RAS 4019

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

IN THE MATTER OF	)	Docket Nos. 50-390-CivP;
	)	50-327-CivP; 50-328-CivP;
TENNESSEE VALLEY AUTHORITY	)	50-259-CivP; 50-260-CivP;
	)	50-296-CivP
	)	
(Watts Bar Nuclear Plant, Unit 1;	)	ASLBP No. 01-791-01-CivP
Sequoyah Nuclear Plant, Units 1 & 2;	)	
Browns Ferry Nuclear Plant,	)	EA 99-234
Units 1, 2, & 3)	)	

REPLY IN SUPPORT OF TENNESSEE VALLEY AUTHORITY'S MOTION FOR SUMMARY DECISION

In this proceeding, Tennessee Valley Authority (TVA) has requested a hearing with respect to a May 4, 2001, order from the NRC Staff imposing a civil monetary penalty of $110,000. The order is based on a February 7, 2000, notice of violation (NOV) against TVA for allegedly violating 10 C.F.R. § 50.7 (2001) by discriminating against Gary L. Fiser, a former TVA employee, for engaging in "protected activities."

Pending before the Board is TVA's motion for summary decision on the grounds that there is no genuine issue as to any material fact and that it is entitled to a decision in its favor as a matter of law. As set forth in its initial brief, the bases of TVA's motion are twofold: (1) contrary to the NRC Staff's assertion that Thomas J. McGrath was "knowledgeable and critical" of Fiser's protected activity, there is absolutely no evidence that he had any awareness that Fiser had purportedly raised concerns in 1991-93 or filed a 1993 DOL complaint prior to 1996; and (2) the NRC Staff inference of discrimination based in part upon the "temporal proximity between

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the appointment of [McGrath and Dr. Wilson C. McArthur] as Fiser's supervisors and his non-selection in July 1996" (Feb. 7, 2000, letter at 3) is contrary to law.[1]

1. **The NRC Staff's contention that TVA filed an improper motion for summary decision is without merit.** The NRC Staff "requests that the Board deny TVA's motion for summary decision for failure to comply with regulatory requirements" (resp. at 25). It claims that TVA did not "annex a statement of undisputed facts to its motion for summary decision" as required by 10 C.F.R. § 2.749(a) (2001) (resp. at 25). To the contrary, TVA's "statement of undisputed facts" that it "contends that there is no genuine issue to be heard" (10 C.F.R. § 2.749(a)) is set forth in its brief in support of its motion for summary decision. (TVA br. at 3-9). The rule does not preclude the inclusion of the moving party's statement of facts in its brief. The NRC Staff's argument is frivolous.

2. **The NRC Staff points to no facts in the summary decision record showing that McGrath had knowledge of Fiser's protected activity prior to the filing of his 1996 complaint.** Instead, it speculates that he had such knowledge. First, the NRC Staff states that McGrath "admitted" that he had "likely seen" or read a newspaper article in the *Dayton Herald News* (Exhibit No. 80) about the DOL complaint filed by William Jocher that "discussed Fiser's 1993 complaint" (resp. at 32). That is wrong. McGrath did not admit, explicitly or implicitly, that he read the June 14, 1994, *Dayton Herald News* article about Jocher's complaint. The transcript illustrates the NRC Staff's mischaracterization of McGrath's clear and unambiguous testimony:

> Q. And I asked you earlier about Jocher's DOL complaint. Do you recall---it's my understanding there was a lot of newspaper articles about that at the time---[remember] ever reading any of those?

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1 TVA will cite to its initial brief as "TVA br. at __" and to NRC Staff's evidentiary submission as "Exhibit No. __." All other citations to the record are to TVA's previously submitted evidentiary submission.

A. I probably did [Exhibit No. 79, McGrath dep. at 50].

As reflected above, McGrath did not testify that he had read or "likely seen" the article set forth in Exhibit No. 80. Nor does his testimony remotely suggest that he had read or "likely seen" any newspaper article containing any information about Fiser's 1993 complaint. The NRC Staff fails to identify which of the numerous articles written about Jocher's complaint that McGrath did in fact read (resp. at passim). The NRC Staff simply offers up speculation that McGrath read the June 14, 1994, *Dayton Herald News* article. As the Supreme Court has made clear, to defeat a motion for summary judgment, the NRC Staff is required to present "affirmative evidence." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) ("Instead, the plaintiff ***must present affirmative evidence*** in order to defeat a properly supported motion for summary judgment" (emphasis added)). Speculation, as is presented here, will not suffice to defeat TVA's properly supported motion for summary decision.[2] *Anderson*, 477 U.S. at 257.

Second, the NRC Staff asserts that "the 1993 DOL complaint is not the only protected activity in which Fiser engaged," "at least two of which were known to McGrath--the dispute over trending, and the dispute over the three hour PASS requirement" (resp. at 32). Again, the NRC Staff engages in speculation. As to the "trending" issue, Fiser concedes that sometime in early 1992 the Nuclear Safety Review Board (NSRB) gave him the directive to "place in procedures where [chemistry data] trends are required to be generated every day" (Exhibit No. 12, Fiser dep. at 128).

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2 The NRC Staff also speculates that the speculation of others should be considered by the Board as evidence of McGrath's knowledge of Fiser's protected activity. For example, the NRC Staff states that "Grover ***perceived*** that McGrath's negative perception of Fiser was due to Fiser's DOL activities" (resp. at 9; emphasis added). This is speculation of the rankest order, and is not the affirmative evidence required to overcome the undisputed fact that McGrath was unaware of Fiser's protected activity. *See Lewis v. Young Men's Christian Ass'n*, 53 F. Supp. 2d 1253, 1255 (N.D. Ala. 1999) ("'Tenuous insinuation' and empty speculation based on loose construal of the evidence will not satisfy the nonmovant's burden."), *aff'd*, 208 F.3d 1303 (11th Cir. 2000).

Fiser concedes that he "could not meet that requirement" (*id.*) "[b]ecause it would have required work seven days a week, holidays, et cetera" (*id.* at 129). In his refusal to perform this task, Fiser did not claim that providing such information would implicate nuclear safety concerns (*id.* at 128-29). Nor did he claim that his inability to provide such information would violate any NRC rules (*id.*).

To manufacture protected activity where none exists, the NRC Staff leaps to the speculation that Fiser's declaration, that "I could not put that in procedures" a requirement to provide the chemistry data trends seven days a week is protected activity (Exhibit No. 12, Fiser dep. at 128; resp. at 31). To the contrary, if Fiser told the NSRB in 1992 of his inability to provide certain requested data, that was not protected activity as a matter of law. The NSRB was established pursuant to NRC and industry guidelines to provide safety oversight to nuclear plants (McArthur decl. ¶ 2). In fact, Fiser admits in his 1993 complaint ("Sequence of Events" at 1-2) that his organization at Sequoyah discontinued providing daily information to the Sequoyah plant operators which the NSRB felt would contribute to the safe operation of the plant. Fiser refused to resume providing that information, not because he felt it would cause a safety problem or that providing such information would violate the Atomic Energy Act (AEA) or the Energy Reorganization Act (ERA), but because of the administrative inconvenience to him (Exhibit No. 12, Fiser dep. at 128-29).

According to the Secretary of Labor, management is entitled to establish job responsibilities and work schedules, and an employee's lack of performance is not protected by simply claiming an inability to meet those expectations. *Skelly v. TVA*, No. 87-ERA-8, slip op. at 8 (ALJ Feb. 22, 1989), *adopted* (Sec'y Mar. 21, 1994) ("[T]he complaints Skelly voiced to his co-workers and supervisors related to the quantity of work Skelly was required to produce" "was not at the expense of safety and thus no safety issue is involved" and "cannot conceivably be perceived as being protected

by Section 5851.") (*id.* at 10); *Sutherland v. Spray Sys. Envtl.*, No. 95-CAA-1, slip op. at 3 (Sec'y Feb. 26, 1996) ("Management has the prerogative to determine which means it deems to be most effective provided such means comport with requisite safety and health standards. There is no requirement for management to engage in a dialog with the refusing workers as to which procedure would be most efficacious."). *See also Crosby v. United States Dep't of Labor*, 53 F.3d 338 (table), 1995 WL 234904 (9th Cir. Apr. 20, 1995; copy attached), *aff'g Crosby v. Hughes Aircraft Co.*, No. 85-TSC-2 (Sec'y Aug. 17, 1993) (court affirming Secretary's determination that the complainant was discharged for proper reasons when he refused to work on a project because he did not like the protocol).[3]

Of equal significance, even if the refusal to provide such information could conceivably rise to the level of protected activity, Fiser never even told the NSRB that he believed that there was any nuclear safety hazard in providing the requested data or it would violate the AEA or the ERA (Exhibit No. 12, Fiser dep. at 128-29). Given this undisputed fact, the NRC Staff has not raised a genuine issue of disputed fact, that any NSRB member who was present at the January 1992 meeting could have retaliated against Fiser for engaging in protected activity simply because none of the members were aware that he had engaged in protected activity. *Bartlik v. TVA*, No. 88-ERA-15, slip op. at 2 (Sec'y Apr. 7, 1993), *aff'd sub nom. Bartlik v. United States Dep't of Labor*, 73 F.3d 100 (6th Cir. 1996); *Robinson v. Adams*, 847 F.2d 1315, 1316 (9th Cir. 1987).

As to the post accident sampling system (or PASS) matter, the NRC Staff opines that "Fiser and Jocher disagreed with Sequoyah plant management over the

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3 It would indeed be anomalous if any employee could excuse his poor performance by refusing to provide information helpful to safely operate a nuclear plant by claiming that his refusal to fulfill his job responsibilities entitled him to immunity under the ERA. The Board's acceptance of such an absurdity would stand the employee protection provision of the ERA on its head.

proper implementation of the three hour requirement for conducting post-accident sampling system (PASS) analyses" (resp. at 31), and that this disagreement constitutes protected activity on the part of Fiser (*id.* at 31, 32). However, this is a flat out incorrect statement of the facts. In his December 11, 2001, deposition, Fiser disavows that he had any disagreement with Jocher or Sequoyah plant management (Exhibit No. 12, Fiser dep. at 136-37). He testified as follows:

> Q. Isn't that reflected in the minutes of the NSRB that the two of you could not agree, and it occurred and it continued to occur from meeting to meeting as the NSRB was reviewing the PASS system at Sequoyah?
>
> A. I would have to--what I recall is us having questions about, sorting this out, giving a test and documenting it. I don't have knowledge of an explicit disagreement between Jocher and I. I need to see that, I guess. ***I remember there was a significant disagreement between Jocher and Jack Wilson, the site VP.*** That's what I recall [Exhibit No. 12, Fiser dep. at 137; emphasis added].

Since Fiser had no disagreement with Sequoyah plant management over the implementation of the three-hour requirement for conducting PASS analyses, under the NRC Staff's own theory, he could not have engaged in protected activity regarding the PASS matter.[4]

In its zeal to overcome its lack of any proof that McGrath had any knowledge of Fiser's protected activity before the filing of his 1996 complaint, the NRC Staff suggests that the Board should reject this defense and infer that McGrath has the requisite because "both the ALJ and the ARB rejected TVA's ignorance

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4 Nor did Fiser raise the issue about the ability of the Sequoyah technicians to meet the three-hour PASS requirement. It was raised by the NSRB in November 1991 (Exhibit No. 41, McGrath's PEC dep. at 85-86; McArthur decl., ex. 1 at 14, ex. 2 at 14-15, ex. 3 at 1, 3-4, 23).

defense" in three other unrelated TVA cases (resp. at 33).[5] This argument is ludicrous; the NRC Staff cites to no supporting authority, because there is none.

In advancing this argument, the NRC Staff ignores the fact that this proceeding is *de novo* (10 C.F.R. §§ 2.205(d), (e) (2001)), and the Staff carries the burden of establishing that the NOV and civil penalty are justified based on the evidence in this case. *See Radiation Technology, Inc.*, ALAB-567, 10 NRC 533, 536-37 (1979). Simply put, this case rises and falls on its own facts, not the facts in other cases. Indeed, the alleged discriminating officials in the other TVA cases cited by the NRC Staff are not the same officials in this proceeding. Similarly, the challenged personnel actions involved in the other cases are not involved in this proceeding. This is a red herring.

Moreover, two of the cases cited by the NRC Staff—*Jocher* and *Klock*—were settled after the issuance of ALJ recommended decisions, but before final decisions were issued. The law is clear that "ALJ recommended decisions in ERA cases are simply that and have no precedential value unless explicitly adopted by the Secretary." *Hill v. TVA*, 87-ERA-23 and 24, slip op. at 7 n.4 (Sec'y Dec. Apr. 21, 1994), *aff'd*, 66 F.3d 1331 (6th Cir. 1995). The third case—*Overall*—is currently before the Sixth Circuit Court of Appeals on appeal, involves different technical issues, different plants, and different decisionmakers, and is unrelated to this case as described above.

The NRC Staff's final argument on this point is that "[e]ven if the Board accepts TVA's argument that McGrath lacked knowledge of Fiser's protected activity, TVA is still not entitled to summary judgment" because "it would have no impact on TVA's violation because there is no dispute that McArthur, the other wrongdoer in this

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5 The cases to which the NRC Staff refers (resp. at 33) are *Overall v. TVA*, 97-ERA-53 (ALJ Apr. 1, 1998) (ARB Apr. 30, 2001); *Jocher v. TVA*, 94-ERA-24, (ALJ July 31 1996) (ARB June 24, 1996); and *Klock v. TVA*, 95-ERA-20 (ALJ Sept. 29, 1995) (ARB May 30, 1996).

case, had knowledge of Fiser's protected activities" (resp. at 33). In this last argument, the NRC Staff acknowledges that McGrath's lack of knowledge "would mean that McGrath was cleared of wrongdoing" (*id.*). This admission undercuts any inference that McArthur was a "wrongdoer." The facts in the summary decision record are undisputed that McGrath, not McArthur, was the architect of the 1996 reorganization of Operations Support, the organization in which Corporate Chemistry was located (Exhibit No.79, McGrath dep. 8-15, 17-18; McArthur decl. ¶ 7). The facts also are undisputed that it was McGrath who rejected the plan that was proposed and presented by Grover that would have allowed Corporate Chemistry to reduce its budget by 17 percent, permitting all of the incumbents, including Fiser, to keep their jobs (resp. at 10). Instead, as the NRC Staff points out, "McGrath rejected this plan and insisted that Grover and McArthur develop a plan that would accomplish the entire 40 percent reduction in the first fiscal year" (resp. at 10).

3. The NRC Staff does not cite to any legal authority refuting TVA's position that an inference of discrimination based on temporal proximity must be measured between the date of the protected activity and an adverse action. Instead, the NRC Staff continues to insist that "the temporal proximity between McArthur and McGrath becoming Fiser's supervisors and his nonselection" is the proper measurement, contrary to the law enunciated by the Supreme Court (*Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 121 S. Ct. 1508, 1511 (2001) (holding where "temporal proximity" is relied upon to infer discrimination, it is the time between the "employer's knowledge of protected activity and an adverse employment action" that is subject to measurement) and the Sixth Circuit. *TVA v. Frady*, 134 F.3d 372 (table), 1998 WL 25003, **3 n.1 (6th Cir. Jan. 12, 1998; copy attached) ("We believe that the date of the [DOL] complaint, January 21, 1991, is the more appropriate date to use" in measuring temporal proximity.); *Hafford v. Seidner*, 183 F.3d 506 (6th Cir. 1999).

In its response, the NRC Staff failed to address TVA's contention that even if the Board were to subscribe to its theory that temporal proximity should be based on when McGrath and McArthur became Fiser's superiors, no discrimination could be inferred as a matter of law (TVA br. at 15). As the courts instruct, "the temporal proximity must be 'very close.'" *Clark County Sch. Dist. v. Breeden*, 121 S. Ct. at 1511; *Warren v. Ohio Dep't of Pub. Safety*, No. 00-3560, 2001 WL 1216979, at *4 (6th Cir. Oct. 3, 2001; copy attached). For example, in a recent decision handed down by the Eighth Circuit Court of Appeals, the court held that a 37-day period between alleged protected activity and adverse action was insufficient to infer discrimination. *See Curd v. Hank's Disc. Fine Furniture, Inc.*, 272 F.3d 1039, 1041 (8th Cir. 2001). The NRC Staff ignores the fact that McArthur became Fiser's second-level supervisor in April 1994, which lasted until August 1994 (TVA br. at 4, 15), a period much longer than the 37-day period in *Curd*, and the NRC Staff does not allege that he took any action against Fiser. A full two years would pass before McArthur would again become Fiser's supervisor. Further, McGrath became the Acting General Manager of Operations Support in October 1995 (Exhibit No. 79, McGrath dep. at 17-18), nearly nine months before the purported discrimination—again a period longer than the 37-day period in *Curd*. These undisputed facts point out that even measured using the NRC Staff's standard, there is no temporal proximity here since McArthur and McGrath could have taken action against Fiser much earlier, had they been so motivated.

4. The NRC Staff's contention that Kent's statement about Fiser's DOL complaint prior to the interview constitutes a per se violation of Section 211 has no basis in fact or law (resp. at 47-48).[6] As the NRC Staff

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6 Charles Kent (Manager of Radiological and Chemistry Control at Sequoyah), was a member of the Selection Review Board (SRB) that was impaneled to review the relative qualifications of the candidates for the positions of Program Manager,

acknowledges in its response, Kent "testified that he told McArthur that, in light of Fiser naming McArthur as a discriminating official in the DOL complaint, perhaps he should not say anything during the interviews" and that "he should not participate in the interviews" (*id.* at 21, 47). McArthur did not participate in the interviews. In a similar scenario, the Milestone Independent Review Team (MIRT) found that it is reasonable to inform responsible managers of employees' protected status when possible adverse actions, such as reductions in force, are contemplated "to ensure that they had not been targeted specifically for reduction." *See Report of Review*, Allegations of Discrimination in NRC Office of Investigations Case Nos. 1-96-002, 1-96-007, 1-97-007 and Associated Lessons Learned, at 13 (NRC March 12, 1999). The MIRT determined that such disclosure "is not information sufficient to provide a reasonable expectation that a violation of section 50.7 can be shown by a preponderance of the evidence." *Id.* at 14.

The NRC Staff cites to *Earwood v. Dart Container Corp.*, 93-STA-0016 (Sec'y Dec. 7, 1994), for the proposition that Kent's comment was a per se violation of the employee protection provisions of the ERA. Its reliance on this case is misplaced. In *Earwood*, in response to a request by prospective employers, a representative of Dart made comments about Earwood's engaging in protected activity, stating the company was not pleased that Earwood "took us to court" and that "he had no use for Complainant." 93-STA-0016, slip op. at 2. The Secretary of Labor considered these comments to constitute blacklisting because they "'had a tendency to impede and interfere with [Complainant's] employment opportunities.'" *Id.* at 3. In so finding, the Secretary determined that the comments evinced discriminatory animus. *Id.*

(. . . continued) Chemistry (PWR), PG-8, and to recommend a selectee to McArthur, the selecting official. In addition to Kent, the other SRB members were John Corey (Manager of Radiological and Chemistry Control at Browns Ferry) and H.R. (Rick) Rogers (Manager of Technical Support/Operations Support). See McArthur decl. ex. 7.

The NRC Staff presented no reasonable basis upon which such animus can be inferred from Kent's comments. Unlike the comments in *Earwood*, Kent's comments were not negative, he did not indicate or reveal a displeasure with Fiser for filing an ERA complaint, and he did not, explicitly or otherwise, suggest that Fiser should not be selected because of his protected activity. To the contrary, he counseled McArthur not to participate in the interviews to help to ensure the integrity and fairness of the process.

The NRC Staff also claims that Corey overheard Kent's comment (resp. at 47). The fact that members of the SRB were aware of Fiser's 1996 complaint does not give rise to an inference of discrimination. *See Kelly v. Drexel Univ.*, 94 F.3d 102, 109 (3d Cir. 1996):

> [T]he mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that that perception caused the adverse employment action. . . . If we held otherwise, then by a parity of reasoning, a person in a group protected from adverse employment actions *i.e.*, anyone, could establish a *prima facie* discrimination case merely by demonstrating some adverse action against the individual and that the employer was aware that the employee's characteristic placed him or her in the group, *e.g.*, race, age, or sex.

See also Sutton v. Lader, 185 F.3d 1203, 1208 n.6 (11th Cir. 1999).

Based on the foregoing reasons and the authorities cited herein and in TVA's initial brief, TVA's motion for summary decision should be granted, the NOV dismissed, and the civil penalty should not be enforced.

Respectfully submitted,

March 1, 2002

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(Cite as: 53 F.3d 338, 1995 WL 234904 (9th Cir.))
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NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA9 Rule 36-3 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Ninth Circuit.

Patrick CROSBY, Petitioner,
v.
UNITED STATES DEPARTMENT OF LABOR; Hughes Aircraft Company, Respondents,

No. 93-70834.

Argued and Submitted April 7, 1995.
Decided April 20, 1995.

Petition to Review Decision of the Secretary of Labor, No. 0973-2.

DOL

PETITION DENIED.

Before: McKAY, [FN*] REINHARDT, and FERNANDEZ, Circuit Judges.

FN* Hon. Monroe G. McKay, Senior United States Circuit Judge, United States Court of Appeals for the Tenth Circuit, sitting by designation.

MEMORANDUM [FN**]

FN** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

**1 Patrick Crosby appeals the Secretary of Labor's adoption of an administrative law judge's recommended decision and order to the effect that Crosby was not discriminated against by his former employer, Hughes Aircraft Company, in violation of the whistleblower provisions of various federal environmental statutes. [FN1] The Secretary ruled that Crosby had not shown that Hughes had terminated him for protected rather than non-discriminatory business reasons. We deny the petition.

FN1. Originally, Crosby brought his action under the provisions of the Clean Air Act, 42 U.S.C. § 7622, and the Toxic Substances Control Act, 15 U.S.C. § 2622. The Secretary granted his post-trial motion to amend his complaint to include a cause of action under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610.

If an employee has made out a prima facie case of retaliatory discharge, the burden of production shifts to the employer to show that it had legitimate, nondiscriminatory reasons for its actions. See St. Mary's Honor Ctr. v. Hicks, U.S. , , 113 S. Ct. 2742, 2747, 125 L. Ed. 2d 407 (1993). If it does so, the production burden shifts back to the plaintiff to show that those reasons were pretextual. Id. More to the point for purposes of this appeal, once an employment discrimination case has been tried, as this one has been, the only truly relevant question is whether the plaintiff has met his ultimate burden of proving to the trier of fact that he was the victim of intentional discrimination. See id. at , 113 S. Ct. at 2747- 48.

The Secretary's decision should be upheld unless it is unsupported by substantial evidence or is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. 5 U.S.C. § 706(2)(A), (E) (Administrative Procedure Act); Lockert v. United States Dep't of Labor, 867 F.2d 513, 516-17, 520 (9th Cir. 1989).

Here the Secretary determined that the reasons for Crosby's termination were that his work was not good and he was often insubordinate. Moreover, the final straw was his absolute refusal to work on the PPUP project because he did not like the protocol for the performance of that task. We understand that he sought to retract the refusal; alas, the decision had already been made.

Crosby does not contend that the actual working conditions related to the PPUP project were unsafe or unhealthy. "Employees have no protection ... for refusing to work simply because they believe another method, technique, procedure or equipment would be better or more effective." Pensyl v. Catalytic, Inc., Case No. 83-ERA-2, at 8 (Sec. Dec. Jan. 13, 1984). When an employee's refusal to work does not meet

the Pensyl test, an employer may legitimately terminate the employee. Wilson v. Bechtel Constr., Inc., Case No. 86-ERA-34, at 12 (Sec. Dec. Jan. 9, 1988). The record is filled with evidence of incidents of Crosby's supervisors' dissatisfaction with his work, which began long before he engaged in any protected activities at issue here. From the very beginning of his work for Hughes he resisted completing assignments given to him, refused to work on certain projects and even refused to pass on information to those who were brought in to complete the projects. Finally, he was asked to perform work on PPUP. His reaction was characteristic. He objected to the whole thing and finally said he would not work on the project at all. In short, there is evidence that Crosby fairly bristled with antagonism, complaints, foot dragging, insubordination, and fractiousness. The ALJ and the Secretary decided that his termination was based upon that. There is substantial evidence to support the decision.

**2 It is noteworthy that the individuals who terminated Crosby did not even know of most of his alleged protected activity. While they did hear him complain about PPUP, they did not understand that he was complaining about a possible environmental problem related to a gas detector system if PPUP were used with that system. What they did understand was that Crosby was, once again, refusing to do work that he was directed to do. The Secretary did not err when he found that Crosby was discharged for proper reasons. [FN2]

> FN2. The parties spill much ink over whether Crosby spelled out a prima facie case. We, of course, recognize that a prima facie case is the first step in a trial of this kind. However, given the ultimate determination, there is no need for us to delve into the intricacies of prima facie case building.

Crosby, however, complains of the procedures used to reach a decision in this case. He says that he was entitled to a continuance because certain discovery was delivered late. But though that continuance was denied him, after two days of hearings the proceeding was adjourned for five weeks. Thus, he effectively got his continuance anyway. He also asked that adverse inferences be drawn against Hughes because of the lateness of the discovery and because Hughes asserted a privilege as to some discovery which was sought. But the issue of sanctions is left to the discretion of the ALJ, and we see no abuse of that discretion here. See 29 C.F.R. § 18.6(d)(2)(i). Moreover, it is not appropriate to draw adverse inferences from the failure to produce documents protected by the attorney-client and work product privileges. See Wigmore on Evidence § 291 (rev. 1979).

Crosby further complains that he did not get to examine certain subpoenaed witnesses after the district court refused to enforce a subpoena for them. He said that adverse inferences should have been drawn, but the ALJ determined that their testimony would have been immaterial. Moreover, Crosby did have an opportunity to examine the officials who actually fired him. We see no reversible error.

Finally, Crosby complains that certain offers of proof were improperly relied upon. Those were made when the ALJ refused to hear testimony from certain Hughes witnesses and allowed Hughes to protect the record by stating what the witnesses' testimony would have been. The ALJ did not rely upon the offers at all. While the Secretary did refer to them, those occasional references were not necessary to the final decision and were accompanied by references to proper evidentiary matter. We are unable to say that Crosby's substantial rights were affected by those stray, though improper, references. See 29 C.F.R. § 18.103.

PETITION DENIED.

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(Cite as: 134 F.3d 372, 1998 WL 25003 (6th Cir.))
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NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.

TENNESSEE VALLEY AUTHORITY, Petitioner,
v.
Randolph FRADY, United States Department of Labor, Respondents.

No. 96-3831.

Jan. 12, 1998.

Before: RYAN, SUHRHEINRICH, and COLE, Circuit Judges.

PER CURIAM.

**1 This appeal arises from claims by Randolph Frady under the whistleblower protection provision of the Energy Reorganization Act of 1974(ERA), as amended, 42 U.S.C. § 5851 (1988), which prohibits licensees of the Nuclear Regulatory Commission (NRC) from discriminating against employees who engage in protected activity, such as identifying nuclear safety concerns or making complaints under the ERA. Pursuant to the ERA, Plaintiff Frady filed complaints with the U.S. Department of Labor (DOL), alleging that his non-selection for fourteen different positions was the result of unlawful retaliation for his protected activities while working as a nuclear inspector for Defendant Tennessee Valley Authority (TVA). The case ultimately reached the Secretary of Labor (hereinafter Secretary), who found for Plaintiff with regard to three of the fourteen allegations.

Petitioner TVA appeals the Secretary's decision for Plaintiff on those three allegations. The issues raised by Petitioner on appeal ask whether "the Secretary was arbitrary and capricious in disregarding the ALJ's credibility determinations," and whether his "decision was supported by substantial evidence." We find that the Secretary's decision with regard to the three contested allegations is not supported by substantial evidence. We, therefore, REVERSE that decision.

I. Facts

Plaintiff Frady was employed by TVA from 1978 until 1992. From 1983 on, he worked as a nuclear inspector at the Sequoyah and Watts Bar nuclear plants. While working as an inspector, he raised safety concerns with the NRC and TVA management on several occasions. In December 1990, Frady received notice that he would be terminated due to a reduction in force. In response, Frady filed a complaint under the ERA. The complaint resulted in a settlement agreement which extended Frady's employment with TVA until January 1992. As part of that agreement, Frady was placed in the Employee Transition Program from June 1991 until his termination. The program allowed him to seek a new position within TVA, which he did. However, Frady was not selected for any of the positions he applied for, and he filed ERA complaints challenging these non- selections.

After an investigation by the DOL's Wage and Hour Division found no merit to Frady's complaints, he filed a request for a hearing. An administrative law judge (hereinafter AU), charged with making recommendations to the Secretary, conducted the hearing and thereafter dismissed eight of the fourteen allegations upon TVA's motion for summary judgment. The AU issued a written opinion discussing the remaining six allegations and recommended that they all be decided in TVA's favor. The Secretary adopted the ALJ's recommendations concerning the eight dismissed allegations and three of the six allegations decided on the merits, but found for Frady on the remaining three allegations, which are the only ones contested here. While on remand to the ALJ for determination of Plaintiffs remedy, the parties reached agreement on the appropriate remedy, contingent upon this appeal. The resulting "Joint Stipulation" was recommended for approval by the ALJ, and the Administrative Review Board of the DOL issued an order approving it.

**2 Two of the three contested allegations concern Frady's application for machinist trainee positions at both the Watts Bar and Sequoyah nuclear plants, as well as for a steamfitter trainee position at Sequoyah.

Applicants for each of these three positions were considered by a different three-person committee, consisting of a TVA representative, a member of the applicable union, and Kevin Green, a human resources manager for TVA. The TVA and union representatives were charged with ranking the applicants and making the hiring decisions, while Green was assigned to be a facilitator. Each of the committees ranked Frady below the applicants who were ultimately selected. The third contested allegation concerns Frady's application for a quality control inspector position at the Sequoyah facility. Shortly after the vacancy for this position was announced, a staffing study conducted by an outside consultant recommended that staffing levels at the facility be reduced. Roy Lumpkin, Frady's former supervisor and the supervisor for the open position, ultimately decided to cancel the vacancy without hiring anyone for it.

II. Applicable Law

We review the Secretary's decision to ensure that it is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Ohio v. Ruckelshaus,* 776 F.2d 1333, 1339 (6th Cir.1985) (quoting 5 U.S.C. § 706(2)(A)(Administrative Procedure Act)). As part of our review, "we must determine whether [the decision] is supported by substantial evidence, which is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Moon v. Transport Drivers, Inc.,* 836 F.2d 226, 229 (6th Cir.1987) (quoting *Richardson v. Perales,* 402 U.S. 389. 401 (1971)). The substantial evidence standard requires us to consider evidence in the record that is contrary to the Secretary's findings and conclusions. *Tel Data Corp. v. National Labor Relations Bd.,* 90 F.3d 1195, 1198 (6th Cir.1996).

Although the ALJ only recommends a decision, the evidentiary support for the Secretary's conclusions "may be diminished, however, when the administrative law judge has drawn different conclusions." *National Labor Relations Bd. v. Brown-Graves Lumber Co.,* 949 F.2d 194, 196-97 (6th Cir.1991). In particular, this court "will not normally disturb the credibility assessments of ... an administrative law judge, who has observed the demeanor of the witnesses." *Litton Microwave Cooking Prods. Div., Litton Sys., Inc.,* 868 F.2d 854, 857 (6th Cir.1989) (reversing National Labor Relations Board, which declined to follow ALJ's recommendation to dismiss complaint) (internal quotes omitted); *accord Curran v. Dept. of the Treasury,* 714 F.2d 913, 915 (9th Cir.1983) ("Special deference is to be given the AL's credibility judgments"). Given the conflicts in this case between the conclusions of the ALJ and the Secretary , we must examine the record with particular scrutiny. *Tel Data,* 90 F.3d at 1198.

**3 The law governing Frady's proof of his claims was carefully laid out by the Secretary:

> a complainant ... must first make a *prima facie* case of retaliatory action by the [defendant], by establishing that he engaged in protected activity, that he was subject to adverse action, and that the [defendant] was aware of the protected activity when it took the adverse action. Additionally, a complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. If a complainant succeeds in establishing the foregoing, the [defendant] must produce evidence of a legitimate, nondiscriminatory reason for the adverse action. The complainant bears the ultimate burden of persuading that the [defendant's] proffered reasons ... are a pretext for discrimination. At all times, the complainant bears the burden of establishing by a preponderance of the evidence that the adverse action was in retaliation for protected activity.

Frady v. Tennessee Valley Authority, Nos. 92-ERA-19 & 92-ERA-34, slip op. at 5-6 (Secretary of Labor Oct. 23, 1995) (citations omitted) (hereinafter Secretary's Opinion); *accord Moon,* 836 F.2d at 229. The Secretary went on to state that, as part of the establishment of a prima facie case, "Frady must establish that he was qualified for such position; that, despite his qualifications, he was rejected; and that TVA continued to seek and/or select similarly qualified applicants." Secretary's Opinion at 18 (adopted from *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973)). The Secretary concluded that, for each of the three contested allegations, Frady established all the elements of a prima facie case discussed above and met his ultimate burden of proving that TVA's proffered reasons for its personnel decisions were a pretext for retaliation.

III. Trainee Positions

Two of the three contested allegations involve the machinist and steamfitter trainee positions. The record contains little to support the Secretary's finding that Plaintiff established a prima facie case of

retaliation with regard to these positions. As to the knowledge element of a prima facie case, we agree with the ALJ's finding that there is no evidence that members of the selection committees knew about Plaintiff's protected activity, including his earlier ERA complaint. (J.A. at 73). As to the inference element of a prima facie case, the Secretary found that Plaintiff "established an inference of retaliatory motive based on temporal proximity." Secretary's Opinion at 24. Where adverse employment action follows rapidly after protected activity, common sense and case law allows an inference of a causal connection. *See Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir.1987) (stating, in a case where the plaintiff was fired less than two weeks after making a complaint, that "the proximity in time between protected activity and adverse employment action may give rise to an inference of a causal connection"). However, because seven or eight months elapsed between Frady's most recent protected activity, namely the filing of the earlier ERA complaint, and the decisions by the selections committees, the Secretary's inference is a weak one. [FN1]

> FN1. The Secretary chose to determine temporal proximity based on Frady reaching a settlement agreement with TVA in June 1991, two or three months before his non-selection by the committees. We believe that the date of the complaint, January 1991, is the more appropriate date to use, because 1) unlike a settlement agreement, a complaint is clearly a protected activity under the ERA, and 2) common sense dictates that employees are much more likely to be retaliated against for filing a complaint against their employer than for resolving the dispute with their employer by reaching a settlement agreement.

**4 Even if we were to overlook the scarcity of evidence supporting the knowledge and inference elements of Plaintiffs prima facie case, we would still be forced to conclude that the Secretary's decision regarding the trainee positions was not supported by substantial evidence. Assuming arguendo that Plaintiff established a prima facie case, Defendant must produce evidence of a legitimate, nondiscriminatory reason for the non-selection. The Secretary conceded that Defendant met this burden of production by presenting testimony that the people selected for the trainee positions had qualifications superior to those of Plaintiff. Secretary's Opinion at 24. However, the Secretary found that Plaintiff met his ultimate burden of proving that this legitimate reason was a pretext for discrimination. The Secretary discussed several evidentiary reasons why he reached this conclusion, *id.* at 26-31, but none of them amount to substantial evidence.

The most direct reason cited by the Secretary was that he did "not find the testimony indicating that the selectees ... were found by each committee to be better qualified than Frady based on their 'hands on' experience to be persuasive." *Id.* at 26. In reaching this conclusion, the Secretary did not give any deference, as required, to the AL's implicit finding that this testimony was credible. Moreover, the Secretary substituted his judgment for that of the selection committees at an inappropriate level of detail, when he determined that Frady's experience using calibration tools and building a log home was equivalent to other applicants' experience with automobile engines and heating and air-conditioning equipment. *Id.* at 20-21.

The other reasons cited by the Secretary for his conclusion that Frady proved pretext are speculative at best. For example, the Secretary concludes that "other candidates could have been 'primed' in advance to assist them in answering the standard questions that were asked of each applicant." The Secretary bases this hypothesis solely on committee member Green's off-hand comment during his testimony that "I have no knowledge that [the candidate] was primed or anything." *Id.* at 27-28. The Secretary also cites, as evidence of pretext, that eleven of the eighteen applicants selected by the committees were from outside TVA, despite a TVA policy of filling vacancies from within the ranks of TVA employees. Id. at 29. However, the Secretary fails to explain how discrimination against Frady can explain more than one of the eleven selections from outside TVA.

As further evidence of pretext, the Secretary cites the fact that TVA "relied almost entirely on [committee member] Green's testimony concerning the relevant qualifications." *Id.* at 30. The Secretary concludes that this indicates that Green was less than honest when he indicated that he was a facilitator on the selection committees, rather than a decision maker. Even if we ignore the problems with citing a defendant's strategy as evidence of a witness's credibility, Defendant's reliance on Green's testimony about qualifications can be explained by the fact that Green was the personnel representative on the committees and was the only person to serve on all the relevant selection committees.

**5 Finally, the Secretary cites evidence "that Frady was the subject of a considerable degree of animus from supervisory personnel ... at TVA" *Id.* at 31. However, the Secretary cites no evidence that the animus was due to Frady's protected activity. In fact, there is evidence pointing in the opposite direction. For example, TVA employee Michael Miller, a witness vouched for by Frady, (J.A. at 492-93), attributed the animus from one supervisor to personality conflicts rather than Frady's whistleblowing. (J.A. at 662-4). Without evidence that the animus was based on protected activity, the animus does not suggest retaliation for such activity.

We also note that one of the two decision makers on each selection committee was a union representative, rather than a representative of TVA. Frady never alleged, and the Secretary never found, that the there was any reason why the union representatives would discriminate against Frady. Thus, it is significant that the TVA and union representatives ranked Frady at about the same level, as he concedes. (J.A. at 487). This appears to us to be compelling evidence that the TVA representatives were not biased by Plaintiffs protected activity. Moreover, the fact that the union representatives gave Plaintiff a relatively low ranking indicates that they too believed there was a legitimate reason for not selecting him.

For all the reason discussed above, we conclude that the Secretary's decision regarding the machinist and steamfitter trainee positions is not supported by substantial evidence.

IV. Quality Control Inspector Position

One of the three contested allegations involves a quality control inspector position at the Sequoyah facility. Unlike the trainee positions, this position was canceled rather than being filled by other applicants. However, after Roy Lumpkin canceled the inspector vacancy, two inspectors "returned to their positions as nuclear inspectors at the Sequoyah plant pursuant to the terms of a settlement agreement." Secretary's Opinion at 36. The Secretary, therefore, "conclude[d] that TVA, in effect, filled the announced nuclear inspector vacancy with similarly qualified candidates," thus establishing one element of a prima facie case. *Id.*

We find, however, that this conclusion is not supported by substantial evidence for a number of reasons. First, the two inspectors returned to their positions almost a year after the vacancy was canceled. *Id.* at 36 n. 26. Second, Roy Lumpkin, the manager who canceled the vacancy, moved to an unrelated position four months before the inspectors returned, (J.A. at 600), and was uninvolved in their return. Third, the two inspectors returned based on settlement agreements, whereas Plaintiff sought the position through regular application channels. [FN2] For all these reasons, Plaintiff cannot show that he was treated any differently than similarly qualified candidates. *See White v. General Motors Corp. Inc.*, 908 F.2d 669, 671 (10th Cir.1990) ("to maintain an action for wrongful discharge, [plaintiffs] must demonstrate that they were treated differently because of their whistleblowing activity").

FN2. Plaintiff's earlier settlement agreement guaranteed only that he would be placed in the Employee Transition Program.

**6 The Secretary also concludes that Plaintiff met the prima facie requirement of raising an inference that his protected activity was the likely reason for the adverse action, namely the vacancy cancellation. The Secretary bases this conclusion on two factors. One factor is the temporal proximity between the cancellation and Frady's protected activity. Secretary's Opinion at 38. However, as discussed with regard to the trainee positions, the Secretary's inference based on temporal proximity is a weak one, because seven months elapsed between Frady's earlier ERA complaint and the cancellation of the vacancy. 'The second factor cited by the Secretary is his "conclu[sion] that Lumpkin strongly suspected, if he did not have certain knowledge, that Frady had applied for the position." *Id.* This is by no means a forgone conclusion, given that Lumpkin canceled the vacancy before he received the applications from Human Resources. Yet the Secretary explicitly bases his conclusion on the following summary of Lumpkin's testimony: "although [Lumpkin] was unsure whether he had been told ... that Frady had applied for the job, he was 'reasonably certain if [Frady] wanted the inspector job at Sequoyah, he would have applied.' " *Id.* We fail to see how this testimony leads to the conclusion that Lumpkin strongly suspected or knew for sure that Frady had applied.

In summary, substantial evidence is lacking with regard to at least two elements of a prima facie case of retaliation involving the canceled inspector position. Plaintiff cannot show that the canceled vacancy was filled with similarly qualified candidates, and the Secretary's finding that Plaintiff

successfully raised an inference of discrimination lacks adequate support. We conclude, therefore, that the Secretary's decision regarding the inspector position fails to meet the substantial evidence standard. In addition, we note that the consultant's study, which recommended a reduction in staff, appears to be the legitimate reason for the cancellation, as Defendant contends. However, we need not reach this issue, because a defendant's obligation to proffer a legitimate reason for an adverse employment decision is not triggered until a prima facie case of discrimination is established, *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir.1987), which Plaintiff failed to do here.

V. Conclusion

The Secretary's decision for Plaintiff with regard to each of the three contested allegations is unsupported by substantial evidence. We, therefore, REVERSE that decision and VACATE the orders of the Secretary and Administrative Review Board. The Secretary's decision for Defendant regarding Plaintiff's other eleven allegations is undisturbed.

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United States Court of Appeals,
Sixth Circuit.

Florence A. WARREN, Plaintiff-Appellant,
v.
OHIO DEPARTMENT OF PUBLIC SAFETY, William L. Vasil, Defendants-Appellees.
No. 00-3560.

Oct. 3, 2001.

Equal Employment Opportunity (EEO) compliance officer for state agency brought action against agency and former supervisor, alleging she was discharged in violation of Title VII and free speech clause of First Amendment. The United States District Court for the Southern District of Ohio, Algenon L. Marbley, J., granted summary judgment for state agency and supervisor. Compliance officer appealed. The Court of Appeals, Ralph B. Guy, Jr., Circuit Judge, held that: (1) compliance officer failed to show a causal connection required to establish claim under opposition clause and participation clause of Title VII, and (2) compliance officer failed to establish causal connection between her free speech and her termination, as required to establish claim under First Amendment.

Affirmed.

West Headnotes

[1] Master and Servant ⇐30(6.10)
255k30(6.10)

To establish a claim for retaliation against employee who has opposed a practice unlawful under Title VII or against employee who participated in any manner in a Title VII investigation, employee must show that (1) she engaged in activity protected by Title VII, (2) exercise of protected activity was known to employer, (3) employer took an adverse employment action, and (4) there was a causal connection between protected activity and adverse employment action. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).

[2] Master and Servant ⇐40(1)
255k40(1)

If employee establishes prima facie case of retaliation in violation of Title VII, burden shifts to employer to articulate legitimate, nondiscriminatory reasons for employee's discharge, and employee must then demonstrate that proffered reasons were a mere pretext for discrimination. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).

[3] States ⇐53
360k53

Equal Employment Opportunity (EEO) compliance officer with state agency failed to establish a claim of retaliation for participating in a Title VII investigation with respect to internal investigation concerning one state employee, where there were no allegations of violation of Title VII rights. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).

[4] Master and Servant ⇐30(6.10)
255k30(6.10)

Under opposition clause which prohibits retaliation against someone opposing violation of Title VII, person opposing apparently discriminatory practices must have a good faith belief that practice is unlawful. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).

[5] Master and Servant ⇐30(6.10)
255k30(6.10)

Under opposition clause which prohibits retaliation against someone opposing violation of Title VII, there is no qualification on who individual doing complaining may be or on who party to whom complaint is made; thus, fact that plaintiff is a human resource director who may have a contractual duty to voice such concerns does not defeat a claim

of retaliation, and complaint may be made to a co-worker, a newspaper reporter, or anyone else. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).

[6] Master and Servant ⚖40(4)
255k40(4)

Temporal proximity alone in the absence of other direct or compelling circumstantial evidence is generally not sufficient to support a finding of causal connection between protected activities and termination, for purposes of establishing a violation of Title VII. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[7] States ⚖53
360k53

Equal Employment Opportunity (EEO) compliance officer for state agency failed to show a causal connection between her alleged activity in opposition to Title VII violation and her termination, as required to establish claim under opposition clause; officer relied wholly on temporal proximity of her meeting in morning with legal counsel and her termination in the afternoon to establish causation, and testimony established that supervisor had decided to terminate officer before her meeting with legal counsel. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).

[8] States ⚖53
360k53

In the absence of any other evidence of retaliatory conduct, single fact that Equal Employment Opportunity (EEO) compliance officer for state agency was discharged two to eleven months after she was involved in internal discrimination investigations did not establish a causal connection between protected activity and her termination. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).

[9] Constitutional Law ⚖90.1(7.2)
92k90.1(7.2)

A public employee has constitutionally protected right to comment on matters of public concern without fear of reprisal from the government as employer. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law ⚖90.1(7.2)
92k90.1(7.2)

A public employee does not forfeit his protection against governmental abridgement of freedom of speech if he decides to express his views privately rather than publicly. U.S.C.A. Const.Amend. 1.

[11] Civil Rights ⚖194
78k194

[11] Civil Rights ⚖332
78k332

An employee may sue a public employer under both Title VII and § 1983 when the § 1983 violation rests on a claim of infringement of rights guaranteed by the Constitution. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1983.

[12] Constitutional Law ⚖90.1(7.2)
92k90.1(7.2)

To establish a § 1983 claim for violation of right to free speech, public employee must first establish that her speech was protected because it was directed toward an issue of public concern, and her interest in making the speech outweighs public employer's interest in promoting efficiency of the public services. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983.

[13] Constitutional Law ⚖90.1(7.2)
92k90.1(7.2)

Matters only of personal interest to public employee are not afforded constitutional protection under First Amendment's free speech clause. U.S.C.A. Const.Amend. 1.

[14] Constitutional Law ⚖90.1(7.2)
92k90.1(7.2)

Public employee's speech upon matters of public concern, which is protected by First Amendment, relates to any matter of political, social, or other concern to the community. U.S.C.A. Const.Amend. 1.

[15] Constitutional Law ⚖45
92k45

It is a question of law for the court to decide whether a public employee's speech is a matter of public

concern so as to be protected by free speech clause of First Amendment. U.S.C.A. Const.Amend. 1.

[16] Constitutional Law ⚖90.1(7.2)
92k90.1(7.2)

Whether a public employee's speech addresses a matter of public concern, so as to be protected by free speech clause of First Amendment, must be determined by the content, form, and context of a given statement, as revealed by the whole record. U.S.C.A. Const.Amend. 1.

[17] Constitutional Law ⚖90.1(7.2)
92k90.1(7.2)

Once public employee establishes that her speech is protected by First Amendment's free speech clause, employee challenging her discharge on free speech grounds must present sufficient evidence to create a genuine issue that her speech caused her discharge, and the speech must have been a substantial or motivating factor in public employer's decision to terminate employment. U.S.C.A. Const.Amend. 1.

[18] Federal Civil Procedure ⚖2497.1
170Ak2497.1

While causation ordinarily is a question of fact for the jury in public employee's action alleging violation of free speech, a court may nevertheless grant summary judgment on issue of causation when warranted. U.S.C.A. Const.Amend. 1.

[19] Constitutional Law ⚖90.1(7.2)
92k90.1(7.2)

If protected speech was a substantial or motivating factor in public employee's termination, public employer may present evidence that employee would have been terminated in the absence of the protected speech. U.S.C.A. Const.Amend. 1.

[20] Constitutional Law ⚖90.1(7.2)
92k90.1(7.2)

[20] States ⚖53
360k53

State employee's allegations of her supervisor's improper handling of discrimination complaints were inherently matters of public concern, for purposes of free speech clause of First Amendment, even if they were tied to personal employment disputes. U.S.C.A. Const.Amend. 1.

[21] Constitutional Law ⚖90.1(7.2)
92k90.1(7.2)

[21] States ⚖53
360k53

State employer was not liable to employee for violation of free speech rights in connection with allegations of supervisor's improper handling of discrimination complaints, given evidence that clearly showed that supervisor decided and took steps to effectuate employee's termination before employee's meeting with state legal counsel occurred and before he learned of meeting. U.S.C.A. Const.Amend. 1.

***262** On Appeal from the United States District Court for the Southern District of Ohio.

Before GUY and MOORE, Circuit Judges; and HULL, District Judge. [FN*]

FN* The Honorable Thomas G. Hull, United States District Judge for the Eastern District of Tennessee, sitting by designation.

RALPH B. GUY, JR., Circuit Judge.

****1** Plaintiff, Florence A. Warren, appeals from the order granting summary judgment in favor of defendants, Ohio Department of Public Safety (ODPS) and William L. Vasil. Plaintiff argues that the district court erred in finding (1) that she did not participate in protected activity under the retaliation provisions of Title VII, (2) that there was no causal connection between protected activity and her termination, and (3) that plaintiff's speech did not address a matter of public concern under the First Amendment. [FN1] For reasons different than those given by the district court, we affirm the grant of summary judgment.

FN1. Plaintiff does not pursue and, therefore, has abandoned on appeal the dismissal of her other 42 U.S.C. § 1983 and state law claims.

I.

Plaintiff was the senior EEO compliance officer and Chief of Human Resources at ODPS. At the relevant times in this case, plaintiff reported to defendant Vasil, the Assistant Director of ODPS.

Plaintiff's duties included supervising personnel matters; providing advice to the Director and the Assistant Director regarding personnel matters; drafting pamphlets and handbooks concerning work rules, disciplinary procedures, and other matters related to EEO compliance. Plaintiff also investigated or supervised the investigation of sexual discrimination *263 and harassment complaints by ODPS employees.

There were a large number of sexual discrimination and harassment complaints within ODPS during plaintiff's tenure. Three specific internal investigations were the focus of plaintiff's Title VII claim. The first involved Bessie Smith, a Human Resources employee, who was disciplined in May 1995 for neglect of duty and malfeasance. As a result of Bessie Smith's mishandling of the termination of another employee, the terminated employee was awarded back pay. There were no allegations of discrimination under Title VII in that internal investigation. In the second, Rebecca Gustamente complained of sexual harassment by her supervisor. In November 1994, the supervisor was reassigned within ODPS. Gustamente testified that she was not subjected to further harassment thereafter. Warren testified that her last involvement with the Gustamente complaint was in mid to late 1994 and no later than February 1995. Julie Smith was the subject of the third investigation. Julie Smith was disciplined in August 1995, after she was charged with sexual harassment by another female employee.

Plaintiff subsequently heard that the union was considering filing an unfair labor practices complaint or class action litigation with respect to discrimination complaints. She then arranged to meet with Maria J. Armstrong, the Deputy Chief Legal Counsel for the Governor of Ohio, on the morning of November 9, 1995. Plaintiff states that she informed Armstrong of the threatened union action and discussed plaintiff's concerns that Vasil acted illegally in his direct handling of several discrimination issues, including the Julie Smith matter. In the afternoon of that same day, Vasil gave plaintiff notice of termination of her employment with ODPS. While he did not have prior knowledge, Vasil learned of the morning meeting between plaintiff and Armstrong in the afternoon of the day that plaintiff's employment was terminated.

**2 Vasil stated that he terminated plaintiff's employment because of complaints about the ineffectiveness of the Human Resources division and lack of confidence in her judgment and reliability. Defendants offered evidence that Vasil decided to discharge plaintiff and took steps to initiate the discharge before plaintiff's meeting with Armstrong. In anticipation of discharging plaintiff, Vasil discussed transferring plaintiff's duties to another employee. Vasil talked to Warren Davies about having John Demaree assume responsibility for all human resource matters for ODPS. Davies stated in his affidavit that this discussion occurred approximately two weeks before November 9. While they did not specifically discuss plaintiff's termination, Davies understood that Vasil was going to transfer all of plaintiff's responsibilities to Demaree. The transfer of those responsibilities became effective on November 9.

Vasil did specifically discuss plaintiff's termination with Armstrong. Armstrong testified in her affidavit and during her deposition that Vasil told her several weeks before the November 9 meeting that Vasil intended to discharge plaintiff and restructure the Human Resources functions within ODPS. Finally, Demaree testified that several days before November 9, 1995, Vasil asked him to prepare the paperwork for terminating plaintiff's employment.

The district court granted summary judgment in favor of defendants. Plaintiff appealed.

II.

We review *de novo* the district court's grant of summary judgment. *See, e.g., *264 Smith v. Ameritech,* 129 F.3d 857, 863 (6th Cir.1997). We may affirm the grant of summary judgment on other grounds, even one not considered by the district court. *Boger v. Wayne County,* 950 F.2d 316, 322 (6th Cir.1991). Summary judgment is appropriate when there are no issues of material fact in dispute, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In deciding a motion for summary judgment, the court must view the factual evidence and draw all reasonable inferences in favor of the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

A. Title VII Retaliation

Title VII prohibits an employer from retaliating against an employee who has "opposed" any practice

by an employer made unlawful under Title VII. It also prohibits retaliation against an employee who has "participated" in any manner in an investigation under Title VII. 42 U.S.C. § 2000e-3(a). These two provisions are known as the opposition clause and the participation clause. *See Johnson v. Univ. of Cincinnati,* 215 F.3d 561, 578 (6th Cir.), *cert. denied,* 531 U.S. 1052, 121 S.Ct. 657, 148 L.Ed.2d 560 (2000).

[1][2] To establish a claim under either the opposition or the participation clause, plaintiff must show that (1) she engaged in activity protected by Title VII, (2) this exercise of protected activity was known to defendants, (3) defendants took an adverse employment action, and (4) there was a causal connection between the protected activity and the adverse employment action. If plaintiff establishes this *prima facie* case, the burden shifts to defendants to articulate legitimate, nondiscriminatory reasons for plaintiff's discharge. Plaintiff must then demonstrate that the proffered reasons were a mere pretext for discrimination. *Id.* The plaintiff bears the burden of persuasion throughout the entire process. *See Morris v. Oldham County Fiscal Court,* 201 F.3d 784, 793 (6th Cir.2000).

**3 Plaintiff argues that she was retaliated against in violation of both the participation and the opposition clauses because she complained about Vasil to Armstrong at the November 9 meeting. The district court in this case found that plaintiff did not engage in protected activity under the participation clause and that she failed to show a causal connection between her alleged opposition activities and her termination. We find that summary judgment was appropriate on both plaintiff's opposition and participation claims because she failed to show a causal connection between the alleged protected activity and her termination.

1. Participation Claim

[3] The district court concluded that plaintiff failed to establish a claim of retaliation with respect to the Bessie Smith internal investigation because there were no allegations of violation of Title VII rights. We agree. Section 2000e-3(a) requires participation in proceedings under Title VII or opposition to unlawful employment practices under Title VII. *Holden v. Owens-Illinois, Inc.,* 793 F.2d 745, 748 (6th Cir.1986). There were no Title VII allegations involved in the Bessie Smith matter, and it cannot form the basis of a retaliation claim under Title VII.

With respect to the Julie Smith and Rebecca Gustamente internal investigations, the district court found that there was no protected activity under the participation clause because plaintiff did not participate in an EEOC proceeding. Plaintiff argues on appeal that internal investigations by an employer's EEO compliance officer are protected activity under the ***265** participation clause. This Court has not directly addressed the question of whether participation in internal investigations constitutes protected activity under the participation clause. [FN2] Other courts, however, have held that protected activity under the participation clause does not include participation in internal investigations. *See EEOC v. Total Sys. Servs., Inc.,* 221 F.3d 1171, 1174 (11th Cir.2000); *Brower v. Runyon,* 178 F.3d 1002, 1006 (8th Cir.1999); and *Vasconcelos v. Meese,* 907 F.2d 111, 113 (9th Cir.1990).

FN2. *See Davis v. Rich Prods. Corp.,* 2001 WL 392036, 11 Fed.Appx. (6th Cir. Apr. 9, 2001) (unpublished disposition).

These decisions comport with the plain language of 42 U.S.C. § 2000e- 3(a): "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing *under this subchapter."* (Emphasis added.) They also are consistent with our decision in *Booker v. Brown & Williamson Tobacco Co.,* 879 F.2d 1304, 1313 (6th Cir.1989), where we stated that the purpose of the participation clause is "to protect access to the machinery available to seek redress for civil rights violations and to protect the operation of that machinery once it has been engaged." In *Booker,* we examined the participation clause under Title VII in interpreting similar provisions under the Michigan Elliott Larsen Civil Rights Act. We concluded that the language must be read literally and, therefore, the instigation of proceedings leading to the filing of a complaint or a charge, including a visit to a government agency to inquire about filing a charge, is a prerequisite to protection under the participation clause. *Id.*

**4 It is not necessary, however, for us to decide whether an internal investigation is protected activity under the participation clause. To do so would not fully resolve the case because plaintiff's participation in the internal investigations and her meeting with the Governor's office may have been protected activity under the opposition clause. *See Booker,* 879 F.2d at 1313 n. 3; *Laughlin v. Metro. Wash. Airports*

Auth., 149 F.3d 253, 259 (4th Cir.1998). Whether plaintiff's participation in the Julie Smith and Rebecca Gustamente internal investigations is considered protected activity under the participation clause or the opposition clause, as discussed in the next section, plaintiff failed to show the requisite causal connection.

2. Opposition Claim.

[4][5] Under the opposition clause, the person opposing apparently discriminatory practices must have a good faith belief that the practice is unlawful. There is no qualification on who the individual doing the complaining may be or on who the party to whom the complaint is made. Thus, the fact that the plaintiff is a human resource director who may have a "contractual duty to voice such concerns" does not defeat a claim of retaliation; and the complaint may be made to a co-worker, a newspaper reporter, or anyone else. *Johnson,* 215 F.3d at 579-80.

[6] To defend against summary judgment, plaintiff was required to show the existence of a causal connection between her protected activities and her termination. Temporal proximity alone in the absence of other direct or compelling circumstantial evidence is generally not sufficient to support a finding of causal connection. *See Nguyen v. City of Cleveland,* 229 F.3d 559, 566 (6th Cir.2000). Cases addressing this issue have said that temporal proximity may establish a *prima facie* case only if the temporal proximity is "very ***266** close." *Clark County Sch. Dist. v. Breeden,* 532 U.S. 268, 121 S.Ct. 1508, 1511, 149 L.Ed.2d 509 (2001). *See also, Hafford v. Seidner,* 183 F.3d 506, 515 (6th Cir.1999) (absent additional evidence, two to five months insufficient to create a triable issue of causation); *Cooper v. City of North Olmsted,* 795 F.2d 1265, 1272 (6th Cir.1986) (four months insufficient to support an inference of retaliation).

[7][8] The district court found that plaintiff failed to show a causal connection between her alleged oppositional activity and her termination because the Gustamente matter had been resolved almost 11 months before plaintiff met with Armstrong. Plaintiff does not argue that there was a causal connection between her involvement with the internal investigations and her termination under the participation or the opposition clauses. She relies wholly on the temporal proximity of her meeting in the morning with Armstrong and her termination in the afternoon of November 9 to establish causation. [FN3] Defendants claim that there was no causal connection because Vasil decided to terminate plaintiff's employment before the meeting. Plaintiff argues that Vasil's statements should be discredited because in his deposition he could provide little detail about his reasons for terminating her employment, and he did not ask that complaints about plaintiff's performance be made in writing. This is not relevant or responsive to the testimony of Vasil, Armstrong, and other employees that Vasil took steps to transfer plaintiff's duties to Demaree and asked Demaree to prepare paperwork to terminate plaintiff's employment *before* Vasil learned of the meeting with Armstrong. Employers need not suspend previously contemplated employment actions upon learning of protected activity by the employee. *See Alexander,* 121 S.Ct. at 1511 (no evidence of causality where employer planned to transfer employee before learning Title VII suit had been filed). Here, plaintiff offered no evidence, other than mere temporal proximity, that she was terminated because of the Armstrong meeting. Plaintiff has failed to raise a genuine issue of material fact of causation. Accordingly, she has failed to establish a *prima facie* case of retaliation under Title VII, and summary judgment in favor of defendants is appropriate.

> FN3. The issue of causation as it related to the internal investigations was briefed by the defendants before the district court and on appeal. Plaintiff, therefore, has not been denied the opportunity to respond, and it is appropriate for us to affirm summary judgment on this other ground. *See Carver v. Dennis,* 104 F.3d 847, 849 (6th Cir.1997) . Plaintiff's involvement in the Gustamente sexual harassment investigation was resolved by November 1994, or at the latest February 1995; and the Julie Smith internal investigation was completed by August 1995. Plaintiff offered no evidence to show a causal connection between these investigations and her termination. In the absence of any other evidence of retaliatory conduct, the single fact that plaintiff was discharged two to eleven months after she was involved in internal discrimination investigations does not establish a causal connection between protected activity and her termination.

B. First Amendment

***5** [9][10][11] A public employee has the constitutionally protected right to comment on matters of public concern without fear of reprisal from the government as employer. [FN4] *See Connick v. Myers,* 461 U.S. 138, *267 147, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). A public employee does not forfeit his protection against

governmental abridgement of freedom of speech if he decides to express his views privately rather than publicly. *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 412, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979)

FN4. Defendants argue that plaintiff's § 1983 action is precluded by Title VII. The district court did not address this argument. An employee may sue a public employer under both Title VII and § 1983 when the § 1983 violation rests on a claim of infringement of rights guaranteed by the Constitution. *Day v. Wayne County Bd. of Auditors*, 749 F.2d 1199, 1205 (6th Cir.1984). *See also, Johnson*, 215 F.3d at 583. Defendants also argue that plaintiff abandoned her First Amendment claim by not briefing it in response to the motion for summary judgment. The district court, however, ruled on the First Amendment claim, and plaintiff is not relying on facts or arguments that were not considered by the district court in making that ruling.

[12][13][14][15][16] To establish a § 1983 claim for violation of her right to free speech, plaintiff must first establish that her speech was protected because it was directed toward an issue of public concern, and her interest in making the speech outweighs the public employer's interest in promoting the efficiency of the public services. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); *Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 144 (6th Cir.1997). Matters only of personal interest are not afforded constitutional protection. Speech upon matters of public concern relates to "any matter of political, social, or other concern to the community." *Connick*, 461 U.S. at 146. It is a question of law for the court to decide whether an employee's speech is a matter of public concern. *Johnson*, 215 F.3d at 583. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48.

[17][18] Once she establishes that her speech is protected, plaintiff must present sufficient evidence to create a genuine issue that her speech caused her discharge. The speech must have been a substantial or motivating factor in defendants' decision to terminate her employment. *See Mt. Healthy*, 429 U.S. at 287. While causation ordinarily is a question of fact for the jury, a court may "nevertheless grant summary judgment on the issue of causation when warranted." *Bailey*, 106 F.3d at 145.

[19] If the protected speech was a substantial or motivating factor in an employee's termination, the employer may present evidence that the employee would have been terminated in the absence of the protected speech. *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1186 (6th Cir.1995).

[20] Plaintiff argues that her discussion with Armstrong about improper handling of discrimination claims was protected speech, and that she was terminated because of that speech in violation of the First Amendment. The district court found plaintiff's discussion with Armstrong was not protected speech because it was nothing more than the "quintessential employee beef: management has acted incompetently."

Allegations of racial and sexual discrimination are inherently matters of public concern even if they are tied to personal employment disputes. *See, Connick*, 461 U.S. at 148 n. 8 (allegations of racial discrimination by a public employer are a "matter inherently of public concern" discussing *Givhan*, 439 U.S. at 415-16); *Strouss v. Mich. Dept. of Corr.*, 250 F.3d 336, 346 n. 5 (6th Cir.2001) (sexual harassment is a matter of public concern); *Boger*, 950 F.2d at 322 (response to reporter's question about racial discrimination addressed matter of public concern); *Matulin v. Vill. of Lodi*, 862 F.2d 609, 612-13 (6th Cir.1988) (sexual and handicap discrimination in the workplace are matters of public concern). Whether the motive behind complaining of discrimination is civic ***268** mindedness or an individual employee concern is not relevant. What is relevant is the subject of the complaint, discrimination, which is a matter "inherently of public concern." *Perry v. McGinnis*, 209 F.3d 597, 608 (6th Cir.2000).

****6** While plaintiff offered somewhat differing accounts of her meeting with Armstrong, at one point in her deposition she testified that she informed Armstrong of a potential problem relating to the handling of discrimination complaints, that Vasil had told plaintiff not to be concerned because they were "just passing through," and that the Governor's office needed to do something about it. On this record, plaintiff presented sufficient evidence that her discussion with Armstrong was about the improper handling of sexual discrimination complaints, which is inherently a matter of public concern. The district court erred, therefore, in finding that the discussion with Armstrong was not protected speech under the

First Amendment.

[21] Defendants nonetheless are entitled to summary judgment. In order for plaintiff to prevail on her § 1983 claim, she must prove that her speech was a substantial or motivating factor in defendants' decision to terminate her employment. As discussed in the previous section, the evidence clearly shows that Vasil decided and took steps to effectuate plaintiff's termination before the meeting with Armstrong occurred and before he learned of the meeting. There being no material fact in dispute on causation, defendants were entitled to summary judgment on plaintiff's First Amendment claim.

AFFIRMED.

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