RAS 6241 50-390-CIVP, et. al Staff Exhibit 148-Rec'd 9/11/02

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Date: April 21, 1998

Case No. 97-ERA-59

GARY L. FISER,
Complainant,

v.

TENNESSEE VALLEY AUTHORITY,
Respondent.

980423D007

ORDER DENYING MOTION FOR SUMMARY DECISION

This claim arises under the Employee Protection provisions of the Energy Reorganization Act of 1974 as amended, 42 U.S.C. §5851 ("the Act" or "ERA"), and the implementing regulations found in 29 C.F.R. Part 24. Employees of, licensees of, or applicants for a license from the Nuclear Regulatory Commission ("NRC") and their contractors and subcontractors may file complaints and receive redress upon a showing of being subjected to discriminatory action for engaging in a protected activity.

Complainant Gary L. Fiser ("Complainant") has alleged Respondent Tennessee Valley Authority ("Respondent") functionally eliminated Complainant's position in retaliation for Complainant's prior filing of an ERA complaint. Presently before me is Respondent's Motion for Summary Decision.[1] Respondent has moved for a recommended decision and order dismissing the proceeding with full prejudice because there is no genuine issue of material fact and that Respondent is entitled to summary decision as a matter of law. Timely briefs were filed on behalf of both parties in this matter, and have been fully considered by the undersigned. For the reasons expressed herein, Respondent's motion for summary decision is denied.

I. Summary of the Evidence

The documents submitted in favor of, and in opposition to, the Motion for Summary Decision establish the following undisputed facts:

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[1] The regulations governing hearings before the Office of Administrative Law Judges provide for the filing of a Motion for Summary Decision. 29 C.F.R. §§ 18.40, 18.41. The regulations closely track the summary judgment standard in the Federal Rules of Civil Procedure. Fed R. Civ. P. 56.

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SECY-02

NUCLEAR REGULATORY COMMISSION

Docket No. 01-791-01 Official Exh. No. Staff 148

In the matter of TVA

Staff	IDENTIFIED ✓
Applicant	RECEIVED ✓
Intervenor	REJECTED
	WITHDRAWN
DATE 9-11-02	Witness McGrath
Clerk R. Davis	

1. Complainant filed an ERA complaint, a protected activity, on September 23, 1993. The complaint was based on new procedures required by Tom McGrath, chairman of the Nuclear Safety Review Board, and Wilson McArthur, a member of the same board.[2]

2. On April 5, 1994, the parties entered a settlement agreement. Respondent selected Complainant for the position of Program Manager, Technical Support, PG-8, in Chattanooga, Tennessee. This was a non-supervisory position to which Complainant had previously been assigned.

3. In the summer of 1994, Respondent reorganized and Complainant's position was eliminated. Complainant applied for, and was selected for the Chemistry and Environmental Protection Senior Program Manager, PG-8, in Chattanooga, Tennessee. He was hired for that position effective October 17, 1994.

4. In early 1996, Respondent announced another reorganization. Department managers were asked to create a budget which would reduce costs by 17% for fiscal year 1997, in furtherance of an ultimate goal of a 40% reduction by fiscal year 2001. Complainant's supervisor, Ron Grover ("Grover"), made a proposal that reduced the budget by 17% for fiscal year 1997. Tom McGrath, who was the General Manager of Operations Support, rejected the proposal and insisted that the Chemistry Department make the entire 40% reduction for fiscal year 1997.

5. On March 25, 1996, Complainant learned that the Chemistry Department had to make the entire 40% reduction for fiscal year 1997. To achieve this goal, at least one position had to be eliminated. Only the Chemistry Department was required to reduce the budget for fiscal year 1997 by the entire 40% long-term projection.

6. Grover's new proposal eliminated one PG-7, one PG-8, and one PG-11 position and created two new PG-8 positions. This proposal was accepted by Tom McGrath.

7. Complainant, employed in the soon-to-be-eliminated PG-8 position, was told to draft the job description for one of new positions created by the reorganization.

8. On June 17, 1996, Wilson McArthur assumed the duties of the Manager of Radiological and Chemistry Services.

9. Also on June 17, 1996, Complainant was told that McGrath decided the new jobs were dissimilar and posted the position. Where jobs are similar, regulations require

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[2] All activity took place at TVA offices in Chattanooga, Tennessee, unless otherwise noted.

that employees in the eliminated positions be permitted to rollover into the new positions. Where jobs are dissimilar, the positions are posted and filled on a competitive basis.

10. In June 1996, Complainant, Sam Harvey ("Harvey"), and E.S. Chandrasekaran ("Chandrasekaran"), posted their bids for the two positions and were eventually selected for them.

11. On June 25, 1996, Complainant filed an ERA complaint for discrimination based on the classification of the new positions as dissimilar and Complainant's resulting inability to rollover into one of the new positions. Complainant alleged these actions were in retaliation for his ERA complaint in 1993.

12. In July 1996, the Review Board interviewed and ranked each applicant. Complainant had the lowest score. Chandrasekaran was offered the position of Program Manager, Chemistry (BWR), PG-8. Harvey was offered the position of Program Manager, Chemistry (PWR), PG-8. Complainant was not offered a position. The Review Board for the vacant position selection was consisted of Charles Kent ("Kent"), Manager of Radiological and Chemistry Control at Sequoyah, John Corey ("Corey"), Manager of Radiological and Chemistry Support at Browns Ferry, and Rick Rogers ("Rogers"), Manager of Technical Support/Operations Support.

13. On August 30, 1996, Complainant was given a notice that Complainant's position would be eliminated effective the beginning of the 1997 fiscal year. The notice gave him the option to work in another branch at a lower wage, through at least the end of the 1997 fiscal year, or to resign with a severance package.

14. On September 5, 1996, Complainant resigned with his severance package.

15. On September 27, 1996, Respondent offered Complainant a position as Chemistry Program Manager (PWR), PG-8, in Chattanooga, Tennessee, in the Corporate Radiological and Chemistry Organization. Although this was the exact position Complainant posted for, he refused the appointment. He still received his severance package which included a salary pay-out for fiscal year 1997, severance pay, and the cash equivalent of his annual leave balance.

II. Standard of Review

The regulations pertaining to summary decision proved, in part, that:

The administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters

officially noticed show that there is no genuine issue of material fact and that a party is entitled to summary decision.

29 C.F.R. § 18.40(d). A court shall render summary judgment when there is no genuine issue as to any material fact, the moving party is entitled to judgement as a matter of law, and reasonable minds could come to but one conclusion, which is adverse to the party against whom the motion is made. *See LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 378 (6th Cir. 1993); *United States v. TRW, Inc.* 4 F.3d 417, 423 (6th Cir. 1993), *cert. denied sub nom., Eagleye v. TRW, Inc.*, 511 U.S. 1004 (1994). The nonmoving party must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Gillilian v. Tennessee Valley Authority*, 91-ERA-31 (Sec'y Aug. 28, 1995) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. V. Catrett*, 477 U.S. 317, 324 (1986)). The determination of whether a genuine issue of material fact exists must be made viewing all the evidence and factual inferences in the light most favorable to the nonmoving party. *Id.* (Citing *OFCCP v. CSX Tran., Inc.*, 88-OFC-24 (Asst. Sec'y Oct. 13, 1994)); Fed. R. Civ. P. 56(c); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

The substantive law identifies which facts are material. Material facts are those that might affect the outcome of the suit under the governing law. *See generally* 10 A.C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2275, pp. 93-95 (1983). Under *Celotex*, where the nonmoving party has "failed to make a sufficient showing of an essential element of [its] case with respect to which [it] has the burden of proof" the moving party is "entitled to a judgment as a matter of law." *Celotex*, 477 U.S. 323.

III. The Act

Under the Act, a complainant must pass a gatekeeper test before the Secretary may investigate. As part of the prima facie case, the complainant must show that retaliation for the protected activity was a "contributing factor in the unfavorable personnel action." 42 U.S.C. § 5831(b)(3)(A). Then the burden of production shifts to respondent to demonstrate, by clear and convincing evidence, a legitimate, non-discriminatory reason for the action. 42 U.S.C. § 5831(b)(3)(B). If respondent cannot make this showing, the Secretary will investigate. If respondent does make this showing, the burden shifts back to the complainant to show respondent's reason was pretextual, and that the true reason for the action was discrimination based on the protected activity. 42 U.S.C. § 5831(b)(3)(C). If complainant is successful, the burden finally shifts back to respondent who then gets the last chance to show, by clear and convincing evidence, that they would have taken the same action regardless of the protected activity. 42 U.S.C. § 831(b)(3)(D).

IV. Analysis

To establish a prima facie case, the complainant must demonstrates five elements:

1. The employer is governed by the applicable Act;

2. The employee engaged in an protected activity as defined by the Act;

3. The employer was aware of the conduct;

4. The employer took some adverse action against the employee; and

5. A nexus exists between the protected activity and the adverse action.

DeFord v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983). *See also Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984).

The only element in question in this case is a nexus between the protected activity and the adverse action. The complainant must be able to present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. *Id.* A complainant may carry this burden by showing direct or circumstantial evidence of anti-whistleblower animus on the part of respondent. *Dillard v. Tennessee Valley Authority*, 90-ERA-31@ 2 (Sec'y July 21, 1994).

Complainant filed his first ERA claim on September 23, 1993, based on new procedures required by McGrath and McArthur. The April 5, 1994, settlement agreement placed Complainant in the position of Program Manager, Technical Support, PG-8, in Chattanooga, Tennessee. Respondent reorganized and eliminated Complainant's position. He posted for the new position of Chemistry and Environmental Protection Senior Program Manager, PG-8, in Chattanooga, Tennessee. He was hired for that position effective October 17, 1994. Sometime between late 1995 and early 1996, McGrath and McArthur were placed in supervisory roles over Complainant. Shortly thereafter, Complainant's position was eliminated for fiscal year 1997. He did not receive the job he posted for in June 1996. Complainant resigned on September 5, 1996, with a severance package. Viewing these facts in the light most favorable to Complainant, the nonmoving party, I find the time period between the protected activity, the ERA complaint, and the adverse action, the elimination of Complainant's position, to be approximately two years.

The proximity in time between the protected activity and the adverse action can demonstrate causation. *White v. The Osage Tribal Council*, 95-SDW-1, slip op. at 4 (ARB Aug. 8, 1997). ERA cases have found periods of up to one year between the protected activity and the adverse action to be close enough to raise the inference. *Mandreger v. The Detroit Edison Co.*, 88-ERA-17 @ 9 (Sec'y Mar. 30, 1994) (six months raised inference). *See also Thomas v. Arizona Public Service Co.*, 89-ERA-19 (Sec'y Sept. 17, 1993) (one year raised inference).

However, eighteen months was found to be too remote. *Dillard*, 90-ERA-31 @ 2, *supra*. In fact, a significant lapse of time between the two events may establish the absence of a causal connection. *Varnadore v. Oak Ridge National Laboratory*, 92-CAA-2 and 5 and 93-CAA-1, slip op. at 86-87 (Sec'y Jan. 26, 1996) (periods up to 12 months sufficiently proximate to raise inference, but at 18 months gap begins to militate against using temporal proximity alone to raise inference). Although two years is too long of a time period to establish the inference of a causal connection, it is not dispositive on the issue of the causation. *See Lewis v. Delaware Dept. of Pub. Instruction*, 948 F. Supp. 352, 364 (D. Del. 1996); *Kachmar v. Sunguard Data Sys., Inc.*, 109 F.3d 173, 178 (1997). Temporal proximity is merely one method to establish a causal connection between the protected activity and the adverse action. *T.V.A. v. Frady*, No. 96-3831 mem. at 4 (Jan. 12, 1998).

Complainant may overcome a significant lapse of time by presenting direct evidence supporting the assertion that the adverse action was the result of the protected activity. *Shusterman v. EBASCO Services.*, 87-ERA-27, slip op. at 8-9 (Sec'y June 6, 1992), *aff'd mem.*, *Shusterman v. Secretary of Labor*, No. 92-4029 (2d. Cir. 1992). The briefs and other documents offered by Complainant present sufficient facts to show that a genuine issue of material fact remains to be decided at a hearing regarding causation; namely the following.

In 1993, McGrath told the plant manager that Complainant was a problem and they needed to get rid of him. Complainant then filed his original ERA claim because of actions taken by McGrath and McArthur. Following the April 1994 settlement, neither McGrath nor McArthur had direct supervision over Complainant until 1996. Within three months of their being put into authority positions over Complainant, the department was reorganized and Complainant's position was eliminated.

Two new positions were created in the reorganization effort. Complainant could have been rolled-over into one of the new positions.[3] Although the written job description of the Chemistry and Environmental Protection Senior Program Manager required some environmental work, Complainant performed environmental functions less than five percent of the time according to Grover. Thus, his actual duties as the Chemistry and Environmental Protection Senior Program Manager matched the written job description of the new Chemistry Program Manager (PWR), PG-8, position for which he had to post. McGrath, however, determined that two jobs were dissimilar and posted the job in a Vacant Position Announcement.

Harvey, Chandrakesaran, and Complainant were all Chemistry and Environmental Protections Senior Program Managers. Each posted for the positions. Complainant has produced

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[3] Respondent's personnel actions are governed by the regulations promulgated by the Office of Personnel Management. The incumbents of positions being eliminated are entitled to "rollover" into newly created positions if the positions are similar. When the positions are dissimilar, Respondent fills vacancies on a competitive basis. However, it is the duties performed or the actual function of the job that determines whether the positions are similar or not. See 5 C.F.R. §§ 432.103(g), 752.201(d)(3), and 752.402(g).

evidence to suggest that Harvey was pre-selected for one of the new positions. David Goetcheus ("Goetcheus") told Dave Voeller ("Voeller") that Harvey would get the job "if push came to shove." On June 3, 1996, Harvey called Voeller and told him that he would be working a lot closer with him in the future in the PWR corporate chemistry position. Harvey felt this was the case because he was not released by corporate management for a position at Sequoyah nuclear power plant. Harvey "felt sorry for [Complainant] as the odd man out." Harvey called Voeller again on June 10, 1996, and explained that he, himself, might be the odd man out. Voeller believes that Harvey changed his attitude regarding the job because of some negative feedback he may have gotten.

Finally, Complainant has presented evidence that the selection for the Review Board for the vacant position was contrived. The Review Board consisted of Kent, Corey, and Rogers. Kent worked closely with Harvey in the past, while Corey had worked closely with Chandrasekaran. Both had knowledge that Complainant had previously filed an ERA claim against Respondent. Believing Complainant to be untrustworthy, they excluded him from a meeting in which they discussed "sensitive matters." Originally, Jack Cox ("Cox") was to be a member of the Review Board. He had worked most closely with Complainant and could give an accurate account of Complainant's competence. However, he was not available on July 18, 1996. McGrath would not reschedule the interviews and he replaced Cox with Rogers as the final member of the Review Board. Rogers was the only Review Board member who did not know, either directly or indirectly, that Complainant had previously filed an ERA claim against Respondent in 1993. Discriminatory animus can be shown by demonstrating that people who are involved in the employment decision acted with unlawful purpose regarding the decisional process itself. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J. concurring). Complainant received the lowest score of the three candidates; he was not placed in a position while McArthur placed Harvey and Chandrasekaran in the two open positions.

Viewing the evidence and factual inferences in the light most favorable to Complainant, there is an inference that the protected activity prompted the adverse action.

The burden shifts to Respondent to demonstrate a legitimate, non-discriminatory reason for the adverse action. 42 U.S.C. § 5831(b)(3)(B). Respondent has met this burden by demonstrating that the actions took place in a circumstance governed by the need to decrease the size of the workforce.[4] Respondent claims to have reorganized to hold down electric rates by improving productivity and reducing costs. The burden now shifts back to Complainant to show Respondent's reason was pretextual, and that the true reason for the action was discrimination based on the protected activity. 42 U.S.C. § 5831(b)(3)(C).

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[4] Respondent contends that is actions were "motivated" by the circumstance stated regarding the need to decrease the size of the workforce. Since the burden of production, at this point, has a low threshold of merely stating the legitimate business reason, that burden has been met. However, the ultimate "motive" for the action in the case of Complainant is the ultimate factual determination that must be made by the trier of fact under the cited case.

At all times the burden of persuasion remains with Complainant to show that Respondent was motivated by an unlawful, discriminatory purpose. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981). Once a respondent produces evidence sufficient to rebut the "presumed" retaliation raised by the prima facie case, the inference "simply drops out of the picture," and "the trier of fact proceeds to decide the ultimate question." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510-511 (1993). *See Carroll v. United States Dep't of Labor*, 78 F.3d 352, 356 (8th Cir. 1996) (whether the complainant previously established a prima facie case becomes irrelevant once the respondent has produced evidence of a legitimate business non-discriminatory reason for the adverse action); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1063 (5th Cir. 1991) (court declined to revisit sufficiency of prima facie case; "[b]ecause the case has been fully tried and we thus have a fully developed record before us, the focus of our inquiry is on the ultimate question of discrimination"); *Hu v. Public Service Electric & Gas Co.*, 93-ERA-38, slip op. at 9 and 12 (ALJ Dec. 8, 1993) (ALJ declined to determine whether the complainant demonstrated a prima facie case because the complainant had "not sustained his ultimate burden of proving that his allegedly protected activity motivated, in whole or in part, [Respondent's] decision to any of the adverse employment actions he experienced.")

Assuming Complainant has shown a prima facie case, the claim turns on the question of pretext. Complainant asserts the same facts listed above to establish that Respondent acted with a discriminatory motive even though a legitimate, non-discriminatory reason for the adverse action was advanced. The facts, however circumstantial, can support a finding of discriminatory intent. *See Beauford v. Sisters of Mercy*, 816 F.2d 1104, 1108 (6th Cir. 1987) (citing *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n. 3 (1983). Case law supports the assertion that questions of motivation are more properly held for the jury. *Beauford*, 816 F.2d at 1108, (discriminatory motivation is a question of fact, and "factual questions are traditionally within the domain of the jury"); *Conklin v. Lovely*, 834 F.2d 543, 546-547 (6th Cir. 1987) (summary judgment was improper where question of motivation, a jury question, was raised though circumstantial evidence). I find the facts described in the causal nexus section of this Decision and Order are sufficient to raise a question as to genuine issue of material fact to be resolved by the appropriate trier of fact. In an Administrative Court, the Administrative Law Judge is the trier of fact. The question of Respondent's motivation may be more properly fleshed out at a hearing on the matter before an Administrative Law Judge than through summary decision. Therefore, Respondent's motion for summary decision shall be denied.

V. Unconditional Job Offer

Respondent argues that Complainant's rejection of an unconditional job offer precludes any liability or relief. Complainant resigned on September 5, 1996, after he was turned down for the Chemistry Program Manager (PWR), PG-8, position in Chattanooga, Tennessee, and his current position was eliminated for fiscal year 1997. Complainant made it clear that he would not accept any position with Respondent. On September 27, 1996, Respondent offered Complainant the same position he posted for and was denied, which would cancel his voluntary resignation. Complainant rejected the offer.

Respondent contends that the late job offer constituted prompt corrective action and precludes Complainant from any relief. Respondent cites four hostile work environment cases involving sexual harassment. These cases are distinguishable because the complainants in those cases were not retaliated against with adverse employment actions. They were not terminated and then offered reinstatement positions. The prompt corrective action in those cases related to disciplining the offender or removing the complainant from the offender's supervision when the employer had knowledge of the hostile activity. Respondent cites *Dartey v. Zack Co.*, 82-ERA-2 (Sec'y Apr. 25, 1983), for the proposition that the Secretary of Labor adopted the paradigm of Title VII cases when analyzing ERA cases. On closer review of *Dartey*, however, it is clear that the Secretary only adopted the burden of proof and burden of persuasion analysis used in the Title VII cases. *Dartey* does not stand for the proposition that every element of a Title VII case applies equally to an ERA case. Therefore, Respondent's argument of "prompt corrective action" has no application to a whistleblower claim.

Second, Respondent argues that their offer to Complainant of the position he sought relieves them from any liability. In *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982), the Court held that an employer tolls the running of back pay by making an unconditional offer to the complainant of a job substantially equivalent to the one he or she was denied. *See Shore v. Federal Express Corp.*, 42 F.3d 373, 378-79 (6th Cir. 1994). Absent special circumstances, a complainant is required to accept an unconditional offer of the job originally sought, and this acceptance preserves the complainant's right to be made whole. However, if complainant refuses the offer, he forfeits any claim to back pay from the date of the offer. 458 U.S. at 238-239. Where there are valid reasons for refusing the offer, a complainant is not precluded from relief. *Giandonato v. Sybron Corp.*, 804 F.2d 120, 124 (10th Cir. 1986). A complainant cannot, however, refuse an offer because he does not want to work for the same supervisors. *Id.* Although Complainant asserted that he did not wish to return to work for Respondent, Ford Motor Co. v. EEOC, is only binding if the offer is truly unconditional. *Morvay v. Maghielse Tool & Die Co.*, 708 F.2d 229, 232 (6th Cir. 1983). An offer is not unconditional if it requires the complainant to drop his unfair labor practice charge. *Id.* Finally, back pay is only tolled if the offer was unreasonable, and this is a question of fact for the jury. *Cripps v. United Biscuit of Great Britian*, 732 F. Supp. 844, 848-849 (E.D. Tenn. 1989).

Complainant alleges that he conversed with Phillip Reynolds ("Reynolds") on August 26, 1996, at which time Reynolds asked what it would take to settle the second DOL claim that Complainant filed in June 1996. They discussed the possibility of reinstatement and a cash settlement. Complainant told Reynolds that he intended to reject any offer of settlement that included employment with Respondent. After that, Reynolds stated that he was authorized to make an unconditional offer to Complainant for the PWR Chemistry Program Manager position on September 27, 1996. If Complainant had accepted the offer, his voluntary resignation would have been canceled. The face of the offer states, "This is in response to our discussion regarding your employment at TVA. As a result of our discussion, I am offering you a position as Chemistry Program Manager (PWR), PG-8, at a salary of $77,069.00." In light of the Complainant's view of the events leading up to the offer, there appears to be a genuine dispute as

to the reasonableness of the offer and whether the offer was truly unconditional. Therefore, I find that Respondent is not entitled to summary decision based on this argument.

VI. Conclusion and Order

Complainant has presented sufficient evidence to raise genuine issues of material fact. Therefore, Respondent's Motion for Summary Decision is **DENIED**.

Thomas F. Phalen

THOMAS F. PHALEN, JR.
Administrative Law Judge