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

DOCKETED  
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OFFICE OF THE SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

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)	)	

**TENNESSEE VALLEY AUTHORITY'S RESPONSE IN OPPOSITION TO  
NRC STAFF MOTION IN LIMINE TO EXCLUDE THE TESTIMONY  
AND SUMMARY OF ANALYSES OF CAREY L. PETERS**

The Nuclear Regulatory Commission (NRC) Staff has filed a motion in limine to exclude the testimony and statistical analysis of Carey L. Peters. The NRC Staff argues that "[t]he Board should exclude the testimony of Peters as well as his report because they are irrelevant to the matters at issue in this proceeding and they are unreliable evidence" (Mot. at 2).<sup>1</sup> This contention has no merit.

Before addressing the NRC Staff's substantive reasons advanced in its motion, it suggests that Tennessee Valley Authority's (TVA) witness list was deficient because it "did not specify the nature of Peters' knowledge and testimony" (Mot. at 1). This is incorrect. TVA's witness list fully complied with paragraph 5 of the Board's January 30, 2002, third prehearing conference order in that TVA filed a list of its proposed witnesses on March 29, 2002. The order does not specify that either party was required to "specify the nature" of the proposed testimony of their witnesses.

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<sup>1</sup> TVA will cite to the Staff's motion "Mot. at \_\_\_." Copies of the Peters' resume and report are attached hereto as exhibits A and B, respectively.

Template = SECY-041

SECY-02

The NRC Staff seeks to blame TVA for its failure to request during the five-month discovery period the identity of the witnesses, including any expert witness such as Peters, whom TVA intended to use at the hearing in this proceeding.<sup>2</sup> The NRC Staff does not point to any provisions in the Board's rules or prior orders requiring TVA to produce such information in the event NRC Staff fails to request it. Simply, had it requested the identity of Peters and the nature of his intended testimony in any of its three separate sets of interrogatories, TVA would have provided that information.<sup>3</sup>

The NRC Staff's substantive arguments fare no better. The basis of the NRC Staff's claim in this proceeding is that TVA violated 10 C.F.R. § 50.7 (2001) by "retaliating against Gary Fiser for engaging in protected activities" (Mot. at 1). Specifically, one of its claims is that the Selection Review Board (SRB) that interviewed Fiser for the PWR Chemistry Manager position was not neutral because two of the three members—John Corey and Charles Kent—were aware of his protected activity. The facts are undisputed that the third SRB member—Heyward (Rick) Rogers—was unaware of Fiser's protected activity at the time of his interview.

Peters performed a statistical analysis of the ratings that the three SRB members gave the three top applicants, including Fiser, and determined that Rogers'

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<sup>2</sup> As set forth in the Board's first, second, and third prehearing conference orders, discovery began on August 13, 2001, and ended on January 22, 2002.

<sup>3</sup> The NRC Staff also claims that, "[i]n its document list, TVA included a number of documents which it had not previously provided to the Nuclear Regulatory (NRC) Staff during discovery" (Mot. at 1). The NRC Staff dances close to the line of truth. While these documents might not have been provided during discovery, the NRC Staff conveniently chooses not to inform the Board that it did not request such documents during discovery, and TVA had no obligation, without a discovery request from the NRC Staff, to produce them.

ratings of Fiser were statistically significantly lower than Corey's and Kent's.<sup>4</sup> Based on his findings, Peters concludes that "the results clearly and strongly indicate that the ratings Fiser received were most likely *not* lower because Corey and Kent knew he was involved in a protected activity" (ex. B at 2; emphasis in original). The NRC Staff claims that this evidence is irrelevant.

However, controlling Sixth Circuit precedent considers such evidence "compelling." See *TVA v. Frady*, 134 F.3d 372 (table), No. 96-3831, 1998 WL 25003, at \*\*5 (6th Cir. Jan. 12, 1998):

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 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 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.<sup>5</sup>

Not unlike the union representatives in *Frady*, Rogers had no reason to discriminate against Fiser due to his protected status because Rogers was unaware of Fiser's protected activity. See *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (noting alleged discriminating official could not have taken action against employee because of her protected activity where "there is no indication that Rice even knew about the right-to-sue letter when she proposed transferring respondent"); *McKenzie v. BellSouth Telecomm., Inc.*, 219 F.3d 508, 518 (6th Cir. 2000) ("McKenzie has alleged

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<sup>4</sup> The SRB also interviewed candidates for the related position of BWR Chemistry Manager position. Fiser chose not to apply for this job. The PWR and BWR positions were awarded to the two candidates who were rated the highest by the SRB.

<sup>5</sup> Copies of unreported decisions are attached; emphasis added unless otherwise noted.

no evidence that supports that her employer, BellSouth, was aware of her protected activity”). And the NRC Staff does not suggest any such reason in its motion. This “compelling evidence” is not only relevant but also admissible under 10 C.F.R. § 2.743(c) (2001) as well as Rules 401 and 402 of the Federal Rules of Evidence.

Specifically, the Supreme Court has decided that an employer may, by use of statistics, rebut a claim of intentional discrimination. *See Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978):

[T]he employer must be allowed some latitude to introduce evidence which bears on his motive. Proof that his work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided. We cannot say that such proof would have absolutely no probative value in determining whether the otherwise unexplained rejection of the minority applicants was discriminatorily motivated [438 U.S. at 580].

*See also Cross v. United States Postal Serv.*, 639 F.2d 409, 414 (8th Cir. 1981) (noting “it is true that statistical evidence of a nondiscriminatory hiring pattern has some relevance in negating an inference of discriminatory motive”).

Despite the relevance of the Peters’ testimony and Report, the NRC Staff argues that this evidence should be excluded because Peters does not have “personal knowledge of the process used by [SRB]” (Mot. at 2). The NRC Staff misreads Rule 602 of the Federal Rules of Evidence (Mot. at 2-3). Rule 602 states that “[a] witness may not testify to a *matter* unless . . . the witness has personal knowledge of the matter.” The “matter” about which TVA will have Peters testify is his statistical analysis of the ratings of the SRB members and the preparation of his report, *not* the SRB process. Having personal knowledge of his own analysis as well as the report that he prepared, Peters is competent to testify about the opinions set out in his Report.

See Rule 601, Fed. R. Evid. The NRC Staff's contention to the contrary simply is a red herring.<sup>6</sup>

Nor does the subjective nature of the SRB interview process lend credence to NRC Staff's contention that this evidence should be excluded (Mot. at 2-4). While Peters' statistical analysis is an objective measure of whether the ratings of the three SRB members were influenced by bias, it confirms that bias did not play a part in the ratings because Rogers—the member of the SRB who had no knowledge of Fiser's protected activity—rated Fiser “significantly lower” than Corey and Kent, as noted in Peters' report (ex. B at 2). As the Sixth Circuit opined in *Frady*, this evidence shows that Rogers, like Corey and Kent, “believed there was a legitimate reason for not selecting him.” 1998 WL 25003, at \*\*5.

NRC Staff makes multiple assertions about alleged weaknesses in Peters' report—the supposed failures to take into consideration (1) the subjective nature of the interviews, (2) the nature of the interview questions, (3) the purported positive basis that Corey and Kent may have had for the other two top candidates, and (4) the fact that the SRB did not have a member who favored Fiser. These are attacks on the factual basis of Peters' proposed testimony and opinions (Mot. at *passim*). However, as the Sixth Circuit makes clear, mere possible “weaknesses in the factual basis of an expert witness' opinion . . . bear on the weight of the evidence rather than on its admissibility.” *United States v. L.E. Cooke Co.*, 991 F.2d 336, 342 (6th Cir. 1993). Put another way, the Sixth Circuit states that the alleged “incomplete bases for the expert testimony are subject to the crucible of cross examination and affect the weight

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<sup>6</sup> In any event, Rule 703 of the Federal Rules of Evidence provides that “[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.” In other words, personal knowledge of the underlying facts or data forming the basis of an expert's opinion is not a requirement for his or her testimony to be relevant as well as admissible.

properly given . . . evidence, not the admissibility of such information at trial.”

*Laski v. Bellwood*, 132 F.3d 33 (table), No. 96-2188, 1997 WL 764416, \*\*4 (6th Cir. Nov. 26, 1997).<sup>7</sup>

Under *Frady*, the Peters evidence is both “compelling” and relevant; therefore, as the trier of fact, the Board must determine, after cross examination, the proper weight to be accorded to the Peters evidence. Again, the Sixth Circuit makes this point clear:

The Federal Rules of Evidence allow an expert great liberty in determining the basis of his opinions and whether an expert opinion should be accepted as having an adequate basis is a matter for the trier of fact to decide. See *Mannino v. International Mfg. Co.*, 650 F.2d 846, 853 (6th Cir.1981). Because Fish’s testimony was clearly relevant to the issue at trial and did have some factual basis, it was admissible [*United States v. L.E. Cooke Co.*, 991 F.2d at 342].

The NRC Staff next argues that Peters’ testimony and report are unreliable because he conducted his analysis six years after the SRB interviews (Mot. at 2-3). To the contrary, Peters conducted a purely statistical correlation of the ratings of the three SRB members, and such ratings have not changed since they were given and will not change over time. Consequently, had Peters performed the statistical analysis six years ago, the results set out in Peters’ report would have been exactly the same. The motion identifies no statute, regulation, or case law requiring TVA to conduct an analysis of the SRB ratings six years ago. Simply, the timing of the preparation of the statistical analysis does not make this proof unreliable under 10 C.F.R. § 2.743(c), and the NRC Staff’s hyperbole to the contrary does not make it so.

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<sup>7</sup> The NRC Staff also suggests that Peters’ status as a TVA employee cuts against qualifying him as an expert ( Mot. at 3). Of course, Peters’ qualifications, as set out in his resume (ex. A), are the key elements in determining whether he qualifies as an expert, not his employment status.

Based on the foregoing reasons and authorities, the NRC Staff's motion in limine to exclude Peters' testimony and his report should be denied.

Respectfully submitted,

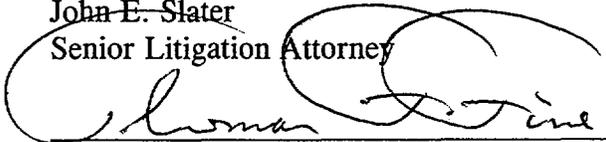
April 8, 2002

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A handwritten signature in cursive script, appearing to read "Thomas F. Fine", is written over a horizontal line. The signature is enclosed within a large, hand-drawn oval.

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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing response to NRC Staff's motion in limine to exclude the testimony and summary of analyses of Carey L. Peters have been served by overnight messenger on the Board members and NRC Staff and by regular mail on the other persons listed below. Copies of the response, less the attachments which are being sent either by overnight or regular mail, have also been sent by e-mail to those persons listed below with e-mail addresses.

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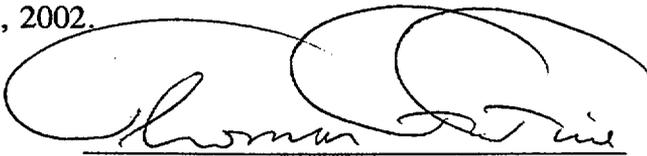
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This 8th day of April, 2002.

  
Attorney for TVA

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## **Education**

### **Doctor of Philosophy (May 1997)**

The University of Tennessee, Knoxville, Tennessee  
Major: Industrial/Organizational Psychology. GPA: 3.94/4.0

### **Master of Arts (May 1988)**

The University of Nebraska, Lincoln, Nebraska  
Major: Educational Psychology with an emphasis in counseling. GPA: 4.0/4.0

### **Bachelor of Science (August 1984)**

Taylor University, Upland, Indiana  
Major: Social Work. GPA: 3.45/4.0

### **Associate of Arts (August 1982)**

Hesston College, Hesston, Kansas  
Major: Social Work. GPA: 3.7/4.0

## **Professional Experience**

### **The Tennessee Valley Authority (TVA)** *Program Manager*

**February 1997 - present**

- Present during organization-wide televised broadcasts on human resource topics
- Design and implement large-scale organization change workshops and HR processes
- Serve on numerous HR strategic planning teams
- Evaluate, redesign, and manage the company-wide 360-Degree Feedback program
- Facilitate numerous training sessions
- Develop and manage all performance appraisal processes
- Design and write training materials and technical reports
- Coordinate activities with all levels of employees throughout the company
- Consult on career development and succession planning programs
- Design and implement employee selection systems

### **General Teaching** *Instructor*

**(periodic assignments) January 1986 - present**

- Invited to serve as guest lecturer for various college level courses
- Present workshops on issues pertaining to management and human resource development
- Taught a Graduate Record Examination (GRE) test preparation course
- Counseled students concerning vocational interests

**L. M. Berry & Company**  
**Trainer**

**May 1995 - July 1996**

- Conducted training sessions for managers and employees on issues surrounding their transition to a team-based organization
- Researched, wrote, and edited training modules on topics such as mentoring, time management, team development, giving and receiving feedback, leadership, and individual development
- Participated on a consulting team to deliver services to the organization
- Discussed organizational issues and problems with the company's management

**Tennessee Assessment Center**  
**Assessor**

**(periodic projects)**

**July 1994 - October 1995**

- Served as an assessment center rater for managerial and executive job candidates
- Wrote feedback reports for participants
- Received extensive training in assessment center behavioral dimensions and rating procedures
- Participated in consensus team meetings to finalize evaluations

**Personnel Assessment Systems**  
**Assessor**

**(periodic projects)**

**June 1994 - February 1995**

- Assessed the performance of government employees via assessment center exercises
- Wrote developmental feedback reports for participants
- Attended extensive training workshops on assessment center procedures
- Participated in consensus team meetings to finalize participant ratings

**Wallace Hardware**  
**Organizational Consultant**

**August 1993 - March 1995**

- Proposed and acquired a contract to assess 175 employees
- Consulted with the President and vice-presidents of the company to design and implement a developmental employee assessment program
- Conducted individual assessments consisting of personality, vocational interest, and cognitive ability measures and two structured interviews
- Wrote extensive developmental feedback reports on all employees assessed
- Designed and presented numerous feedback workshops for company employees
- Generated numerous additional requests for services (e.g., additional developmental assessments, performance appraisal system design, sales training, team building, and organizational climate feedback)

**University of Tennessee Statistics Laboratory**  
***Graduate Teaching Assistant***

**August 1993 - May 1994**

- Taught weekly laboratory sections for two different graduate statistics courses
- Explained the material to students and reviewed homework with them
- Provided tutoring assistance outside of regular class hours
- Graded all tests and assigned course grades

**Tennessee Government**  
**Executive Institute**  
***Trainer and Group Facilitator***

**(periodic projects)**

**July 1993 - January 1997**

- Supervised colleagues selected to help conduct training sessions
- Instructed executives regarding team dynamics, work performance, and individual personality issues
- Lead group discussions concerning team development and interpersonal interaction
- Observed, evaluated, and offered feedback to individuals and teams regarding their job-related behaviors

**Management Development Center (periodic projects)**  
***Trainer and Group Facilitator***

**January 1993 - January 1997**

- Conducted training workshops
- Facilitated group discussions concerning team processes, group problem-solving, and interpersonal relationships
- Interpreted personality profiles
- Provided feedback on team performance and individual personality variables

**National Institute of Mental**  
**Health Research Grant**  
***Graduate Research Assistant***

**September 1992 - January 1997**

- Served on a federally funded grant designed to examine the organizational climate and culture of government agencies
- Worked on a cross-discipline organizational development team focused on conceptualizing and implementing an "ideal" organizational culture
- Developed and administered organizational climate and culture surveys for various social service agencies
- Collected data through extensive personal contacts with subjects in the field
- Analyzed data and made written and oral presentations of the research findings

**Pilot Oil Management Chair of  
Excellence Research Team  
*Research Team Member***

**August 1992 - May 1995**

- Participated in the development of a new technique called "conditional reasoning" designed to measure achievement motivation, human reliability, and aggression
- Attended weekly meetings to examine the role of personality variables in work behavior
- Discussed improved methods of gaining insight into individual personality

**Texas Christian University (TCU)  
*Assistant Director of Admission and Field Representative***

**March 1989 - August 1995**

- Served as Assistant Director of Admission until beginning doctoral work in 1992
- Supervised and refined the administration of over two million dollars in academic scholarships
- Managed approximately 20 student assistants
- Recruited students via individual interviews and follow-up contacts with prospective students and their families
- Gave informational presentations to groups of prospective students and their families
- Evaluated applications and worked on a committee to make admission decisions

**University of Nebraska  
*Admission Counselor***

**July 1988 - March 1989**

- Performed public relations work for the Office of Admission
- Conducted over 150 presentations for prospective students and their families
- Initiated and completed a study on the campus visitation program

## Graduate Courses

### Master of Arts

- College Student Development
- College Student Personnel
- Counseling Practicum
- Counseling Theories & Interventions
- Educational & Psychological Measurement
- Field Placement (applied counseling position)
- Human Cognition & Instruction
- Occupational & Vocational Psychology
- Physiological Psychology
- Social & Group Psychology
- Statistical Methods
- Statistics Computer Lab

### Doctor of Philosophy

- Ethics for Psychology
- Industrial Psychology
- Leadership
- Linear Structural Equations (LISREL)
  - Multivariate Statistics
- Organizational Psychology
- Performance Appraisal
- Personality
- Personnel Selection
- Psychometrics
- Research Methods
- Teams
- Univariate Statistics

## Honors and Activities

- Social Science Research Institute dissertation grant (\$5,000)
- National Association for College Admission Counseling grant (\$2,140)
- Graduate College Travel Grant (\$650)
- American Psychological Society dissertation grant (\$250)
- "Outstanding Newcomer, 1991" Texas Association for College Admission Counseling
- Mensa
- Honor roll in college
- Student government
- President and emcee of church class
- Big Brothers/Big Sisters
- Adjunct faculty at Tusculum College

## Professional Affiliations

- Academy of Management
- American Psychological Association
- Society for Human Resource Management
- Society for Industrial and Organizational Psychology

## Research

Martin, L. M., Peters, C. L., Bailey, J. W., & Glisson, C. G. (1996). The role of psychosocial functioning in case management recommendations for children entering state custody. National Institute of Mental Health grant report.

Martin, L. M., Peters, C. L., & Glisson, C. (1998). Factors affecting case management recommendations for children entering state custody. Social Service Review, December 1998, 521-544.

Peters, C. L. (1990). Tips for an effective campus visitation day program. Journal of College Admissions, 129, 25-29.

Peters, C. L. (1993). Goal setting theory: A direct test of the moderating effects of expectancy and commitment. Paper presented at the annual meeting of the Industrial/Organizational Psychology and Organizational Behavior Graduate Student Conference, Toronto, Ontario, Canada.

Peters, C. L. (1995). Motivational distortion scales: An examination of their use (and potential misuse). Paper presented during a poster session at the annual meeting of the Academy of Management, Vancouver, British Columbia, Canada.

Peters, C. L. (1997). Human resource practices in college admission offices. (National Association for College Admission Counseling Monograph Series). Alexandria, VA.

Peters, C. L. (1997). Motivation for group membership: Three perspectives. Paper accepted for a poster session at the annual meeting of the Academy of Management, Boston, MA.

Peters, C. L. (1997). Psychologically oriented human resource practices and organizational effectiveness. Paper accepted for a poster session at the annual meeting of the American Psychological Association, Chicago, IL.

Peters, C. L. (1999). Human resource practices and organizational effectiveness: A test of three perspectives on strengthening the relationship. Submitted for publication.

Peters, C. L. (1999). 360-Degree Feedback: Keys for Implementing a Successful Program. Proposal accepted for presentation at the annual meeting of the Society for Human Resource Management, June 25-28, 2000, Las Vegas, NV.

Peters, C. L., & Brown, R. G. (1991). The relationship of high school involvement, high school population size, and gender to college students' self-efficacy beliefs. College Student Journal, 25, 473-481.

Peters, C. L., Maetzke, S. M., Adams, D. M., & Bryant, S. B. (1998). The optimal number of response options: A neglected consideration in questionnaire design. Best Paper Proceedings at the annual meeting for the Academy of Management, San Diego, CA.

Peters, C. L., Maetzke, S. M., Adams, D. M., & Bryant, S. B. (1999). The optimal number of response options: A neglected consideration in questionnaire design. Conditionally accepted by Psychological Methods.

Peters, C. L., Maetzke, S. B., & Baugous, A. M. (1999). How many response options in questionnaire design: 5, 7, or 9? Paper submitted for presentation at the annual meeting of the American Psychological Association, August 4-8, 2000, Washington, D.C.

Peters, C. L., Yates, J. L., & Glisson, C. G. (1997). The influence of organizational culture on job satisfaction and burnout. Paper presented during a poster session at the annual meeting of the Society for Industrial and Organizational Psychology, St. Louis, MO.

Peters, C. L., Yates, J. L., & Glisson, C. G. (1997). The influence of organizational culture on job satisfaction and burnout. National Institute of Mental Health grant report.

## Summary of Analyses: Likelihood of Negative Interview Bias Against Employee Involved in a Protected Activity

Carey L. Peters, Ph. D.  
Compensation and HR Planning  
March 2002

I received interview ratings data from Brent Marquand, TVA Office of the General Counsel, containing ratings from three raters (Corey, Kent, and Rogers) on three candidates (Candidate A, Candidate B, and Fiser). Each rater rated each candidate on each of nine interview questions for a total of 81 data points (3 x 3 x 9).

As a first step in analyzing the data, an analysis of variance (ANOVA) was conducted to test for differences between raters in the ratings they gave the candidates. The results were significant ( $p < .05$ ), indicating that there was a statistically significant difference between the three raters. However, an ANOVA alone does not indicate where the significant differences lie (i.e., which rater was different from which other rater(s)). Post hoc analyses were conducted to further explore exactly where the significant differences occurred. These analyses showed that the ratings Corey gave ( $x = 8.46$ ) were significantly higher than the ratings Rogers gave ( $x = 7.52$ ,  $p < .05$ ).

An ANOVA was also conducted to test for differences between candidates in the ratings they received. The results were significant ( $p < .05$ ). Post hoc analyses showed that Candidate A ( $x = 8.73$ ) and Candidate B ( $x = 8.72$ ) received significantly higher ( $p < .05$ ) ratings than Fiser ( $x = 6.70$ ). Plots I and II and Graphs I and II illustrate these findings.

The primary question was addressed next: Did raters' knowledge of candidates' involvement in a protected activity (IPA) negatively bias their ratings against such candidates? To do this, the data were averaged across Corey and Kent to create a category called "knew of involvement in a protected activity." Second, the data were averaged across Candidate A and Candidate B to create a group called "not involved in a protected activity." The result was a 2 x 2 matrix representing answers to the interview questions. One axis of the matrix represented knew of involvement in a protected activity vs. Rogers and the other axis represented not involved in a protected activity vs. Fiser.

A one-way ANOVA was conducted to test for main effects. Results were significant ( $p < .05$ ) and consistent with previous analyses. Raters who knew of candidates' IPA status gave significantly higher ratings than the rater who had no knowledge of IPA status (Rogers). And, candidates who were not IPA received significantly higher ratings than the candidate who was IPA (Fiser).

Because the results from the one-way ANOVA were significant, a test for an interaction was conducted to answer the key question about whether knowledge

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of IPA may have negatively biased ratings against the IPA candidate. A test for an interaction examines factors that moderate the main effects. In other words, the presence of an interaction can highlight the conditions under which the main effects occur and provide a more specific explanation of the overall main effects of the ANOVA.

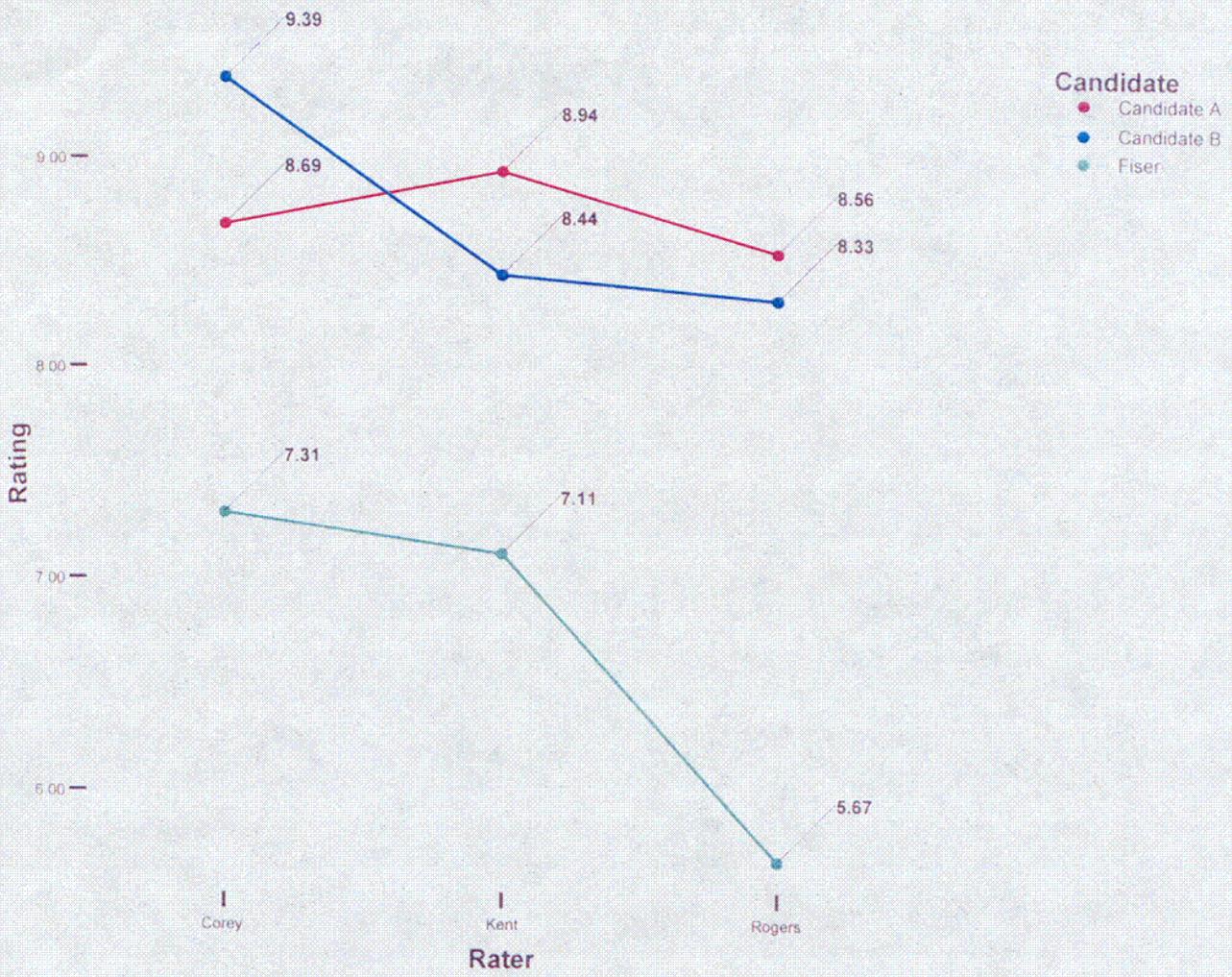
In this situation, the interaction was used to test whether Fiser's low ratings were contingent on raters' knowledge of IPA. These results were significant and show that ratings were lowest when the rater did not know of candidates' IPA. In other words, Fiser's low ratings were due in large part to Rogers, the only rater who did not know of Fiser's IPA status. The raters who knew of Fiser's IPA status gave him *higher* ratings than Rogers. The results can be restated from the standpoint of the raters. The overall higher ratings given by the raters who knew of Fiser's IPA status were due in large part to the ratings they gave to Fiser, which were significantly *higher* than the ratings Rogers gave Fiser. Plots III and IV illustrate these findings.

As a follow-up, one-way ANOVAs were conducted to test for differences between raters for Fiser only and for differences between candidates for Rogers only. Both ANOVAs were significant ( $p < .05$ ). Post hoc analyses showed that Fiser ( $x = 5.67$ ) received significantly lower ratings than Candidate A ( $x = 8.56$ ) and Candidate B ( $x = 8.33$ ,  $p < .05$ ) when considering only ratings from Rogers. Post hoc analyses showed that Rogers ( $x = 5.67$ ) gave significantly lower ratings than Corey ( $x = 7.31$ ) and Kent ( $x = 7.11$ ,  $p < .05$ ) when considering only ratings received by Fiser.

Correlations between the three raters were all significant ( $p < .05$ ), indicating strong consistency in their ratings.

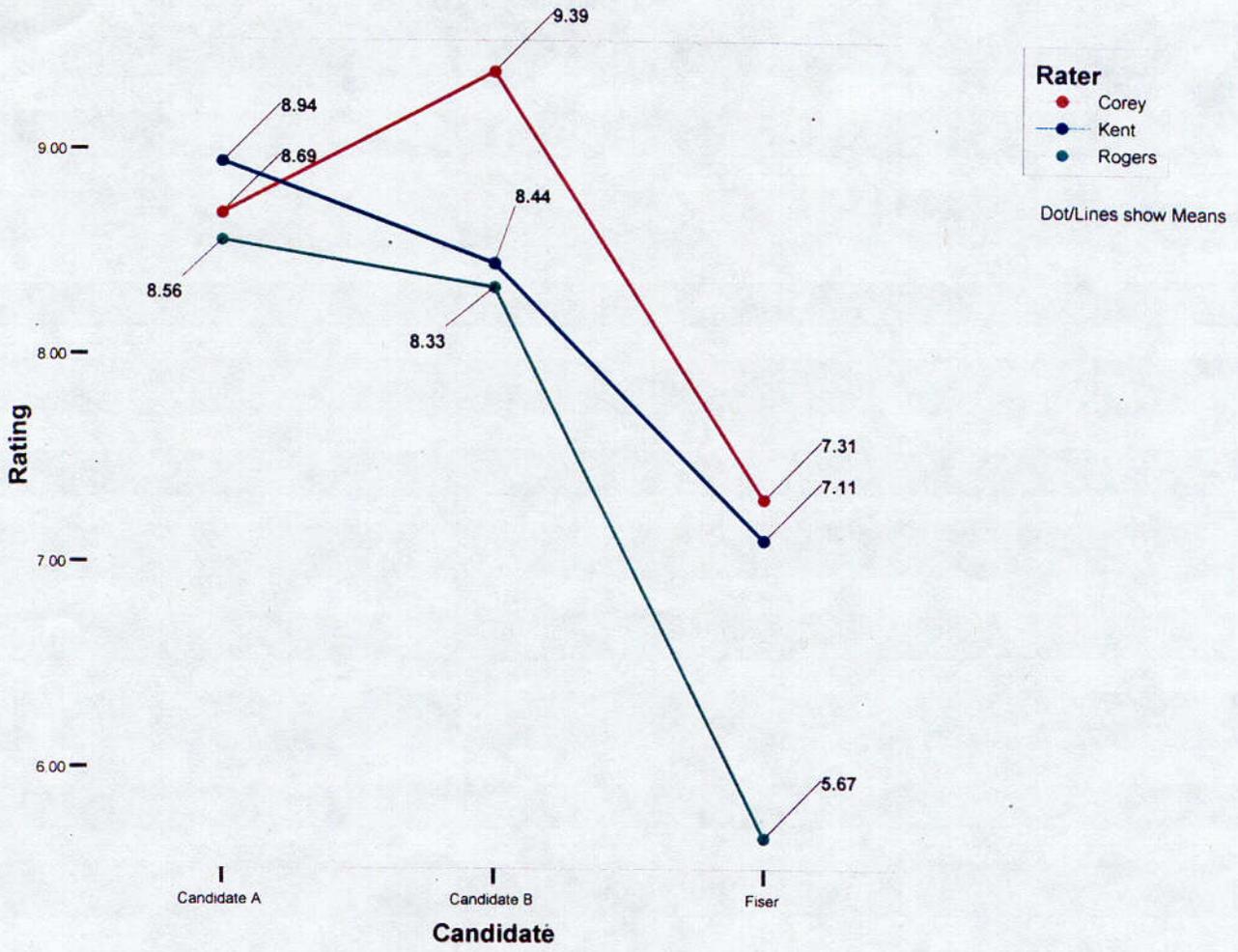
In conclusion, the results of all analyses were very consistent with each other. Taken together, the results clearly and strongly indicate that the ratings Fiser received were most likely not lower because Corey and Kent knew he was involved in a protected activity.

Plot I: Rater by Candidate



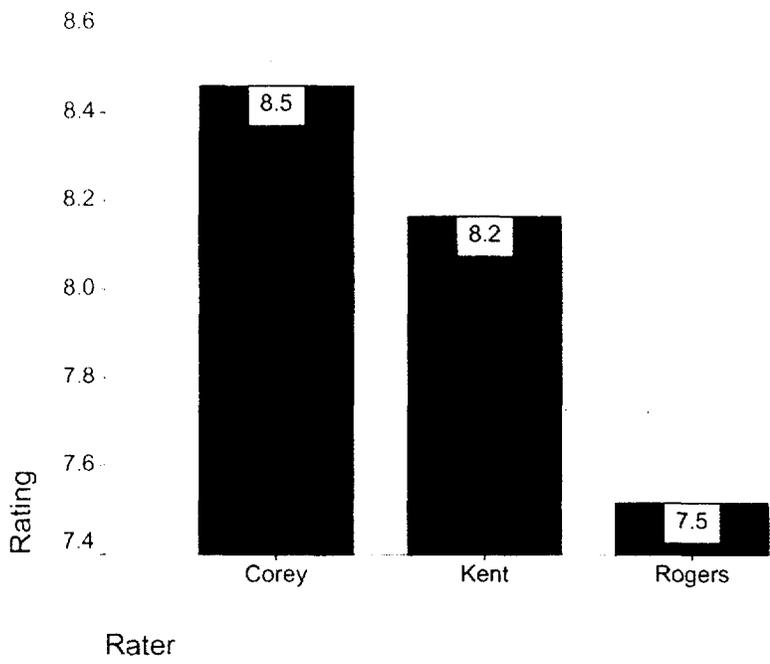
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# Plot II: Candidate by Rater

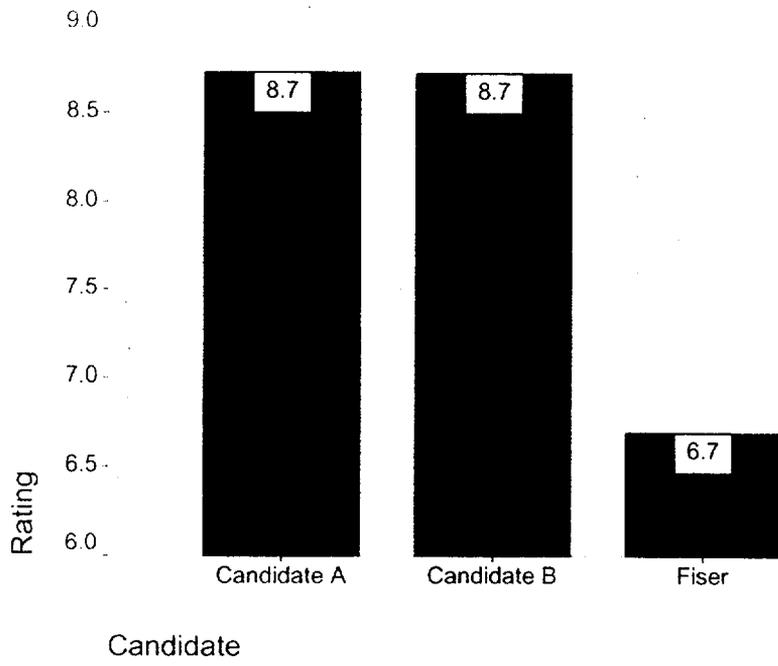


FB 000011

Graph I: Average Ratings for Raters

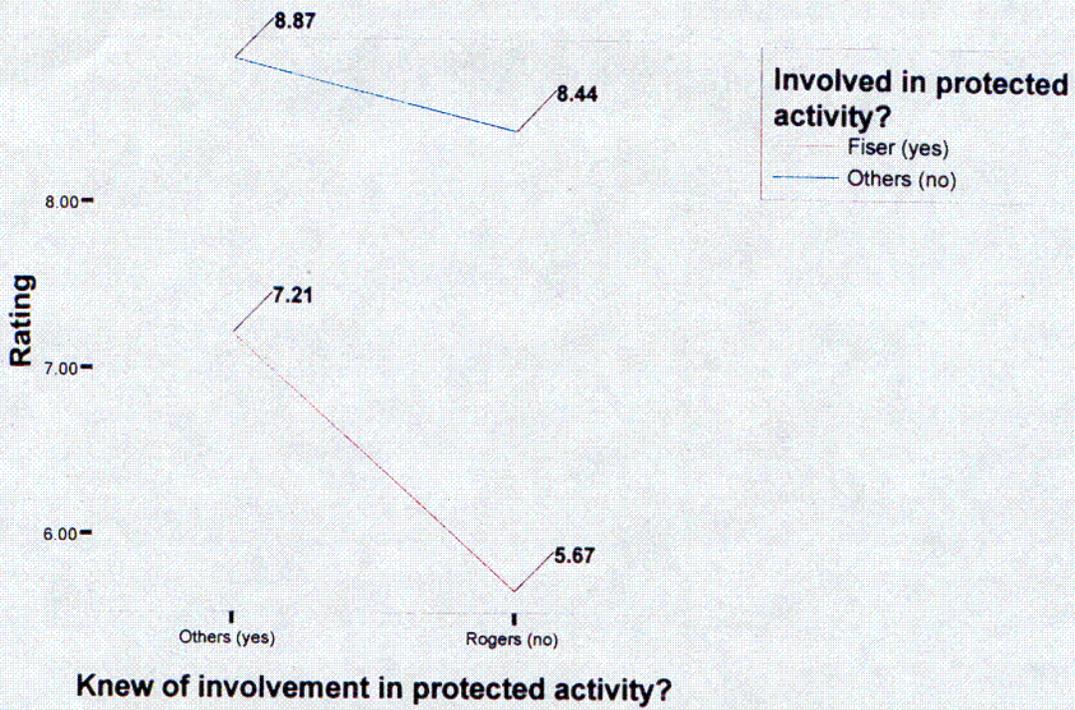


Graph II: Average Ratings for Candidates



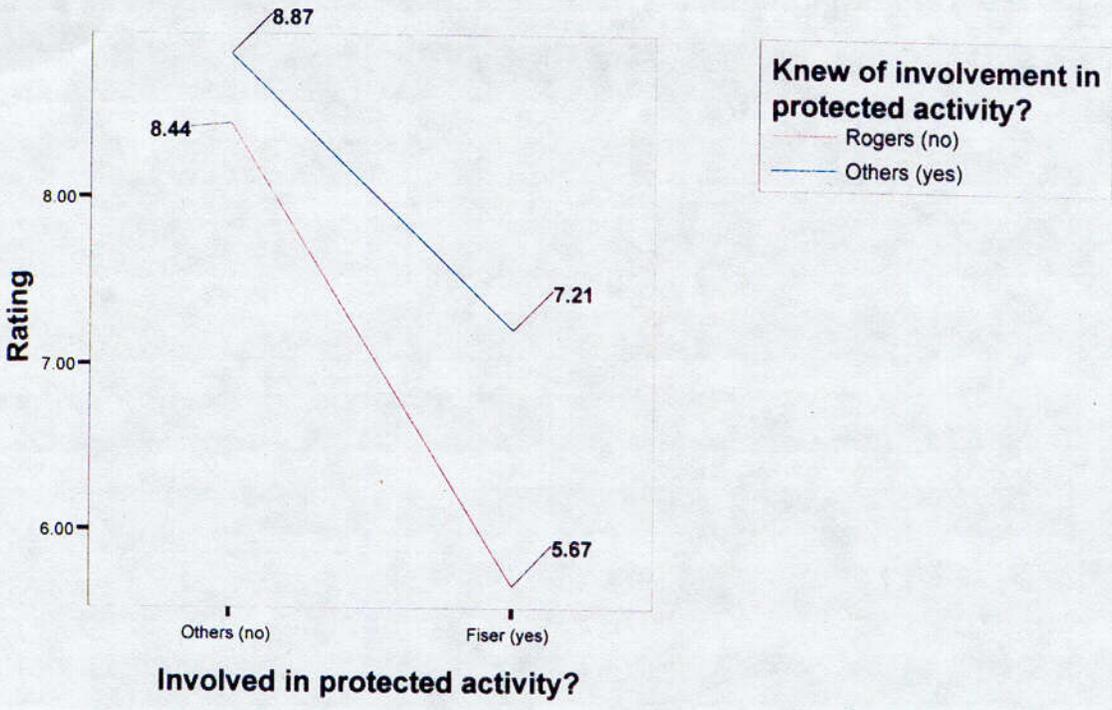
FB 000013

### Plot III: Knew by Involvement



FB 000014

# Plot IV: Involvement by Knew



FB 000015

**July 18, 1996 SELECTION REVIEW BOARD RESULTS  
PWR CHEMISTRY PROGRAM MANAGER (VPA 10703)**

Question No.	<u>John Corey</u>			<u>Charles Kent</u>			<u>H.R. (Rick) Rogers</u>		
	Candidate B	Candidate A	Fiser	Candidate B	Candidate A	Fiser	Candidate B	Candidate A	Fiser
1	10	8.5	7	8	9	7.5	8	9	5
2	9	8.7	7	8	9	7	9	9	5
7	10	8.5	7.5	8.5	9	7	9	8	5
9	9.5	9	7.8	8	9	7	8	8	7
11	9.5	9	7	8.5	8.5	7	8	9	6
12	9	9	7.5	9	9.5	7.5	8	9	6
15	10	8.5	7	8.5	9	6	8	8	5
16	8.5	8	7	8.5	8	7	8	8	5
17	9	9	8	9	9.5	8	9	9	7
<b>Subtotal:</b>	<b>84.5</b>	<b>78.2</b>	<b>65.8</b>	<b>76</b>	<b>80.5</b>	<b>64</b>	<b>75</b>	<b>77</b>	<b>51</b>
* *	* *	* *	* *	* *	* *	* *	* *	* *	* *

FB 000016

<b>Total Score:</b>	<b>Candidate A</b> 235.7	<b>Candidate B</b> 235.5	<b>Gary Fiser</b> 180.8
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(Cite as: 134 F.3d 372, 1998 WL 25003 (6th Cir.))

**C**

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

(Cite as: 134 F.3d 372, 1998 WL 25003, \*\*3 (6th Cir.))

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 ALJ'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 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

(Cite as: 134 F.3d 372, 1998 WL 25003, \*\*6 (6th Cir.))

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.

END OF DOCUMENT

(Cite as: 132 F.3d 33, 1997 WL 764416 (6th Cir.(Mich.)))

**H**

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.

**David E. LASKI, Plaintiff-Appellant,**  
v.  
**Reginald W. BELLWOOD and General Motors of  
Canada, Ltd., Defendants-Appellees.**

No. 96-2188.

Nov. 26, 1997.

ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE EASTERN  
DISTRICT OF MICHIGAN.

Before: CONTIE, DAUGHTREY, AND COLE,  
Circuit Judges.

PER CURIAM.

\*\*1 The plaintiff-appellant, David E. Laski, appeals from the ruling of the district court granting the defendants, Reginald Bellwood and General Motors of Canada, Ltd., judgment as a matter of law on Laski's claim for non-economic damages resulting from an automobile accident. The plaintiff contends that the district judge erred in not allowing Laski's experts to testify concerning the cause of his injuries, and further insists that the district court mistakenly granted the defendants judgment as a matter of law. Because we find that Laski's expert witnesses should have been allowed to testify before the jury concerning causation, and because the failure to allow such testimony affected the plaintiff's substantial right to present his case, we conclude that the district court's judgment must be reversed in part and that the case must be remanded for a new trial.

#### *PROCEDURAL AND FACTUAL BACKGROUND*

Shortly before 10:00 p.m. on September 16, 1993, Reginald Bellwood, a Canadian citizen driving a company car owned by General Motors of Canada,

Ltd., rear-ended a vehicle driven by David Laski in Wayne County, Michigan. Although Bellwood was traveling 40 miles per hour shortly before the accident, and although both cars were rendered inoperable as a result of the collision, neither man required immediate hospitalization or other medical attention. The next day, however, Laski sought treatment from his family physician for back pain incurred from the accident. In the ensuing weeks, neither that care-giver nor a neurologist detected any abnormalities with the plaintiff's skeletal system. A magnetic resonance imaging test (MRI) performed on November 1, 1993, also revealed that Laski's spinal discs were normal as of that date.

Despite these medical findings, Laski continued to complain of back pain and sought treatment from other physicians and therapists. Those professionals, however, never concluded that Laski was disabled or that he was even significantly impaired in carrying out daily activities.

In July or August 1994, one year after the car accident with Bellwood, the plaintiff allegedly exacerbated his back injury lifting bags of ice. He further aggravated that injury during a seven-hour car trip later in August. A second MRI of Laski's spine in September 1994 showed for the first time a bulge in a disc of the lower back. After continuing to complain of severe pain, Laski then underwent steroid injections and physical therapy in an effort to alleviate the discomfort. Nevertheless, while applying for membership in a health club in December 1994, Laski did not mention that he was then being treated by back pain specialists.

Finally, in January 1996, the plaintiff traveled to Minnesota for surgery to remove the bulging disc and to fuse corresponding discs. Laski thereafter informed his surgeon of a May 1996 automobile accident in which the plaintiff was involved, but failed to tell him or any prior care-giver of two other minor accidents in which he had been involved before September 1993. Laski also did not inform his treating physicians about earlier treatments for depression, about his membership in a health club, or about chiropractic spinal adjustments he had received after the September 1993 mishap. Furthermore, the plaintiff admitted that he did not mention a history of back pain on his in-patient history form when initially visiting a Michigan rehabilitation center

(Cite as: 132 F.3d 33, 1997 WL 764416, \*\*1 (6th Cir.(Mich.)))

despite having complained of back pain as early as 1991 after being injured in a bar fight.

\*\*2 Within one year of the accident, Laski filed suit in Michigan state court, alleging that the defendants' negligence resulted in injuries to "his body, neck, back, left wrist, and jaw." The defendants removed the action to federal district court and then filed motions *in limine* to exclude testimony from the plaintiff's witnesses "concerning accident severity and the speed of Reginald Bellwood's vehicle" and "auto accident injury causation opinions/testimony by plaintiff's dentist and physicians." Both motions were granted. [FN1]

FN1. Laski does not challenge on appeal the district court's ruling concerning the motion *in limine* regarding restriction of testimony about the severity of the accident or the speed of Bellwood's vehicle. Thus, no further discussion of that motion is warranted.

At the close of all the proof, the defendants moved for judgment in their favor as a matter of law. They argued that, even viewing the evidence presented in the light most favorable to the plaintiff, Laski had failed to introduce testimony that the September 16, 1993, accident was the cause of his back problems. The defendants further contended that Laski had failed to establish that the back pain was a "serious impairment of a body function." The district court took the motion under advisement and submitted the case to the jury. After deliberating, the jury ruled in favor of the defendants, finding that the defendants' negligence was not the cause of Laski's injuries.

The court then revisited the motion for judgment as a matter of law and

concluded in the jury's verdict. In her order granting the motion, the district judge noted a lack of evidence that the accident caused the plaintiff's injuries and the improbability that a reasonable jury could view Laski's injury as rising to the level of a "serious impairment of a body function." From those findings, the plaintiff now appeals.

#### DISCUSSION

##### A. Exclusion of Testimony of Plaintiff's Expert Witnesses

In his first appellate issue, Laski contends that the district court erred in restricting his medical experts from testifying concerning the cause of the plaintiff's

back injury. This court reviews a district court decision regarding admission of expert testimony only for an abuse of discretion. *United States v. Jones*, 107 F.3d 1147, 1151 (6th Cir.), *cert. denied*, 117 S.Ct. 2527 (1997). Moreover, that discretion has been broadly construed and will be sustained "unless manifestly erroneous." *United States v. Bonds*, 12 F.3d 540, 554 (6th Cir. 1993) (quoting *United States v. Green*, 548 F.2d 1261, 1268 (6th Cir.1977)).

Federal Rules of Evidence 702 and 703 govern the admissibility of expert testimony in federal court. Pursuant to Rule 702:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 703 further describes the acceptable bases for the expert testimony. The rule states:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

\*\*3 After the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), federal courts have recognized the "liberal thrust" of the Federal Rules and their "general approach of relaxing the traditional barriers to "opinion testimony." " *Id.* at 588 (citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)). The district court, however, adopting the position of the defendants in this matter, denied the plaintiff full examination of his experts on the issue of injury causation because those witnesses were "only" medical specialists and not experts in biomechanics or accident reconstruction.

Requiring such specialization thwarts the goals and purposes of the Federal Rules. Our sister circuits have recognized as much. In *DaSilva v. American Brands, Inc.*, 845 F.2d 356, 361 (1st Cir.1988), for example, the court rejected a suggestion that a mechanical engineer was not qualified to render an opinion on the safety design of a machine because he had no design experience with it. Instead, the court allowed the expert testimony so as not to require, in

essence, "that the only experts who could testify regarding a machine are those who have an interest in defending its design." *Id.* See also *Doe v. Cutter Biological, Inc.*, 971 F.2d 375, 385 (9th Cir.1992) ("courts impose no requirement that an expert be a specialist in a given field"). More recently, the Third Circuit forcefully held in *Holbrook v. Lykes Bros. S.S. Co., Inc.*, 80 F.3d 777, 782 (3d Cir.1996), that a district court abuses its discretion in excluding expert testimony "simply because the trial court does not deem the proposed expert to be the best qualified or because the proposed expert does not have the specialization that the court considers most appropriate." (Citing *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 856 (3d Cir.1990)).

In this case, the plaintiff sought to offer evidence from treating physicians who examined Laski in the weeks, months, and years after his accident with Bellwood. Although those witnesses admittedly were not experts in biomechanics or accident reconstruction, they were licensed physicians trained to recognize catalysts of physical discomfort and injury in order to treat patients properly. Their *opinions* that the plaintiff's condition resulted from the accident that is the subject of this lawsuit clearly could shed light on a determinative issue facing the jury and assist the trier of fact in its ultimate decision. Not being both physicians and accident reconstructionists and not being eyewitnesses to the accident itself, the plaintiff's proposed experts could not definitively link Laski's back injury to the September 16, 1993 accident. Such certitude is not required by the Federal Rules of Evidence, however. Laski's treating physicians could offer relevant *opinions* on the cause of the injury based upon scientific evidence that was beyond the ken of average jurors. Under such circumstances, the district court should have allowed the testimony of the plaintiff's experts and erred in failing to do so on the basis of those witnesses' lack of expertise in the specialized fields of biomechanics and accident reconstruction.

**\*\*4** The relaxation of admission standards does not mean, however, that federal district courts no longer serve a legitimate function in controlling the conduct of a trial. As stated by the Supreme Court in *Daubert*, "under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 U.S. 589.

In this case, the defendants contend that the decision

to restrict the expert testimony of the plaintiff's witnesses is justified because the witnesses' lack of knowledge of the circumstances of the accident and of Laski's prior medical history would render such opinions unreliable. It is uncontroverted that some of the plaintiff's experts were not familiar with details of the collision, and that the witnesses also were not aware of automobile accidents involving Laski both before and after the crash in September 1993. Those same physicians further were not privy to portions of the personal medical history of the plaintiff detailing Laski's earlier complaints of back pain resulting from a bar fight, his treatment for depression, and prior chiropractic manipulation.

Without question, ignorance of such important factors casts the validity of the opinion testimony of the plaintiff's experts on injury causation into considerable doubt. Medical diagnoses and treatments are, however, commonly and appropriately made without the luxury of detailed medical histories. Opinions rendered on questions of health, possible causes of maladies, and their treatments are, nevertheless, still routinely offered in federal courts pursuant to the standards of Federal Rules of Evidence 702 and 703. In those instances, as in this case, the incomplete bases for the expert testimony are subject to the crucible of cross-examination and affect the weight properly given to the scientific or medical evidence, not the admissibility of such information at trial. [FN2]

FN2. The defendants rely upon this court's recent opinion in *Smelser v. Norfolk Southern Ry. Co.*, 105 F.3d 299 (6th Cir.1997), for the proposition that less than complete knowledge of a person's medical condition renders an expert's testimony regarding injury causation unreliable and, therefore, inadmissible. In *Smelser*, however, the expert attempting to determine the cause of an injury was not a physician familiar with making such determinations in the absence of *some* relevant information, but rather, a biomechanic untrained in medical science. The incomplete picture of the plaintiff portrayed in *Smelser* was thus much more critical than the situation present in this case. Interestingly, this court's discussion of limits of permissible testimony by *Smelser's* biomechanics expert also weakens considerably the force of the defendants' arguments here that biomechanical or accident reconstruction testimony was essential to the injury causation issue.

The district court correctly recognized that the plaintiff's expert witnesses could have been specialists in fields more germane to the ultimate

inquiry in the lawsuit, and could have been better informed by Laski about the plaintiff's medical history. The failure to meet those expectations, however, does not compromise the experts' ability to satisfy the threshold requirements of relevance and reliability of expert testimony. The Federal Rules of Evidence do not mandate that litigants offer only the best, the most relevant, and the most reliable expert witnesses at trial. We conclude that the district court erred in this matter in holding Laski to just such an impossible standard.

The defendants argue that any error committed by the district court in not admitting the expert testimony was harmless because the plaintiff's expert witnesses were able to convey to the jury in isolated portions of their testimony their belief that the September 1 1993 accident caused Laski's injury. For instance, Dr. Elkiss, Laski's neurologist, testified in his deposition that he could attribute the plaintiff's pain to a specific traumatic event because, "as the man described it to [Elkiss], he did not have a problem. He had an accident. And right after the accident he had a problem." Dr. Morton, a physician retained by Laski's insurance company, stated that "based upon that history, his clinical exam, which means what I saw, his diagnostic studies, I felt that his symptoms were most likely related from the auto accident." Finally, deposition testimony from Dr. Burton, the plaintiff's neurologist, indicated that he found Laski's injuries were "consistent with one serious and significant traumatic injury to a normal disc."

\*\*5 Although those discrete pieces of opinion testimony were placed before the jury, the plaintiff's expert witnesses were willing and able to expound upon and clarify that information for the fact-finders. Because the jury later determined that the plaintiff's proof did not establish that Bellwood's actions caused the contested injury, we are unable to say that eliciting the physician's opinions in greater detail would not have precipitated a different result. For that reason, we do not believe the district court's restriction on the plaintiff's expert witnesses' testimony can be considered harmless.

#### B. Grant of Judgment for the Defendants as a Matter of Law

Laski next submits that the district court also erred in granting the defendants' motion for judgment as a matter of law. This court reviews such a grant under the same standard employed by the district

court. *Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 726 (6th Cir.1994). Consequently, this court does not weigh the evidence or evaluate the credibility of witnesses, but rather views the evidence in the light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences. *Wayne v. Village of Sebring*, 36 F.3d 517, 525 (6th Cir.1994) "Only when it is clear that reasonable people could come to but one conclusion from the evidence should a court grant a motion for directed verdict." *Hill v. McIntyre*, 884 F.2d 271, 274 (6th Cir.1989) (citation omitted).

Pursuant to applicable Michigan law, recovery is available for non-economic damages traceable to an automobile accident only if the plaintiff "has suffered death, serious impairment of body function, or permanent serious disfigurement." M.C.L.A. § 500.3135(1). [FN3] In granting the defendants' motion for judgment as a matter of law in this case, the district court effectively ruled that the plaintiff introduced no evidence from which a reasonable jury could conclude that Laski's back injury caused either a "serious impairment of body function" or "permanent serious disfigurement."

FN3. M.C.L.A. § 500.3135 was amended subsequent to the filing of this lawsuit. See Mich. Pub. Act 1995, No. 222, § 1, eff. Mar. 28, 1996. The wording of § 500.3135(1) in both the new version of the statute and in the version in effect previously is, however, identical.

#### 1. Serious Impairment of Body Function

In considering whether the statutory threshold injury requirement has been met to recover non-economic damages in a Michigan tort action, the plaintiff must establish both that a body function was impaired due to the collision with Bellwood and that the impairment was serious. *DiFranco v. Pickard*, 398 N.W.2d 896, 901 (Mich.1986). Before this court, the defendants insist that neither prong of the test has been met--that Laski cannot prove the accident at issue caused his injuries and that he cannot prove that the alleged injuries seriously impaired any body function.

The question of causation has previously been addressed in this opinion. As stated above, Laski's effort to establish the necessary causal relationship between the accident and his injury was significantly hampered by the district court's decision not to allow the plaintiff's medical experts to testify about the

cause of his injury. Because Laski's attempt to present his case to the jury was thus fatally handicapped by a court ruling, his failure to establish positively the connection between the tortious action of the defendants and his injury should not be held against him.

\*\*6 The defendants also argue that the alleged injury suffered by the plaintiff cannot, as a matter of law, constitute a serious impairment of body function. The "serious impairment of body function" threshold was enacted by the Michigan legislature to "eliminate suits based on clearly minor injuries." *DiFranco*, 398 N.W.2d at 911. Nevertheless, while that threshold is significant, it is not extraordinarily high. *Id.* The Michigan Supreme Court has directed that a determination of whether an injury seriously impairs a body function should focus upon "the extent of the impairment, the particular body function impaired, the length of time the impairment lasted, the treatment required to correct the impairment, and any other relevant factors." *Id.* at 915. To be considered serious, however, an impairment need not be permanent. *Id.*

Laski adduced evidence that he began to suffer back stiffness and pain almost immediately after the accident. In fact, he visited his family physician the day following the collision and continued to seek medical relief for the alleged pain for more than two years. As a result, he has been forced to abandon many of the activities he previously enjoyed and, perhaps most important, underwent potentially dangerous injections for pain relief and submitted to disc surgery under general anesthesia. As the Michigan Supreme Court concluded in *DiFranco*, "[a]n impairment which can only be corrected by surgery may be more serious than one that can be remedied by bed rest." *Id.* at 914.

If the plaintiff is able to overcome the causation hurdle that was raised inappropriately high by the district court's evidentiary rulings in this matter, a reasonable jury could come to more than one conclusion when considering whether such evidence establishes a serious impairment of body function. Faced with such a situation, therefore, a district court commits error in directing a verdict for one litigant or another.

Before this court, the defendants contend that Laski's challenge to the judgment as a matter of law on this basis is moot because the plaintiff's evidence was submitted to the jury and that deliberative body

returned a verdict in favor of Bellwood and General Motors of Canada, Ltd. The verdict returned by the jury, however, was not a finding that Laski had not proven serious impairment of a body function, but rather a finding that the plaintiff had not established that the accident with Bellwood caused the back injury ultimately necessitating corrective surgery. Again, given the fact that the district court refused to allow expert testimony from the plaintiff's witnesses regarding causation, such a jury finding is hardly surprising. Were such evidence admitted, however, and were the plaintiff able to establish the necessary causal connection between the accident and the injury, a far different result might be reached.

## 2. Permanent Serious Disfigurement

A plaintiff injured in a tort action may also recover non-economic damages in Michigan by proving that permanent serious disfigurement resulted from the automobile accident. M.C.L.A. § 500.3515(1). Laski attempts to take advantage of this alternative method of compensation by arguing that the surgical scar on his back constitutes the type of disfigurement envisioned by the statute. In any event, he contends that a legitimate jury issue was presented by his testimony about the scar and that, consequently, judgment as a matter of law on this claim was inappropriate.

\*\*7 The appellate record in this case contains pictures of the scar left from the plaintiff's back surgery. While the defendants do not argue that the scar is not permanent or that it is not technically a disfigurement, they and the district court agreed that no reasonable jury could, under the facts of this case, consider it a "serious" disfigurement. We also agree. Were the plaintiff a male swimwear or underwear model who spent many of his waking hours baring his back to the public at his waistline, a fact-finder could possibly consider the scar a "serious disfigurement." Given the facts, however, that Laski is a cellular phone sales representative and that the scar is almost always covered by clothing, that reminder of a prior surgery cannot be considered a "permanent serious disfigurement." The district court did not err in granting the defendants judgment as a matter of law on this discrete issue.

## CONCLUSION

A district judge has broad discretion in controlling the admission of expert testimony during a trial. That discretion may be abused, however, by

(Cite as: 132 F.3d 33, 1997 WL 764416, \*\*7 (6th Cir.(Mich.)))

rendering a "manifestly erroneous" decision regarding admissibility. Unfortunately, the district court abused its discretion in this case by refusing to allow Laski's medical experts to offer their opinions on the cause of the plaintiff's injury. The court's requirement that such experts be trained in biomechanics or accident reconstruction improperly restricted the plaintiff's ability to present his case to the jury and is diametrically opposed to the thrust of the Federal Rules of Evidence and Supreme Court decisions interpreting them that set a lower threshold for admission of expert testimony.

As a result of the district court's error in this regard, Laski was also unnecessarily hindered in his effort to establish serious impairment of a body function as a result of the defendants' tortious actions. If the appropriate causal connection could be established through expert testimony, a legitimate jury question

on the severity of the injury suffered by the plaintiff would be presented. Consequently, we hold that the district court erred in granting the defendants judgment as a matter of law on that prong of Laski's case.

We further hold, however, that the plaintiff has failed to present evidence from which a reasonable jury could determine that Laski's surgical scar constitutes a permanent serious disfigurement. The district court thus appropriately granted judgment as a matter of law to the defendants on this issue.

For these reasons, we conclude that the judgment of the district court be REVERSED in part and the case REMANDED for a new trial.

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