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By Telecopier
July 2, 2001

Mr. Loren R. Plisco, Director
Division of Reactor Projects
Nuclear Regulatory Commission, Region II
Sam Nunn Atlanta Federal Center
61 Forsyth Street SW, Suite 23T85
Atlanta, GA 30303-8931

Re: EA-98-327, Apparent Violations of Employee
Discrimination Requirements (U.S. Department of Labor
Case No. 1997-ERA-0053).

Dear Mr. Plisco:

This letter is submitted in reference to your letter to Mr. John A. Scalice of the Tennessee Valley Authority ("TVA"), dated June 18, 2001, regarding the NRC's notice of two apparent violations of NRC regulations prohibiting discrimination against employees who engage in protected activities.

I am writing to inform you of two critical issues that should be taken into account by the NRC in deciding whether to take escalated enforcement action against TVA: (1) the continuing harassment of Mr. Overall for reporting of problems with the ice condenser system internally within TVA and externally, including actions so severe that they drove him off the job site; and (2) TVA's practices regarding managers who were found to have discriminated and retaliated against nuclear whistleblowers by the Department of Labor in the past. Indeed, the continuing harassment forced Mr. Overall to file a second DOL complaint, as discussed in the next section.

**I. The Continuing Harassment of Mr. Overall That Is
Attributable to TVA.**

On April 1, 1998, ALJ Kennington issued his Recommended Decision and Order in Overall v. TVA, Case No. 97-ERA-53. TVA was ordered to reinstate Mr. Overall to his former position or a comparable position, provide him with back pay, compensatory damages and pay his attorneys' fees and costs.

*DOL/Hillard indicated
OK to make DOL
transcripts public.
08/09/01.*

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As set forth below, Mr. Overall suffered from escalated harassment taken against him after the ALJ's decision and after his return to work at the Watts Bar Nuclear Plant. This harassment was closely linked to Mr. Overall's protected disclosures of safety problems at Watts Bar, which he made within TVA, to the NRC and publicly.

It is undisputed that TVA managers and employees knew about Mr. Overall's protected conduct, since ALJ Kennington's Order was posted throughout Watts Bar. TVA managers and employees also knew of Mr. Overall's protected conduct subsequent to ALJ Kennington's Order, since he not only raised these issues with his managers and co-workers while he was at Watts Bar in August and September 1998, but also his managers actively monitored his contacts with the NRC. Further, Mr. Overall's managers and coworkers knew that Mr. Overall's reporting of safety issues with the ice condenser system would have potentially costly consequences for TVA in possibly shutting down Watts Bar, as had happened at D.C. Cook.

Further, many of the harassing actions were timed so as to silence Mr. Overall from speaking out on safety issues to the press or the NRC. In fact, these actions reached a crescendo at the time shortly before and during the NRC's inspection of the ice condenser system at Watts Bar in early September 1998. Knowing that Mr. Overall was continuing to report problems with the ice condenser to the NRC, TVA increased the pressure on Mr. Overall to leave the job site, finally succeeding with the placement of a fake bomb in his truck on September 9, 1998, which aggravated his deteriorating physical and psychological state to the point where he could no longer work.

Mr. Overall had not been subjected to any harassing actions for a year prior to the issuance of ALJ Kennington's Decision, on April 1, 1998. While Mr. Overall's attorney and TVA's attorneys were attempting to negotiate a settlement of all of his claims, the media announced Mr. Overall's participation in an upcoming tritium press conference on May 23, and a press release issued on May 25, 1998 confirmed it. See Declaration of Curtis C. Overall, at ¶¶ 50, 54, 56 (Apr. 8, 2001) ("Overall Decl.") (attached and incorporated herein as Exhibit 1). The night of May 25, just before Mr. Overall left for the press conference in Washington, D.C., he received a harassing telephone call in which the caller repeatedly blew a whistle. *Id.* ¶ 58. Clearly, this was intended to intimidate him from being a nuclear "whistleblower," speaking out at the tritium press conference.

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Two days after the tritium press conference, which was televised nationally, and received extensive coverage in the local newspapers, a "SILKWOOD" harassing note was left on the windshield of his truck. *Id.* ¶ 61-62. This threatening note, which referenced a nuclear whistleblower who had been killed under suspicious circumstances, was intended as a direct threat to Mr. Overall for having participated in the tritium press conference and a warning that he should stop any further reporting of safety issues at Watts Bar.

One week after the tritium press conference, someone tampered with the gas cap of Mr. Overall's truck, either in an attempt to sabotage the vehicle that he routinely used, or to warn him that sabotage would occur in the future. *Id.* ¶ 63. This was intended to reinforce the "SILKWOOD" threatening note, as Ms. Silkwood was killed in an unexplained car accident.

In early June 1998, the local and nuclear industry press reported that the NRC had scheduled a conference with TVA to discuss problems with the ice condenser system. *Id.* ¶ 65. In rapid succession, two more harassing notes -- a "BOO!" note and a "STOP IT NOW" note -- were left on Mr. Overall's door and truck windshield, *id.* ¶¶ 66-67, another attempt to tamper with the gas cap of his truck occurred, *id.* ¶ 68, and a harassing phone call was made to his home, in which a number of people were laughing and breathing heavily. *Id.* ¶ 70. All these threats were intended to warn Mr. Overall that he should stop providing information to the NRC about ice condenser problems at Watts Bar and that the harassment would escalate if he continued.

On June 17, 1998, after the NRC conference with TVA, Mr. Overall saw a suspicious car, and on June 26, 1998, another harassing telephone call, in which the caller repeatedly blew a whistle, was made to the Overall home. *Id.* ¶¶ 73, 76. These two harassing incidents closely followed the publication of articles in the Chattanooga newspapers on June 17, that reported the NRC conference and mentioned Mr. Overall as a whistleblower. *Id.* ¶ 72. Once again, these harassing events were intended to warn Mr. Overall that he should not be providing information to the NRC, and that he should stop being a whistleblower.

After Mr. Overall returned to Watts Bar in early August 1998, he again made efforts to participate in the resolution of serious ongoing safety problems with the ice condenser system. The harassment of Mr. Overall continued unabated. Contrary to ALJ Kennington's Order, TVA did not reinstate him, but placed him

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in a make-work position, where he was systematically isolated, ostracized, and excluded from any meaningful work. Id. ¶¶ 78-79. TVA management told those who were named as harassers in ALJ Kennington's Decision that TVA was continuing to support them. These actions were intended to send Mr. Overall a message that he was being punished for being a whistleblower, and that he would be further retaliated against for reporting any new safety problems.

By August 1998, TVA management knew that the NRC was coming to do an inspection of the ice condenser system at Watts Bar in early September. Id. ¶ 78. TVA also knew that there were numerous open problems with this system, including the same or similar problems that had been identified at D.C. Cook, which had kept those plants shut down for almost two years, at a cost of over \$700 million. Id. ¶¶ 98, 144-150.

Thus, TVA commenced a series of increasingly threatening actions against Mr. Overall during the week prior to the NRC inspection. On August 25, 1998, James Adair, who was named in ALJ Kennington's Decision, had a confrontational conversation with Mr. Overall in which he (Adair) refused to provide Mr. Overall with necessary information about a Problem Evaluation Report ("PER") which had identified the same problems during a recent outage that Mr. Overall had identified in PER 246 in 1995. Id. ¶ 80. Indeed, the NRC had previously cited TVA for a violation because Mr. Adair, as the Lead Civil Engineer in 1995, had improperly closed out PER 246.¹ That evening, a truck followed Mr. Overall home from work and attempted to force him off the road. Id. ¶ 81. On August 26, 1998, Mr. Overall reported his concerns about Mr. Adair's obstructive attitude to his supervisor, Philip Smith, and that he (Overall) was being excluded from any meaningful work. Id. ¶ 82. On August 27, 1998, Mr. Overall received, through TVA interoffice mail, a threatening note, which read "LEAVE WATTS BAR, THERE IS NO ROOM FOR WHISTLEBLOWERS HERE OR ELSE." Id. ¶¶ 83-84. On August 30, 1998, a harassing voice mail message was left on Mr. Overall's work telephone. Id. ¶ 87.

The threatening note could only have been perpetrated by someone who had a Watts Bar security clearance so as to be able

¹See NRC, EA-99-115, Notice of Violation (NRC Office of Investigations Report Nos. 2-98-023 and 2-98-023S, and NRC Inspection Report Nos. 50-390, 391/99-06) (July 17, 2000).

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to obtain TVA mailers from that facility. Id. ¶ 86. The harassing voice mail message must have been made by someone at TVA, who knew Mr. Overall's work number and knew that incoming calls at TVA could not be identified as to caller. Id. ¶ 87. All four harassing incidents were intended to warn Mr. Overall that he must stop investigating safety problems with the ice condenser system, and not provide any information to the NRC during its upcoming inspection. Although Mr. Overall took some time off from work due to the onsite harassment, especially the harassing note, he returned during the week of the NRC inspection. Id. ¶¶ 88, 91.

During the week of the NRC inspection, when Mr. Overall was reporting problems privately to the NRC, the harassment of Mr. Overall drastically escalated. On September 2, 1998, Mr. Overall had a private meeting with the NRC inspectors, at their request. Id. ¶¶ 92-93. His supervisors attempted to monitor this meeting and tried to get him to divulge what he had told the NRC, but Mr. Overall refused to share this private conversation with them. Id. That evening, a call was made to Mr. Overall's home by someone who was attempting to monitor his whereabouts. Id. ¶ 94.

On the evening of September 3, 1998, or the morning of September 4, someone wrote a threatening note on the wall of the bathroom at Watts Bar that Mr. Overall usually used, which read "Go Home All Whistleblowers Now." Id. ¶ 96. This note could only have been written by someone who had a Watts Bar security clearance, and who knew which bathroom was closest to Mr. Overall's office. Id. This note was written during the night in the bathroom directly under the conference room where the NRC inspectors were working on the inspection. TVA quickly painted it over since an employee other than Mr. Overall reported it and it would be better if the NRC did not find out about it.

Mr. Overall never saw this note, and, therefore, did not react to it. So, he stayed on site and continued to talk to the NRC inspectors about ongoing problems with the ice condenser system. Id. ¶ 97. On Friday, September 4, 1998, Mr. Overall tried to have another private meeting with the NRC inspectors in the conference room where they were working. However, Mr. Adair, in the middle of that meeting, interrupted and stopped Mr. Overall from speaking any further with the NRC inspectors. Id. ¶ 97. All of these harassing events were intended to stop Mr. Overall from reporting about the continuing problems with the ice condenser system.

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Therefore, on the weekend following the NRC inspection, yet another threatening note was left on one of his cars, which read "DID YOU GET THE MESSAGE YET?" Id. ¶ 99. Mr. Overall received leave for the following Tuesday (after Labor Day) because of his distress from the latest note. He also took leave for the following Wednesday, September 9, 1998, in order to photocopy documents for the TVA OIG. Id. ¶ 102. That day somebody followed Mr. Overall from his home to a shopping center and placed a fake pipe bomb in the bed of his pickup truck while he was making his photocopies at an office store in the shopping center. Id. ¶¶ 103-106, 108. At this point, Mr. Overall's physical and mental health collapsed, and he was admitted to the hospital as he showed heart attack symptoms. Id. ¶ 107. It was this life threatening incident which succeeded in driving Mr. Overall off the Watts Bar site for good.

One week after the bomb threat, Mr. Overall received another harassing note tied to the fence outside his home, which read "Curtis, Watch Your Backside..." and was signed "Your Friend." Accompanying the note was a bag of screws. Id. ¶ 113. This note served two purposes. It was yet another threat ("Watch Your Backside..."). It also was an attempt to reassure Mr. Overall that if he continued to stay away from Watts Bar, and stopped his involvement with the NRC and its investigation of safety problems in the ice condenser system at Watts Bar, then he would not be harassed any more. This harassing note, prepared on Watts Bar official stationery, and accompanied by a bag of broken ice basket screws, could only have been done by a TVA manager or employee with a Watts Bar security clearance, who had access to Watts Bar stationery and to the broken ice basket screws, and who had a motive to silence Mr. Overall. Id.

Finally, a "You Need To Go" harassing note was sent to Mr. Overall in late December 2000, near the close of discovery in his second DOL case, and a few months before the hearing was scheduled to commence. Id. ¶ 143. This anonymous threat could only have been perpetrated by someone with a Watts Bar security clearance who had access to Mr. Overall's old Watts Bar identification badge, which he had returned to Watts Bar Human Resources nine months before. Id. ¶¶ 138, 143. This threat was the most recent attempt to warn Mr. Overall that he should stop talking about safety problems with the ice condenser system at Watts Bar.

Critically, only TVA managers or employees had the opportunity to have committed many of the anonymous harassing

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incidents. Further, only TVA managers or employees had the motivation and intent to commit all of the harassing and threatening incidents, since TVA was desperately attempting to stop the NRC from implementing escalated enforcement against TVA with regard to both the finding of discrimination by ALJ Kennington and the safety reports made by Mr. Overall about the ice condenser system during this period in 1998. All of the harassing actions had to do with Mr. Overall's reporting of safety problems at Watts Bar and his earned title as a "whistleblower." Mr. Overall was the only known "whistleblower" still on the Watts Bar site in 1998. No one except TVA management had any interest in the fact that Mr. Overall was a "whistleblower" who was threatening the continued operation of Watts Bar through his safety reports. None of these incidents referred to anything but Mr. Overall's safety reports.

Therefore, all of the evidence points to only one conclusion -- that TVA management took all of these harassing actions against Mr. Overall to drive him off the Watts Bar site and ensure he would never again have access to information about the ice condenser system at Watts Bar.

II. TVA's Failure to Discipline Its Managers Who Were Found to Have Discriminated Against Nuclear Whistleblowers.

TVA has failed to discipline managers who were found by the DOL to have discriminated against nuclear whistleblowers. This includes not only the managers who discriminated and retaliated against Mr. Overall, but also the managers who were found to have discriminated against at least two other TVA whistleblowers, William Jocher and Robert Klock.

A. TVA's Failure To Discipline Its Managers Who Discriminated Against Curtis Overall.

The DOL found that three TVA managers -- James Adair, Dennis Koehl and Landy McCormick -- had discriminated and retaliated against Mr. Overall for his protected conduct. See Overall v. TVA, Final Decision and Order (ARB Apr. 30, 2001), at 6-10, 21-26, 28-34. Indeed, the ARB concluded that "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." Id. at 37. Notwithstanding these findings, TVA subsequently promoted Messrs. Adair and Koehl.

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Mr. Adair recently testified that TVA promoted him to the position of Manager of the Fossil Engineering Services in December 1999, which was after the ALJ's decision in Mr. Overall's first case. See Hearing Transcript, Overall v. TVA, Case No. 1999-ERA-0025, at 2188-2190 (May 10, 2001) (portions attached and incorporated herein as Exhibit 2). Mr. Adair further admitted that TVA has never disciplined him for his involvement in the scheme to cover up the safety problems that were identified by Mr. Overall. Id. at 2190.

Similarly, Mr. Koehl, who was Mr. Overall's second-line supervisor in 1995, was subsequently promoted by TVA to the position of Plant Manager at Sequoyah Nuclear Power Plant. See Inside TVA, "For the Record, Sequoyah Excels" (Nov. 21, 2000) (attached and incorporated herein as Exhibit 3).

B. TVA's Failure To Discipline Its Managers Who Discriminated Against William Jocher.

The Department of Labor, in a final decision,² Jocher v. TVA, found that Joe Bynum, who was then TVA's Vice President of Nuclear Operations, discriminated against Mr. Jocher, a TVA nuclear whistleblower. See Jocher v. TVA, Case. No. 94-ERA-24 (ALJ July 31, 1996) (attached and incorporated herein as Exhibit 4), The NRC similarly determined that Mr. Bynum deliberately discriminated against Mr. Jocher. See NRC, "Order Prohibiting Involvement in NRC-Licensed Activities" (Jan. 13, 1997) (attached and incorporated herein as Exhibit 5). The NRC ordered that Mr. Bynum be "prohibited from any involvement in NRC-licensed activities for a period of five years." Id. at 3. The NRC proposed a \$100,000 fine against TVA based upon the ALJ's finding that TVA and Mr. Bynum had retaliated against Mr. Jocher:

The violation is significant and is given a Severity Level I, the highest level of NRC violation, because it involved an act of employee discrimination by a senior corporate manager. . . . [The] impact of discrimination committed at this level has the potential to affect the environment throughout the company, and the NRC places a high value on the freedom of nuclear industry employees to raise potential safety concerns to licensee management or to the NRC.

²Mr. Jocher's case was subsequently settled in his favor, so there was no review by the ARB.

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See "NRC Staff Proposes \$100,000 Fine Against Tennessee Valley Authority" (Jan. 14, 1997) (attached and incorporated herein as Exhibit 6); see also "NRC Information Notice: 1997 Enforcement Sanctions for Deliberate Violations of NRC Employee Protection Requirements," at 2 (Feb. 9, 1998) (attached and incorporated herein as Exhibit 7).

Instead of terminating Mr. Bynum, TVA promoted him. At the time of the ALJ's decision and the NRC's Order, Mr. Bynum was Vice President, Fossil Operations in the Fossil and Hydro Power organization at TVA, having been transferred from TVA Nuclear. In 1998, one year after the NRC's Order and two years after the ALJ's decision, TVA promoted Mr. Bynum to Executive Vice President, Fossil Power Group. See "TVA Annual Report for 2000: Executive Committee," at 2 (attached and incorporated herein as Exhibit 8); see also TVA Leadership (2001) (attached and incorporated herein as Exhibit 9).

C. TVA's Failure To Discipline Its Managers Who Discriminated Against Robert Klock.

The Department of Labor, in a final decision,³ Klock v. TVA, found that Masoud Bajestani discriminated against Mr. Klock, another TVA nuclear whistleblower. See Klock v. TVA, Case No. 95-ERA-20 (ALJ Sept. 29, 1995) (attached and incorporated herein as Exhibit 10). ALJ Burke found that Mr. Bajestani, who reported directly to Mr. Scalice, fired Mr. Klock only two weeks after Mr. Klock engaged in protected activity. Id. at 12. Mr. Scalice, Mr. Bajestani's first-line supervisor, ratified Mr. Bajestani's decision. ALJ Burke noted that Mr. Bajestani's testimony lacked credibility and was pretextual. Id. at 17. ALJ Burke concluded that Mr. Bajestani's actions were motivated by Mr. Klock's reputation as a whistleblower. Id. at 21. At that time, Mr. Bajestani was the test group lead for the NSSS Group (Nuclear Steam Supply System Group). Id. at 4.

Once again, instead of disciplining Mr. Bajestani, TVA promoted him to Assistant Plant Manager at Watts Bar, then to Plant Manager at Browns Ferry Nuclear Plant, then to Site Vice President at Sequoyah Nuclear Plant, and most recently to Senior Vice President of Fossil Operations. See Inside TVA, "Bajestani new SVP in FPG," at 1-2 (July 18, 2000) (attached and

³Mr. Klock's case was subsequently settled in his favor, so there was no review by the ARB.

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incorporated herein as Exhibit 11). Indeed, Mr. Bajestani now reports directly to Mr. Bynum. Id. at 1.

D. The Sworn Testimony of John Scalice, TVA's Chief Nuclear Officer, That TVA Disciplines or Terminates Its Managers Who Discriminated Against TVA Employees Who Engaged in Protected Conduct, Lacks Credibility.

John Scalice, TVA's Chief Nuclear Officer and Executive Vice President, recently testified that TVA disciplines or terminates its supervisors and managers who discriminated against TVA employees who engaged in protected conduct. See Hearing Transcript, Overall v. TVA, Case No. 1999-ERA-0025, at 845-846, 849, 852-853 (Apr. 26, 2001) (portions attached and incorporated herein as Exhibit 12). Mr. Scalice testified that TVA has a specific disciplinary policy with a range of penalties for various offenses, including intimidation and harassment. Id. at 855-857.

Mr. Scalice specifically denied that Mr. Bajestani had been found by the NRC or the DOL to have discriminated against a nuclear whistleblower. Id. at 877-878, 894. Mr. Scalice did not know whether TVA had determined if Mr. Bynum had discriminated against Mr. Jocher. Id. at 893.

Mr. Scalice's testimony lacks credibility in light of the fact that Messrs. Adair, Bajestani, Bynum and Koehl, all of whom were found by the DOL to have discriminated and retaliated against nuclear whistleblowers, each received substantial promotions within a short time period after these DOL findings, as set forth supra.

Clearly, TVA's policy is the opposite of what it espouses -- its policy is to reward managers who harass, terminate and intimidate whistleblowers.

III. CONCLUSION.

Mr. Overall suffered from significant harassment subsequent to the ALJ's decision in his first DOL case -- harassment that was closely related in time to his continued protected disclosures, that escalated after his return to work and that culminated with a series of events during and immediately following the NRC inspection of the ice condenser system at Watts Bar, ultimately forcing Mr. Overall off the worksite. Clearly, TVA failed to maintain a harassment-free work environment. More

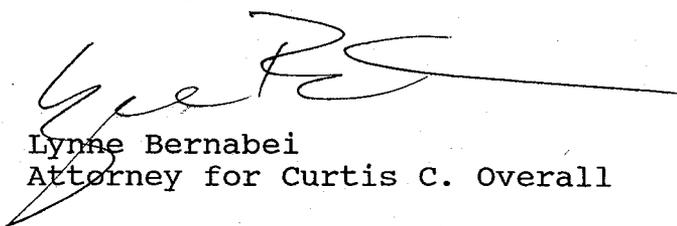
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importantly, TVA carried out this harassment and retaliation. Only TVA had the motive and opportunity to carry out this type of retaliation on and off the worksite. TVA's motive and intent is also evidenced by TVA's failure to discipline its managers who were found by the DOL to have discriminated against other nuclear whistleblowers.

In light of TVA's repeated and flagrant harassment of whistleblowers such as Mr. Overall, and its flaunting of DOL and NRC findings of discrimination in the past, the NRC should take severe actions against TVA including a fine of at least \$1.0 million and findings against the specific TVA managers who retaliated against Mr. Overall. Severe enforcement action against TVA would also tend to rehabilitate NRC Region II's image as a region whose lax enforcement or non-enforcement for safety problems is the rule.

Please give me a call if you would like to discuss this matter further.

Sincerely,



Lynne Bernabei
Attorney for Curtis C. Overall

Enc.
cc: Mr. Curtis C. Overall

BEFORE THE OFFICE OF ADMINISTRATIVE LAW JUDGES
UNITED STATES OF AMERICA
DEPARTMENT OF LABOR

CURTIS C. OVERALL, Complainant, v. TENNESSEE VALLEY AUTHORITY, Respondent.
--

Case No. 99-ERA-25

DECLARATION OF CURTIS C. OVERALL

I, Curtis C. Overall, this 8 day of April 2001, declare and state as follows:

1. I am the Complainant in the above-captioned action. I am submitting this declaration in support of Complainant Curtis C. Overall's Opposition to Respondent Tennessee Valley Authority's Motion for Summary Decision. I am over 18 years of age and have personal knowledge of the facts related herein.

2. I earned an Associate of Science degree from Cleveland State Community College in 1973, in technical engineering and drafting. See Resume of C. Overall (March 2001) (attached and incorporated herein as Attachment 1). From 1974 to February 1979, I was employed as a Draftsman II for the Chattanooga Department of Public Works, Engineering Division. Id. at 3.

3. From February 1979, when I started my employment with the Tennessee Valley Authority ("TVA"), to January 1983, I worked in the TVA Fossil & Hydro Division, Chattanooga, Tenn., as an Engineering Aide. Id. My job responsibilities were to provide technical support to all TVA fossil and nuclear plants, through

harassing note that I found on the fence by my house on September 17, 1998. See Letter from C. Van Beke to C. Hickman (Feb. 1, 1999) (attached and incorporated herein as Attachment 56).

However, I never heard anything further from the TVA OIG about their investigation of these incidents.

122. On February 3, 1999, I met with several investigators from the NRC Region II Office of Investigations. I discussed the harassing incidents and the events surrounding the PER 246 that I had initiated in 1995.

123. On February 19, 1999, I filed a new complaint with the Department of Labor, setting forth the harassment and intimidation that occurred after ALJ Kennington had ruled in my favor in April 1998, and requesting relief under Section 211 of the Energy Reorganization Act. See Complaint of Curtis C. Overall (Feb. 19, 1999) (portions attached and incorporated herein as Attachment 57).

124. On April 3, 1999, the Associated Press distributed a wire article that was published in five Tennessee and Alabama newspapers. This article stated that the NRC was inspecting the ice condenser systems at Watts Bar, McGuire, Sequoyah and Catawba plants based on the problems I had identified with the ice condenser system at Watts Bar. This article was published in the Florence Times Daily (Alabama), Nashville Tennessean, Decatur Daily, Chattanooga Times/Free Press, and the Knoxville News-Sentinel. See Associated Press, "Systems Cited by TVA Whistleblower Inspected" (Apr. 3, 1999) (attached and

incorporated herein as Attachment 58).

125. On or around April 4, 1999, Doug Jackson of the TVA Employee Concerns program called me to tell me that the TVA Employee Concerns Program had a file on the harassment that I reported. I asked Mr. Jackson if he would read the file to me over the phone, and he did. However, the file largely concerned the broken screws and my reports of subsequent harassment, but nothing in the file indicated that TVA had taken any action on the harassment, or had they reported the harassment to the NRC. Indeed, TVA had closed out the case with no action taken.

126. On May 5, 1999, I wrote to Al Ignatonis, an NRC Region II investigator, setting forth my nuclear safety concerns at TVA facilities. See Letter from C. Overall to A. Ignatonis (May 5, 1999) (attached and incorporated herein as Attachment 59). I informed Mr. Ignatonis that I had "received threats on the job site at Watts Bar" and that the hostile work environment toward me was a significant safety concern. Id.

127. During 1999, I continued to meet on a regular basis with my treating psychologist, Dr. Leigh, and less frequently with my psychiatrist, Dr. Ferguson. I found that because I was no longer at Watts Bar, I usually experienced less emotional distress and physical stress, although TVA's request in early January 1999 that I provide them with compelled handwriting exemplars and take a lie detector test did significantly upset me at the time.

128. During 1999, I discussed with Dr. Leigh whether I could

return to work at TVA, but preferably not at Watts Bar. I told him that my life's work had been in this field and that I was considered an expert at TVA regarding the ice condenser system, which was my pride and joy. Not being able to work in my field of expertise was having a devastating effect on my pride and self-esteem.

129. In late May 1999, I met with Dr. Patrick Lavin, a psychologist who worked for TVA, as part of the reinstatement of my security clearance. I told Dr. Lavin about all the harassing and threatening incidents that I and my family members had experienced, and the effects that these incidents were having on my emotional health. I also told Dr. Lavin that I thought I was slowly "getting better," although I was still suspicious and paying close attention to the area around me.

130. On July 8, 1999, I had a follow-up session with Dr. Lavin, TVA's psychologist. I told Dr. Lavin that I felt like I was in better control of myself, and had an improved self-esteem. I took another psychological test. I told Dr. Lavin that I was still anxious and concerned about returning to work at Watts Bar, but I thought I could return to work in a non-nuclear setting, if I was not reminded of my bad experiences at Watts Bar. I told Dr. Lavin that "I want to put nuclear behind me," and that I was willing to undergo new training to work in a different job.

131. In early August 1999, I was contacted by several individuals who were planning on participating in a meeting to discuss the ongoing problems at the D.C. Cook nuclear plant,

including the ice condenser system. I was asked to talk about the safety problems that I had identified at Watts Bar that were also applicable to D.C. Cook, and the organizers listed my name as an attendee in the meeting announcement. Ultimately, however, I was unable to participate in this meeting. I later learned, through discovery, that Mr. Smith, my former manager at Watts Bar, was monitoring my plans to participate in this meeting and was reporting this to Watts Bar Human Resources.

132. On August 23, 1999, I had another session with Dr. Lavin, TVA's psychologist. Dr. Lavin administered a psychological test to me, called the MMPI-II. He did not tell me what the results were of this test. Several days later, I had a follow-up session with Dr. Lavin on August 27, 1999. I told him that I felt better over the past few months, although my mood remained variable. I said that I was still "on guard," and that "I wouldn't say that I'm paranoid but I'm over-cautious." I told Dr. Lavin that I could return to work at TVA, if it was in a safe area where the other workers did not know about my prior experience at Watts Bar.

133. In mid-October, 1999, I was informed by TVA Nuclear Security that my "unescorted access security clearance has been denied." See Letter from R. Casey to C. Overall (Oct. 12, 1999) (attached and incorporated herein as Attachment 60). TVA's decision was based upon Dr. Lavin's "decision not to recommend your psychological approval for unescorted access at this time" and correspondence from Drs. Ferguson & Leigh. Id. Through my

attorneys, I then requested a review of this decision by the Screening Board at its next meeting. On November 22, 1999, my attorneys also filed a new Section 211 complaint, based upon TVA's denial of my security clearance. My attorneys also submitted two additional letters from Dr. Leigh that stated I could go back to work if provided a safe work environment, where my safety was protected.

134. On December 6, 1999, my unescorted access security clearance was reinstated by TVA. See Letter from R. Casey to C. Overall (Dec. 6, 1999) (attached and incorporated herein as Attachment 61). Mr. Casey stated that this was based upon Dr. Lavin's "recommendation, which states that it is his opinion that you should be regarded as psychologically fit for duty and as meeting psychological qualifications for unescorted access authorization to TVA nuclear plants at this time." Id. Dr. Lavin stated that his opinion was based on the professional judgment of my treating psychologist, Dr. Leigh, whose "knowledge of this patient is based upon very extensive treatment contact." Id. Dr. Lavin recognized that Dr. Leigh "is highly experienced in conducting psychological assessments for NRC nuclear plant security purposes." Id. As a result, the Section 211 complaint that I had filed on November 22, 1999 was withdrawn.

135. During December 1999 and January 2000, my attorneys negotiated my return to work with TVA's attorneys. My treating psychologist, Dr. Leigh, advised my attorneys about the medical restrictions that he recommended for me. See Letter from G.

Leigh to L. Bernabei (Jan. 18, 2000) (attached and incorporated herein as Attachment 62). Dr. Leigh emphasized "first and foremost is that he not return to the Watts Bar Nuclear Plant," and that working at Sequoyah would also be a "very high risk." Id. Therefore, Dr. Leigh recommended a transition to full time work, at the TVA offices in Chattanooga. Id. Dr. Leigh also emphasized that "restricting his contact with personnel previously identified by Mr. Overall as threatening to him is recommended." Id.

136. As a result, TVA and my attorneys agreed that I would return to work at the TVA Fossil and Hydro Division, located in Chattanooga, on February 28, 2000. My job title is Engineer, Operations Specialist and I am assigned to the Fossil Power Group, Corporate Office.

137. Upon my return to work at Chattanooga, I soon learned that Mr. Adair, who was involved with the premature closure of my PER 246 at Watts Bar, and who had a confrontational conversation with me during my brief return to work at Watts Bar in 1998, was now in my supervisory chain-of-command at Chattanooga, since he had transferred from Watts Bar to Fossil and Hydro the previous year. I also learned that he had received an e-mail regarding the date for my return to work. I was upset and concerned that, despite TVA's agreement to place me in a neutral environment, I was now being exposed to someone who had harassed me back in 1995, and again in 1998. However, I have focused on my new job, and attempted to avoid any unnecessary contact with Mr. Adair.

138. In the Spring of 2000, I realized that I still had my Watts Bar badge and beeper (pager). Since I no longer needed these in my new job at Chattanooga, I had my wife Janice mail them back to Mr. Higginbotham (Watts Bar Human Resources).

139. In late March 2000, I received from David Lochbaum, a nuclear engineer who works for the Union of Concerned Scientists (Washington, D.C.), a copy of a letter that he had received from the NRC regarding the ice condenser problems that he and I had reported to the NRC. See Letter from NRC to D. Lochbaum (Mar. 23, 2000) (attached and incorporated herein as Attachment 63). The NRC stated that they had substantiated my allegations regarding the broken and whole ice basket screws that I found in the melt tank in 1995. Id. Furthermore, "based on NRC inspections and review of licensee testing data, the screw deficiency was determined to be most probably caused by improper installation, and not by improper basket design or defective screws," as TVA had claimed. Id.

140. The NRC also stated that "the NRC inspections and an OI investigation confirmed that the results of the [first and second lab reports had not been] sent 'officially' to Westinghouse, as required by the corrective action steps in PER WBPER950246." Id. Further, "the evidence appeared to indicate that both apparent violations were willful," and "the evidence indicated that the licensee willfully violated this requirement." Id. Finally, the NRC concluded that "NRC inspections and an OI investigation confirmed that defects identified in warehouse screws and

documented in the June 2, 1995, TVA CLS facility report [first lab report] were not listed in the June 19, 1995 report [second lab report] and not timely evaluated; and that the June 2 report [first lab report] was retracted and attempts made to retrieve all the issued copies." Id. For these reasons, the NRC decided to hold "a closed predecisional enforcement conference to discuss these apparent violations" in Atlanta in April 2000. This meeting was ultimately canceled. I later learned, through discovery in this case, that TVA management, including Messrs. Pace, Smith, Jordan and Purcell, devoted extensive time and effort to convince the NRC to postpone or cancel this conference. In particular, TVA claimed that there was no discrepancy between the two versions of Figure 7 in the first and second lab reports, arguing that the same screw was used in both versions.

141. In or around March 2000, I was contacted by a reporter from the South Bend Tribune, who was doing a story on the problems at the D.C. Cook plant, including the ice condenser issue which extended the plant shutdown, ultimately costing the utility company over \$700 million in lost revenue. I informed this reporter about the problems that I had identified at Watts Bar, and explained how these problems were applicable to other ice condenser plants, including D.C. Cook. I told him that I had reported my concerns to the NRC, both Regions II and III, and that Region III had initiated inspections at D.C. Cook which determined that D.C. Cook had the some of the same problems that I had found at Watts Bar.

142. In late May 2000, the South Bend Tribune newspaper published a five-part series on D.C. Cook; I was featured in the second article. See "This Dog Don't Hunt.' That's What an Ice Condenser Expert Thought when He Heard Cook Nuclear Plant Was Prepared for Restart," South Bend Tribune (May 29, 2000) (attached and incorporated herein as Attachment 64). The reporter wrote: "The long shutdown of Donald C. Cook Nuclear Plant vindicated Curtis Overall, but his career is shot just the same." Id. This article discussed my extensive contacts with my counterparts at other ice condenser plants, including those at D.C. Cook. Id. I later learned, through discovery in this case, that Mr. Smith was continuing to monitor my contacts with the media, and had informed TVA management when the reporter had contacted my counterparts at D.C. Cook and told them that I had provided him with information about the ice condenser system.

143. On December 21, 2000, my wife Janice was opening the mail; it is her custom to open all mail addressed to our house. She opened an envelope that was addressed to me, with a printed label. It contained a note that said, in cut-out letters, "you need to go," and included a photocopy of my old Watts Bar identification badge. See harassing note (Dec. 21, 2000) (attached and incorporated herein as Attachment 65). Janice showed me this note, which she then mailed to a document examiner, David Grimes, that my attorneys had retained. Janice also filed a report with the local police department. See Cleveland Police Dept., Uniform Offense Report, Complaint No. 00-

61014 (Dec. 21, 2000) (attached and incorporated herein as Attachment 66). She told the police that I had received similar harassing notes in the past, that I had been recently reinstated at TVA, and that we did not know who did this. My attorneys also provided TVA's attorneys with this harassing note and envelope. However, I never heard anything further from the local police or TVA OIG about their investigation of this threatening incident.

144. On March 9, 2001, my attorneys informed me that TVA had just sent them another 700 pages of documents, including 16 PERs that specifically related to safety and operational problems with the ice condenser system at Watts Bar. See Watts Bar PER 980018 (Jan. 17, 1998); PER 980313 (Mar. 18, 1998); PER 980597 (May 18, 1998); PER 980639 (May 28, 1998); PER 980742 (June 22, 1998); PER 980787 (July 6, 1998); PER 980784 (July 7, 1998); PER 980792 (July 8, 1998); PER 980823 (July 17, 1998); PER 980835 (July 21, 1998); PER 980885 (Aug. 3, 1998); PER 980956 (Aug. 25, 1998); PER 980973 (Aug. 28, 1998); PER 980974 (Aug. 28, 1998); PER 980977 (Aug. 28, 1998); and PER 980982 (Sept. 1, 1998) (portions attached and incorporated herein as Attachments 67-82). Fourteen of the sixteen PERs were still open while I was at Watts Bar during August and early September 1998. See Attachments 69-82. Indeed, five of the PERs were initiated while I was at Watts Bar. See Attachments 78-82. There is no reason that I should not have been involved with the close-out and other work on these PERs, since it was central to my work on the ice condenser system as a systems engineer for that system.

145. Of the fourteen PERs that were open, I saw that my manager at Watts Bar in 1998, Mr. Smith, was involved with the investigation and closure of twelve of them. See Attachments 69-72 and 75-82. I also saw that Mr. Jordan, who held my former position and was my supervisor, was involved with close-out and other work on ten of the fourteen open PERs. See Attachments 69-71, 75-77 and 79-82.

146. I saw that five of these PERs related to issues that were first identified by the NRC at D.C. Cook, and TVA was determining whether they were also applicable to Watts Bar, in some cases at the NRC's demand. See Attachments 70, 73, 75, 80 and 82. Since I was the one who had reported my safety concerns to NRC Region III, which then initiated the D.C. Cook inspections, these PERs fell within my area of expertise, and I believe that I should have been informed about these PERs and allowed to participate in their investigation and closure while I was working at Watts Bar in 1998. For example, PER 980639 required that TVA evaluate 109 questions that the NRC had raised at D.C. Cook. See Attachment 70. Instead, Mr. Smith and others excluded me from having any participation with these PERs, or even knowing about the initiation of these PERs.

147. I also saw that four of these PERs related to unexpected temperature increases and steam leaks in the ice condenser system, which was causing excessive condensation, leading to ice buildup around the deck doors and excessive moisture in the insulation blankets. See Attachments 69, 72, 77

and 78. As these were critical safety issues that I had discussed with the NRC, and that I attempted to raise with Mr. Smith and others in my work group, I believe that I should have been told that TVA had initiated five PERs on this subject, and allowed to participate in their closure. For example, PER 980787 reported that approximately 100 pounds of ice were removed from the intermediate deck doors in four bays, there was excess moisture buildup on the underside of the upper deck doors, and that this problem "continues to threaten the operability of the ice condenser." See Attachment 72. Similarly, PER 980956 reported that "there have been repetitive failures of the pull test for ice condenser intermediate deck doors," meaning that there was so much ice buildup around these doors that they could not be opened with a reasonable amount of force. See Attachment 78. Mr. Smith and Mr. Jordan excluded me from doing any work on these PERs.

148. One of the open PERs involved screw heads being found in the melt tank and around the base of the ice condenser baskets. See Attachment 75. As this was exactly the same problem that I had identified in PER 246, my supervisors should have informed me about the recurrence of this problem, so that I could use my knowledge and expertise to work on the closure of this PER. As before, I was instead excluded from any participation with this PER.

149. Three of the open PERs concerned the technical specifications for the ice condenser system, including whether

the warehouse screws were not in compliance with the specifications. See Attachments 71, 74 and 81. Since I had extensive experience with the technical specifications for the entire ice condenser system, my TVA supervisors should have assigned me to participate in the investigation and closure of these PERs. Instead, Mr. Smith and others in my group excluded me from having any role with these two PERs.

150. The remaining open PER involved damage to some of the ice condenser baskets that occurred during the weighing of the baskets. See Attachment 79. Again, since I had extensive experience with the baskets and their weighing, my TVA supervisors should have involved me with the investigation and closure of this PER. However, Mr. Smith and others in my work group prevented me from participating in this PER.

I declare, this 8 day of April, 2001, under penalty of perjury, and pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge.


CURTIS C. OVERALL

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:)

CURTIS C. OVERALL,)

Complainant,)

v.)

TENNESSEE VALLEY AUTHORITY,)
WATTS BAR NUCLEAR PLANT,)

Respondent.)

Case No. 1999-ERA-0025

Thursday
May 10, 2001

Bankruptcy Courtroom
Baker Federal Courthouse
800 Market Street
Knoxville, Tennessee

The above-entitled matter came on for hearing,
pursuant to notice, at 8:37 a.m.

BEFORE: HONORABLE ROBERT L. HILLYARD
Administrative Law Judge

BAYLEY REPORTING, INC.
(727) 585-0600

Exhibit 2
EA-99-115 (TVA)

on-the-job training to TVA personnel on maintenance practices and data accumulation, and assisting plant outage support groups with the planning of refueling and maintenance outages. Id.

4. From January 1983 to December 1984, I worked at TVA's Sequoyah Nuclear Plant ("SQN" or "Sequoyah"), Soddy Daisy, Tenn., as an Engineering Associate in the Mechanical Maintenance Group. Id. My job responsibilities were to write repair instructions, to provide technical support and troubleshooting, to assure material availability, and to coordinate craft and operations personnel, all as required to maintain the plant operation and availability. Id. At Sequoyah, I worked on various systems including the ice condenser system.

5. From December 1984 to December 1989, I worked at TVA's Watts Bar Nuclear Plant ("WBN" or "Watts Bar"), Spring City, Tenn., as Power Plant Maintenance Specialist. Id. My job responsibilities included working on corrective and preventive maintenance tasks; trending assigned systems and components; and initiating field change requests and design change notices, all as required to improve plant efficiency and operability. Id. I also periodically served as back-shift Engineer Coordinator, which meant that I was the maintenance contact person for all systems at WBN, including the ice condenser system. In 1987, TVA awarded me the Bronze Honor Award, in recognition for my contributions to the ice condenser system at Watts Bar, which significantly improved the efficiency and operability of this system. See TVA Bronze Honor Award (1987) (attached and

incorporated herein as Attachment 2).

6. From December 1989 to October 1995, I was a Power Maintenance Specialist (Systems Engineer) at Watts Bar. See Attachment 1, at 2. My primary responsibility was to be the Systems Engineer for the System 61 Ice Condenser. I was the plant expert and primary plant contact for the ice condenser system, which required me to perform multi-disciplinary engineering activities associated with this system. See Curtis C. Overall, Job Description (Nov. 20, 1989) (attached and incorporated herein as Attachment 3). I performed work relating to the maintenance, testing, operation, construction and design of the ice condenser system at Watts Bar. Id. at 2, ¶ 1. I was responsible for ensuring that this system operates efficiently and reliably so that the availability and operability of this system is maximized. Id.

7. As Systems Engineer for the ice condenser system at Watts Bar, I was responsible for knowing all aspects of this system, and for maintaining all quality assurance documents relating to this system. Id. at 2, ¶¶ 3-4. I was also responsible for ensuring that the ice condenser system was properly tested, which included testing that maintenance, modification work, or operational activities had been done properly. Id. at 2, ¶ 5.

8. As Systems Engineer, I was independently responsible for taking or initiating appropriate actions and documentation to resolve all system problems with the ice condenser system. Id.

at 2, ¶ 6. To perform these duties, I performed inspections, took measurements, drew sketches, took photographs, designed special tools, and provided expert advice in preparing design studies or meetings required to resolve system problems. Id. I also trained other TVA employees on the operability of the ice condenser system and the processes for ice loading.

9. As Systems Engineer, I was required to conduct or participate in investigations resulting from abnormal events, and to prepare or provide input for reports to TVA and the Nuclear Regulatory Commission ("NRC"). Id. at 3, ¶ 1. This included analyzing the abnormal event to determine the root cause of the problem, and recommending corrective actions. Id.

10. As part of my investigatory and regulatory responsibilities, I initiated and participated in the closure of Problem Evaluation Reports ("PER" or "PERs"). A PER is a formal corrective action document which describes the problem, enrolls it in TVA's formal problem tracking system, sets out steps and corrective actions to resolve the problem, and documents when and how the problem has been resolved. A PER is designed to address conditions that are adverse to the safe operation of the plant.

11. As Systems Engineer, I also represented TVA at industry-wide conferences and task force meetings, and exchanged information relating to the design, operation, maintenance, modification, and trending of the ice condenser system. Id. at 3, ¶ 5. There are only nine nuclear power plants in this country with ice condenser systems, all designed by Westinghouse:

Sequoyah Units 1 & 2 and Watts Bar Unit 1 (TVA); Catawba Units 1 & 2 and McGuire Units 1 & 2 (Duke Energy) and Donald C. Cook Units 1 & 2 (American Electric Power). As Systems Engineer, I maintained regular contact with my counterparts at the other ice condenser plants and with the Westinghouse representatives.

12. I was considered by my peers and my supervisors to be the expert at Watts Bar on ice condenser system issues. On all of my annual performance reviews, I never received a total rating of less than "Fully adequate" and my performance with regard to ice condenser system issues was described in positive terms.

13. The ice condenser system is located within the primary containment building, and surrounds the reactor core. The ice condenser system is composed of twenty four compartments or bays, each of which have eight hinged doors (192 doors total) that open to the containment area. The ice condenser system has three sectors: Lower Plenum; Intermediate Deck; and Upper Deck. There are doors for each of the three sectors that provide access into the system, and these doors have to remain operable at all times while the plant is in operation, so that plant personnel can readily access the ice condenser system at any time. These doors cannot be blocked by debris, particularly excess ice buildup. Each bay has 81 ice baskets, packed together in a nine-by-nine array, for a total of 1,944 baskets. Each basket is 48 feet long and 12 inches in diameter. Each basket is designed to be held together with a total of 100 screws, arranged in six-foot intervals, for a total of 194,400 screws in the system.

14. The ice condenser system is a major safety system for Westinghouse-designed nuclear power plants. It is designed to absorb any excess pressure or steam if an adverse condition in the reactor containment vessel, such as a loss-of-coolant accident or a main steam line break, should occur. This is intended to minimize the release of radioactivity to the external environment. The system contains approximately three million pounds of special ice that contains sodium tetraborate, which will absorb and retain radioactive iodine and act as a neutron glue to prevent a sustained nuclear chain reaction.

15. The ice condenser system is triggered by a release of steam in the reactor containment vessel which increases the pressure within the containment. This pressure increase causes the lower doors of the ice condenser to open, so that the steam enters the ice condenser system, where it will condense back into water. Meanwhile, the steam and vapor will cause some of the ice to melt; the melt water will pass through floor drains into sump tanks, where it is then transferred into the reactor vessel for emergency core cooling.

16. The operator's manual provided by Westinghouse claimed that the ice condenser system was supposed to be a low maintenance system, and that ice would seldom have to be added. However, it was my experience at Watts Bar that it was frequently necessary to add ice, including during outages, in order to maintain compliance with the technical specifications. Further, it was necessary to properly space and balance the ice within

each basket, and constantly monitor the system to ensure that it is fully operable.

17. The ice condenser system at Watts Bar was first loaded with ice in 1984, in preparation for fuel loading. Although fuel loading did not then occur, the ice condenser system was maintained at full operability over the following years. In 1991, TVA conducted a complete melt-out of the ice, in order to refurbish and repair the ice condenser system. In December 1994, I commenced the re-loading of ice into the system, which was completed in February 1995.

18. As part of the re-loading process, significant quantities of excess ice and debris will accumulate at the bottom of the condenser. Previously, TVA had laborers use snow shovels to bag the waste ice and take it outdoors for melting. This was a labor-intensive and time consuming process, so I designed a portable melt tank with heaters, located at the base of the ice condenser system, to melt the ice; the excess melt water was then vacuumed away from the containment. Any solid debris would remain within the melt tank. I adapted this system from a permanent melt-reclaim system that was installed at the Donald C. Cook and Duke Energy nuclear plants.

19. The ice loading was completed on February 17, 1995, but the melt tank was not removed from the containment building until early April 1995. On April 11, 1995, I was notified by a TVA boilermaker, Gerald Riggs, that there was debris in the melt tank. Mr. Riggs asked me to inspect the tank.

20. On April 12, 1995, I inspected the melt tank, and I found various items of trash. I also found approximately 170 ice basket screw heads and 32 whole screws. I showed these screw heads and whole screws to the Westinghouse site representative, Gordon Yetter, who reported this to Chuck Scrabis at the Westinghouse corporate office in Pittsburgh. Mr. Scrabis told us that if these were ice basket screws, then my discovery would have a significant impact on fuel loading, both at Watts Bar and at the other ice condenser plants.

21. On April 13, 1995, I informed my supervisor, Landy McCormick (NSSS Systems Engineer Supervisor), of the screws and screw heads that I found in the melt tank. Mr. McCormick agreed that I should initiate a PER. I also contacted my counterparts at Duke Power and D.C. Cook, all Westinghouse plants, who told me that they had also found screws in their melt tanks.

22. On April 21, 1995, I initiated Watts Bar PER 950246 ("PER 246") to report this adverse condition. See PER 246 (Apr. 21, 1995) (attached and incorporated herein as Attachment 4). Mr. McCormick, on April 26, 1995, determined that this was a "Confirmed Adverse Condition" which was "Potentially Reportable;" this was acknowledged by my second-line supervisor, Dennis Koehl (Watts Bar Technical Support Manager). Id. If there is something wrong with the ice condenser system, then it is a significant safety issue that must be reported and resolved, because the ice condenser system is a critical system needed to shut down Watts Bar in the event of an accident or emergency.

23. In late April 1995, I discussed with George Russell, a TVA maintenance planner, my proposal for a Work Order to conduct a video camera inspection of the ice baskets. I gave Mr. Russell diagrams of the ice condensers in each bay, indicating those that I had randomly selected for an inspection. This inspection was based upon a computer program, "ICEMAN," which I had arranged for TVA to acquire from Duke Power. It was not possible to conduct an in-person inspection, since one could only view the screw heads that are exposed on the outside of the nine-by-nine array of baskets, not those that are facing inwards. Thus, I planned to uncouple selected baskets from their anchorage, successively position the video camera at each 6-foot interval, and rotate each basket so that all the screw heads could be inspected.

24. The purpose of this video camera inspection was to determine the proportion of installed screws that were missing or had broken heads. I had frequently used a video camera to inspect these baskets in the past, so I knew that this would be a feasible method to inspect the ice basket screw heads. I also knew that it would take approximately six months to complete the camera inspection, which could delay the fuel loading by up to a year. If the camera inspection determined that there were more missing or broken screws than allowed for by the minimum design requirements, then it would be necessary to melt out the ice again, replace the screws, and re-load the ice baskets, which would yet further delay the fuel loading.

25. On May 11, 1995, Mr. Koehl convened a meeting of

Technical Support employees, including Mr. McCormick and myself. Mr. Koehl stated that "money was tight" and that Watts Bar was not meeting its original target fuel loading date. Mr. Koehl told us that if problems arose, TVA management wanted them quickly resolved through a PER. Based on discussions with my coworkers, I became aware that others at Watts Bar viewed my PER 246 as potentially requiring extensive repairs and delays that could lead to a shutdown and an indefinite postponement of the fuel re-loading at Watts Bar. I knew that the specifications required that the ice condenser system be fully operational, with all tests completed and all problems closed out, before the reactor could start generating power.

26. On May 18, 1995, I set forth a four-step Corrective Action Plan procedure to evaluate and address the problem of the screw heads and whole screws that were found in the melt tank. See PER 246, Part C-4: Causal Factor Analysis (May 18, 1995) (attached and incorporated herein as Attachment 5). The first step was performing metallurgical testing and evaluation of the failed screws to determine the mode of failure. Id. The second step was coordinating a camera inspection of approximately 389 baskets to determine their condition, the number of missing or broken screws, and the location of missing or broken screws. Id. The third step was a Westinghouse evaluation of the results of the metallurgical tests and camera inspection. Id. The fourth step was a review and revision of the system procedures based upon the results of the first three steps. Id.

27. On May 19, 1995, I determined that the probable cause of the screw failure was inadvertent over-tightening of the screws during the installation process, combined with expansion and contraction of the ice baskets over the previous decade caused by the initial ice loading, the 1991 melt-out, and the second cooldown, re-loading and weighing of the baskets in early 1995. See PER 246, C4: Causal Factor Analysis (May 19, 1995) (attached and incorporated herein as Attachment 6). This probable cause determination was based upon my over ten years experience with the ice condenser system, and my knowledge that other Westinghouse plants were having similar problems with loose or broken screws in their ice condenser systems.

28. On May 19, 1995, I consulted with TVA's onsite metallurgical engineer, Vonda Sisson, as part of the Corrective Action Plan that I initiated to determine the root cause of the screw failure and to resolve the PER. We gathered and transferred eight sets of screws to TVA's Central Laboratories Services (Chattanooga, Tenn.) for metallurgical testing. The screws that Ms. Sisson and I collected included broken screws found in the melt tank; new screws from the warehouse; and in-service screws removed from the ice condenser system.

29. On June 2, 1995, I received from Ms. Sisson the metallurgical report prepared by TVA's Central Laboratories. See TVA Central Laboratories Services Technical Report No. 95-1021, "Ice Condenser Basket Screws" (June 2, 1995) ("first lab report") (attached and incorporated herein as Attachment 7).

30. This first lab report concluded that the mode of failure of the broken screws was intergranular separation, and the mechanism was stress overload. Id. at 2. TVA Central Laboratories identified seven probable causes of the screw failure, including stresses on the screws that were higher than design limits; an elevated carbon content of the screws, which made them harder and less ductile; and the presence of quench cracks in the screws when received from the manufacturer. Id.

31. I then provided this first lab report to Messrs. Scrabis and Yetter, TVA's Westinghouse contacts, who agreed that a meeting should be held to discuss this issue.

32. On June 13, 1995, I received a harassing phone call message at my office telephone; an anonymous male voice said, "You sure picked a fine time to bring up the screw issue at Watts Bar." I reported this call to my supervisor, Mr. McCormick, and to the Watts Bar Concerns Resolution Staff. They did nothing to investigate this problem.

33. On June 14, 1995, there was a meeting at TVA to discuss the ice basket screw issue. This meeting was convened by Terry Ray Woods, TVA's Chief Metallurgical Engineer, and was attended by a number of TVA personnel and by Mr. Yetter. At this meeting, Mr. Woods asserted that the ice basket screw problem was not a safety issue and was not reportable to the NRC. He claimed that the TVA Central Laboratories personnel were not qualified to determine the seven probable causes of the problem, and he voided the first lab Report.

34. On the evening of June 14, 1995, I received a harassing phone call at my home. A woman stated, "Mr. Overall, the screw issue won't keep Watts Bar from operating." I reported this call to Mr. McCormick and to the Watts Bar Concerns Resolution Staff. Again, TVA management did nothing to investigate the call.

35. On June 15, 1995, Mr. McCormick, Vernon Law, and I were discussing the ice screw issue, after a telephone conference with TVA's Westinghouse representatives. I recall Mr. McCormick stating that "We need to give this PER over to Nuclear Engineering" and "I hope NRC doesn't review this PER prior to licensing."

36. The following day, On June 16, 1995, Mr. Koehl gave me a letter, dated "June 23, 1995," which notified me that my position "has been identified as at risk and is targeted for surplus" and that I would transfer to a temporary position as of September 18, 1995. See Letter from D. Koehl to C. Overall (June 23 [16], 1995) (attached and incorporated herein as Attachment 8). I met with Mr. Koehl immediately afterwards to discuss this letter. I asked Mr. Koehl why my position was being terminated when the ice condenser system was still going to exist at Watts Bar. Mr. Koehl claimed that there was not enough work for me to do, which was not possible, since I was spending most of my time working on the ice condenser system. My counterpart at Sequoyah, John Rathjen, remained employed full-time as the ice condenser Systems Engineer for that facility, even after the plant went back into operation.

37. After the meeting with Mr. Koehl referenced in the previous paragraph, I learned that Gary Jordan would be taking over my old position, and I had to spend a substantial amount of time over the next several months training Mr. Jordan, because he had no prior experience with this system, other than having done some editing of procedures. My training of Mr. Jordan included describing the paperwork; walking him through the entire system; explaining all the procedures, specifications and regulations; and transferring my files to him. Mr. Jordan is still employed as the Systems Engineer for the ice condenser system at Watts Bar, in my former position.

38. On Sunday, June 18, 1995, I received a harassing phone call at home; an anonymous caller said, "We're really glad you're leaving Watts Bar." I reported this call to my supervisor, Mr. McCormick. He did nothing to investigate the call.

39. On June 19, 1995, TVA Central Laboratories issued a second and different Report, at the direction of Mr. Woods. See TVA Central Laboratories Services Technical Report No. 95-1021 (June 19, 1995) ("second lab report") (attached and incorporated herein as Attachment 9). This report omitted any mention of possible causes of the screw failure or intergranular separation. Figure 7 of this report, which showed a crack in a screw, differed from the first report, because a different screw was photographed.

40. On July 10, 1995, Mr. McCormick and James Adair, who was then Lead Civil Engineer at Watts Bar, transferred PER 246

from my organization to another department at Watts Bar, Civil Engineering. See PER 246, Continuation Page (July 10, 1995) (attached and incorporated herein as Attachment 10). I was informed, shortly thereafter, that I was no longer to have any responsibility for the investigation and closure of PER 246. Because of this transfer for close-out to another organization, which is extremely unusual and which was unjustified in this instance, I was unable to implement the video camera inspection, or to analyze the results of any of the other steps in my Corrective Action Plan.

41. On July 21, 1995, Larry Katcham (Civil Engineer, Watts Bar), with the approval of Mr. Adair, prepared a new four-step Corrective Action Plan. See PER 246, Part C: Corrective Action Plan Development (July 21, 1995) (attached and incorporated herein as Attachment 11). This plan significantly differed from my original plan because it omitted any requirement to do a video camera inspection of the installed ice basket screws to determine how many were missing or broken. The result of this new close-out plan was that it was possible for TVA to close out PER 246 and commence fuel loading much sooner.

42. On July 26, 1995, only six days after TVA approved the revised Corrective Action Plan, Messrs. Adair and Katcham signed off on the closure of PER 246. See PER 246, Part D: Closure Verification (July 28, 1995) (attached and incorporated herein as Attachment 12). Mr. Katcham claimed that TVA needed to do nothing further, based on "the fact that all ice condenser screws

are in place." Id. at 4. I know that Mr. Katcham's statement was inaccurate, because TVA did no visual inspection of the ice baskets, so TVA had no way of knowing whether all the ice basket screws were present and intact. In fact, in April 1995, I had found approximately 170 screw heads and 32 whole screws in the melt tank, and some or all of these screws could have come out of the ice condenser baskets.

43. On August 10, 1995, Tom McCollum, TVA Nuclear Assurance, prepared the Nuclear Assurance Statement for PER 246, which reiterated that the four corrective actions were completed. Id. at 3.

44. Based upon my experience and knowledge of the ice condenser system at Watts Bar, I do not believe that it was possible for TVA to close out PER 246 that rapidly. TVA did not conduct any visual inspection of the ice baskets and did not address any of the seven potential causes that were identified in the first lab report, or the probable causes that I identified on May 19, 1995. Nor did TVA provide sufficient information to Westinghouse so that they could conduct an effective comparison of the broken, installed, and warehouse screws.

45. On November 3, 1995, I commenced work as a Project Manager at TVA Services, as a result of the termination of my employment at Watts Bar. See Attachment 1, at 2. During that time, I drafted business proposals and set up meetings with Watts Bar and Sequoyah personnel, but I did not receive any contract work. I later learned that during that time, TVA used

inexperienced Stone & Webster contract personnel for ice condenser work instead of using my services. I also applied for a number of positions, both internal and external, but was not hired. On July 24, 1996, I was notified that I was to be laid off for a shortage of funds, effective September 30, 1996.

46. From the time of my termination in October 1996, until my reinstatement to Watts Bar in August 1999, I tried to find employment in my field, but was unsuccessful. In April 1997, I obtained a low-paying job as a contract laborer for a temporary staffing firm, Accustaff Incorporated (Cleveland, Tenn.). I was belittled, embarrassed and humiliated by this job, because it was very much below the level at which I had been working as the ice condenser system engineer at Watts Bar.

47. On January 15, 1997, I filed my first whistleblower complaint, under Section 211 of the Energy Reorganization Act ("ERA"); this complaint was amended on April 3, 1997. The Department of Labor then conducted an investigation. In March 1997, while that investigation was pending, I received another harassing telephone call, in which the caller said, "Mr. Overall, you need to keep your damn mouth shut." On June 13, 1997, the Department of Labor found that TVA had discriminated against me through its termination of my employment. TVA appealed this decision. After discovery, and a hearing on December 16-18, 1997, Administrative Law Judge Kennington issued a Recommended Decision and Order on April 1, 1998. See Overall v. TVA, 97-ERA-53, Recommended Decision and Order (Apr. 1, 1998) (attached and

incorporated herein as Attachment 13).

48. ALJ Kennington concluded that TVA had discriminated against me because I had reported safety issues relating to the ice condenser system, which was in violation of the ERA. TVA's discrimination consisted of its transferring, laying off, and refusing to rehire me. Id. at 27-34. ALJ Kennington ordered, as the remedy, that "TVA shall reinstate Overall to his former position . . . at Watts Bar, or, if no longer available, to a substantially equivalent position." Id. at 36. ALJ Kennington also ordered that I was to receive back pay with interest; reimbursement for my insurance, retirement fund and medical expenses; and compensatory damages. Id. at 36-37. ALJ Kennington also ordered that TVA was to post the "Recommended Notice to Employees" on all bulletin boards at Watts Bar and TVA Services facilities. Id. at 37-39.

49. On May 2, 1998, an article appeared in the Knoxville newspaper, which announced ALJ Kennington's decision that I was to be reinstated and receive compensatory damages, back pay and attorneys' fees. See Jerry Dean, "TVA whistle-blower wins back his job," Knoxville News-Sentinel (May 2, 1998) (attached and incorporated herein as Attachment 14).

50. From May through June 1998, my former attorney and TVA's attorneys negotiated a possible settlement of all my claims against TVA, including a settlement of my first case against TVA. These negotiations were not successful.

51. In early May, 1998, I received a letter from the NRC

Region III office, in response to my providing them with information about ice condenser problems at Watts Bar that were also applicable to the D.C. Cook plant. See Letter from NRC Region III to C. Overall (May 1, 1998) (attached and incorporated herein as Attachment 15). Region III has oversight of nuclear plants in the Midwest, including D.C. Cook; Region II has oversight of nuclear plants in the Southeast, including the TVA and Duke Energy facilities.

52. In its May 1, 1998 letter, the NRC stated that they had initiated an inspection to review my "concern related to activities at the D.C. Cook Nuclear Plant." Id. The NRC inspectors found "multiple deficiencies" that were "related to the ice condenser containment at the D.C. Cook plant," id., and the NRC determined that "a number of apparent violations of NRC requirements were identified." Id. The NRC concluded that: "We have substantiated your concern." Id.

53. On May 17, 1998, an article appeared in the Atlanta Constitution (and was republished in the Nashville Tennessean); this article discussed TVA's plans to enter the tritium (nuclear weapons) business. See John Harmon, "Mistakes Aside, TVA Ranks High In Its Field," Atlanta Constitution (May 17, 1998) (attached and incorporated herein as Attachment 16). This article included a photograph of myself, standing in front of the Watts Bar cooling towers, and noted that "a federal administrative law judge found that TVA illegally fired engineer Curtis Overall in 1996 after he reported potential flaws with emergency reactor

cooling systems at the Watts Bar plant." Id.

54. In May 1998, I was contacted by various individuals regarding their concerns about tritium production at TVA's nuclear plants. I agreed to participate in a press conference in Washington, D.C., on May 26, 1998, to discuss the potential danger to the public safety with production of tritium at Watts Bar, which did not have a fully functioning ice condenser system.

55. On or around May 21, 1998, I received a letter from TVA's Human Resources office that began my reinstatement. See Letter from R. Higginbotham to C. Overall (May 20, 1998) (attached and incorporated herein as Attachment 17). Mr. Higginbotham stated that, pursuant to ALJ Kennington's Order, I was "being reinstated to [my] former position of Power Maintenance Specialist, SD-4, involving the ice condenser system at the Watts Bar Nuclear Plant." Id. He also stated that I should report for work on June 1, 1998. Id.

56. On May 23, 1998, a second article appeared in the Atlanta Constitution, which stated that other whistleblowers and I would participate in an upcoming tritium press conference. See John Harmon, "Activists Try to Stop TVA Nuclear Plant Construction," Atlanta Constitution (May 23, 1998) (attached and incorporated herein as Attachment 18). The reporter wrote the following about my whistleblower case: "Already, Overall's story has sent tremors well beyond Watts Bar. His report on the Watts Bar ice condenser system led government inspectors to find serious defects at the similarly designed Donald C. Cook plant in

Michigan. . . . The NRC also has ordered a review of other ice condenser plants." Id. The article quoted me as saying, "I used to think all these whistle-blowers were just disgruntled workers or people opposed to nuclear power But then all I did was identify a problem and report it. And they did it to me." Id.

57. On May 25, 1998, a press release was distributed which announced the tritium press conference. See Press Release, "Ralph Nader and Whistleblowers Call on Congress to Halt Further Funding of Tritium Production at TVA's Nuclear Power Plants" (May 25, 1998) (attached and incorporated herein as Attachment 19).

58. On Monday, May 25, 1998, at about 8 p.m., I received a harassing telephone call, in which when I picked up the telephone a whistle was blown loudly, over and over again. Earlier this year, I had installed caller-id on my home telephone, which showed that this was a local call, from 472-9374. I reported this incident to the local FBI office and to my attorney. This harassing call occurred two days after the article in the Atlanta Constitution, a few hours after a press release was issued concerning the upcoming tritium press conference, and the evening before I was to fly to Washington, D.C. participate in the tritium press conference. I interpreted this call as a warning to me not to speak out at the press conference on tritium, and a threat that should I resume my public speech about problems with the ice condenser, TVA harassment against me would resume, as had been done in the past. This was the first harassing call that I had received in over a year, since the March 1997 call.

59. On Tuesday, May 26, 1998, I flew from Knoxville to Washington, D.C., to participate in the tritium press conference at the National Press Club. I spoke about the safety issues that I had reported regarding the ice condenser basket screws, and TVA's actions in removing me from my position and in closing out PER 246 without conducting the necessary tests. See Statement of Curtis Overall (May 26, 1998) (attached and incorporated herein as Attachment 20). I said that because of TVA's questionable safety record, TVA should not be involved with nuclear weapons production. Id. I also discussed the harassing incidents that I had suffered. Other nuclear whistleblowers at TVA, including Ann Harris and William Jocher, also spoke at this press conference, which was televised.

60. On Wednesday, May 27, 1998, an article about the press conference appeared in the Knoxville newspaper. See Richard Powelson, "Nader Opposes TVA's Tritium Plan," Knoxville News-Sentinel (May 27, 1998) (attached and incorporated herein as Attachment 21). This article referenced my statements that the Watts Bar ice condenser system was not in proper operating condition and in danger of malfunctioning in an accident. Id.

61. On Thursday, May 28, 1998, one day after publication of the newspaper article about the tritium press conference, I had stayed up late after returning from my part-time job. At around 2 or 2:30 a.m. the following day, I heard my dog barking aggressively, and I went outside to look around, but did not see anything unusual. About a half hour later, I heard other dogs

barking, so I went outside again, and saw a car down the block, being driven with its lights off; the driver then went off at a high speed. After sunrise, my wife Janice found a threatening note on the windshield of my truck, which was parked in the driveway. This note had the word "SILKWOOD." See harassing note (May 29, 1998) (attached and incorporated herein as Attachment 22). My wife ran into the house, and after showing it to me, I realized what it said and I felt anger and sadness from knowing what it meant. I knew that Karen Silkwood was a nuclear whistleblower who had been killed by having her car run off the highway. I remember crying that night, and being very upset.

62. I reported the "SILKWOOD" harassing note to the local police and to the local FBI office, and filed a police report. See Cleveland Police Dept., Uniform Offense Report, Complaint No. 98-19423 (May 29, 1998) (attached and incorporated herein as Attachment 23). However, I never heard anything further from the local police about their investigation of this incident, and now know that they did nothing to investigate the matter. I also reported this incident to my attorney, who reported it to TVA, and arranged with TVA that my return to work would be postponed for thirty days, as a cooling off period.

63. On Monday, June 1, 1998, my son Joey was returning home late, shortly before midnight, and he saw that the gas cap door of my truck was open, and the gas cap had been removed. He told me about this; I went outside and observed that the door area had been wiped clean. At the time I was very concerned because I did

not leave it open. Shortly after midnight, I called the local police, who came to my house and took my report. See Cleveland Police Department, Uniform Offense Report, Complaint No. 98-19922 (June 2, 1998) (attached and incorporated herein as Attachment 24). However, I never heard anything further from the local police about their investigation of this incident, and now know that they did nothing to investigate the matter. I also reported this to the local FBI office, and to my attorney.

64. On June 2, 1998, an article appeared in the Chattanooga newspaper, which discussed the "SILKWOOD" note and a harassing telephone call that another TVA whistleblower, Ann Harris, had received. See "2 TVA Whistleblowers Receive Death Threats," Chattanooga Free Press (June 2, 1998) (attached and incorporated herein as Attachment 25). These threats occurred within a week after our participation in the tritium press conference. The threatening call to Ms. Harris occurred the night before TVA's deposition of her in her whistleblower case, which was then pending. Ms Harris reported to me that the caller had told said, "You've been running your mouth long enough. It's time for you to shut up."

65. On June 2, 1998, an article appeared in the Chattanooga newspaper, which announced that the NRC was going to hold a conference on June 16, 1998 with TVA to discuss the ice condenser issues. See "TVA-NRC Meeting June 16 in Atlanta," Chattanooga Free Press (June 2, 1998) (attached and incorporated herein as Attachment 26). A related article appeared in the nuclear

industry trade press, which discussed the NRC's plans to inspect all ice condenser plants for problems similar to those that the NRC had found at the D.C. Cook plant after I reported my concerns to the NRC Region III. See Tom Harrison, "NRC Will Check All Ice Condensers For Cook-type Degradation Ills," Nucleonics Week (June 4, 1998) (attached and incorporated herein as Attachment 27).

The NRC had ongoing concerns with the ice condenser system at Watts Bar and other Westinghouse plants because of the safety reports I had made internally at TVA and to the NRC.

66. The week after the two articles about the NRC's concerns with the ice condenser systems were published, I received another harassing note. On the morning of Tuesday, June 9, 1998, there was a note taped to the storm door of our house, which had a single word, BOO! See harassing note (June 9, 1998) (attached and incorporated herein as Attachment 28). I became very upset after seeing this note, because I was worried that whoever was doing this was now coming to our front door. My wife Janice and I became extremely aware and alert, so that every time someone came by or knocked on the door, we would become terrified. I called the local FBI office and the local police, who suggested that I should get a security system. I filed a report with the local police. See Cleveland Police Department, Uniform Offense Report, Complaint No. 98-21008 (June 9, 1998) (attached and incorporated herein as Attachment 29). However, I never heard anything further from the local police about their investigation of this incident. I also reported this harassing

incident to my attorney, who notified TVA.

67. Later that same week, on Thursday, June 11, 1998, I was shopping at a local Wal-Mart store. Upon returning to my truck in the parking lot, I found a note on the windshield, which said "STOP IT NOW." See harassing note (June 11, 1998) (attached and incorporated herein as Attachment 30). After finding this note, I sat in the truck and became so angry and worried that now someone was following me. All this harassment was becoming overwhelming to me. I called the local FBI office and the local police, and filed a police report. See Cleveland Police Department, Uniform Offense Report, Complaint No. 98-21474 (June 12, 1998) (attached and incorporated herein as Attachment 31). However, I never heard anything further from the local police about their investigation of this incident, and now know that they did no investigation of the incident. I also reported this to my attorney, who said he would inform TVA's attorney. I called Nancy Holloway, the TVA Office of Inspector General ("OIG") Special Agent who was assigned to my case, and reported this threatening note to her. However, I never heard anything further from the TVA OIG about their investigation of this threatening incident.

68. Later that same week, on Saturday, June 13, 1998, while Janice, Amanda and I were watching a movie, Janice noticed that the motion detector light, which I had recently installed at our house, went off at around 11:35 pm. She told me that she saw someone standing outside. I asked her to call the police. I

went outside, taking my handgun for protection, and noticed that someone had opened the gas tank lid on my truck. However, I had recently installed a locking gas cap after the June 1, 1998 incident, so the gas tank was not tampered with. Janice and Amanda had also come outside, and we saw a man running away down the street. I was extremely nervous and scared about this, so that I could not sleep that night. The next morning, I left a voice mail message with Ms. Holloway (TVA OIG), reporting this incident to her. However, I never heard anything further from the TVA OIG about their investigation of this threatening incident. I also reported this to the local police, who informed me that it was a good thing I had installed a locking gas cap, but did no investigation of the matter.

69. On Monday, June 15, 1998, I called Ms. Holloway (TVA OIG) and Scott Barker (FBI) to set up a meeting to discuss all of the harassing incidents, which by now were frightening to me. During my conversation with Mr. Barker, he suggested to me that another TVA employee might be doing these harassing incidents. Neither TVA OIG or the FBI ever informed me about what investigation, if any, they did about these harassing incidents.

70. On Tuesday, June 16, 1998, while I was at the local police department, my daughter Amanda received a harassing telephone call, in which there was a lot of breathing and laughter. She told me that she had repeatedly asked, "Hello?" but there was no response. The caller-id on our phone indicated that this was a local call, from 472-9936. Amanda tried to call

me at the police station, but I had just left. I reported this to the local police and filed a police report. See Cleveland Police Department, Uniform Offense Report, Complaint No. 98-22370 (June 17, 1998) (attached and incorporated herein as Attachment 32). However, I never heard anything further from the local police about their investigation of this incident, and now know that they did no investigation of the matter. This incident occurred on the same day as the meeting convened by the NRC to discuss the ice condenser problems at the TVA nuclear plants, including Watts Bar.

71. Later that same day, June 16, 1998, I met with Ms. Holloway, and gave her the three threatening notes ("SILKWOOD;" "BOO!" and "STOP IT NOW") and copies of the four police reports. I also informed her of the other harassing incidents, including the telephone calls, attempts to tamper with the gas tank of my truck, and the suspicious cars. I described to her my safety reports regarding the ice condenser system, and I attempted to explain to her how the ice condenser system works and why it is important for the operation of Watts Bar. Ms. Holloway asked me who I thought might be responsible, and I told her that Mr. Barker (FBI) had suggested that it might be another TVA employee. However, I never heard anything further from the TVA OIG about their investigation of these threatening incidents.

72. On Wednesday, June 17, 1998, two articles appeared in the Chattanooga newspapers that described the meeting convened by the NRC to discuss the ice condenser problems at D.C. Cook and

the potential for these problems to adversely affect Watts Bar and Sequoyah. See Victor Miller, "NRC Studies TVA N-Plants for Ice Condenser Flaws," Chattanooga Free Press (June 17, 1998); "TVA's Reactors Safe, Nuclear Commission Says," Chattanooga Times (June 17, 1998) (attached and incorporated herein as Attachments 33-34). I was mentioned as a "TVA whistleblower" in the second story, which also quoted the NRC spokesman as saying, "the NRC is relying largely on TVA's own inspection program of its ice condenser safety systems." See Attachment 33.

73. Also on June 17, 1998, Amanda and I noticed a suspicious car while we were running errands. This was a Buick Riviera (Tennessee license # 007DNU), and the male driver stared at us, then waved, and drove off. I reported this suspicious incident to Ms. Holloway on June 18, 1998. However, I never heard anything further from the TVA OIG about their investigation of this threatening incident, and now know that they did nothing to find the owner of the vehicle for over nine months. On June 23, 1998, Howard Cutshaw (Watts Bar Human Resources) called me, and I gave him the license number of this suspicious car.

74. On Wednesday, June 24, 1998, I met with Ms. Holloway and provided her with copies of my daily journal entries that related to the harassing and other suspicious incidents that had occurred. It was my practice to keep a daily journal, in which I recorded work-related events, as well as unusual events that occurred away from work.

75. On Friday, June 26, 1998, Ms. Holloway came to our

house and checked the layout of the house, yard, and the cars.

76. Later that same day, at 4:48 p.m., there was another harassing phone call to our home number. The caller repeatedly blew a whistle. My reaction to this continuing harassment was mixed, anger with fear. The caller-id showed this as a local call, from 339-9822. I reported this to the local FBI office and the local police. I also reported this to Ms. Holloway, my attorney, and the NRC. However, I never heard anything further from the TVA OIG about their investigation of this threatening incident, other than that it was from a pay phone.

77. During the period of June through early July 1998, my attorney was negotiating with TVA counsel to see if we could reach some resolution of my first case under which I would not have to return to TVA employment. I believed that these harassing calls and other incidents were intended to put pressure on me to settle with TVA and not return to TVA.

78. In an agreement reached with TVA, on Wednesday, August 5, 1998, I reported to Watts Bar to return to work. I met with Randy Higginbotham (Watts Bar Human Resources), who informed me that TVA was appealing the Order. Mr. Higginbotham introduced me to Phillip Smith, who was to be my new supervisor. I met with the other members of Mr. Smith's group, including Gary Jordan, who still held my former position. I learned from them that the ice condenser system had become a "mess," largely because of a significant steam leak in the lower containment, which was entering the ice condenser system. I heard that they had found

even more screws in the ice debris. I came to realize that several TVA witnesses had lied in their testimony during the December 1997 hearing. Mr. Smith and others expressed their concern that an upcoming NRC inspection would result in adverse findings regarding the ice condenser system at Watts Bar. It was obvious that TVA was not going to put me in my old position as the systems engineer to replace Gary Jordan, but was making me subordinate to Mr. Jordan, whom I had trained.

79. During the rest of August 1998, I continued to work at Watts Bar in the Systems Engineering group. Since Mr. Jordan continued to hold my former position, my duties were poorly defined, and I essentially had to make my own work, which consisted of reviewing the paperwork relating to the ice condenser system to learn what had happened since my departure from Watts Bar in late 1995. I attempted to become involved with active issues relating to the ice condenser system, but was consistently excluded from important meetings and conversations about this subject. I felt that Mr. Smith, Mr. Jordan and others were repeatedly shunning me, not providing me with any meaningful work, not sharing information that they were receiving from Westinghouse and the other ice condenser plants, and trying to keep me from contributing to resolving any ongoing problems with this system. In particular, they kept me away from any participation on the PERs that were open during that month, so that I did not know that TVA had numerous open and unresolved PERs relating to the ice condenser system. They were also

attempting to micro-manage my activities in order to monitor my reporting of safety problems.

80. On Tuesday, August 25, 1998, I had a conversation with Mr. Adair, who was involved with the closure of PER 246 that I had initiated in 1995, and who was named in ALJ Kennington's Recommended Decision and Order as having been involved in the scheme to discriminate against me. During this conversation, Mr. Adair became very confrontational and refused to give me technical information that I needed to do my job. Mr. Adair also demanded that I tell him why I needed to know anything about the ice condenser system PERs. He told me someone else would have to provide the information, but that person was on vacation.

81. That evening, while driving home on Highway 58, a blue pick-up truck closely followed me for about 20 miles, and attempted to force me off the road. I was worried when he did not back off, and I was getting really scared, not knowing what his intentions were. This was a highly upsetting experience; at first I started driving faster to escape him, but then I had to slow down to avoid an accident. The next morning, I called Ms. Holloway and reported this incident to her. However, I never heard anything further from the TVA OIG about their investigation of this threatening incident, and now know that they did no investigation.

82. On Wednesday, August 26, 1998, I informed Mr. Smith of my concerns with Mr. Adair's conversation. I also told him that I felt isolated, that he and others were excluding me from any

involvement with the ice condenser system, and that I was not being given meaningful work. I stated that I was not given a job as the ice condenser engineer, or a comparable job, as ALJ Kennington had ordered. Finally, I also mentioned the harassing truck incident that had occurred the previous evening. I also discussed some of these same concerns with Richter Wiggall (acting Systems Engineering Manager), Mr. Smith's supervisor.

83. On Thursday, August 27, 1998, while I was on the telephone with Ms. Holloway, a co-worker distributed the interoffice mail. After I completed my conversation with Ms. Holloway, I opened my mail. One envelope, in a TVA office mailer, had a harassing note that appeared to be a photocopy of a typed or computer generated note, "LEAVE WATTS BAR, THERE IS NO ROOM FOR WHISTLEBLOWERS HERE OR ELSE!!!!" See harassing note (Aug. 27, 1998) (attached and incorporated herein as Attachment 35). I was so upset, that I threw this note to the floor, and called out to a coworker, Robin Gray. Mr. Gray picked up the note, read it and then took me to find our managers. We eventually found Mr. Smith, who called Site Security and Human Resources; Mr. Wiggall then appeared. I became emotionally upset, started to cry, and became overwhelmed and bewildered by this direct attack towards me. I started to feel some chest pains, so I took a nitroglycerin pill.

84. I provided a statement about my discovery of this harassing note to TVA Security. See Statement of Curtis Overall (Aug. 27, 1998) (attached and incorporated herein as Attachment

36). TVA Security arranged for me to be escorted home.

85. As I was walking down the hallway to leave the building after the harassing note incident, Douglas Williams, Power Plant Maintenance Specialist, Watts Bar, whom I had known for a long time, stopped me. This was the first time that I had talked to Mr. Williams since my return to work. Mr. Williams did not work in the same area as I worked, so I knew of no reason that he would be in my work area at this particular time. Mr. Williams had been named in ALJ Kennington's decision as someone who had been retained when I was terminated. Mr. Williams told me he was very upset with being named, and said that several other TVA employees had come to him asking if he was the one who was harassing me. I was troubled, since I now wondered if he had something to do with this harassing note. Mr. Williams wanted to discuss these issues, but I was in no condition to do so, told him so, and went home.

86. Later that day, August 27, 1998, Ms. Holloway called me at home. I described to her the harassing note that I had received in the TVA interoffice mail, and that I was very upset by it. Since it was in a TVA mailer and was distributed through the interoffice mail, I knew that it had to have been sent by someone at TVA who had a security clearance to work at Watts Bar. However, I never heard anything further from the TVA OIG about their investigation of this threatening incident. I also reported to Ms. Holloway that Mr. Williams had confronted me about being named in the ALJ's decision.

87. On Sunday, August 30, 1998, I called into my TVA voice mail system to check for messages. There was a message that was left on Saturday, at about 1:45 p.m., which consisted of a person repeatedly blowing a whistle. Since this was on my TVA voice mail, I knew that it had to have been made by someone who knew my TVA telephone number, which could only have been a TVA employee. I reported this harassing phone call to Ms. Holloway and Mr. Smith. The following day, Ms. Holloway called and said that she would be at Watts Bar on September 1, to conduct interviews of managers and engineers as part of her investigation. However, I never heard anything further from the TVA OIG about their investigation of this threatening incident or the results of their interviews.

88. Because of the harassing note and harassing telephone call, I was too upset to return to work on Monday, August 31, 1998. Therefore, I received leave to take the day off. I learned when I returned to work the following day, Tuesday, September 1, 1998, that the NRC inspectors had arrived at Watts Bar the previous day for an inspection which was to include the ice condenser system. I now believe that the harassing note and telephone call were intended to prevent me from going to work when the NRC was inspecting the ice condenser system.

89. I learned from the other members of my work group, including Mr. Smith, that the NRC would be inspecting the ice condenser system using a polar crane, instead of actually walking through the system. This made it unlikely that the NRC would

recognize the severity of the significant safety problems TVA was having with the wet insulation blankets that covered the ice condenser system.

90. On the afternoon of September 1, 1998, I called Mr. Higginbotham (Watts Bar Human Resources), to inquire about the status of the TVA OIG investigation. Mr. Higginbotham said that it was ongoing, but he did not provide me with any details. I told him that all these incidents were becoming highly stressful and frightening to me. I also mentioned that a Watts Bar boilermaker, Denny Tumlin, had called me a whistleblower. I discussed my concerns with Mr. Higginbotham that I was not being involved in meetings and communications regarding the ice condenser system as I should be, and that I was being excluded from any meaningful work on the ice condenser system, as ALJ Kennington had ordered.

91. The NRC inspection of the ice condenser system continued on September 2, 1998. I noticed that Mr. Smith constantly remained with the NRC inspectors wherever they went. I learned that the other people in my work group had spent a lot of time over the past three to four days in cleaning up the ice condenser system, removing debris, and making it look much better than it had previously appeared. I overheard the Westinghouse representative saying that they could not locate the certificates on the materials for the ice condenser system, which was unusual since TVA is required to maintain all such documents.

92. On September 2, 1998, the NRC inspectors asked to have a private meeting with me while we were inside the ice condenser system. At first, Mr. Smith and Mr. Jordan attempted to listen in on this meeting, but they eventually went outside the condenser to wait for us. I told the NRC inspectors about my concerns with the unsafe operating conditions of the ice condenser system at Watts Bar.

93. After my meeting with the NRC inspectors, I was invited into Mr. Smith's office for another "cheerleading" session, which was attended by Mr. Wiggall. First Mr. Smith and later Mr. Wiggall pressured me to tell them, and the other TVA persons in our work group, about my private conversation with the NRC inspectors. I declined to do so.

94. That evening, September 2, 1998, at approximately 7:30 p.m., someone called my home telephone number. My daughter Amanda answered the phone, and the caller asked whether I was at home. She told him that I was, but I was busy, and she asked who was calling. The caller then slammed down the telephone. The caller-id did not show any number, but listed this as "Out of Area," meaning that it was not from southeastern Tennessee, or else that it could have been made from a cell phone or even from some payphones. Amanda told me about this, and I was disturbed in that someone was trying to verify my whereabouts, or was watching my home. I reported this harassing incident to Ms. Holloway by leaving a message on her voice mail. However, I never heard anything further from the TVA OIG about their

investigation of this threatening incident.

95. On Thursday, September 3, 1998, while at work, I overheard others in my work group saying that potentially defective screws were still being installed in the ice baskets at both Watts Bar and Sequoyah. Meanwhile, I had prepared a list of comments and questions for the NRC, which I gave to the NRC inspectors. See C. Overall, "NRC Questions / Statements; Comments to NRC" (Sept. 3, 1998) (attached and incorporated herein as Attachment 37). I reiterated my concerns with the ice condenser system at Watts Bar, and I also discussed some of the recent harassing incidents.

96. I learned, as later confirmed in discovery in this case, that between the morning of September 3 and the morning of September 4, 1998, a harassing message that read "Go Home All Whistleblowers Now" was written on a bathroom stall on the first floor of my building, which is the lavatory that I usually use. On September 4, I saw a sign indicating that this stall was "out of service," but did not see the message.

97. On Friday, September 4, 1998, in the early afternoon, I had another private meeting with the NRC inspectors, in a conference room on the second floor of Watts Bar, which is the same floor where Mr. Adair works. During this meeting, Mr. Adair walked in, which prevented me from being able to talk to the NRC inspectors, so I had to cut short my discussion.

98. On Friday, September 4, 1998, I attended the NRC exit meeting at which the NRC inspectors discussed their preliminary

findings with the ice condenser system at Watts Bar. During this meeting, one inspector said that they had checked how the ice basket screws were stored, and they mentioned the two versions of the ice basket screw reports. The NRC inspectors discussed their concerns with the ice condenser top deck insulation blankets being wet, and whether these blankets would satisfy the criteria for accident conditions, which became an open item. Nick Economos, one of the NRC inspectors, said that this inspection was just a "snapshot" and that the NRC inspectors would be returning. After the NRC inspectors left, one of the plant managers told us that the NRC will be back, and that we need to be better prepared and have all open items addressed and completed before their return. Paul Pace, the Site Licensing Manager for Watts Bar, attended this meeting, and I recall seeing him visit Mr. Smith during the period after I returned to work at Watts Bar. I learned at this time that TVA was very concerned that the problems with the ice condenser system at the D.C. Cook plant, which extended the shutdown of that plant and cost the utility substantial lost revenue of at least \$700 million, would also occur at Watts Bar.

99. On Sunday, September 6, 1998, in the early afternoon, Janice, Amanda, Joey and I were returning from an out-of-town trip. When we pulled into the driveway of our house, I discovered another threatening note on the windshield of our family car. The note said, "DID YOU GET THE MESSAGE YET!!" See harassing note (Sept. 6, 1998) (attached and incorporated herein

as Attachment 38). I placed this note into a plastic bag. This message was very upsetting to me and to the rest of my family, because I took this as a direct warning to me. I reported this harassing note to Ms. Holloway and Mr. Smith, and left messages with the local FBI office and the local police department. A police officer came and took a report. However, I never heard anything further from the local police or TVA OIG about their investigation of this threatening incident. I now know that the local police and TVA OIG did no investigation of this incident.

100. On Tuesday, September 8, 1998, after Labor Day, I still felt very disturbed about the harassing note, and also had an upset stomach, so I called Mr. Higginbotham (Watts Bar Human Resources) and requested sick leave; I also notified Mr. Smith. I told Mr. Higginbotham that I was very upset, that I did not feel like I can work, and that I need a safe work environment. I also told him that I felt as upset as when my father passed away and that I was going to see my psychologist today.

101. During the afternoon of September 8, 1998, I received a call from Kim van Doorn, the NRC Resident Inspector at Watts Bar, who had heard about the latest harassing note that I received. I told him that with all that took place, I believed that TVA could not provide me with a safe work environment, based upon the threatening notes, harassing incidents, and exclusion of me by my supervisor and co-workers. We also discussed the memorandum that I had given to the NRC inspectors on September 3, 1998, setting forth my concerns with the approach taken by TVA's management

towards the questions raised by the NRC inspectors. Mr. van Doorn stated to me that perhaps TVA's management was nervous about my raising more safety issues.

102. I took leave, which was approved by my TVA supervisors, for September 9, 1998, in order to copy documents related to the ice condenser issue to provide to TVA OIG and the NRC. My supervisors knew that I would not be at home on that date, but rather, would be collecting materials about the harassing actions taken against me for my meeting with TVA OIG later that day.

103. At mid-day on Wednesday, September 9, 1998, I drove to a nearby shopping center in Cleveland to photocopy numerous documents at the Office Max store. When I returned to my truck, I noticed a suspicious object in the bed of the pickup. This object was not there when I left my house that morning. It appeared to be some type of pipe bomb or other explosive device, as it was wrapped in electrical tape with wires coming out of it.

104. I became very upset and worried when I saw what looked like a bomb. I will never forget this day because it was so horrific, confusing, and was a very cruel act of violence to me. I immediately returned to the Office Max store, and asked that they call the police. The local police came and took a report. See Cleveland Police Department, Uniform Offense Report, Complaint No. 98-35049 (Sept. 9, 1998) (attached and incorporated herein as Attachment 39). I told the police about the other harassing notes and phone calls I had received but that this was the most frightening threat that I had experienced. The

Chattanooga police bomb squad came to remove this bomb, and the local office of the Bureau of Alcohol, Tobacco, and Firearms ("BATF") also came to investigate.

105. I also called my home, and told my wife Janice that I had found a suspicious object in the bed of my truck, and that the police were coming. I did not tell her that I thought it was a bomb because I was afraid of alarming her. Janice later told me that she and Amanda had seen a strange white truck, S-10 type, that had driven by our house very slowly, and the driver acted suspiciously.

106. Ms. Holloway arrived at the parking lot, and told me that she had stopped at my house to interview me, but was told by my wife that I had just called about this threatening incident. By that time, I had become even more upset, and told her, "Just have TVA move me to Australia. I can't take any more of this." I also said that this incident was starting to push me over the edge toward a breakdown, and that whoever had placed the bomb in my truck must have followed me from my home. She asked me who knew that I was off from work today, and I said, "TVA knows," meaning that everyone in my work group, and others at Watts Bar, knew of my absence this week.

107. A paramedic had arrived soon after my conversation with Ms. Holloway. I had taken a nitroglycerin pill after I started to feel cold and clammy, with chest pains, which felt like a heart attack was coming on. I told Ms. Holloway and the paramedic that I had some previous coronary problems, and the

paramedic decided to transport me to the Bradley Hospital, where I was admitted under an assumed name in order to shield me from any further incidents. I remained in the hospital for three nights and returned home on Saturday, September 12, 1998. My whole family was devastated by this bomb incident. I became so nervous that I thought I was going to have a breakdown, or worse. Even being hospitalized under an assumed name had an adverse effect on me, as I just could not believe that the harassment against me had escalated to this point.

108. Meanwhile, the Chattanooga bomb squad and the BATF attempted to explode the bomb, but I learned that they determined that this was a fake bomb. At this time, a number of articles appeared in the Tennessee, Alabama and Georgia newspapers about this threatening incident. See Ron Clayton, "TVA Employee Finds Fake Bomb In Truck," Chattanooga Free Press (Sept. 10, 1998); Pam Sohn & Sandra Rowland, "Third Bomb Scare Reported in Bradley," Chattanooga Times (Sept. 10, 1998); "Fake Bomb Found in TVA Whistle-blower's Pickup," Knoxville News-Sentinel (Sept. 10, 1998); Drew Sullivan, "Watts Bar Whistle-blower Apparent Victim of Bomb Scare Hoax," Nashville Tennessean (Sept. 10, 1998); John Harmon, "Nuclear Plant Whistle-blower Reports Threats; Fake Bomb Found in Truck," Atlanta Constitution (Sept. 11, 1998); "TVA, Nuclear Board Probe Fake Bomb," Chattanooga Times (Sept. 11, 1998); Editorial, "Whistleblowers: Punish Those Making Threats," Decatur Daily (Sept. 14, 1998) (attached and incorporated herein as Attachments 40-45). Two articles about this threatening

incident also appeared in the nuclear industry trade press. See "NRC Chairman Shirley Jackson Has Authorized a Review of Region II's OI Investigation," Nuclear News Flashes (Sept. 11, 1998); Tom Harrison, "TVA Whistleblower Hospitalized; Watchdogs Groups Assail NRC Response," Inside N.R.C. (Sept. 14, 1998) (attached and incorporated herein as Attachments 46-47). These trade articles also discussed the concerns that I and nuclear safety groups were raising about the inadequacy of NRC Region II's investigation of my allegations. Id.

109. While I was still in the hospital, Janice and Amanda reported the suspicious white truck that they saw driving by our house on September 9, 1998, to Ron Hudson (TVA OIG Special Agent) and provided him with the license plate number. After I returned from the hospital, I realized that it was not doing us any good to report these incidents to the local (Cleveland, Tenn.) police department since they were not doing any investigation, never informed me as to whether they had any leads or suspects, and never did any follow-up interviews of me. So, on September 24, 1998, my daughter went with Ann Harris, another TVA whistleblower who provided me and my family with tremendous support during this period, to the sheriff's department in Roane County, where the officers arranged for her to provide information that resulted in a computer-generated composite drawing of this driver. We did not recognize the identity of this person, but we kept a copy of this composite drawing.

110. On Tuesday, September 15, 1998, I received a call from

William McNulty, of NRC Region II, who wanted to talk to me about the harassing incidents. I informed him that I was not yet in a condition to do so.

111. On Wednesday, September 16, 1998, Ms. Holloway called regarding the bomb incident. I told Ms. Holloway that I was to meet with the NRC next week. I said that a lot of people at TVA knew that I was not at work the previous week, including Mr. Smith and the others in my work group. I also told her that I was getting too worked up and upset to keep on talking about all the harassment that had occurred. However, I never heard anything further from the TVA OIG about their investigation of this threatening incident, and later learned that they had done no investigation of this incident.

112. That same day, Mr. Hudson (TVA OIG) came to my house and said that he was going to do a "neighborhood investigation." However, I never heard anything further from the TVA OIG about the results of this neighborhood investigation. I provided Mr. Hudson with some information about my ongoing sessions with my psychologist, Dr. Gary Leigh. I told Mr. Hudson that I could not return to work unless TVA provided me with a safe working environment, which it currently was incapable of doing. I also told Mr. Hudson that I thought there were several TVA managers who are upset with me as a result of my whistleblower case against TVA. I reminded Mr. Hudson that ALJ Kennington had criticized several TVA managers, including Mr. Adair, at the hearing and made them look bad in his Recommended Decision and

Order, and suggested that they might well be involved in the continuing harassment of me.

113. On Thursday, September 17, 1998, someone left a threatening note with an attached plastic bag on the fence by my house. This note was written on an official Watts Bar "Daily Journal" record sheet. The note said, "Curtis watch your backside / You are being set-up! / Be carefull [sic] / Here are more screw[s] found last outage / Your Friend." See harassing note (Sept. 17, 1998) (attached and incorporated herein as Attachment 48). The plastic bag contained a number of ice basket screws, similar to those that I had found in the melt tank in April 1995. I became very upset that this harassment was still continuing, and that it was by someone who had access to Watts Bar stationery and to the ice basket screws. I was also confused with the signature, "your friend," since I do not need friends like that. Once again, someone had come very close to me and my family. This harassing note also sent a message that more threats were coming. My daughter Amanda and Ms. Harris took the note and the screws to the Roane County Sheriff's Department on September 24, 1998; the investigator subsequently provided TVA OIG with the note and screws.

114. Because of all these harassing and threatening incidents, I did not return to work at Watts Bar during the Fall of 1998; my last day at Watts Bar was September 4, 1998. I continued to meet on a regular basis with my psychologist, Dr. Leigh, for therapy sessions as my emotional condition and my

relationships with family members had considerably worsened since the time that I returned to work. Dr. Leigh told me that he recommended that I not return to work at Watts Bar, because that would further harm my mental health. I also saw my psychiatrist, Dr. Kevin Ferguson, on a less-frequent basis, primarily to review the medications that he had prescribed for me.

115. In early October 1998, I received a letter from TVA Nuclear Security, which informed me that my unescorted access security clearance was being suspended. See Letter from R. Casey to C. Overall (Sept. 30, 1998) (attached and incorporated herein as Attachment 49). Mr. Casey asked me "to arrange an interview with a TVAN psychologist to reevaluate your psychological approval for clearance." Id.

116. Later in October 1998, I received a letter from NRC Region II, in which the NRC stated that, "You also mentioned that the ice blankets contain water which in your opinion will not dry, the ice condenser will continue to suffer adverse effects if efforts are not made soon to repair a steam generator leak, and that you hope that NRC Region II is seriously looking at ice basket screw concerns." See Letter from NRC Region II to C. Overall (Oct. 7, 1998) (attached and incorporated herein as Attachment 50). The NRC concluded that it "is aware of the technical issues that you described and has and continues to perform inspections in this area. Regarding ice basket screw concerns, NRR has the lead on this issue and NRC Region II is providing inspection support." Id.

117. In December 1998, I was interviewed by Duncan Mansfield, a reporter for the Associated Press. I told him about the ongoing harassment and retaliation that I was continuing to suffer for having reported safety problems with the ice condenser system back in 1995. I also told Mr. Mansfield that my daughter Amanda had gone to the police who had prepared a computer-generated composite drawing of the suspicious person who had slowly driven by our house on the day that I found the fake bomb in my truck, and that we had a copy of this drawing. Mr. Mansfield's article was published in the Nashville newspaper and distributed through Associated Press. See "Tiny Screws Cause Woes for TVA Whistle-blower," Nashville Tennessean (Dec. 21, 1998); Duncan Mansfield, "Broken Screws Turned TVA Worker Into Whistleblower," Associated Press (Dec. 21, 1998) (attached and incorporated herein as Attachments 51-52). This article was embarrassing to TVA because it was obvious that TVA OIG had done no investigation of a number of harassing incidents as soon as I was off the Watts Bar site.

118. In early January 1999, my attorney received a letter from the TVA Assistant Inspector General, which claimed that one handwriting examiner had "linked" my handwriting "to two of the [harassing] notes," and therefore, requested that I provide handwriting exemplars. See Letter from G. Hickman to C. Van Beke (Jan. 6, 1999) (attached and incorporated herein as Attachment 53). TVA also requested that I undergo a polygraph or lie detector examination. Id. I was shocked that TVA would try to

blame me for the harassing notes, and, apparently, had no similar investigation of any other potential suspect.

119. Based on the advice of my counsel, I declined to agree to these requests. My psychiatrist also advised me that because of my current mental state, and the medications that I was taking, a lie detector test might give unreliable results.

120. In mid-January, 1999, TVA announced that it would provide a \$10,000 reward to any individual who had information leading to the arrest and conviction of the person who placed the fake bomb in my truck on September 9, 1998. See Duncan Mansfield, "TVA Targets Whistle-blower; Wants Man to Take Lie-detector Test," Nashville Tennessean (Jan. 16, 1999); "TVA Offers \$10,000 Reward for Information in Bomb Case," Knoxville News-Sentinel (Jan. 16, 1999) (attached and incorporated herein as Attachments 54-55). The articles also mentioned that TVA wanted me to take a lie detector test and provide handwriting exemplars because TVA "investigators also hadn't ruled out Overall himself." See Attachment 54. It seemed clear that TVA was offering a reward at this time only to blunt public criticism that it had done so little investigation of the harassment against me, and most of that investigation had tried to blame me for the harassment. Also, the proposed reward was not accompanied by any promise of immunity for the informant.

121. On February 1, 1999, my attorney gave TVA OIG the composite drawing that my daughter Amanda had prepared of the suspicious driver that she saw on September 9, 1999, and the

I N D E XCOMPLAINANT'S WITNESSESDIRECT CROSS REDIRECT RECROSS

(None this volume)

RESPONDENT'S WITNESSESDIRECT CROSS REDIRECT RECROSS

JAMES C. ADAIR

2127 2151 2191

GRANT R. SPERRY

2198 2278 2366 2373

DANIEL R. DUNN III

2376 2381

PAUL PACE

2396

1 A No, ma'am.

2 Q Okay. And you don't know any basis other than any
3 handwriting analysis that may have been done by the
4 inspector general's office, right?

5 A That's possible.

6 Q And you don't recall who you heard those rumors
7 from?

8 A No, ma'am.

9 Q And was it pretty common knowledge among managers
10 at your level that there were rumors that he wrote the
11 harassing notes to himself?

12 A I don't know if -- I would say it was knowledge,
13 common knowledge, maybe.

14 Q Now, since the administrative law judge's decision
15 in this case you have been promoted by the Tennessee Valley
16 Authority, is that correct?

17 A Yes, ma'am.

18 Q Okay. And you have been promoted specifically to
19 be a manager in the fossil fuel division of TVA, is that
20 correct?

21 A The fossil power group, yes, ma'am.

22 Q And that was a promotion that was made in December
23 of 1999, is that correct?

24 A Yes, ma'am.

25 Q And that was after the administrative law judge's

1 finding that you engaged in a conspiracy to discriminate
2 against Mr. Overall?

3 MR. MARQUAND: Objection; mischaracterization,
4 Your Honor. The ALJ decision doesn't say that Mr. Adair did
5 anything with respect to Mr. Overall. Counsel can't --

6 MS. BERNABEI: He's testified --

7 MR. MARQUAND: It's not in the record for any
8 substantive purpose. If counsel wants to refer to it, it
9 behooves her not to mischaracterize it.

10 MS. BERNABEI: This witness has testified that
11 that's what it says.

12 MR. MARQUAND: It said that he was involved with
13 respect to the safety issues, not with respect to Mr.
14 Overall.

15 JUDGE HILLYARD: I don't believe that to be his
16 testimony. The objection is sustained.

17 BY MS. BERNABEI:

18 Q Okay. Mr. Adair, you knew that the administrative
19 law judge had said that you engaged in a conspiracy to cover
20 up safety problems that Mr. Overall identified?

21 A Yes, ma'am.

22 Q Okay. and after that decision you were promoted
23 to a position in fossil fuel that you currently hold, is
24 that correct?

25 A That is correct.

1 Q And in that position you went from earning [REDACTED]
2 [REDACTED] is that correct?

3 A That is correct.

4 Q And you were aware, were you not, that the
5 administrative review board of the Department of Labor has
6 recently confirmed the decision of the administrative law
7 judge in that case?

8 A Yes, ma'am.

9 Q Okay. And he -- and that board, or the Department
10 of Labor has now confirmed the conspiracy that they say you
11 and others participated in to cover up safety problems?

12 A I have not read that. I have not seen it.

13 Q Okay. So you don't know?

14 A I don't know.

15 Q No one at TVA has ever said that you were going to
16 be disciplined in any way for your participation in a scheme
17 to cover up safety problems, have they?

18 A No, ma'am.

19 Q Now, in your current position you are, if I
20 understand, the third level manager over Mr. Overall?

21 A That is correct.

22 Q Now, you -- at the time Mr. Overall returned to
23 work, you made certain inquiries about the date he would
24 return to work, is that correct?

25 A Yes, ma'am.

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November 21, 2000



For the record, Sequoyah excels

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During Sequoyah Nuclear Plant's Unit 2 outage, (from left) Radiography Technician Brian Christopher and Eddy Current Technicians Jane Lockwood and Arthur Lee induce an electromagnetic field to check the condition of tubing from a heat exchanger.

By KAY WHITTENBURG

For the fourth time at Sequoyah Nuclear Plant, employees have set a world refueling record for plants of similar design. On Nov. 14, Unit 2 was returned to service in just 23 days, 4 minutes.

The unit was reconnected to TVA's seven-state power system at 10:04 p.m., which was 4 hours, 27 minutes ahead of the previous refueling-outage record set by the same unit in May 1999.

While the Unit 2 refueling outage was a success, it started very differently than any other refueling outage in the history of the plant.

In late September, the Sequoyah team was focused on preparing for the upcoming Unit 2 outage when Unit 1 shut down because of the failure of a bearing on a main feedwater lube-oil pump.

With the unit down, a reactor-coolant-pump motor was inspected to troubleshoot the source of increased vibration. Work was completed, and Unit 1 was returned to service 10 days later on Oct. 5.

The next day, with Unit 1 at about 50-percent power, high vibration on the reactor coolant pump resulted in the unit's being shut down again — only 16 days before Sequoyah's most aggressive refueling outage was to begin.

"It was frustrating for the team at first," says Sequoyah Plant Manager Dennis Koehl. "No one wants a forced outage, especially during a refueling outage. We wanted to put the majority of our

Complainant's Exhibit 473

Exhibit 3
EA-99-115 (TVA)

time and effort on preparing for the upcoming Unit 2 outage.

“You could see the determination, and everyone rallied. The workers were going to make it through these outages and come back as a stronger team with a better-performing plant than before.”

The determination paid off, and both units are now back online. Unit 1 returned Nov. 13, just one day ahead of Unit 2.

TVA Chief Nuclear Officer John Scalice commended the Sequoyah team for its performance during this world-class outage.

“Not only did the workers perform refueling outage work on Unit 2 safely and in a high-quality and most expeditious manner, they also met the challenges with Unit 1,” Scalice says. “They focused on their work, paid close attention to detail, and now have returned both units to service.”

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Jocher v. Tennessee Valley Authority, 94-ERA-24 (ALJ July 31, 1996)

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Date: July 31, 1996
CASE No.: 94-ERA-24

In the Matter of

WILLIAM F. JOCHER

Complainant

v.

TENNESSEE VALLEY AUTHORITY

Respondent

APPEARANCES:

Charles W. VanBeke, Esquire
Wagner, Myers & Sanger

For the Complainant

Thomas F. Fine, Esquire
Philip J. Pfeifer, Esquire
Brent R. Marquand, Esquire
Tennessee Valley Association

For the Respondent

BEFORE: ROBERT L. HILLYARD
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises out of a complaint of discrimination

[Page 2]

filed pursuant to Section 210 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. Section 5851, *et seq.*, (hereinafter ERA). The implementing regulations are found at 29 C.F.R. Part 24. The ERA affords protection from employment discrimination to employees in the nuclear industry who commence, testify at, or participate in proceedings or other actions to carry out the purposes of the ERA or the Atomic Energy Act of 1954, as amended 42 U.S.C. Section 2011, *et seq.* The law is designed to protect "whistleblower" employees from retaliatory or discriminatory actions by the employer.

A formal hearing in this case was held in Knoxville, Tennessee, from May 9, 1995 to May 18, 1995. Each of the parties was afforded full opportunity to present evidence and argument at the hearing as provided in the Act and the regulations issued thereunder. The findings and conclusions which follow

are based upon my observation of the appearance and the demeanor of the witnesses who testified at the hearing, and upon a careful analysis of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent case law.

I. STATEMENT OF THE CASE

William F. Jocher (Jocher or Complainant) filed a complaint with the Wage and Hour Division, Employment Standards Administration on June 29, 1993, alleging that he had been forced to resign as a result of his reporting of safety concerns relating Tennessee Valley Association's (TVA) chemistry program (ALJX 1).¹ The Area Director of Wage and Hour Division, Employment Standards Administration conducted an investigation and on April 29, 1994, issued a decision in favor of the Complainant. *Id.* On May 3, 1994, Respondent appealed that decision and requested a hearing before

[Page 3]

the Office of Administrative Law Judges (ALJX 2).

II. ISSUES

1. Whether the Complainant's resignation was voluntary;
2. Whether TVA demonstrated legitimate, non-pretextual reasons for seeking the Complainant's resignation; and
3. Whether TVA discriminated against the Complainant as a result of his reporting of safety concerns relating to TVA's chemistry program, in violation of the Act.

III. STIPULATIONS

The stipulations are incorporated into the Factual Background Section and the Findings of Fact Section. They are contained in ALJX 39.

IV. FACTUAL BACKGROUND

A. Jocher's Work History and Educational Background

The Complainant, William Jocher, began his career in the utility industry in the mid-1960's as an equipment operator at a Public Service Electric & Gas fossil fuel plant. Jocher was later transferred to the test department, where he learned how to repair, maintain and calibrate instruments, as well as conduct laboratory analyses (CX 2, Tr. 27-29). Public Service Electric & Gas announced the building of its Salem Nuclear Generating Station, and in October of 1972 Jocher began working at the Station as an instrument technician, health physics (radiation protection) technician and chemistry technician (CX 2, Tr. 28). Beginning in 1979, Jocher began working for the Seabrook Nuclear Power Plant as a plant chemist (CX 2, Tr. 29). A year later, Jocher took a job as a senior engineering assistant at the Three Mile Island Nuclear Power Plant, responsible for restructuring and developing the chemistry department in the wake of the Plant's accident (CX 2, Tr. 32). Jocher returned to the Salem Nuclear Generating Station in 1981, serving as senior supervisor

[Page 4]

and acting head of the department of health, physics and chemistry - a position analogous to chemistry manager at other nuclear facilities. *Id.* Beginning in 1983, Jocher worked for the Pennsylvania Power & Light Company Susquehanna Steam Electric Station as a senior chemist (CX 2, Tr. 36). In 1986, Jocher took a job at Georgia Power Company Vogtle Electric Generating Plant as a radiochemistry supervisor (CX 2, Tr. 41). From 1987 to 1990, Jocher worked at Houston Lighting 7 Power Company South Texas

Project as a chemistry support general supervisor. *Id.*

Jocher's work history familiarized him with the two types of nuclear reactors in the United States - pressurized water reactors and boiling water reactors. His work history also gave him experience in the technical chemistry issues specific to nuclear power plants as well as an overall understanding of the workings of a nuclear power plant. Jocher co-authored a number of papers addressing issues facing the nuclear power industry and presented them at industry meetings (CX 5, 6, 7). These factors, along with Jocher's extensive work experience, led TVA to hire him in November of 1990 for the position of Manager, Chemistry and Environmental Protection, in its corporate nuclear office.

Jocher received his degree in Professional Studies from Elizabethtown College in January of 1990 (CX 1). In his TVA employment application, Jocher represented that he attended Elizabethtown for four years, earning a 3.0 grade point average. In fact, Jocher attended Elizabethtown over a period of eight years and also attended six other colleges and universities over twenty-eight years (RX 45, Tr. 343-44). Elizabethtown awarded Jocher his degree based upon academic credits accumulated at Elizabethtown, previously earned academic credits from other colleges and universities, and credits awarded for on-the-job experience (Tr. 361). Jocher's transcripts, which included all of the colleges and universities he attended, do not support a 3.0 grade point average (RX 45). In an employment application filled out in 1994, Jocher represented that he majored (32 credits) in nuclear chemistry (RX 43). Jocher's transcripts do not show 32 hours/credits of chemistry classes (RX 45).

B. Jocher's Tenure at TVA Corporate - November 1990 to March 1992

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On November 26, 1990, Jocher was hired by TVA in its Office of Nuclear Power as Manager, Corporate Chemistry and Environmental Protection (TVA corporate) (ALJX 39). Jocher's position was classified as Grade PG-10 on TVA's Management and Specialist Pay Schedule.² At the time of Jocher's hiring, TVA had three operating nuclear units at two sites (Sequoyah and Browns Ferry) and two sites (Bellefonte and Watts Bar) with units under construction (Tr. 63, 1347). Jocher's role as corporate chemistry/environmental manager was to provide technical support and assistance to the sites as well as provide information on program issues to corporate management (CX 9). The Sequoyah, Browns Ferry and Watts Bar facilities each had their own chemistry and environmental staffs.

Jocher's technical skills were highly regarded. As discussed, Jocher came to TVA with extensive experience in nuclear chemistry. James Barker, who hired Jocher and was his first supervisor at TVA, testified that he was very impressed with the technical skills Jocher had built up over the years (Tr. 468). Donald Vetal of Nuclear Utility Services (NUS), a nuclear consulting firm, worked with Jocher both prior to and after Jocher began working at TVA and testified that he would rate Jocher very high from a technical standpoint (Tr. 678-680). Patrick Lydon, corporate operations manager at TVA who supervised Jocher for approximately seven months, testified that Jocher was technically sound (Tr. 615). Dr. William McArthur, TVA's Manager of Technical Support and one of Jocher's supervisors, testified that Jocher was a very strong technical person and wrote in Jocher's September 8, 1992 employee appraisal that his strengths included technical knowledge and experience (Tr. 1093, 1101, CX 14, ALJX 39). Robert Beecken, plant manager at Sequoyah when Jocher was at TVA corporate, said that he was impressed with Jocher's knowledge in the nuclear chemistry field (Tr. 1253).

Some of the tasks that Jocher undertook at TVA corporate included promoting the adoption of a hydrogen water chemistry plan at Browns Ferry, recommending a treatment plan for Browns Ferry's main surface condenser, and developing a corporate chemistry manual to promote uniformity across the site chemistry programs. (Tr. 61, 71, ALJX 39, CX 173).

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While at TVA corporate Jocher interacted with numerous people from both the corporate office and the

sites. Donald Matthews, the chemistry program manager at Watts Bar, testified that Jocher got along well with other team members and behaved professionally during staff meetings (Tr. 541, 546). Dr. E.S. Chandrasekaran, a senior chemistry and environmental specialist at TVA who worked with Jocher prior to joining TVA and was brought to TVA by Jocher, testified that Jocher behaved professionally during staff meetings (Tr. 768-771, 778). Charles Hudson, manager of TVA's corporate radiological control group, testified that he had a good relationship with Jocher but had little knowledge of Jocher's dealings with others (Tr. 506, 511, 531). James Barker testified that he got along well with Jocher and was happy with the progress made at TVA corporate during Jocher's tenure (Tr. 475). Barker acknowledged that he did not have much opportunity to observe Jocher interacting with other managers and said that tension between corporate and site staffs had always been common (Tr. 488, 494).

Dr. Don Adams, chemistry program manager at Sequoyah, testified that while at TVA corporate Jocher had accused him of initiating a rumor that he (Jocher) had been demoted; Adams denied starting the rumor and Jocher later apologized to Adams for making the accusation (Tr. 1023, 1047-48). Adams told Wilson McArthur about the incident (Tr. 1049). Adams said that he did not trust Jocher, believing him to have a "get even" attitude (Tr. 1048-49). Betsy Eiford-Lee, a chemist and member of Jocher's corporate chemistry staff, testified that Jocher often interrupted staff meetings by placing phone calls³ and contributed to the divisiveness in the meetings by favoring chemists over environmentalists⁴ (Tr. 741-42, 747). Eiford-Lee spoke of one instance where Jocher inserted an unfavorable remark in her performance evaluation after she had signed it; she asked Jocher to delete the remark and he did (Tr. 747-48). Because she did not like working for Jocher, Eiford-Lee requested and was granted a transfer out of the corporate chemistry staff (Tr. 751).⁵ David Sorrelle, a Senior Program Manager at TVA corporate who worked for Jocher, testified that Jocher disrupted corporate staff meetings by making "unwarranted personal attacks" on people in the

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meetings, particularly the site chemistry managers⁶ (Tr. 842-45).

Jocher had an uneasy working relationship with John Sabados, TVA's acting Chemistry Manager at Browns Ferry during the time that Jocher was at TVA corporate. Their problems started with the hydrogen water chemistry initiative at Browns Ferry, a program vigorously championed by Jocher. Sabados took offense to Jocher's aggressive campaigning, feeling that the program needed further review before it was ready for implementation⁷ (Tr. 1518-1521, ALJX 39). Sabados also had a problem with the corporate chemistry manual, a Jocher project, believing the manual was unnecessary and "superfluous." (Tr. 1516). Jocher's recommendation of a treatment plan for Brown Ferry's main surface condenser was initially opposed by Sabados (ALJX 39).

The above disagreements resulted in discord between Jocher and Sabados. Sabados testified that he felt Jocher was meddling with the sites, giving orders rather than offering support (Tr. 1093, 1116, 1212, ALJX 39). Jocher testified that the two had a "rocky relationship" and that Sabados did not take well to suggestions from TVA corporate (Tr. 71). David Sorrelle testified that he overheard what⁸ he believed to be a phone conversation Jocher was having with a manager from another power plant concerning the mental stability of Sabados (Tr. 847). Sorrelle told Sabados about the phone call and Sabados became upset, believing that Jocher was attempting to remove him from TVA (Tr. 847, 1522). Jocher testified that he called Sabados' former supervisor for advice on dealing with Sabados (Tr. 72); Jocher said that Sabados' former supervisor broached the subject of Sabados' mental stability, not him (Tr. 1642).

This incident led to a meeting attended by Wilson McArthur, Jocher, Sabados and Max Herrel, Sabados' supervisor at Browns Ferry. At the meeting, Jocher and Sabados discussed their differences and agreed to work professionally together (Tr. 72, 1521-23, ALJX 39). Jocher testified that he felt the meeting went fine and he had no further problems with Sabados (Tr. 72-73). Sabados testified that he remained leery of Jocher and did not like working with him (Tr. 1523).

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The two crossed paths again after Jocher's assignment to Sequoyah. Jocher did not support Sabados' nomination as permanent chemistry manager at Browns Ferry (Tr. 1524, 1534-35, ALJX 39). And during a meeting in which Sabados offered Jocher constructive criticism, Jocher responded that he hoped to be able to "repay the favor." (Tr. 1527-28, ALJX 39). Sabados felt that the remark could be taken two ways and chose not to take any affront to Jocher's remark (ALJX 39). In May 1992, McArthur talked to Sabados and McArthur understood that Sabados was not happy with Jocher about some issue. Jocher recalls that the issue may have involved his proposal to combine site chemistry and health physics into a single radcon organization. McArthur told Jocher what Sabados had said. McArthur recorded that Jocher intended to develop better rapport with Sabados and be a team player (ALJX 39, RX 12).

Jocher received an overall favorable performance review for his work at TVA corporate. The report read that Jocher "has met all his goals in a timely, professional manner. He and his staff have technical credibility with corporate and site organizations and have worked to establish a good team relationship." (CX 12). It was also noted that Jocher's "rapport with the site managers is established" and that "Mr. Jocher has provided leadership and solid technical direction to corporate and site chemistry." *Id.* The report noted that Jocher needed to place additional emphasis on delegation and meeting administrative commitments. *Id.* Jocher received a \$3,800.00 performance based bonus that year (Tr. 279-280, CX 108).

C. Jocher's Assignment to Sequoyah

One of Jocher's duties while at TVA corporate was to prepare an assessment of Sequoyah's chemistry program (Tr. 100-01, CX 38, ALJX 39). Part of the assessment involved reviewing previously identified problems at the site, identified by the Nuclear Manager's Review Group (NMRG), Operational Readiness Review (ORR), Institute of Nuclear Power Operations (INPO) and Quality Assurance (QA)⁸ (Tr. 75). Jocher's review revealed a number of problems at Sequoyah, including: unreliable equipment, problems with procedural compliance, operational readiness, post-accident sampling procedures; training deficiencies at the shift personnel,

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technician and supervisor levels; improper labeling of chemicals; and unfulfilled work requests (CX 162, 163, 164, 166, 167, 168, 170, 171). Most of these problems, while for years known to exist, still prevailed (Tr. 122, 134, 139, 147). Jocher summarized the problems in a report titled the "Chemistry Improvement Plan" and presented his findings to TVA management (Tr. 101, CX 38).

At about the same time, Gary Fiser, Sequoyah's then acting Chemistry Manager, was ready to return to TVA corporate - leaving the Sequoyah chemistry manager position open (ALJX 39). Since Jocher had studied and reviewed the Sequoyah chemistry program, TVA management felt that Jocher was the right person to cure Sequoyah's ailing chemistry program and proposed that he assume the site's chemistry manager position; Jocher agreed and the assignment was made in February of 1992.⁹ *Id.* As a condition to the assignment Jocher received assurance that, unless otherwise agreed to, he would return to corporate in one year. *Id.* Dan Keuter, TVA's Vice President of Operational Services, impressed upon Jocher that his assignment to Sequoyah provided him an opportunity to build credibility by showing that he could solve problems at the site level. TVA management expected Jocher to "put his money where his mouth was." *Id.*

D. Jocher's Tenure at Sequoyah

Upon arriving at Sequoyah, Jocher continued to identify problems. Many of them involved out of service equipment, including radiation monitors, chlorination systems, condenser vacuum exhaust monitors and on-line monitors (Tr. 166-174, CX 55B-F). All totalled, the Chemistry Improvement Plan evolved during Jocher's tenure at Sequoyah from approximately 65 items to over 120 items (ALJX 39).

Jocher commenced efforts to improve the Sequoyah chemistry program. He solicited feedback from the

chemistry personnel in the form of an anonymous questionnaire. The responses revealed the existence of a number of morale, management, personnel, training and communication issues at the Plant (ALJX 39). In an

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effort to improve the chemistry program, Jocher instituted a number of accountability measures. He outlined tasks to be completed by his shift supervisors and lab technicians, providing a time frame for completion (Tr. 82, CX 37, 37A). Technicians were provided with binders to note assignments and document their progress (Tr. 82-83, CX 40). Jocher prepared a list of daily minimum expectations for the technicians and shift supervisors (Tr. 85, 87-88, CX 4, 45). To combat the problem of out of service equipment, technicians were required to monitor their use of instruments in an analyst log book, ensuring that the instruments met quality assurance checks¹⁰ (Tr. 87-88). As a motivational tool for the technicians, Jocher adopted the "Top Crew" program whereby he awarded peak performers by placing them on a straight day schedule rather than on rotating shifts (Tr. 90-93, CX 54). Jocher testified that his initiatives led to a reduction in the amount of reported errors, as documented in monthly chemistry reports (Tr. 95-101, CX 55D-J).

Another of Jocher's concerns when he arrived at Sequoyah was the technician's level of knowledge. As far back as 1988, deficiencies in the technician's level of knowledge had been documented in INPO, NMRG, ORR and QA audits (ALJX 39, Tr. 193-94, 1026-27, CX 78, 79, 168).¹¹ Prior to Jocher's tenure at TVA, as part of a reorganization, TVA discontinued using its central chemistry training laboratory for training and moved from a periodic to a continuous training program. INPO, NMRG, ORR and QA auditors had identified chemistry training as an area of concern, with unresolved open items questioning the systems and theoretical knowledge of the chemistry technicians. TVA chemistry technicians typically tested well in their areas of specialization, but not so well in areas in which they did not work. Many exhibited a lack of understanding of theoretical and fundamental nuclear plant chemistry issues (ALJX 39). Lawrence Durham, TVA's Nuclear Training Manager, testified that he did not believe the restructuring of TVA's training program had a significant negative impact on the technician's level of knowledge (Tr. 1481, 1485, 1489).

In an effort to assess the level of knowledge, Jocher

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administered a test to his shift supervisors and technicians (Tr. 184, CX 60). The test was not administered anonymously (Tr. 438). The scores on the test established a low level of theoretical knowledge in chemistry related matters¹² (Tr. 183). Jocher attempted to improve the technician's level of knowledge by initiating classes at the Sequoyah training facility. He taught some of the classes himself, calling them the "adjunct professor" program (ALJX 39).

The technicians were unhappy with the manner in which Jocher administered the test. Dan Keuter (TVA's Vice President of Operations Services) testified that the technicians were upset because the test was not administered anonymously and did not test pertinent knowledge (Tr. 944, RX 20). Keuter did not think it was appropriate for Jocher to require the technicians to include their names on the test because the purpose of the test was to obtain an overview of technician knowledge, not identify individual technician weaknesses¹³ (Tr. 946). Lawrence Durham (TVA's Nuclear Training Manager) also questioned Jocher's decision to require the technicians to identify themselves and, like Keuter, felt that the test's subject matter did not correlate with the technicians' training (Tr. 1493, 1498, 1500). Charles Kent, Sequoyah's Radiological Control Manager, testified that the test led to morale problems with the technicians (Tr. 1285). In Durham's opinion, Jocher intimidated the training program personnel (Tr. 1507-08).

The Nuclear Safety Review Board (NSRB)¹⁴ eventually had the technicians retested, determining that the Jocher-administered test did not properly test the technicians' knowledge and asked improper

follow-up questions (Tr. 945-46, 1496, RX 20). TVA's Training Programs Executive Committee (TPEC)¹⁵ administered the new test in March of 1993; the test was taken anonymously (Tr. 1505, ALJX 39, RX 41, 62). The test was designed to assess the technicians' basic knowledge in maintenance, chemistry and radiation protection (Tr. 1501). The results of the test revealed weaknesses in the technicians' fundamental and theoretical knowledge (ALJX 39, Tr. 1505).

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Jocher's attempts to effectuate changes at Sequoyah involved significant interaction with plant and non-plant personnel. Patrick Lydon (TVA's Corporate Operations Manager) testified that some workers were unhappy with the "higher standard" set by Jocher (Tr. 624). Lydon said that he found Jocher to be an "excellent manager" and a "team player" while at Sequoyah (Tr. 613-14). Lydon received no complaints about Jocher's management style and no claims that Jocher belittled or intimidated the chemistry staff (Tr. 615-16). Dr. E.S. Chandrasekaran (TVA's Senior Chemistry and Environmental Specialist) testified that Jocher was never demeaning or unprofessional with the Sequoyah staff (Tr. 778). James Mullenix, a Quality Assurance assessor for TVA, testified that Jocher behaved well in staff meetings and never embarrassed members of the staff. Mullenix said that Jocher was effective at addressing problems brought to his attention by Quality Assurance, unlike previous managers who downplayed problems and were loathe to take action¹⁶ (Tr. 803-05). Donald Vetal of NUS testified that his observation of Jocher revealed that he (Jocher) worked effectively with his staff (Tr. 695).

When Jocher went to Sequoyah there were several vacant positions in the site chemistry organization. Jocher told Sequoyah Human Resources Manager K. Jill Wallace that he wanted to fill those positions with two persons he previously worked with at other power plants. Wallace told Jocher that the additions could pose head count problems because the vacant positions were going to be eliminated. Wallace testified that Jocher became frustrated with the delays associated with changing personnel (Tr. 712). She felt that Jocher was moving too quick¹⁷ (Tr. 710-711). Wallace also testified that she complained to management that Jocher was very arrogant, loud [and] demanding, "that he tried to "talk down" to her, and that he treated her like a "little girl [who] doesn't know what she's doing." (Tr. 714-17, 1388-89). She acknowledged that after she made her concerns known to Jocher he treated her in a more

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polite manner (Tr. 727). As part of Jocher's personnel changes, he attempted to transfer certain instrument maintenance work from the instrument mechanics to the chemistry technicians, to get higher priority for maintenance of the instruments. Jocher did not use proper channels and upset the personnel effected by his proposal (Tr. 717-721, 728, 1263-64, 1365-68, 1389-1390).

In February of 1993, Jocher called Sam Harvey, a manager Jocher had brought onto TVA's corporate chemistry staff in 1991, from Jocher's former place of work, the South Texas Nuclear Project. Jocher was angry because he felt that Harvey had improperly disagreed with him in discussions with a Quality Assurance auditor. That evening Harvey had a meeting with Dan Keuter and told him about the incident, that he was disturbed to be attacked, and that he did not know if he could work with Jocher. Keuter considered that Harvey had been a strong supporter of Jocher and told Harvey not to worry, that his job was secure. The next day, Harvey told McArthur, who told Jocher about Harvey's fear. Jocher promptly called Harvey to his office and attempted to reestablish their working relationship (ALJX 39).

Dan Keuter testified concerning the feedback he received concerning Jocher's management style at Sequoyah. He said that Jocher was having trouble getting the technicians to buy into his ideas; that Jocher usually managed by memo and was not a "hands on" manager; and that Jocher frequently meddled in the affairs at Browns Ferry (Tr. 910-911). Wilson McArthur also received feedback concerning Jocher's management style. He said that Jocher needed to be more of a team player; was too slow to implement changes; and often played favoritism with the people he brought to Sequoyah (Tr. 1104, 1121, 1123). Like Keuter, McArthur commented that Jocher was too memo minded and meddled in the affairs of Browns Ferry (Tr. 1116-17). David Goetcheus, TVA's corporate Manager of Outage

Management and Steam Generator Technology, questioned Jocher's management skills, testifying that he was slow to implement changes¹⁸ (Tr. 1550-54).

E. Jocher's Protected Activity at Sequoyah

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1. Post-Accident Sampling System

The Post-Accident Sampling System (PASS) came about as a result of the accident at the Three Mile Island nuclear plant (Tr. 591). After the accident, it was necessary to obtain a sample of the reactor coolant system (Tr. 142). This posed a great risk of radiation exposure to the persons taking the sample (Tr. 591). Manufacturers devised a safer means of obtaining the sample by using a heavily shielded panel apparatus (Tr. 142-43). Federal regulations set forth the requirements that a licensee must meet in order to satisfy post-accident sampling conditions (Tr. 143). TVA did not have an effective PASS in place, and this was noted in a 1988 visit by INPO, which wrote that "the post-accident sampling system is not reliable due to equipment and procedure deficiencies." (CX 168). McArthur acknowledged that while TVA knew of the PASS problem, formal corrective action was never initiated (Tr. 1216-17).

Every chemistry lab technician was tested to see if he or she could operate the PASS equipment to obtain a gas and liquid sample and to complete an analysis within three hours. The site training organization administered the test. The test revealed that there were an insufficient number of personnel who could obtain samples and complete an analysis within three hours. Jocher initiated a Significant Corrective Action Report (SCAR) 92-0004 on May 11, 1992¹⁹ (ALJX 39, CX 75). A SCAR is a formal corrective action document at TVA, and a copy is automatically provided to the on-site Nuclear Regulatory Commission (NRC) representative (ALJX 39). A SCAR is the most serious level of corrective action and garners the most attention from TVA management and the NRC (Tr. 592, 1435). Jocher testified that as a result of the SCAR the PASS equipment was corrected and all of the technicians were trained (Tr. 208-211).

Jocher and Sequoyah Vice President Jack Wilson disagreed over the interpretation of Federal regulations pertaining to the PASS (Tr. 201-02, ALJX 39). The disagreement centered around the allowable time frame to obtain a sample (Tr. 201-02). Jocher believed that once the decision had been made to obtain a sample, the clock began to run - even before assembling the sampling team (Tr. 202). Wilson maintained that the clock did not begin to run

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until the decision was made to take the sample *and* the sampling team had been assembled (Tr. 1061). To resolve the conflict, Jocher, with McArthur's approval, called a representative of NRC's Nuclear Reactor Regulations office (NRR) (ALJX 39).²⁰ McArthur subsequently told Jocher that Robert Beecken (Sequoyah's plant manager) and Wilson were unhappy that he (Jocher) had contacted NRR (Tr. 206, 593). Beecken denied being unhappy with Jocher's decision, testifying that he "more so . . . endorsed him" (Tr. 1268).

2. On-Line Instrumentation Monitors and Calibration

Jocher also reported problems concerning the on-line instrumentation system. When working correctly, this system gives a constant reading of the erosion and corrosion processes occurring within the pipes of the plant (Tr. 120). When the instruments are not working, readings can be taken by obtaining a "grab sample," which means that a technician will go out and physically obtain a sample from within the pipe and bring it back to the laboratory for analysis (Tr. 118). The grab sample technique can be unreliable because (1) it only allows for a look into what the situation is at the exact moment when the sample is taken, creating the possibility of missing an event occurring between two samples and (2) it is susceptible to human error, i.e., decay occurring in the time it takes to take the sample and run it back to

the laboratory (Tr. 117-18, 120). For these reasons, an on-line instrumentation system is always preferable (Tr. 119). Jocher testified that he estimated that 40 percent of the daily samples were grab samples due to the fact that instruments were not operable (Tr. 119). The high rate of operable monitors stemmed from the fact that there was a backlog of work requests for the maintenance department (Tr. 123-25, 820, 1365). The percentage of instruments out each month were reported in the Sequoyah monthly chemistry reports (CX 55A-J).²¹

As with PASS, the lack of operable monitors problem had been identified previously by both ORR and INPO. In a review ORR conducted in 1987, it was noted that "large numbers of work requests, engineering change notices and conditions adverse to

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quality remain open for extended periods of time." (CX 163). INPO's review found that approximately 35% of the on-line monitors were out of service that approximately 86% of these out of service monitors (30% of the total monitors) had been inoperable for over three months, with some dating back to 1990 (CX 65). INPO also noted that "some of the monitors that have been out of service for an extended period of time are significant in controlling plant chemistry." *Id.*

On June 23, 1992, Jocher entered the on-line instrumentation problems into the formal corrective action process by initiating a SCAR (CX 69). The SCAR raised the following issues: (1) approximately 40% of the on-line analyzers used by Chemistry to monitor plant operations systems were out of service at any given time; (2) the alarm setpoints on the on-line analyzers had been improperly set; and (3) that the required annual calibration of those instruments was last performed on May 10, 1985 and February 21, 1984, for units 1 and 2, respectively²² (ALJX 39).

Pat Lydon testified that when Rob Beecken (Sequoyah's Plant Manager) learned of Jocher's corrective actions he became visibly upset (Tr. 587-88). Lydon said that Beecken was upset because he felt the on-line monitoring issue was non-safety related and did not merit SCAR status (Tr. 588). Wilson McArthur (TVA's Manager of Technical Support) testified that he did not disagree with Jocher's decision, that it was part of Jocher's responsibility and had no adverse effect on him (Tr. 1150-51).

Jocher's SCAR came to the attention of the resident NRC inspector (Tr. 228). In a March 22, 1993 formal Notice of Violation (NOV) from the NRC that addressed other problems, the NRC indicated it was concerned about the on-line instrumentation issues raised by Jocher in his SCAR and that the NRC was going to conduct an investigation in its next visit (CX 96). When the NRC did the investigation, it concluded that 50 of the non-operative instruments encompassed by Jocher's SCAR were safety related and the NRC issued a NOV on April 22, 1994 (Tr. 229, CX 97).

3. Chemical Traffic Control

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Unlabeled containers pose a problem for nuclear power plants because their contents (i.e., chemicals) may have a corrosive effect if it interacts with metal, heat or other chemicals inside the plant (Tr. 602). Consequently, all containers inside a power plant must be properly labeled. This process is known as chemical traffic control. A 1992 assessment of Sequoyah's chemistry program identified a problem with the Plant's chemical traffic control procedures; this finding resulted in a NRC Notice of Violation against TVA (ALJX 39).

In response to the Notice of Violation, TVA assured NRC that the problem would be rectified (CX 81). The nuclear consulting firm NUS conducted a chemical traffic control audit of Sequoyah and developed a list of approved and unapproved chemicals (Tr. 690). Subsequently, TVA's training department put together a 30 minute video explaining the proper chemical traffic control procedures (Tr. 604-05). TVA assured the NRC that designated departments would view the training film (CX 81). Patrick Lydon

(TVA's Corporate Operations Manager) testified that TVA's goal was to have all on-site personnel view the film by a certain date (Tr. 604-05). On November 3, 1992, TVA sent the NRC a letter stating that they were in full compliance, meaning that all designated personnel had viewed the chemical traffic control training film (CX 82).

Jocher testified that a few weeks later he received a computerized printout showing that not everyone had viewed the training film²³ (Tr. 262). James Mullenix (Quality Assurance for TVA) testified that he too discovered that not all of the designated personnel had viewed the film, while TVA management represented to the NRC that they had (Tr. 810, CX 174). Charles Kent (TVA's Radiological Control Manager) disputed the accuracy of the printout, testifying that he viewed the film but was not given credit for it (Tr. 1318-19). In a NSRB meeting in February of 1993, Jocher stated that about 20% of the persons at the site had not attended the chemical traffic control training film (ALJX 39).

TVA disputed Jocher's allegations, pointing out that no Notice of Violation resulted from Jocher's February 1993 statement (RX 50). TVA's response to the NRC's Notice of

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Violation included an assurance to train *craft* employees²⁴, not all Sequoyah employees, as Jocher had alleged (Tr. 1674-79, RX 57). Charles Kent (Sequoyah's Radiological Control Manager) testified that the NRC representatives told him that Sequoyah's problem was with the labeling of containers, not with chemical traffic control training. He said that the NRC was "fully satisfied that [TVA] had met [its] training commitment (Tr. 1291-93, RX 50). The NRC was in contact with Jocher after he left TVA, and after another investigation, it concurred with Jocher's assessment that the chemical traffic control training had not been completed in a timely manner (CX 98).

Jocher was not alone in initiating corrective action reports. Even before he arrived at Sequoyah, forty other LER's and 478 other corrective action documents such as SCARS and PERS had been filed by other TVA managers and employers (Tr. 1296-99, RX 23). Dr. Don Adams (Sequoyah's Chemistry Program Manager) testified that "a number of corrective actions [had been] filed and reported on the [Sequoyah chemistry] program to document weaknesses." (Tr. 1047). Joseph Bynum, TVA's Vice President of Nuclear Operations, testified that he was concerned with TVA's inability to reduce the number of corrective action documents (Tr. 1435-36).

Jocher testified that most SCARS are initiated because of isolated incidents, but that the ones he initiated dealt with programmatic breakdowns (Tr. 215-16). Patrick Lydon (TVA's Corporate Operations Manager) also testified that Jocher's corrective actions were programmatic in nature. A programmatic breakdown represents a system wide problem and generates a higher level of concern (Tr. 216-17, 667-69, 1437). Charles Kent testified that while TVA is accustomed to the filing of corrective action reports, some upset management more than others (Tr. 1311). Jocher acknowledged that raising safety concerns was part of his job and that he was not criticized for doing so (Tr. 361-62). Joseph Bynum (TVA's Vice President of Nuclear Operations) testified that he did not scrutinize corrective action reports and was unaware of the ones initiated by Jocher (Tr. 1410-1411, 1463-64). Kent believed that Jocher's initiation of the corrective action reports was designed to draw attention to the problems at Sequoyah's chemistry program so that TVA

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management would devote more financial resources to the program, thereby allowing Jocher to meet his goals (Tr. 1308-09, CX 125).

F. Documentation of Jocher's Performance While at Sequoyah

Jocher testified that while he was at Sequoyah he never received any verbal or written counseling or reprimands (Tr. 294, 302). Wilson McArthur testified that Joseph Bynum, Dan Keuter and himself had

on occasion talked about Jocher's management problems (Tr. 1135). McArthur had also spoken to Jocher about his behavior. McArthur's work notes show that he spoke to Jocher on February 19, 1992, reminding him "to be less aggressive and to work with others" and that he "may not always be in fact right." (Tr. 1104, 1238, RX 12). On February 25, 1993, before Jocher returned to his corporate position, McArthur and Jocher discussed his need for rapport with the sites (Tr. 1129, RX 12, ALJX 39). On March 10, 1993, McArthur and Jocher agreed that Jocher would work on his management skills. McArthur recorded in his work notes that Jocher was committed to developing a better attitude (Tr. 1239-1240, RX 12, ALJX 39). At the hearing, Jocher acknowledged that McArthur discussed with him the need to "tone it down a little bit." (Tr. 1662). Jocher's work notes dated March 10, 1993, express concern that TVA might "ax" him (Tr. 295-96, CX 15). When questioned on how much he knew of McArthur's counselling of Jocher, Joseph Bynum replied that he took McArthur's word that he (McArthur) had counseled Jocher (Tr. 1419, 1462). Michael Pope, a member of TVA's Human Resources Department who was involved in Jocher's departure, testified that McArthur told him that he (McArthur) counseled Jocher during the previous year; however, Pope said that he was not aware of the existence of warning letters (Tr. 1346).

Jocher's second performance evaluation covered the period from October 1, 1991 to September 20, 1992, which included six of the twelve months he worked at Sequoyah (CX 14). As with his first performance review, Jocher's second review, which was signed by Patrick Lydon and Robert Beecken, was overall favorable. The review stated that Jocher

[H]as made significant progress on the Chemistry Improvement plan. He promptly identifies problems and aggressively works to correct them. . . . [Jocher] approaches all work as a member of [Sequoyah's] plant team while still providing input to the corporate Chemistry group. He has established high standards for himself and the Chemistry department and holds all accountable.

Id.

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The review further read: "[Jocher] is very proactive and has established a run-it-like-it-was-our-own business attitude which had been missing in the Chemistry department." *Id.* The report listed a litany of Jocher's accomplishments during the six months he was stationed at Sequoyah, many of which have been discussed previously (improvement of chemistry instrumentation, defined job assignments, implementation of PASS procedures, implementation of raw cooling water and equipment control plan). *Id.* The review concluded that Jocher had made significant improvement in Sequoyah's chemistry department. *Id.*

As part of the performance review, McArthur submitted a letter listing Jocher's strengths and weaknesses. He noted Jocher's technical strength and high motivation as strengths. He also noted that Jocher's "support with others sometimes require[s] some work" and that Jocher did not "desire to work with those he assumes to be unqualified." McArthur concluded that Jocher was "in the category of someone that" he "would want on his team, either at Corporate or at the site." (CX 14, ALJX 39). McArthur acknowledged that his comments did not include observations of management problems, and that if he felt Jocher had problems in that area, he would have initiated progressive discipline procedures (Tr. 1224, CX 129A).

In February 1993, external review of the Sequoyah chemistry program by TVA's NSRB noted in connection with the Chemistry Improvement Program that "significant progress has been made in Site Chemistry." The NSRB also noted that there were still problems with basic housekeeping, data recording and labeling of some materials in the chemistry laboratory. These had been problems at Sequoyah prior to Jocher's arrival (ALJX 39). As Jocher's one-year temporary assignment to Sequoyah drew to a close, Robert Beecken (Sequoyah's Plant Manager) decided

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that he did not want to retain Jocher at the Plant beyond the agreed-upon year (Tr. 1256, 1264-66). In Beecken's view, Jocher had failed to take effective action to resolve the problems that had been identified in the Sequoyah chemistry program (Tr. 1264-66). Jocher returned to TVA corporate on or about March 8, 1993, after completing his one year tenure at Sequoyah.

G. The Circumstances Surrounding Jocher's Departure from TVA

Discussions of the events surrounding Jocher's departure from TVA are contained in transcripts of interviews from TVA's Office of Inspector General (TVA OIG)²⁵ and from testimony at the hearing.

The TVA OIG interviews revealed conflicting accounts of the events surrounding Jocher's departure. In early March of 1993, Bynum, Keuter and McArthur had a meeting to discuss Jocher's return to TVA corporate. Bynum expressed concern that Jocher was not fitting in and would have a hard time convincing the sites to "buy in" to his ideas once he returned to TVA corporate. Keuter proposed a six month improvement period to allow Jocher to prove his management skills. McArthur agreed with Keuter's suggestion. Both Keuter and McArthur, in separate interviews with the OIG, said that Bynum agreed to Keuter's proposal (CX 126B, 129B). When the OIG asked him about the six month improvement plan Bynum said that he did not recall specifically discussing such a plan but said that they may have discussed a "get well" program; he said that the first time he heard of a six month improvement plan was after the fact (CX 113B).

McArthur said that after the early March 1993 meeting, on or about March 10, 1993, he approached Jocher and told him that he had six months to improve his performance (CX 129B). Jocher testified that Benjamin Easley of TVA's Human Resources Department also told him about the six month improvement plan (Tr. 298). Easley testified that he did, in fact, inform Jocher of the six month improvement plan (Tr. 1596).

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Bynum, Keuter and McArthur held a second meeting in early April of 1993. Keuter and McArthur told the OIG that at that meeting Bynum said that Jocher was not working out and that he should be asked to leave (CX 126B, 129B). Keuter and McArthur said that they were surprised by Bynum's decision to abandon the six month improvement plan and did not know why he chose to do so. *Id.* Both Keuter and McArthur told the OIG that, if the decision was up to them, they would have retained Jocher. *Id.*²⁶

Bynum's interview with the OIG produced a different version of events. He attributed Jocher's departure to downsizing,²⁷ saying that Keuter and McArthur wanted to hire Gordon Rich as Sequoyah's chemistry manager and when TVA management decided not to fill the position the two lobbied for Rich's hiring at TVA corporate, meaning that Jocher would have to be let go to create a position for Rich (CX 113B). Bynum said that the downsizing, coupled with Keuter's and McArthur's desire to hire Rich, was the deciding factor in asking Jocher to leave; he said that the decision was a consensus. *Id.*

Keuter and McArthur disagreed with Bynum's account. Keuter told the OIG that the downsizing had already occurred and that Rich's candidacy for a position with TVA was only in the preliminary stages (CX 126B). He said that it was not until after Jocher left and the site chemistry manager position became unavailable that Rich was considered for the corporate position. *Id.* McArthur did not recall discussing TVA downsizing with Bynum (CX 129B). Both said that the decision to let Jocher go was not a consensus²⁸ (CX 126B, 129B).

Bynum's, Keuter's and McArthur's hearing testimony concerning Jocher's departure was more compatible, although some testimony contradicted earlier statements made to the OIG. Bynum downplayed his earlier statements concerning TVA downsizing, testifying that Jocher's departure was based solely on his poor managerial performance (Tr. 1405-06). McArthur retreated from his earlier statement about not wanting to let Jocher go, saying that TVA was justified in asking him to leave (Tr. 1147). Contrary to what he told the OIG, Keuter testified that the

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decision to ask Jocher to leave was a consensus (Tr. 967). In an effort to explain the six month improvement plan discrepancy with Bynum, Keuter testified that he recalled Bynum telling him to "make sure that Bill Jocher is looking for a job," hypothesizing that Bynum may have meant that Jocher had six months to find a new job (Tr. 920-21).²⁹ Both Keuter and McArthur testified that they were still in favor of the six month improvement plan (Tr. 967, 1138).

Further testimony was taken concerning the six month improvement plan discrepancy. At the second meeting Bynum expressed concern over Jocher's ability to perform and inquired if he should be asked to leave. Keuter responded that he thought they had agreed to a six month improvement plan, to which Bynum responded "[d]o you really think that [Jocher] is going to change?" Keuter said that he did not think so. McArthur testified that Bynum then said: "why don't we just get the job done and go ahead and ask [Jocher] to resign." (Tr. 923, 966-67, 977, 982, 1402, 1168, 1237-1240). McArthur did not believe asking Jocher to resign would be a problem. He testified that even before Bynum, Keuter and he met, Jocher told him: "hey, if I don't fit in here, if I'm not accepted by management, you know me, I can find a job any place. I'll leave, I'll resign (Tr. 1142). In early April 1993, before he was asked to leave, Jocher repeated his offer to resign. Jocher acknowledged that he had offered to leave but testified that he did not anticipate McArthur's response, which was that "it may come to that." (Tr. 454).

Jocher testified that on April 5, 1993 McArthur met with him and told him that he (Jocher) was not a team player and that he should begin looking for another job (Tr. 302). Jocher then went to Keuter's office to inquire about the problem but was told that it was too late, that TVA was preparing two letters for him - one for resignation and one for termination. *Id.* Jocher said that he asked Keuter about a transfer from nuclear to fossil and was told it was not an option. *Id.* Later in the same day, McArthur called Jocher into his office, where they were joined by Benjamin Easley (TVA Office of Human Resources). McArthur showed Jocher the two letters.³⁰ Jocher testified that upon reading the letter of

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termination he asked to see documentation supporting its allegations of poor management performance; Jocher said that McArthur was unable to do so. *Id.* Easley testified that he did not recall Jocher asking for documentation³¹ (Tr. 1594). Jocher testified that when he asked what would happen if he did not sign the letter of resignation he was told that he would be terminated (Tr. 303). Jocher signed the letter of resignation, filling in a six month resignation date (October 5, 1993) (Tr. 308, CX 20). McArthur testified that after Jocher filled in the October 5, 1993 date, he told him that he (McArthur) was not authorized to give Jocher six months but that he would go back and discuss it with management (Tr. 1143).

Jocher testified that when he arrived at work the next day he was told that the six month resignation date was unacceptable, that the most TVA was willing to offer was three months (Tr. 309). Jocher signed the letter of resignation with a three month resignation date typed in, acknowledging that he signed the letter to barter for some time, some security and some income (Tr. 309, 460, CX 22).

Jocher said that when he met with McArthur to sign the letter of resignation he asked him if he would write a letter of recommendation for him; McArthur agreed to write the letter³² (Tr. 310). Jocher testified that his request for the letter of recommendation was not part of a negotiated resignation, that McArthur simply agreed to write the letter³³ (Tr. 309-310). McArthur disagreed, testifying: "This was a negotiated resignation, a letter of recommendation based on his resignation. What I wanted to do was to provide him support in finding a job some place else." (Tr. 1164).

Within two weeks of his signing the resignation letter, Jocher told at least eight persons, both inside and outside of TVA, that he had been let go by TVA and had resigned under threat of termination (ALJX 39). On June 10, 1993, with the assistance of counsel, Jocher sent a letter to TVA seeking to withdraw his resignation. *Id.* TVA had already hired Gordon Rich, his replacement. Jocher received full pay and

benefits until July 6,

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1993. His job search has resulted in his starting another job on March 15, 1995, with a different mix of annual compensation and benefits, which could be greater or lesser than his TVA compensation, depending on performance. *Id.*

IV. FINDINGS OF FACT

Based on my review of the testimony and exhibits, summarized above, I make the following factual and credibility findings:

1. Respondent TVA is an agency and instrumentality of the United States Government. It holds several nuclear plant licenses from the United States Nuclear Regulatory Commission.
2. Between November 26, 1990, and July 6, 1993, Complainant, William F. Jocher was employed by TVA as a PG-10 nuclear manager (grade PG-10 on TVA's Management and Specialist Pay Schedule), in its corporate nuclear offices in Chattanooga, Tennessee, and at its Sequoyah Nuclear Plant, located near Soddy Daisy, Tennessee. Grade PG-11 is the highest grade on TVA's Management and Specialist pay schedule.
3. Jocher has considerable experience in the nuclear chemistry field and his technical skills are very sound. His managerial skills were lacking.
4. Jocher was effective in his work at TVA corporate. His efforts to promote the adoption of the hydrogen water chemistry plan proved successful and many of his ideas were well received by TVA management.
5. TVA management assigned Jocher to Sequoyah because he was the most qualified person for the job, not because they decided to give him a second chance to prove himself. Jocher had spent considerable time at TVA corporate investigating the problems at Sequoyah, documenting his findings in the "Chemistry Improvement Manual." TVA management impressed upon Jocher the need to revamp Sequoyah's chemistry program. Jocher arrived at Sequoyah knowing that he had only one year to improve the program and made laudable efforts to do so, as evidenced by the various programs he initiated.

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6. Jocher was not the most popular person at TVA, nor was he the most disliked. He has an aggressive personality which at times made him difficult to work with. The worst relationship that Jocher had at TVA was with John Sabados, evidenced by the numerous confrontations that the two had. Jocher was sincere in his efforts to get along with Sabados after being told that he had to be more cooperative. The other "run ins" that Jocher had with TVA personnel, including those with Betsy Eiford Lee, K. Jill Wallace, Don Adams, David Sorrelle and Sam Harvey are best described as petty and are not unusual for a high pressured work setting such as TVA.
7. Jocher's comments during the TVA/NRC meeting were inappropriate. The meeting was an isolated incident, however, and did not pertain to his management style. TVA's decision to ask Jocher to leave was not rooted in this incident.
8. Jocher's testing of the technicians revealed a low level of theoretical knowledge in chemistry related matters. The fact that Jocher required the technicians to include their names on the test upset the them and caused morale problems. The language in the NSRB directive for administering the test implied that the test was not to be given anonymously. The results of TPEC's retest were similar to the results of the Jocher-administered test.

9. Jocher was shown to lack credibility in two areas - his educational background and the diesel oil spill incident at Sequoyah. Jocher misrepresented his educational background in both his TVA application for employment and post-TVA applications. Jocher's denial that he issued cleanup instructions for the spill was contradicted by a September 21, 1992 memorandum signed by him, which contained his proposal for cleanup of the spill.

10. Jocher was involved in four incidents of protected activity - the PASS SCAR, two PERS related to the overflow of reactor coolant, the on-line instrumentation SCAR, and his comments during the NSRB meeting concerning Sequoyah's chemical traffic control training. The problems reported by Jocher were programmatic in nature, more serious than isolated incidents. TVA management did nothing to discourage Jocher's actions;

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corrective action reports are common at TVA and accepted by TVA management. The on-line instrumentation SCAR resulted in an April 22, 1994 Notice of Violation.

11. McArthur spoke to Jocher four times about his poor behavior - during the Sabados meeting; on February 19, 1992 (for his behavior at corporate); on February 25, 1993 (for the incident with Sam Harvey); and on March 10, 1993 (told of the six month improvement plan). McArthur recorded each of these meetings in his work notes.

12. Combined, Jocher's two performance reviews covered the period when he was at TVA corporate and six of the twelve months he was at Sequoyah. The reviews were favorable and for the most part did not support TVA's claims of poor management performance.

13. Jocher had on two occasions told McArthur that he was willing to resign if things were not working out. Jocher did not expect his comments to be taken seriously. Bynum, Keuter and McArthur met two times concerning Jocher's status at TVA. During the first meeting, all three agreed that Jocher would be given six months to improve his performance. Bynum alone abandoned the six month plan in the second meeting and ordered Jocher terminated. Keuter's and McArthur's answers to the TVA OIG questions concerning the events surrounding Jocher's departure were consistent and credible. Bynum's abandoning of the improvement plan (in early April of 1993) after being told by the NRC on March 22, 1993 that they were going to investigate Jocher's on-line instrumentation SCAR is suspect as I find the timing too coincidental.

14. Jocher did not negotiate his resignation. Either he signed the resignation letter or he was going to be fired. TVA's granting of a three month resignation date and McArthur's letter of recommendation served as accommodations to Jocher. McArthur's comments in the letter, that he would personally hire Jocher if the situation arose, were not meant to be taken literally as they were made only in the context of a letter of recommendation.

V. ANALYSIS

The Energy Reorganization Act prohibits employers subject to

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its provisions from discriminating "in practically any job-related fashion against an employee because the employee participated in NRC investigatory or enforcement proceedings." *DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1981). The statute has necessarily been interpreted broadly "to prevent employers from inhibiting disclosure of particular facts or types of information." *Id.* "The statute is aimed at preventing intimidation and whether the scope of such activity happens to be narrow or broad in a particular case is of no import." *Id.* The Act specifically provides protection to an employee who:

- (A) notified his employer of an alleged violation of this chapter . . . ;
- (B) refused to engage in any practice made unlawful by this chapter . . . if the employee has identified the alleged illegality of the employer;
- (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter . . . ;
- (D) commenced, caused to be commenced, or is about to commence or cause to be commenced, a proceeding under this chapter . . . or a proceeding for the administration or enforcement of any requirement imposed under this chapter;
- (E) testified or is about to testify in any such proceeding; or
- (F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purpose of this chapter . . .

42 U.S.C. §5851(a)(1)(A)-(F).

Claims brought under the Act are subject to the following burdens of proof and production: (1) the complainant must first lay out a *prima facie* case of discrimination. *DeFord*, 700 F.2d at 286; (2) if the complainant satisfies the elements for a *prima facie* case, then the evidentiary burden shifts to the respondent to prove that the alleged

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discriminatory activity was in fact legitimate, non-discriminatory. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981); (3) if the respondent meets that burden, then the complainant must demonstrate, by a preponderance of the evidence, that the articulated reason for the adverse employment action was a pretext for discrimination. *Burdine*, 450 U.S. at 256; *Zinn v. University of Missouri*, 93-ERA-34 and 36 (Sec'y January 18, 1996); and (4) if the trier of fact determines that the respondent was motivated by both prohibited and legitimate reasons, a "dual motive" analysis is necessary. *Mt. Healthy Sch. Dist. v. Doyle*, 429 U.S. 274 (1977); *Dysert v. Florida Power Corp.*, 93-ERA-21 (Sec'y August 7, 1995); *Dartey v. Zack Co. of Chicago*, 82-ERA-2 (Sec'y April 25, 1983).

A. *Prima Facie Case of Discrimination*

The basic elements of a *prima facie* case of illegal discrimination under the Act involves a showing through direct or circumstantial evidence that: (1) the respondent is governed by the Act; (2) the complainant engaged in protected activity; (3) the complainant was subjected to adverse employment action by the respondent; and (4) a nexus exists between the protected activity and the discharge. *DeFord*, 700 F.2d at 286; *see also Kahn v. Secretary of Labor*, 64 F.3d 271, 277 (7th Cir. 1995); *Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 933-34 (11th Cir. 1995); *Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995). A complainant's burden at the *prima facie* stage is not onerous; rather, a *prima facie* showing is "quite easy to meet." *Kahn*, 64 F.3d at 277, quoting *Burdine*, 450 U.S. at 253. TVA holds several nuclear plant licenses from the United States Nuclear Regulatory Commission and is, therefore, governed by the Act. 42 U.S.C. §5851(a)(2)(A); *see also* Order Denying Motion For Summary Decision at 5-9. In their post-hearing brief, TVA conceded that the Complainant engaged in activity protected by the Act. Respondent's Post-Hearing Brief at 22.

Complainant must next demonstrate that he was subjected to adverse employment action by the respondent. As noted in the Findings of Fact, my review of the record showed that if the

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Complainant did not sign the letter of recommendation, he was going to be fired. Where an employee is

offered the choice between resignation and termination, a resulting resignation will not be considered voluntary where the threatened termination is shown to be based on illegal or improper motivations. *Schultz v. United States Navy*, 810 F.2d 1133, 1136 (Fed. Cir 1987); *Christie v. United States*, 518 F.2d 584, 588 (Ct. Cl. 1975).

In their post-hearing brief, TVA argues that the Complainant resigned voluntarily, thereby preventing him from demonstrating an adverse employment action. TVA contends that the Complainant: (1) "repeatedly broached the topic of his resignation, and management relied on his earlier resignation offers in deciding on a course of action" and (2) negotiated both his letter of recommendation and the three month resignation period. (Respondent's Post-Hearing Brief at 29-32) These arguments, however, are without merit. Rather than "repeatedly broach[ing] the topic of his resignation," Jocher had on only two previous occasions alluded to his willingness to resign if he did not fit in. As noted in the Findings of Fact, Jocher did not expect his comments to be taken seriously; he was not prepared to resign when he made those statements. Nor am I willing to accept TVA's contention that management relied on Jocher's earlier resignation offers in deciding on a course of action. The only manager consistently testifying to this proposition was William McArthur, with Dan Keuter and Joseph Bynum offering inconsistent versions, especially in their interviews with TVA OIG. Finally, as stated in the Findings of Fact, both McArthur's letter of recommendation and TVA's offering of a three month resignation period were mere accommodations to Jocher, not negotiated conditions to his resignation. Therefore, I find that the Complainant has demonstrated that the respondent subjected him to adverse employment action.

The final requirement for a *prima facie* case is a showing of a nexus between the protected activity and the discharge. Proximity in time between the protected activity and the adverse employment action is sufficient nexus to satisfy this requirement. *Bechtel*, 50 F.3d at 934; *see also Bartlik v. United States Department of Labor*, 73 F.3d 100 (6th Cir. 1996)(Ryan, concurring). Interpretations of this

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standard vary to the point where "proximity in time" is non-definable, leaving the trier of fact to make a determination on a case-by-case basis. *See Nolan v. AC Express*, 92-STA-37 (Sec'y January 17, 1995)(two months between protected activity and adverse employment action sufficient to establish nexus); *Zinn v. University of Missouri*, 93-ERA-34 and 36 (Sec'y January 18, 1996)(six months sufficient to establish nexus); *Thomas v. Arizona Public Serv. Co.*, 89-ERA-19 (Sec'y September 17, 1993)(twelve months sufficient to establish nexus); *but see Cooper v. City of Olmstead*, 795 F.2d 1265, 1272-73 (6th Cir. 1986), *aff'd* 848 F.2d 189 (6th Cir. 1988)(four months between protected activity and personnel action too long to establish nexus); *Hughes v. Derwinski*, 967 F.2d 1168, 1174 (7th Cir. 1992)(four months too long); *Dillard v. TVA*, 90-ERA-31 (Sec'y July 21, 1994)(one-and-one-half years too long). In the present case, the date of the adverse employment action, April 5, 1993, falls on the heels of Joseph Bynum's receipt on March 23, 1993 of NRC's letter informing him that the Commission was preparing to investigate the Complainant's on-line instrumentation SCAR. The timing of NRC's notification in relation to the Complainant's forced resignation is close enough in time to raise an inference of causation.

TVA's claim that two years passed between the Complainant's protected activity and his departure from TVA is simply wrong. TVA points out that the Complainant engaged in protected activity as early as November 1990, upon being hired by TVA, and this forms the basis for their two year interval assertion. However, the only documented incidents of protected activity occurred after the Complainant began working at Sequoyah - a period which covers approximately *one* year before he was forced to resign. Even if I were to credit TVA's assertion that the complainant engaged in protected activity as early as 1990, the fact that TVA may have waited until 1993 to force him out is not dispositive, as the March 22, 1993 letter may have served as the last tolerable incident of protected activity.

I also reject TVA's argument that Bynum had no knowledge of Jocher's protected activity. Bynum, as TVA's Vice President of Nuclear Operations, received copies of all of NRC's Notices of violations, SCARS and LERS (Tr. 1432). All SCARS initiated by Jocher were signed by him as the "initiating

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supervisor" (CX 69, 75). I find Bynum's testimony that he did not have time to read the NRC notices non-persuasive, as he himself acknowledged that a SCAR is the most serious level of corrective action and garners the most attention from TVA management and the NRC (Tr. 1435). Furthermore, Bynum had an office at Sequoyah and spent one to two days a week at the Plant. He was in constant communication with Jack Wilson (Sequoyah Vice President), who undoubtedly was aware of the corrective action reports filed by Sequoyah employees, especially the ones filed by Jocher because he occupied a high level position (PG-10). Also persuasive is the fact that Bynum was intimately involved in the discussions surrounding the decision to ask Jocher to leave TVA. Had Bynum been unfamiliar with Jocher's actions at Sequoyah, as TVA claims, he would not have played such a major role in seeking his resignation.

Finally, TVA argued that workers at their plants routinely engage in protective activity, as it is an encouraged practice and considered part of one's job. TVA noted that Jocher was not alone in initiating corrective action reports, as even before Jocher arrived at Sequoyah forty other LER's and 478 other corrective action documents such as SCARS and PERS had been filed by other TVA managers and employers (Tr. 1296-99, RX 23). Dr. Don Adams (Sequoyah's Chemistry Program Manager) testified that "a number of corrective actions [had been] filed and reported on the [Sequoyah chemistry] program to document weaknesses." (Tr. 1047). However, TVA's reliance on these numbers is misguided. Jocher's protected activity exposed long known but neglected problems at Sequoyah and was of a type that generated a higher level of concern with both TVA and the NRC. Jocher's protected activity was programmatic in nature, involving system wide defects rather than isolated incidents (Tr. 216-17, 667-69, 1437). While Jocher may not have been the first person to identify the problems at issue, he was the first person to initiate corrective action proceedings for them. By doing so, he overtly held senior TVA management responsible for neglecting to take corrective action on known problems. As such, Jocher's protective activity, rather than involving routine matters, is distinguishable from other types of protected activity because it drew an inordinate amount of unfavorable attention to TVA management.

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Therefore, I find that the Complainant has established a *prima facie* case of discriminatory intent on behalf of the Respondent.

B. *Rebuttal of the Prima Facie Case*

Once a complainant satisfies his *prima facie* case, the burden shifts to TVA to produce evidence of the existence of a legitimate, non-discriminatory reason for the adverse employment action taken against a complainant. *St Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). To carry its burden, TVA must only produce evidence of some legitimate grounds for the April 5, 1993 forced resignation of the Complainant. It does not have to prove at this stage that it was actually motivated to seek Jocher's resignation because of the proffered reason. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981).

TVA presented evidence that its decision seek Jocher's resignation was based on Jocher's poor management style. I find that this proffered explanation constitutes a legitimate, non-discriminatory reason for the adverse action taken against him. Therefore, I find that TVA has successfully rebutted the Complainant's *prima facie* case.

C. *Pretext*

Once the respondent articulates a legitimate, non-discriminatory reason for seeking the complainant's resignation, the burden shifts back to the complainant to prove that the proffered legitimate reason is a mere pretext rather than the true reason for the challenged employment action. *Burdine*, 450 U.S. at 236; *Carrol v. United States Dept. of Labor*, 78 F.3d 352 (8th Cir. March 5, 1996); *Zinn*, 93-ERA-34 and 36. The complainant may demonstrate pretext by showing that discrimination was more likely the motivating factor or by showing that the proffered explanation is not worthy of credence. The proof

must go beyond disbelief of the respondent - the factfinder must believe the complainant's explanation of intentional discrimination. *St Mary's Honor Center*, 509

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U.S. at 509; *Fraday v. Tennessee Valley Authority*, 92-ERA-19 and 34 (Sec'y October 23, 1995).

As evidence that their decision to ask for Jocher's resignation was not pretextual, TVA cites to Jocher's poor management style, arguing that their decision was a business one, not subject to challenge. TVA points to Jocher's inability to get along with co-workers and supervisors, his behavior during meetings, and improper testing of Sequoyah personnel as evidence of Jocher's poor management style.

Jocher's inability to get along with his co-workers is the most frequently cited example of his poor managerial style. Undoubtedly, Jocher's managerial skills were weaker than his technical skills. However, Jocher arrived at Sequoyah knowing that he had only one year to improve the embattled chemistry program and took an aggressive, often combative approach in accomplishing that task.³⁴ With the exception of John Sabados, Jocher's problems with his co-workers amounted to a series of isolated incidents. As noted in the Findings of Fact, Jocher's quarrels with Betsy Eiford Lee, Jill Wallace, Don Adams, David Sorrelle and Sam Harvey are best described as petty and are not unusual for a high pressured work setting such as TVA.³⁵ Jocher's problems with Sabados were largely rooted in technical disagreements that became personal. After meeting with McArthur and Max Herrel, Jocher pledged to get along better with Sabados and did. As much as Jocher had problems with co-workers at TVA corporate and Sequoyah, numerous other co-workers testified that they got along fine with Jocher and had no problems with his managerial style. Donald Matthews testified that Jocher got along well with other team members and behaved professionally during staff meetings (Tr. 768-771, 778). Charles Hudson testified that he had a good relationship with Jocher (Tr. 512-13). James Barker testified that he got along well with Jocher and was happy with the progress made at TVA corporate during Jocher's tenure (Tr. 475).

The incident involving Jocher's testing of Sequoyah technicians fails to defeat the complainant's pretext argument. While the test may have upset some of the technicians because they were told to include their names, the language in the NSRB directive

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for administering the test implied that it was not to be given anonymously (Tr. 954-55, RX 20). As well, despite allegations that the Jocher-administered test did not properly test the technicians' knowledge and asked improper follow-up questions, the results of TPEC's retest were similar to the results of the Jocher-administered test (ALJX 39, Tr. 1505).

Nor do Jocher's ill-advised comments during the TVA/NRC meeting mitigate a finding of pretext. The meeting was an isolated incident and did not pertain to Jocher's management style. Besides, TVA's decision to seek Jocher's resignation was not dependent on the incident (Tr. 1468-69). Similarly, Jocher's less than honest portrayal of his educational background and unsupported account of his handling of the oil spill at Sequoyah pertain more to his credibility than his managerial style.

Also significant is the fact that TVA's claim of poor managerial style as a reason for seeking his resignation is not supported by Jocher's two performance evaluations. Jocher's first performance review, which covered most of his tenure at TVA corporate, was favorable. The report read that Jocher met all of his goals in a timely, professional manner and had established credibility and a "good team relationship" with the corporate and site organizations (CX 12). The report also noted that Jocher established a rapport with site managers and provided leadership and technical direction to corporate and site management. The second performance evaluation, covering the remainder of Jocher's term at TVA corporate and half of his term at Sequoyah, was equally favorable. The report stated that Jocher had made significant progress on the Chemistry Improvement plan, that he approached work as a member of Sequoyah's

team, and had established high standards for himself and his department. The report commended Jocher for his positive approach, commenting that he has a "run-it-like-it-was-our-own business attitude which had been missing in the chemistry department." (CX 14). The performance evaluations were written prior to any claim being filed in this case and represent unbiased accounts of Jocher's performance at TVA and are accorded substantial weight.

Besides the performance evaluations, the record evidences other accomplishments of Jocher supporting the Complainant's contention that TVA's claim of poor managerial style was a

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pretext for discrimination. During his first year at TVA, Jocher received at \$3,800.00 bonus. While at TVA corporate, Jocher promoted the adoption of a hydrogen water chemistry plan at Browns Ferry, recommended a treatment plan for Browns Ferry's main surface condenser, and developed a corporate chemistry manual to promote uniformity across the site chemistry programs. (Tr. 61, 71, ALJX 39, CX 173). His efforts to promote the adoption of the hydrogen water chemistry plan proved successful and many of his ideas were well received by TVA management. Upon moving to Sequoyah, Jocher instituted numerous accountability measures to improve the chemistry program; monthly chemistry reports documented a reduction in the amount of reported errors (CX 55D-J). A February 1993 external review of Sequoyah's chemistry program by TVA's NSRB noted significant progress (ALJX 39).

Documented negative comments of Jocher's performance were few. Jocher's first performance evaluation noted that he needed to place additional emphasis on delegation and meeting administrative commitments (CX 12). McArthur wrote in Jocher's second performance review that Jocher's "support with others sometimes requires work" and that he did not "desire to work with those he assumes to be unqualified." (CX 14, ALJX 39). Finally, NSRB's February 1993 external review also noted that there were still problems with basic housekeeping, data recording and labeling of some materials in the chemistry laboratory - problems that existed prior to Jocher's arrival at Sequoyah (ALJX 39). These comments do not evidence a significant degree of managerial shortcomings, especially when viewed in light of the numerous favorable comments.

Furthermore, if TVA was troubled by Jocher's managerial performance, they failed to adequately notify him of their concerns. TVA contends that they counseled Jocher on numerous occasions about the need to improve his attitude toward his co-workers. However, the record evidences only four instances over a two year period where McArthur spoke to Jocher about the need to improve his relationships with his co-workers. Rather than qualifying as formal counseling, as TVA contends, McArthur's talks with Jocher were informal, better characterized as passing comments. As such, I am unwilling to endorse TVA's argument that

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they repeatedly counseled Jocher about the need to improve his managerial skills.

Further evidence that TVA's decision to seek Jocher's resignation was pretextual are Bynum's, Keuter's and McArthur's inconsistent and conflicting accounts of the events surrounding Jocher's departure. It has been held that an employer's shifting explanations may be considered evidence of pretext. *Hobby v. Georgia Power Co.*, 90-ERA-30 (Sec'y August 4, 1995), citing *Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 935 (11th Cir. 1995). Noted discrepancies included the following: (1) Keuter and McArthur told TVA OIG that at the first meeting all three managers (Bynum, Keuter, McArthur) agreed to a six month improvement plan; Bynum told TVA OIG that he knew nothing of a six month improvement plan (CX 113B, 126B, 129B); (2) Keuter and McArthur told TVA OIG that at the second meeting Bynum decided to abandon the six month program and that Bynum alone wanted Jocher removed; Bynum told TVA OIG that the decision to remove Jocher was a consensus. *Id.*; (3) Bynum told TVA OIG that TVA downsizing, coupled with Keuter's and McArthur's desire to hire Gordon Rich, was a factor in asking Jocher to leave; both Keuter and McArthur told TVA OIG that downsizing was not discussed at the meeting. *Id.* Attempts at the hearing to reconcile the discrepancies failed to diminish the

suspicious raised by the previous inconsistent and conflicting accounts.³⁶

I find that the reasons given by TVA in seeking Jocher's resignation are primarily pretextual, unrelated to poor managerial style.

Once evidence of a pretext has been established the complainant must still demonstrate that the adverse employment action was linked to his protected activity. *Bryant v. Bob Evans Trans.*, 94-STA-24 (Sec'y April 10, 1995). Proving that the proffered reason was unbelievable does not compel a finding for the complainant. Rather, the trier of fact must find intentional discrimination in order for the complainant to prevail. *Leveille v. New York Air Nat'l Guard*, 94-TSC-3 and 4 at 7-8 (Sec'y December 11, 1995). Nonetheless, rejection of the respondent's reasons, particularly if the rejection is accompanied by a suspicion of mendacity, may, together with the

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elements of the *prima facie* case, suffice to show intentional discrimination; no additional proof of discrimination is required. *Bechtel*, 50 F.3d 926.

Relying on the *Bechtel* holding, a review of my *prima facie* and pretext discussions provides sufficient proof that TVA's decision to seek Jocher's resignation was in fact related to his protected activity. While the examples cited may be classified as circumstantial, the presence of retaliatory motive is a legal conclusion and is provable by circumstantial evidence. *Ellis Fischel State Cancer Hosp. v. Marshall*, 629 F.2d 563, 566 (8th cir. 1980), *cert. denied*, 450 U.S. 1040 (1981). Jocher's protected activity exposed programmatic defects at Sequoyah and placed unfavorable attention on TVA management. Indeed, evidence adduced at the hearing revealed that some members of TVA management were upset with Jocher's actions.³⁷ Bynum's decision to abandon the six month improvement plan soon after learning that TVA was preparing to investigate Jocher's on-line instrumentation SCAR is suspect as the timing is too coincidental. The discrepancies associated with the interviews that Bynum, Keuter and McArthur had with the TVA OIG strongly suggest that TVA management was concealing the real reason for seeking Jocher's resignation. A finding of retaliatory intent can be supported when an employer's witnesses testimony was inconsistent and evasive and evidenced an intent to obfuscate the facts. *Cook v. Guardian Lubricants, Inc.*, 95-STA-43 (Sec'y May 1, 1996). Jocher's advanced technical skills, as evidenced by his two favorable performance evaluations and accomplishments at both TVA corporate and Sequoyah, were such that he was valuable to TVA. That TVA chose to seek the resignation of a person as qualified and valuable as Jocher for perceived managerial problems, with no attempt at reassignment, begs a finding of discriminatory animus.³⁸ Therefore, I find that TVA's decision to seek Jocher's resignation was linked to his protected activity.

TVA's reason for seeking Jocher's resignation was primarily pretextual and linked to his protected activity. Nonetheless, TVA sufficiently demonstrated that Jocher possessed poor managerial skills, which, by itself, would be a legitimate reason for seeking his resignation. This gives rise to a dual motives analysis.

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D. Dual Motive

The dual motive test requires that when both discriminatory and non-discriminatory reasons for the adverse employment action have been presented, the respondent must demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of protected activity. *Mount Healthy School Dist. v. Doyle*, 429 U.S. 274 (1977); *Dysert v. Florida Power Corp.*, 93-ERA-21 (Sec'y August 7, 1995); *Dartey v. Zack Co. of Chicago*, 82-ERA-2 at 6-9 (Sec'y April 25, 1983). The application of the clear and convincing standard represents a change in the law. The Comprehensive National Energy Policy Act of 1992 raised the burden of proof for the respondent in a dual motives analysis in an ERA whistleblower case from a preponderance of the evidence to clear and

convincing evidence. 42 U.S.C. §5851(b)(3)(D); *Yule v. Burns Int'l Security Serv.*, 93-ERA-12 (Sec'y May 24, 1995). The Secretary has noted that while there is no precise definition of "clear and convincing evidence," the courts recognize that it is a higher burden than "preponderance of the evidence" but less than "beyond a reasonable doubt." See *Grogan v. Garner*, 498 U.S. 279, 282 (1991); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 n.11 (1991). The existence of a legitimate reason for the taking of an adverse employment action against a complainant does not, by itself, carry a respondent's burden in a dual motives analysis. Rather, the record must establish that the respondent would have taken the action for the legitimate reason alone. See *Martin v. Department of the Army*, 93-SDW-1 (Sec'y July 13, 1995).

The Respondent has failed to demonstrate by clear and convincing evidence that Jocher's poor management style was the sole reason for seeking his resignation. As discussed *supra*, Jocher possessed advanced technical skills and was a valuable employee to TVA. The problems he had with some of his co-workers were not disruptive to the point where it was necessary to ask him to leave. Simply put, had Jocher not engaged in protected activity TVA management undoubtedly would have overlooked his managerial inadequacies, probably working with him to improve those skills. Indeed, TVA was prepared to do

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this until Joseph Bynum abruptly abandoned the six month improvement plan after learning of the NRC's intention to investigate Jocher's on-line instrumentation SCAR. Therefore, I find that the respondent failed to satisfy the dual motives burden.

VI. CONCLUSION

The Respondent, Tennessee Valley Authority, violated Section 210 of the Energy Reorganization Act.

VII. DAMAGES, ATTORNEY FEES AND COSTS

In order to determine the amount of backpay, attorney fees and other costs, the Complainant, through counsel, shall file, within thirty (30) days of this Recommended Decision and Order, the following information with this Office with proof of service on the Respondent: (1) A documented list of all claimed backpay, damages and other costs which he is claiming by virtue of his termination of employment from TVA; (2) A documented fee petition and bill of costs; and (3) A list of any income which would constitute offsets to the above.

Respondent will then have twenty (20) days thereafter to file any comments and/or objections with this Office. Thereafter, a supplemental Order for fees and costs will issue.

VIII. RECOMMENDED ORDER

Accordingly, it is hereby recommended that an ORDER be issued by the Secretary of Labor providing that the Tennessee Valley Authority is to pay to Complainant all damages plus costs and expenses, including attorney fees, reasonably incurred in connection with the bringing of the complaint upon which this recommended order is issued, such as may be approved by the Secretary upon issuance of the Supplemental Recommended Decision and Order.

ROBERT L. HILLYARD
Administrative Law Judge

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NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for final decision to the Administrative Review Board, United States Department of Labor, Room S-4309, Francis Perkins Building, 200 Constitution Ave., N.W., Washington, DC 20210. See 61 Fed. Reg. 19978 and 19982 (1996).

[ENDNOTES]

¹ In this decision, "CX" refers to the Complainant's Exhibits, "RX" refers to the Respondent's Exhibits, "ALJX" refers to the Administrative Law Judge's Exhibits and "Tr." refers to the Transcript of the hearing.

² Grade PG-10 is considered a high level position as it is the second highest grade on TVA's Management and Specialist Pay Schedule (ALJX 39).

³ Dr. Chandrasekaran said that the phone calls were not disruptive (Tr. 776-77).

⁴ Jocher's environmental responsibilities were eventually removed (RX 56, ALJX 39).

⁵ Eiford-Lee also testified that after Jocher had been moved to Sequoyah the two clashed after she questioned Jocher's conduct during a nuclear plant emergency drill, stating that Jocher "essentially called [her] a liar" and made her feel that her career was "not going to go anywhere" in corporate chemistry. Eiford-Lee said that she reported Jocher's comments to Wilson McArthur (Tr. 749-753).

⁶ Sorrelle also alluded to an incident that occurred after Jocher transferred to Sequoyah. He testified that in the late fall of 1992, after an anonymous phone call had been made to the State of Tennessee, Jocher notified him of a diesel oil spill occurring at Sequoyah (Tr. 853-54). Sorrelle believed that Jocher knew about the incident beforehand because when he (Sorrelle) arrived on the scene, cleanup work had already begun under Jocher's direction (Tr. 854-56). Sorrelle said that if Jocher had notified TVA environmental sooner, rather than having the problem come to light via an anonymous phone call, TVA could have mitigated their resulting credibility problems with the State of Tennessee, who issued a Notice of Violation to TVA after learning of the spill through the anonymous phone call (Tr. 859). Sorrelle said that he believed Wilson McArthur was apprised of the incident. *Id.* For his part, Jocher testified that the digging began before he knew of the spill and that he alerted TVA environmental the moment he became aware of the spill. Jocher denied issuing cleanup instructions, saying that any instructions to dig were issued by Pat Lydon, Sequoyah's site operations manager (Tr. 1635-37). Jocher's account of the incident does not comport with a September 21, 1992 memorandum signed by him, which contains his proposal for cleanup of the spill; Lydon is copied on the memorandum (CX 90). Lydon, who testified at the hearing, was not questioned about the spill.

⁷ Sabados was concerned that the program would result in increased radiation exposure (Tr. 1519). A "blue ribbon" study group was formed to study the feasibility of the project. The study group eventually recommended implementation of the program (ALJX 39).

⁸ NMRG, ORR and QA are internal TVA "watchdog" groups, created to identify and assess problems at the sites. INPO is an industry-wide consulting group created for the same purpose.

⁹ Prior to his arrival at Sequoyah and again shortly after he arrived, Jocher issued questionnaires to all Sequoyah Chemistry personnel in order to identify issues that troubled them. Some responded anonymously and some signed their responses. There were a number of morale, management, personnel, training, and communication issues reported which pre-existed Jocher's arrival at Sequoyah (ALJX 39).

¹⁰ Within several months of coming to work at Sequoyah, Joseph Bynum, TVA's vice-president of Nuclear Operations, asked Jocher to develop a new site chemistry organization chart for implementation at all sites. Jocher developed a plan to reorganize the chemistry group which he felt was consistent with senior management's directions on the proper ratio of direct reports to a manager. This would have impacted the position of a number of personnel, including the shift supervisors. Jocher recalls that Bynum, Sabados and Donald Matthews, the chemistry program manager at Watts Bar, agreed with the plan in principle. Sequoyah Human Resources and Bynum ultimately disapproved of the reorganization plan (ALJX 39).

¹¹ When Jocher was asked whether the technicians could safely continue to work, he said that as long as

the technicians operated in their areas of specialization, and steps were taken to provide training, there was no need to take drastic action. Further, in the face of INPO's threat to revoke Sequoyah's chemistry training program's certification, Jocher assembled the documentation to defend the program and prepared TVA's representative for the presentation that was made to INPO. Subsequent to the presentation, INPO determined that Sequoyah's chemistry technician training program should keep its certification (ALJX 39).

¹² An incident occurring at the Sequoyah Plant involving a condenser leak illustrates this low level of knowledge. Chemistry technicians were unable to identify the source of the leak for 18-20 hours before Jocher was paged to come to the Plant; he located the leak (Tr. 108-111, CX 59).

¹³ Keuter acknowledged that the NSRB instructions for administering the test implied that the test was not to be administered anonymously: "The Chemistry Manager agreed to administer an examination in November 1992 to establish a baseline of knowledge level. Appropriate remedial action and supervisor attention will be provided for personnel not passing the examination." (Tr. 954-55, RX 20).

¹⁴ NSRB is an independent board of senior TVA managers (ALJX 39).

¹⁵ TPEC is a policy making body for TVA's nuclear division. It is typically chaired by the Senior Vice-President for Nuclear Operations and includes plant managers, department vice presidents, and personnel and training managers (Tr. 1501-02).

¹⁶ Mullenix was involved in a confrontation with David Goetcheus, TVA's Corporate Manager of Outage Management and Steam Generator Technology. At the hearing, Goetcheus acknowledged that he became very upset with Mullenix, overreacted, cursed and behaved in an inexcusable way. Goetcheus said he soon realized his error and apologized. Mullenix filed an employee concern report over the incident (Tr. 1564-68).

¹⁷ Wallace testified that Jocher told her he had authority from TVA management to make changes as he deemed necessary. Wallace checked with TVA management and was told that Jocher had no such authority (Tr. 736).

¹⁸ As an example of Jocher's inappropriate conduct in meetings, TVA pointed to an incident occurring during a high level meeting at Sequoyah in 1992. Jocher was one of several people chosen to give a formal presentation to representatives of TVA management and the Nuclear Regulatory Commission. Joe Bynum, TVA's Vice President of Nuclear Operations, was at the meeting and testified that Jocher went beyond his "scripted" material and began "ad libbing," claiming that with all the good things he was doing at Sequoyah, "he was not being paid enough money." (Tr. 1395-96). Bynum said that Jocher's comments were inappropriate and made everyone in the meeting uncomfortable (Tr. 1396). Bynum testified that while the remark did not directly cause him to seek Jocher's resignation, it was a "dumb thing to say" and confirmed his assessment of Jocher (Tr. 1468-69).

¹⁹ While at Sequoyah, Jocher also was the manager responsible for initiating the development of two Problem Evaluation Reports (PERs) related to the overflow of some reactor coolant from two tanks used in PASS testing. PERS are also formal corrective action documents.

²⁰ Charles Kent, TVA's radiological control manager, disagreed with Jocher's interpretation, testifying that TVA views the regulation differently (Tr. 1282, CX 75).

²¹ Concerning work request backlogs, Dan Keuter (TVA's Vice President of Operation Services) testified that if an area in need of repair poses a low safety concern and has a high repair cost, it receives low priority (Tr. 948).

²² In November of 1992, Jocher was the manager responsible for the initiation of documentation leading to TVA filing a Licensee Event Report (LER) with the NRC concerning improper calibration of both safety and non-safety related radiation monitors (CX 89). An LER is a nuclear regulatory document and

is generated as a result of a violation of the plant's technical specifications (Tr. 212). In accordance with its practice, TVA sent the LER to the INPO records center for circulation throughout the industry, to the NRC in Washington, D.C., the regional office in Atlanta, Georgia, and to the local NRC resident official at Sequoyah (ALJX 39).

23 The large number of workers and conflicting work schedules made it difficult for everyone to view the video. To monitor the progress, TVA initiated a "tracking and reporting of open items" (TROI), a computerized database that loads all internal and external commitments (Tr. 259, 606, CX 84). It was from this database that Jocher received the computerized printout.

24 Craft employees are non-management level employees.

25 TVA's OIG is charged with reporting to the TVA Board of Directors and the United States Congress on the overall efficiency, effectiveness, and economy of all TVA programs and operations; on TVA efforts to prevent and detect waste, fraud, abuse; and on investigations of employee concerns. OIG is responsible for identifying and investigating indications of allegations of irregularities, waste, fraud, abuse deviations from TVA's standards of employee conduct or violations of applicable law. TVA's Inspector General is independent and subject only to the general supervision of the TVA Board of Directors.

It is policy of TVA's Nuclear Power organization to request OIG to investigate the circumstances surrounding each complaint filed under the Act in order to obtain an independent view of the facts so that TVA management can assess whether corrective action needs to be taken with respect to TVA policies. OIG conducted such an investigation in the present case.

26 Both said the decision to let Jocher go was at the behest of Bynum (CX 126B, 129B).

27 Bynum told the OIG that the downsizing involved reducing the staff at TVA corporate chemistry from eight people to four people (CX 113B).

28 Keuter testified that Bynum became upset that when he learned of the conflicting stories. When Keuter approached him to talk about it, Bynum told him that "somebody's lying, and it's not me. Get your ass out of here." (Tr. 983).

29 At the hearing Keuter said that he had met with TVA counsel to "iron out" the previous misunderstandings (Tr. 1019).

30 The resignation letter read:

This is to inform you that I am voluntarily resigning my position as Manager, Chemistry effective _____.

(CX 19).

The termination letter read:

This is to inform you that you will be terminated from your position as Manager, Chemistry, Technical Programs, Operations Services, Chattanooga, Tennessee, effective May 5, 1993. This action is being taken because your overall performance in that position has not been adequate, particularly in the area of your management skills. These performance issues have been discussed with you on several occasions, but there has not been sufficient improvement. It is essential that this position be filled with an individual that can be recognized as a primary support to the nuclear sites and has the management capabilities to do so. We have lost confidence in your ability to carry out these responsibilities. It is, therefore, necessary that your employment be terminated.

If you have any questions or wish to discuss this matter, I will be available to do so.

(CX 17).

Easley prepared both letters (Tr. 1592).

³¹ Bynum and Keuter testified that traditionally managers at Jocher's level are not given warning letters or progressive discipline as would be provided to lower level, bargaining unit employees (Tr. 932-33, 1409-1410). Bynum testified that it was very common for TVA managers to be removed from their positions (Tr. 1408-09). Some are retained by TVA in other positions (Tr. 973-74).

³² The letter of recommendation read:

I have worked with Bill for approximately three (3) years. During this period of time he has reported to me directly as the Manager of Corporate Chemistry. One year of this time was spent at the Sequoyah Nuclear Plant (SQN) as the SQN Supervisor of Chemistry and Environmental. Bill's assignment at SQN was necessitated due to chemistry problems at the plant and management determination that he could be effective in correcting those problems.

During Bill's tenure with the Tennessee Valley Authority (TVA) he has been a very responsible Chemistry Manager in both the technical and oversight areas. He was effective in identifying problems and developing a corrective action plan, not only for SQN and Browns Ferry Nuclear plants, but Watts Bar Nuclear Plant as well.

I found him to be trustworthy, dependable and professional in his responsibilities. I would personally hire him as a Chemistry Manager again if the situation occurred.

Bill's capabilities will most assuredly be missed at TVA.

³³ At the hearing the following deposition testimony from Jocher was read into the record:

Question: What were the circumstances under which Dr. McArthur was giving you this letter of recommendation?

Answer (Jocher): The circumstances were I requested a letter of recommendation from him to help me facilitate finding employment somewhere else.

Question: Was this part of the agreement on your resignation, that he would provide you a letter of reference?

Answer (Jocher): I asked him to provide me a letter of reference. I wouldn't characterize it as an agreement, I mean, if I sign this, will you give me that, in that context.

Question: Well, what was the context, I guess?

Answer (Jocher): I asked for a letter of recommendation.

Question: All right, sir. But was it part of the discussion of the terms for your resignation?

Answer (Jocher): Oh, yes. Absolutely. I wanted something to counteract any retaliatory measures that TVA might take in seeking employment elsewhere. You know, at least I would have something in my hand to say, well, this is the man I worked for, contact him.

(Tr. 459).

³⁴ Indeed, TVA management impressed upon Jocher the need to "put his money where his mouth was" when they sent him to Sequoyah (ALJX 39).

35 Jocher was not the only worker at TVA to have difficulty with co-workers. David Goetcheus became irate with James Mullenix on at least one occasion, prompting Mullenix to file an employee concern report (Tr. 1564-68). Concerning Jocher's tenure at TVA corporate, James Barker testified that tension between corporate and site staffs had always been common (Tr. 488-494).

36 TVA elicited testimony from Bynum that it was very common for TVA managers to be removed from their positions (Tr. 1408-09). However, many are reassigned to other positions within TVA (Tr. 973-74). When TVA told Jocher that he was no longer needed, his request to be transferred from nuclear to fossil was denied (Tr. 302).

37 Charles Kent testified that he believed Jocher's initiation of the corrective action reports was designed to draw attention to the problems at Sequoyah's chemistry program so that TVA management would devote more financial resources to the program, thereby allowing Jocher to meet his goals (Tr. 1308-09, CX 125). Patrick Lydon said that both Bynum and Robert Beecken (Sequoyah's Plant Manager) were unhappy with Jocher's initiatives (Tr. 587-88, 601, 612).

38 Contrary to TVA's assertion, the propriety of their decision to seek Jocher's resignation is subject to scrutiny. *See Adams v. Coastal Prod. Op, Inc.*, 89-ERA-3 at 11 (August 5, 1992); *see also Pogue v. United States Department of Labor*, 940 F.2d 1287, 1291 (9th Cir. 1991).

January 13, 1997

[A 96-101

Mr. Joseph R. Bynum
[HOME ADDRESS DELETED
UNDER 10 CFR 2.290]

SUBJECT: ORDER PROHIBITING INVOLVEMENT IN NRC-LICENSED ACTIVITIES
(EFFECTIVELY IMMEDIATELY)

Dear Mr. Bynum:

The enclosed Order Prohibiting Involvement in NRC-Licensed Activities is being issued because of your deliberate misconduct, in violation of 10 CFR 50.5 of the Commission's regulations. Specifically, in April of 1993, while performing duties and responsibilities as the Vice President of Nuclear Operations for the Tennessee Valley Authority, you discriminated against Mr. William F. Jocher for engaging in protected activities, contrary to the requirements of Section 211 of the Energy Reorganization Act, as amended, and 10 CFR 50.7, Employee Protection. Based on your deliberate actions, the attached Order prohibits your involvement in NRC-licensed activities for a period of five years. However, because of your transfer from TVA-Nuclear in April 1993, the Order is retroactive to May 1, 1993, and will be effective until April 30, 1998.

Pursuant to Section 223 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2273, any person who willfully violates, attempts to violate, or conspires to violate, any provision of this Order shall be subject to criminal prosecution as set forth in that section. Violation of this order may also subject the person to civil monetary penalty.

Questions concerning this Order should be addressed to James Lieberman, Director, Office of Enforcement, who can be reached at (301) 415-2741.

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

Sincerely,

Edward L. Jordan
Deputy Executive Director for
Regulatory Effectiveness, Program Oversight,
Investigations, and Enforcement

Enclosure: Order Prohibiting Involvement
in NRC Licensed Activities (Effectively Immediately)

cc w/encl [HOME ADDRESS DELETED]:
Tennessee Valley Authority
ATTN: Mr. Oliver D. Kingsley, Jr.
President, TVA Nuclear and
Chief Nuclear Officer
6A Lookout Place
1101 Market Street
Chattanooga, TN 37402-2801

Mr. William F. Jocher


UNITED STATES
NUCLEAR REGULATORY COMMISSION

In the Matter of

JOSEPH R. BYNUM

)
)
)

IA 96-101

ORDER PROHIBITING INVOLVEMENT IN
NRC-LICENSED ACTIVITIES
(EFFECTIVE IMMEDIATELY)

I

Since April 1993, Joseph R. Bynum has held the position of Vice President, Fossil Operations in the Fossil and Hydro Power organization of the Tennessee Valley Authority (TVA or Licensee). At the time of the events described in this Order, Mr. Bynum was employed as Vice President, Nuclear Operations, in the Licensee's corporate organization and was responsible for the oversight of TVA's nuclear program at its four nuclear reactor sites. During this time, the Licensee held five operating licenses and four construction permits issued by the Nuclear Regulatory Commission (NRC or Commission) pursuant to 10 CFR Part 50. License Nos. DPR-77 and DPR-79 authorized the Licensee's operation of the Sequoyah Nuclear Plant in Soddy-Daisy, Tennessee; License Nos. DPR-33, DPR-52, and DPR-68 authorized operation of the Browns Ferry Nuclear Plant in Athens, Alabama; Construction Permit Nos. CPPR-91 (now Operating License NPF-90) and CPPR-92 authorized the construction of the Watts Bar Nuclear Plant in Spring City, Tennessee; and Construction Permit Nos. CPPR-122 and CPPR-123 authorized the construction of the Bellefonte Nuclear Plant in Scottsboro, Alabama.

II

Following receipt of information regarding alleged discrimination against Mr. William F. Jocher, former Manager, Chemistry and Environmental Protection in TVA's corporate organization, the NRC Office of Investigations (OI) initiated an investigation, Case No. 2-93-015, on April 15, 1993. OI completed its investigation on August 31, 1995, and concluded that: (1) Mr. Jocher "was engaged in protected activities during his employment at TVA, and received an adverse employment action in the form of a threat of termination by TVA if he did not resign"; (2) "the reason proffered by TVA for this adverse action, namely that Jocher's performance in the area of management skills was inadequate, was primarily pretextual"; and (3) "despite denials by the TVA managers involved, the methodology of Jocher's engagement in protected activity was the primary reason for the adverse action" against him.

In addition, on June 29, 1993, Mr. Jocher, filed a complaint with the U. S. Department of Labor (DOL). In his DOL complaint, Mr. Jocher alleged that he was forced to resign from employment with TVA as a result of carrying out activities protected by the Atomic Energy Act of 1954. He further stated that his forced resignation was based on his activities in revealing deficiencies in the plant chemistry programs at the Sequoyah Nuclear Plant, revealing TVA's non-compliance with NRC approved guidelines, and revealing inconsistencies between actual facts and TVA management's reports to the NRC and other TVA oversight groups.

DOL efforts to conciliate the matter between Mr. Jocher and TVA were unsuccessful, and on April 29, 1994, the DOL District Director (DD) issued the initial finding of the DOL compliance action in the case. The DOL DD concluded that Mr. Jocher was a protected employee engaged in protected activity within the scope of the Energy Reorganization Act, and that discrimination, as defined and prohibited by the statute, was a factor in the actions which comprised his complaint.

Following an appeal by TVA, administrative hearings were conducted before the DOL Administrative Law Judge (ALJ). On July 31, 1996, the DOL ALJ issued a Recommended Decision and Order (RDO) in the case (DOL Case No. 94-ERA-24) finding that TVA discriminated against Mr. Jocher in violation of Section 211 of the Energy Reorganization Act. On November 20, 1996, the ALJ issued a Recommended Order of Dismissal, based on a conciliation agreement between Mr. Jocher and TVA, and on November 22, 1996, the DOL Administrative Review Board issued a Final Order Approving

Settlement and Dismissing Complaint.

Both the ALJ and OI stated that Mr. Joseph R. Bynum, the former Vice President of Nuclear Operations of TVA, ordered the forced resignation of Mr. Jocher. By letter dated August 26, 1996, Mr. Bynum was informed of the DOL findings and the OI investigation results and requested to attend a predecisional enforcement conference. On September 23, 1996, a closed, transcribed conference was conducted with Mr. Bynum, legal counsel, and management representatives of TVA. During the conference and in a written statement provided to NRC Region II prior to the conference, Mr. Bynum vigorously denied any violation of 10 CFR 50.5, Deliberate Misconduct, and stated that he did not discriminate against Mr. Jocher for engaging in protected activities. He attributed his decision to ask for Mr. Jocher's resignation to Mr. Jocher's poor management skills, and stated that he (Mr. Bynum) used poor judgement in not coordinating the personnel action with the appropriate TVA offices (i.e., Human Resources, Office of General Counsel). Mr. Bynum provided a detailed description of the events and circumstances surrounding Mr. Jocher's departure and addressed specific conclusions drawn by the DOL ALJ.

Based on the NRC staff's review of the evidence gathered by OI, the ALJ decision, and the views presented by Mr. Bynum at the predecisional enforcement conference, the NRC staff is satisfied that discrimination against Mr. Jocher by Mr. Bynum, who is currently the TVA Vice President for Fossil Operations, as described in the ALJ RDO and the OI Report, had occurred when Mr. Bynum ordered the forced resignation of Mr. Jocher. In reaching this determination the staff considered among other things: (1) the close timing between some of the protected activities in March 1993, i.e., formal notification by the NRC that it would be investigating the safety issues raised by Mr. Jocher, and the adverse action taken against Mr. Jocher on April 5, 1993; (2) statements made by TVA managers that Mr. Bynum ordered the forced resignation of Mr. Jocher; (3) inconsistent statements made by Mr. Bynum and the two managers who carried out the forced resignation of Mr. Jocher with respect to why and how the employment decision was made, and whether Mr. Jocher was placed in a six month improvement program in March, 1993; (4) inconsistencies in the various statements given by Mr. Bynum regarding his knowledge of Mr. Jocher's protected activities, most notably the post-polygraph interview where he stated that he was aware that Mr. Jocher had submitted several safety complaints and Significant Corrective Action Reports, in light of TVA's processes for handling safety issues of which Mr. Bynum should have been fully cognizant; (5) the results of Mr. Bynum's voluntary polygraph examination which indicated deception with respect to key questions related to the termination of Mr. Jocher; and (6) the lack of adequate documentation by TVA as to Mr. Jocher's inadequacies as a TVA manager.

The staff adopts, in essence, the conclusions reached by OI and the DOL ALJ and believes that Mr. Jocher would not have been forced to resign on April 5, 1993 but for his engaging in protected activities. Therefore, it is concluded that, on April 5, 1993, Mr. Bynum's deliberate actions against Mr. Jocher were in violation of Section 211 of the Energy Reorganization Act and 10 CFR 50.5, Deliberate Misconduct. Further, Mr. Bynum's actions caused TVA to be in violation of 10 CFR 50.7, Employee Protection.

III

Based on the above, the staff concludes that Mr. Joseph R. Bynum, an employee of the Licensee, has engaged in deliberate misconduct in violation of 10 CFR 50.5 that has caused the Licensee to be in violation of 10 CFR 50.7. NRC must be able to rely on the Licensee and its employees to comply with NRC requirements, including the requirement that prohibits discrimination against employees for engaging in protected activities. Joseph R. Bynum's actions in causing the Licensee to violate 10 CFR 50.7 have raised serious doubt as to whether he can be relied upon to comply with NRC requirements in the future.

Consequently, I lack the requisite reasonable assurance that licensed activities can be conducted in compliance with the Commission's requirements and that the health and safety of the public will be protected if Joseph R. Bynum were permitted at this time to be involved in NRC-licensed activities. Therefore, the public health, safety and interest require that Joseph R. Bynum be prohibited from any involvement in NRC-licensed activities for a period of five years retroactive to May 1, 1993, the date in which he was transferred out of the Licensee's nuclear organization. If Mr. Bynum is currently involved in or overseeing NRC-licensed activities at TVA or any other licensee of the NRC, he must immediately cease such activities, and inform the NRC of the name, address and telephone number of the employer,

and provide a copy of this order to the employer. Additionally, Joseph R. Bynum is required to notify the NRC of his first involvement in NRC-licensed activities following the prohibition period. Furthermore, pursuant to 10 CFR 2.202, I find that the significance of Mr. Bynum's conduct described above is such that the public health, safety and interest require that this Order be immediately effective.

IV

Accordingly, pursuant to sections 103, 161b, 161i, 182 and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202, 10 CFR 50.5, and 10 CFR 150.20, IT IS HEREBY ORDERED THAT:

A. For a period of five years from May 1, 1993, Joseph R. Bynum is prohibited from engaging in, or exercising control over individuals engaged in NRC-licensed activities. NRC-licensed activities are those activities which are conducted pursuant to a specific or general license issued by the NRC, including, but not limited to, those activities of Agreement State licensees conducted pursuant to the authority granted by 10 CFR 150.20. This prohibition includes, but is not limited to: (1) using licensed materials or conducting licensed activities in any capacity within the jurisdiction of the NRC; and (2) supervising or directing any licensed activities conducted within the jurisdiction of the NRC.

B. Following the five-year period of prohibition in Section IV.A above, at least five days prior to the first time that Joseph R. Bynum engages in, or exercises control over, NRC-licensed activities, he shall notify the Director, Office of Enforcement, U. S. Nuclear Regulatory Commission, Washington, D.C. 20555, of the name, address, and telephone number of the NRC or Agreement State licensee and the location where the licensed activities will be performed. The notice shall be accompanied by a statement that Joseph R. Bynum is committed to compliance with NRC requirements and the reasons why the Commission should have confidence that he will comply with applicable NRC requirements.

The Director, Office of Enforcement, may, in writing, relax or rescind any of the above conditions upon demonstration by Mr. Bynum of good cause.

V

In accordance with 10 CFR 2.202, Joseph R. Bynum must, and any other person adversely affected by this Order may, submit an answer to this Order, and may request a hearing on this Order, within 20 days of the date of this Order. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be made in writing to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission Washington, D.C. 20555, and include a statement of good cause for the extension. The answer may consent to this Order. Unless the answer consents to this Order, the answer shall, in writing and under oath or affirmation, specifically admit or deny each allegation or charge made in this Order and shall set forth the matters of fact and law on which Joseph R. Bynum or other person adversely affected relies and the reasons as to why the Order should not have been issued. Any answer or request for a hearing shall be submitted to the Secretary, U.S. Nuclear Regulatory Commission, Attn: Chief, Docketing and Service Section, Washington, DC 20555. Copies also shall be sent to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, to the Assistant General Counsel for Hearings and Enforcement at the same address, to the Regional Administrator, NRC Region II, 101 Marietta Street, Suite 2900, Atlanta, GA 30323, and to Joseph R. Bynum if the answer or hearing request is by a person other than Joseph R. Bynum. If a person other than Joseph R. Bynum requests a hearing, that person shall set forth with particularity the manner in which his or her interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.714(d).

If a hearing is requested by Joseph R. Bynum or a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Order should be sustained.

Pursuant to 10 CFR 2.202(c)(2)(i), Mr. Joseph R. Bynum, or any other person adversely affected by this Order, may, in addition to demanding a hearing, at the time the answer is filed or sooner, move the presiding officer to set aside the immediate effectiveness of the Order on the ground that the Order, including the need for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations, or error.

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section IV above shall be effective and final 20 days from the date of this Order without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions specified in Section IV shall be final when the extension expires if a hearing request has not been received. **AN ANSWER OR A REQUEST FOR HEARING SHALL NOT STAY THE IMMEDIATE EFFECTIVENESS OF THIS ORDER.**

FOR THE NUCLEAR REGULATORY COMMISSION

Edward L. Jordan
Deputy Executive Director for
Regulatory Effectiveness, Program Oversight,
Investigations, and Enforcement

Dated at Rockville, Maryland
this 13th day of January 1997

Nuclear Regulatory Commission

Office of Public Affairs -- Region II

101 Marietta St. NW - Suite 2900, Atlanta GA 30323

Ken Clark (Phone: 404/331-5503, E-mail: kmc2@nrc.gov)

Roger Hannah (Phone: 404/331-7878, E-mail: rdh1@nrc.gov)

No.: II-97-08

(Tuesday, January 14, 1997)

NRC STAFF PROPOSES \$100,000 FINE AGAINST TENNESSEE VALLEY AUTHORITY

NRC Staff Also Prohibits TVA Executive from Involvement in NRC-Licensed Activities

The Nuclear Regulatory Commission staff has proposed a \$100,000 civil penalty against the Tennessee Valley Authority after the U.S. Department of Labor and the NRC Office of Investigations concluded that TVA discriminated against William F. Jocher, a former TVA corporate manager and a former manager at TVA's Sequoyah nuclear plant.

The DOL and NRC both found that Jocher resigned under threat of termination after engaging in protected activities which included raising questions at the Sequoyah plant about post-accident sampling, on-line chemistry instrumentation and the accuracy of training in the chemistry area.

According to the letter sent to TVA by NRC Regional Administrator Luis Reyes, the violation is significant and is given a Severity Level I, the highest level of NRC violation, because "it involved an act of employee discrimination by a senior corporate manager." Reyes further wrote that "the impact of discrimination committed at this level has the potential to affect the environment throughout the company," and "the NRC places a high value on the freedom of nuclear industry employees to raise potential safety concerns to licensee management or to the NRC."

In addition to the fine, the NRC staff has issued an order prohibiting TVA executive Joseph R. Bynum from engaging in NRC-licensed activities for a period of five years for his role in the discrimination. That prohibition is retroactive to May 1, 1993 and will be effective until April 30, 1998. Bynum was TVA's Vice President of Nuclear Operations but is currently in a non-nuclear part of the utility.

TVA has 30 days to either pay the fine or to protest its imposition.

#

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Complainant's Exhibit 475

Exhibit 6
EA-99-115 (TVA)

UNITED STATES
NUCLEAR REGULATORY COMMISSION
OFFICE OF NUCLEAR REACTOR REGULATION
OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS
OFFICE OF ENFORCEMENT
WASHINGTON, D.C. 20555-0001

February 9, 1998

NRC INFORMATION NOTICE 98-04: 1997 ENFORCEMENT SANCTIONS FOR DELIBERATE VIOLATIONS OF NRC EMPLOYEE PROTECTION REQUIREMENTS

Addressees

All U.S. Nuclear Regulatory Commission licensees.

Purpose

The U.S. Nuclear Regulatory Commission (NRC) is issuing this information notice (IN) to remind licensees and their employees of the sanctions that could result from deliberately violating NRC requirements in the area of employee protection. It is expected that licensees will review this information notice, distribute it to management and staff involved with licensed activities, including senior management at nuclear power plants, and consider actions, as appropriate, to avoid similar problems. However, suggestions contained in this IN are not NRC requirements; therefore, no specific action is required.

Discussion

The NRC places a high value on nuclear industry employees being free to raise potential safety concerns to both licensee management and to the NRC without fear of reprisal or actual harassment and intimidation. Section 211 of the Energy Reorganization Act (ERA), and 10 CFR 19.20, 30.7, 40.7, 50.7, 60.9, 61.9, 70.7, and 72.10, provide that no employer may discharge or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee engaged in certain protected activities. These protected activities include notifying an employer of an alleged violation of the Atomic Energy Act or ERA, refusing to engage in any practice made unlawful by those Acts, testifying before Congress or in a Federal or State proceeding regarding any provision of these Acts, or commencing, testifying, assisting, or participating in any proceeding under these Acts. Licensees and contractors are responsible for ensuring that discrimination does not occur against its employees for engaging in such protected activities. Licensees and contractors who discriminate against their employees for the employees' protected activities are subject to sanctions by the NRC. These sanctions include Notices of Violation and Civil Penalties.

In addition, under the Deliberate Misconduct Rule (see, e.g., 10 CFR 30.10 and 10 CFR 50.5), licensee and contractor employees, including senior managers, are subject to sanctions by the NRC for discrimination against other employees for these employees' protected activities. These sanctions include Orders barring individuals from licensed activities. Significant NRC enforcement actions are published in NUREG-0940 and can be accessed through the NRC Office of Enforcement's Home Page at www.nrc.gov/OE.

Complainant's Exhibit 476

Descriptions of Significant 1997 Enforcement Actions and Sanctions

Exhibit 7
EA-99-115 (TVA)

- (1) An Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately) (IA 96-101) (NUREG-0940, Vol. 6, No. 1, Part 1 @ A-79) was issued on January 13, 1997, to an individual who, at the time of the events described in this IN, was employed by the Tennessee Valley Authority (TVA) as Vice-President for Nuclear Operations. This individual was responsible for the oversight of TVA's nuclear program at its four nuclear reactor sites. The former Manager, Chemistry and Environmental Protection (C&EP) in TVA's corporate organization alleged that he was engaged in protected activities during his employment at TVA, and as a result of these protected activities, he was discriminated against when he received an adverse employment action in the form of a threat of termination by TVA if he did not resign from his job. This former C&EP Manager filed a complaint with the U.S. Department of Labor (DOL) on June 29, 1993.

A DOL District Director concluded that discrimination, as defined and prohibited by Section 211 of the ERA, was a factor in the actions that comprised the former C&EP Manager's complaint. A DOL Administrative Law Judge (ALJ) issued a Recommended Decision and Order, finding that TVA discriminated against the former C&EP Manager in violation of Section 211 of the ERA (94-ERA-024).⁽¹⁾ The NRC's Office of Investigations (OI) also concluded that despite denials by the TVA managers involved, the methodology of the former C&EP Manager's engagement in protected activities was the primary reason for the adverse action against him. Both the DOL ALJ and OI concluded that the former Vice-President of Nuclear Operations at TVA ordered the forced resignation of the former C&EP Manager. The NRC staff concluded that the former Vice -President of Nuclear Operations at TVA was engaged in deliberate misconduct, in violation of 10 CFR 50.5, when he caused TVA to be in violation of the employee protection regulation contained in 10 CFR 50.7.

As a result of this NRC staff's conclusion, the former Vice-President was prohibited from engaging in, or exercising control over individuals engaged in NRC-licensed activities for a five year period beginning on May 1, 1993. In addition, for a five year period beginning May 1, 1998, this former Vice-President is required to notify the NRC at least five days prior to the first time he engages in, or exercises control over, NRC-licensed activities. The level of the sanction against the former Vice-President for Nuclear Operations at TVA was related, in part, to his seniority.

- (2) Related to this case, on January 13, 1997, the NRC issued a Notice of Violation (NOV) and Proposed Imposition of a \$100,000 Civil Penalty (EA 95-199) (NUREG-0940, Vol 16., No. 1, Part 2 @ A-202) to TVA based on a Severity Level I violation of 10 CFR 50.7. As noted above, this violation was based on the licensee's discrimination against the former C&EP Manager by the former Vice-President of Nuclear Operations on April 5, 1993, when the C&EP Manager was forced to resign from TVA because he had engaged in protected activities. TVA paid the Civil Penalty on February 11, 1997.
- (3) On January 23, 1997, the NRC issued an NOV (EA 95-006) (NUREG-0940, Vol. 16, No. 1, Part 3 @ B-159) to the Honolulu Medical Group based on the licensee discriminating against one of its employees by discharging the employee as a result of the employee alleging infractions of NRC requirements in written correspondence to the licensee.
- (4) On March 19, 1997, the NRC issued an NOV and Proposed Imposition of an \$8,000 Civil Penalty (EA 96-498) (NUREG-0940, Vol. 16, No. 1, Part 3 @ A-79) against Koppel Steel Corporation for a Severity Level II violation of 10 CFR 30.7. The enforcement action was based on discrimination by the licensee against its former Radiation Safety Officer (RSO) for the RSO providing information to an NRC inspector during an April 1996 inspection of the licensee's facility. The information provided during the inspection, in part, resulted in the NRC issuance of an NOV to the licensee on May 23, 1996, for five violations of NRC requirements identified during the inspection. Koppel Steel paid the Civil Penalty on April 18, 1997.

- (5) On October 31, 1997, an NOV and Proposed Imposition of a \$10,000 Civil Penalty (EA 97-180) was issued to Mattingly Testing Services, Inc. (MTSI) based on a Severity Level III violation of 10 CFR 30.7. This case was similar to the Koppel Steel case in that the enforcement action was based on discrimination by the licensee against one of its employees because the employee reported violations of NRC requirements to the NRC. The information provided to the NRC by MTSI's employee, in part, resulted in the NRC issuance of an NOV and assessing a \$15,000 Civil Penalty on May 5, 1995, against MTSI, for multiple violations of radiography requirements, and NOVs to individuals who committed the deliberate technical violations.

No specific action or written response is required by this information notice. If you have any questions about this matter, please call the contact listed below or the appropriate NRC regional office.

/s/'d by

Donald A. Cool, Director
Division of Industrial and Medical Nuclear Safety
Office of Nuclear Material Safety and Safeguards

/s/'d by

Jack W. Roe, Acting Director
Division of Reactor Program Management
Office of Nuclear Reactor Regulation

Contact: Michael Stein, OE
301-415-1688
E-mail: mhs@nrc.gov

¹ On November 20, 1996, the ALJ issued a Recommended Order of Dismissal, based on a conciliation agreement between the former C&EP Manager and TVA, and on November 22, 1996, the DOL Administrative Review Board issued a Final Order Approving Settlement and Dismissing Complaint.

(NUDOCS Accession Number 9802050188)



THE

executive committee

Quick Index



Ike Zeringue, President & Chief Operating Officer, has more than 25 years in the nuclear industry . . . directed start-up and licensing of TVA's Watts Bar Nuclear Plant and recovery and restart of Browns Ferry Nuclear Plant . . . directed start-up, maintenance and operation of Arizona Public Service Co.'s Palo Verde Unit 3 . . . became TVA's Senior VP of Nuclear Operations in 1993 . . . was named TVA's Chief Nuclear Officer and Executive VP of TVA Nuclear in 1997 . . . appointed in 1998 to current position, overseeing TVA's power production, transmission, marketing, economic development and resource management programs . . . nuclear-engineering degree from North Carolina State University . . . graduated from Advanced Management Program at Harvard Business School.



Norm Zigrossi, Chief Administrative Officer & Executive Vice President, Business Services, joined TVA in 1986 . . . served as TVA's first Inspector General until 1992 . . . was President of TVA's Resource Group from 1992 to 1994 . . . was named Chief Administrative Officer in 1994 and Executive VP of Business Services in 1996 . . . before joining TVA, held a number of management and executive positions with the FBI, including the position of Special Agent in charge of Washington, D.C., field office . . . attended Loyola School of Law in New Orleans . . . B.A. from Ohio Wesleyan University and M.S. from the University of Maryland.



David N. Smith, Chief Financial Officer & Executive Vice President, Financial Services, came to TVA as its Chief Financial Officer in 1995 . . . was named Executive VP of Financial Services in 1996 . . . has led refinancing of \$23 billion of debt with a variety of U.S., global and retail bond offerings since 1995 . . . previously co-founded and served as Executive Director of Odyssey Financial, a corporate consulting firm . . . played key role in the reorganization of LTV Corp., enabling it to successfully emerge from one of the largest, most complex bankruptcies in U.S. history . . . was VP of Corporate Development for 10 years at Cyclops Corp. . . . CPA certification in 1969 . . . graduate of Northwestern University . . . M.B.A. in finance from Northwestern's Kellogg School of Business.



Terry Boston, Executive Vice President, Transmission/Power Supply, more than 27 years of experience with TVA . . . served as Manager of Pricing in Customer Service & Marketing . . . named to current position in 1999 . . . responsible for planning, building, operating and maintaining one of the nation's largest transmission and power supply networks, with some 17,000 miles of transmission lines and 675 substations, as well as for providing transmission and related services . . . previous positions with TVA include Division Manager of Electric

Complainant's Exhibit 477

Exhibit 8

EA-99-115 (TVA)

System Division, District Manager of Regional Operations and Chief of Transmission Construction . . . registered professional engineer's license in Tennessee . . . B.S. in engineering from Tennessee Tech and M.S. in engineering administration from the University of Tennessee.



Joseph R. Bynum, Executive Vice President, Fossil Power Group, worked in TVA engineering and plant operations positions from 1972 to 1982 . . . Plant Manager of Palo Verde Nuclear Generating Station for Arizona Public Service from 1982 to 1987 . . . named to senior position in TVA's Nuclear Power Operations in 1987 . . . appointed VP of Nuclear Operations in 1989 . . . served as VP of several TVA Fossil and Hydro organizations from 1993 to 1998, including Maintenance & Testing Services, Fuel Supply & Engineering and Fossil Operations . . . named to current position in 1998 . . . B.S. in electrical engineering and M.S. in nuclear engineering from Georgia Tech.



Edward S. Christenbury, Senior Vice President & General Counsel, has served as TVA's General Counsel since 1987 . . . advises the Board on legal matters and serves as Secretary to the Corporation . . . oversees and coordinates all legal work for TVA . . . worked at the Nuclear Regulatory Commission for seven years before joining TVA . . . while there, served as an Assistant General Counsel and supervised NRC attorneys representing the agency staff in nuclear-licensing proceedings . . . was a trial attorney and supervisor at the U.S. Department of Justice for 11 years . . . licensed to practice before the Supreme Court of the United States . . . B.S. in business administration and law degree from the University of Tennessee.

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TVA Board of Directors

TVA's Board of Directors consists of three members who are appointed by the President of the United States and confirmed by the Senate. The President also determines which Board member will serve as Chairman. Each member serves a term that lasts nine years. The board currently has two members.

Skila Harris

Director, Tennessee Valley Authority

Glenn L. McCullough Jr.

Director, Tennessee Valley Authority

TVA Executive Committee

Terry Boston

Executive Vice President, Transmission & Power Supply

Joseph R. Bynum

Executive Vice President, Fossil Power

Maureen H. Dunn

Executive Vice President and General Counsel

Kathryn J. Jackson

Executive Vice President, River System Operations & Environment

John E. Long Jr.

Executive Vice President, Human Resources

Ronald A. Loving

Senior Vice President, Performance Initiatives

Mark O. Medford

Executive Vice President, Customer Service and Marketing

Kathryn S. Rawls

Vice President, Economic Development

John A. Scalice

Chief Nuclear Officer and Executive Vice President, TVA Nuclear

David N. Smith

Chief Financial Officer and Executive Vice President, Financial Services

D. LeAnne Stribley

Complainant's Exhibit 478

Executive Vice President, Administration

Richard L. Tallent
Executive Vice President (Interim), Communications &
Government Relations

R. Larry Taylor
Vice President, Bulk Power Trading

Gregory M. Vincent
Senior Vice President, Power Resources & Operations Planning

Oswald J. "Ike" Zeringue
President and Chief Operating Officer

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DOL/OALJ REPORTER

Klock v. Tennessee Valley Authority, 95-ERA-20 (ALJ Sept. 29, 1995)

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DATE: September 29, 1995

CASE NO: 95-ERA-20

In the Matter of

ROBERT O. KLOCK,
Complainant

v.

TENNESSEE VALLEY AUTHORITY,

and

UNITED ENERGY SERVICES CORPORATION,
Respondents

Appearances:

Peter Alliman, Esq.
Robert Stacy, Esq.
Micaela Burnham, Esq.
For the Complainant

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

Lawrence S. Kalban, Esq.
Carl Sottosanti, Esq.
For the Respondent
United Energy Services Corporation

Before: THOMAS M. BURKE, Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a proceeding brought under the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. Section 5851, and the regulations promulgated thereunder at 29 C.F.R. Part 24. These provisions protect employees against discrimination for attempting to carry out the purposes of the ERA or of the Atomic Energy Act of 1974, as amended, 42 U.S.C.A Section 2011, *et seq.* The Secretary of Labor is empowered to investigate "whistleblower" complaints

[PAGE 2]

filed by employees at facilities licensed by the Nuclear Regulatory Commission ("NRC") who are discharged or otherwise discriminated against with regard to their terms and conditions of employment for taking any action relating to the fulfillment of safety or other requirements established by the NRC.

Complainant, Robert O. Klock, contends that he was discharged from employment by respondents, Tennessee Valley Authority ("TVA") and United Energy Services Corporation ("UESC"), because he engaged in protected activity, that is, because he contacted the NRC regarding certain conditions and

Complainant's Exhibit 471

acts by respondent TVA which he believed were unsafe or violated NRC regulations.

The District Director of the Nashville, Tennessee, regional office of the Employment Standards Administration, United States Department of Labor, found after an investigation that complainant was a protected employee engaging in a protected activity and that discrimination was a factor in the termination of his employment. Respondent TVA was ordered to restore complainant to his prior or comparable employment and to repay wages lost because of the job termination. TVA was also required to pay to complainant the costs he incurred as a result of his loss of income, and was ordered to cease all discrimination with respect to complainant's compensation or conditions of employment because of any action protected by the ERA.

Respondents timely appealed the Employment Standard Administration's order to the Office of Administrative Law Judges. A hearing was scheduled for March 14 and 15, in Knoxville, Tennessee. The hearing was continued at the request of complainant to allow him time to retain counsel.[1] The hearing was rescheduled for April 4 and 5, 1995. The parties were allowed thirty days after the receipt of the hearing transcript to submit a post-hearing brief. The parties did not receive a copy of the transcript until May 24, 1995. A joint motion by Complainant and respondent TVA for an order extending the period of time for submission of post-hearing briefs was granted. Posthearing briefs of complainant and respondent TVA were received on July 10, 1995. Respondent TVA submitted a reply brief on August 1, 1995.

FINDINGS OF FACT

Complainant, Robert O. Klock, was employed at TVA's Watts Bar nuclear power plant in Tennessee from September 14, 1992 until his involuntary termination on July 5, 1994. He was employed by UESC pursuant to an agreement between UESC and TVA whereby UESC provided services of startup engineers to develop and execute a comprehensive nuclear startup program at Watts Bar.[2]

At the time complainant was hired at Watts Bar, and during

[PAGE 3]

his employment there, the plant was in the process of preparation for commercial operation. To prepare for commercial operation, TVA is required to test the plant systems to verify that the systems' components meet safety design requirements. Complainant's contract with UESC provided that he would work as a Lead Engineer in the Startup and Test organization ("Startup"). Startup is a temporary organization responsible for the preoperational tests; it will last only as long as is required to bring the Watts Bar plant onto commercial operation. Because it is temporary, Startup is staffed mostly by employees of several different employment augmentation contractors including UESC. TVA uses contract employees to do temporary work, rather than hiring permanent employees, because the permanent employees will become superfluous upon completion of the temporary work. Complainant was such a contract employee.

Complainant has worked in the nuclear industry for approximately 18 years, principally supporting startup tests in nuclear power plants. His first nuclear industry employment was in construction and startup at the Calvert Cliffs plant in Maryland. He next worked at North Anna in Virginia for four years as a general foreman responsible for startup tests. He worked at Palo Verde in Arizona, where he conducted startup activities. His job at Palo Verde continued after the initial startup phase; he conducted startup testing for three years after the plant became operational. He worked at Palo Verde for approximately eight years. After Palo Verde, he worked at other nuclear plants such as Trojan nuclear plant in Oregon, the River Bend power station in Louisiana and the Peach Bottom Plant in Pennsylvania, where he was the ILRT Coordinator and test

director. Complainant next returned to Calvert Cliffs for a period of approximately a year and a half before accepting the position with UESC at Watts Bar. Richard Daly, Jr., the startup manager at Watts Bar until May, 1994, testified that he had known complainant since they worked together at the North Anna nuclear plant in the mid-1970s. He characterized the quality of the complainant's work as excellent, and described complainant as very dedicated, a hard pusher and very knowledgeable.[3] Kenneth E. Miller, a consultant with the NRC, knows complainant from complainant's work at Palo Verde and Watts Bar. Miller described complainant as one of the best persons working on startup procedures at nuclear plants.[4]

Complainant worked as a startup engineer in Startup's Nuclear Steam Supply System ("NSSS") Group. His initial assignments included the flushing and testing of component systems. He described the flushing program as pushing and moving water through all the lines to verify cleanliness of the safety and non-safety related systems. In early 1994 complainant was

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assigned work with the local leak rate test ("LLRT"). The LLRT is a test to verify that the containment isolation valves are leak tight. Containment isolation valves prevent the escape of contaminants in the event of an accident. At the request of Daly, complainant also accepted responsibility as system engineer for assuring the operation of the ice condenser system.[5] The ice condenser system had been shut down and totally dismantled approximately three years earlier.

Complainant subsequently worked on the integrated leak rate test ("ILRT"). The flushing program and LLRT were programs leading up to the ILRT, a "major milestone" with high visibility[6] that has to be completed before the plant can become operational. The ILRT involves pressure testing the whole system. The ILRT was performed during the period June 22 through 29, 1994. Complainant was described as the key player in the setting up of the leak rate tests by Daly and Keith Pierce, the site manager for UESC personnel at Watts Bar. Daly described complainant as being very knowledgeable in these valve testing procedures. "He pushed every one of these procedures through the necessary hoops to get them approved...he was the key man in that damn thing." Daly often communicated directly with complainant because he "didn't want to get anything scrambled.[7] Pierce offered the opinion that complainant was more than anyone else responsible for the success of the LLRT and ILRT programs. He characterized complainant's work thereon as outstanding.[8]

Although complainant was employed by UESC, he was supervised by TVA personnel. His immediate supervisor was Bill Bryant, the test group lead for NSSS. Bryant reported to Daly, and after Daly left Watts Bar in May of 1994, to Daly's replacement, Masoud Bajestani. However, complainant only saw Bryant when dealing with his work schedule or seeking approval of overtime. In actuality, complainant looked to the group leader of the system he was working on for direction on any problem that might arise. Ken Clark was the group leader for the LLRT and ILRT programs. The group leader reported to Dennis Koehl, Technical Support Manager, who in turn reported to Bajestani.[9] Bajestani reported to Site Vice-President John Scalice. Complainant's contact with UESC was through Keith Prince, UESC's site manager.

Complainant reported several safety concerns to TVA management and the NRC site inspector during the month of June, 1994. Complainant testified that problems arose in the LLRT, ILRT and ice condenser system programs that he was responsible to resolve, and if TVA people reacted inadequately, he would, at times, call the problems to the attention of Miller, the NRC inspector assigned to the LLRT and the ILRT. Complainant testified to specific examples. His first reported contact with the NRC occurred while he was systems engineer for the air lock

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tests. Complainant recommended that a containment air lock test not be attempted because some design changes thought to be necessary by complainant had not been completed. The test failed as the leak rate was about four times the acceptable criteria. In response to questions from Miller, complainant expressed concern that the test had been attempted without the design changes being made. Miller reacted by meeting with Bajestani and Koehl to advise that TVA personnel should work closer with complainant in the testing. [10]

The flushing program detected problems caused by organisms growing in the water pipe lines. Complainant informed his TVA supervisors that the organisms were able to grow because of engineering deficiencies such as insufficient velocity of the water used to flush the system that he believed allowed the organisms to grow. TVA rejected complainant's advise for correcting the problem and, instead, instructed complainant to "accept as is." Complainant subsequently discussed the problem of organisms in lines with Miller, the NRC inspector. [11]

During the heat exchanger thermal performance test program, Miller sought out complainant's opinion on the type of instrumentation that should be used, as Miller was aware that complainant had experience with the test at other plants.

About one week prior to commencement of the ILRT, complainant raised a concern about vents being open to atmospheric contaminants during a valve alignment program performed in preparation for the ILRT. Complainant thought contamination through the open valves was a realistic concern because of ongoing construction at the plant, including cutting and grinding. Complainant voiced his concern at a daily work group meeting while Miller was present. Miller then discussed complainant's concern with Koehl and Jose Ortiz, the LLRT and ILRT engineer who worked for Koehl. Complainant detected a concern by TVA over why the NRC was addressing and raising all these issues. Complainant was told by Ortiz and Clark that these concerns that he had discussed with the NRC inspector were "non-issues." [12]

The ILRT was scheduled to commence on June 22 or 23, 1994. The test necessitated the proper alignment of approximately 700 valves. Early in the day on June 22, complainant identified a closed valve that should have been open for the purposes of the test. Complainant informed Clark of the closed valve at about 3:00 p.m. Clark responded that the valve was in the correct position; that it wasn't a problem. Complainant raised the problem again with Clark later that evening at about 7:00 p.m., but got no response. At the end of his shift, about 8:30 p.m., complainant informed Rocky Gilbert, the NRC inspector assigned to the ILRT, of the closed valve. Gilbert replied that he would

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take care of it. [13] Miller testified that the reason complainant contacted Gilbert was that complainant felt after talking to Clark that Clark was not going to fix the problem and he wanted to assure that the problem would be fixed. [14] When the complainant returned to work at about 7:00 a.m. the following morning, Miller was at complainant's desk, waiting for him. Miller requested information on the closed valve, such as a copy of the LLRT performed on the valve and available drawings and flow diagrams. After discussion with complainant and a review of the documents, Miller concurred that the valve should not be closed. Then, complainant proceeded to Koehl's office with the drawings to discuss the valve placement. However, Bajestani had earlier been made aware of complainant's concern with the valve placement and, prior to seeing complainant, had sent Lonnie Farmer and one other TVA employee to look at the valve. They reported that the valve alignment was correct and complainant was wrong. Nevertheless, after a discussion between complainant, Bajestani and Koehl, it was agreed that there was a problem. The

three of them decided to go and personally inspect the valve. On the trip to the valve location they were joined by three NRC inspectors, including Caudle Julian, chief inspector from NRC's Atlanta office, who were proceeding to inspect the valve themselves. The inspection revealed that the complainant was correct; the valve alignment had to be changed. The inspectors who had been sent to look at the valve alignment earlier that day had inspected the wrong valve. A procedure change was written and the valve alignment was changed that evening. The ILRT test was delayed approximately 24 hours. [15]

Complainant testified that Koehl was angry because a problem existed causing a delay in the ILRT and because TVA did not initially identify the misalignment but had to be informed of it by the NRC. Koehl testified that "[i]t was a very embarrassing morning. I had to inform (the NRC) on three different occasions of different problems we had..." [16] Miller testified that Bajestani and the other TVA employees were embarrassed by complainant bringing the misaligned valve to the attention of the NRC. [17]

The ILRT was completed on Wednesday, June 29, 1994. Complainant had previously discussed with Bryant, the NSSS lead, the possibility of taking time off after completion of the ILRT. Complainant had worked significant overtime on the ILRT; he had already worked 63 hours by Wednesday of that week. He approached Bryant on June 29th and received permission to take the rest of the week off, through Monday, July 4. Complainant testified that he also requested from Bryant permission to take off July 5 through 9, Tuesday through Friday, in the event he obtained custody of his children. According to complainant's testimony,

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his intention was to leave on June 29, 1994 for Maryland where his divorced wife and children resided. If he was able to obtain custody of the children, he would take them to Disney World in Florida. If he made the trip to Florida, he would not return to the plant until Monday, July 11. Complainant testified that Bryant granted his request to take off the four days, July 5 through 9. Complainant also told Prince before he left on his vacation that he might need some "extra" time off because he felt burnt out. Prince replied that complainant taking the time off was alright with him. [18]

Complainant telephoned Prince, the USEC site manager, on July 5 from Florida to inform Prince that he had gone to Florida and would return to the plant on July 11, and to ask Prince to relay the information to Bryant. Prince responded: "Have a good vacation because you've worked all these hours." [19] Prince immediately telephoned Bryant and relayed complainant's message. Prince testified that Bryant expressed no surprise or concern; he merely acknowledged the call, replied "okay" and "thanks for calling." However, about one and a half to two hours later, Prince received a telephone call from Bill Huffaker, the contract administrator with the startup group, informing that complainant was let go "because he took vacation without getting it cleared up front." [20]

When complainant returned from his vacation on the evening of July 10, he found a note placed on his door by a co-worker neighbor stating that he had been fired.

Complainant telephoned Prince about 11:00 on the night of July 10. Prince suggested that they meet at the plant in the morning and together attempt to straighten matters out. Complainant went to Prince's office the next morning. While complainant was in his office, Prince telephoned Bajestani twice and left messages, and telephoned Bryant once. Neither returned his call. Complainant and Prince proceeded to Bryant's office. Bryant informed them that when he told Bajestani on Wednesday that complainant would not be at work until July 11, Bajestani responded that if Bryant could get by without complainant, he would let complainant go. Complainant asked if he could talk to

Bajestani. Bryant replied that he did not think Bajestani would talk to him. Prince approached Bajestani on complainants behalf; he asked Bajestani to please take a few minutes to talk to complainant. Bajestani became irate and loud; he began hollering that he wanted complainant off the site immediately. Prince characterized Bajestani's demeanor as going "ballistic." Bajestani described his temperament as "excited." Prince returned and accompanied complainant to his desk. Bryant appeared at complainant's desk and said that Bajestani had sent him over to observe complainant cleaning out his desk. [21] After

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complainant cleaned out his desk, Prince escorted him to the gate and took his badge. On the way to the gate complainant expressed the desire to talk to Employee Concerns, an organization established by TVA to address employee safety concerns. Prince responded: "That's fine, but you're going to do it from the outside, make an appointment because if we don't get you off site, security is going to come and make things ugly for us." [22] Complainant left.

Complainant testified that as he was leaving, Bryant offered to meet him later, off site. Bryant denies suggesting the meeting. But, in any event, complainant and Bryant did meet at a bar/restaurant outside the plant either later that evening or the following evening. Complainant testified that Bryant told him that he did not know why complainant was fired; that it was Bajestani's decision. Bryant testified that he doesn't remember any details of the conversation, but he denies that he would have said he didn't know the reason since, at that time, he knew the reason for complainant's termination, that is, unexcused absence.

Complainant contacted Employee Concerns by telephone the afternoon of his firing. He received a return call the following day from Keith Ackley, a TVA employee, who told complainant that he was not fired. Complainant inquired of Ackley where he got his information. Ackley called back two days later but was informed by complainant that he had retained counsel and all contacts would have to be through counsel.

Complainant testified that the first time he was given a reason for his termination was when he applied for unemployment compensation on July 14, 1994. He was told by the Tennessee Unemployment Commission that the reason provided by TVA for terminating his employment was absenteeism.

Prior to his termination complainant had worked for twenty-two months at Watts Bar. During the twenty-two months he missed only twelve work days. He was off five days for an operation and seven days for trips to Maryland mandated by divorce proceedings.

Since his termination complainant has been unable to obtain a job in the nuclear industry even though he has filed at a minimum twenty job applications. He thought that two job openings were particularly promising: at the Crystal River Nuclear Plant doing startup testing and at the Milestone Nuclear Plant in Connecticut for Cataract, an employment contractor. However, both applications were rejected after the prospective employers were made aware of complainant's employment and termination at Watts Bar. Complainant accepted employment at the end of October 1994 as a steamfitter with Steam Fitters Local 602 for M.W. Slosser installing and starting up HVAC (heating, ventilation and air-conditioning) equipment. He was laid-off by Slosser, but he found a position doing refrigeration work with a

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company from Buffalo, New York. Both of these positions paid \$21.49 an hour. His salary was \$39.83 an hour plus \$3.00 an hour in benefits at Watts Bar.

MOTION FOR SUMMARY JUDGMENT

Respondent, United Energy Services corporation, moved at the commencement of the hearing for summary judgment in its behalf

pursuant to Rule 56 of the Federal Rules of Civil Procedure. UESC argues in its motion that there is no genuine issue of material fact that UESC did not take any adverse action in violation of the Act against the complainant.

The complainant concedes that UESC did not participate in the decision to terminate the complainant from his position with TVA on July 5, 1994, and that UESC did not discriminate against complainant in violation of the ERA. [23] TVA does not dispute complainant's concession. [24]

Respondent's motion was denied at the commencement of the hearing for reason that UESC may be a necessary party to the formulating of a remedy in the event that complainant is successful in this claim since complainant was an employee of UESC while working at TVA's Watts Bar plant. UESC again moved for summary judgment post hearing. After reconsideration, UESC's motion is granted. Jurisdiction vests in the Secretary under the ERA to issue orders of abatement of violations of the ERA only to employers who have violated the ERA. 29 C.F.R. 524.6(b)(2). As UESC has not violated the ERA, the Secretary lacks jurisdiction under the ERA to order UESC to undertake any action toward the complainant. Moreover, a remedy can be formulated without jurisdiction over UESC. TVA can be ordered to reinstate complainant either as a contract employee of UESC or as its own employee.

Accordingly, respondent UESC's motion for summary judgment is granted. The complaint against UESC is dismissed.

PRIMA FACIE CASE

The requirements for establishing a prima facie case under Section 210 of the ERA were set out by the Secretary of Labor in *Darty v. Zack Co. of Chicago*, Case No. 82-ERA-2 (Sec'y,

April 25, 1983) slip op. at 8. They are: (1) the complainant engaged in protected activity; (2) the complainant was subject to adverse action; and (3) that the respondent was aware of the protected activity when it took the adverse action against him. The complainant must also present sufficient evidence to raise the inference that the protected activity was the likely reason for the adverse action.

PROTECTED ACTIVITY

Section 210 provides that:

No employer may discharge any employee or otherwise

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discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--

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

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

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

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

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

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended. 42 U.S.C.A. §5851.

Complainant has established that he engaged in protected activity on at least five occasions.

The first protected activity was complainant's disclosure to Miller, the NRC inspector, that TVA personnel had performed a containment air lock test against complainant's recommendation that it not be performed because design changes necessary for a successful test were not completed. Miller reacted to complainant's information by meeting with Bajestani and Koehl to suggest that cooperation between complainant and other TVA people be increased. Miller considered this incident as an example of

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poor cooperation. He testified:

A. For an example, the air lock test. [Complainant] told Jose Ortiz and Ken Clark that the air lock is not ready to test and [complainant] didn't want to go ahead and test it because he expected it was going to fail. So Jose and Ken Clark decided they were going to go out there and test that air lock and see what happened. It failed.

Q. Okay.

A. If they had just waited until the necessary repair work had been completed on the air lock, they probably would have just done the test once. That's the kind of thing I'm talking about. [25]

The second protected activity was complainant's informing Miller that TVA personnel had rejected complainant's advice for correcting a problem of organisms growing in the water pipe lines. Complainant believed that the velocity of the water used to flush the system was insufficient.

Complainant's discussion with Miller regarding the type of instrumentation that should be used in the heat exchanger thermal performance test program was a third occasion where he engaged in protected activity.

The fourth occasion when complainant was engaged in protected activity occurred about one week prior to commencement of the ILRT program when complainant voiced a concern about vents being open to atmospheric contaminants during a valve alignment program. Complainant expounded on his concern during a daily work group meeting while Miller was present. Miller's recollection is that he subsequently discussed the contamination problem with Ken Clark and Jose Ortiz.

Complainant's fifth engagement in protected activity occurred on June 22, 1995, one or two days before the ILRT program was scheduled to begin. Complainant informed Rocky Gilbert, the NRC inspector assigned to the ILRT, of a closed valve that should have been opened for the ILRT to be successful. Complainant imparted the information to Gilbert because he had earlier tried and failed to convince Clark, the ILRT group leader that the valve was misaligned. Complainant's meeting the next morning with Miller, wherein he persuaded Miller that the valve was misaligned, his subsequent meeting with Koehl and Bajestani to explain the problem, and his guiding of the group of Koehl, Bajestani, and three NRC inspectors to inspect the valve, all constitute protected activity.

ADVERSE ACTION

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Complainant was fired from his job by Bajestani on July 5, 1995, less than two weeks after he had engaged in protected activity.

KNOWLEDGE OF PROTECTED ACTIVITY

Complainant must show that TVA had knowledge of his protected activity at the time of the adverse employment action. *Hassell v. Industrial Contractors, Inc.*, Case No. 86-CAA-7 (Sec'y, Feb. 13, 1989).

On direct examination Bajestani testified that he did not know that the complaint had raised any concerns with the NRC when he made the decision on July 5, 1995 to fire complainant. [26] However, complainant testified that he told Bajestani, Koehl and Clark that he had reported the misaligned valve to the NRC. It is undisputed that complainant led the impromptu inspection of the valve and that the inspection group included Bajestani, Koehl and three NRC inspectors.

Moreover, Bajestani admitted on cross-examination that he knew on June 23 or 24, the day the ILRT test was completed and ten or twelve days before he fired complainant that complainant had informed the NRC about the misaligned valve. [27] Thus, complainant has shown that TVA knew about his protected activity at the time he was fired.

REASON FOR TERMINATION

Complainant has shown that he engaged in protected activity, that he suffered an adverse action when he was subsequently fired, and that TVA knew of the protected activity when it terminated his employment. Complainant must, to establish a *prima facie* case, present evidence to raise the inference that the protected activity was the likely reason for the adverse action. *Dean Dartey v. Zach Company of Chicago*, Case No. 82-ERA2, slip op., (Sec'y, April 25, 1983). *Stack v. Preston Trucking Co.*, Case No. 86-STA-22, slip op., (Sec'y, Feb. 26, 1987) and *Haubold v. Grand Island Express, Inc.*, No. 90-STA-10, slip op., (Sec'y, April 27, 1990).

Complainant was fired by Bajestani on July 5, 1994, less than two weeks after complainant had contacted Gilbert, the NRC inspector assigned to the ILRT, about the misaligned valve because complainant became concerned when Clark, the group leader for the ILRT, disagreed that the valve was out of alignment, and less than two weeks after the complainant led the impromptu tour, including Bajestani, Koehl and three NRC inspectors, to inspect the valve, an incident which according to Koehl prompted "a very embarrassing morning." [28] The firing was also less than four weeks after Miller, the NRC inspector assigned to the LLRT and ILRT, met with Bajestani and Koehl, to advise that TVA personnel, particularly Clark and Ortiz, needed to work closer with complainant in light of the failed leak rate test.

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This temporal proximity of the firing of complainant to the protected activity is sufficient in itself to raise the inference that the protected activity was the reason for the adverse action. The Court of Appeals in *Couty v. Dole*, 886 F.2d 147 (5th Cir. 1989) held that the temporal proximity of "roughly thirty days" is sufficient as a matter of law to establish an inference of retaliatory motivation. See also the Secretary's decision in *Goldstein v. Ebasco Contractors Inc.*, Case No. 86-ERA-36 (Sec'y, April 7, 1992).

Moreover, complainant's value as an experienced and conscientious employee raises an inference that the firing was caused by retaliatory motivation because it is evidence that his firing was motivated by reasons other than sound business

practice. As previously discussed, Daly, the startup manager, characterized the quality of complainant's work as excellent and described complainant as very dedicated, a hard pusher and very knowledgeable. Daly extolled complainant's competence in the valve testing procedures as "the key man in that damn thing." Keith Prince, the site manager for UESC personnel, characterized complainant's work as outstanding, and offered that complainant was responsible, more than any one else, for the success of the LLRT and ILRT programs. He also lauded complainant as the key person in the leak rate tests. Miller, the NRC inspector, considers complainant to be one of the best persons working on nuclear plant startups. These acclamations suggest that complainant was a valued employee whose termination would not have been in the best interest of the respondent TVA.

RESPONDENT'S REASON FOR TERMINATION

As the complainant has established a *prima facie* case, TVA has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, nondiscriminatory reasons. Significantly, the employer bears only a burden of producing evidence at this point; the ultimate burden of persuasion of the existence of intentional discrimination rests with the employee. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-255 (1981). *Dartey v. Zack Company of Chicago*, Case No. 82-ERA-2 (Sec'y, April 25 1983).

Once a respondent satisfies its burden of production, the complainant then may establish that respondent's proffered reason is not the true reason, either by showing that it is not worthy of belief or by showing that a discriminatory reason more likely motivated respondent. *Shusterman v. EBASCO Services, Inc.*, Case No. 87-ERA-417 (Sec'y, Jan. 6, 1992).

Respondent proffers that complainant was fired by Bajestani on July 5, 1994 because Bajestani received information that complainant was scheduled to be at work but was in Florida and

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would not be back for another week. [29] Bajestani testified that he terminated complainant because of a combination of lack of showing up for work, the test was completed, and unauthorized use of overtime. [30]

ABSENCE FROM WORK

Absence from work with or without leave was out of character for the complainant. During the twelve months complainant had worked at Watts Barr, he had taken off only twelve work days; five days for an operation and another seven days when he had to return to Maryland for divorce proceedings. [31] Commencing in April of 1995, complainant was working between 60 to 100 hours a week because of the added demands of the ice condenser system to his work on the LLRT and ILRT programs. Daly applauded complainant's work ethic: "He must have worked hundred of hours without ever a complaint. And many a time, I would just tell him, 'Bob, you've got to -- you're going to have to work the weekend again'. He never once ever buckled under working additional hours...He worked day in and day out and made the schedule on the testing, which was an extremely tight schedule. [32]

None of the witnesses who were questioned about complainant's work conduct believed that complainant was the type of employee who would, without leave, simply fail to report to work. Richard Camp, vice-President of UESC with the responsibility for implementing the contract with TVA, testified that he was surprised at the reason for complainant's termination. He was not aware of anything in complainant's work history to indicate that complainant would not show up for work. Steven Poulsen, a test group supervisor at Watts Bar, testified that complainant is a dependable, excellent worker who always got the job done. [33] Bryant opined that complainant is the type of

person who you could count on to meet his work schedule. Prince testified that complainant presented no problem regarding absenteeism. Prince elaborated that when the complainant was absent for the operation on his leg and the divorce proceedings, he requested the time off. [34] Even Bajestani admitted that prior to July 5, he did not consider complainant to be an absenteeism problem. [35]

It is illogical that an employee with complainant's reputation as a dependable and excellent worker, and a track record of taking minimal time off while working many hours of overtime without complaint, would be fired for being absent without leave, without being given the opportunity to explain his absence.

Also, the hostile reception accorded complainant by Bajestani when he returned with Pierce "to attempt to straighten matters out" reflects more than a concern over an employee's failure to inform his supervisor about taking time off. When

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Pierce told Bajestani that complainant was at the plant and wanted to talk to him about the matter, Bajestani not only refused to see complainant but became irate. Bajestani described his demeanor as excited. Pierce described the scene:

A. ... And when Mr. Bajestani came in -- excuse me -- I asked him to please take a few minutes to talk to [complainant] and see if we couldn't get it rectified.

Q. And what was Mr. Bajestani's reaction?

A. He went ballistic on me.

Q. What do you mean, "he went ballistic"?

A. He started yelling, high voice, "Get him out of here. Get him out of here. I do not want to see him. I don't have anything to say to him. If you don't get him put of here, I'll have security escort him off site."

Q. Were you able -- From your observations at that point in time, what was Bajestani's attitude toward [complainant].

A. I've never seen anyone have an attitude like that in my whole life. To my knowledge, he had done nothing -- [complainant] had done nothing. At the worst, it was take time off without asking. And I've never seen anybody react to that like Bajestani did. [36]

Bajestani testified that the reason he became excited at complainant's presence at the plant was because complainant's presence after his termination was a security violation. Bajestani's explanation is not accepted. Surely, an accommodation could have been made for an employee, who returns from a vacation to find his job terminated without warning, to appear at his job site to discuss the reasons for his termination and retrieve his personal belongings.

Bajestani's anger at complainant could not have resulted from complainant leaving behind unfinished work that only complainant was capable of completing. Bajestani testified that the ILRT was completed as of July 11 and other test engineers were present to write up the test results. Miller reported to the DOL investigator that, in his opinion, there was no way that complainant could have been needed during the time that he was off, and "If I was his supervisor [I] would have told him to take off and have a good time." [37] Miller explained that the basis for

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his opinion was that the test results weren't available during the time complainant was off. [38]

Complainant testified that when he requested time off from Bryant on June 29, 1994, his request was for the periods June 30 and July 1, and July 5 through 9. Bryant contends that complainant only mentioned June 30 and July 1. Acceptance of this miscommunication or misunderstanding as the rationale for complainant's termination and the reason for the hostility of Bajestani toward complainant, in light of the aforesaid testimony of complainant's expertise and reputation as a worker, would be irrational. Accordingly, TVA's stated reason that complainant was terminated because he took leave without receiving prior approval is determined to be pretextual.

UNAUTHORIZED OVERTIME

Bajestani testified that a factor in his decision to terminate complainant's employment was complainant's use of unauthorized overtime.

Bryant was the test group supervisor. He testified that every week he would submit a request to Bajestani for overtime for the employees under his supervision. His request was based on his experience on the hours needed to do a particular job. Bajestani would approve the request or reply by setting a lower number of hours. All the employees, including complainant, at times worked more overtime hours than the number approved by Bajestani. [39] Bryant testified that there was no doubt that complainant worked those hours, and that complainant could explain the need for doing so. Bryant testified further that he warned complainant that the consequence of working the higher number of hours was that complainant would have to explain the need to Bajestani. [40] Complainant was always paid for the hours that he worked.

Bajestani started at Watts Bar in early May, 1994, about eight weeks before he fired complainant. Bajestani testified that during the eight weeks that both he and complainant worked at Watts Bar, complainant worked more overtime than he was authorized. However, Bajestani was unable to identify those weeks, and he admits that on the two occasions when complainant requested extra overtime from him, he granted the requests. [41] His predecessor as the Startup and Test Manager was Daly. Daly testified that he never had any problem with complainant working unnecessary overtime, but rather, "Usually the shoe was on the other foot." [42]

Prince's duties as the site manager for UESC at Watts Bar included bringing on new UESC employees, letting go employees dismissed by TVA, and working out any performance problems by UESC employees. He testified that no concern was ever expressed to him about complainant working unnecessary hours, and that if

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any such concern had been expressed to him, "we would have cleared that up right away." [43]

Bajestani's testimony that complainant's working of unauthorized overtime was a reason for his termination is not creditable. Complainant was never informed by Bajestani, Bryant or any one else that the number of hours he was working was placing his job at risk. Bajestani never told complainant that there was a problem with him working more than the allotted overtime hours, even though complainant on two occasions requested authorization of additional overtime hours.

COMPLETION OF THE WORK

Bajestani's testimony that one of the reasons for the termination of complainant's employment was the completion of the ILRT is contradicted by the abrupt action he took in terminating complainant's employment. Complainant's termination is inconsistent with Bajestani's testimony that contract employees are given a one or two week notice of termination as their work nears completion. [44]

Accordingly, it is determined that the complainant has met his burden of showing that TVA's proffered reasons for his firing are pretextual. He has shown by the clear preponderance of the evidence that those reasons, as enumerated by Bajestani, did not actually motivate his discharge. See *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078 (6th Cir. 1994); and *Shusterman v. EBASCO Services, Inc.*, *supra*.

TVA's termination of complainant's employment was a deliberate retaliation for his contacts with the NRA.

DELIBERATE VIOLATION

TVA argues that complainant should be denied relief under this claim because he deliberately violated an NRC regulation. TVA does not contend that the violation was a reason for complainant's employment termination but rather cites subsection (g) of the ERA, 42 U.S.C. §5851, for the proposition that the employee protection provisions of the ERA shall not apply with respect to any employee who deliberately causes a violation of any requirement of the Act.

TVA contends that complainant initialed a statement verifying a final valve alignment even though he knew the valve alignment and the procedure to be incorrect. In support, TVA refers to TVA Exhibits 16 and 17 where complainant's initials "verify that a final valve alignment verification has been performed."

TVA's argument is rejected. TVA has not shown that complainant deliberately submitted inaccurate information. To the contrary, this case arises, at least in part, because TVA in the person of Ken Clark refused to accept complainant's warning that the very same valve was misaligned, thereby inducing

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complainant to bring the misaligned valve to the attention of Rocky Gilbert, the NRC inspector.

Complainant testified that his initials on the statement were intended to verify that the penetration, as written in the procedure, was correct, not that he physically inspected the alignment of all 700 valves. Complainant insists that he took the appropriate steps for a situation where the procedure was technically correct but the actual alignment was wrong. He initialed the procedure verification form, verifying that the procedure was technically correct, and then contacted the test director and told him of the misalignment, contacted the test director a second time, and upon finding that the misalignment was not corrected, contacted the NRC. [45]

Clearly, this record does not support a finding that the complainant deliberately submitted information to TVA regarding the misaligned valve that he knew to be incomplete or inaccurate.

DAMAGES

42 U.S.C. §5851(b)(2)(B) provides that once discrimination that is prohibited by the Act is found:

... the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

The Court in *Deford v. Secretary of Labor*, 700 F.2d

281 (6th Cir. 1983), interpreted the above-quoted section as permitting an award of reinstatement to a former job; restoration of all back pay, benefits and entitlements; compensatory damages insofar as they are thought to be appropriate; and reasonable attorney fees and costs.

REINSTATEMENT

The Secretary has adopted for ERA cases the "long accepted rule of remedies that the period of an employer's liability ends when the employee's employment would have ended for reasons independent of the violation found." *Francis v. Bogan*, Case No.

[PAGE 19]

86-ERA-8 (Sec'y, April 1, 1988). Complainant requests that he be reinstated to his former job. However, as a contract employee with TVA, he was hired by UESC under a contract between UESC and TVA whereby UESC agreed to provide startup engineering services at Watts Bar. Thus, complainant is entitled to reinstatement for only so long as he would have remained employed with TVA absent the discriminatory firing.

A finding of intentional discrimination shifts the burden of proof to the defendant in the damage phase of this type of case. *Woolridge v. Marlene Industries Corp.*, 875 F.2d 540, 546 (6th Cir. 1989). Once intentional discrimination in a particular employment decision is shown, the Courts have held that the disadvantaged applicant should be awarded the position retroactively unless the defendant shows by clear and convincing evidence that even in the absence of discrimination the rejected applicant would not have been selected for the open position. *League of United Latin American Citizens v. Salinas Fire Department*, 654 F.2d 557 (9th Cir. 1981). Victims of discrimination are entitled to a presumption in favor of relief; because "recreating the past will necessarily involve a degree of approximation and imprecision." *Woolridge, supra.*, at 546.

At the time complainant was hired in September of 1992, he considered the plant to be about three years away from completion of the start up phase. He envisioned about ten years of work available at Watts Bar, considering start up and operation, but he realistically anticipated only three to five years of employment. [46]

When complainant left on June 29, 1994 on leave, he understood that upon his return he would resume his duties with the ILRT where there was "a lot of testing to be done," including the plant monitoring instrumentation which would take about another two months of work, and he would continue with his duties as the systems engineer for the ice condenser system, which had "an extensive amount of work and testing to be done." Complainant was also under the impression from a discussion he had with Bajestani that upon completion of his work with the ILRT, he would be assigned to work with the Heating, Ventilation and Airconditioning ("HVAC") section of the start up phase, which at that time was working seven days a week, twelve hours a day. Complainant testified that he was told by Bajestani that the remaining work he had with the air condenser system would not preclude his assignment to the HVAC section. [47] TVA had personnel from Startup doing HVAC work at the time of the hearing. [48]

Steven Poulson, a group supervisor in Startup and Test, testified that he was present for discussions among Bajestani, Bryant and others to the effect that complainant and his group would be moved back to HVAC after the ILRT was completed. The

[PAGE 20]

move was to be made because of vacancies in HVAC and availability of people after completion of the ILRT. [49] Prince testified that he was informed by complainant and an unidentified co-worker that Bajestani disclosed to them that he intended to switch the

LLRT personnel over to HVAC work. [50]

Bajestani denied making a commitment to complainant that he would be assigned to the HVAC section upon completion of the ILRT work. Bajestani agreed that the HVAC section needed additional help but he testified that he would not have assigned complainant there because when he asked the supervisor of that section, John Ferguson, if he needed complainant, Ferguson told him that "he doesn't need complainant because he's not a good worker, something to that fact (sic)." [51] Ferguson testified that he never told Bajestani that complainant was not a good worker. Rather, he testified that he told Bajestani that he did not want complainant to work for him in the HVAC section because complainant was "arrogant and headstrong." Ferguson had become section supervisor on June 16, 1994, only about two weeks before complainant went on leave. He had minimal dealings with complainant; he knew him only by reputation from general office conversation.

James Bible is an electrical and instrumentation test group supervisor with the Start up and Test organization. Complainant testified that Bible was present at the meeting between Bajestani and himself in June of 1994 where HVAC testing was discussed. Bible's recollection of the meeting was that Bajestani informed complainant that the next major test would be the HVAC. He does not recall Bajestani stating that he would move complainant and his group to the HVAC. [52]

Complainant was hired under a contract to provide engineering services during the startup phase. It is determined that TVA has not shown that the complainant's employment at Watts Bar would have terminated prior to the completion of the startup phase. Bajestani's testimony that he would not have retained complainant to work on the HVAC system is not credited. His testimony regarding the reason for complainant's termination on July 5 was found to be pretextual. For that reason, his testimony that complainant would have been terminated rather than assigned HVAC work is considered suspect. Moreover, his testimony is inconsistent with the statement he provided to the Wage and Hour Investigator on January 11, 1995. Bajestani told the Wage and Hour Investigator who investigated complainant's complaint that "if the incident hadn't happened", complainant would have continued at Watts Bar through November, 1994 working on the HVAC system. [53]

Ferguson's discussion with Bajestani wherein he described complainant as headstrong and arrogant was subsequent to

[PAGE 21]

complainant's activities as a whistle blower. Ferguson's characterization was based not on personal experience but rather on conversations with others. Those opinions could very well have reflected a disapproval of complainant's approaching the NRC inspectors. Ferguson himself expressed the concern that a safety matter should be first discussed with the two immediate levels of supervision before being reported to the NRC. [54] TVA has not shown that the testimony of Bajostani and Ferguson, to the effect that complainant would not have been retained through the startup phase to do HVAC work, was not affected by complainant's reputation as a whistleblower.

Accordingly, it is ordered that the complainant shall be reinstated so long as TVA continues to employ contract workers performing startup engineering services at Watts Bar.

BACK PAY

Complainant calculates a loss of pay and benefits resulting from the discriminatory firing from July 11, 1994 through April, 1995 to be \$106,192.00. TVA does not contest these calculations. From July 11, 1994 through the date of hearing the complainant earned \$6,801.59. Those earnings are subtracted from the complainant's loss of wages. Complainant is entitled to a loss of pay and benefits up to the time of hearing in the amount of \$99,390.41 (\$106,192.00 - \$6,801.59 = \$99,390.41).

Complainant is also entitled to back pay and benefits until reinstatement or until TVA's use of contract workers in the start up phase is completed. Both parties shall within thirty days supplement the record with evidence of additional loss of back pay and benefits from the date of hearing until the present.

PER DIEM

Complainant requests that he be reimbursed for the per diem he would have received had he continued to work at Watts Bar. Complainant received per them of \$45.00 a day because of his status as a contract employee. Complainant's request for per them is denied. The purpose of the per them was to defray the expenses of living in Tennessee while working at Watts Bar. Without the job, complainant does not have the extra expense of keeping up a temporary residence away from his permanent home.

INTEREST

Complainant is entitled to prejudgment interest on back pay and benefits, calculated in accordance with 29 C.F.R. 520.58(a) at the rate specified in the Internal Revenue Code, 26 U.S.C. §6621.

COMPENSATORY DAMAGES

Complainant testified that the lose of his job with TVA on July 5, 1994 and the resulting loss of income resulted in his inability to make the mortgage payments on his house in Walford, Maryland, the finance payments on his 1992 Mazda automobile and a

[PAGE 22]

boat. His failure to keep up the payments on his house resulted in its sale by foreclosure and his inability to make the payments on the car and boat resulted in their repossession.

The foreclosure and repossession resulted from complainant's loss of income after he was fired by Bajastani. Thus, the loss of the house, car and boat constitutes damages that complainant should be compensated for in order that he be made whole. Complainant's Exhibit 4 shows that the amount of money distributed to the mortgage holder after the foreclosure sale, \$131,212.04, was \$40,158.25 less than the amount complainant and his wife owed the mortgage holder, \$171,370.29. Thus, complainant suffered compensable damages in the amount of the \$40,156.25 deficiency judgment obtained against complainant and his wife as a direct result of complainant's loss of job.

Complainant, however, has failed to sufficiently document other losses. Complainant testified that the fair market value of the house is \$20,000.00 more than the amount he owed on his mortgage. However, the only evidence complainant offered on the fair market value of his house was his own testimony. Complainant testified that he was knowledgeable about the fair market value because he had an appraisal performed about one year earlier when he refinanced his home. Complainant's testimony on fair market value was allowed over the objection of TVA on the condition that a copy of the appraisal be submitted post-hearing. No appraisal of the value of the home was submitted.

Complainant's Exhibit 5 shows that complainant was in default in the amount of \$10,277.91 to Mazda American Credit on October 11, 1994. Complainant testified that he was in default that amount when the car was repossessed. Although complainant estimated the purchase price of his car to be about \$26,000.00, he offered no evidence of the value of the Mazda when it was repossessed. Without such evidence, complainant's loss cannot be calculated.

Claimant argues that he lost \$30,000.00 in equity when his boat was repossessed, that he incurred \$3,500.00 in legal fees when he was unable to keep up his child support payments. He also argues that because of the loss of income after his firing he incurred increased costs of living of \$2,800.00, increased transportation expenses to work of \$1,228.50, travel expenses and time off from work to pursue this claim in the amount of \$1,750.00, and costs from physical injuries and emotional

problems. However, these damages are not documented or otherwise adequately supported by the evidence. Complainant not only has the burden of showing that damages exist with reasonable certainty but also of documenting the amount of such damages. *Prunty v. Arkansas Freightways, Inc.*, 16 F.3d 649 (5th Cir. 1994).

[PAGE 23]

Accordingly, a second hearing devoted solely to damages will be convened to allow complainant an opportunity to meet his burden of proving those compensatory damages he sustained, other than back pay and interest thereon which he has already proven. *Nolan v. AC Express*, Case No. 92-STA-37 (Sec'y, Jan. 17, 1995).

ORDER

IT IS HEREBY ORDERED that a hearing will be conducted in this matter solely on compensatory damages sustained by complainant on Tuesday, October 31, 1995 at 9:00 a.m. at the following location:

U.S. BANKRUPTCY COURT
PLAZA TOWER
SUITE 1501
800 SOUTH GAY STREET
KNOXVILLE, TENNESSEE 37929

The parties shall exchange, by mail, copies of all documents that the party expects to offer into evidence at the hearing on compensatory damages on or before October 26, 1995.

RECOMMENDED ORDER

IT IS HEREBY RECOMMENDED THAT:

1. Respondent United Energy services Corporation's Motion for Summary Judgment be granted;
2. The complaint against Respondent United Energy Services Corporation be dismissed;
3. Respondent Tennessee Valley Authority be ordered to:
 - A. Reinstate complainant, Robert O. Klock, either as a contract employee or its own employee for, at a minimum, so long as Respondent Tennessee Valley Authority continues to employ contract workers performing startup work at Watts Bar;
 - B. Pay to complainant back pay in the amount of \$99,390.41;
 - C. Pay to the complainant interest on the back pay from the date the payments were due as wages until the actual date of payment. The rate of interest is payable at the rate established by section 6621 of the Internal Revenue Code, 26 U.S.C. §6621; and
 - D. Pay to complainant all costs and expenses, including attorney fees, reasonably incurred by him in connection with this proceeding. A service sheet showing that service has been made upon the respondents and complainant must accompany the application. Parties have ten days following receipt of such application within which to file any objections.

THOMAS M. BURKE
Administrative Law Judge

NOTICE: This Recommended Decision and order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Office of Administrative Appeals, U. S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the

regulations at 29 C.F.R. Parts 24 and 1978. See 55 Fed. Reg. 13250 (1990).

[ENDNOTES]

[1] The complainant's request for a continuance and subsequent request for an opportunity to submit a post-hearing brief were considered as constituting a waiver of the speedy decision provisions of 29 C.F.R. §24.3-24.6.

[2] Complainant's Exhibit 2, Attachment A.

[3] Complainant's Exhibit 8; Deposition of Richard Daly, Jr. March 24, 1995, p. 9.

[4] Complainant's Exhibit 6; Deposition of Kenneth E. Miller, March 23, 1995, pp. 38-39.

[5] The ice-condenser system is a safety system whereby steam from a line break contacts ice which floods and cools the containment to prevent containment pressure from exceeding design pressure. N.T. pp. 55-56.

[6] N.T. p. 89.

[7] Complainant's Exhibit 8; Deposition of Richard Daly, Jr. *supra*, pp. 9-11.

[8] Complainants Exhibit 9; Deposition of Keith Prince, March 24, 1995, p. 9. Keith Pierce was involved in the LLRT and ILRT programs in an administrative capacity. He attended all the meetings, kept all the records, and made sure all the paperwork was filled out and turned in properly.

[9] N.T. p. 59.

[10] N.T. pp. 17, 59, 60.

[11] N.T. p. 61.

[12] N.T. pp. 64-66.

[13] N.T. p. 75.

[14] Complainant's Exhibit 6; Deposition of Kenneth Miller, *supra*, p. 29.

[15] N.T. pp. 85-87.

[16] N.T. p. 391.

[17] Complainant's Exhibit 6; Deposition of Kenneth Miller, *supra*, p. 30.

[18] N.T. p. 12.

[19] N.T. p. 102.

[20] Complainant's Exhibit 9; Deposition of Keith Prince, *supra*, pp. 14-15.

[21] N.T. p. 18.

[22] N.T. p. 22.

[23] N.T. pp. 7-9.

[24] *Id.*

[25] N.T. p. 57.

[26] N.T. p. 638.

[27] N.T. pp. 689-690.

[28] N.T. p. 391.

[29] See Respondent TVA's Posthearing brief, p. 19.

[30] N.T. p. 652.

[31] N.T. p. 121.

[32] Complainant's Exhibit 8; p. 10.

[33] N.T. p. 250.

[34] Complainant's Exhibit 9; Deposition of Keith Prince, *supra*, p. 10.

[35] N.T. p. 649.

[36] Complainant's Exhibit 9; Deposition of Keith Pierce, *supra.*, pp. 17-18.

[37] Complainant's Exhibit 6; Deposition of Kenneth Miller, *supra*, p. 45.

[38] *Id.*

[39] See Attachment A to Complainant's post-hearing brief showing the identity of twenty-five workers who worked additional hours than those approved by Bajestani.

[40] N.T. p. 47.

[41] N.T. pp. 657-658.

[42] Complainant's Exhibit 8; Deposition of Richard Daly, Jr., *supra*, p. 10.

[43] Prince testified that it was necessary for the complainant to work the overtime in order to complete his assignments:

Q. Could you explain to the Administrative Law Judge why it was necessary, if it was, for [complainant] to work long hours during the pre-test Watts Bar situation.

A. The schedule was so tight in conjunction with the number of problems that they found. In almost every piece of equipment that was tested we would find problems because you understand, our equipment is many, many years old. It's not like the new equipment right now. And in order to meet the schedule and stay on target, he had to work that many hours. Complainant's Exhibit 9, Deposition of Keith Prince, March 24, 1995, p. 9.

[44] N.T. p. 651.

[45] N.T. pp. 712-714.

[46] N.T. pp. 52-53.

[47] N.T. p. 99.

[48] N.T. p. 279.

[49] N.T. pp. 251-252.

[50] Complainant's Exhibit 9; Deposition of Keith Prince, *supra*, pp. 19, 27.

[51] N.T. p. 635.

[52] N.T. pp. 313, 324.

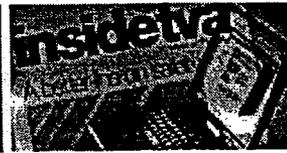
[53] N.T. pp. 679-682.

[54] N.T. p. 277.

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July 18, 2000



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Bajestani new SVP in FPG; Purcell heads Sequoyah

By KAY WHITTENBURG

Masoud Bajestani, a 14-year employee in TVA's nuclear program, has been named Senior Vice President of Fossil Operations.

"Masoud has played a vital role in making TVA's nuclear-power program a leader in the industry," says Joe Bynum, Executive Vice President of the Fossil Power Group. "I am confident he will have the same level of success dealing with the complex issues in the fossil organization."

Rick Purcell is succeeding Bajestani as Site Vice President at Sequoyah Nuclear Plant, and Watts Bar Plant Manager Bill Lagergren is succeeding Purcell as Site Vice President at Watts Bar. Larry Bryant, Assistant Plant Manager at Watts Bar, will assume the Plant Manager position.

All four assignments were effective July 17.

"Rick, Bill and Larry have been key players in improving performance at our nuclear plants," says Chief Nuclear Officer John Scalice.

"Because of their knowledge, skills and management expertise – and the strength of our succession-planning program – we are able to move them into key leadership roles while continuing to ensure strong operational performance at our sites."

The leadership position Bajestani is filling has been vacant since 1998. He will report to Bynum and will oversee the operation and maintenance of TVA's 59 fossil units.



Masoud Bajestani



Rick Purcell



Bill Lagergren



Larry Bryant

Reporting to Bajestani will be Marci Cooper, General Manager of Fossil Operations, West; Jerry Payton, General Manager of Fossil Operations, East; Don Johnson, General Manager of Failure Prevention; and Jacky Preslar, General Manager of Maintenance & Testing Services.

Bajestani has held a number of positions at TVA nuclear plants, including Assistant Plant Manager at Watts Bar, Plant Manager at Browns Ferry and Site Vice President at Sequoyah.

Complainant's Exhibit 479

Before joining TVA, he worked at Virginia Power's Surry Nuclear Power Plant and Toledo Edison's Davis-Besse Nuclear Power Plant.

Purcell, who has been Watts Bar Site VP since 1998, has more than 24 years of nuclear experience. He has been in TVA's nuclear-power program since 1990, including serving as Assistant Plant Manager and Plant Manager at Watts Bar.

Lagergren, who joined TVA in 1976, was named Watts Bar Plant Manager in 1997.

Bryant began his career with TVA in 1977. Before becoming Watts Bar Assistant Plant Manager last fall, he was Assistant Plant Manager at Sequoyah.

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UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:)
)
CURTIS C. OVERALL,)
)
Complainant,)
v.) Case No. 1999-ERA-0025
)
TENNESSEE VALLEY AUTHORITY,)
WATTS BAR NUCLEAR PLANT,)
)
Respondent.)

Thursday,
April 26, 2001

Criminal Court
Division 3
City County Building
400 Main Street
Knoxville, Tennessee

The above-entitled matter came on for hearing,
pursuant to notice, at 9:04 a.m.

BEFORE: HONORABLE ROBERT L. HILLYARD
Administrative Law Judge

BAYLEY REPORTING, INC.
(727) 585-0600

Exhibit 12
EA-99-115 (TVA)

I N D E XCOMPLAINANT'S WITNESSESDIRECT CROSS REDIRECT RECROSS

CURTIS CLIFFORD OVERALL

692 726 782

JOHN SCALICE

815

JANICE MELINDA OVERALL

895

RESPONDENT'S WITNESSESDIRECT CROSS REDIRECT RECROSS

JOHN SCALICE (Recalled)

837 874 893

1 to make sure that that stays anonymous.

2 Q Does this policy forbid any sort of action by
3 management, managers?

4 A Yes, it does.

5 Q And what does it forbid?

6 A It prevents -- it forbids them from any kind of
7 harassment or retaliation for expressing concerns.

8 Q What are the consequences to a manager or a
9 supervisor if they are found guilty of retaliating or taking
10 reprisal against an individual for raising a concern?

11 A There's disciplinary action up to and including
12 termination. I won't tolerate that.

13 Q Is that expressed in this TVA policy as well?

14 A I believe so, and it's expressed in some of our
15 other human resources policies.

16 MR. MARQUAND: Your Honor, I tender TVA Exhibit
17 152.

18 JUDGE HILLYARD: Objection?

19 MS. BERNABEI: No objection.

20 JUDGE HILLYARD: 152 is admitted.

21 (Respondent TVA's Exhibit No. 152 was received
22 into evidence.)

23 BY MR. MARQUAND:

24 Q Now, Mr. Scalice, aside from TVA policies on
25 expressing concerns, does TVA nuclear have any particular

1 policies or provide any information to employees regarding
2 expressing concerns?

3 A Yes.

4 Q And what is the policies or expressions that you
5 make to employees within TVA nuclear?

6 A Well, they are very similar to this policy, in
7 that they basically state that people have avenues to
8 express concerns. We encourage them to express concerns.
9 If they don't choose to give it to their supervisor, we tell
10 them all of the ways that they can express those concerns.

11 We have a group called concerns resolution program
12 to handle those concerns and to resolve them with the
13 required parties. It also discusses that there will not be
14 intimidation, harassment or retaliation and it also
15 discusses the fact that if there is, there will be
16 disciplinary action.

17 MR. MARQUAND: Your Honor, I'd like to show the
18 document -- show the witness a document which has been
19 marked as TVA Exhibit 153.

20 JUDGE HILLYARD: Very well.

21 BY MR. MARQUAND:

22 Q Mr. Scalice, what is TVA Exhibit 153?

23 A It's basically a bulletin that -- under my
24 signature with respect to employee's capabilities or request
25 to issue and handle concerns and it talks about how we're

1 JUDGE HILLYARD: 153 is admitted.

2 (Respondent TVA's Exhibit No. 153 was received
3 into evidence.)

4 BY MR. MARQUAND:

5 Q Mr. Scalice, with respect to when you've got an IG
6 investigation and it identifies a manager or a supervisor
7 who is responsible for taking an act of reprisal or
8 discrimination against an employee for raising a safety
9 concern, what are the consequences to that employee?

10 A Most likely it would be termination, but it could
11 be a disciplinary action up to and including termination,
12 depending on some of the recommendations and evaluations.

13 Q And we briefly touched on a TVA policy and the TVA
14 nuclear policy with respect to raising concerns. Do you
15 consider raising concerns and resolving concerns to be
16 important?

17 A I sure do. This is -- in the nuclear field, you
18 know, safety is utmost. We have 104 plants in this country
19 and anything that happens in one plant affects everybody
20 else.

21 You know, one of the things that we take seriously
22 -- I certainly personally take it seriously, is that safety
23 is of the utmost importance. And we're trying to make sure
24 that anything that's out there that needs to be resolved,
25 gets resolved very quickly, and we want to have the avenues

1 Q Well, how is it integral to bringing forth safety
2 concerns?

3 A Well, any issue that's at a nuclear plant can
4 affect, potentially, in terms of the way the plant can build
5 up to affect a safety issue. It could be considered to be a
6 safety issue.

7 Not every one is, obviously, but it could be. And
8 so, what we do is, we make sure that all of them are brought
9 up and we have a way of looking at all of them to find out
10 if they do or not.

11 Q What would be the consequence to a manager at TVA
12 if it was determined by the NRC that that manager or
13 supervisor had taken reprisal action against an individual
14 for raising, you know, harassed this individual by sending
15 them threatening notes, making prank calls, planting fake
16 bombs in their vehicles, what would be the consequences to
17 an individual such as that if the NRC determined that that
18 individual was responsible --

19 A Well, they would lose --

20 MS. BERNABEI: Objection. Objection; it's been
21 asked and answered.

22 JUDGE HILLYARD: Overruled.

23 THE WITNESS: They would lose their job, and in
24 the event that the NRC determined it, the way that the NRC
25 rules work, most likely they would be banned from ever

1 working in nuclear plants.

2 BY MR. MARQUAND:

3 Q And what kind of consequences would there be to
4 TVA if the NRC determined that the TVA manager was
5 responsible?

6 A You know, they can get all the way down to
7 shutting our plants down. This is a serious -- obviously a
8 serious issue. We'll get fined. We would have to address
9 these issues at very high levels. We'd have bad publicity.

10 It certainly sends the wrong message to our
11 employees also, too. You know, we're trying to express that
12 we want these plants run safely. If there's someone out
13 there that's doing the wrong thing, then that's negative for
14 all these people.

15 Q Mr. Scalice, you've been in the nuclear industry
16 how many years?

17 A Almost 30 years.

18 Q In all the various positions you've had and all of
19 your experience in the nuclear industry, can you tell me
20 anything that any manager might have to gain by harassing or
21 intimidating an individual, by sending them threatening
22 notes or making prank calls for raising safety concerns?

23 MS. BERNABEI: Objection. This is total
24 speculation.

25 JUDGE HILLYARD: What?

1 each of our plants in this country rely on the others to
2 operate safely, and that's why we have the Institute of
3 Nuclear Plant Operators, so that we can evaluate and grade
4 the plants against each other to keep getting better and
5 better, otherwise it will affect the entire industry.

6 As far as the individuals are concerned, they are
7 risking working -- risking losing their job. We have
8 policies. We have procedures that they have to follow, and
9 there's nothing for them to gain at all.

10 MR. MARQUAND: Your Honor, I'd like to show the
11 witness a document which has been marked TVA Exhibit 46
12 (sic). It's entitled "Employee Conduct and Disciplinary
13 Guideline."

14 JUDGE HILLYARD: Very well.

15 MR. MARQUAND: Your Honor, I've been informed that
16 I've misstated, that that is, in fact, TVA Exhibit 146.

17 JUDGE HILLYARD: Very well. 146.

18 BY MR. MARQUAND:

19 Q Mr. Scalice, do you recognize this document?

20 A Yes.

21 Q What is it?

22 A It's the Employee Conduct and Disciplinary Action
23 Guideline.

24 Q For what organization?

25 A For TVA Nuclear.

1 Q For all of TVA Nuclear?

2 A Yes.

3 Q Does it address intimidation, harassment?

4 A Yes, it does.

5 Q And is intimidation and harassment allowed under
6 the employee conduct and disciplinary guidelines?

7 A No, it is not.

8 Q Does it provide for specific discipline to be
9 provided in the event that an employee is found guilty of
10 intimidation and harassment?

11 A Yes, it does.

12 MR. MARQUAND: Your Honor, I tender TVA Exhibit
13 146.

14 JUDGE HILLYARD: Objection?

15 MS. BERNABEI: No objection.

16 JUDGE HILLYARD: 146 is admitted.

17 (Respondent TVA's Exhibit No. 146 was received
18 into evidence.)

19 BY MR. MARQUAND:

20 Q And where is that discipline set out, Mr. Scalice?

21 A Well, it is a matrix that talks about the range of
22 penalties for a series of different offenses.

23 Q And where is that matrix, what page?

24 A Page 4 of 12.

25 Q And there is a line specifically for intimidation

1 and harassment?

2 A Yes.

3 Q Beyond that, if you'll look at -- I believe it's
4 page 7. Is there a specific entry for intimidation and
5 harassment?

6 A Yes, there is.

7 Q Is this available to all employees in TVA nuclear?

8 A Yes, it is. It's part of our training program
9 besides all of the people that work in our plants and that
10 are subject to working at the plants go through a general
11 employee training.

12 Q All right. Now --

13 A This is a specific issue.

14 Q Now, directing your attention to Mr. Overall's
15 case, were you aware of the administrative law judge's
16 decision with respect to his first case?

17 A Yes.

18 Q And you were aware that that judge ordered him to
19 be reinstated?

20 A Yes.

21 Q What, if anything, did you do after you learned
22 the judge ordered that he be reinstated?

23 A I discussed -- at that time, I believe, I was
24 still at the Watts Bar Plant, at least housed in the
25 facility, and I called the human resources people together

1 name is?

2 MS. BERNABEI: You can pronounce it correctly.

3 THE WITNESS: Masoud Bajestani.

4 MS. BERNABEI: Bajestani. Thank you.

5 JUDGE HILLYARD: Can anyone spell it for the
6 reporter.

7 THE WITNESS: B-a-j-e-s-t-a-n-i.

8 BY MS. BERNABEI:

9 Q Okay. Now, it's true, is it not that there were
10 either recommended or official decisions of discrimination
11 against Mr. Bajestani by the DOL and by the NRC?

12 A To my understanding, no.

13 Q You don't know of an administrative law judge
14 recommended decision of discrimination against him?

15 A My understanding is that he was cleared of that.

16 Q Okay. Well, let me ask you this -- he was moved
17 -- and we can present evidence at the appropriate time, but
18 isn't it true that he was moved over to fossil fuel from the
19 nuclear program after a number of complaints of
20 discrimination were brought against him?

21 A On a temporary basis he was put over in the fossil
22 group.

23 Q And that was after complaints of discrimination
24 were brought against him, is that correct?

25 A Yes.

1 Q And he was never demoted, was he?

2 A No. He was brought back to nuclear when he was
3 cleared.

4 Q And isn't it true that the Department of Labor,
5 either at the administrative law judge state, or at the
6 secretary's stage found a Mr. Floyd Smith guilty of
7 harassment and discrimination?

8 A Before I answer that, can I clarify something else
9 with Mr. Bajestani? I think that's important --

10 JUDGE HILLYARD: Yes. Go ahead.

11 THE WITNESS: Because I don't want to be
12 inaccurate.

13 He was returned to nuclear. He subsequent is now
14 -- well, he is now a senior vice president in the fossil
15 group, but that's years later. I mean, he was -- I think
16 the difference is probably five years.

17 BY MS. BERNABEI:

18 Q Now, Mr. Floyd Smith, he was -- the Department of
19 Labor at some stage, either found him guilty of
20 discrimination, did it not?

21 A I don't know Mr. Floyd Smith. I'm not familiar
22 with that.

23 Q Okay. And you don't know that he's also moved
24 over to fossil and hydro and has suffered no demotion as a
25 result of any findings?

1 I don't remember what they used specifically. They said
2 that there were some notes that were written and that they
3 suspected, based on what I said before, that he might have
4 written them.

5 Q Did TVA's IG ever tell you they had gone to talk
6 about possible criminal prosecution of Mr. Overall with the
7 U.S. Attorney, but the U.S. Attorney had declined the
8 prosecution?

9 A I don't recall that.

10 Q Okay. So they never told you that?

11 A I don't recall. They may have.

12 Q Okay. I have no other questions.

13 A I'm sure they said if they could prove it that
14 they would go forth.

15 Q I have no other questions.

16 JUDGE HILLYARD: Mr. Marquand, anything further?

17 REDIRECT EXAMINATION

18 BY MR. MARQUAND:

19 Q Mr. Scalice, with respect to Mr. Joe Bynum.

20 A Yes.

21 Q Was there ever a final determination -- did TVA
22 ever finally determine that he was guilty of discriminating
23 against an individual?

24 A I don't believe they did, but I don't recall all
25 the details.

1 Q Did -- with respect to Masoud Bajestani, did the
2 Inspector General -- TVA's Inspector General conclude that
3 he was guilty of discrimination or harassment?

4 A Sorry. The first question was Inspector General
5 also?

6 Q Well, no. I just said TVA.

7 A Oh. TVA, no. And the second question is the IG
8 in the -- for Masoud Bajestani --

9 Q Right.

10 A -- was that there was no indication of
11 discrimination.

12 Q And what did the NRC -- conclusions did the NRC
13 make with respect to Mr. Bajestani, if you know?

14 A Well, I know that he was -- well, as I recall,
15 what happened is, is that -- that there was an
16 investigation, initially some concern, some lie detector
17 tests given, and then they, I believe, concluded that he
18 wasn't discriminated -- he did not discriminate.

19 If he did discriminate, he wouldn't have been able
20 to stay in nuclear.

21 Q And you don't know about this Mr. Floyd Smith?

22 A No, I don't.

23 Q Okay. Do you know what the Inspector General
24 concluded with respect to Mr. Bynum?

25 A Right now I couldn't --