of TVA's June 2, 1995 metallurgical report. According to the NRC the June 2 report had "identified screws with manufacturing induced quench cracks and core hardness values in excess of design specification values." A potential cause for the failed screws identified in the June 2 report was that the pre-existing quench cracks had been created during the manufacturing process. Westinghouse had failed to complete design reviews of the serviceability of the remaining screws which were susceptible to failure. Such reviews should have addressed the potential for failed ice basket segments impacting the air handling units within the condenser and introducing glycol into the sump, which could inhibit emergency core cooling systems. CX 52.

These findings underwent further NRC review. *See* Respondent's Exhibits (RXX) 18, 20, 21 and 22; Complainant's Exhibits (CXX) 53, 54 and 57. The upshot appears to have been twofold:

> [A] first violation involved . . . a condition adverse to quality [that] was not promptly identified and corrected. Specifically . . . a crack in an ice condenser screw was identified and documented in a June 2, 1995 [TVA] Central Laboratory and Field Testing Services (CLS) report, and in a second CLS report of June 19, 1995. However, TVA did not pursue this issue in a timely manner. The NRC has concluded that this violation was not willful . . . .

RX 21 at 2. The NRC found a second violation to be willful, however:

> TVA did not request Westinghouse Electric Corporation to evaluate the data collected from the metallurgical testing and evaluation performed by the CLS as documented in [Step 3 of PER 246]. The NRC has concluded that this violation was willful. Specifically, TVA closed [PER 246] as evidenced by the signature

> of [its] lead civil engineer [James Adair] on July 28, 1995. However, at the time this individual signed the PER as completed, he knew, or should have known, that Step 3 of the PER was a part of the corrective action plan, and that this action had not been performed as stated in the PER.

Id.

The ALJ's Decision

General disposition

In his April 1, 1998 R.D.O., the ALJ identified the substantive issues as whether "TVA engaged in a concerted attempt to conceal significant safety deficits in its Watts Bar ice condenser system" and whether as part of its concealment TVA unlawfully "transferred, laid off, and thereafter refused to recall Overall because of his attempt at exposing and correcting safety deficits in the Watts Bar ice condenser system." R.D.O. at 3.

The ALJ found that Overall had succeeded in making a *prima facie* showing of unlawful discrimination, that TVA had rebutted the consequent discriminatory inference by articulating legitimate reasons for taking adverse action, but that Overall prevailed ultimately by proving intentional discrimination. The ALJ found the complaint timely – a preliminary issue – under a "continuing violation" theory, that is, the complaint was filed within the statutory limitations period following discovery of the most recent of a series of discriminatory actions taken pursuant to an invalid underlying policy or practice. The ALJ accordingly issued a preliminary order granting relief as provided under the ERA. 42 U.S.C. §5851(b)(2)(A).

Particular findings on liability

Citing the elements necessary for an ERA complainant to establish a *prima facie* showing of discrimination, R.D.O. at 30, the ALJ noted that there was no dispute as to TVA's status as an employer; that Overall engaged in protected activity of which TVA was aware (activities in furtherance of PER 246); and that TVA took action adverse to Overall (at-risk transfer, layoff and refusal to re-employ). *Id.* Thus, the ALJ turned to the issue of causation.

The ALJ first found that Overall had established a *prima facie* case of discrimination based in part on temporal proximity between protected activity and adverse action, specifically that "Overall was notified of his involuntary transfer [from Watts Bar to Services as an at-risk employee] by Koehl on June 16, 1995, at which time Overall was intimately involved in the processing of PER 246 and only two days after [TVA metallurgical supervisor Terry Woods] announced that PER 246 was not a safety issue." R.D.O. at 32.

The ALJ additionally cited evidence contravening TVA's defense. TVA argued that Overall's position was "targeted for surplus" as early as September 1994 rather than in mid-1995, that Overall was not singled out for disparate treatment in the June 1995 at-risk transfer decision, that Overall applied voluntarily for a permanent position in Services and that managers at Services were not aware of Overall's protected activity when they laid him off in September 1996. In rejecting TVA's defense, the ALJ found that the 1994 action was tentative – the decision to transfer Overall in an at-risk status "became definite only when Overall engaged in protected activity by initiating PER 246." R.D.O. at 31. The ALJ pointed to evidence that TVA treated Overall disparately in 1995 "by retaining and overnight upgrading" a comparably qualified employee and permitting less qualified employees "to transfer to other positions within Watts Bar while retaining full time employment." *Id.* As to the "so called voluntary [1995] transfer to [a permanent position in] TVA Services," the ALJ recognized that Overall "chose the lesser to two evils" when also "[f]aced with being treated as an at-risk employee with little hope of retention . . . ." *Id.* at 30.

With regard to the 1996 layoff from TVA Services, the ALJ discredited testimony by TVA Services manager James Swindell denying knowledge of Overall's 1995 protected activity on the basis of "widespread" knowledge within the TVA organization, the potential import of the protected activity on Watts Bar fuel load, start up and operation and Koehl's extensive contacts with Swindell and Services generally. R.D.O. at 31. The ALJ noted that the issue of Swindell's knowledge was not dispositive "because in large part Overall's failure to secure ice condenser work [a purported rationale for laying him off] stemmed from Watts Bar officials' refusal to accept Overall's services while instead employing inexperienced contract personnel to perform ice condenser work." *Id.*

Having found that Overall satisfied the threshold showing, the ALJ considered TVA's rebuttal which he found adequate to shift the burden back to Overall. TVA's showing of legitimate, non-discriminatory reasons in this regard included "lack of a need for a full time ice condenser specialist, lack of flexibility in work assignments, and lack of funding caused by an inability of Overall to secure work." R.D.O. at 32.

The ALJ then turned to the question whether TVA's stated reasons for transferring, discharging and refusing to rehire Overall were pretextual, finding in summary: "My review of the credible testimony convinces me all the reasons cited by TVA, including its denials of discriminatory motive, are false and clearly associated with that degree of mendacity to establish a strong circumstantial case of intentional discrimination." R.D.O. at 33. Key to this finding were inconsistent reasons proffered by TVA for the at-risk transfer decision, disparate treatment accorded Overall vis-a-vis treatment of employees who were comparably qualified or even less qualified, and a number of additional facts which suggested false motive, including:

> (1) TVA's attempt to attribute the decision to transfer Overall to McCormick rather than to Koehl; (2) TVA's assertion that lack of funds resulted in laying off Overall when in fact his position had been budgeted for; and (3) TVA's refusal to re-employ Overall to work on the ice condenser choosing instead inexperienced . . . personnel for such work.

Id. Considered in conjunction with TVA's "concerted effort to conceal" the screw failure and Overall's expertise in the system, the above-referenced factors persuaded the ALJ "that the only plausible and credible reason for adverse employment actions, *i.e.*, transfer, layoff and refusal to recall . . . was a desire to retaliate against and prevent Overall from engaging in protected activities." *Id.* at 34.

Particular findings on timeliness

Apart from the merits, TVA argued that Overall filed his January 15, 1997 discrimination complaint after the expiration of the 180-day ERA limitations period. According to TVA the June 16, 1995 notification of Overall's at-risk transfer to Services, which formed the gravamen of the complaint, triggered the limitations period.

The ALJ found to the contrary that the complaint was timely filed within the limitations period arising as the result of adverse action (notification of layoff (July 1996)) taken to further a continuing policy of discrimination which rendered the complaint with respect to the other, earlier adverse action (notification of at-risk transfer (June 1995)) timely. R.D.O. at 28-30. The ALJ found specifically that TVA had engaged in "a broad coverup of significant safety hazzards caused by the use of defective ice basket condenser screws" which included actions directed at Overall, namely TVA's transfer of "PER 246 to nuclear engineering so as to remove it from Overall's control and responsibility," Koehl's transfer of "Overall to TVA Services under the pretext of lack of need for a full time ice condenser specialist," TVA's "attempt to lure Overall away from Watts Bar by creating a position in TVA Services at the urging of Koehl," "Swindell's layoff of Overall for pretextual reasons stating an alleged lack of funds when in truth funds had been set aside for Overall's position" and "TVA's refusal to re-employ Overall at any of its ice condenser facilities including Watts Bar using instead inexperienced outside contractors to do ice condenser work." *Id.* at 29.

DISCUSSION

I. Standard of Review

Under the Administrative Procedure Act this Board, as the designee of the Secretary of Labor, acts with all the powers the Secretary would possess in rendering a decision under 42

U.S.C. §5851(b)(2). The Board engages in *de novo* review of the recommended decision of the ALJ. *See* 5 U.S.C. §557(b) (1994); 29 C.F.R. §24.8; *Stone & Webster Eng'g Corp. v. Herman,* 115 F.3d 1568, 1571-1572 (11th Cir. 1997). The Board is not bound by an ALJ's findings of fact and conclusions of law because the recommended decision is advisory in nature. *See* Att'y Gen. Manual on the Administrative Procedure Act, Chapter VII, §8 pp. 83-84 (1947) ("the agency is [not] bound by a [recommended] decision of its subordinate officer; it retains complete freedom of decision as though it had heard the evidence itself"). *See generally Starrett v. Special Counsel,* 792 F.2d 1246, 1252 (4th Cir. 1986) (under principles of administrative law, agency or board may adopt or reject ALJ's findings and conclusions); *Mattes v. United States Dep't of Agriculture,* 721 F.2d 1125, 1128-1130 (7th Cir. 1983) (relying on *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 496 (1951) in rejecting argument that higher level administrative official was bound by ALJ's decision). Unlike the Board, however, the ALJ is accorded the opportunity to observe witness demeanor during the hearing, and the Board ordinarily defers to an ALJ's credibility determinations based on demeanor. *OFCCP v. Goodyear Tire & Rubber Co.,* ARB Case No. 97-039, Aug. 30, 1999, slip op. at 16 n.13.

II. The Complaint is Meritorious.

A. Legal Standard

ERA section 5851 prohibits an employer from discharging or otherwise discriminating against an employee with respect to his compensation, terms, conditions or privileges of employment because the employee has notified his employer of an alleged violation of the Act, refused to engage in any practice made unlawful under the Act, testified regarding any provision of the Act, commenced any proceeding under the Act, testified in any such proceeding or assisted or participated in any such proceeding. 42 U.S.C. §5851(a)(1). To prevail on a complaint of unlawful discrimination, a complainant must establish by a preponderance of the evidence that the respondent took adverse employment action against the complainant because of protected activity. *Carrol v. United States Dep't of Labor,* 78 F.3d 352 (8th Cir. 1996); *Ellis Fischel State Cancer Hosp. v. Marshall,* 629 F.2d 563, 566 (8th Cir. 1980), *cert. denied,* 450 U.S. 1040 (1981). We may determine that a violation has occurred if the complainant demonstrates that any protected behavior "was a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C. §5851(b)(3)(C); *Trimmer v. U.S. Dep't of Labor,* 174 F.3d 1098 (10th Cir. 1999); *Dysert v. U.S. Sec'y of Labor,* 105 F.3d 607 (11th Cir. 1997). Relief nevertheless may not be ordered "if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable employment action in the absence of [protected] behavior." 42 U.S.C. §5851(b)(3)(D).

TVA does not contest the presence of protected activity or adverse action. Only the issue of causation is contested. TVA argues that the record is devoid of any direct evidence attributing illicit motivation to any of TVA's management. Discrimination complaints legitimately may be

grounded on circumstantial (indirect) evidence of retaliatory intent, however. *See, e.g., Ellis Fischel State Cancer Hosp. v. Marshall,* 629 F.2d at 566 ("[t]he presence or absence of retaliatory motive is a legal conclusion and is provable by circumstantial evidence even if there is testimony to the contrary by witnesses who perceived lack of such improper motive"); *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 716 (1983) ("the question facing triers of fact in discrimination cases is both sensitive and difficult;" "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes" for use in establishing intentional discrimination).

In such "inferential" cases arising under the 29 C.F.R. Part 24 employee protection provisions, this Board and reviewing courts routinely apply the framework of burdens developed for pretext analysis under Title VII of the Civil Rights Act of 1964 and other employment discrimination laws. *See, e.g., Kahn v. U. S. Sec'y of Labor,* 64 F.3d 271, 277 (7th Cir. 1995); *Couty v. Dole,* 886 F.2d 147 (8th Cir. 1989). Central to this precedent are *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248 (1981); *St. Mary's Honor Center v. Hicks,* 450 U.S. 502 (1993), and more recently *Reeves v. Sanderson Plumbing Products, Inc.,* 120 S.Ct. 2097 (2000) (rejecting so-called "pretext plus" rule under Age Discrimination in Employment Act), *rev'g* 197 F.3d 688 (5th Cir. 1999). For application *see, e.g., Ross v. Campbell Soup Co.,* 237 F.3d 701, 708-709 (6th Cir. 2001); *Dammen v. Unimed Medical Center,* 236 F.3d 978, 980-981 (8th Cir. 2001); *Blow v. City of San Antonio, Texas,* 236 F.3d 293, 297-298 (5th Cir. 2001). A complainant may prevail under the pretext model when the complaint consists exclusively of a *prima facie* case of discrimination and evidence sufficient for a reasonable adjudicator to disbelieve or reject the respondent's legitimate nondiscriminatory reason for its adverse action. This combination of evidence thus may sustain a finding of liability for intentional discrimination.

Under the *McDonnell Douglas* line of precedent as adapted to Part 24 complaints, a complainant first must create an inference of unlawful discrimination by establishing a *prima facie* case of discrimination. Overall satisfied this burden by showing that TVA is subject to the ERA; that he (Overall) engaged in protected activity (processing PER 246); that he suffered adverse employment action (*e.g.,* notification of transfer and layoff, refusal to re-employ); and that a nexus existed between the protected activity and adverse action. *See Bechtel Constr. Co. v. Sec'y of Labor,* 50 F.3d 926, 933-934 (11th Cir. 1995); *Simon v. Simmons Foods, Inc.,* 49 F.3d 386, 389 (8th Cir. 1995) (*citing Couty v. Dole,* 886 F.2d at 148 ("[proximity in time is sufficient to raise an inference of causation")). The burden then shifted to TVA to produce evidence that it took adverse action for a legitimate, nondiscriminatory reason. This (TVA's) burden of "production" entails no credibility assessment. *Reeves v. Sanderson Plumbing Products, Inc.,* 120 S.Ct. at 2106, *citing St. Mary's Honor Center v. Hicks,* 509 U.S. at 509. TVA met this burden by producing evidence sufficient for the trier of fact to conclude that it had surplused Overall's position(s) as the result of reorganization and had elected to engage a contractor for purposes of the outage. The inference of discrimination accordingly disappeared, leaving the

single issue of discrimination *vel non.* Overall then assumed the burden of proving by a preponderance of the evidence that TVA's proffered reasons were incredible and constituted pretext for discrimination. While the presumption of discrimination arising from the *prima facie* case evaporates at this juncture, an adjudicator legitimately may consider the evidence which established the *prima facie* case and inferences properly drawn from that evidence in determining whether an employer's explanation is pretextual. *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. at 2106.

St. Mary's Honor Center speaks to the ultimate burden of persuasion. An adjudicator's rejection of an employer's proffered legitimate, nondiscriminatory explanation for adverse action *permits* rather than compels a finding of intentional discrimination. Specifically, "[it is not enough . . . to disbelieve the employer; the fact finder must believe the plaintiff's explanation of intentional discrimination." 450 U.S. at 519. An adjudicator may, however, infer discrimination from a finding that the employer's rationale is false:

> The fact finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination.

St. Mary's Honor Center v. Hicks, 509 U.S. at 511. Indeed, proof that an explanation is incredible constitutes a piece of indirect evidence which "becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination." *Id.* at 517.

In *Reeves v. Sanderson Plumbing Products, Inc.*, the Supreme Court further delineated the burden assumed in proving intentional discrimination by means of indirect evidence as follows:

> [T]he trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the fact finder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. Thus, a plaintiff's prima facie case, combined with sufficient evidence to

> find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

120 S.Ct. at 2108-2109 (citations omitted).[10/]

B. TVA's Challenges to the ALJ's Findings

Foremost in TVA's review petition before this Board is "TVA's position that the R.D.O. is fatally flawed by constructing an extensive conspiracy to remove [Overall] from his job, a conspiracy unsupported by the evidence in the record." TVA 7/9/98 Brief at 1 and at 12-13 ("DO finds that there was a widespread conspiracy to cover up the problems raised in the PER, a conspiracy involving Technical Support, Watts Bar Engineering, the Central Labs, and Mr. Woods"; "[w]hile this makes for an interesting story, it lacks any basis in the record"). TVA also reiterates a number of the arguments posited to the ALJ, including that Overall's specialist position at Watts Bar was targeted for surplus in 1994, that Overall elected voluntarily to take the permanent position in Services, that Koehl and McCormick participated in neither the closeout of PER 246 nor the decision to lay off Overall from his Services position and that the layoff emanated from Overall's inability to generate revenue for Services.

TVA discounts myriad factual findings made by the ALJ as unsupported by the record. According to TVA, for example, Overall's employment in 1994 and early 1995 was "tightly focused" on the ice condenser system at Watts Bar, to the exclusion of all other systems; Overall was not assigned backup duties; Overall declined to obtain equivalency training; the decision to eliminate Overall's position at Watts Bar was reached in 1994 "and was not revisited or changed thereafter;" with regard to TVA's offer of a permanent position in Services, "[t]here was no evidence whatsoever that anyone at Watts Bar had anything to do with Mr. Miller's offer to Mr. Overall;" record evidence cited in the R.D.O. "does not establish that either Mr. McCormick or Mr. Koehl saw [PER 246] as a make-or-break issue for Watts Bar;" and the "NRC was aware of the ice basket screw issue and had no problems with how it was handled." TVA 7/9/98 Brief at 3, 4, 6, 7, 11, 16. TVA faults Overall for his alleged failure to raise screw failure concerns at various junctures, and TVA attempts to distance Koehl and McCormick from TVA's decisions concerning Overall's employment. *Id.* at 16, 20, 24, 29. TVA criticizes the R.D.O. generally as

---

[10/] The Court distinguished cases where proof of an incredible explanation might not be probative of intentional discrimination, specifically instances where "no rational factfinder could conclude that the action was discriminatory." *Reeves v. Sanderson Plumbing Products, Inc.* 120 S.Ct. at 2109. An example might be "circumstances show[ing] that the defendant gave the false explanation to conceal something other than discrimination" in which case "'the inference of discrimination [would] be weak or nonexistent.'" *Id.*, *quoting Fischer v. Vassar College,* 114 F. 3d 1332, 1338 (2d Cir. 1997)(en banc), *cert. denied,* 522 U.S. 1075 (1998).

"based on assumptions and speculation which are not probative and which should not have influenced the decision." *Id.* at 15.

C. Analysis

The ALJ correctly applied the *Burdine/St. Mary's Honor Center/Reeves* discrimination model in this case. The sequence of events and TVA's proffered, and rejected, rationale for its actions presents a strong circumstantial case that Overall suffered intentional discrimination. In evaluating the record we recognize that the ALJ expressly credited Overall's testimony as "straight forward, detailed, sincere and consistent" and discredited the testimony of the foremost TVA witnesses as "inconsistent, vague or illogical." R.D.O. at 27. *See id.* at 12, 13, 16, 18, 21-22, 25 (findings nos. 17 and 18), 26 (finding no. 28), 31 and 33 for additional credibility findings.

The ALJ construed the evidence to support a finding that TVA engaged in a coverup of safety hazards to facilitate fuel load and start up at Watts Bar, an integral facet of which was to remove Overall from the Watts Bar ice condenser system, from employment at Watts Bar, from contact with any TVA ice condenser system and from employment at TVA altogether because of his activities to ensure the safety of the systems. The evidence viewed in its entirety substantiates the ALJ's findings. Under the *Burdine/St. Mary's Honor Center/Reeves* model we first examine the temporal proximity of protected activity and adverse action. We then turn to the rationale advanced by TVA for its actions and its possible "dissembling."

1. Overall established a nexus between protected activity and adverse action grounded in the sequence of events.

Initially striking in our examination of the record is Overall's experience with and expertise in nuclear power plant ice condenser systems measured against TVA's 1995 decision to transfer him at-risk to Services for termination. Overall had worked with ice condensers continually since at least 1982. His performance reviews document his performance as a dedicated and conscientious systems expert. An early review entry stated that Overall's "support of ice condenser maintenance activities has been particularly effective due to his initiative, concern for quality, and ability to work well with plant personnel." Joint Exhibit (JX) 9 at 3; CXX 7, 8. A subsequent entry stated:

> Mr. Overall has commendable experience and knowledge of ice condenser operation and maintenance, both inside and outside of TVA. He continually develops innovative changes to improve ice condenser maintenance and performance. He has participated in industry-wide task group conference [sic] dealing with ice condenser problems and improvements. His efforts and

> determination in this area has [sic] much to do with the above average performance of the Watts Bar Nuclear Plant ice condenser.

JX 9 at 4; CX 10. CX 11 (performance review for 1985-1986) noted: "Mr. Overall's knowledge and experience in ice condenser work has been invaluable to Watts Bar. During this time period, he initiated and developed special automated thermal drilling tools that reduced manpower requirements by at least 70% and at the same time, produced higher quality work." JX 9 at 4-5.

During 1987 and 1988 Overall demonstrated "exceptional expertise" in the ice condenser system, "recommended and implemented numerous changes to improve the ice condenser performance" and "actively pursued coordination with other utilities on ice condenser activities both by providing information and assistance and by following the results of their implemented changes." CX 13; JX 9 at 5-6.

Between 1988 and 1989 Overall demonstrated proficiency in "all aspects of the ice condenser system," was "very innovative in developing practices and techniques for preserving the ice inventory," and "assisted in the development of a training module to be used at [Sequoyah] and [Watts Bar] prior to ice bed maintenance." CX 14; JX 9 at 6. Pursuant to NRC inquiry about the ice condenser system, Overall "develop[ed] a presentation for the Plant Manager to utilize during a subsequent meeting with the NRC" during the 1989-1990 review period. CX 15; JX 9 at 6. His compilation of the presentation package was judged "an outstanding job" allowing for site management's thorough preparation. *Id.*

Overall contributed to at least three significant projects as Watts Bar approached completion of its construction phase. First, the 1990-1991 review commended Overall for his work on the ice condenser ice melt, which required exacting preparation:

> Mr. Overall was very instrumental and creative in determining what preparations had to be made and initiating work requests to get the preparations started. He worked closely with both planning and craft personnel to ensure all preparations were properly implemented. Mr. Overall also spent many hours writing procedures for how the ice condenser should be melted. In order to meet the ice melt schedule, Mr. Overall did a lot of this work on his own time. During the ice melt, he provided technical support to Operations on shift [and contributed to] writing and issuing a lessons learned final report on the ice condenser ice melt effort. Mr. Overall's knowledge and experience with this system was invaluable in ensuring that this project was completed on schedule and without any problems.

CX 16; JX 9 at 7. Second in terms of significant projects, the 1992-1993 performance review commended Overall for "independently pursuing the resolution of issues" at Watts Bar related to ice condenser floor upheaval concerns that were prompted by problems experienced at Sequoyah, which the review identified as "an important activity with a large potential for schedule impact." CX 18; JX 9 at 8. The review continued:

> [Overall] drove this issue to ensure that [Watts Bar] problems were identified during plant walkdowns and that appropriate action was being taken to resolve these issues. He did an excellent job of keeping management informed of the status of this work. . . .
>
> Mr. Overall did an excellent job of maintaining a good knowledge of the status of his system. He ensured he was cognizant of modification work, maintenance work, and post modification and maintenance testing in progress. He did a great job of interfacing with modifications to help resolve problems during their implementation.
>
> Mr. Overall's knowledge of the site organization and people all allowed him to get work done quickly and correctly. It was beneficial in helping the Startup Organization meet their testing schedule.

Id. Finally, performance reviews issued in 1994 and 1995 cited Overall for consistent and "creative" efforts to improve the ice condenser system and for efforts "instrumental" in timely completion of the "significant" task of the Watts Bar ice condenser loading. CXX 19, 20; JX 9 at 8-9.

Vernon Law, Overall's backup on the ice condenser system (who subsequently supervised Overall's replacement), characterized Overall as "very owner-oriented towards his system." T. 418. *See* T. 430-431. Law testified:

> [Overall] tried to look at other ice-condenser plants and see what type of modifications, upgrades that they had done at those plants that might be beneficial to Watts Bar. And, I know that he's spent lots of hours trying to get money allocated to do the modifications at Watts Bar to make the system better. . . . Curtis [Overall] was always working with his system, making sure that everything was the way he thought it ought to be.

T. 418-419.

Overall received public recognition for ice condenser activities, JX 9 at 3 (joint stipulations 4 and 5); CX 5, and in March 1995 TVA presented Overall individually with "the Power of Excellence" award for his contribution to safe and timely completion of a "milestone," namely ice loading the Watts Bar ice condenser. CX 3. The award cited particularly "[t]asks such as implementing contracts; purchasing material; training personnel; testing components; setting up computer functions; and operating, troubleshooting, and repairing equipment [which] required a significant amount of coordination and effort among on- and off-site personnel." *Id.*

Oddly, about three months after receiving the Power of Excellence award Overall received the June 16, 1995 notification of at-risk transfer to Services. An obvious issue becomes whether anything significant transpired in the interim. Overall's protected activity on PER 246, dating from mid-April 1995, thus invites scrutiny.

As the ALJ recognized, Overall demonstrated "zeal and competence" in addressing the screw failure which spawned PER 246. Upon finding the ice basket screws and screw heads in the ice melt tank (April 12, 1995), Overall took action immediately. He arranged for a camera inspection of the system,[11] apprized the onsite nuclear metallurgical engineer (Vonda Sisson) of the screw failure and provided her with screws for analysis by the TVA central laboratories. On April 21, 1995, Overall initiated PER 246. McCormick countersigned the PER on April 26. R.D.O. at 24 (finding no. 11); CX 23. Upon contacting his ice condenser counterparts at other nuclear power plants, Overall learned that they similarly had experienced screw failure. *Id.* at 8 (one counterpart "failed to report the condition to his management because of its potential effect on plant operations"). *See* CX 24 at 4/12/95 and 4/13/95; RX 14; T. 100-106.[12] Overall apprized TVA management of this information. CX 24 at 6/14/95 (Overall stated to TVA metallurgical supervisor Terry Woods that AEP at the D.C. Cook nuclear power plant had experienced screw failure; Woods "stated nothing"). In conjunction with filing PER 246 Overall recommended a comprehensive procedure by which to evaluate the screw failure.

TVA convened a meeting of technical support employees (May 11). Overall's notes of the meeting document an emphasis on fuel load and start up activities, stating: "DLK [Koehl] meeting with TSS [Technical Support Section]. . . . Expectations leading up to fuel load, dollars

---

[11] Overall contacted George Newton (a maintenance planner) to arrange for the camera inspection and he contacted Bob Foreston in quality assurance to devise a methodology for determining which ice baskets to inspect. CX 24 at 9-10; T. 114-116, 118-120. Overall also contacted two Westinghouse representatives, Gordon Yetter and Chuck Scrabis, who commented that the screw failure could have an impact upon the fuel load date at Watts Bar and the operation of other nuclear power plants with ice condenser systems since they all used the same screws. T. 100-101, 103; CX 24 at 4/12/95.

[12] Of the various counterparts contacted, Alex Smith at Duke Power informed Overall that his unit had discovered hundreds of failed screws during outages; Art Tetzlaff and Brenda Sheares at D.C. Cook attested to the same experience.

are critical issue. Open items, over time, etc. PER's, WR's, DCN's [Designated Change Notices], etc. No more, only if fuel-load related." T. 173-174; CX 24. The ALJ found that "Koehl told employees that they were behind schedule in fuel loading and needed to eliminate all necessary [sic] expenditures by reducing overtime and closing out open items such as work requests, design changes . . . and PERs." R.D.O. at 24 (finding no. 12). TVA had scheduled fuel loading for November 1995.[13/] The ALJ rejected testimony in which Koehl denied discouraging PERs, based in part on the testimony of Vernon Law (Overall's ice condenser backup engineer) who testified "that Koehl emphasized that he wanted to avoid delays as much as possible." *Id.* at 24 n.17 (citation omitted). The ALJ noted that it was "clear from the unrebutted testimony of Law . . . that PER 246 was viewed by many Watts Bar employees as involving extensive repairs and delays that could easily lead to plant closure." *Id.* at 9. *See* T. 423-424. Overall testified that discovery of a significant screw failure would have necessitated up to a year's delay for purposes of melting the ice, making repairs and reloading the ice. T. 171-172.

On June 1, 1995, in the midst of Overall's efforts to address the concerns raised by PER 246, TVA Services supervisor Rich Miller, previously unknown to Overall, telephoned Overall about applying for a permanent (specially created) position in Services.

TVA central laboratories thereafter issued the metallurgical report that Overall had requested (June 2). It identified the mode and probable causes of failure. R.D.O. at 24 (finding no. 13). Overall requested, and was refused, access to ice condenser sheet metal screws used at TVA's Sequoyah nuclear power plant (June 9). According to Overall, a Sequoyah supervisor refused to cooperate because he feared that the plant would be shut down. *Id.* at 10 (supervisor instructed "not to send screws to Overall for testing allegedly because the screws would be off site and out of his control and, being aware that the screw request had the potential for plant shut down"); CX 24 at 6/9/95; T. 127-129.

Overall received a first anonymous telephone call on his office recorder and a second anonymous telephone call at his residence (June 14). The first caller stated that Overall had picked a fine time to raise the screw issue, and the second caller stated that the screw issue would not keep Watts Bar from operating. CX 24, p. 28; T. 130, 180-181.

At a second meeting between managers and employees (June 14), TVA metallurgical supervisor Terry Woods announced that the screw failure was neither a safety problem nor reportable to the NRC. The ALJ noted testimony contradicting Woods's assessment:

[13/] Safety systems such as the ice condenser must be operable prior to fuel loading. The November 1995 fuel load date required that the ice condenser be operable during the segment of the start up process scheduled for August 1995. T. 828-832, 856-858.

> McCormick acknowledged the screws were a safety issue directly related to escape[] of radioactive gases and further that a basket inspection was necessary to determine the number of missing screws. Further, McCormick admitted [that] there was a potential for all basket screws to be affected but neither Westinghouse nor [TVA] Nuclear Engineering to whom the PER was transferred. . . ever made any such basket inspection and that during a LOCA [Loss-of-Coolant Accident] ice baskets were capable of penetrating the containing vessel.

R.D.O. at 13 (citations omitted).[14/] Woods "pushed [Westinghouse] to get resolution ASAP – near [fuel load] this issue needs to be put to bed." CX 24 at 6/14/95. TVA suppressed troublesome aspects of the June 2 metallurgical report. Within about a week and a half of its issuance the report was withdrawn and any reference to design defects which could have delayed fuel load and start up was deleted. R.D.O. at 24 (finding no. 14) (Woods "directed TVA metallurgical engineers to issue a revised report listing only the mode of screw failure while omitting all 7 causes, 5 of which Woods had no objection thereto"). TVA has characterized these causes as conjectural, but Sisson (a TVA metallurgical engineer instrumental in appraising the screw failure and familiar with the condition of the Watts Bar ice condenser) testified that each of the listed items could have caused the screw failure. T. 486-495. The modified report also deleted references to cracks appearing in certain screws. We note that the retention of the barest of explanations (the mode of screw failure being intergranular separation) and the deletion of numerous possible "whys," *i.e.*, attempts to explain the causes of failure, offers compelling evidence that TVA sought to discourage further inquiry.

Overall testified that during a June 15 teleconference call involving Overall, Law, McCormick and Westinghouse personnel, an unidentified voice stated that it was a bad time to bring up the screw issue and that immediately following the call McCormick stated: "We need to give this PER over to Nuclear Engineering and I sure hope NRC doesn't review this one, the way it was handled here recently." R.D.O. at 14; T. 183; CX 24, p. 24. Additionally, "TVA officials told Westinghouse representative, Chuck Scrabis 'to get the skids greased and get the wheels turning for them to crank out a report to put this issue [PER] to bed.'" R.D.O. at 14.

14/ McCormick's actions in initiating the PER are telling in this regard. McCormick testified that he believed the screw failure to be safety-related because damaged or missing screws could prevent the ice condenser from working properly. T. 812-813. He accordingly marked the screw failure as "potentially reportable" to the NRC and signed PER Appendix E-1 (10 C.F.R. 50.55(e) screening form) (CX 23 at 86) stating that the failure was safety-related and that he could not confirm that the ice condenser could perform its safety function. T. 814.

TVA served Overall, the expert ice condenser system specialist and originator of PER 246, with notification of at-risk transfer (June 16) a full week in advance of its apparent scheduled issuance (June 23). Koehl stated that he had ordered Overall transferred because the ice condenser position did not warrant full-time employment, but Koehl refused to reduce the rationale to writing as Overall requested. T. 190-191. Overall received a third anonymous telephone call (June 19) to the effect that the caller was glad that Overall was leaving Watts Bar. CX 24, p. 26; T. 193.

Shortly thereafter (June 22), Westinghouse manager J.W. Irons issued an incomplete and inaccurate report declaring the ice condenser operable; the TVA systems engineers certified the ice condenser the next day. R.D.O. at 24-25 (finding no. 16).[15] Overall was not provided a copy of the report. CX 23 at 50-56. Overall met with TVA metallurgical engineers to develop a recurrence control for the screw failure (July 7); TVA then removed Overall from PER 246 (July 10). The ALJ found: "McCormick, without any credible explanation, transferred PER 246 to TVA's Nuclear Engineering organization [July 12] under the supervision of James G. Adair and Larry A. Katchum who in turn recommended closure of PER 246 without taking any corrective action to assess and/or replace defective ice basket screws." *Id.* at 25 (finding no. 17). The ALJ noted:

> When PER 246 was transferred . . . it went from McCormick's control in Technical Support to Nuclear Engineering under the control of James Adair. This transfer was admittedly highly unusual for although other organizations within TVA worked on an individual PER to bring it to final resolution, no other PERs had been removed from the organization that initiated the investigation.

---

[15] The report focused only on the screws found by Overall in the ice melt tank, rather than on the possibility that additional screws might fail because of internal anomalies resulting from the manufacturing process. The ALJ's finding no. 16 states in part that the Westinghouse report concluded, "without any inspection of the ice baskets to determine the number of missing or faulty screws, that the statistical probability of ice basket failure was remote." R.D.O. at 25. Moreover,

> McCormick, who had a degree in mathematics, was unable to explain the so called statistical analysis. The report . . . inaccurately concluded that the ice baskets were not ejectable whereas the credible testimony of Overall showed that the ice baskets were not only ejectable but when ejected could prevent the proper functioning of ice condenser doors and penetrate the containment vessel allowing for the escape of radioactive gases.

Id.

Id. at 13; T. 185, 316-319, 433-434. 809-810. It bears noting that Adair had spearheaded criticism of the June 2 metallurgical report and was instrumental in its withdrawal. Adair personally signed the closing documents for PER 246 in late July 1995 and according to the NRC "knew, or should have known," that a portion of the PER corrective action plan had not been performed as stated. RX 21 at 2. Both Overall and Law testified that in their experience the employee initiating a PER continued as a participant or at least as a liaison until close-out. T. 185-186 (Overall), 434 (Law: "I open, I also close"). TVA deviated from the norm in the advent of fuel loading and start up at Watts Bar. The ALJ discounted McCormick's rationale for transferring the PER from Technical Support to Nuclear Engineering as unpersuasive:

> McCormick, who allegedly made the PER transfer decision, testified that he made the decision to transfer because Technical Support (1) was not resolving the problem, (2) did not have the authority to do the basket inspection because this would involve help from mechanical maintenance, (3) did not have a good plan for basket inspection, (4) lacked the necessary expertise, and (5) there was no agreement from upper level management on what to do. None of these explanations withstand scrutiny, for Overall was making progress in analyzing and suggesting ways to address the problem. Overall had a feasible plan for basket inspection utilizing the help of mechanical maintenance and had already worked successful[ly] with metallurgy in determining possible causes for the screw failure.

R.D.O. at 13. The ALJ thus expressly rejected TVA's rationale, accepting instead Overall's testimony in finding the following: "The only plausible and credible explanation for TVA's refusal to do camera or actual basket inspection was that given by Overall. Overall testified without contradiction that a camera inspection would have delayed fuel loading from 6 months to a year resulting in considerable loss of income." *Id.* John Rathjen, Overall's counterpart on the ice condenser systems at Sequoyah, offered testimony consistent with this finding, namely that the screw failure "had the potential to be a very large problem." RX 14 at 35-37.

TVA closed PER 246 (August 10) based on the Westinghouse assessment that the presence of ten out of every 12 screws was acceptable. TVA never verified the assessment, however, because it never performed a camera inspection. R.D.O. at 25 (finding no. 18) (TVA supervisor closed out PER without taking any corrective action; supervisor "inaccurately conclud[ed] that the ice baskets in question were inaccessible whereas the credible testimony of Overall showed that the ice baskets were accessible"). Such an inspection would have affected the fuel load and start up dates significantly had less than the required number of screws been present. R.D.O. at 13; T. 160-172. TVA and Westinghouse accorded PER 246 only perfunctory treatment prior to close out. An object almost certainly was to deflect focus. Daryl Smith, a TVA

central laboratory metallurgical engineer responsible for both the initial and modified metallurgical reports testified essentially that such reports are tailored to avoid NRC scrutiny. T. 522-524.

Overall met with a TVA labor relations specialist and a Union representative to contest his at-risk transfer (August 24), and TVA thereafter issued its "response" essentially denying reconsideration (September 18). CX 26. In early October TVA offered Overall the permanent position of project administrator in Services. In early November the NRC issued a determination that the Watts Bar ice condenser was acceptable without any reference to the sheet metal screw failure raised in PER 246. This confluence of events – Overall's continued challenge to the at-risk transfer, followed by the offer of an ostensibly secure position and the heightened NRC scrutiny at Watts Bar for operational approval – suggests a degree of urgency in removing Overall from Watts Bar. An NRC finding of "acceptability" was critical during 1995. The ALJ noted: "Proper operation of the ice condenser was a *sine qua non* for plant operations for without a functional and approved ice condenser, Watts Bar could not go on line and produce power. In fact, Watts Bar could not even pressure test its safety equipment without an operable ice condenser." R.D.O. at 7. "Following closure of PER 246, TVA supervisors never advised the NRC of the safety issue raised by the defective ice basket screws and accordingly thereafter received an operating license from the NRC." R.D.O. at 25 (finding no. 19).[16/]

This sequence of events supports, and we adopt, the ALJ's finding of causation linking protected activity and adverse action, namely:

> Overall was notified of his involuntary transfer by Koehl on June 16, 1995, at which time Overall was intimately involved with the processing of PER 246 and only two days after Woods announced that PER 246 was not a safety issue. This is clearly close enough in time to establish solid evidence of causation sufficient to raise an inference of retaliatory motive.

R.D.O. at 32. We find in addition that TVA persisted in its actions to thwart Overall from engaging in protected activity by removing him from PER 246 on July 10, 1995, and by removing him from Watts Bar in the fall of 1995.

The ALJ admittedly identified the temporal proximity between protected activity and adverse action as a component of Overall's *prima facie* showing. The evidence supporting the presumption of discrimination properly may bear on whether TVA's nondiscriminatory explanation for its actions constituted pretext, however. *See Reeves v. Sanderson Plumbing*

16/ As discussed *supra* under "Subsequent NRC Activity," the NRC did not have occasion to begin investigating the ice condenser screw failure at Watts Bar until mid-1998.

Products, Inc., 120 S.Ct. at 2106 ("although the presumption of discrimination 'drops out of the picture' once the defendant meets its burden of production, the trier of fact may still consider the evidence establishing the plaintiff's *prima facie* case 'and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual'") (*quoting St. Mary's Honor Center v. Hicks*, 509 U.S. at 511; *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 255).

2. The "legitimate, nondiscriminatory" rationale advanced by TVA for its actions was false.

The ALJ rejected *in toto* the reasons proffered by TVA for deciding to transfer and lay off Overall and to refuse him re-employment. We concur with the ALJ that, considered in conjunction with the temporal proximity between protected activity and adverse action evident in the sequence of events, the rejection of TVA's rationale compels a finding of intentional discrimination.

The At-risk Transfer Decision

We begin by examining the reasons advanced, predominantly through the testimony of Koehl and McCormick, for transferring Overall to Services in an at-risk status.

TVA maintains various employment schedules. These schedules include, in order of ascension,

- The SE schedule (Overall's classification from 1981 through 1984) which covers engineering *aides* and *technicians;*
- The SD schedule (Overall's classification from 1985 until his layoff in 1996) which covers power plant *specialists* in a particular system who have obtained expertise beyond that of SE aide/technician but who do not possess an engineering degree or its equivalent;
- The SC schedule which covers *degreed engineers* and their equivalents.

These schedules are key to TVA's defense that Overall's transfer was for legitimate business reasons, and not retaliatory.

During the 1995 transition at Watts Bar from construction, through fuel load and start up, to full operation, TVA eliminated all SD positions within Overall's section, retaining only

employees on the SC schedule.[17] TVA offered two reasons for eliminating Overall and his SD schedule position: (1) that the ice condenser systems specialist did not constitute a full-time position ("insufficient man-hour" defense) and (2) a professed preference for degreed engineers or their equivalents who managed multiple systems as opposed to SD schedule employees who concentrated on a single system ("lack of flexibility" defense). These reasons do not withstand scrutiny.

The testimony of Gary Jordan, Overall's replacement on the ice condenser system at Watts Bar, and Vernon Law, Overall's backup engineer, belies TVA's "insufficient man-hour" defense; whereas Overall's multifaceted employment experience and expectations belie TVA's "lack of flexibility" defense.

Jordan testified that after Overall's 1995 departure he (Jordan) spent most of his time on the ice condenser system with some time spent on the flood mode boration system which he agreed was "a pretty simple system." T. 215. He also served as backup for the containment isolation system (duties limited to simple testing) and for the auxiliary feed water system (assisting maintenance in testing and responding to inquiries). T. 220-223. Both Jordan and Law testified that Overall was capable of exercising primary responsibility for the ice condenser and flood mode boration systems and backup responsibility for the containment isolation and auxiliary feed water systems. T. 223, 425.

Overall testified that during his tenure as a systems specialist he bore responsibility for a variety of plant systems, T. 58-59, and that the ice condenser system, which comprises much of the containment vessel, consists of components found in numerous other mechanical systems at a nuclear power plant, for example chillers, blowers, duct work, insulation, instrumentation, pumps, valves and gauges. T. 69-71. The ice condenser system also shares heating and refrigeration components with other plant systems. T. 70. This testimony finds support in Overall's job description covering the period 1991 until September 1995. The job description states in relevant part:

> Backup systems are assigned to the incumbent [Overall] to resolve problems and initiate required documentation when the primary engineer is in leave status. The incumbent may be assigned other systems after receiving sufficient on the job training and any

---

[17] By 1995 the number of employees in Overall's section had diminished significantly through attrition. Of the original 19 employees who had received notification of *potential* at-risk status in September 1994, only four employees including Overall received notification of actual at-risk transfer in June 1995. The other employees had retired or transferred elsewhere. One of the four employees notified of at-risk transfer in 1995, John Ferguson, received a "last minute" engineering equivalency rating. R.D.O. at 21.

> classroom specialized training such that the individual is knowledgeable enough to perform as a primary engineer on the system.

CX 2 at 3. The job description requires that the incumbent possess knowledge of systems which "interface" with the ice condenser and understand how those systems "effect or are affected" by the ice condenser. *Id.* at 4; T. 72-73. Undermining TVA's defense in this regard, Koehl and McCormick admitted that Overall's job description permitted, if not required, flexibility and that Overall had received training in systems engineering. T. 652-653, 734, 773-774, 855-845. The ALJ found: "Overall's job description and duties not only required flexibility by working systems other than the ice condenser but in fact Overall had worked other systems including plant wide maintenance and diesel generation. Further, many of the systems within the ice condenser were located throughout the plant." R.D.O. at 26 (finding no. 30).

Overall's removal left a distinct void in the Watts Bar work force. Overall's replacement (Jordan) had next to no experience with the ice condenser system. Indeed, McCormick testified that he retained Overall beyond the transfer date because of a dearth of SC engineers able readily to "pick up" the ice condenser duties, any experience by any other engineer at Watts Bar being limited to backup responsibilities for the system.

The ALJ rejected Koehl's and McCormick's testimony of TVA's supposed reasons for transferring Overall to an at-risk position in Services based predominantly on inconsistency and contravention:

> TVA advanced inconsistent reasons for the transfer with Koehl stating it was because there was no need for a full time ice condenser specialist while McCormick claimed it was because of a lack of flexibility in work assignments. Both reasons were clearly false as established by Overall's replacement, Jordan, who working as ice condenser specialist has spent at least 95% of his time on the ice condenser and the remaining 5% on flood mode boration, which Overall was qualified to do. The lack of flexibility was contradicted by Overall's work outside of ice condenser systems and the fact that many of the ice condenser systems were located in other plant wide systems. More importantly, TVA chose an inexperienced person, Jordan, to operate it[s] most important safety system when professing to place safety as its number one priority.

R.D.O. at 33. *See id.* at 10 ("[John] Rathjen testified by deposition that as system engineer at Sequoyah, he held a comparable position to Overall, being responsible for operation of the ice condenser system, and that 99% of his time is spent with [that] system.").

TVA falsely asserted that McCormick had made the decision to transfer Overall at-risk to Services in 1994. The ALJ determined instead that Koehl made the decision in the midst of the 1995 fuel load and start up. The ALJ found:

> Koehl denied making the decision to transfer Overall to TVA Services stating the decision was made by McCormick because of Overall's lack of an engineering degree or its equivalent and because the ice condenser specialist position did not require a full time person or 2000 man hours of work. Koehl's denial was incredible and conflicted with the statements of McCormick and [TVA human resources manager] Howard Cutshaw who in conversations with Overall on June 16 and 21, attributed the decision to Koehl.

R.D.O. at 26 (finding no. 28). The record shows that, contrary to Koehl's testimony, McCormick attributed the at-risk transfer decision solely to Overall's purported lack of flexibility in terms of assignment to plant systems other than the ice condenser – *not* to inadequate man-hours. T. 777-779, 805, 807. No other witness supported McCormick's rationale. Koehl in fact admitted that Overall had worked on other systems in the past. T. 733-735.

The ALJ rejected as "nonsensical" McCormick's testimony that Overall could not work on other systems because if he did so "he would seek a reclassification to the SC schedule which would be unsuccessful." R.D.O. at 21. The ALJ credited Overall's testimony that his position description permitted him to work on systems other than the ice condenser and that he in fact had worked on other systems including diesel generation. *Id.* at 21-22. McCormick ultimately confirmed that Overall could work backup systems and that he had completed most of the requisite engineer equivalency training. T. 772, 843-846.

The ALJ additionally pointed to disparate treatment accorded Overall to refute TVA's purported reasons for the at-risk transfer decision. TVA retained other employees, *e.g.*, John Ferguson, Ronnie Schouggins and Doug Williams, with qualifications equal or inferior to those possessed by Overall. R.D.O. at 17, 21, 22, 24 (finding no. 8), 31, 33.

The ALJ found: "Ferguson, who had no formal engineering education, but rather a 4 year degree in business and who had the same total score of 1325 [equivalency] points as Overall, was given a [last minute] engineering equivalency rating in June 1995 and elevated to the SC [engineer] scale and not transferred to TVA Services as an at-risk employee." R.D.O. at 24 (finding no. 8). *See id.* at 21 ("both Ferguson and Overall had the same total score but no attempt was made to re-evaluate Overall's status; Koehl admitted that Overall's completion of in-house training since 1991 should have been factored into his equivalency score but was apparently not

done") (citation omitted). *See also id.* at 31 ("Ferguson was upgraded to a SC engineer position although he had no formal engineering training as did Overall."); T. 218-219, 232, 724-725.

Unlike Overall, TVA permitted SD "specialist" employees Schouggins and Williams "the opportunity to transfer to other positions within Watts Bar while retaining full time employment." R.D.O. at 31. In particular, "Williams, who has no degree, was assigned from Technical Support (component engineering) to maintenance prior to the June 1995 transfers and since the . . . transfers has performed work on the ice condenser. Schouggins has no degree and has continued to work up to the present performing maintenance work on pumps and turbines." *Id.* at 22. *See* 738-740; CX 31.

Koehl's Participation in the June 1995 Adverse Employment Decisions

The ALJ found Koehl responsible both for making the decision to transfer Overall to Services in an at-risk status *and* for creating the "permanent" project administrator position for Overall in Services. R.D.O. at 26 (finding no. 28), 31. Evidence of the decisions appeared nearly contemporaneously in June 1995 directly following Overall's initiation of activity in furtherance of PER 246. We agree with the ALJ that the facts tie Koehl directly to these two actions which adversely affected Overall's employment in that they rendered Overall vulnerable to layoff.

We examine the record in some detail to discern Koehl's role in the decision to transfer Overall to an at-risk position in Services and Koehl's role in creating the project administrator position for Overall in Services. That Koehl made the former decision is beyond cavil. The ALJ grounded the finding of Koehl's culpability on statements to that effect by both McCormick and Cutshaw, and he expressly rejected Koehl's denial as incredible. The ALJ instead credited Overall's testimony as to the following: "I talked with Howard Cutshaw in [TVA] Human Resources about what had taken place. We discussed why . . . Dennis Koehl was sending me away." T. 195. According to Overall, Cutshaw stated that "the [transfer] decision was wrong but 'You know Dennis.'" R.D.O. at 16. When confronted by Overall about the transfer decision, McCormick said "'You know, I tried to talk to Dennis about doing this, that it wasn't the right thing, but you know Dennis.'" *Id.*[18] Other evidence supports the ALJ's finding. The notification of at-risk transfer bears Koehl's signature, Koehl served Overall with the notification and Koehl discussed with Overall the reasons for the transfer.

Koehl's role in creating the position of project administrator was somewhat more nuanced, but no less real. The ALJ found essentially that at the inception of PER 246 Koehl

---

[18] As the ALJ noted, TVA neither called Cutshaw to testify nor denied that Cutshaw made the comment as Overall testified. McCormick testified that he did not recall speaking to Overall about the transfer decision. R.D.O. at 16.

prevailed on Services supervisor Rich Miller to create a seemingly secure position in Services tailored to Overall's qualifications. The ALJ summarized events during June 1995:

> Rich Miller, a supervisor with TVA Technical Service Group . . . telephoned and offered [Overall] a permanent position in Services. Miller told Overall that he was aware of Overall's ice condenser experience from previous conversations with Koehl and as such was a highly marketable individual for whom Miller would create or tailor a *permanent* position within the *core* group at TVA Services. Prior to the call, Overall never heard of Miller but knew as an at-risk employee his employment with TVA would not last more than a year after his reclassification to that status. *As a permanent employee Miller told Overall that he would remain with the core group within Services.* Subsequently, TVA Services posted a position as project administrator which fit exactly Overall's qualifications.

R.D.O. at 14 (citations omitted; emphasis added). *See* T. 196-197, 294-302. This portion of the ALJ's statement forms the basis for his finding that "[i]n June, 1995, TVA Services supervisor, Miller, at the prompting of Koehl, created a permanent position of project administrator at TVA Services and offered such a position to Overall telling Overall because of his experience in ice condensers he was a very marketable individual." *Id.* at 25 (finding no. 20).

Our determination that Koehl was involved rests on Overall's testimony and overly convenient coincidence. Overall documented discussions with Miller in two entries in his Franklin Planner daily diary on June 1 and 28, 1995. The first entry states that Rich Miller of the Services Organization telephoned to discuss the possibility of employment and that Miller would be asking for an interview. The entry references the possibility of employment at the SC (engineer or equivalency) level or at Overall's present SD level and notes that Miller feels that Overall is "very marketable." RX 9 at 1. The second entry states that Miller requested Overall to submit an outline detailing what "Services can do for the [power] plants in [the] area of ice condenser, etc." *Id.* at 2. Overall's testimony is consistent with this documentation.

On direct examination Overall testified that Rich Miller in the Technical Services Group in Chattanooga, Tennessee, had expressed an interest in employing him in a permanent position because of his marketability and that as a permanent employee he (Overall) would remain at the core of Services. T. 195-197. When questioned about the contact on cross-examination, Overall testified in relevant part:

> I never met Mr. Miller before and never knew a Rich Miller in my life. [H]e called and wanted to know the possibilities of

> employment within Services as a permanent employee, to help market my skills. [S]ince he called me first and he spurred the interest, we discussed what the possibilities would be down there, what work he was aligning me to do. . . . He said I was a very marketable person and he wanted to offer me a position, possibly [S]C-3 [engineer equivalent], maybe a [S]D-4. He felt I was possibly – my background and experience could actually propose up to a [S]C-3. [He said] it would be a permanent position. It would not be an at-risk position. . . . [T]hat permanent position goes without saying that that would be a secure position, rather than an at-risk position.

T. 297-299. When asked whether Miller had advised him that the vacancy announcement would be tailored for him, Overall responded, "Mr. Miller conveyed to me on the telephone that there's a position available, we can make one available for you. . . . He said he had several – I believe, several positions down there that I could apply for in his organization, that he needed to market my skills. They were permanent-type positions." T. 300-301.

The following colloquy ensued in reference to the second entry in Overall's daily diary pertaining to the Services outline request:

> Q. And I believe, sir, that there's a note, again about midway down the page, "Rich wants outline of what Services can do for the plants in area of ice condenser, etc."
>
> A. Umm-hmm. (Affirmative response.)
>
> Q. Is that again referring to Mr. Miller and TVA Services?
>
> A. Yes, sir. He called me and asked me that specific question. He brought up the word "ice condenser." Not myself. He obviously knew my background, so –
>
> Q. Did you ever find out how Mr. Miller had learned about you?
>
> A. No sir, I understand that he did know Mr. Koehl. I understand he had mentioned that several times. That they had had some conversations.

T. 302. We read Overall's response to the last of the foregoing questions to mean that while Overall did not know for certain how Miller had learned of him, Overall understood that Miller and Koehl had nevertheless discussed Overall's expertise in ice condenser systems. The ALJ construed this testimony to include Koehl in the creation of a position in Services for Overall. Based upon the record as a whole, including Koehl's role in the at-risk transfer decision, we find the ALJ's construction to be a reasonable one. In sum, the above-referenced testimony suggests that Miller mentioned Koehl's name in conversations between Miller and Overall in the context of Overall's expertise in ice condenser systems. Overall, located at Watts Bar, and Miller, located in Chattanooga, had no reason to know of each other. Overall in fact testified that he never had heard of Miller previously. Koehl, whom Miller claimed to know and who acted as Overall's second-line supervisor, supplies the likely connection.

Another indicator of an association between Koehl and Miller is the extent to which the vacant position announcement tracked Overall's experience and qualifications, known previously to Koehl but not to Miller. It read:

> Summary Description of Duties: Serves as a project administration [sic] (civil) for implementation and completion of civil projects involving design and engineering. Supervises other SD-3's and SE's. Assignments include: Performs and reviews civil design and engineering documents including computerized or hand calculations; writes and reviews walkdown procedures and performs walkdown of the plant configuration; trains other personnel in proper civil techniques and methods; coordinates manpower utilization, reviews customer implementing instructions to ensure compliance with upper tier procedures and standards; provides cost estimates and budgets for projects. Monitors cost and schedules.

RX 10. The announcement described the minimum qualifications as an "associate degree in mechanical or civil engineering technology or at least two years of college level course work in a related engineering field and a minimum of four years of practical experience." *Id.* A comparison of the project administrator duties with Overall's job description for the period 1991 until he commenced work for Services (CX 2) reveals markedly common functions. Overall more than qualified for the position in Services: He possessed a two-year engineering degree and nineteen years of nuclear power plant experience.

The ALJ reasonably marshaled these elements – Miller's express interest in Overall's ice condenser expertise, Miller's mention of Koehl in conjunction with his knowledge of Overall's expertise and the coincident commonality of job duties – to find that Koehl likely prevailed on

Miller to create a position in Services in an "attempt to lure Overall away from Watts Bar . . . ." R.D.O. at 29.

Having associated Koehl directly with both actions (*i.e.*, (1) the decision to transfer Overall at-risk to Services and (2) the creation of a permanent position for Overall in Services), we turn to the issue of retaliatory adverse action under the ERA. Section 5851 provides that "[n]o 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 [has engaged in protected activity]." 42 U.S.C. §5851(a). Viewed in their entirety, we consider the above-referenced actions to constitute adverse action under the ERA in that they placed Overall in a considerably more tenuous employment situation than he had occupied before he engaged in protected activity by reporting the ice condenser screw failure and initiating and processing PER 246. As an at-risk employee transferred to Services, Overall likely would have been terminated in 12 months. And as a project administrator, it turns out that Overall would be affected by a subsequent major reorganization of Services which resulted in substantial layoffs, including his own. Overall reasonably believed that in moving to Services in a permanent capacity he would succeed in marketing his expertise at least to TVA due to continued operation of the condenser-protected units at Sequoyah and Watts Bar. Employment in Services instead ended in separation from TVA, in part because of TVA's reluctance to retrieve employees from Services. Law testified:

> [O]ur section supervisor at the time, when they were looking at bringing people back up to do some work, there was some talk about trying to get people back up specifically to work on the ice condenser. And, I guess the comment was made more in general by the section supervisor at that time that they [would] most likely not be bringing people back from Services because they felt like it would be – not look good to upper management because if they had let them go and then had to bring them back, you know, it would look like they'd made a bad decision to let them go.

T. 427. Koehl's action in removing Overall from the Watts Bar ice condenser and shunting him, one way or another, to the neophyte and apparently short-lived Services organization accordingly constituted adverse action under the ERA because, as reasonably could be expected, it adversely affected Overall's compensation, terms, conditions or privileges of employment by ensuring his termination.

Additional Retaliatory Action

The ALJ found that retaliation continued beyond Overall's removal as an ice condenser specialist at Watts Bar and his tenure with Services inasmuch as TVA organizations refused to contract for his assistance as a project administrator. We agree. The ALJ noted:

> [T]he mission of TVA Services was to assist employees whose jobs were being eliminated to find new opportunities within TVA including the acquisition of new training and skills. TVA Services was designed to be financially self-supporting by generating revenues from the sale of their services through contracts within and outside of the TVA organization. As of July 1996, Overall had not been able to acquire any contracts for his services for fiscal year 1997.

R.D.O. at 17. The ALJ found in particular that during his tenure in Services Overall "unsuccessfully attempted to market his services both to the Watts Bar and Sequoyah plants and other plants outside of the TVA organization." *Id.* at 25-26 (finding no. 25). Overall's failure in this regard was not for lack of trying. "Overall drafted business plans, set up meetings with plant personnel, put together brochures, visited both Watts Bar and Sequoyah plants but received no work." *Id.* at 17. He was equally unsuccessful in applying for "announced vacant, non-ice condenser positions" at Watts Bar and Sequoyah and in seeking work outside of TVA organizations. *Id.*

The ALJ viewed the inability of the competent and motivated Overall to secure contracts as suspect. Testimony by Ulysses White, task manager for the TVA modifications group at Watts Bar, as to his reasons for declining Overall's services during a mid-cycle outage bordered on the inane:

> After listening to Overall's presentation which included his ice condenser expertise, White recommended against using Overall. When asked why White replied: "the money value that probably Service would be charging for us, we only had a certain amount of dollar values to do this project and the short time that we had to do it in, we just felt that, you know, we didn't need their services at this particular time."

R.D.O. at 18; T. 628-629. The record contains no explanation of the "value that *probably* Service would be charging" or what the "short" length of time available for completion signified. White denied any knowledge of safety concerns raised by Overall about the ice condenser. The ALJ correctly identified this testimony as the single attempt by TVA at the hearing to explain its

reasons for refusing Overall's services. *Id.* at 18. The ALJ accorded the testimony little credence: "White's explanation was vague and never supported by any documentation. His denial of knowledge of safety issues was refuted by White's presence at the June 14, 1995 meeting wherein ice condenser safety was discussed." *Id.* At bottom, TVA offered tantamount to "no reason" for declining Overall's services.

The ALJ focused on discrepancies in statements by TVA managers about employment expectations in Services. TVA assertedly conditioned continued employment in Services on generating revenue from the sale of employee services, an objective that TVA itself prevented Overall from achieving. Despite TVA Services director Gary Pitzel's representation to Overall that his (Overall's) permanent position in Services had been budgeted for fiscal 1997, R.D.O. at 26 (finding no. 26), manager of plant services James Swindell attested that "Overall was let go because there were no work opportunities to sustain and cover [Overall's] cost for the 1997 fiscal year." *Id.* at 18. Overall testified that Pitzel, whom TVA did not call as a witness, stated that "Overall did not have to worry about layoffs because Swindell had informed him, Pitzel, that Overall's services and skills were still in demand." *Id.* at 18. The ALJ considered significant TVA's failure to produce Pitzel "to refute his conversation with Overall in which he clearly indicated, contrary to Swindell's assertions, that funds had been set aside for Overall's position." The ALJ noted: "It is well established that when a party has relevant evidence within its control which it fails to produce, that failure gives rise to an inference that the evidence is unfavorable to said party." *Id.* at 33-34 (citing cases). In sum, Pitzel's statements flatly contravened the explanation advanced by Swindell for Overall's layoff. A fact finder reasonably may "infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. at 2108.

Finally, the ALJ found suspect TVA's refusal to re-employ Overall directly. We agree. In addition to declining Overall's services as project administrator, modifications task manager Ulysses White participated in TVA's decision not to hire Overall on the Watts Bar ice condenser during outage activity in mid-1997. White contacted Overall by telephone on May 7, 1997, about the prospect of working on the ice condenser system at Watts Bar during a pre-outage and scheduled outage, guaranteeing him nearly full forty-hour work weeks during the entire summer. White suggested that Overall might provide support services following the outage. T. 626-628. But after several weeks White advised Overall that he would not be requiring his services. "On cross [examination] White testified that TVA would normally have done the outage work with their own personnel" as opposed to engaging a contractor. R.D.O. at 18. *See id.* at 26 (finding no. 27) ("[f]ollowing his layoff Overall diligently attempted to secure work at Watts Bar, Sequoyah and other non-TVA facilities but without success;" TVA "chose an outside contractor,

Stone and Webster, to do ice condenser outage work [at Watts Bar] despite the fact that Stone and Webster had no employees with previous condenser experience").[19]

Ultimate Findings on the Merits of the Complaint

We agree with the ALJ that the course of Overall's employment as set out above, "considered in the context of a concerted effort to conceal major safety hazzards by the use of defective ice condenser screws . . . and Overall's admitted zeal and competence in dealing with ice condenser problems" readily supports the finding "that the only plausible and credible reason for adverse employment actions, *i.e.*, transfer, layoff and refusal to recall, was a desire by TVA officials to retaliate against [Overall] and [to] prevent Overall from engaging in protected activities." R.D.O. at 34. Indeed, each "legitimate" reason posited by TVA for its actions (*e.g.*, lack of sufficient man-hours, lack of flexibility, lack of marketability, lack of funds) the weight of the evidence refuted. Having peeled away every explanation proffered, the ALJ found that only unlawful motivation remained. *See Reeves v. Sanderson Plumbling Products, Inc.*, 120 S.Ct. at 2108-2109 (fact finder may construe "a party's dishonesty about a material fact as 'affirmative evidence of guilt'" ; "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer

---

[19] The ALJ identified Koehl as a likely participant in employment decisions at TVA facilities during Overall's tenure at Services and when, after layoff, Overall applied to TVA for outage work at Watts Bar (May 1977). The ALJ found:

> Koehl had direct contacts with Swindell and other TVA Service supervisors on a frequent basis and in fact negotiated Overall's rate of pay with Swindell. Indeed it was Koehl who was responsible for TVA Services creating a position for Overall so as to remove him from processing PER 246. . . . Following Overall's transfer to TVA Services, Koehl assumed even greater authority and control at Watts Bar, and eventually Sequoyah, being promoted to assistant plant manager and operations manager at Watts Bar and in June 1977 assigned to the position of assistant plant manager at Sequoyah.

R.D.O. 31. White testified that Stone and Webster maintained close contact with plant management when contracted to work outages. T. 635-636. Koehl had worked for Stone and Webster for a six-year period during the 1980's. T. 589-592. In June 1997 Koehl left his position as operations manager at Watts Bar to become assistant plant manager at Sequoyah. Although acknowledging that Koehl had denied contact with Services and Stone and Webster about Overall, the ALJ observed that Koehl "admittedly . . . had worked with Stone and Webster in the past and had frequent conversations with personnel in TVA Services and as technical support manager, assistant plant manager, and operations manager he certainly was in a position to directly influence Overall's work opportunities at Watts Bar." R.D.O. at 31. *See* R.D.O. at 21 (*citing* T. 592, 593, 599, 711 and 712).

is in the best position to put forth the actual reason for its decision"). We adopt the ALJ's finding of intentional discrimination.

We otherwise agree with the ALJ that assuming the existence of dual motives (both legitimate and discriminatory reasons for adverse action) TVA failed to meet the "clear and convincing" evidence standard under 42 U.S.C. §5851(b)(3)(D) for being relieved of liability under the ERA in a dual motive case ("[r]elief may not be ordered . . . if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of [protected activity]"). *See Mount Healthy City Sch. Dist. v. Doyle,* 429 U.S. 274 (1977); *Stone & Webster Engineering Co. v. Herman,* 115 F.3d at 1572. The evidence, considered in its entirety, fell short of substantiating TVA's defenses, *i.e.*, "lack of need for a full time ice condenser specialist," "lack of . . . flexibility" on the part of Overall to perform duties pertaining to a number of systems and "shortage of funds" necessary to retain Overall's permanent position in Services. R.D.O. at 34.

III. The Complaint was Timely.

The ERA provides that any employee who believes he has been discriminated against in violation of the Act may file a complaint with the Secretary of Labor within 180 days of the violation. 42 U.S.C. §5851(b)(1). TVA asserts that the discrimination complaint in the instant case is barred as untimely because Overall filed the complaint more than 180 days after the adverse employment action. Overall counters that the limitations period is subject to equitable modification and that modification is appropriate here. Overall argues alternatively that he filed a timely complaint within 180 days of one of a series of "continuing" violations which effectively "shelters claims for all other actions taken pursuant to the same policy from the limitations period." *Connecticut Light & Power Co. v. Sec'y of U.S. Dep't of Labor,* 85 F.3d 89, 96 (2d Cir. 1996). The ALJ agreed with Overall's continuing violation theory but declined to apply principles of equitable modification in holding Overall's complaint timely filed. We find Overall's complaint timely under both approaches.

We focus on three time periods in addressing the timeliness issue, the first of which is September 1994, when TVA initially advised Overall of a possible change in his employment conditions. Overall was one of 19 employees whom Koehl served at this time with a document captioned "Written Notification of *Potential* At-risk Status." RX 2 (emphasis added).

The second period of focus is mid-April through November 1995, when Overall/TVA processed PER 246 and the NRC scrutinized pre-operation activities at Watts Bar. Overall's activities associated with PER 246 commenced in mid-April 1995 and culminated in his removal by TVA from work on the PER in mid-July 1995. About a month before TVA removed Overall from the PER process, in early June 1995, TVA approached Overall with the offer of the position of project administrator in Services. Overall applied for the position on June 16, 1995, spurred

by TVA's issuance of a second written notification of an employment action on the same date. This time TVA notified Overall of an imminent transfer to Services as an at-risk employee subject to termination within 12 months. TVA formally offered Overall the position of project administrator on October 2, 1995, he accepted, and he commenced work on November 3. Koehl was aware that Services had been funded for a two-year period ending at the conclusion of fiscal 1996, but Overall was not similarly aware of a funding limitation and was quite surprised when on July 24, 1996 he received a notification of layoff effective September 30. At this juncture Overall understood that his job was in jeopardy, contrary to earlier belief. On January 15, 1997 – 175 days after being notified of layoff from TVA Services – Overall filed a complaint of unlawful discrimination.

Finally, we focus on May and June 1997 when TVA refused to re-employ Overall after having laid him off. As discussed under Part II *supra,* TVA modifications task manager White initially approached Overall about performing work on the Watts Bar ice condenser during an outage and guaranteed him a specific work schedule. TVA then chose to engage a contractor (Stone and Webster) whose engineers lacked any ice condenser experience whatever.

Statutes of limitation run from the date an employee receives final, definitive and unequivocal notice of an adverse employment decision. The date that an employer communicates a decision to implement such a decision, rather than the date the consequences of the decision are felt, marks the occurrence of a violation. *See generally Chardon v. Fernandez,* 454 U.S. 6 (1981) (proper focus contemplates the time the employee receives notification of the discriminatory act, not the point at which the consequences of the act become painful); *Delaware State College v. Ricks,* 449 U.S. 250 (1980) (limitations period began to run when the employee was denied tenure rather than on the date his employment terminated).

In addressing the instant scenario, we distinguish between the *accrual* of Overall's claim and the *tolling* of the limitations period by means of either of two modifications doctrines – equitable estoppel and equitable tolling. *See Cada v. Baxter Healthcare Corp.,* 920 F.2d 446, 450-453 (7th Cir. 1990), *cert. denied,* 501 U.S. 1261 (1991). We find – contrary to the ALJ – that the limitations period with regard to the adverse employment action taken against Overall in 1995 (at-risk transfer) was tolled. We then turn to the continuing violation theory under which the ALJ found Overall's complaint timely – a finding which we adopt.

Claim accrual is the date a statute of limitations begins to run, *i.e.,* the date a complainant *discovers* he has been injured. Accrual may differ from the date the respondent decides to inflict injury which may pre-date a complainant's discovery of the injury. This "discovery rule" may operate to postpone the beginning of a limitations period which, as the *Cada* court notes, is consistent with *Delaware State College v. Ricks,* 449 U.S. at 258 (statute of limitations begins to run at the time the adverse decision is made *and communicated* to an employee). *Cada v. Baxter Healthcare Corp.,* 920 F.2d at 450. This Board essentially has applied the discovery rule

in holding that statutes of limitation in whistleblower cases begin to run on the date when facts which would support a discrimination complaint were apparent or should have been apparent to a person similarly situated to the complainant with a reasonably prudent regard for his rights. *Whitaker v. CTI-Alaska, Inc.*, ARB Case No. 98-036, ALJ Case No. 97-CAA-15, ARB Dec. & Rem. Ord., May 28, 1999, slip op. at 7-8; *Ross v. Florida Power & Light Co.*, ARB Case No. 98-044, ALJ Case No. 96-ERA-36, ARB Fin. Dec. & Ord., Mar. 31, 1999, slip op. at 4; *McGough v. U.S. Navy*, Case Nos. 86-ERA-18/19/20, Sec. Dec., June 30, 1988, slip op. at 9-10.

ERA time limitations are not jurisdictional. They instead are analogous to statutes of limitation which are subject to equitable modification, *i.e.*, they "may be extended when fairness requires." *Hill v. U.S. Dep't of Labor*, 65 F.3d 1331, 1335 (6th Cir. 1995). Both of the above-referenced doctrines of equitable modification are, as is the discovery rule, "grafted on to" federal statutes of limitation including limitations under laws prohibiting employment discrimination. *Cada v. Baxter Healthcare Corp.*, 920 F.2d at 451-452. *See Oshiver v. Levin, Fishbein, Sedran & Berman*, 39 F.3d 1380, 1386 and n.5 (3d Cir. 1994). The doctrines of equitable modification may apply to stop a limitations period from running once a claim has accrued.

TVA's threshold argument is that the limitations period began to run as early as September 15, 1994, when TVA issued Overall a written notification which stated in relevant part:

> Based on workforce planning projections, we have identified occupations and positions within our organization which will not be required to support our future business needs. Your current position of Power Maintenance Specialist SD-04 has been identified as *potentially* at-risk and is targeted for surplus as of July 3, 1995. As a result, we *may* assign you to the Services organization effective July 3, 1995 . . . .
>
> During your *temporary* assignment to the Services organization, you will remain at your current schedule and grade and in the same competitive area and level as your current position until other job opportunities become available. . . .

RX 2 (emphasis added). We find that TVA's threshold argument fails on its face since the above-referenced communication by its terms constituted less than a final, definitive and unequivocal notice of adverse action. The notification nowhere stated that Overall would be subject to termination within a specified period. Rather, it suggested temporary assignment to Services pending reassignment to another position. At no time following issuance of the notification did TVA advise Overall that an assignment to Services would occur on the date indicated, and such an assignment in fact did not materialize on that date.

The context in which Overall received the 1994 notification reinforces our finding. Overall testified that in an August 1994 meeting TVA presented the reorganization as a preliminary proposal, and that McCormick advised Overall: "Not to worry. Things could change." T. 255. Overall's contemporaneous notes substantiate this testimony and document McCormick as commenting additionally that "some [S]D's [Overall's classification] maybe SE's [a less qualified classification] will be needed depending on need." CX 44. Overall noted the continuing necessity for an ice condenser specialist. *Id.* Overall's testimony went unrebutted. In finding the 1994 notification to be "no more than a potential notice of future transfers" the ALJ noted that "[w]hen questioned about the . . . 1994 at-risk notices and whether he told Overall that he would be definitely transferred as opposed to just possibly being transferred, McCormick was unable to recall what he told Overall or to explain the meaning of 'potentially at-risk.'" R.D.O. at 26 and n.18 (finding no. 31). *See* T. 782. Based on these considerations, we adopt the ALJ's finding of non-finality.

Having eliminated the 1994 notification, we examine the remaining landscape pertaining to timeliness. On June 16, 1995, Koehl served Overall with a "written notification of at-risk status & transfer to the Services Organization" effective September 18, 1995, which by Overall's own admission and judging from his subsequent actions Overall recognized as potentially adverse.[20] Perhaps most significant in terms of subsequent actions was Overall's June 16, 1995 application for the "permanent" position of project administrator at the "core" of Services (R.D.O. at 14) which TVA ultimately offered to him and which he accepted. The ALJ found: "When faced with an involuntary at-risk transfer, Overall decided to apply for the position of project administrator at TVA Services. The decision to apply was obviously not a voluntary decision." R.D.O. at 25 (finding no. 23). Beyond this fork in the road Overall encountered (1) the July 24, 1996 notification of layoff from the project administrator position, at which time he realized that contrary to earlier belief his so-called permanent/core position was in jeopardy; (2) the September 30, 1996 layoff; and (3) TVA's June 16, 1997 refusal to re-employ him.

Equitable modification

While holding that Overall's complaint was timely based on the existence of a continuing violation, the ALJ rejected Overall's alternative timeliness argument based on equitable estoppel, holding that "the equitable principle of fraudulent concealment does not apply" in this case. R.D.O. at 28. We disagree with the ALJ as to the applicability of equitable estoppel. We conclude that if the 1995 notification of at-risk transfer to TVA Services was a discrete, isolated

---

[20] Overall requested that Koehl provide him with a written statement that, as Koehl had professed, the reason for the transfer was insufficient work afforded by the position of ice condenser system specialist. T. 187-188, 190-191. Overall subsequently appealed to numerous individuals for reconsideration including the TVA human resources manager, a TVA labor relations specialist and a union representative. T. 195; CX 24, p. 27; CX 26.

and completed act in and of itself, and not part of a continuing violation, the limitations period for filing a complaint was tolled due to TVA's successful concealment of an operative fact forming the basis of a cause of action.

Assuming Overall's claims arise out of separate adverse actions (and not as part of a continuing violation), as such they are separately actionable. Thus the decision to transfer Overall to Services in an at-risk status gave rise to one complaint; the decision to terminate Overall's permanent employment with Services gave rise to another. Each claim, in turn, carried a separate accrual date, *i.e.*, June 16, 1995 (notification of at-risk transfer); July 24, 1996 (notification of termination from Services).

We consider application of the two modifications doctrines referenced above – equitable estoppel and equitable tolling. Under both of these doctrines the claim has accrued; but the doctrines halt the running of the limitations period. We consider the doctrines as delineated in *Cada v. Baxter Healthcare Corp.*, 920 F.2d at 450-451. *Compare Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d at 1389 and n.7 (terminology may differ among circuits).[21/]

The first doctrine is *equitable estoppel*, sometimes denominated fraudulent concealment, which operates when a respondent has acted affirmatively to prevent a complainant from suing in time, for example by promising not to plead the limitations defense or by presenting fabricated evidence to negate any basis for a claim. Equitable estoppel "presupposes that the plaintiff has discovered, or, as required by the discovery rule, should have discovered, that the defendant injured him, and denotes efforts by the defendant – beyond the wrongdoing upon which the claim is grounded – to prevent the plaintiff from filing a timely complaint." *Cada v. Baxter Healthcare Corp.*, 920 F.2d at 451. At least one federal circuit has articulated the burden of proof assumed by the party invoking the doctrine as follows: "(1) wrongful concealment of their actions by the defendants; (2) failure of the plaintiff to discover the operative facts that are the basis of the cause of action within the limitations period; and (3) plaintiff's due diligence until discovery of the facts." *Hill v. U.S. Dep't of Labor*, 65 F.3d at 1335, *quoting Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975). Application of the doctrine of equitable estoppel

---

[21/] The *Oshiver* court for example explained that in that circuit the term "equitable tolling" denotes what the *Cada* court has designated "equitable estoppel" inasmuch as the *Oshiver* circuit's equitable tolling "excuses a late filing where such tardiness results from active deception on the part of the defendant." *Oshiver*, 38 F.3d at 1389 n.7. According to a panel of yet another circuit employer deceit constitutes an element triggering both equitable tolling and equitable estoppel. *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987), *cert. denied*, 486 U.S. 1044 (1988) (equitable tolling applies where the employer wrongfully deceives or misleads a plaintiff in order to conceal the existence of a cause of action; whereas equitable estoppel applies where, despite a plaintiff's knowledge of the facts, an employer engages in intentional misconduct in order to cause the plaintiff to miss the filing deadline). Under the *Cada* formulation, employer deceit does not necessarily constitute an element of equitable tolling.

subtracts from the limitations period the entire period during which the modifying condition is extant so as to prevent a respondent from benefitting as the result of its concealment. *Cada v. Baxter Healthcare Corp.*, 920 F.2d at 452.

The second doctrine arguably germane is *equitable tolling*. It applies where a complainant, despite due diligence, is unable to secure information supporting the existence of a claim. Unlike equitable estoppel it does not assume any effort by a respondent to prevent the complainant from suing. The complainant knows that he has suffered an injury but is unable to ascertain whether that injury is due to wrongdoing or, if cognizant of wrongdoing, whether the respondent perpetrated the wrongdoing. An employer, for example, may discharge an employee who is protected under laws prohibiting age discrimination and replace him several months later with a young and inexperienced employee. The discharged employee knows that he has suffered injury inflicted by his employer but is unaware of possible wrongdoing until he discovers the fact and identity of his replacement which would suggest that age may have motivated the discharge. The doctrine of equitable tolling suspends the running of the statute of limitations only until such time as is reasonably necessary to conduct an inquiry to ascertain the existence of a claim.[22/]

Because of TVA's actions in the instant case the applicable doctrine for assessing whether the limitations period was tolled is equitable estoppel (fraudulent concealment), as opposed to equitable tolling. Rich Miller, the TVA Technical Services supervisor who contacted Overall about the permanent project administrator position, represented that he "was aware of Overall's ice condenser experience from previous conversations with Koehl and as such [Overall] was a

---

22/ The court in *Cada* noted that because fraudulent concealment is not a factor, equitable tolling serves to adjust the rights of two parties who are blameless as to the necessity for modification. No automatic extension of a statute of limitations for a definite term thus is defensible. The court emphasized that tolling comprised "an equitable doctrine." It stated:

> [The doctrine] gives the plaintiff extra time if he needs it. If he doesn't need it there is no basis for depriving the defendant of the protection of the statute of limitations [which] protect[s] important social interests in certainty, accuracy, and repose. . . . When we are speaking not of equitable estoppel but of equitable tolling, we are dealing with two innocent parties and in these circumstances the negligence of the party invoking the doctrine can tip the balance against its application . . . . We hold that a plaintiff who invokes equitable tolling to suspend the statute of limitations must bring suit within a reasonable time after he has obtained, or by due diligence could have obtained, the necessary information.

Cada v. Baxter Healthcare Corp., 920 F.2d at 452-453. *See Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d at 1390.

highly marketable individual for whom Miller would create or tailor a permanent position within the core group at TVA services." R.D.O. at 14. The position thus appeared particularly attractive to Overall especially when faced with imminent at-risk transfer, and Overall reasonably could depend upon being selected in that TVA reportedly had created the position especially for him. The position in Services carried the same pay and benefits as the ice condenser specialist position at Watts Bar, and it purportedly would afford Overall the opportunity to service not only the Watts Bar ice condenser system but TVA's Sequoyah systems and systems outside of TVA. We find TVA's assurances sufficient reasonably to have lulled Overall into refraining from filing a discrimination complaint arising from the notification of at-risk transfer pending completion of job selection for the position of project administrator. While somewhat concerned about the prospect of an at-risk transfer, Overall practically had been guaranteed a permanent position in Services. Overall reasonably would have filed a complaint in the event that TVA denied him the permanent position and he retained at-risk status. TVA instead offered him the position.

In holding that equitable estoppel did not toll the limitations period, the ALJ reasoned as follows:

> In the instant case I find that on June 16, 1995, Overall knew that he was going to be transferred to TVA Services. He also knew by that date that management . . . was attempting to cover up the issue of screw safety and that the reasons advanced by Koehl for his transfer, *i.e.*, not enough work for one full time ice condenser specialist, was false. Overall was also aware that he had the right to file a complaint with DOL because of adverse employment actions by TVA. Accordingly, I find that although TVA concealed its true motive in transferring him, Overall had enough information to realize that he had a cause of action under ERA.

R.D.O. at 28. We agree with the ALJ to the following extent: On June 16 Overall, having engaged in protected activity in furtherance of PER 246, was aware that TVA had subjected him to adverse employment action – by notifying him of impending at-risk transfer. The record suggests that he suspected that his protected activity had motivated TVA to take this adverse action. Accordingly the "claim" arising as the result of the June 16 notification of at-risk transfer "accrued" at this juncture.

Beyond this finding we part company with the ALJ's analysis, because it was not TVA's concealment of its "true motive" with respect to the at-risk transfer that is of import, but rather TVA's subsequent concealment of operative facts which form the basis of a cause of action. Specifically, TVA masked the true nature of Overall's employment status by fraudulently offering Overall what he reasonably believed to be a secure position in Services. Indeed, TVA presented the opportunity to be more desirable than that afforded by his previous position at Watts Bar. In

these circumstances equitable estoppel applies because TVA actively misled Overall about the desirability of the permanent position by concealing the fact that the funding limitation for Services would ensure, or at least serve to rationalize, his layoff. TVA's actions prevented Overall from realizing critical information about an operative component of a cause of action, *i.e.*, continuing adverse action. While discerning TVA's intent with respect to the at-risk transfer notification, Overall foresaw no animus with respect to the offer of a secure position. We find that TVA's concealment (1) prevented Overall from discovering that he in fact had been wronged in applying for and taking the permanent position in Services and (2) deterred him from filing a complaint arising from TVA's at-risk transfer decision because he believed that whatever wrong may have been committed as the result of that decision had been corrected by TVA's offering him what in all respects appeared to be an enhanced employment opportunity.

The ALJ relied on *Hill v. U. S. Dep't of Labor*, 65 F.3d 1331 (6th Cir. 1995). There, complainants argued that the limitations period should be tolled because respondent concealed the existence of discriminatory *motivation* in that respondent led complainants to believe that it discharged them for legitimate reasons when the reasons actually were unlawful. All predicates to a discrimination complaint – protected activity, adverse action and an inference of causation – were extant. Here, TVA notified Overall of a seemingly secure (permanent) position (June 1) which in reality would be subject to ready elimination upon expiration of the unit's funding. When Overall neglected to apply for the position immediately TVA notified him of imminent at-risk transfer (June 16). Overall then applied for and was awarded the permanent position. By engaging in this ruse TVA concealed its ongoing resolution to injure Overall, a fact essential to a claim arising from the totality of its actions. The *Hill* court formulated the distinction between these circumstances:

> A deception regarding motive supports application of equitable [estoppel] only where the deception conceals the very fact of discrimination. Equitable [estoppel] through fraudulent concealment is not warranted where a petitioner is aware of all the essential facts constituting discriminatory treatment but lacks direct knowledge or evidence of the defendant's subjective discriminatory motive. The critical question is not whether concealment of motives alone constitutes fraudulent concealment, but whether the defendant's alleged fraudulent conduct concealed from the plaintiff facts respecting the *accrual* or *merits* of the plaintiff's claim.

65 F.3d at 1337 (citations omitted; emphasis added). With regard to the notification of at-risk transfer, Overall acknowledges claim accrual, *i.e.*, the existence of all elements of a complaint including suspected unlawful motivation. In concealing from Overall the vulnerable status of the permanent position in Services, TVA withheld the "fact" that Overall continued to suffer adverse

action as the result of the position he chose in order to avert adverse action visited by at-risk status.

The question then becomes the appropriate extent of modification. A complaint would be timely if the statute of limitations was tolled from June 16, 1995 – the date that Overall received notification of the at-risk transfer to Services *and* applied for the permanent position of project administrator – until July 24, 1996, when TVA notified Overall of the layoff from the permanent position. We find this modification appropriate because the doctrine of equitable estoppel applies in the circumstances of this case. That doctrine subtracts from the limitations period the entire period during which the modifying condition is extant. The entire limitations period having been tolled, we find the complaint concerning notification of at-risk transfer to be timely.

Continuing violation

The ALJ found the complaint timely as filed within 180 days of notification of one of a series of adverse actions comprising a continuing violation. R.D.O. at 29-30. The court in *Connecticut Light & Power Co. v. Sec'y of Labor,* (ERA whistleblower case) described the applicable standard as follows:

> Under the continuing violation standard, a timely charge with respect to any incident of discrimination in furtherance of a policy of discrimination renders claims against other discriminatory actions taken pursuant to that policy timely, even if they would be untimely if standing alone. A continuing violation exists where there is a relationship between a series of discriminatory actions and an invalid, underlying policy. Thus in cases where the plaintiff proves i) an underlying discriminatory policy or practice, and ii) an action taken pursuant to that policy during the statutory period preceding the filing of the complaint, the continuing violation rule shelters claims for all other actions taken pursuant to the same policy from the limitations period.

85 F. 3d at 96 (citations omitted). *Accord Berkman v. United States Coast Guard Academy,* ARB Case No. 98-056; ALJ Case Nos. 97-CAA-2/9, Dec. and Rem. Ord., Feb. 29, 2000, slip op. at 14-15; *Varnadore v. Oak Ridge National Laboratory,* ALJ Case Nos. 92-CAA-2, et al., Sec. Dec. and Ord., Feb. 5, 1996, slip op. at 61, 66, *aff'd sub nom. Varnadore v. Sec'y of Labor,* 141 F.3d 625 (6th Cir. 1998).

In finding the existence of a continuing violation, the ALJ found that TVA had engaged in an unlawful coverup of the ice condenser screw failure which, insofar as it related to Overall

particularly, resulted in a series of retaliatory actions taken by TVA against him in furtherance of the coverup. The ALJ stated:

> In this case the facts clearly show an organized scheme to remove Overall from the Watts Bar facility by transferring him to TVA Services. Once there TVA's plan was to lay him off and never recall him to either TVA Services or more importantly to Watts Bar. The credible evidence in this case indicates a broad coverup of significant safety hazzards caused by the use of defective ice basket condenser screws. Those management officials involved in the coverup were (1) Woods who directed the issuance of a revised and incomplete screw report omitting reference to any possible cause for screw failure so as to avoid questioning by NRC investigators; (2) McCormick who transferred PER 246 to nuclear engineering so as to remove it from Overall's control and responsibility; (3) Koehl who transferred Overall to TVA Services under the pretext of lack of need for a full time ice condenser specialist; (4) J.W. Irons, Westinghouse representative, who at the insistence of TVA officials issued a superficial and misleading report attesting the safety of the ice condenser; (5) James G. Adair's and Larry A. Katchum's recommendation that PER 246 be closed without taking any corrective action to assess or replace the defective ice basket screws; (6) Tom McCollum's subsequent action in closing out or completing the investigation of PER 246 without taking any corrective action and inaccurately concluding that the ice baskets were not accessible; (7) Woods, McCormick, Koehl, Adair, Katchum and McCollum's failure to advise the NRC of the safety issue raised by the defective ice basket screws which in turn led the NRC to subsequently issue an operating license to TVA for the Watts Bar plant; (8) Rich Miller's attempt to lure Overall away from Watts Bar by creating a position in TVA Services at the urging of Koehl; (9) Swindell's layoff of Overall for pretextual reasons stating a lack of funds when in truth funds had been set aside for Overall's position; (10) TVA's refusal to re-employ Overall at any of its ice condenser facilities including Watts Bar using instead inexperienced outside contractors to do ice condenser work.
>
> Thus, Overall's transfer to TVA Services, subsequent layoff and refusal to re-employ or recall were part of an organized scheme to prevent Overall's continued involvement with the Watts Bar or any

> other TVA ice condenser system so as to permit operation of such condensers without regard for significant operational safety concerns raised by the use of defective Westinghouse ice basket screws.

R.D.O. at 29-30. Specific to the issue of "claim accrual" (*i.e.*, the point at which Overall *discovered* the wrong and the limitations period began to run), the ALJ made the following findings:

> [T]he permanency of the transfer resulting in no further ice condenser work and eventual layoff did not become apparent until Overall received his notice of layoff on July 24, 1996. Prior to that time Overall had been assured by TVA that his services were not only valuable but marketable as well. In reality Overall found only a consistent pattern of rejection by TVA for no apparent reason other than its desire to eliminate him from its ice condenser workforce. In reality there was no realistic possibility of Overall returning to Watts Bar for as section supervisor Jim Yates told Law, TVA would not bring back employees to work on the ice condenser who had been transferred to TVA Services because to do so would be tantamount to an admission of an improper or bad decision in sending Overall to TVA Services in the first place.

Id. at 30.

We find ample evidence in the record to support the ALJ's findings of a coverup by TVA in order to facilitate the fuel load and start up at Watts Bar. With regard to Overall in particular the coverup included the following:

- Upon discovering and reporting the ice condenser screw failure in April 1995, Overall set in motion a number of remedial processes, all activities protected under the ERA.

- In May and June 1995, TVA attempted to minimize the import of the ice condenser screw failure during the course of two meetings between management and staff, while at the same time withdrawing and reissuing the June 2, 1995 metallurgical report in order to delete identified causes of failure and thereby deter further scrutiny.

- At virtually the same time TVA dangled the prospect of a custom-made job opportunity before Overall in which Overall supposedly would be able to maximize use of his ice condenser expertise – but which also would remove him from Watts Bar and relocate him to TVA's Chattanooga corporate offices.

- When Overall initially failed to seize the job opportunity, persisting instead in following up on the ice condenser safety issue (despite receiving three anonymous telephone threats during this same period), TVA notified him on June 16, 1995, of imminent at-risk transfer subject to termination within 12 months. That same day Overall applied for the permanent position of project administrator in TVA Services.

- Notwithstanding his imminent transfer to Services, Overall continued to pursue the ice condenser safety issue. When, in July 1995, Overall met with TVA engineers to develop a "recurrence control" program for the screw failure, TVA finally relieved him of responsibility for PER 246 by taking the unusual step of transferring the PER to another department which promptly closed out the PER without taking any corrective action.

- Overall subsequently took the permanent position with Services. Notwithstanding that he had been informed that the position had been custom-made to fit his expertise with ice condenser systems, and notwithstanding recurrent need for his expertise, TVA thereafter declined to utilize him in any capacity relating to ice condenser systems. "Overall found only a consistent pattern of rejection by TVA for no apparent reason other than its desire to eliminate him from its ice condenser workforce"; TVA "refus[ed] to re-employ Overall at any of its ice condenser facilities including Watts Bar using instead inexperienced outside contractors to do ice condenser work." R.D.O. at 29.

- TVA sought to minimize the potential that the ice condenser safety issue might reemerge by removing Overall from contact not only with the system at Watts Bar but from such systems generally.

- Finally, TVA notified Overall of his termination from employment at Services on July 24, 1996, laying off Overall "for pretextual reasons stating an alleged lack of funds when in truth funds had been set aside for Overall's position . . . ." R.D.O. at 29. On January 15, 1997 – 175 days thereafter – Overall filed his discrimination complaint.

We agree with the ALJ that Overall timely filed his discrimination complaint within the ERA limitations period following an adverse employment action taken against him. We further agree with the ALJ that Overall's 1996 termination from Services was but the most recent in a series of related adverse actions motivated by discriminatory animus and taken in furtherance of TVA's effort to suppress safety concerns pertaining to the ice condenser system. Accordingly, we find that Overall's complaint was timely filed as to all retaliatory actions alleged.

IV. Remedy

The ALJ recommended that Complainant Curtis C. Overall be reinstated with back pay and interest, that he be reimbursed for costs incurred for health insurance, medical costs, life insurance and retirement fund, that TVA expunge from Complainant's employment records all derogatory or negative information pertaining to TVA's discriminatory treatment of Complainant, that TVA pay Complainant $50,000 in compensatory damages, and that TVA comply with a posting requirement. R.D.O. at 36-37.

On May 12, 1998 the ALJ issued a Preliminary Order Granting Relief and Supplemental Order on Attorney's Fees and Costs. The ALJ essentially reissued most of his previous recommendations in the form of a preliminary order with specific award amounts pursuant to 29 C.F.R. §24.7(c)(2). The preliminary order provided for the following specific monetary recovery:

- Back pay from November 4, 1995, until reinstatement and all attendant benefits with credit permitted TVA for compensation and wages paid to Overall from alternate employment ($13,415.99) but excepting earnings from unemployment compensation ($6,240.00);

- Interest on the back pay, compounded quarterly, at the rate specified by this Board in *Doyle v. Hydro Nuclear Services,* ARB Nos. 99-041, 99-042 & 00-012, ALJ No. 89-ERA-22, ARB Fin. Dec. and Ord., May 17, 2000, slip op. at 19-20;[23]

---

[23] The interest rate is that charged on the underpayment of Federal income taxes, *i.e.,* the Federal short-term rate under 26 U.S.C. §6621(b)(3) plus three percentage points. *See* 26 U.S.C. §6621(a)(2). The referenced Federal short term rate is the "applicable federal rate" (AFR) for a quarterly period of compounding. *E.g.,* Rev. Rule 2000-23, Table 1. *Doyle* sets out the following methodology:

> To determine the interest for the first quarter of back pay owed, the parties shall multiply the back pay principal owed for that quarter by the sum of the quarterly average AFR plus three percentage points. To determine the quarterly average interest rate, the parties shall calculate the arithmetic average of the AFR for each of three months of the calendar quarter, rounded to the nearest whole percentage point. . . .
>
> To determine the interest for the second quarter of back pay owed, the parties shall add the first quarter principal, the first quarter interest, and the second quarter principal. The resulting sum is multiplied by the second quarter's interest rate as calculated according to the preceding paragraph. This multiplication yields the second quarter interest.

Slip op. at 19-20.

- Reimbursement for health insurance costs in the amount of $6,822.24; medical costs in the amount of $98.00; out-of-pocket expenses exclusive of legal fees in the amount of $1,726.11; late fees in the amount of $902.22; travel expenses in the amount of $664.34; telephone expenses in the amount of $184.40; interest costs in the amount of $220.00;

- Attorney fees totaling $81,328.55.

Complainant has excepted to a number of the ALJ's findings in this regard, citing the following items:

1. *A typographical error concerning amended joint stipulation no. 34 of Joint Exhibit No. 9* which should read $904.22. We hereby order this amount corrected.

2. *An attorney fee award for a combination of deposition time and travel time* which was incorrectly reduced . Complainant's counsel has substantiated the proposed adjustments based on his records, and the amounts appear reasonable. We accordingly order the award increased by $1,540.

3. *An award for expenses which should have included a fee to compensate an expert witness* for preparation of an affidavit attesting to appropriate attorney fees. Such an award is standard in the preparation of fee petitions, and the amount appears reasonable. We accordingly increase the award for expenses by $1,280.

4. *An improper reduction of the amount awarded for post hearing attorney fees.* The arguments advanced by Complainant for increasing this award – the length of the hearing and the transcript of hearing and the non-identity of issues briefed in response to the motion for summary disposition and in post-hearing filings – are compelling. We accordingly order the award of attorney fees increased by $19,443.75.

It is further **ORDERED** that Complainant may, within twenty (20) days from the date of this Decision and Order, submit to this Board an itemized petition for additional attorney fees and other litigation expenses incurred after **the May 12, 1998** issuance of the ALJ's Preliminary Order Granting Relief and Supplemental Order on Attorney's Fees and Costs. Complainant shall serve the petition on Respondent, who shall submit any response within thirty (30) days after the date of this Decision and Order. This Board will issue a supplemental order regarding attorney fees and costs after considering the additional attorney fee petition and any response thereto.

We adopt the ALJ's preliminary order as modified above. We additionally adopt the ALJ's recommendation that Complainant be awarded $50,000 in compensatory damages.

SO ORDERED.[24/]

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

[24/] Because this decision resolves all issues with the exception of the collateral issue of supplemental attorney fees and costs, it is final and appealable. *See Fluor Constructors, Inc. v. Reich*, 111 F.3d 979 (11th Cir. 1997) (under the Energy Reorganization Act, a decision that resolves all issues except attorney fees is final).

ADMINISTRATIVE REVIEW BOARD
CERTIFICATE OF SERVICE

CASE NAME : *Curtis Overall v. Tennessee Valley Authority*

ARB CASE NOS: **98-128, 98-111**

ALJ CASE NO. : **97-ERA-53**

DOCUMENT : **Final Decision and Order**

A copy of the above-referenced document was sent to the following persons on

APR 30 2001.

Tina McRae

CERTIFIED MAIL:

Lynne Bernabie, Esq.
Bernabei & Katz, PLCC
1773 T Street, NW
Washington, DC 20009-7139

Thomas F. Fine, Esq.
Assistant General Counsel
Office of General Counsel
Tennessee Valley Authority
400 West Summit Hill Drive
Knoxville, TN 37902-1499

O.D. Kingsley, President
Generating Group
Tennessee Valley Authority
1101 Market Street, 6A Lookout Place
Chattanooga, TN 37402

REGULAR MAIL:

Steven J. Mandel, Esq.
Associate Solicitor
Division of Fair Labor Standards
U.S. Department of Labor
200 Constitution Ave., N.W.
Room N-2716, FPB
Washington, DC 20210

John Spear
Office of Investigative Assistance
U.S. Department of Labor/OSHA
200 Constitution Avenue, N.W.
Room N-3618
Washington, DC 20210

Carol Merchant
Assistant District Director
Wage and Hour Division/ESA
John Duncan Federal Building
710 Locust St., Room 101
Knoxville, TN 37902

Director, Office of Enforcement
U.S. Nuclear Regulatory Commission
Washington, DC 20555

US Nuclear Regulatory Commission
Enforcement Officer
Region 2
61 Forsyth Street, S.W.
Suite 23T85
Atlanta, GA 30303-8931

Assistant General Counsel for Materials
Litigation and Enforcement
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Hon. John M. Vittone
Chief Administrative Law Judge
Office of Administrative Law Judges
800 K Street, N.W., Suite 400
Washington, DC 20001-8002

Hon. Clement J. Kennington
Administrative Law Judge
Office of Administrative Law Judges
Heritage Plaza, Suite 530
111 Veterans Memorial Blvd.
Metairie, LA 70005