A Guide To Merit Systems Protection Board Law and Practice

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Citing Byrd [32 MSPR 300 (1987)] . . . the agency correctly asserts that the administrative judge erred by confusing the requirements for the rating assigned to the appellant's individual critical element and the summary rating assigned to the appellant's overall performance.

In *Byrd*, the Board explained that under 5 CFR § 430.204 an agency is required to develop: (1) a minimum of three rating levels for each critical element and (2) five summary rating levels for the employee's performance derived from the ratings on the critical elements and, at the agency's discretion, from the ratings on the noncritical elements. The Board also stated that the administrative judge had correctly relied on *Donaldson v. Department of Labor*, 27 MSPR 293 (1985), in stating that (1) where the agency has chosen to create a five-level evaluation system for each critical element, it must inform its employees of what level of performance is required to earn a "minimally satisfactory" evaluation and (2) agency performance appraisal plans that require extrapolating the performance rating on a critical element more than one level below the only level for which there is a written standard violated the statutory requirements of objectivity. . . . Upon review, we find that the opinion in *Byrd* misstated that Board's holding in *Donaldson* regarding extrapolation of performance ratings.

In *Donaldson*, the issue was whether an agency's extrapolation of a performance rating more than one level above or below the written standard conclusively established that the standard failed to meet statutory requirements and warranted reversal of the action. Although the appellants in *Donaldson* argued that the Board should be bound by the requirements of Federal Personnel Manual Letter 430-4 (March 24, 1981) which stated that performance rating systems requiring extrapolating more than one level above or below the written standard failed to satisfy the requirement for objectivity . . . the Board rejected that argument. Rather, it stated:

> We find that the agency's system contravenes the cited FPM Letter, and we agree with OPM's analysis that such a system generally will violate the statutory requirement of objectivity. However, we find that an employee's substantive rights to a *bona fide* opportunity to demonstrate acceptable performance and to communication of the standards he is expected to meet may be met otherwise than by a performance standard which meets OPM's requirement for extrapolation only one level above or below the written standard. Thus, we hold that an agency may satisfy the employee's rights . . . by communicating to the employee the standards he must meet in order to be evaluated as demonstrating performance at a level which is sufficient for retention. . . . Such communication may occur in the PIP . . . in counseling sessions, in written instructions, or in any manner calculated to apprise the employee of the requirements against which he is to be measured.

Donaldson, 27 MSPR at 297-98.

In both appeals involved in *Donaldson*, the Board found that the agency's performance standards did not comply with OPM's restrictions on extrapolating standards. Nevertheless, the Board considered whether the agencies had otherwise adequately informed the appellants of the appropriate level of performance that was expected of them. . . .

Thus, the initial decision and the Board's decision in *Byrd* are inconsistent with *Donaldson* to the extent that they imply that a performance rating under standards that do not meet OPM's extrapolation restrictions could never meet the statutory requirements. . . .

In this case, however, as in *Byrd*, the evidence supports the agency's claim that although it had the required five-level rating system for its summary rating of the appellant's performance, it did not have a five-level rating system for the individual critical element in issue. The appellant's performance standards for the critical element are identified as "far exceeds," "exceeds," or "met." Thus, in finding the appellant's performance unacceptable, the agency did not extrapolate the performance rating on the appellant's critical element more than one level below a level for which there was a written standard, and the administrative judge erred in finding that the agency had an improper performance rating system.

In the event that *Cochran* is not entirely clear, in *Donaldson* it was held that the agency may avoid the problem of lack of formal distinctions between levels of performance in a five-tier system by communicating to the employee, through a PIP, counseling sessions, written instructions, or other means, the requirements that he must meet to retain employment. Standards, if set at only one level for a five-level review system, are inadequate, but statutory requirements may be met if the standard that is satisfactory is communicated in a performance improvement plan, in counseling sessions, in written instructions, or in any manner calculated to apprise the employee of the requirements. *Adams v. Dept. of Navy*, 28 MSPR 589 (1985) (Table).

The Board tried again in *Luscri v. Dept. of Army*, 39 MSPR 482, 489 (1989), coming right out and holding, in plain language, that "the agency did not need to establish a separate level for 'minimally acceptable' performance":

> The appellant notes that the performance improvement plan references only the standards that the appellant must meet for "fully successful performance" in the critical elements. The agency correctly held the appellant to these standards, however, because it did not have a "minimally acceptable" level of rating for the critical elements. Rather, the agency had only one defined performance standard — the fully successful level — and three levels of rating for each critical element — exceeded, met, and not met. Under 5 CFR § 430.204(e), a system with three rating levels for each critical element is acceptable; the agency did not need to establish a separate level for "minimally acceptable" performance in the critical elements. *See Cochran v. Veterans Administration*, 35 MSPR 555, 556-58 (1987).
>
> That the agency had five rating levels against which to judge the appellant's *overall* performance, including a minimally acceptable level, is irrelevant. Under 5 CFR § 430.204(h), agencies are required to develop five summary rating levels for the employee's performance derived from the ratings on the critical elements and, at the agency's discretion, from the ratings on the noncritical elements. *Cochran*, 35 MSPR at 556. Here, the agency had the necessary 5-level plan, but it required the appellant to meet the defined performance standards in all critical elements to be rated even marginally acceptable. The appellant has not identified any error in this requirement, because an employee may be removed for failing to meet the

established performance standards in one or more of the critical elements of his position. *See* 5 USC §§ 4301(3) and 4302(b)(6).

The Board also attempted to explain (through indirection) the difference between a performance action based on single-level standards and multiple-level summary ratings in *Seplavy v. VA*, 41 MSPR 251, 252–54 (1989), involving a demotion:

> The agency charged the appellant with failing to satisfy the critical elements of Grounds Maintenance and Safety. Each of these elements only specified one level of performance. Relying on the Board's decision in *Donaldson* . . . the administrative judge found that these standards were invalid because "any assessment of performance must be extrapolated from the one set of performance guidelines." The administrative judge also found that this need to extrapolate adds a measure of subjectivity to the assessment of the employee's performance which is contrary to the mandate of 5 USC Chapter 43 that performance be judged, to the maximum extent feasible, on the basis of objective criteria. . . .
>
> We find, however, that the present case is distinguishable from *Donaldson*. In *Donaldson*, the Board found that a performance appraisal plan that requires the rating on an individual critical element to be extrapolated more than one level above and below the written standard may violate the objectivity requirement. . . . This holding, however, applies to the rating assigned to individual critical elements, and not to summary ratings of an employee's overall performance. *See Byrd v. Department of the Army*, 32 MSPR 300, 302 (1987), *as modified by Cochran v. Veterans Administration*, 35 MSPR 555 (1987).
>
> In the present case, there is no evidence supporting the administrative judge's finding that the agency established a system that requires extrapolation more than one level above or below the written standard for each critical element. The appellant's performance appraisal indicates that the written performance standards describe the "fully successful" levels of achievement. The appraisal also establishes that the appellant is rated on each critical element as "exceptional," "fully successful," or "less than fully successful." Thus, the performance plan does communicate the minimally acceptable level for the employee's retention in his position — performance at the level described in the standard itself. Although the appraisal does have a five-level evaluation system to determine the appellant's overall rating, this five-level system was not used to evaluate his performance on each critical element. We, therefore, conclude that the administrative judge erred in finding that the performance standards at issue are invalid. . . .

See also Sherrell v. Dept. of Air Force, 47 MSPR 534 (1991); *Clifford v. Dept. of Agric.*, 50 MSPR 232 (1991).

c. Two-Level, or Pass/Fail Rating System

Although a rating system may have but two levels (pass or fail), the standards supporting the system must still be objective and not absolute. *Johnson v. Dept. of Interior*, 87 MSPR 359 (2000), faulted an agency for absolute standards that did no more than describe, and did not measure, job performance. The Board's decision began by setting out the performance standards, id. at 363–64:

> QUALITY
>
> Knowledge of the Field or Profession: Maintains and demonstrates technical competence and/or expertise in areas of assigned responsibility.
>
> Accuracy and Thoroughness of Work: Plans, organizes, and executes work logically. Anticipates and analyzes problems clearly and determines appropriate solutions. Work is correct and complete.
>
> Soundness of Judgment and Decisions: Assesses task objectively and researches and documents assignments carefully. Weighs alternative courses of action, considering long and short term implications. Makes and executes timely decision.
>
> Effectiveness of Written Documents: Written work is clear, relevant, concise, well organized, grammatically correct, and appropriate to audience.
>
> Effectiveness of communications: Presentation meets objectives, is persuasive, tactful, and appropriate to audience. Demonstrates attention, courtesy, and respect for other points of view.
>
> Timeliness of Meeting Deadlines: Completes work in accordance with established deadlines.
>
> TEAMWORK
>
> Participation: Willingly participates in group activities, performing in a thorough and complete fashion. Communicates regularly with team members. Seeks team consensus.
>
> Leadership: Provides encouragement, guidance, and direction to team members as needed. Adjusts style to fit situation.
>
> Cooperation: Support team initiatives. Demonstrates respect for team members, accepts the views of others, and actively support team decisions.
>
> CUSTOMER SERVICE
>
> Quality of Service: Delivers high quality products and service to both external and internal customers. Initiates and responds to suggestions for improving service.
>
> Timeliness of Service: Delivers quality products and services in accordance with time schedules agreed upon with customer.
>
> Courtesy: Treats external and internal customers with courtesy and respect. Customer satisfaction is high priority.
>
> OTHER: No more than 4 validated customer complaints [will] be allowed.

Johnson continued describing the development of the performance standards, 87 MSPR at 364:

The agency further explained that the appellant's PIP gave content to these standards by instructing her to perform the following:

> Provide each requisitioner with a calendar/timeline outlining the estimated time from receipt of requisition through the solicitation process to award and delivery. In addition keep the requisitioner apprised of the status of the acquisition on a regular basis appropriate to the nature of the acquisition.
>
> Follow through with customers on promises made and explanations for any delays that may occur.
>
> Assure accuracy and thoroughness of work by reviewing incoming and outgoing documents.
>
> Assure that requisitioner receives copies of the fully executed acquisition documents.
>
> Provide clear concise instructions to requisitioners either orally or in writing on the preparation of agreements documents. When you need additional or specific information from your customer, you must be able to articulate the requirement, often in the most rudimentary terms. Especially with agreements, the process is one that is very different than other acquisition processes. If you are unable to do so, the customer questions your competency and will often seek other sources for services.
>
> Provide approved examples for requisitioners to follow and skeleton (fill in the blank) agreements in order to streamline the process for the requisitioner.

Johnson concluded that the standards were impermissibly absolute, 87 MSPR at 364–66:

> We find that, with the exception of the performance standard providing that no more than 4 validated customer complaints would be allowed, the performance standards, even as amended by the PIP notice, are invalid because they are improperly absolute. *See Callaway,* 23 MSPR at 597–600. In reaching this conclusion, we acknowledge that a two-tier performance system is permitted under the Office of Personnel Management's regulations. *See* 5 CFR § 430.208(d). We disagree, however, with the agency's claim that the generic performance standards it has developed under its two-tier system are valid.[1]
>
> [1] Our conclusion, however, is limited to the specific standards at issue in this appeal, and we do not reach the question of the general validity of all generic performance standards (or performance indicators).

The Office of Personnel Management (OPM) has provided guidance regarding the proper method for promulgating valid performance plans, including two-tier plans. *See* Office of Personnel Management, A Handbook for Measuring Employee Performance: Aligning Employee Performance Plans with Organizational Goals (1999) <http: // apps. opm. gov/ perform / wppdf / handbook. pdf>. This handbook[2] explains that all critical elements for a position must have performance standards, and it defines performance standards as "management approved expressions of the performance thresholds, requirements, or expectations that employees must meet to be appraised at particular levels of performance." *See also* 5 CFR § 430.203. It further states that each critical element must have a fully successful or equivalent standard, and that, in a two-level appraisal program, the fully successful standard describes a single point of performance, rather than a range. Any performance at or above that single point s fully successful, and any performance below is unacceptable. *Id.* at Chapter 3, Step 6, at 50.

> [2] While OPM's guidance in this handbook is not entitled to the force and effect of law, we find that it is entitled to weight in construing OPM's regulations concerning two-tier performance appraisal systems. *See Special Counsel v. Malone,* 84 MSPR 342, 356 n.9 (1999).

OPM also warned agencies, however, that the level of performance necessary for the employee to be retained in the job, such as the fully successful level in the present two-tier system, must not be impermissibly absolute, and must allow for some error. *Id.* at 51–52. It then provided the following examples of fully successful standards that would be considered improper absolute retention-level standards if used in a two-level appraisal program: "Work is timely, efficient, and of acceptable quality"; and "[c]ommunicates effectively within and outside of the organization." OPM explained that these standards are considered absolute because they appear to require that work is always timely, efficient and of acceptable quality, and that the employee always communicates effectively. *Id.* at 52.

All but one of the standards in the instant case suffer from this very deficiency. For example, they state the appellant must plan, organize and execute work "logically," that her work be "correct and complete," that her written work be "clear, relevant and concise," and that she complete work "in accordance with established deadlines." As written and fleshed out in the PIP notice, these standards are absolute because the appellant must always meet these requirements.

We further note that the standards at issue differ from the examples OPM cites as acceptable standards in Appendix C to its handbook. The Appendix provides examples of elements and standards that were written specifically for two-tier performance appraisal programs. One of the examples includes standards that, like the standards in the present case, require that tasks be "correctly" performed. Unlike the present standards, however, those acceptable standards further provide that the employee's supervisor is "routinely satisfied" that the tasks are correctly performed. It further states that, to meet the fully successful standard, the employee only need satisfy a majority of the specific items that need to be accurately performed. In contrast, the standards at issue in the present case do not provide for a supervisor's "routine satisfaction," or that work be correctly performed a "majority" of the time in order to successfully perform. Instead, the agency's standards require the appellant to correctly perform all but one of them all of the time.

Another example of acceptable standards contained in the Appendix requires that all of the tasks be accomplished to be fully successful. The standards, however, also state that the supervisor is "routinely" satisfied that the work is done properly. They further provide that some work is "generally" done by a certain date. As stated above, the appellant's standards here,

with one exception, instead require her to perform all of the work properly all of the time, without qualifying terms such as "generally" or "routinely." . They are, therefore, impermissibly absolute. *See Callaway,* 23 MSPR at 599 (absolute standards are those that fail to provide a basis for evaluating an employee as exceeding required performance); *see also Bronfman v. General Services Administration,* 40 MSPR 184, 187–88 (1989) (performance standards deemed improperly absolute where they described job duties without including the level of performance necessary for acceptable performance).

13. Standards Development

5 USC 4302(a)(2) provides that each agency shall encourage employee participation in developing performance standards. The Federal Labor Relations Authority stripped the requirement of significance when it ruled that labor unions could not require negotiation of performance standards. *NTEU and Dept. of Treasury, Bureau of the Public Debt,* 3 FLRA 768 (1980). The MSPB has done nothing to improve the situation. Many agencies do ask employees for their comments on standards, but comments can be disregarded, and some agencies do not bother to ask for comments at all. Once the standards are established, they may be supplemented, according to MSPB, by all types of communications from supervisors. What are the effects of the failure of an agency to solicit or provide a reasoned rejection of employee suggestions for standards? What constraints are there on the development of standards?

a. Employee Participation

If an employee defends against a performance-related action, including the denial of a step increase, on the basis that he was not given the opportunity to participate in the development of his performance standards, the defense asserted is an affirmative one. The employee bears the burden of proof on the issue. *Lim v. Dept. of Agric.,* 10 MSPR 129 (1982). The issue is then the right of the employee to participate in standards development. The answer, under *Beverly v. DLA, post,* is that there is no statutory or regulatory requirement that each employee have an opportunity to participate in the development of performance standards. 5 USC 4302(a)(2) does not require the agency to offer the appellant an opportunity to participate in the development of established standards prior to taking an action for unacceptable performance under Chapter 43. The statute does not create any substantive right for each employee to participate in the development of performance standards; it does establish that the encouragement of employee participation in the development of standards is a statutory requirement that cannot be overlooked by government agencies. *Beverly v. DLA,* 27 MSPR 600, 603–04 (1985), found unobjectionable standards developed 10 months before the appellant entered the position:

> [A]ppellant claims that the agency erred in not providing her with an opportunity to participate in the establishment of the performance standards for her position. 5 USC § 4302(a)(2) provides that *agencies* shall develop performance appraisal systems which encourage employee participation in establishing performance standards. However, there is no statutory or regulatory requirement that each employee have an actual opportunity to participate in the development of performance standards. The agency established performance standards for appellant's GS-5 Voucher Examiner position in March of 1982, almost 10 months before appellant entered the position in January, 1983. We cannot interpret 5 USC § 4302(a)(2) as requiring that the agency offer appellant an opportunity to participate in the development of established standards prior to taking an action for unacceptable performance under Chapter 43. Appellant fails to cite any precedent or theory which supports a finding that 5 USC § 4302(a)(2) creates such a right for an employee assuming a position for which standards have already been set with employee participation. Therefore, appellant fails to show any error in this regard.[6]
>
> [6] While 5 USC § 4302(a)(2) does not create any substantive right for each employee to have an actual opportunity to participate in the development of performance standards, it does establish that the encouragement of employee participation in the development of standards is a statutory requirement which cannot be overlooked by government agencies.

The Board found that an appellant submitted detailed comments on his standards before they were issued; the Board commented that "an employee's right to comment on proposed performance standards does not amount to veto power . . . ." *Smith v. Dept. of Agric.,* 64 MSPR 46, 58 (1994).

b. Personal Characteristics: Initiative, Reliability

The Board provided some guidance to agencies concerning standards development in *Callaway v. Dept. of Army,* 23 MSPR 592, 601 (1984), endorsing OPM guidance in (the now abolished) FPM Ch. 430, Subch. 2-4(a) (1980) discouraging use of performance standards to measure traits such as dependability, interest, reliability, and initiative, unless they are clearly job-related and capable of being documented and measured.

14. Changes in Standards

An agency may modify performance requirements as long as it does so according to a reasonable standard and makes the employee aware of the modifications. The agency is not required to alter the employee's position description to reflect changed requirements. *Archuleta v. DHHS,* 38 MSPR 648, 654 (1988); *Alexander v. Dept. of Commerce,* 30 MSPR 243, 248 (1986); *Smallwood v. Dept. of Navy,* 52 MSPR 678, 685 (1992) ("The only requirement imposed on an agency in changing a performance standard is that the agency communicate the standard to the employee at or before the beginning of the appraisal period which forms the basis of the action against the employee."). But agencies may not use a performance improvement period either to reduce or to increase the standards of performance established at the beginning of the appraisal period. *Brown v. VA,* 44 MSPR 635, 643 (1990) (allowing, however, that when standards are set for annual performance it is reasonable to establish a proportional numerical standard for the PIP, except in cases where seasonal or other variations in work load would make a

proportional standard unfair and inaccurate); *Smallwood v. Dept. of Navy*, 52 MSPR 678 (1992) (standard developed for measure of work over one year properly modified to measure work for the 90-day PIP). An agency may change performance standards for the employee at the point in time she is placed on a performance improvement plan, as long as the employee is given a *bona fide* opportunity to demonstrate acceptable performance, and as long as the changes do not unduly change performance requirements. *See Anthony v. Dept. of Army*, 27 MSPR 271, 273 n.* (1985) ("Here, as the presiding official found the changes in appellant's performance standards neither materially changed the performance expected nor posed any additional burdens on appellant."); *Boggess v. Dept. of Air Force*, 31 MSPR 461 (1986), *post*.

If an agency does make acceptable material changes in standards, the employee must be given an opportunity to perform under those standards before being rated and placed on a performance improvement period, assuming the agency ultimately desires to use the changed standards to support what may become an unacceptable performance action. In *Boggess v. Dept. of Air Force*, 31 MSPR 461 (1986), the appellant, a housing manager, was removed for unacceptable performance after the agency presented him with revised performance standards substantially different from prior standards and notified him that his performance was unacceptable and that he had 30 days to improve. The Board concluded that the agency was required to evaluate appellant's performance under the revised standards before it could give him a reasonable opportunity period to improve his performance under those standards. It was immaterial that the agency could have removed the appellant for unacceptable performance under his original standards. He had earlier been given a notice of unacceptable performance and an opportunity to improve under those standards. The new performance plan did not encompass the one performance standard earlier identified as warranting an unacceptable performance rating; accordingly, it could not be said that the new standards and opportunity period carried forward the deficiencies noted in the prior plan and opportunity period. The Board noted that under regulations then (and no longer) prevailing, 5 CFR 430.204(m) (1986), the agency was required to provide the appellant 90 days to demonstrate the quality of his work under the new standards and critical elements before rating him on his performance during that period. The Board distinguished the *Anthony* case, discussed earlier, observing that there the employee was not denied an opportunity to demonstrate acceptable performance, notwithstanding that standards were changed when she was placed on an improvement plan; the changed standards neither materially changed the performance expected nor posed added burdens on the employee.

If a standard is changed, the fairness of the revised standard may be challenged. That problem was explored in *Walker v. Dept. of Treasury*, 28 MSPR 227 (1985). The appellant was removed under Chapter 43 as a GS-4 Accounting Clerk for failure to meet one critical element entitled "controlled work." Appellant was required under the standard to screen, log, and distribute 400-700 pieces of correspondence each month. She was highly successful with but one error, fully acceptable with two errors, and marginal with three monthly errors. The standards were in effect for about six months, with an average error rate of nine per month, for the six months before appellant received an unacceptable rating. She was then given 30 days to improve but made ten errors during that month. Before the standard came into being, the appellant's performance requirements consisted of a percentage standard stating that errors above 14% of the correspondence constituted unacceptable performance. In the past the appellant met the old standard. Of these circumstances, the Board concluded that there had been an abuse of discretion, holding in *Walker*, 28 MSPR at 229:

> The agency's numerical performance standard in this case was clearly objective and set forth in writing. We do not believe, however, that the agency has demonstrated by substantial evidence that it was realistic or reasonably attainable. While an agency may properly decide to increase the quality and quantity of the performance it will require of its employees, it must do so according to a reasonable standard so that its application will not denigrate their rights. Here, under the previously acceptable percentage-based standard, the affected employees were held to an 86% efficiency requirement — equivalent to an average of approximately 77 errors per month — for acceptable performance. Under the current 3-error[s]-per-month numerical system, they are held to an approximately 99.5% efficiency standard. The agency attempted to demonstrate the reasonableness of the numerical standard by arguing, *inter alia*, that it had determined that the old error rate, based upon a percentage of the number of pieces of correspondence handled, "was not workable because the volume of work was not constant." As the appellant aptly notes in her petition, however, logic dictates that the fluctuation in the volume of correspondence handled would render a percentage-based standard significantly more objective and equitable than a fixed-number standard. . . .

As to the agency argument that it was important to have error-free work, the Board stated in *Walker*, 28 MSPR at 230-31:

> Finally, the agency argued that because of the potential impact of the appellant's errors on the efficiency of her supervisors' labors, as well as on the investors whom they served, it was "extremely important that [her] work be as error free as possible." However a review of the record does not reveal that the agency was able to show that the commission of what are essentially clerical errors in the performance of this critical element had nearly as grave a result as could be considered to warrant the imposition of the performance standard at issue. . . .
>
> We conclude that the agency abused its discretion in instituting and implementing the particular standard for the critical element at issue in this case. The requirement of near perfection in this critical element fails to provide a reasonable basis for rewarding an employee, but instead allows the agency to remove an employee, as it did here, on the basis of an extremely low monthly error rate. We therefore find that this contravention of 5 USC § 4302(b)(1) renders the performance standard invalid as a basis for measuring performance, and the appellant cannot be removed based on the invalid standard.

Revised performance standards cannot be retroactively applied. To do so would run afoul of the requirement that the standards be communicated to the employee at or before the beginning of the appraisal period that forms the basis of the action. *Talbot v. DHHS*, (Fed. Cir. 1989 nonprecedential No. 88-3237). *Cf. VA and AFGE Local 1765*, 43 FLRA 216 (1991) (standards not to be retroactively applied).

Assuming the appellant is on notice of standards and extensions of those standards through "performance indicators," a performance action is not invalidated because the agency did not modify the standards in accordance with its internal guidance to supervisors. *Mouser v. DHHS*, 32 MSPR 543 (1987).

a. Changes Through PIP

The PIP is not the time to materially change performance standards. *Betters v. FEMA*, 57 MSPR 405, 409–10 (1993), also noted that agencies generally ought not to use details to assess performance and held that:

> [I]n *Boggess v. Dept. of Air Force*, 31 MSPR 461, 462–63 (1986), the Board held that by simultaneously presenting the appellant with revised performance standards that were substantially different from the prior standards and notifying him both that his performance was unacceptable and that he had thirty days to improve, the agency failed to fulfill the substantive requirement of 5 USC 4303 to provide the appellant with a reasonable opportunity to improve. The Board found further that the appellant was entitled to an appraisal period under the revised standards and to a reasonable opportunity to improve *after* his performance was rated as deficient under those standards before the agency could properly initiate an action based on an unacceptable performance. . . .
>
> The administrative judge found that the agency's failure in this regard went further when the agency gave the appellant a new performance plan when he was placed on the PIP. This plan, too, differed significantly from that for the appellant's official position of record. Agencies may not use a PIP either to reduce or increase the standards of performance established at the beginning of the appraisal period. *See Brown v. Veterans Administration*, 44 MSPR 635, 643 (1990). Accordingly, we find no error in the administrative judge's finding that the agency improperly used a PIP to change the appellant's performance standards.

The Board cautioned against making improper changes in standards during a PIP in *Clifford v. Dept. of Agric.*, 50 MSPR 232, 236 (1991):

> In *Brown v. Veterans Administration*, 44 MSPR at 643, the Board held that an employee's performance pursuant to a PIP must always be reviewed in the context of the employee's performance plan, and that agencies may not use a PIP either to reduce or to increase the standards of performance established at the beginning of the appraisal period. In the present case, the initial decision's discussion . . . did not address the appellant's contention that his detail resulted in additional duties that prevented him from successfully completing his PIP. The initial decision should, therefore, discuss this matter on remand.

D. OPPORTUNITY TO IMPROVE

Unlike the adverse action based on poor performance, the unacceptable performance action is preconditioned upon notice of performance deficiencies and a fair chance to improve. The right to a meaningful opportunity to improve is one of the most important substantive rights in the entire Chapter 43 performance appraisal framework. *Adorador v. Dept. of Air Force*, 38 MSPR 461, 464 (1988) (relying upon *Zang v. Defense Investigative Serv.*, 26 MSPR 155 (1985)); *Thompson v. Farm Credit Admin.*, 51 MSPR 569, 578 (1991); *Vines v. Dept. of Defense*, 67 MSPR 667, 671 (1995) (nonprecedential opinion; Opinion of Chairman Erdreich). If the employee demonstrates acceptable performance during the improvement period or PIP provided by the agency, the agency is precluded from removing or demoting the employee solely on the basis of deficiencies that preceded and triggered the PIP. If the employee's performance is unacceptable during the PIP, the agency may base its action on that deficiency and need not also show deficient performance prior to the PIP. *Brown v. VA*, 44 MSPR 635, 640–41 (1990). It is the removal or downgrading that is appealable, not the PIP; that the appellant may be subjected to an appealable action as a result of his performance under a PIP is speculative and not a proper basis for the current assertion of jurisdiction. *Shaishaa v. Dept. of Army*, 58 MSPR 450, 454 (1993). But a PIP may be a threatened personnel action for purposes of an Individual Right of Action appeal, discussed in Chapter 13. *See Gonzales v. DHUD*, 64 MSPR 314 (1994) (a performance improvement period plan involves a threatened personnel action, such as a reduction in grade or removal).

In practice, the PIP often translates into detailed performance requirements and deadlines, coupled with periodic counseling or work reviews. Improvement during the performance improvement period ("PIP") as a result of the individual development plan ("IDP"), as the opportunity period and notice of deficiencies are sometimes called, can salvage the employee. The improvement period is a significant step: An agency can properly consider an appellant's performance following its issuance of a requirement letter to determine whether his performance fell short of satisfactory for any targeted critical element of his position, and to determine whether performance-based action is warranted. *O'Hearn v. GSA*, 41 MSPR 280 (1989). But an agency cannot remove an employee for substandard performance prior to the opportunity period if the employee's performance during the opportunity period is adequate. *See Siedle v. Dept. of Interior*, 35 MSPR 241, 251 n.14 (1987) (not addressing the situation of the employee whose performance slips to unsatisfactory following the close of the opportunity period). In some organizations opportunity periods are no more than formalities preceding a termination that is preordained. Some agencies ensure that managers make a sincere effort to secure an employee's improvement. Whatever the philosophy, if it can be called that, of a particular agency, the Board has established a few requirements for agencies to follow as to the statutorily-required improvement period.

1. Prerequisite of Unsatisfactory Performance

It is unacceptable performance that triggers the unacceptable performance action through the notice of an opportunity to improve. An agency that rates an employee's performance as marginal may not give the employee an improvement period, then rate the employee and take action on the basis of subsequent unacceptable performance. If the action taken is removal, it must be reversed. The employee has not been given a reasonable opportunity to demonstrate acceptable performance. *Colgan v. Dept.*

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-7474

JOHN R. SELLERS,
Petitioner,

v.

LYNN MARTIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
and TENNESSEE VALLEY AUTHORITY,
Respondents.

On Petition for Review of a Final
Decision and Order of the
Secretary of Labor

BRIEF FOR THE SECRETARY OF LABOR

STATEMENT OF JURISDICTION

The Secretary of Labor had jurisdiction of this matter pursuant to Section 210(b), the employee protection provision of the Energy Reorganization Act of 1974 ("ERA" or "Act"), as amended, 42 U.S.C. 5851(b). The Secretary of Labor issued her final decision and order on April 18, 1991, and Petitioner has filed a timely appeal from the Secretary's order. Section 210(c)(1) of the ERA, 42 U.S.C. 5851(c)(1), grants this Court jurisdiction to review the Secretary's decision.

clearly not protected activity. See Rollins v. State of Florida Department of Law Enforcement, 868 F.2d 397, 400 (11th Cir. 1989) (Title VII's anti-retaliation provision shields an employee regardless of the merits of her complaint, only if she can show a good faith, reasonable belief that the challenged practice violates Title VII). Thus, the Secretary properly regarded January 24, 1989, the date of the NRC complaint, as the critical date in her analysis of the record.

2. Even assuming arguendo that Sellers' January 5, 1989 complaint was protected activity, the record still amply demonstrates that the TVA had legitimate, nondiscriminatory reasons for Sellers' termination

An "employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all as long as its action is not for a discriminatory reason." Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1187 (11th Cir. 1984) (citation omitted). Accord Ad Art, Inc. v. NLRB, 645 F.2d 669, 679 (9th Cir. 1981); L'Eggs Products, Inc. v. NLRB, 619 F.2d 1337, 1341 (9th Cir. 1980). The employee who is incompetent, or insubordinate, or has become inefficient cannot use his protected activity as a shield against a discharge for non-discriminatory reasons. Ad Art, Inc. v. NLRB, supra; L'Eggs Products, Inc. v. NLRB, supra; NLRB v. Red Top, Inc., 455 F.2d 721, 726-728 (8th Cir. 1972); see also NLRB v. Knuth Brothers, Inc., 537 F.2d 950, 953 (7th Cir. 1976) (The statute "does not immunize an employee from discharge for acts of ... misconduct merely because those acts were associated with protected

instruction of his supervisor, Smith, arguing that it was not in compliance with the work plan (T. 32). Sellers' co-worker Billy Tidwell, who was Sellers' work partner at the intake pump that day, testified, however, that Smith's instruction to the crew was not in any way a violation of the work plan or any TVA procedure, nor out of the ordinary (T. 144). Yet, in Tidwell's words, Sellers became "outraged" and used "abusive language" because Smith had directed them to build their hangar like a hangar already constructed by another member of the crew (DX 12-1). As already discussed (see supra p. 23) on that same day, upon Smith's return to the work site after the earlier argument, yet another confrontation occurred, this time concerning the lack of progress in the work. Sellers again became belligerent and used profanity (T. 103, 107, 187, 188).

The record facts regarding this incident make it very clear that, on this occasion, as on many others both before and after January 1989, Sellers resented supervision (see T. 188), and this resulted in repeated conflicts with management. In enacting anti-discrimination provisions such as the one involved here, Congress did not seek "to tie the hands of employers in the objective selection and control of personnel." Hochstadt v. Worcester Foundation For Experimental Biology, 545 F.2d at 231. The "protective mantle" of such provisions must be "tempered by the employer's right to exact a day's work for a day's pay and to maintain discipline ...." Caterpillar Tractor Co. v. NLRB, 230 F.2d 357, 358 (7th Cir. 1956). See also TRW, Inc. v. NLRB, 654

ENCLOSURE 4

United States
Nuclear Regulatory Commission

Report of Review

MILLSTONE UNITS 1, 2, AND 3:

Allegations of Discrimination in NRC Office of Investigations Case Nos. 1-96-002, 1-96-007, 1-97-007, and Associated Lessons Learned

Millstone Independent Review Team

March 12, 1999

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Attachments:

REPORT OF REVIEW OF ALLEGATIONS IN NRC OFFICE OF INVESTIGATIONS CASE NOS. 1-96-002, 1-96-007, 1-97-007, AND ASSOCIATED LESSONS LEARNED

In accordance with Chairman Jackson's January 28, 1999 tasking memorandum and the Chairman's February 9, 1999 memorandum establishing a charter for the Millstone Independent Review Team (MIRT), we have conducted a review of Office of Investigations (OI) Case Nos. 1-96-002, 1-96-007, and 1-97-007, all of which were described or referenced in the Office of the Inspector General (OIG) Event Inquiry, Case No. 99-01S (Dec. 31, 1998) [hereinafter OIG Report]. Based on that review, we have concluded the following:

1. With respect to Case No. 1-96-002, as described in Attachment 2, the available evidence is sufficient to support the conclusion that the two allegers were the subjects of discrimination in violation of 10 C.F.R. § 50.7.

2. With respect to Case No. 1-96-007, as described in Attachment 3, the available evidence is insufficient to support the conclusion that the three allegers were the subjects of discrimination in violation of section 50.7.

3. With respect to Case No. 1-97-007, as is described in Attachment 4, the available evidence is sufficient to support the conclusion that the alleger was the subject of discrimination in violation of section 50.7.

Further, although we find there is an adequate basis for a finding of discrimination in two of these three cases, we recommend that no enforcement action be taken. Our conclusion in this regard is based on the utility's apparently successful response to the remedial requirements already imposed by the agency to correct discrimination at the Northeast Utilities System (NU) Millstone facility.

In section II of this report, we summarize the results of our review of each of the three cases and, having concluded there is a sufficient evidentiary basis for proceeding in two of these cases, in section III explain our recommendation regarding appropriate enforcement action.

In addition, based on our review of the OI investigative materials for these cases and the information provided in connection with background interviews conducted by the MIRT with individuals from the Office of the General Counsel (OGC), the Office of Enforcement (OE), OI, and OIG, we have concluded there are certain "lessons learned" that can be drawn relative to the investigative and enforcement processes that were utilized in these cases. These are set forth in section IV of this report. Moreover, as requested in the Chairman's January 28, 1999 memorandum, and as an introduction to our discussion regarding the merits of the individual OI cases, in section I of this report we provide a

discussion of the "standard of review" for initiating enforcement cases concerning violations of the provisions of 10 C.F.R. § 50.7 that afford individuals protection from discrimination based on their involvement in "protected activities."

Gary K. Hamer, Supervisory Investigator with the United States Office of Special Counsel (OSC), acting as an expert advisor to the MIRT, participated in our background interviews and discussions regarding the attached case studies, and reviewed the final case studies and this report. He agrees with the conclusions and recommendations made in this memorandum and the accompanying case studies.

Also acting as an expert advisor to the MIRT was Alan S. Rosenthal, former Chairman of the NRC Atomic Safety and Licensing Appeal Panel and the General Accounting Office Personnel Appeals Board. He likewise participated in our background interviews and discussions regarding the attached case studies, and reviewed the final case studies and this report. His views concurring in the contents of this report and the attached case studies are included as Attachment 5.[1]

[1] The Review Team would like to express its appreciation to the administrative staff of the Atomic Safety and Licensing Board Panel, in particular Jack Whetstine, Sharon Perini, Allene Comiez, and James M. Cutchin, V, for their invaluable assistance in the preparation of this report.

I. EVIDENTIARY STANDARD OF REVIEW

Before providing our analysis of the particular OI cases, we outline the general standard of review we consider appropriate for reaching a decision about whether there is an adequate evidentiary basis to proceed in connection with each of these cases. It should be noted, however, that this is not the equivalent of a determination about whether to actually proceed with an enforcement action. Although a determination about whether there is an adequate evidentiary basis to sustain a discrimination allegation may be a substantial factor in making a decision to proceed with an enforcement action, that enforcement decision also involves consideration of the exercise of enforcement discretion, with all of its policy and resource implications.

A. Four Elements for Review in Discrimination Cases

We discussed with both OE and OGC the standard they currently use to determine when an enforcement case should be instituted relative to claimed violations of section 50.7. We were provided with a copy of guidance recently prepared by OGC for use by the staff in determining whether discrimination occurred in violation of section 50.7. In that memorandum, a copy of which is included as Attachment 1, OGC describes an analytical framework for determining whether discrimination occurred, pertinent parts of which we summarize below.

As this guidance is relevant to the three cases we were asked to review,[2] four elements are of critical importance:

1. Did the employee engage in protected activity?

To answer this question requires a determination about whether the employee took some action to raise or advance a nuclear safety concern. As the OGC memo notes, activities might include instituting an NRC or Department of Labor (DOL) proceeding, documenting safety concerns, or an internal or external expression of safety concerns.

2. Was the employer aware of the protected activity?

This element necessitates a finding that the employer knew about the employee's nuclear safety concern or activities to advance the concern. An employer would not be liable for violating section 50.7 if an employee failed to articulate a safety concern in a way that brought it to the employer's attention.

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[2] As the OGC memo notes, other elements, such as whether the individual who is the subject of the claimed discrimination is an "employee," may be involved; however, they are not at issue in the OI cases we reviewed.

3. Was an adverse action taken against the employee?

To satisfy this component, it is necessary to conclude that the employer visited some detrimental effect on the employee's terms, conditions, or privileges of employment. As OGC points out, this could include a variety of actions ranging from actual termination to the threat to take some detrimental action.

4. Was the adverse action taken because of the protected activity?

This requires a finding that there is a causal link between the adverse action and the protected activity. Thus, in considering an employer-articulated reason for taking an adverse action that invariably is interposed to demonstrate the action was not taken because of an employee's protected activity, it is necessary to determine whether (1) the articulated reason is a pretext intended to conceal an action taken solely because of protected activity; or (2) the articulated reason is part of a dual motive for the action in that there was both a legitimate and an improper, discrimination-based reason for the action, with the latter being a "contributing factor" to the action.[3]

B. Standard for Determining Whether There Is A Sufficient Evidentiary Basis to Institute an Enforcement Action

1. Nature of the Evidence in Discrimination Cases

Although all four of the items described above are necessary to make out a case of discrimination under section 50.7, the fourth item is the most problematic, both generally and in the cases we were asked to review. This is because it is rare that this crucial element can be established by so-called "smoking gun" evidence, i.e., evidence that irrefutably shows the adverse action was pretextual. (The clearest example of such evidence would be an admission by the official of the employer who was directly responsible for the adverse action that he or she took that action against the employee because the employee engaged in protected activity.)

Instead, what usually is available from an investigation into a section 50.7 discrimination allegation is testimony and documentary information, often conflicting, that provides circumstantial evidence of whether an adverse action was taken because an employee engaged in protected activity. Circumstantial evidence is "evidence that tends to prove a fact by proving other events or circumstances which afford a basis for a reasonable inference of the occurrence of the fact in issue." Webster's New Collegiate Dictionary 203 (1975) [hereinafter Webster's Dictionary]. In the context of a discrimination case, relying on circumstantial evidence means that the requisite factual

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[3] The question of the degree to which the protected activity must be a consideration in the employer's determination to take an adverse action so as to be a "contributing factor" is discussed further in section I.C.2 below.

finding that adverse action was taken because of the protected activity would be the product of a reasonable inference drawn from other proven events or circumstances in the case.

In so describing what is often the central supporting material in discrimination cases, it should not be supposed that because the information is circumstantial, the cases are somehow rooted in weak or deficient evidence. All cases, including a criminal case that must be proven with the highest degree of certainty, i.e., beyond a reasonable doubt, legitimately can be based wholly on circumstantial evidence. Indeed, such evidence, often the result of a painstaking exercise in drawing inferences (or more specifically reasonable inferences) based on the factual circumstances that are presented, can be as convincing as the "smoking gun."

One other comment is appropriate regarding the nature of circumstantial evidence. Based as it is upon the ability to draw "reasonable inferences," it is a somewhat subjective notion. As is often said, "reasonable people can differ." Thus, there is room for judgments to diverge about the extent to which any given circumstance or set of circumstances is sufficient to create an inference about the fact in issue, i.e., in section 50.7 discrimination cases, whether there is a sufficient causal nexus between the protected activity and the adverse action.

2. Evidentiary Basis for Enforcement Action

With this background, the question remains about the basis on which a decision should be made whether there is sufficient evidence to institute an enforcement action in a section 50.7 discrimination case, particularly with regard to the problematic fourth element. This being said, there appear to be four possible "burden of proof" constructs within which to frame a decision about whether there is sufficient evidence to conclude that a violation of section 50.7 occurred. In ascending order of difficulty these are: (1) the prima facie case; (2) preponderance of the evidence; (3) clear and convincing evidence; (4) beyond a reasonable doubt. And in the context of a discrimination case relative to the question of whether an adverse action was taken because of a protected activity, they might be summarized as follows:

a. Prima facie case – is there evidence that shows temporal proximity between the protected activity and the adverse action (as this standard is utilized in DOL discrimination cases, described further below, this is usually one year).

b. Preponderance of the evidence – it is more likely than not (more than a 50-50 case) that the adverse action was pretextual or that protected activity was a "contributing factor" in the adverse action.

c. Clear and convincing evidence – is there evidence that shows with reasonable certainty or a high probability that the adverse action was

pretextual or that the protected activity was a "contributing factor" in the adverse action.

d. Beyond a reasonable doubt -- is there evidence that is clear, precise, and indubitable or that establishes to a moral certainty that the adverse action was pretextual or that the protected activity was a "contributing factor" in the adverse action.

From this group, the most obvious candidate is the preponderance of the evidence standard. As the OGC memorandum correctly indicates, this is the standard to be applied if an administrative hearing is held on an agency enforcement case charging discrimination. In contrast, invoking the clear and convincing evidence or beyond a reasonable doubt standards seems unnecessary. Either would put the agency to a higher standard of proof to lodge a charge than it would need to actually prove that charge if it is challenged. It is not apparent why imposing this burden on the enforcement process might be warranted.

So too, the lower standard used to establish a prima facie case seems inappropriate. That standard is used in cases brought before DOL under section 211 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851, both in making a decision to institute an agency investigation of an employee's discrimination complaint and in the initial stages of the administrative hearing regarding the validity of the individual's challenge. In DOL hearings, the shifting allocation of burdens that begins with the complainant's need to establish a prima facie case recognizes the inherent difficulty an individual faces in bringing a case that is likely to be based on circumstantial evidence about unspoken motivations. As similarly is true in the equal employment opportunity (EEO) arena, providing that only a prima facie case must be established to shift the burden back to the employer to show it did not act improperly "is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 n.8 (1981). In DOL cases, the prima facie case generally is established by utilizing a inference (or presumption) based on temporal proximity. Once established, the employer is then required to show that the adverse action was motivated by legitimate, nondiscriminatory reasons. Ultimately, however, the burden rests on the complainant to show by a preponderance of the evidence that the employer's adverse action was taken because of the employee's protected activity.

In the context of NRC discrimination cases, one of the significant justifications for the burden shifting that is at the heart of the prima facie case seems to be lacking. With its resources and access to licensee employees and documentation by way of its investigative processes, this agency should be able to look into allegations of discrimination in a way that allows development of a significantly more concrete evidentiary record than the average employee in a DOL hearing. Accordingly, it makes sense for the decision about whether there is a sufficient evidentiary basis to proceed to be based on an assessment of how strong the case is in relationship to the ultimate

standard of proof -- preponderance of the evidence. Compare U.S. Department of Justice, Principles of Federal Prosecution 5-6 (July 1980) (government attorney should commence or recommend federal prosecution if he or she believes that a person's conduct constitutes a federal offense and that admissible evidence will probably be sufficient to obtain a conviction).

Accordingly, in assessing these and other discrimination cases, we believe the appropriate "evidentiary" standard should be:

> Whether, based on all the available evidence, there is information sufficient to provide a reasonable expectation that a violation of section 50.7 can be shown by a preponderance of the evidence.

In the context of this standard, as the OGC memorandum suggests, Attachment 1, at 2 n.1, we would consider the "available evidence" to include all the information accessible to those making the enforcement decision, regardless of whether it would be considered admissible in an adjudicatory hearing.[4] Further, we note that, because this standard is based on a "reasonable expectation" of what can be shown, there is room for differing informed judgments about when the requisite expectation has been fulfilled.

C. Additional Considerations

Having outlined this general standard, we think two additional, related points require some mention.

1. Evidentiary Basis to Charge Company v. Individual Company Officials

From the information gathered as part of the OIG investigation, there seems to be some uncertainty about whether there is a difference in the evidentiary standard when enforcement action is being considered against a company, as opposed to the company employees who are alleged to have been the actors in the adverse action. There is a suggestion that, for the latter, there should be a somewhat higher standard, going more toward the clear and convincing side of the evidentiary spectrum. As far as we can ascertain, however, the applicable statutory or regulatory provisions regarding discrimination do not distinguish between the company and its employees in terms of

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[4] As the OGC memorandum appears to recognize, see Attachment 1, at 3, making a decision based on "available" rather than "admissible" evidence does not relieve those entrusted with making the decision on whether to go forward from candidly considering the strength of that evidence, which should include possible admissibility problems. In the administrative context, however, "admissibility" is a more flexible concept that allows the use of evidence, such as hearsay, that would not be permitted in a judicial proceeding. See, e.g., Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-863, 25 NRC 273, 279 (1987).

culpability or liability. Accordingly, in both instances, the evidentiary standard must be the same.

What may lead to different treatment is the exercise of enforcement discretion. Even with a determination that there is an adequate evidentiary basis for finding a violation, as the Enforcement Policy indicates, the agency has wide discretion in determining when to act against companies or individuals that violate its requirements. Relative to discrimination cases, any number of factors may be relevant to bringing charges against individuals, including the seriousness of the violation, whether the individual has committed previous violations, and the company's efforts to correct any violation both as to the company employee involved in the adverse action and the employee who was the subject of the action.

Ultimately, it is important not to confuse the standard being utilized to determine whether a case has a sufficient evidentiary basis to go forward and the associated exercise of enforcement discretion to ensure that all applicable agency policy and resource considerations are given appropriate consideration.

2. Protected Activity as a "Contributing Factor" in Dual Motive Cases.

As we have already noted, in "dual motive" cases the question that must be confronted is whether the protected activity was a "contributing factor" in the adverse action. It might be asked, however, what is the meaning of "contribute" in terms of the quantitative or qualitative addition that the protected activity made to the decision to bring an adverse action?

One suggestion we encountered was to apply a "but for" analysis, whereby one would find the protected activity to be a contributing factor if one could reasonably conclude that "but for" the protected activity, the adverse action would not have been taken. This, however, seems to set the bar too high, because it essentially requires that the protected activity be a predominate reason for the adverse action. On the other hand, if the protected activity played a role in the adverse action that was the equivalent of adding "a drop of water into the ocean," would that provide a sufficient evidentiary basis for going forward? Common sense suggests that it must be something more.

"Contribute" is defined as "to play a significant part in bringing about an end or result." Webster's Dictionary at 247. And, in turn, "significant" is defined as "having or likely to have influence or effect." Id. at 1079. These definitions, in concert, arguably strike the proper balance. And consistent with their terms, knowledge that an employee has engaged in protected activity by the company official taking the adverse action, standing alone, would not be enough to establish that the protected activity was a "contributing factor." Instead, there would need to be an adequate evidentiary basis, i.e., a preponderance of the evidence, for a reasonable inference that the company official had some motivation or impetus relating to the protected activity that, in some meaningful way, was an ingredient in the decision to take the adverse action.

II. ANALYSIS OF CASES

A. Case Review Process

In accordance with the directive in Chairman Jackson's January 28, 1999 memorandum, the review team evaluated three OI cases involving discrimination allegations. Although all the team members and team advisors familiarized themselves with each of the cases, an individualized, in-depth review of each of the cases was conducted by a single team member or advisor who provided a report on his or her conclusions.

For these in-depth studies, the case reviewer had available the OI case report; all supporting exhibits; the OI investigative file for the case, which included correspondence and investigator notes; and the OE file for the case. In addition, relative to Case Nos. 1-96-002 and 1-97-007, team personnel conducted interviews with the OI investigators with principal responsibility for those cases to clarify questions about the scope of the investigation that was conducted. Further, relative to Case No. 1-96-007, the in-depth review included consideration of the October 2, 1996 NRC Task Force Report and associated attachments; a December 10, 1997 OI Investigator memorandum; the investigative report in another OI case, No. 1-90-001, along with two interview reports conducted in connection with that case; and a February 4, 1999 letter to Chairman Jackson from one of the allegers. Also in connection with that case, the team reviewed additional comparative information regarding the employees who were in the final pool considered for termination that OIG obtained from NU as part of the inquiry that resulted in the OIG December 1998 report. Finally, also considered in Case No. 1-96-002 were SECY-98-292, Proposed Staff Action Regarding Alleged Discrimination Against Two Employees at Northeast Utilities (EA 98-325) (Dec. 21, 1998); Commissioner vote sheets concerning that SECY paper; and letters dated January 19, January 27, February 9, and February 23, 1999, from one of the allegers to OIG that were referred to the review team for its consideration.[5]

Besides this case specific information, team personnel also reviewed various "generic" documents in an attempt to acquire an understanding of the overall situation at Millstone during the relevant time period. These included: Confirmatory Order Establishing Independent Corrective Action Verification Program (Effective Immediately) (Aug. 14, 1996); NRC Office of Nuclear Reactor Regulation, Millstone Lessons Learned Task Group Report, Part 1: Review and Findings (Sept. 1996); Order Requiring Independent, Third-Party Oversight of Northeast Nuclear Energy Company's Implementation of Resolution of Millstone Station Employees' Safety Concerns (Oct. 24, 1996) [hereinafter October 1996 Order]; SECY-97-036, Millstone Lessons Learned Report, Part 2: Policy Issues (Feb. 12, 1997); SECY-98-090, Selected Issues Related to Recovery of Millstone

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[5] OIG advised the team that the alleger was informed of the referral of the January 1999 letters.

Nuclear Power Station Unit 3 (Apr. 24, 1998); SECY-98-119, Remaining Issues Related to Recovery of Millstone Nuclear Power Station, Unit 3 (May 28, 1998); SECY-99-10, Closure of Order Requiring Independent, Third-Party Oversight of Northeast Nuclear Energy Company's Implementation of Resolution of the Millstone Station Employees' Safety Concerns (Jan. 12, 1999); Transcript of Meeting on Status of Third Party Oversight of Millstone Station's Employee Concerns Program and Safety Conscious Work Environment (Jan. 19, 1999).

Each of the individual case studies was subjected to critical analysis by all team personnel. The case studies have been adopted by all of the team members and, as is noted above, each has been endorsed by the team's advisors.

B. Discrimination at Northeast Utilities

As is noted above, each of the three cases assigned for independent review was evaluated in terms of its individual merits as reflected by the documentary and testimonial evidence obtained in the course of the OI investigation. Nonetheless, given the circumstantial nature of the body of that evidence, in reaching a conclusion respecting whether discriminatory action on the part of NU management occurred it was necessary in each case to draw inferences from the established facts.

This function was undertaken against the background of an order issued in late 1996 on behalf of the Commission by the Acting Director of the Office of Nuclear Reactor Regulation with regard to the operating licenses held by NU for the three Millstone units. As noted in its caption and further developed in its text, the order imposed a requirement that there be independent, third-party oversight of NU implementation of a mandated "comprehensive plan for reviewing and dispositioning safety issues raised by [its] employees and ensuring that employees who raise safety concerns are not subject to discrimination." October 1996 Order at 7.

As justification for imposing the requirement, the order observed that it was addressing "past failures in management processes and procedures for handling safety issues raised by employees, and in ensuring that the employees who raise safety concerns are not discriminated against." Id. at 2. The order went on to note the Commission's concern regarding the manner in which NU "has treated employees who brought safety and other concerns to the attention of [its] management." Id.

Still further, the order pointed to NU completion in January 1996 of its review of "the effectiveness of its Nuclear Safety Concerns Program (NSCP) in taking corrective actions related to employee concerns and ensuring that the employees who raise concerns are treated appropriately." Id. at 3. According to the order, that review led to findings "similar to those of previous [NU] assessments, studies and audits performed since 1991." Id. at 4. Among those "common findings" was one to the effect that management "tended to punish rather than reward employees who raised safety concerns." Id. Moreover, the review disclosed that many of the past problems it

identified still existed because prior recommendations had not been implemented "in a coordinated and effective manner." Id.

The cases before us involve allegations of discriminatory action in 1993, 1995, and 1996, respectively. Thus, they called for an examination of events occurring in the period during which, according to the Commission order, there were significant deficiencies in the manner in which NU was treating employees who raised safety concerns.

Standing alone, that consideration could not be deemed dispositive in assessing the merit of the allegations at hand. Stated otherwise, it does not necessarily follow from the fact there may have been numerous instances of discriminatory action in the relevant time period that the individual allegers with whom we are concerned were among the victims.

At the same time, however, the revelations contained in the Commission order manifestly could be taken into account in circumstances where the OI investigation was found to have produced sufficient independent evidence to support an inference that a nexus existed between the alleger's dismissal or demotion and the protected activity in which he had previously engaged. More specifically, NU's unenviable track record in dealing with employees who had raised safety concerns could properly serve in such circumstances to buttress the independently drawn inference of improper management conduct. Additionally, although seemingly not the situation in any of the cases at hand, had the OI record allowed a choice between equally plausible opposing inferences respecting the likelihood that protected activity was an influencing factor in the adverse personnel action, that track record might well have tipped the balance in favor of a finding of discrimination.

Against this backdrop, we provide the following synopsis of our review and conclusions regarding each of the three cases.[6]

C. Case No. 1-96-002

OI Case No. 1-96-002 involved two supervisors who were demoted in the course of a "reintegration," i.e., reorganization, of NU's nuclear engineering functions in November 1993. Both employees maintained that their demotions, to the positions of senior and principal engineer, respectively, were prompted by the fact that they had raised and championed a variety of safety issues in the two years preceding the reorganization. Indeed, just days before the announcement of the reorganization, both had raised

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[6] In connection with the foregoing discussion, we note that the totality of the record before us does not support the conclusion that discriminatory circumstances at NU were so "pervasive and regular" with respect to the individual allegers as to constitute a "hostile work environment" as that concept is outlined in the OGC guidance memorandum. See Attachment 1, at 2.

controversial safety issues with the vice president who presided over the process that led to their demotions.

The reorganization involved not merely first-level supervisory positions such as those held by the employees here involved but, as well, higher-level positions including those held by vice presidents. The process of determining with whom the various positions would be filled was, however, not the same in all instances.

In the case of managers, directors, and vice presidents, each candidate for such a position received a formal assessment based upon the consideration of a number of competency factors and a numerical rating that ultimately influenced the placement decisions. In the case of the first-level supervisory positions, however, there was no equivalent evaluation of employees who were supervisors at the time. The selection for those positions was made from a pool consisting of incumbent supervisors and employees who either had some experience as acting supervisors or no supervisory experience at all. The managerial potential of only the forty to fifty employees not in supervisory positions was assessed. Those employees were then ranked in four quartiles.

The actual supervisory position selections were made at a meeting presided over by a vice president and attended by, among others, persons who had already been tapped for director positions in the reorganized engineering structures. Apart from the quartile ratings for the potential supervisors, there was no written material -- such as performance appraisals -- available to the selecting officials. Moreover, it appears that, in order to receive any consideration, a candidate had to be proposed by one of those officials. According to the presiding vice president, the objective of the selection process was to determine which candidates would be the "best fit" in the positions that survived the reorganization.

Whether or not the names of the two allegers were ever mentioned, the OI record indicates that apparently neither received any consideration at all. In the totality of the circumstances disclosed by the OI record, we concluded that it could and should be inferred that this failure was influenced by the employees' prior protected activity. Among other things, both individuals had strong performance appraisals that reflected attributes that would appear to have been what was being sought in the quest for the "best fits." Beyond that, one of the allegers was replaced as a supervisor by an individual (a prior mere acting supervisor) who was not shown to have possessed qualifications lacking in the alleger.

All in all, the officials involved in the selection process did not supply a credible explanation respecting why neither alleger was worthy even of consideration for retention in supervisory positions in which they had performed well in the past. Given the totally subjective nature of the selection process for supervisory positions, this shortcoming could be deemed pivotal on the question of whether their protected activity influenced their non-selection.

Consequently, we have concluded with respect to this case that, based on all the available evidence, there is information sufficient to provide a reasonable expectation that a violation of section 50.7 can be shown by a preponderance of the evidence.

D. Case No. 1-96-007

OI Case No. 1-96-007 involved three individuals whose employment was terminated in January 1996, along with ninety-nine other employees, as part of a workforce reduction program. Each employee alleged that his inclusion in the reduction was brought about by reason of his involvement in protected activity.

Employees under consideration for termination under the workforce reduction program were evaluated and ranked, on a matrix, with their peers in a number of specific areas of competence. With input from their supervisors, managers were responsible for completing the matrices and were to base their scores on the employee's last two performance reviews and a prediction of how the employee was likely to perform in the future organization. The review procedure in connection with the completed matrices included an examination of those of certain employees who had raised safety concerns. The purpose was to ensure that they had not been targeted specifically for reduction. The three allegers were on this so-called "added assurance" review list.

In the case of the division in which each of the allegers was employed, it was ultimately determined that a total of four employees were to be terminated. On the basis of their low relative rankings on the matrices, the allegers were included in that group.

Because the matrices of the employees not terminated were destroyed in the interim, an inquiry into whether there was invidious disparate treatment of the allegers has been foreclosed. The OI record, however, not only confirmed that the allegers had faired poorly in the evaluation process, but also negated any suggestion that their low rankings might have had discriminatory underpinnings. The content of their matrices was furnished by first and second-level supervisors without any discernible reason to provide the allegers with unjustifiable low evaluations in retaliation for their protected activity. More important, peers of all three allegers confirmed the existence of performance shortcomings that readily justified the rankings that were given to them. There was some suggestion that the vice president in charge of the division in which they worked may have acted against them because of his knowledge either of the past involvement of two of the allegers with a well known Millstone whistleblower or as a result of his service on a board that reviewed the other alleger's appeal of his 1994 performance evaluation. In the totality of circumstances, however, we could not discern a sufficient basis for a finding that the protected activities of one or more of the allegers was a factor involved in their inclusion in the workforce reduction.

In this regard, we have considered the concerns expressed by the NRC Task Force and the OI investigator with principal responsibility for this case. On analysis of these concerns, our assessment of the record before us remains unaltered.

Consequently, we have concluded with respect to this case that, based on all the available evidence, there 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.

E. Case No. 1-97-007

OI Case No. 1-97-007 involved an electrical engineering supervisor whose employment was terminated in August 1995. The assigned justification for that action was that his performance in that role was unsatisfactory and, under a newly-formulated accountability philosophy, in such circumstances dismissal rather than demotion was required. The employee insisted, however, that his dismissal was in retaliation for his having immediately reported to higher-level management a threat he had allegedly received from his immediate superior approximately nine months earlier. As he had interpreted the threat, he was being told that, if modifications on a Millstone Unit 2 safety-related system extended a refueling outage then in effect, he and a subordinate engineer assigned to the project would be fired. Thus, he was being at least implicitly directed to cut corners if necessary to ensure that the project did not hold up resumption of Unit 2 operation.

Our analysis of the record persuaded us that the reason assigned for the employee's termination was pretextual and that, in actuality, he was a victim of discriminatory action based upon his protected activity in reporting the threat. Two considerations principally undergird this conclusion.

First, the management officials responsible for the termination decision maintained that, in the 1994-95 time period, his supervisory performance was so poor that resort to a performance improvement plan would have served no good purpose. (Subsequently, a grievance committee ordered his reinstatement on the ground that company and departmental policy had required that he be given an opportunity to improve his performance.) Yet, the employee had become a supervisor in the early 1980s and the OI investigation revealed that, up to 1994, his performance appraisals were unblemished.

Second, the primary assigned example of assertedly poor supervisory performance involved an untoward incident that occurred when the employee was on vacation. The explanation given by management for nonetheless holding him accountable for the incident was specious. Moreover, the individual found principally responsible for the incident was later given supervisory responsibilities.

Consequently, we have concluded with respect to this case that, based on all the available evidence, there is information sufficient to provide a reasonable expectation that a violation of section 50.7 can be shown by a preponderance of the evidence.

III. ENFORCEMENT RECOMMENDATION

The question remains as to whether enforcement action should be taken in either or both of the two cases in which we have concluded that NU management personnel discriminated against subordinates because they engaged in protected activities. If taken, that action could be directed against either or both the licensee and the discriminating managers.

Manifestly, the question is essentially one of the appropriate exercise of enforcement discretion and, as such, brings policy considerations into play. Moreover, some of those considerations -- for example, the best utilization of what are doubtless limited agency resources -- clearly are beyond our ability to evaluate. We thus must confine ourselves to what can be said based upon our understanding of the philosophy undergirding the Commission's enforcement policy, as well as of significant developments occurring since the determined discriminatory actions took place in 1993 and 1995, respectively.

A. Enforcement Policy Regarding Discrimination Cases

A reading of the totality of the General Statement of Policy and Procedures for NRC Enforcement Actions, NUREG-1600, Rev. 1 (May 1998), 63 Fed. Reg. 26,630 (1998) [hereinafter NUREG-1600], confirms the remedial nature of such actions. In the context of discriminatory misconduct such as that found to have occurred in the two cases here, the foundation of the enforcement policy appears to be the recognition that retaliation against employees who have raised safety concerns poses a significant actual or potential threat to the public health and safety. Accordingly, it is important where wrongdoing of that stripe has been uncovered that measures be taken designed to ensure that there is not a repetition on the part of the licensee and its managers. Further, it is equally important that the message be clearly conveyed to other NRC licensees and their managers that retaliatory adverse personnel actions are a very serious matter and cannot and will not be tolerated by this agency.

B. Relevant Factors in Implementing Policy

If this understanding is correct, the pivotal inquiry is into whether, in the circumstances at hand, enforcement action against NU and/or its offending managers is warranted in the furtherance of the dual purposes at the root of the enforcement policy as it applies to discrimination cases. In approaching this question, we have taken note of three documents of seeming relevance: (1) the previously discussed October 24, 1996 Commission order in which NU was directed to take certain specific steps designed to rectify prior misconduct in the treatment of employees who had voiced safety concerns; (2) the transcript of an open Commission meeting held on January 19, 1999, regarding possible closure of that order; and (3) the March 9, 1999 staff requirements memorandum (SRM) approving the staff's recommendation to close out the October 1996 order.

1. October 1996 Order

As earlier noted, the backdrop of the October 1996 order was a several year history of retaliation by NU managers against employees who engaged in protected activity; as stated in the order, one recurrent finding was to the effect that the management "tended to punish rather than reward employees who raised safety concerns." This state of affairs prompted the Commission to order NU to put in place an independent, third-party oversight of its implementation of a mandated "comprehensive plan for reviewing and dispositioning safety issues raised by [its] employees and ensuring that employees who raise safety concerns are not subject to discrimination." See supra p. 10.

2. January 1999 Commission Meeting

The January 19 Commission meeting -- conducted more than two years after the October 1996 order was issued -- addressed specifically the matter of the status of the third-party oversight of Millstone Station's Employee Concerns Program (ECP) and safety conscious work environment (SCWE). The participants in the meeting included, in addition to a number of NU officers assigned to the Millstone facility, officials of Little Harbor Consultants, Inc. (which conducted the independent third-party oversight), members of the Millstone Ad-Hoc Employee Group, and senior members of the NRC staff.

At the outset of the meeting, Chairman Jackson referred to the October 1996 Commission order and to events in the wake of that order. Among other things, she noted that, with Commission approval, NU had selected Little Harbor Consultants to conduct the third party oversight. Since May 1997, approximately a dozen meetings had been held between NU, Little Harbor, and the NRC staff to discuss the status of the mandated NU comprehensive plan embracing the ECP and the SCWE. The purpose of the January 1999 briefing, she indicated, was to collect information to assist the Commission in deciding "whether to close the October, 1996 order." Tr. at S-5 to S-8.

After entertaining the views of NU senior management who expressed the belief that the comprehensive plan was achieving the desired results, Tr. at S-8 to S-75, the Commission invited Little Harbor's appraisal. In response, John Beck, its president, first outlined the specific functions that Little Harbor had undertaken in carrying out the assigned mission. Tr. at S-76 to S-78. He then stated categorically that he supported the lifting of the October 1996 order. Tr. at S-78 to S-79. In his words: "We genuinely feel that we are no longer needed on a full time basis to assure that Millstone management does the right thing when challenged by those events which occur in everyone's work place. We further believe that Millstone management is committed to keeping it that way in the future." Tr. at S-79.[7] This assessment was essentially

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[7]The Commission was told that NU nonetheless planned to continue to avail itself (continued...)

endorsed by Billie Garde, a Little Harbor consultant involved in the oversight activity. Tr. at S-83.

For its part, the NRC staff concurred in the Little Harbor judgment that the strictures of the October 1996 order were no longer required. Tr. at S-89 to S-120. And the three representatives of the Millstone Employees Ad-Hoc Group were generally positive respecting the effectiveness of the corrective measures taken in fulfillment of that order. Tr. at S-128 to S-147.[8]

3. Closure of October 1996 Order

Subsequently, in apparent agreement with the appraisals of NU, the staff, Little Harbor, and the Millstone Employees Ad-Hoc Group, in a March 9, 1999 SRM concerning SECY-99-10, the Commission approved the staff's recommendation to close the October 1996 order. In doing so, the Commission directed the staff to be vigilant in monitoring NU's performance in the ECP and SCWE areas to ensure any performance decline is detected early on.

C. Timing of Enforcement Action

As is apparent from the foregoing, over two years before the determination of wrongdoing that we now make in Cases Nos. 1-96-002 and 1-97-007, the Commission took action against NU that, in its effect, applied directly to such wrongdoing. This was, of course, a very unusual sequence of events insofar as concerns the customary Commission response to allegations of discrimination flowing from protected activity.

Normally, the consideration of possible Commission enforcement action addressed to a particular alleged violation of the employee protection provisions of 10 C.F.R. § 50.7 does, as it must, abide a finding that the allegation is meritorious. Only upon such a finding can it be appropriately determined what, if any, sanction against the licensee and/or the offending managers should be imposed in the fulfillment of the purposes underlying the enforcement policy as applied to section 50.7 violations.

As seen, two factors turned the normal process on its head in this instance. First, by 1996 it had become clear to the Commission that there had been for many years an unhealthy NU environment respecting the treatment of employees engaged in protected

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[7](...continued)
of Little Harbor's services on a part-time basis. Tr. at S-21, S-80.

[8] Other witnesses, including representatives of the State of Connecticut Nuclear Energy Advisory Council and Friends of a Safe Millstone, expressed the view that it was desirable to continue Little Harbor oversight on an "on call" part-time basis. Tr. at S-123, S-146.

activities. As a consequence, corrective action in the form of the NU implementation of a broad-scale remedial plan under independent third-party oversight was ordered in that year. Second, while the umbrella of the decreed corrective action extended to the allegations of 1993 and 1995 wrongdoing in Cases Nos. 1-96-002 and 1-97-007, respectively, it is not until 1999 that those allegations are being upheld. As of this time, the corrective action has been in progress for over two years and, according to all those involved in its implementation (NU), its oversight (Little Harbor), and its regulatory appraisal (NRC staff), has successfully accomplished its intended objective, an assessment with which the Commission seemingly agrees.

D. Recommendation

1. Completed NU Remedial Actions Make Enforcement Action Unnecessary

In the final analysis, it appears that, with the Commission's apparent acceptance of the representations made at the January 19 meeting, as a result of agency action taken on the basis of a generic determination of wrongdoing the misconduct found in the two cases under consideration was adequately remedied before those findings surfaced.[9] In that extraordinary circumstance, there is reason to question what worthwhile purpose might be served by taking further, formal enforcement action against either NU or its managers responsible for the 1993 and 1995 discrimination. The October 1996 order conveyed a strong message to NU respecting the unacceptability of the conduct addressed in it and, among other things, put NU to the considerable expense of arranging for independent third party oversight. That message seemingly has had its desired result insofar as regards NU and doubtless was not lost on other reactor licensees.[10] That being so, any additional sanction imposed at this time – such as the imposition of a civil penalty – might be thought to be more punitive in character than remedial.

2. Enforcement Action if Completed NU Remedial Actions Are Found to be Insufficient as Basis for Foregoing Enforcement Action

Should the Commission nonetheless not be satisfied that the misconduct found in the two cases under consideration has already been totally remedied, as we explain below

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[9] In addition, it should be noted that, in Case No. 1-97-007, an NU grievance committee overturned the termination that we have found had a discriminatory foundation (albeit on other, purely procedural, grounds).

[10] With what is an apparently radical change in the NU environment since 1996 with regard to the treatment of employees raising safety concerns, it is a reasonable assumption that the offending managers in the cases we have reviewed who are still employed by NU have been "given the word" that such conduct is not acceptable and will not be tolerated.

the violations we have identified do appear to warrant escalated enforcement action against the licensee. Additionally, enforcement action against the utility officials involved in the discriminatory activities may be warranted as well.

For Case No. 1-96-002, given our conclusions about the involvement of two mid-level management officials (a director and a vice president, who were third and fourth-level supervisors, respectively), a Severity Level II civil penalty is potentially involved. See NUREG-1600, at 23, 63 Fed. Reg. at 26,652. Moreover, applying the enforcement policy flow chart, id. at 9, 63 Fed. Reg. at 26,638, because NU has been the subject of escalated enforcement action within the past two years, see SECY-98-119, at 13-14, and, in these circumstances, would receive no credit for identification or corrective action,[11] subject to the exercise of discretion,[12] the civil penalty amount potentially would be the Severity Level II base amount ($88,000) plus 100 percent.

For Case No. 1-97-007, because one of the NU officials involved was at the time a mid-level management official (a director, who was third-level supervisor), a Severity Level II civil penalty also potentially is involved. Again, because NU has been the subject of escalated action within the past two years and, in these circumstances, would be entitled to no credit for identification or corrective action,[13] subject to the exercise of discretion, the civil penalty amount potentially would be the Severity Level II base amount plus 100 percent.

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[11] The identification credit appears inappropriate in Case No. 1-96-002 because the agency, not NU, is identifying the violation. In connection with the corrective action credit, the enforcement policy statement indicates that in discrimination cases it should normally be considered only if the licensee "takes prompt, comprehensive corrective action that (1) addresses the broader environment for raising safety concerns in the workplace, and (2) provides a remedy for the particular discrimination at issue." NUREG-1600, at 11, 63 Fed. Reg. at 26,640. For Case No. 1-96-002, up to this point the licensee has not taken any action under the second element, and thus does not appear to qualify for this credit either.

[12] In both cases, there may be significant questions about the appropriate use of limited enforcement resources. As we have previously noted, this is a matter about which we cannot make an informed judgment.

[13] The identification credit appears inappropriate in Case No. 1-97-007 as well because the agency, not NU, is identifying the violation. The corrective action credit also appears inapplicable because under element two -- provide a remedy for the particular discrimination -- although the utility did take action to reinstate the terminated employee through an internal grievance process, that was as a result of a finding unrelated to discrimination. See supra note 9.

With respect to the individuals involved, the agency previously has taken enforcement action against utility officials found to have been involved in discriminatory activities, by issuing either a notice of violation or an order banning the individual from licensed activities for a specified period.[14] A review of significant enforcement actions between January 1990 and June 1998 reveals three instances in which utility supervisors, as individuals, have been subjected to agency enforcement action for being involved in taking discriminatory actions in violation of section 50.7.[15]

As the enforcement policy notes, however, when escalated enforcement action appears to be warranted, the agency may provide the opportunity for a predecisional enforcement conference to obtain further information to assist it in making the appropriate enforcement decision. In this instance, particularly with respect to the individuals involved,[16] such a conference should be convened to ensure that the agency can make a fully informed enforcement decision.

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[14] Although the enforcement policy also indicates that a letter of reprimand may be issued to an individual to identify significant deficiencies in his or her performance of licensed activities, it is our understanding that use of this administrative action is in the process of being discontinued.

[15] In 1995 and 1996 cases -- IA 95-042 and IA 96-015, respectively -- notices of violation for Severity Level II and Severity Level III violations were issued to individuals after OIG or OI and DOL findings of discrimination by their employer based on their actions, and, in one case, a federal criminal guilty plea to violating NRC requirements. In both cases, the staff did not issue an order removing the individuals from licensed activities. In the one instance, the staff indicated this was based on the employer's action removing the individual from such activities, while in the other the staff recognized the significant penalties already imposed, including loss of employment and a felony conviction, as well as the individual's recognition he had acted improperly and understood the importance of the requirements of section 50.7. In the third case, which was brought in 1997 (IA 96-101), an enforcement order was issued against a utility vice president for violating section 50.7 following OI and DOL findings of discrimination by his employer based on his actions. In the enforcement order, which placed a five-year prohibition on his involvement in NRC-licensed activities, it was noted that during a predecisional enforcement conference the utility official continued to insist that he had not taken any discriminatory action.

[16] With respect to the individuals involved, based on the cases previously brought by the agency, a significant factor in making an enforcement decision appears to be the extent to which those individuals are willing to acknowledge wrongdoing.

IV. LESSONS LEARNED

A. Lessons Learned Review Process

In seeking to draw lessons learned from the investigative and enforcement processes used with respect to these cases, and principally Case No. 1-96-007 that was the focus of the December 1998 OIG report, in addition to review of the individual case information outlined in section II.A. above, team personnel reviewed the January 27, 1999 memorandum from the Executive Director for Operations (EDO) outlining staff responses to Chairman Jackson's January 7, 1999 questions concerning the December 1998 OIG report, and conducted interviews with senior officials from OI, OE, and OGC about the general conduct of the agency's investigative and enforcement processes. Team personnel also had discussions with an OIG investigator who was involved in the preparation of the December 1998 report. In this regard, the team was given access to the transcribed interviews of various agency employees taken during the OIG inquiry that led to the December 1998 report.

Based on the information gathered through this process, we provide the following suggestions and recommendations.

B. Lessons Learned

1. Utilization of Millstone Task Force

From what we have been able to gather, the decision to assemble the special task force to begin a review of the 1996 Millstone reorganization apparently was a sound one. What is less clear, however, is whether there was a clear concept of the way in which that group's work was to be utilized and incorporated into the existing investigative and enforcement processes. The seemingly abrupt decision to halt their work, in combination with the belated direction, some five months later, to prepare a report on their conclusions, seems to reflect there was not, at its conception, a plan for integrating the task force into the existing regulatory scheme. This is also reflected by the apparent lack of any concerted effort to include appropriate task force members in all steps of the enforcement process, including the June 1998 final conference on Case No. 1-96-007.

A special task force like that established to review the 1996 NU downsizing effort can serve a valuable purpose by bringing special expertise and insight into the investigative and enforcement processes. As the circumstances surrounding that task force illustrate, however, failure explicitly to define the group's role in the existing agency processes from the outset can effectively nullify its usefulness by creating unnecessary misunderstandings and misperceptions about the validity of any results derived from those processes.

2. OI Investigation

Although as to each of the three cases reviewed, we generally found the OI investigation to be thorough and comprehensive, we were struck by the lack of comment by the investigators regarding their observations of witness behavior or demeanor that would be relevant in assessing the witness' credibility and veracity. Particularly in the context of these discrimination cases that depend on inferences about motives, witness credibility can be a significant factor in assessing the strength or weakness of evidence upon which inferences about discrimination will be based. In discussions with OI, it was suggested that they are reluctant to put such information in reports, but are always willing to discuss such matters with OE or OGC personnel involved in case review. To the degree there is a need for closer coordination between OGC and OI (and perhaps OE as well) regarding case development and analysis, see section IV.B.5 below, we would hope this type of information will be conveyed and affirmatively utilized in making decisions about whether there is an adequate evidentiary basis to proceed with particular discrimination cases.

3. Department of Justice (DOJ) Interaction

Another apparently unique aspect regarding the various discrimination cases relating to Millstone is the request from the local United States Attorney's Office that OI investigative reports relating to referred Millstone discrimination allegations not include a summary of conclusions. The apparent basis for this request was previous leaks of this information coming from within the NRC that the federal prosecutors perceived was interfering with their ability to conduct their prosecutorial assessments.

While the decision not to forward OI summaries for these reports was appropriate, the apparent decision not to even prepare those summaries is questionable. The process of analyzing the mass of information generated in the course of investigations such as those at issue here in order to prepare a thorough, reasoned summary and supporting conclusions is a vital part of the process. Notwithstanding the problem of leaks, it does not seem that preparing such a summary, retaining it within OI until DOJ has finished its review of the report, and then attaching the summary (with any additional supplementation that might be necessary based on the DOJ review) as the report goes forward for consideration as part of the agency enforcement process is likely to cause the problem identified by DOJ relative to Millstone.[17]

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[17] The January 27, 1999 EDO response to Chairman Jackson's January 7, 1999 memorandum regarding the December 1998 OIG report indicates that "OI will provide written conclusions and synopses after DOJ returns the case to NRC." Jan. 27, 1999 Memorandum from William D. Travers, EDO, to Chairman Jackson, attach. 1, at 1 (emphasis supplied). So that the analytical process is complete, we think it is important the conclusions be drafted at the same time the report is prepared, even if they are not "attached" until later.

Although acknowledged in the OIG report, it is worth mentioning again that the lack of any investigatory summary here apparently had another, albeit again unintended, detrimental impact on the process. OI has a policy in its manual that governs the resolution of disputes between investigators and OI managers. See OI Procedures Manual at 32-33 (Aug. 1996). As the OIG report indicates, however, that policy was not utilized to address the apparent conflict between the OI investigator and the Field Office Director over the sufficiency of Case No. 1-96-007 because the report did not contain a written conclusion. See OIG Report at 10. This is unfortunate, since a more direct confrontation of the problems of this case at an earlier stage through this policy might have surfaced at a much earlier point the uncertainties that ultimately led to the position reversal that raised concerns about the overall integrity of the enforcement process.

4. Enforcement Conference Process

As we have noted, because they involve drawing inferences about the generally unexpressed motives of individuals, discrimination cases are among the most difficult agency enforcement matters. Especially concerning the critical question of whether there is a sufficient "causal nexus" between the protected action and the adverse action, these cases require a careful analysis of the factual record -- determining what the relevant facts are and how they are to be weighted, compared, and contrasted -- to reach a conclusion.

Enforcement Guidance Memorandum (EGM) 99-001, which is included as Attachment 2 to the January 27, 1999 EDO response, provides guidance intended to ensure that Enforcement Action (EA) Request and Enforcement Strategy Forms now used as status and briefing aids at staff enforcement conferences more accurately reflect what occurs during, and the outcome of, these conferences. This certainly addresses the recordkeeping concern identified by the OIG report. There is, however, another, perhaps more substantive concern, that appears to remain regarding the enforcement conference decisional process as it relates to discrimination cases.

From the most recent draft of Staff Requirements Memorandum (SRM) M990115, it appears the Commission is considering requested that in future enforcement papers to the Commission, the staff clearly state (1) the criteria it used to determine whether a violation occurred and the facts and analysis relied on to reach that conclusion; and (2) in the event of differences between OE and OI, the basis for OE's ultimate recommendation, including a supporting analysis. We think, however, that particularly for the concededly difficult discrimination cases, consideration should be given to starting this "articulated analytical process" at the inception of the enforcement process, not just when these matters reach the Commission.

What we contemplate for discrimination cases is a process, beginning at the enforcement panel stage, in which there is some attempt by the major participants -- e.g., OI, OGC, and OE -- to set out briefly in writing the analytical framework for their tentative conclusions regarding a particular discrimination allegation. The construct we have

described in section II.A. above (supplemented to address other relevant factors) could provide a template for such an analysis, with the length being something along the lines of the case summaries that are set forth in section II.C.-E of this report.

The OI investigation report (with conclusions) seemingly could constitute the articulated analysis for that office.[18] OGC and OE likewise would be expected to provide some concise written explanation of their analysis of the facts provided in the OI report. These office products arguably would provide a more focused basis for the subsequent enforcement conference discussions.

To be sure, there are personnel resource and timeliness implications to this approach, to say nothing of the general antipathy to further "papering" what in may instances are already voluminous records. On the other hand, given the significance of discrimination cases in the overall investigative caseload, see section IV.B.5 below, this additional "up front" work might well provide the benefit of requiring less "clean up" labor later in the enforcement process.

5. OGC Involvement

On the basis of disclosures in the OIG investigation, there may be room for reassessing the OGC role in determining whether to take enforcement action in a particular case of alleged discrimination.[19] It appears that, at least in the time period relevant to our inquiry, in many instances OGC confined itself to a notation that it had "no legal objection" to the institution of a particular enforcement action. That notation, as we have been led to understand it, did not mean that the OGC enforcement attorneys who had reviewed the case file had concluded that the case for enforcement was strong, i.e., that, should it be litigated, the proposed penalty would likely be upheld.[20] All that "no legal objection" appears to have meant was what was literally stated: whether or not justified on the established facts, no illegality would be involved in bringing an enforcement action.

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[18] It is our understanding that, at least in some of the regional offices, a separate written case analysis is prepared by regional officials prior to an enforcement conference, which also could continue to be provided for the conference.

[19] In making this recommendation, it should be understood that we are not critiquing the way in which OGC enforcement attorneys or supervisors have performed their duties in any individual case, given the institutional construct in which they were operating. Rather, what we suggest is a concern about the nature of the framework within which they labor.

[20] To the contrary, the attorneys might have concluded that the case was so weak that, in the words of one OGC lawyer interviewed during the Office of Inspector General's investigation, bringing an enforcement action would be "a dumb thing to do."

When so confined, as it may well have been in connection with the December 1997 enforcement panel meeting in which it was decided to proceed with enforcement in Case No. 1-96-007, such OGC participation is not as helpful as it might otherwise be. Given the fact that at least one OGC enforcement attorney has reviewed the entire case file, the role of that office might extend far beyond simply venturing an opinion on whether an enforcement action would or would not be legally precluded. Rather, we know of no good reason why OGC should not provide OE with its considered judgment as to whether an enforcement action is not only legally permissible, but also warranted under whatever evidentiary standard the Commission has adopted as a basis for taking such action.[21]

On the basis of oral briefings we received with regard to the role OGC attorneys play in giving advice to OE and OI in cases involving alleged violations of section 50.7, it appears that the situation indicated by the OIG investigation may now have changed. Specifically, we have been given reason to believe that, at present, OGC enforcement attorneys may be assuming a more proactive role in providing their views on the strengths and weaknesses of particular cases as illuminated by the record amassed in the course of the OI investigation. If so, the process of reaching an informed judgment on whether a section 50.7 violation worthy of enforcement has occurred will have been benefitted.

We also note that, according to the information we were given by OI, approximately forty percent of the office's total caseload is discrimination cases, with those case types making up sixty-five percent of the high-priority cases.. Because discrimination cases are so "fact intensive," i.e., they require a careful development and sifting of the facts to determine what reasonable inferences can be drawn, earlier involvement on the part of OGC attorneys (and perhaps OE personnel) may well be useful, arguably from the investigation's inception. In one of our oral briefings, OGC indicated that in the context of a planned office reorganization, it is considering assigning discrimination cases with the anticipation that the attorney who advises on the case during the investigative/enforcement process will be the attorney responsible for trying the matter should it go to an administrative hearing.[22] This undoubtedly would help to ensure that

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[21] OGC would not, of course, be called upon to pass upon such policy questions as whether it would be an appropriate exercise of prosecutorial discretion to forego an enforcement action in the circumstances of the particular case.

[22] In this regard, we hope that the seeming need for enhanced interaction between OI and OGC enforcement attorneys, particularly at the outset of the investigative process, would not fall victim to historical concerns about OI independence. The need to maintain OI independence is clear; however, more collaboration between OGC enforcement attorneys and OI investigators to develop the factual construct for enforcement cases, particularly discrimination cases, seems highly desirable.

evidentiary problems are explored thoroughly before any decision to bring enforcement action is made.[23]

6. Handling of Discrimination Cases Generally

As we have already noted, several of those interviewed suggested that the Millstone situation was somewhat unique. It nonetheless seems to us that, with the present state of the electric generation industry in which competition and deregulation are hallmarks, massive downsizings like that which occurred in 1996 can be expected at other utilities in the future. It further seems likely that in such instances, as was the case with Millstone, a number of discrimination complaints can be anticipated. It thus may be a benefit to the agency to have in mind a more systematic approach to handling such events.

As we have indicated in our report on Case No. 1-96-007 relative to the 1996 NU reorganization, the utility's destruction of the matrix information on everyone other than those selected for termination has rendered impossible any attempt to analyze the circumstances based on disparate treatment. Nonetheless, because evidence of disparate treatment may be significant in identifying as pretextual discrimination actions that otherwise might be discounted as "legitimate business reasons," a principal agency concern should be that for a reasonable period of time the utility retains, and the agency has access to, all relevant information regarding those whose positions were implicated in a reorganization/downsizing process. This would include information on all personnel whose positions were considered as part of the reorganization process, whether or not they were (1) involved in protected activity; or (2) actually subjected to an adverse action, such as termination or demotion.

Along these same lines, the agency may wish to consider a more standardized approach relative to identifying and interviewing "comparable" individuals in connection with the disparate treatment aspects of an investigation into a large reorganization. Admittedly, attempting to get a complete picture of what occurred for the purpose of making a disparate treatment analysis often will be very resource intensive. For instance, in Case No. 1-96-002, to get a complete view of disparate treatment would require interviews with perhaps thirty people, including those who were demoted in 1993, those who retained their supervisory positions, and those who were given supervisory positions for the first time. Nonetheless, without obtaining relevant information on a significant number of these individuals, it may be difficult to reach a concrete conclusion about the

[23] In scrutinizing a claim that a federal executive branch "whistleblower" has been subjected to a prohibited personnel practice, an Office of Special Counsel investigator and the OSC attorney responsible for seeking corrective and disciplinary action through litigation before the Merit Systems Protection Board work closely on the case almost from its inception. Based on his 20 years of experience with the OSC, Supervisory Investigator Hamer has found this interaction is integral to developing and prosecuting such cases successfully.

role of disparate treatment evidence in a particular investigation. Further, although some interviews designed to elicit comparative information were done in Case No. 1-96-002, it does not seem there was a clear idea of exactly what "comparative" information was needed to provide the best analytical basis to reach a conclusion about disparate treatment. Given the similarity of this analysis to that which is regularly used in the EEO context, continuing interaction between those in the agency who handle EEO cases and OI, OE, and OGC enforcement attorneys might provide those on the enforcement side with a better understanding of what is required.

7. Other Matters

The MIRT also received unsolicited suggestions for revisions/improvements to the investigative and enforcement processes from an agency employee and a public interest group with a stated interest in Millstone. One commenter outlined a perceived problem with the job classification used for OI investigators, while the other suggested that OI should again be made a Commission-level office. These appear to be matters that fall outside of the scope of the review we were asked to undertake. Accordingly, absent some further Commission directive, we plan to offer no recommendations regarding either suggestion.

V. CONCLUSION

In reviewing the allegations in OI Case Nos. 1-96-002, 1-96-007, and 1-97-007 that NU management officials violated the prohibition in 10 C.F.R. § 50.7 on taking adverse action against an employee for participating in any protected activity, we have sought to determine whether, based on all the available evidence, there is information sufficient to provide a reasonable expectation that a violation of section 50.7 can be shown by a preponderance of the evidence. A case meeting this evidentiary standard of review is a legitimate candidate for enforcement action, subject to the exercise of discretion in accordance with the agency's enforcement policy.

Further, based upon a review of the available evidence for these three cases, we have concluded with respect to OI Case No. 1-96-007, that there 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. On the other hand, with regard to OI Case Nos. 1-96-002 and 1-97-007, we have determined there is information sufficient to provide a reasonable expectation that a violation of section 50.7 can be shown by a preponderance of the evidence. We do not recommend that enforcement action be instituted in connection with those cases, however, because of the remedial actions already undertaken by NU to address previously identified failures in management processes and procedures for handling safety issues raised by employees, thereby ensuring that employees who raise safety concerns are not discriminated against.

Finally, based on our review of the investigative and enforcement processes utilized by the NRC staff with respect to these OI cases, and in particular OI Case No. 1-96-007, we make the following recommendations regarding those processes:

1. At its inception, any "special" task force formed to investigate or otherwise review circumstances in which agency enforcement action is a possible outcome should have its role within the agency's existing investigative/enforcement processes clearly delineated.

2. Particularly with respect to 10 C.F.R. § 50.7 discrimination cases, to the degree practical, OI investigator impressions regarding witness credibility and veracity garnered though observation of the witnesses should be communicated to those making the decision on whether there is sufficient evidence to pursue enforcement action.

3. Notwithstanding a DOJ request not to transmit an OI summary and conclusion for a case sent for prosecutorial review, the OI summary and conclusion should be prepared at the time the OI case report is assembled and, once the case is returned from DOJ, made a part of the OI report so as to be available as an aid in determining whether agency enforcement action is appropriate.

4. Particularly with respect to 10 C.F.R. § 50.7 discrimination cases, an "articulated analytical process" should be incorporated into the enforcement conference process to the extent practicable.

5. Particularly with respect to 10 C.F.R. § 50.7 discrimination cases, OGC enforcement attorneys should take a more proactive role in the investigative process from its inception, with the expectation that, to the extent practicable, the attorney assigned to an OI case would be responsible for handling the case if it is adjudicated.

6. Anticipating that electric industry deregulation and enhanced competition will produce other large scale reorganization/downsizing efforts, the agency should endeavor to ensure that the utility retains all relevant documentary information regarding all those whose positions are implicated in the reorganization/downsizing.

Respectfully Submitted by
the Millstone Independent Review Team

Original Signed by:

G. Paul Bollwerk, III
Acting Chief Administrative Judge.
Atomic Safety and Licensing Board Panel

Original Signed by:

Carolyn F. Evans
Regional Counsel
NRC Region II

Original Signed by:

Sara McAndrew
Attorney
Office of the General Counsel

March 12, 1999

SEPARATE STATEMENT
OF
ALAN S. ROSENTHAL

Advisor to the Millstone Independent Review Team [MIRT]

My independent examination of the voluminous product of the OI investigations, as well as of the other documentary materials made available to the review team, leaves me in total agreement with the conclusions reached in the three cases addressed in the team's report. As will be discussed in greater detail below, this is not to say that I would have deemed a contrary conclusion in one or more of the cases to have been beyond the bounds of reason. In each instance, however, the team has provided an analysis of the relevant facts disclosed by the OI investigation that, in my judgment, amply supports the inferences drawn respecting the ultimate question presented: was the adverse personnel action taken against the particular alleger motivated, in whole or in part, by protected activity in which he had engaged?

My agreement with the content of the report extends to the discussion of the evidentiary standard of review, as well as to the enforcement recommendation applicable to the two cases in which the review team has concluded that a violation of 10 C.F.R. § 50.7 had occurred. And it further seems to me that the review team has identified the principal lessons to be learned from what has transpired with regard to these cases.

Notwithstanding my endorsement of the review team's report in its entirety, I offer a few additional observations of my own. In the main, they serve simply to stress portions of the report that I feel warrant additional emphasis.

1. In none of the three cases examined by the review team was it difficult to discern from the OI investigation materials the presence of three of the four elements that, as the review team notes, must undergird a finding of a violation of the employee protection provisions

of 10 C.F.R.

§ 50.7. Each alleger manifestly had engaged in protected activity;[1] there was the requisite management awareness of that fact; and the alleger's termination or demotion was a classic example of adverse personnel action.

Unsurprisingly, the difficult assessment concerned the fourth element: whether the required nexus existed between the protected activity and the adverse action. In approaching that question in each case, there was a recognition of the obvious: the fruits of the OI investigation would not include any acknowledgment of licensee wrongdoing or, in all likelihood, anything that might constitute direct evidence either in support or in refutation of the alleger's claims. Thus, the determination respecting whether the licensee's proffered explanation for the adverse action was genuine, or instead in whole or in part pretextual, would necessarily hinge upon the drawing of inferences from evidentiary disclosures that might well be in substantial conflict.

Such was the situation that confronted the review team as it embarked upon its assigned task. In carrying out that task, it had two marked advantages.

The first, presumably enjoyed whenever the results of an OI investigation are in hand, stemmed from the completeness of the evidentiary record on which the inferences had to be based. There doubtless is no investigation that could not be taken a step further if time and resources permitted. In the three cases before the review team, however, the investigation was

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[1] I would think that employees called upon to perform safety-related functions (as were all the allegers in the cases at hand) inevitably will find it necessary to raise safety issues from time to time in the fulfillment of their responsibilities. Of course, the extent to which they might choose to pursue those issues either internally or with the NRC will vary and might well affect the solicitude of superiors regarding a particular protected activity.

conducted by one or more OI Special Agents with considerable thought and consummate thoroughness. Without being overbearing in their probing, the investigators identified and pursued tenaciously the appropriate lines of inquiry; had no hesitancy in confronting a witness with contradictory statements of another witness; and, in general, sought to develop a record that would enable an informed judgment by the ultimate decision maker on each issue that had to be addressed. In almost 40 years of federal service in three separate agencies, I had occasion to consider and to act upon innumerable investigation reports and their underlying documentation. None surpassed in quality what I encountered here.[2]

Second, and this was an advantage not usually possessed in the assessment of the product of OI investigations, the review team -- consisting of three NRC lawyers -- had available to it six full weeks to analyze these cases and to reach its conclusions.[3] As a consequence, its members and advisors were able to spend innumerable hours in examining the wealth of interview transcripts and documentary exhibits in the OI file; in collegial discussion of the decisional implications of that material; and in the drafting and peer review of the extensive case studies now put before the Commission. This luxury of time and resources is likely not accorded to OE and OGC personnel who customarily must pass judgment on the merits of alleged Section 50.7 violations.

Despite these advantages, I think that the review team members would agree with me that in none of the cases did the answer to the nexus question become obvious from a casual examination of the OI report of investigation and its documentary foundation. (Indeed, in the

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[2] I would hope that, either in their reports or in separate documentation, the OI investigators would supplement the transcripts or summaries of witness interviews with any impressions as to a witness' credibility garnered through observation of his or her demeanor during the interview. Such additional information can be most helpful, particularly in circumstances where there is a clear conflict in the evidence.

[3] This advisor also devoted his entire attention to the project during that period.

case in which I was asked to take an early particularly close look, my first impression as to the likely appropriate response made an 180-degree turn as I gave the matter additional thought.) And, even after all involved in this enterprise had made full use of the time available for study and reflection, there still was room in the instance of at least some of the allegers to be less than fully confident in the choice that had to be made between conflicting possible inferences.

I do not mean to suggest that the conclusions reached by the review team in its case studies are suspect. Once again, I think them totally supported by a cogent analysis based on a full consideration of the pertinent facts as disclosed by the OI investigation. Accordingly, had a like conclusion founded on a like analysis come before me in my time as an adjudicator in this agency and later in the General Accounting Office, I would have had no hesitancy in upholding it. All that I do mean to convey is my belief that cases such as these do not lend themselves to certainty. Whenever the drawing of inferences from inconclusive facts is the order of the day, reasonable minds can and often will differ.[4] Thus, for example, while it may be contrary to the outcome of the review team's analysis (with which I am in full agreement), it does not follow that the conclusion reached by the NRC Task Force in Case No. 1-96-007 is perforce flawed.[5]

2. In two of the three cases examined (Nos. 1-96-002 and 1-96-007), the adverse action taken against the allegers was part of a broad-based restructuring or reduction-in-force involving a significant number of NU employees. Thus, for example, the three allegers in Case No.

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[4] This is especially so where the required inference relates to the state of mind of the management official(s) who took the adverse action alleged to have been discriminatory.

[5] Of course, the Task Force may not have had at its disposal the time and resources available to the review team.

1-96-007 were among a total of over 100 individuals (out of a pool of approximately 3,200) who were terminated as part of a 1996 downsizing effort.

In such circumstances, the issue of disparate treatment would appear on the surface to have been of potentially appreciable significance in determining whether their protected activity was a factor in the decision to include the allegers in the group of employees ultimately selected for termination. Yet, as noted in the review team report (in Section IV. B. 6.), in the instance of Case No. 1-96-007 that issue could not be effectively explored. This was because NU had destroyed the matrix information on all employees other than those terminated -- i.e., there was not available the information as to performance and capabilities that supposedly was central to the decision on which employees should be laid off.

I agree with the review team's recommendation that utilities be required to retain, and make available to the agency as required, all relevant information regarding those persons whose positions were implicated in a reorganization/downsizing process. At the same time, however, it should be recognized that, even had all of that information been in hand, it might well not have proven particularly useful in reaching a disparate treatment conclusion in Case No. 1-96-007.

The data supplied by NU to the Office of the Inspector General at the latter's request revealed, among other things, that 19 of the 43 candidates for layoff who were on an "added assurance" review list were subsequently (albeit not by the reviewers of that list) removed from consideration for termination as part of the reduction-in-force.[6] It was also disclosed that, of the approximately 90 employees who were identified by name as having raised safety concerns with

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[6] That list was comprised of employees who, for one reason or other (such as prior protected activity) were deemed "sensitive" and, as such, merited special examination before being included in the layoff.

either the NU Employee Concerns Program (ECP) or its equivalent predecessor group at Millstone from January 1990 to January 1996, five were included in the "added assurance" review list. Of those five, three were selected for termination. In addition, two employees who had raised safety concerns with the ECP were terminated even though they had not been on the " added assurance" review list.

Presumably, all 19 of the employees on the "added assurance" review list who survived the workforce reduction were among the total of approximately 3,200 individuals subject to evaluation by the matrix process. Additionally, it may reasonably be assumed that, even if they did not turn up on that list, most of the retained persons who had brought safety concerns to the ECP similarly had been assessed as candidates for possible layoff.

The short of the matter thus is that, if the matrices of the several thousand employees who were evaluated but not terminated had been available to the OI investigator and then examined, the results likely would not have justified the formidable time and effort that would have been involved in the examination. The investigator still would have been confronted with the fact that a vast majority of the employees who placed safety concerns before the ECP between 1990 and 1996 were not laid off and, in the more select group of employees receiving special "added assurance" review because of their perceived "sensitivity," almost 50% kept their jobs. This being so, it is difficult to see how a comparison of the matrices of the three allegers in Case No. 1-96-007 (all of whom were on the "added assurance" review list) with those of some or all of the retained employees might have assisted an informed determination on the likelihood that the allegers had been the victims of disparate treatment because of their protected activity.

As it turned out, in Case No. 1-96-007, as well as in the other case involving adverse action taken in the course of a large-scale program involving many employees (No. 1-96-002), it was possible to reach an ultimate conclusion on the Section 50.7 violation issue on bases that did not require an inquiry into the possibility of disparate treatment. In 1-96-007, the low matrix

ranking given to all three allegers, which in turn was supplied as the reason for their inclusion in the reduction-in-force, was sufficiently supported by the appraisal of their peers. Beyond that, nothing uncovered by the OI investigation gave rise to a suspicion that, nonetheless, more probable than not past protected activity was an influencing factor in their termination. Thus, the review team reasonably concluded that any determination that the allegers' layoff was impermissibly motivated would have had a purely conjectural -- and therefore unacceptable -- foundation.

As the review team found, the situation disclosed by the OI investigation in 1-96-002 was markedly different and called for an opposite result. There, the process used in determining who should receive positions as first-level supervisors as part of the 1993 reorganization was both unusual and wide open to the making of choices on bases other than merit. In stark contrast to the matrix process utilized in carrying out the 1996 workforce reduction program, which brought about the evaluation of all candidates for termination, in the 1993 reorganization existing supervisors were not formally appraised at all. Nor, apparently, were they given any consideration for retention as a supervisor unless, at the meeting convened for the purpose of making the selections, one of the management officials in attendance put their names forward.

In the case of the two supervisor allegers in 1-96-002, no official did so. As a consequence, without any discussion of their qualifications, both ended up demoted to line positions and, indeed, one of them found himself subordinated to a newly-created supervisor. Given the fact that the allegers had solid prior performance appraisals in their supervisor roles -- appraisals that, however, were not made available at the selection meeting -- this state of affairs manifestly placed a decided burden upon the management to demonstrate that the demotions had a totally non-discriminatory basis. This burden was not met.

The third case examined by the review team (No. 1-97-007) did not involve a broad-scale reorganization or workforce reduction but, instead, a termination of a single

individual -- the alleger -- for asserted lack of satisfactory supervisory performance. Although two instances of different treatment accorded other employees surfaced in the course of the OI investigation, the review team found them of no probative value. Rather, the conclusion that the alleger's termination was at least partially motivated by his prior protected activity was founded on the responsible management officials' failure to provide an acceptable basis for their claim that his supervisory capabilities and performance were poor beyond the possibility of remedy. Given the totality of the circumstances undermining the explanation offered, the review team found that explanation pretextual.

As I see it, the analytic framework utilized in these three cases has generic value. In a nutshell, while there well may be cases in which disparate treatment can be discerned and a Section 50.7 violation based thereon, I believe that, in most instances, the more useful

exploration will be in another area.[7] Specifically, it will be into whether, taking into account all attendant circumstances, the reasons assigned by the licensee's management as constituting the non-discriminatory basis for the adverse action appear totally credible on their face. If not, and the management is not able to counter successfully the difficulties that inhere in the assigned reasons, an inference that the adverse action was impermissibly motivated (at least in part) both can and should be drawn.

3. Finally, a solid foundation appears to undergird the review team's recommendations regarding enforcement action in the two cases in which it found 10 C.F.R. § 50.7 violations. At first blush, given the unusual step taken by the Commission in chartering an extensive, independent inquiry into these three cases, a failure to pursue found violations might seem anomalous. The fact remains, however, that the Commission addressed in its October 1996 order the hostility that this licensee had demonstrated over the course of years with regard to employees raising safety concerns. If that order has served its intended purpose, as the Commission apparently now believes based on the briefing that took place less than two months

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[7] As noted above (fn. 1), employees engaged in safety-related activities can be expected to raise safety issues in the course of the performance of their assigned functions. Any disparate treatment analysis would have to take this fact into account, as well as the equally obvious fact that not all protected activity will be looked upon by licensee management in identical fashion. For example, it might turn out that the employee suffering the adverse action had presented a claim to his superiors that the reactor was operating unsafely and, when it was rejected by the management, had renewed the claim before this Commission. In deciding whether that conduct had motivated the adverse action, it would be quite beside the point that similar action had not been taken against other employees who either had raised safety concerns of less impact upon the licensee's pocketbook or had readily accepted the management's response to the expressed concerns.

Thus, disparate treatment analyses may require a sophisticated determination respecting precisely which employees should be selected for comparison purposes. This is another reason why I believe that, in many instances, such an analysis might not prove fruitful.

[8] See March 9, 1999 SRM regarding SECY-99-010.

ago[5], it is difficult to quarrel with the review team's conclusion that further enforcement action would have a punitive, rather than a remedial, flavor.

With the Commission's indulgence, I close this brief statement with a purely personal observation. I welcomed the opportunity to return, if but for a very short time, to the agency in which I had served for the better part of two decades. And it was a particular pleasure to have renewed my association with Judge Bollwerk, a member of the Atomic Safety and Licensing Appeal Panel during my last years on that Panel, and to have become acquainted with the other members of the review team.

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[5] See March 9, 1999 SRM regarding SECY-99-010.

UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL
WASHINGTON, D.C. 20555-0001

March 31, 1999

MEMORANDUM TO: Chairman Jackson

FROM: G. Paul Bollwerk, III
Acting Chief Administrative Judge

SUBJECT: CLARIFICATION OF ENFORCEMENT DISCUSSION IN MARCH 19, 1999 MILLSTONE INDEPENDENT REVIEW TEAM REPORT

As a result of the discussions held with you and the Commission regarding the March 19, 1999 report of the Millstone Independent Review Team (MIRT), it became clear that one aspect of the report's discussion required further clarification.

In addressing the enforcement options available to the Commission relative to Office of Investigations Case Nos. 96-002 and 97-007, the discussion in section III.D.1 of the MIRT report was confined to the question of the need for the imposition of a civil penalty or an enforcement order in those cases. For the reasons stated in that section, we concluded that any such need had been obviated by the Northeast Utilities System (NU) response to the agency's October 24, 1996 order as that response had been detailed at a January 19, 1999 Commission briefing. That section was not intended to address the entirely separate question of the appropriateness of agency issuance of a notice of violation (NOV) or a letter of reprimand to NU or any of the individual supervisors involved in those cases and, accordingly, should not be understood as recommending against issuance of an NOV or letter of reprimand.

cc: Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield

PATRICK CROSBY, Petitioner, v. UNITED STATES DEPARTMENT OFLABOR; HUGHES AIRCRAFT COMPANY, Respondents
No. 93-70834

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1995 U.S. App. LEXIS 9164

April 7, 1995, Argued and Submitted, Pasadena, California
April 20, 1995, FILED

NOTICE:

[*1] THIS DISPOSITION IS NOT APPROPRIATE FOR PUBLICATION AND MAY NOT BE CITED TO OR BY THE COURTS OF THIS CIRCUIT EXCEPT AS PROVIDED BY THE 9TH CIR. R. 36-3.

SUBSEQUENT HISTORY: Reported in Table Case Format at: *53 F.3d 338, 1995 U.S. App. LEXIS 22757.*

PRIOR HISTORY: Petition to Review Decision of the Secretary of Labor. DOL No. 0973-2.

DISPOSITION: PETITION DENIED.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner employee sought review of the decision of respondent, the United States Secretary of Labor, which affirmed the decision of the administrative law judge that petitioner was not discriminated against by respondent former employer, in violation of the whistleblower provisions of various federal environmental statutes.

OVERVIEW: Respondent, the United States Secretary of Labor (secretary), affirmed the decision of the administrative law judge that petitioner employee was not discriminated against by respondent former employer in violation of the whistleblower provisions of the Clean Air Act, *42 U.S C.S. § 7622,* the Toxic Substances Control Act, *15 U.S.C.S. § 2622,* and the Comprehensive Environmental Response, Compensation and Liability Act, *42 U.S.C.S. § 9610.* Respondent secretary determined that the reasons for petitioner's termination were that his work was not good and that he was often insubordinate. Moreover, the final straw was petitioner's absolute refusal to work on a project because he did not like the protocol for the performance of that task. The court affirmed the denial of petitioner's claim because petitioner failed to meet his ultimate burden of proving to the trier of fact that he was the victim of intentional discrimination. The court found that the record was filled with evidence of incidents of petitioner's supervisors' dissatisfaction with his work, which began long before petitioner engaged in any of the protected activities at issue.

OUTCOME: The court affirmed the denial of petitioner employee's complaint that he was discriminated against by respondent former employer in violation of the whistleblower statutes of various federal environmental statutes. Petitioner failed to meet his ultimate burden of proving to the trier of fact that he was the victim of intentional discrimination. The record was filled with evidence of incidents of his supervisors' dissatisfaction with his work.

CORE TERMS: prima facie case, complain, continuance, discovery, nondiscriminatory, termination, terminated, hear

CORE CONCEPTS -

Labor & Employment Law: Discrimination: Retaliation
If an employee makes out a prima facie case of retaliatory discharge, the burden of production shifts to the employer to show that it has legitimate, nondiscriminatory reasons for its actions. If it does so, the production burden shifts back to the plaintiff to show that those reasons were pretextual. Once an employment discrimination case is tried, the only truly relevant question is whether the plaintiff has met his ultimate

burden of proving to the trier of fact that he is the victim of intentional discrimination.

Administrative Law: Judicial Review: Standards of Review: Abuse of Discretion
Administrative Law: Judicial Review: Standards of Review: Arbitrary & Capricious Review
Administrative Law: Judicial Review: Standards of Review: Substantial Evidence Review
The United States Secretary of Labor's decision is upheld unless it is unsupported by substantial evidence or is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.

COUNSEL: For PATRICK CROSBY, Petitioner: Thomas M. Devine, Esq., Government Accountability Project, Washington, DC. Thomas Michael Devine, Government Accountability Project, Washington, DC.

For UNITED STATES DEPARTMENT OF LABOR, Respondent: Secretary-DOL, UNITED STATES DEPARTMENT OF LABOR, Washington, DC. Civil Division, Appellate Section, U.S. Department of Justice, Washington, DC. Solicitor-DOL, Esq., UNITED STATES DEPARTMENT OF LABOR, Washington, DC. Mary J. Rieser, Attorney, U.S. Department of Labor, Washington, DC.

For HUGHES AIRCRAFT COMPANY, Respondent: Russell F. Sauer, Jr., Esq., LATHAM & WATKINS, Los Angeles, CA.

JUDGES: Before: McKAY, ** REINHARDT, and FERNANDEZ, Circuit Judges

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

OPINION: MEMORANDUM *

* 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.

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. n1 The Secretary ruled that Crosby had not shown that Hughes had [*2]terminated him for protected rather than nondiscriminatory business reasons. We deny the petition.

n1 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 [*3]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[*4] 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 PUP. 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.

It is noteworthy that the individuals who[*5] 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. n2

> n2 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[*6] 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[*7] 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.

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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(Cite as: 215 F.3d 1326, 2000 WL 712355 (6th Cir.(Ohio)))

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.

Marie A. LOVAS, Plaintiff-Appellant,
v.
HUNTINGTON NATIONAL BANK, Defendant-Appellee.

No. 99-3213.

May 22, 2000.

On Appeal from the United States District Court for the Northern District of Ohio.

Before NORRIS, MOORE, and COLE, Circuit Judges.

OPINION

COLE, Circuit Judge.

**1 Plaintiff, Marie A. Lovas, was terminated in a reduction-in-force by the defendant, Huntington National Bank ("Huntington"). Lovas alleged that Huntington discriminated against her based on age and sex in violation of the Age Discrimination in Employment Act, 29 U.S .C. § 621 *et seq.;* Title VII, 42 U.S.C. § 2000(e) *et seq.;* Ohio Rev.Code § § 4112 and 4101.17 and alleged several breaches of Ohio contract and tort law. The district court granted summary judgment in favor of Huntington, finding that Lovas failed to establish a prima facie case of age or sex discrimination and also failed to show that Huntington's proffered reason for the termination was pretextual. For the following reasons, we AFFIRM the district court's grant of summary judgment in favor of Huntington.

I.

Lovas began working at First National Bank of Burton ("FNB") in the bookkeeping and operations areas on February 12, 1967. In January 1981, FNB merged with Huntington and Lovas was promoted to Operations Manager, an officer position. As Operations Manager, Lovas managed accounting employees and created operational plans and audits. Lovas received consistent performance evaluations of "meets expectations" throughout her employment at Huntington.

Following the 1981 merger, Huntington transferred operations-related functions from the individual bank branches to centralized centers, reducing the need for operations-related staff at each branch. In addition, computer systems reduced the need for processing staff at each branch. By 1991, the necessary operations' staff in the Burton office fell from over a dozen employees to one--Lovas.

In 1991, William Hoag was assigned as City Executive for Huntington in Burton overseeing the five branches within Geauga County. Also in 1991, Hoag installed Charles Bixler as Manager of retail banking operations, supervising operations in the Huntington branches. Although Lovas frequently worked with Hoag, she reported directly to Bixler, who evaluated her performance.

In 1994, due to the reduction in operations-related work, Lovas was assigned the position of City Office Compliance Officer/Operations Specialist in charge of reports for installment loans and the remaining operations' functions in the Burton office. On internal Huntington forms, Bixler designated Lovas's new position as a demotion. Although Lovas's salary remained the same, her salary grade was lowered and she considered the new position a demotion. Hoag considered Lovas's new duties an alternative to eliminating her position.

In 1995, Huntington moved the installment loan compliance process from the Burton branch to a centralized center in Dover, Ohio. Huntington's removal of the compliance process eliminated the "city compliance" portion of Lovas's position, leaving only the "operations specialist" duties. Huntington also instructed Hoag to reduce salary, advertising expenses, and charitable contributions within the Geauga County offices. As part of this reduction, Hoag entirely eliminated Lovas's "operations specialist" position due to a lack of work.

**2 Hoag spoke with Human Resources representative Sandra Clarke about eliminating Lovas's position and indicated that he and Bixler would assume Lovas's remaining operations specialist duties. Although Hoag designated Lovas's position for elimination, the human resources department deemed both Lovas and Bixler as candidates for the reduction-in-force ("RIF") because they were the employees involved in the operations' function of the bank.

Clarke, following the instructions of Huntington's vice-president of Human Resources, Cheri Webb, used Huntington's method of ranking employees competing for a particular position to determine which employee would be terminated in the reduction. Clarke scored Lovas and Bixler in five performance categories, with the scores compiled from their two most recent performance evaluations. The five performance categories were assigned numbers based on information from the performance evaluations. Lovas's performance evaluations used in the analysis had been completed by Bixler prior to the RIF, and no other personnel information was used in the evaluation. After Clark completed the comparison process, Bixler received a score of 22 and Lovas received a score of 18.05.

On September 6, 1995, Clarke presented the results to Hoag, who made the final decision to terminate Lovas and transfer her remaining duties to himself, Bixler, and a temporary employee. Later that day, Hoag and Webb informed Lovas of her termination. Lovas participated in a transition program offered by Huntington, but did not obtain a new position within the transition period. Lovas was officially terminated on March 6, 1995.

On April 4, 1996, Lovas filed a charge of discrimination with the Equal Employment Opportunity Commission. The EEOC issued a notice of right to sue on April 11, 1997. Lovas filed suit in federal court on July 8, 1997, alleging that Huntington: (1) violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.;* (2) discriminated on the basis of sex in violation of Title VII, 42 U.S.C. § 2000(e) *et seq.;* (3) discriminated on the basis of sex and age in violation of Ohio Rev.Code §§ 41001.17, 4112.02 and 4112.99; and (4) violated Ohio law by breach of implied contract, promissory estoppel and infliction of emotional distress.

Huntington moved for summary judgment on July 17, 1998. The district court granted Huntington's motion for summary judgment on January 29, 1999, finding that Lovas failed to establish a prima facie case of age discrimination under the ADEA and Ohio law or sex discrimination under Title VII and Ohio law. Pursuant to 28 U.S.C. § 1367(c)(3), the district court dismissed Lovas's remaining state-law claims without prejudice. Lovas filed a timely notice of appeal.

II.

We review *de novo* a district court's grant of summary judgment, using the same Rule 56(c) standard as the district court. *See Godfredson v. Hess & Clark, Inc.,* 173 F.3d 365, 370-71 (6th Cir.1999). Under Rule 56(c), summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In deciding the motion, a court must view the evidence and draw all reasonable inferences in favor of the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986). If the moving party shows this absence, the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. *See Matsushita,* 475 U.S. at 587. Merely alleging the existence of a factual dispute is insufficient to defeat a summary judgment motion; rather, there must exist in the record a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-50 (1986).

III.

**3 The *McDonnell Douglas/Burdine* framework is applicable to claims brought under Title VII, the ADEA, and claims of discrimination under Ohio state law, Ohio Rev.Code §§ 4112.02 and 4112.99. *See Mitchell v. Toledo Hosp.,* 964 F.2d 577, 582 (6th Cir.1992) (applying *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1972) and *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 256 (1981)); *Little Forrest Med. Ctr. of Akron v. Ohio Civil Rights Comm'n,* 575 N.E.2d 1164, 1167-68 (Ohio 1991) (same). Thus, the plaintiff's ADEA,

Title VII and Ohio state-law discrimination claims all arising from the same set of facts, can be properly analyzed together.

A.

"A plaintiff who brings a claim under the [ADEA] must prove that age was a determining factor in the adverse employment action taken against him or her." *See Phelps v. Yale Sec., Inc.*, 986 F.2d 1020, 1023 (6th Cir.1993) (citing *Kraus v. Sobel Corrugated Containers, Inc.*, 915 F.2d 227, 229-30 (6th Cir.1990)). To establish a prima facie case of age discrimination the plaintiff must show by a preponderance of the evidence that (1) she was a member of the protected class, (2) she was subjected to an adverse employment action, (3) she was qualified for a particular position, and (4) she was replaced by a younger person. *See Godfredson,* 173 F.3d at 365; *see also O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 (1996); *Skalka v. Fernald Envtl. Restoration Mgmt. Corp.*, 178 F.3d 414, 420 (6th Cir.1999). When the employee is discharged in the context of a RIF, however, the final requirement of a prima facie case is modified because the employee is not, in fact, replaced. *See Godfredson,* 173 F.3d at 365 (citing *Scott v. Goodyear Tire & Rubber Co.*, 160 F.2d 1121, 1126 (6th Cir.1991)). Instead, the fourth element of the prima facie case requires that a plaintiff discharged due to a RIF offer some "direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons." *Skalka,* 178 F.3d at 420 (quoting *Barnes v. GenCorp. Inc.*, 896 F.2d 1457, 1465 (6th Cir.1990)).

In the present case, the district court correctly determined that Lovas failed to establish the fourth element of a prima facie case of age discrimination. Lovas contends that as "the only forty-eight year old officer" who was demoted in 1994 and later terminated in 1995, she established the fourth element of the prima facie case. Huntington's evidence, however, shows that five employees older than Lovas in the bank's Geauga County branches were retained in the RIF. Thus, the fact that Lovas was the "only forty-eight year old officer" demoted or terminated does not establish that she was singled out because of her age when placed in context.

Lovas does not dispute that older employees were retained, but contends that the isolated nature of her termination is sufficient to establish a prima facie case. The evidence, however, also shows that the operations' positions within the Geauga County offices were declining. Moreover, Huntington eliminated Lovas's city compliance duties. Lovas's isolated position was due to the reduction in operations-related duties within the Huntington branches. Lovas has offered no evidence showing that the elimination of her operations' duties was motivated in part by age or that she was singled out for impermissible reasons. Although Lovas contends that Hoag made derogatory comments about her age, we find no reference to ageist comments by Hoag in our review of the record. Further, the comments noted by the district court--such as "your pension will be jeopardized if you don't shape up"--do not establish circumstantial evidence that age motivated Lovas's termination or that she was singled out for termination. Accordingly, the district court correctly found that Lovas failed to establish a prima facie case of age discrimination under the ADEA.

B.

**4 Huntington contends that even if Lovas established a prima facie case of age discrimination, she failed to show that Huntington's non-discriminatory reason for the termination was pretextual. We agree. Once a plaintiff has established a prima facie case of age or sex discrimination, the burden of production shifts to the defendant to articulate legitimate, nondiscriminatory reasons for the adverse employment action. *See Kline v. Tennessee Valley Authority,* 128 F.3d 337, 346 (6th Cir.1998). Huntington contends that the employee comparison process administered by the human resources department determined the employee to be terminated after Hoag eliminated Lovas's position. Because Huntington has set forth a legitimate, non-discriminatory reason, Lovas must show that their proffered reasons are pretextual. *See Saint Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 511 (1993). There are three ways a plaintiff may establish that a proffered explanation is pretextual. *See Kline,* 128 F.3d at 346. A plaintiff can establish pretext by showing by a preponderance of the evidence that the given reason is factually false, by showing that the stated reason is insufficient to explain the adverse employment action or finally, by showing that the stated reason was not the actual reason. *See id.* In cases in which the employer's explanation is

challenged as not being the actual or true reason for the adverse action, the plaintiff cannot rely on evidence used to make a prima facie showing, but must introduce additional evidence of discrimination. *See Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir.1994).

Lovas failed to show that Huntington's employee comparison process was not the motivating cause of her termination. Lovas contends that Hoag's alleged derogatory statements and the 1993 memorandum indicate that Huntington's reason was pretextual. Although Hoag's alleged comments are indicative of distinctions on the basis of sex, and the memorandum indicates that Hoag clearly disapproved of Lovas's past performance, the evidence does not support that the comparison process was pretextual. The memorandum did not address Lovas's sex or age and only discussed Lovas's failure to report to work during a 1993 weather-related outage and potential discipline for the infraction. Moreover, the comments and memorandum lack any temporal proximity to the steady reduction in operations' personnel and Huntington's elimination of Lovas's compliance duties. Lovas has not shown that Huntington's elimination of her position and its employee comparison process were false, or motivated by age.

Lovas also contends that Hoag's statements to Clarke that he and Bixler would assume Lovas's duties constituted bias in the RIF comparison process. Lovas argues that her performance evaluations used in the ranking process were conducted by Bixler, her supervisor, and were inherently biased. In addition, the process was tainted because there was no interview or other evaluation of the employees' skills. Although it is troubling that Hoag appears to have assumed that Lovas would be terminated prior to the human resource process of eliminating her position, it remains unchallenged that the decision to eliminate Lovas's compliance officer duties was not made by Hoag.

**5 In addition, Huntington's human resource department determined the candidates for the RIF based upon the position eliminated. Hoag's statements assuming that the position elimination meant that Lovas would be terminated did not alter Huntington's formulaic approach to comparing employees and determining who would be terminated in the RIF. Huntington followed internal procedures to determine the candidates for termination and the comparison of those candidates. Lovas has not shown that the employee comparison process was influenced or controlled by Hoag's input or past disciplinary action. Lovas's evaluations used in the comparison process were completed by Bixler prior to the RIF and no evidence shows that the evaluations were biased. Finally, as the district court noted, interviews are not required in RIF terminations. *See Kline,* 128 F.3d at 351. Huntington has also established that the human resources employee, Clarke, had limited discretion to assign scores based on information in Bixler's and Lovas's employee evaluations. The scores assigned to each employee were determined by current job descriptions and performance evaluations. The employee comparison process has not been shown to be false or tainted.

Without further evidence showing that the RIF was not the true reason for Lovas's termination, the district court correctly determined that Lovas failed to rebut Huntington's proffered reasons for her termination.

C.

Lovas claims that she was terminated because of her sex in violation of Title VII. A prima facie case of sex discrimination under Title VII requires a plaintiff to demonstrate by a preponderance of the evidence that (1) she was a member of a protected class, (2) she was qualified for the position, (3) she suffered an adverse employment action, and (4) she was replaced by a person outside of the protected class. *See Mitchell,* 964 F.2d at 582-83 (citing *McDonnell Douglas,* 411 U.S. at 802). "[A] plaintiff can also make out a prima facie case by showing ... that a comparable non-protected person was treated better," in a claim of disparate treatment. *Mitchell,* 964 F.2d at 582; *see also Hollins v. Atlantic Co., Inc.,* 188 F.3d 652, 658 (6th Cir.1999).

In a RIF, this court stated that an employee is not replaced when their duties are assigned to others doing related work in addition to the plaintiff's duties. *See Barnes,* 896 F.2d at 1465. [FN1] In the present case, Lovas contends that no other male was demoted and terminated. "To prevail on a claim of disparate treatment a plaintiff must show that her employer intentionally discriminated against her."

Lynch v. Freeman, 817 F.2d 380 (6th Cir.1987); *see also Huguley v. General Motors Corp.,* 52 F.3d 1364, 1370 (6th Cir.1995). Intent can be established by proof of "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act." ' *Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 576 (1978) (quoting *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 358 (1977)); *see also Shah v. General Elec. Co.,* 816 F.2d 264, 267 (6th Cir.1987) (stating that proof of discriminatory motive can be inferred from differences in treatment). Accordingly, Lovas must show that similarly situated individuals were treated differently, producing evidence that the comparable employees are similarly situated with regard to relevant aspects of employment. *See Ercegovich v. Goodyear Tire & Rubber Co.,* 154 F.3d 344, 352 (6th Cir.1998) (discussing similarly situated in context of employment and position).

FN1. In *Barnes,* this court explained:
A work force reduction situation occurs when business considerations cause an employer to eliminate one or more positions within the company. An employee is not eliminated as part of work force reduction when he or she is replaced after his or her discharge. However, a person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work. A person is replaced only when another employee is hired or reassigned to perform the plaintiff's duties.
896 F.2d at 1465. The court required direct, circumstantial or statistical evidence in a RIF termination because without such evidence the plaintiff's prima facie case has not raised an inference that the workforce reduction was not the reason for the discharge. *See id.* at 1464-65.

**6 Because Lovas has failed to rebut Huntington's proffered reasons for her termination, however, we need not reach Lovas's prima facie case of sex discrimination. *See Kline,* 128 F.3d at 346. Assuming that Lovas established a prima facie case of sex discrimination, she has failed to show that Huntington's reasons were not the actual or true reasons for her termination. The alleged comments by Hoag--"there's a woman for you" and "what do you expect from a woman"--do not demonstrate that Huntington's reduction of operations' personnel and comparison process were not the reasons for Lovas's termination. In addition, Hoag's memorandum does not refer to Lovas's sex at all, but merely addresses a potential disciplinary action arising from a particular incident three years prior to Lovas's dismissal. Moreover, Hoag's memorandum and comments are not temporally connected to the elimination of Lovas's position in the RIF or Huntington's comparison process. Because Lovas has failed to demonstrate that Huntington's reasons were not the actual or true reasons for the termination, we affirm the district court's grant of summary judgment on Lovas's sex discrimination claim in favor of Huntington.

IV.

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment in favor of Huntington on Lovas's discrimination claims.

215 F.3d 1326 (Table), 2000 WL 712355 (6th Cir.(Ohio)), Unpublished Disposition

END OF DOCUMENT

MARTHA J. PETERSON, Plaintiff-Appellant, v. DIALYSIS CLINIC, INC., Defendant-Appellee.
No. 96-6093

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1997 U.S. App. LEXIS 26254

September 18, 1997, Filed

NOTICE:

[*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

SUBSEQUENT HISTORY: Reported in Table Case Format at: *124 F.3d 199, 1997 U.S. App. LEXIS 30684.*

PRIOR HISTORY: On Appeal from the United States District Court for the Eastern District of Tennessee.

DISPOSITION: AFFIRMED.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff employee filed an action against defendant employer in the United States District Court for the Eastern District of Tennessee alleging she was fired in retaliation for a decision to testify against the employer in an unrelated matter in violation of 42 U.S.C.S. §§ 2000e-2000e-17. The employer filed a motion for summary judgment, which was granted. The employee appealed.

OVERVIEW: The district court concluded the employee did not establish a prima facie case of unlawful retaliation or prove that the employer's proffered reason for the discharge was a pretext for such retaliation. The employee claimed that there was sufficient evidence to permit a reasonable jury to find the elements of a prima facie case. The court affirmed the judgment. To establish a prima facie case of unlawful retaliation the employee had to prove that she was engaged in a protected activity, the protected activity was known to the employer, she was subjected to an adverse employment action, and there was a causal connection between the protected activity and the adverse employment action. The court found that a reasonable jury could have supported a conclusion of a pretext but that because the employer had no knowledge of the protected activity, an inference of unlawful retaliation where the basic question of knowledge itself was in doubt could not have been made. There was no evidence that the employer knew of the employee's protected activity. Thus, the employee failed to make out a prima facie case sufficient to create a jury question as to the ultimate fact of unlawful retaliation.

OUTCOME: The judgment of the district court granting the employer's motion for summary judgment was affirmed.

CORE TERMS: retaliation, protected activity, prima facie case, appointment, pretext, nurse, summary judgment, reasonable jury, permission, quit, discharged, fired, proffered reason, direct evidence, agreed to testify, causal connection, deposition, friendship, vacation, attend, circumstantial evidence, race discrimination, produced evidence, preponderance, favorable, paradigm, termination, suspension, scheduled, afternoon

CORE CONCEPTS -

Civil Procedure: Summary Judgment: Summary Judgment Standard
Civil Procedure: Appeals: Standards of Review: De Novo Review
The appellate court reviews a district court's grant of summary judgment de novo, examining the record and drawing all inferences in the light most favorable to the non-moving party.

Constitutional Law: Civil Rights Enforcement: Civil Rights Act of 1964
Labor & Employment Law: Discrimination: Title VII

In order to establish a prima facie case of unlawful retaliation under Title VII of the Civil Rights Act of 1964, a plaintiff must prove, by a preponderance of the evidence that: 1) she engaged in a protected activity; 2) this protected activity was known to defendant; 3) she was thereafter subjected to an adverse employment action; and 4) there was a causal connection between the protected activity and the adverse employment action. The central inquiry in evaluating whether the plaintiff has met her initial burden is whether the circumstantial evidence presented is sufficient to create an inference of unlawful retaliation.

Labor & Employment Law: Discrimination: Disparate Treatment
Once the plaintiff establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the challenged employment action. The plaintiff then has the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for unlawful retaliation. Evidence sufficient to permit a reasonable jury to conclude that the defendant's proffered reasons were not its true reasons, together with evidence sufficient to establish the elements of the prima facie case, is sufficient to create a jury question as to the "ultimate fact" of unlawful retaliation.

COUNSEL: For MARTHA J. PETERSON, Plaintiff - Appellant: Robert D. Bradshaw, Chattanooga, TN.

For DIALYSIS CLINIC INC, Defendant - Appellee: Tim K. Garrett, Bass, Berry & Sims, Nashville, TN.

JUDGES: BEFORE: NELSON and RYAN, Circuit Judges; QUIST, District Judge. *

* The Honorable Gordon J. Quist, United States District Judge for the Western District of Michigan, sitting by designation.

OPINIONBY: RYAN

OPINION: RYAN, Circuit Judge. Martha J. Peterson filed suit against Dialysis Clinic, Inc. (DCI), pursuant to *42 U.S.C. §§ 2000e*-2000e-17, Title VII of the Civil Rights Act of 1964, alleging that DCI fired her in retaliation for her decision to testify on behalf of a coworker who had filed a charge of race discrimination. DCI moved for and was granted summary judgment. [*2] The district court concluded that Peterson could neither establish a prima facie case of unlawful retaliation nor prove that DCI's proffered reason for the discharge was a pretext for such retaliation. We agree that Peterson has not produced evidence sufficient to permit a reasonable jury to find the elements of the prima facie case. Accordingly, we will affirm.

I.

A.

DCI is a not-for-profit corporation which provides dialysis treatment at multiple locations. Pam Bethune is the administrator of several DCI facilities, including the "Broad Street" facility in Chattanooga, Tennessee. Mickey Chumley is the head nurse at the Broad Street location. As head nurse, Chumley supervises daily operations and reports to Bethune.

Peterson, a registered nurse, was hired by DCI in June 1993. After completing training, Peterson was assigned to the Broad Street facility. According to Peterson, almost immediately after she began working at Broad Street, Chumley made racially hostile remarks regarding a black nurse, Sharon Parks. Peterson stated in her deposition that Chumley indicated that Bethune had "gotten rid of" or "run off" two other black employees.

In October 1993, Parks filed[*3] a charge of race discrimination in response to a suspension. According to Parks, she asked Peterson to testify on her behalf several times, beginning in November 1993. Both Peterson and Parks agree that it was sometime in December when Peterson agreed to testify for Parks.

Explaining her decision to testify, Peterson stated that, although she had initially complained to Chumley about Parks's attitude and work ethic, she eventually came to think of Parks as a good worker and a friend. Peterson added that she had been goaded into complaining about Parks by Chumley. According to Peterson, Chumley was aware that Peterson and Parks became friends, and Chumley was "furious" about the friendship.

On January 21, 1994, Peterson was permitted to take time off from work in order to attend a meeting regarding Peterson's plan to donate a kidney to her sister. After returning to work that same day, Peterson told Chumley that she had a second appointment with a transplant coordinator at 1:00 p.m., on February 23, 1994. Peterson asked Chumley for permission to attend the appointment, and offered to give up one of her vacation days, scheduled for February 18-22, 1994. According to Peterson, Chumley[*4] told her that she did not need to give up a day of vacation, and that they would "work it out" so that Peterson could keep the appointment.

Chumley testified, however, that she subsequently told Peterson that, although Peterson could keep her scheduled vacation, she would have to reschedule her February 23 appointment because the Broad Street facility was experiencing unexpected staffing shortages. Peterson does not dispute that Chumley made some statement to this effect, but Peterson contends that, in context, Chumley appeared to be joking.

Peterson and Chumley apparently continued to have difficulty communicating about the February 23 appointment. According to Peterson, although Chumley made vague statements suggesting that Peterson's appointment was an inconvenience, Chumley never told Peterson that she could not keep her appointment or that she would be fired if she did so. Chumley testified in her deposition, however, that she made it clear to Peterson that Peterson did not have permission to leave, and that, if Peterson left, she would not have a job when she returned. Peterson left for her appointment sometime shortly before 1:00 p.m. After consulting with Bethune, Chumley[*5] fired Peterson when Peterson returned to work later that afternoon.

Peterson went immediately to Bethune's office to dispute her termination. Bethune agreed to place Peterson on suspension and conduct an investigation. Upon review, however, Bethune concluded that Peterson had left work without permission and she informed Peterson that her termination would not be rescinded.

Louise Roberson, a nurse who works at the DCI facility where Bethune's office is located, testified in her deposition that she was asked at 8:40 a.m., on February 23, 1994, by the head nurse at her facility, if she would be able to fill in at the Broad Street facility the following week. Roberson explained that she asked, "Who's quit now?" because Broad Street "has had a bad reputation for many years of not being able to keep staff." Roberson was told that "Martha [Peterson]" had quit. When Peterson arrived to speak to Bethune later that afternoon, Roberson told Peterson that she was sorry to hear that Peterson had quit. Roberson testified that Peterson told her that she had not quit, but, rather, had been fired.

B.

On July 12, 1995, Peterson filed a complaint, pursuant to *42 U.S.C. §§ 2000e*-2000e-17, [*6] alleging that she had been discharged in retaliation for agreeing to testify on behalf of Parks. On April 22, 1996, DCI moved for summary judgment, arguing that Peterson could neither establish a prima facie case nor prove that DCI's reason for firing Peterson was a pretext for unlawful retaliation. With specific regard to the prima facie case, DCI argued that Peterson could not prove that DCI knew of Peterson's intent to testify for Parks, or that there was a connection between Peterson's protected activity and her discharge.

Both Bethune and Chumley denied having knowledge of Peterson's decision to testify on behalf of Parks. Peterson herself acknowledged that she had not shared her decision with any representative of DCI, because she "did not think that [it] was in [her] best interests" to do so. Parks likewise testified that she did not tell anyone about Peterson's decision.

However, both Parks and Peterson submitted affidavits in which they averred that they had discussed Peterson's decision to testify "on several occasions in the breakroom at DCI's Broad Street facility." They explained that the employees at Broad Street were prone to gossip, and that "once one[*7] employee learned information about another employee, it was repeated until all of the employees knew about it." Another nurse, Connie Bedwell, who was herself discharged for excessive absenteeism, submitted an affidavit in which she averred that she overheard two other employees discussing the fact "that Martha Peterson was going to support [Parks's] complaint with her testimony."

On May 16, 1996, the district court concluded that Peterson had failed to establish a prima facie case of unlawful retaliation under Title VII, and it granted DCI's motion for summary judgment. Specifically, the district court concluded that Peterson had failed to submit evidence sufficient to establish either that DCI knew she had engaged in protected activity or that there was a causal connection between her protected activity and her discharge. The district court also concluded that Peterson could not succeed at the pretext stage because "she has utterly failed to produce evidence that DCI was motivated to fire her for her involvement with Parks rather than because of her leaving the facility without permission."

Peterson filed a motion for reconsideration, relying heavily on Roberson's testimony, [*8] which the district court had not discussed in its opinion. The district court denied Peterson's motion, stating that she had failed to present any evidence, direct or indirect, that DCI knew that she had agreed to testify on Parks's behalf.

II.

Peterson argues that the district court erred when it granted DCI's motion for summary judgment. Specifically, Peterson argues that the totality of the circumstances, including: the "gossipy" work environment; Bedwell's testimony; Chumley's hostility to Peterson's friendship with Parks; Chumley's awareness

that Peterson knew of racial hostility directed at Parks; Peterson's otherwise unblemished work record; the timing of Peterson's discharge; and Roberson's testimony, is sufficient to permit a reasonable jury to conclude that DCI knew of Peterson's decision to testify and that DCI discharged Peterson because of this knowledge. We disagree.

This court "review[s] a district court's grant of summary judgment de novo, examining the record and drawing all inferences in the light most favorable to the non-moving party." *Woythal v. Tex-Tenn Corp., 112 F.3d 243, 245-46 (6th Cir. 1997).*

In order to establish a prima facie case[*9] of unlawful retaliation under Title VII, a plaintiff must prove, by a preponderance of the evidence that: 1) she engaged in a protected activity; 2) this protected activity was known to defendant; 3) she was thereafter subjected to an adverse employment action; and 4) there was a causal connection between the protected activity and the adverse employment action. *Canitia v. Yellow Freight Sys., Inc., 903 F.2d 1064, 1066 (6th Cir. 1990).* The "central inquiry in evaluating whether the plaintiff has met [her] initial burden is whether the circumstantial evidence presented is sufficient to create an inference" of unlawful retaliation. *Shah v. General Elec. Co., 816 F.2d 264, 268 (6th Cir.1987);* see *EEOC v. Avery Dennison Corp., 104 F.3d 858, 861 (6th Cir. 1997).*

Once the plaintiff establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the challenged employment action. *St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-07, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993).* The plaintiff then has the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant[*10] were not its true reasons, but were a pretext for" unlawful retaliation. *Id. at 515* (quoting *Texas Dep't of Community Affairs v. Burdine 450 U.S. 248, 253, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981)).* Evidence sufficient to permit a reasonable jury to conclude that the defendant's proffered reasons were not its true reasons, together with evidence sufficient to establish the elements of the prima facie case, is sufficient to create a jury question as to the "ultimate fact" of unlawful retaliation. Id. at 511; *EEOC v. Yenkin-Majestic Paint Corp., 112 F.3d 831, 834 (6th Cir. 1997).*

In the light most favorable to Peterson, Roberson's testimony that she was told that Peterson had quit several hours before Peterson committed the act which allegedly led to her discharge, and Peterson's testimony that she was led to believe that she had permission to attend her appointment, could permit a reasonable jury to conclude that DCI manipulated Peterson so that it would have an excuse to fire her. In other words, this testimony could support the conclusion that DCI's proffered reason for discharging Peterson was a pretext--the critical question being: "a pretext for what?" If Peterson[*11] has produced sufficient evidence to prove the elements of the prima facie case, a reasonable jury could conclude that DCI's proffered reason was a pretext for unlawful retaliation.

After a careful and thorough consideration of all the evidence in the record, however, we find that we are in agreement with the district court's conclusion that Peterson has not produced evidence sufficient to establish the third or fourth elements of a prima facie case of unlawful retaliation. On the record before us, we simply cannot conclude that it would be reasonable, as distinguished from speculative, for a jury to conclude that DCI knew of Peterson's protected activity and that this knowledge was causally connected to Peterson's discharge.

Although the paradigm established by *McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973),* was designed to accommodate discrimination claims based on circumstantial evidence, see *Burns v. City of Columbus, Dep't of Pub. Safety, Div. of Police, 91 F.3d 836, 843 (6th Cir. 1996),* a plaintiff relying on this paradigm to prove unlawful retaliation typically has direct evidence that the defendant was aware of the plaintiff's [*12]protected activity. See, e.g., *Harrison v. Metropolitan Gov't of Nashville and Davidson County, Tenn., 80 F.3d 1107, 1118* (6th Cir.), cert. denied, *136 L. Ed. 2d 111, 117 S. Ct. 169 (1996); Jackson v. RKO Bottlers of Toledo, Inc., 743 F.2d 370, 377 n.3 (6th Cir. 1984).* In such cases, the difficult question is whether the defendant's knowledge of the plaintiff's protected activity motivated the adverse employment action.

Here, however, there is no direct evidence that DCI knew that Peterson had agreed to testify on behalf of Parks. Although we do not intend to suggest that such direct evidence is always necessary, this case highlights how difficult it is to create an inference of unlawful retaliation where the basic question of knowledge is itself in doubt.

Both Peterson and Parks indicated that they endeavored to keep their arrangement secret, and both Bethune and Chumley denied that they were aware of Peterson's decision to testify. Although Bedwell's testimony might establish that Peterson's decision became grist for the office rumor mill, and Peterson's testimony might establish that Chumley was aware of and hostile to Peterson's friendship with Parks, there is nothing[*13] in these circumstances which suggests that DCI actually

learned of and acted on the basis of Peterson's protected activity.

Any inference of unlawful intent which might arise from the timing of Peterson's discharge, an inference which is of questionable strength to begin with, see, e.g., *Cooper v. City of North Olmsted, 795 F.2d 1265, 1272-73 (6th Cir. 1986),* is significantly blunted by the fact that there is no evidence that DCI knew of Peterson's protected activity, cf. *Polk v. Yellow Freight Sys., 876 F.2d 527, 531 (6th Cir. 1989).* The fact that Peterson was discharged roughly two months after deciding to testify is hardly sufficient to reasonably raise both an inference that DCI knew of Peterson's decision to testify and an inference that there was a causal connection between such knowledge and Peterson's discharge.

In the end, then, although we accept that Roberson's testimony may suggest that something was afoul, we cannot conclude that the evidence permits the reasonable inference that this something was DCI's knowledge of Peterson's decision to testify on Parks's behalf.

III.

Accordingly, we AFFIRM the judgment of the district[*14] court.

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FLORENCE A. WARREN, Plaintiff-Appellant, v. OHIO DEPARTMENT OF PUBLIC SAFETY, WILLIAM L. VASIL, Defendants-Appellees.

No. 00-3560

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

24 Fed. Appx. 259; 2001 U.S. App. LEXIS 21664

October 3, 2001, Filed

NOTICE:
[**1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

PRIOR HISTORY:
On Appeal from the United States District Court for the Southern District of Ohio. 97-00460. Marbley. 3-28-00.

DISPOSITION:
AFFIRMED.

CASE SUMMARY

PROCEDURAL POSTURE: Discrimination plaintiff, a terminated employee, appealed from a grant of summary judgment by the United States District Court for the Southern District of Ohio in favor of defendants, employer and supervisor, and held that she had not participated in protected activity, it was causally unrelated to her termination, and her speech in issue did not address a matter of public concern under U.S. Const. amend. I.

OVERVIEW: The employee was the senior Equal Employment Opportunity compliance officer and Chief of Human Resources for employer. As such, she participated in other employees' discrimination claim investigations. Defendant supervisor testified that he terminated the employee because of complaints about the ineffectiveness of the Human Resources division and lack of confidence in her judgment and reliability, and had planned to do so before she engaged in her alleged protected speech to a state official. Although the court of appeals questioned the district court's determination that the employee's speech was not protected activity under the civil rights statutes, Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e* et seq., and *42 U.S.C.S. § 1983*, it held that summary judgment was nonetheless proper because the employee could not establish a causal connection between her conversation with the state officer, which could be protected speech, and her firing, based on the supervisor's testimony that her termination was already contemplated. She therefore could not prove that her speech was a substantial or motivating factor in the decision to terminate her employment.

OUTCOME: Summary judgment was affirmed on a different ground, that the employee failed to show the requisite causal connection between her activity and her termination.

JUDGES:
Before: GUY and MOORE, Circuit Judges; and HULL, District Judge. *

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

OPINIONBY:
RALPH B. GUY, JR.

OPINION:

[*262]

RALPH B. GUY, JR., Circuit Judge. 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 [**2] a matter of public concern under the First Amendment. n1 For reasons different than those given by the district court, we affirm the grant of summary judgment.

n1 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 [**3] 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. [**4] 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.

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 [**5] 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.

[HN1] 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).* [**6] 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, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).*

A. Title VII Retaliation

[HN2] 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).*

[HN3] To establish a claim under either the opposition or the participation clause, plaintiff must show that (1) she engaged in activity **[**7]** 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).*

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 **[**8]** claims because she failed to show a causal connection between the alleged protected activity and her termination.

1. Participation Claim

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 **[**9]** investigations constitutes protected activity under the participation clause. n2 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).*

n2 *See Davis v. Rich Prods. Corp., 2001 U.S. App. LEXIS 7114, 2001 WL 392036* (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 **[**10]** 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.*

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 **[**11]** 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.

[HN4] 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.*

[HN5] 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).* **[**12]** 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).

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. n3 Defendants **[**13]** 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 **[**14]** a *prima facie* case of retaliation under Title VII, and summary judgment in favor of defendants is appropriate.

> n3 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. 1991).* 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.

[15]**

B. First Amendment

[HN6] A public employee has the constitutionally protected right to comment on matters of public concern without fear of reprisal from the government as employer. n4 *See Connick v. Myers, 461 U.S. 138,* **[*267]** *147, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (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, 58 L. Ed. 2d 619, 99 S. Ct. 693 (1979).*

n4 Defendants argue that plaintiff's § 1983 action is precluded by Title VII. The district court did not address this argument. [HN7] 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.

[16]** [HN8]

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, 50 L. Ed. 2d 471, 97 S. Ct. 568 (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.*

[HN9] Once she establishes that her speech is protected, **[**17]** 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.*

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).*

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."

[HN10] Allegations of racial and sexual **[**18]** 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).*

While plaintiff offered somewhat differing accounts of her meeting with Armstrong, at one point in her deposition she testified **[**19]** 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.

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.

[20] AFFIRMED.**

BARBARA WILLIAMS, Appellant v. DONALD RUMSFELD, Secretary, Department of Defense

No. 01-4016

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

44 Fed. Appx. 592; 2002 U.S. App. LEXIS 16524

July 16, 2002, Submitted Pursuant to Third Circuit L.A.R. 34.1(a)

August 13, 2002, Opinion Filed

NOTICE:
[**1] RULES OF THE THIRD CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY:
On Appeal from the United States District Court for the Middle District of Pennsylvania. (D.C. Civ. No. 1: CV-00-1283). District Judge: The Honorable Sylvia H. Rambo.

DISPOSITION:
Affirmed.

COUNSEL:
For Barbara Williams, Appellant: Andrew J. Ostrowski, Harrisburg, PA.

For Secretary Defense, Appellee: Joseph J. Terz, Office of United States Attorney, Harrisburg, PA.

JUDGES:
Before: SCIRICA, ALITO and FUENTES, Circuit Judges.

OPINIONBY:
Fuentes

OPINION:

[*593] OPINION OF THE COURT

FUENTES, Circuit Judge:

Plaintiff Barbara Williams appeals the district court's grant of the Defendant's summary judgment motion. Williams, an African-American female, had alleged that she was separated from federal service based on her race, in violation of Title VII. She also claimed that she was terminated in retaliation for pursuing administrative EEO remedies, a protected activity under Title VII. Because we agree with the district court that Williams' claim raised no genuine issues of material fact, we affirm.

I.

Barbara Williams brought the instant lawsuit after [**2] having been separated from federal service in September 1999. n1 Williams had been employed by the Defense Logistics Agency (DLA), a component of the United States Department of Defense, since 1985. At all times relevant to this case, Williams held the position of Administrative Assistant, GS-05.

n1 The background and factual allegations underlying this case are well known to the parties, and therefore, they are not detailed here, except to the extent that they directly bear upon the analysis.

In 1997, the DLA was re-organized and two of its distribution regions were consolidated as part of a "Most Efficient Organization" plan ("MEO"). As a result, fifty-seven positions within the newly created Defense Distribution Center ("DDC") (including all GS-05's in Williams' office) were slated to be eliminated. However, because of the two-year differential between the proposal of the MEO and the implementation of the force reduction, many of the DLA employees in positions that the MEO had identified as 'excess' were able to take advantage of either Voluntary Early Retirement (VERA) and/or Voluntary Separation Incentive Payment (VISP) initiatives. In addition, others applied [*594] and were selected for promotion or reassignment to positions that became vacant prior to September 1999 (the MEO's

implementation date). Together, these groups constituted the majority of the employees whose positions were [**3] slated to be eliminated by the MEO.

Nevertheless, by July of 1999, the voluntary staffing reductions of the MEO had not been fully realized, and a mandatory Reduction-in-Force (RIF) was initiated. Although sixteen employees in the DDC headquarters were still employed in positions targeted by the RIF in July, the only employees who were ultimately involuntarily separated in September were Williams and one Hispanic female.

II.

[HN1] We exercise plenary review over an order granting summary judgment, applying the same standard that the lower court should have applied. *Armbruster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir. 1994).* Therefore, we must grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. In making this determination, "a court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor." *Armbruster, 32 F.3d at 777.* Our jurisdiction to review summary judgment [**4] orders is based upon *28 U.S.C. § 1291.*

III.

Williams first claims that the district court erred in granting summary judgment because there existed sufficient evidence to create a genuine issue of material fact, namely whether three non-protected employees were treated more favorably through the RIF. [HN2] The Supreme Court has set forth a three-step, burden-shifting framework for the presentation of evidence in discriminatory treatment cases litigated under Title VII of the Civil Rights Act of 1964. See *McDonnel-Douglas v. Green, 411 U.S. 792 (1973).* In the first step, the plaintiff must make out a prima facie case of race discrimination. See In re: *Carnegie Center Assoc., 129 F.3d 290, 294 (3d Cir. 1997).* The district court below found, and the defendant stipulates on appeal, that Williams has met her threshold burden. See *Id. at 294-95* (determining that, [HN3] "in a Title VII case...involving a reduction in force...to make out a prima facie case the plaintiff must show that (1) she belonged to a protected class, (2) she was qualified for the position from which she was terminated, (3) she was terminated and (4) persons outside [**5] of the protected class were retained."). Furthermore, we agree with the District Court that the defense has clearly met its intermediate burden of articulating a facially legitimate non-discriminatory reason for Williams' termination, namely that it had conducted the RIF in accordance with the procedure prescribed by the OPM. See App. Br. at 16; *Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994)* (instructing that, [HN4] in order to satisfy its burden of production, defendant need only "introduce evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision.").

[HN5] Once the defendant has proffered a legitimate, non-discriminatory reason for its actions, the burden then shifts back to the plaintiff. *Fuentes, 32 F.3d at 763.* In Fuentes, we instructed that;

[HN6] To defeat summary judgment when the defendant answers the plaintiff's prima [*595] facie case with legitimate, non-discriminatory reasons for its action, the plaintiff must point to some evidence, direct or circumstantial, from which a fact finder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe [**6] that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action. In other words...a plaintiff who has made out a prima facie case may defeat a motion for summary judgment by either (i) discrediting the proffered reasons, either circumstantially or directly, or (ii) adducing evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action. Id.

This third and final stage of the McDonnel-Douglas test is the only one at issue here. On appeal, Williams claims that the district court erred in granting the defendant's summary judgment motion because "conflicting and misleading evidence of [Williams'] seniority status" created a genuine issue of material fact. App. Br. at 19. She identifies three different documents that appear to indicate three different tenure ranking dates for her. She alleges that, if the DDC had relied on the highest of her three tenure rankings (and the one which Williams alleges is correct), she would have been listed ahead of three "excess" employees who were retained, even though none of them were members [**7] of a protected class. App. Br. at 19-20.

Nevertheless, Williams offers no evidence that any of the three non-protected employees were hired based on their seniority. As Fuentes makes clear, [HN7] at this stage of the proceedings, the burden of proof is on Williams. *Fuentes, 32 F.3d at 763.* Specifically, she must offer some material evidence that casts doubt on the DDC's proffered, facially non-discriminatory explanation of its reasons for separating her from Federal service. However, Williams' evidence that she may have had a higher seniority status than the three retained employees

is not material if it was a non-factor in the hiring process. See *Gray v. York Newspapers, Inc., 957 F.2d 1070, 1078 (3d Cir. 1992)* ([HN8] "[a] disputed fact is 'material' if it would affect the outcome of the suit as determined by the substantive law"). Therefore, Williams' attempt to discredit the DDC's facially legitimate claim for separating her from federal service based on her proffered conflicting and misleading evidence of her seniority status must fail as a matter of law. Id. (instructing that [HN9] a party attempting to avoid a motion for summary judgment must offer "sufficient evidence **[**8]** for jury to return a verdict in favor of the nonmoving party; if the evidence is merely colorable or not significantly probative, summary judgment should be granted").

Williams also claims that "a position for which [Williams had] interviewed and was qualified, was available exclusively to her as of September 30, 1999," and the fact that she was not offered the position is evidence that Defendant's proffered legitimate non-discriminatory purpose was actually a pretext for racial discrimination. The District Court rejected Williams' claim, indicating that the position that Williams claims was available "exclusively" to her on September 30, actually did not become open until October 12, 1999. Since Williams had already been separated by that time, the Court reasoned that the Defendant's refusal to offer the position to Williams is not evidence that Defendant's non-discriminatory reason for separating Williams was a pretext for racial discrimination. App. at 10.

On appeal, Williams claims that since the availability date given for the job opening, **[*596]** October 12th, is not "a sworn and verified date" the District Court resolved a material fact issue against a non-moving party, and therefore **[**9]** its decision to grant summary judgment should be reversed. See *Armbruster, 32 F.3d at 777* (instructing that, [HN10] in reviewing a motion for summary judgment, a court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor). Nevertheless, there is evidence in the record that a previously selected employee did not refuse the position until October 12th, 1999, See App. at 131 (DDC's Referral and Selection Register), and Williams offers no evidence to the contrary. While this Court must, on Defendant's motion for summary judgment, view the facts in a light most favorable to Williams' claim, we are not obligated to accept Williams naked assertions contrary to evidence that exists in the record. Williams further claims that there was a "legitimate opportunity to avoid the impact of the RIF as it relates to [Williams]," citing a recommendation made by the chief union steward to the DDC that Williams "could be placed in the Dispatcher position" once the previously selected employee had declined. App. at 132. Nevertheless, this information is clearly not "significantly probative" as to the Defendant's alleged pretext for **[**10]** Williams' separation, since Williams had already been separated once the previously selected employee had declined the position in question. Therefore, Williams has failed to meet her burden of proof to show that Defendant's proffered legitimate reason was actually a pretext for racial discrimination, and we find that no genuine issue of material fact exists with regard to this claim.

Williams also offers evidence that three non-protected DDC employees each held two jobs simultaneously with the Department of Defense during the period in question, and that this evidence is "alone dispositive" of her racial discrimination claim. In addition, she also alleges that she has presented sufficient evidence of a discriminatory workplace atmosphere and that her separation was retaliation for earlier EEOC claim. With regard to each of these issues, we find the reasoning of the district court to have been thorough and persuasive. We therefore affirm substantially for the reasons stated in that opinion.

/s/ Julio M. Fuentes

Circuit Judge