

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

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DEPT. OF LABOR SECRETARY
RULE MAKING AND
ADJUDICATIONS STAFF

IN THE MATTER OF)
)
GARY L. FISER)
)
Complainant)
)
v.)
)
TENNESSEE VALLEY AUTHORITY)
)
Respondent)

Case No. 97-ERA-59

BRIEF IN SUPPORT OF RESPONDENT'S MOTION
FOR SUMMARY DECISION

STATEMENT

Introduction

In this proceeding, complainant Gary L. Fiser, a former employee of respondent Tennessee Valley Authority (TVA), filed a June 25, 1996, complaint under Section 211 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (1994) (ERA), claiming that the creation of new positions in a 1996 reorganization within TVA's Nuclear Power organization was intended to discriminate against him in violation of the ERA. TVA has now filed a motion for summary decision based on the complaint and the declarations of Fredrick M. Anderson, James E. Boyles, John M. Corey, Sam L. Harvey, Wilson C. McArthur, Ph.D., Phillip L. Reynolds, Heyward R. Rogers, and Milissa W. Westbrook.

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CLEAR REGULATORY COMMISSION

Lucret No. 01-791-01 Official Exh. No. Staff 147

In the matter of TVA

Staff _____ IDENTIFIED

Applicant _____ RECEIVED

Liability _____ REJECTED

Case _____ WITHDRAWN

DATE 9-11-02 Witness McGrath

Clerk R. Davis

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It is TVA's position that the complaint should be dismissed for three reasons. First, complainant cannot establish a prima facie case since he cannot demonstrate a nexus between his claimed protected activity and any alleged adverse action. Second, even if complainant could establish a prima facie case, he cannot meet his burden to show that TVA's reasons for its 1996 reorganization or his nonselection for one of the newly created positions were a pretext for discrimination. Third, TVA's offer to complainant of a new position comparable to his old position precludes any liability and tolls any backpay relief to which he could be entitled.

Facts

1. Background. In order to understand the context in which this complaint arose, some background information is necessary about two major TVA efforts. The first effort relates to major improvements to TVA's nuclear power program. In 1985, TVA voluntarily shut down its Sequoyah Nuclear Plant (Sequoyah) and Browns Ferry Nuclear Plant (Browns Ferry) and voluntarily ceased pursuing an operating license for Unit 1 at Watts Bar Nuclear Plant (Watts Bar) in order to address major issues in TVA's nuclear program. Many of these issues were identified as a result of the accident at Three Mile Island (TMI), and TVA's efforts were aimed at ensuring that its nuclear plants would not be susceptible to similar accidents. McArthur decl. ¶ 2.

One of the measures implemented by TVA in response to TMI, in accordance with Nuclear Regulatory Commission (NRC) and industry guidelines, was the establishment of a Nuclear Safety Review Board (NSRB), a blue-ribbon committee of the best experts from within and outside TVA that operates outside the chain of command, critically reviews TVA nuclear programs and operations, and reports its

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findings to top management. The NSRB's reports are provided as a matter of course to line management so that they can act on the NSRB's recommendations. *Id.*

TVA's efforts to upgrade its nuclear program, to restart Sequoyah and Browns Ferry, and to perform the initial startup of Watts Bar required large numbers of TVA employees and contractors. As its nuclear program was upgraded, TVA successfully restarted Sequoyah Units 1 and 2 and Browns Ferry Units 2 and 3. Most recently, TVA has successfully completed the initial startup of Watts Bar Unit 1, the only nuclear plant actively under construction in the United States. As work on those five nuclear units was completed and they were placed in full service, the large numbers of nuclear employees and contractors who were working on the upgrade, restart, and construction programs were no longer necessary. As those programs were winding down, TVA has been adjusting the size of its nuclear workforce as it changes from a construction and modifications organization to a much smaller operations organization. Westbrook decl. ¶ 2.

The second effort at TVA is an attempt to hold down electric rates by improving productivity and reducing costs. This effort is driven by the need to become more competitive with other electric utilities in anticipation of deregulation of the electric utility industry. Westbrook decl. ¶ 3.

As a result of both efforts, TVA has reorganized and reduced the number of employees in its Nuclear Power organization. The changes in the workforce have not occurred all at once; rather, the reductions are being implemented in a deliberate step-wise fashion year by year. Thus, during 1994-1997, a number of TVA employees in TVA's Nuclear Power organization lost their old positions. While some employees were successful in being selected for new positions created as a result of the reorganizations, many TVA employees involuntarily lost their positions and employment with TVA. Westbrook decl. ¶ 4.

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2. Complainant's previous positions with TVA. From 1988 until 1992, complainant served as Chemistry Manager, grade PG-9, at Sequoyah. Reynolds decl. ¶ 2.¹ Because of deficiencies in the Sequoyah chemistry program and because management perceived that complainant had weak management skills, complainant was rotated to the Corporate Chemistry Manager position in Chattanooga, Tennessee, in 1992. When complainant continued to display weak leadership, he was removed from the position of Corporate Chemistry Manager and assigned to work as a Chemistry Program Manager in the Corporate Chemistry organization.² While still assigned to the management and specialist pay schedule, complainant no longer had supervisory responsibilities, but provided technical expertise to the plants. Reynolds decl. ¶ 2; McArthur decl. ¶¶ 3-5.

3. Complainant's 1993 ERA complaint. Although complainant had moved out of the Sequoyah Chemistry Manager position and the Corporate Chemistry Manager position, TVA's Nuclear Human Resources organization had not caught up with his reassignments and had not issued official paperwork reflecting his new position. Thus, when a 1993 reorganization eliminated the Sequoyah Chemistry Manager position, complainant still occupied the Sequoyah Chemistry Manager position on paper and he received a reduction-in-force notice. On September 23, 1993, he filed an ERA complaint alleging discrimination in his removal from the Sequoyah Chemistry

¹ TVA's PG schedule includes management and specialist positions which are classified from grade PG-1 to grade PG-11. Reynolds decl. ¶ 2 n.1.

² The complaint in this case is premised on the assumption that the removal of complainant from the position of Sequoyah Chemistry Manager in 1992 was discriminatory. Aside from the fact that that claim was never adjudicated, is now untimely, and is irrelevant to TVA's 1996 reorganization, the weaknesses in the Sequoyah chemistry program and complainant's deficiencies as its manager are well documented. Those deficiencies and weaknesses are summarized in appendix I.

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Manager position. When TVA management realized that complainant was being reduced in force from a position which he did not actually occupy, TVA canceled complainant's RIF notice and settled complainant's ERA complaint by officially placing him in the lower level, nonsupervisory Chemistry Program Manager staff position at the PG-8 level in the Corporate Chemistry organization, to which he had already been assigned. Reynolds decl. ¶ 3, ex. 1. As a result of the settlement, there was no decision in that case at any administrative level by the Department of Labor. Reynolds decl. ¶ 3.

At the time of the settlement of complainant's 1993 ERA complaint, the corporate chemistry and environmental functions were separate with each reporting to a different manager. Although the April 8, 1994, agreement provided that complainant would be officially placed in a Chemistry Program Manager position, it did not guarantee the continued existence of that position, did not guarantee him continued employment, and did not guarantee that his position or organization would never be subject to a reorganization. Indeed, in the summer of 1994, as a result of a reorganization, a decision was made to combine the corporate Chemistry and Environmental organizations into one organization under one supervisor. By combining the two organizations, the Chemistry Manager and the Environmental Manager positions were replaced with a single Chemistry and Environmental Manager position. In addition, the Chemistry Program Manager positions and the Environmental Protection Program Manager positions were eliminated. In their place, Chemistry and Environmental Protection Program Manager positions were created. Westbrook decl. ¶ 6.

Because the new positions were significantly different, the incumbents of the old Chemistry Program Manager positions were not entitled to rollover into the new

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positions by virtue of Federal regulations.³ Accordingly, TVA posted a vacant position announcement for the new positions and held a competitive bidding process.

Complainant applied for and was a successful candidate for one of those new positions. Thus, in the fall of 1994, complainant voluntarily left the position designated in the settlement (which was then eliminated) and entered into a new position. Westbrook decl. ¶ 7, ex. 5.

4. The 1996 reorganization of corporate Nuclear Power. As part of the workforce planning effort for the year 2001 and the budget planning process for Fiscal Year 1997, corporate Nuclear Power underwent a reorganization and reduction in the summer and fall of 1996. The goal for the year 2001 was for the overall corporate organization budget to be reduced by about 40 percent. In the short term, the budget for the corporate organization was to be reduced by at least 17 percent. These proposed reductions were for the overall Nuclear Power organization; some of the constituent organizations might be more, while some might be less. Reynolds decl. ¶ 4.

Although managers of each organization were asked to propose budget and staffing plans, the decisions on their budget and staffing were made by their superiors. Thomas McGrath, the acting General Manager of Operations Support, which included the Radiological Control and Chemistry Services organizations, requested his subordinates to propose an organization supporting the year 2001 goal, including specific functional activities, and a fiscal year 1997 budget and organization which was a logical step in achieving the 2001 goals. Mr. McGrath also requested that

³ As a Federal agency, TVA's personnel actions are governed by regulations promulgated by the Office of Personnel Management. Under those regulations, the incumbents of positions being eliminated are entitled to "rollover" into newly created positions if the positions are sufficiently similar. When the positions are dissimilar, TVA fills vacancies on a competitive basis. Westbrook decl. ¶ 7 n.1.

the Radiological Control and Chemistry Services organizations be combined under the existing but then vacant RadChem Manager position, thereby eliminating one level of management. Thus, Ron Grover, Manager of Corporate Chemistry and Environment, and Wilson McArthur, Ph.D., Manager of Corporate Radiological Control, proposed that their two staffs be combined under one manager. The organizational structure which Mr. McGrath ultimately approved included Mr. Grover's proposal to create two chemistry specialist, PG-8, positions, in place of the three existing generalist chemistry and environmental protection, PG-8, positions.⁴ Those positions were separate Program Manager, Boiling Water Reactor (BWR), and Pressurized Water Reactor (PWR) Chemistry positions which would enable the corporate organization to provide the sites with in-depth expertise to the plants.⁵ Thus, in the area of chemistry and environmental protection, the new organization eliminated one PG-11 manager and two staff positions, a PG-7 and a PG-8 position. McArthur decl. ¶ 7.

Complainant helped draft the job description for the new PWR Chemistry Program Manager position (Harvey decl. ¶ 5). Based on Human Resources' evaluation of the new job descriptions, it was determined that the new positions were significantly different than the old positions, and that the incumbents of the old positions did not have a right to rollover into the new positions. Accordingly, it was decided to post announcements for the positions and to allow employees to apply and compete for the jobs. Boyles decl. ¶ 4, ex. 1.

⁴ Mr. Grover also proposed that a third chemistry specialist position be created to supervise the two PG-8 positions, which he intended that he would occupy (McArthur decl. ¶ 7).

⁵ The idea was to have a chemistry specialist for TVA's two Boiling Water Reactors at Browns Ferry and a chemistry specialist for TVA's three Pressurized Water Reactors at Watts Bar and Sequoyah (McArthur decl. ¶ 7).

When Vacant Position Announcement No. 10703 for the PWR

Chemistry Program Manager position was posted, complainant filed the complaint in this proceeding. The thrust of his latest ERA complaint is that the new PWR position is the same position which he then held and also is the position guaranteed to him by virtue of the agreement settling his earlier complaint. He is clearly wrong on both counts. There is no question that TVA did place complainant in a Chemistry Program Manager position as required by the settlement agreement. However, as discussed above, only months after being confirmed in that position, complainant vacated the agreed-upon position when he applied on and was selected for a different position, Chemistry and Environmental Protection Program Manager. Thus, by his own actions, the position complainant occupied when he filed his complaint was clearly not the same position set forth in the settlement agreement. Moreover, the settlement agreement made no guarantees that the position would continue in existence nor are there any guarantees of job security in the Federal employment sector.

Complainant also fails to take into account the role he played in designing the new organization. He was responsible for drafting the position description for the PWR Chemistry Program Manager position and did so with an eye to his own qualifications. At the time that he did so, he was under the impression that one of his principal competitors for the position, Sam L. Harvey, would be accepting a position to work at Sequoyah and therefore would not be applying for the corporate PWR Chemistry Program Manager position. Complainant did not object to the creation of the new position until after he learned that Mr. Harvey would not be going to Sequoyah and would be competing for the corporate PWR Chemistry Program Manager position. Harvey decl. ¶¶ 3-5.

The three best qualified applicants for the position, including complainant, were interviewed by a neutral selection review board. In fact, individuals

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who indicated that they had a predisposition towards any of the candidates were not allowed to serve. Each of those three candidates were asked the same questions by the review board, and their answers were scored separately by each member of the board. Complainant was scored lower than the other two applicants. Westbrook decl. ¶ 8, exs. 6-8; Corey decl. ¶ 3; Rogers decl. ¶¶ 2-3. Based on the cumulative scores, the review board ranked complainant third. Based on these rankings, on July 1, 1996, Dr. McArthur, who had been made the Manager of the new organization, selected the highest evaluated applicant for the BWR Chemistry Program Manager position and selected Mr. Harvey, the next highest evaluated applicant, for the PWR Chemistry Program Manager position. McArthur decl. ¶ 8, exs. 6, 7.

Although complainant had not been selected for one of the new positions and his previous position would be eliminated effective the beginning of FY 1997, his TVA employment was not terminated. Instead, in accordance with TVA policy, he was given an August 30, 1996, memorandum notifying him that he would be reassigned to TVA's Services Organization. That organization was a relatively new organization within TVA intended to allow employees whose positions had been eliminated to continue their TVA employment. The Services Organization provided job opportunities both within and outside TVA in a manner similar to a contractor. The same memorandum that notified him that he was being reassigned to the Services Organization also notified complainant that he would continue to have a TVA job at least through the end of FY 1997, September 30, 1997. Westbrook decl. ¶ 9, ex. 9. Instead of continuing his TVA employment, complainant chose to resign effective September 6, 1996. By doing so, he qualified for a lump-sum payment equal to his salary for the entire 1997 fiscal year ending September 30, 1997, severance pay, and the cash equivalent of his annual leave balance. Westbrook decl. ¶ 10, ex. 10.

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Even though TVA had decided to downsize its Corporate Chemistry organization and even though complainant was only the third-ranked candidate for the PWR Chemistry Program Manager position, TVA made an unconditional offer of that position to complainant on September 27, 1996. Reynolds decl. ¶ 5, ex. 2. However, complainant rejected that position and took the year's salary, severance pay, and lump-sum payment for annual leave, totaling more than \$100,000. Reynolds decl. ¶¶ 4-5; Anderson decl. ¶ 2.

Complainant charges (compl. "Sequence of Events" at 5) that Mr. Harvey was preselected for the PWR Chemistry Program Manager position. As shown by Mr. Harvey's declaration, he was not preselected for the position and never told complainant that he had been. In the May 14, 1996, entry on his "sequence of events" (at 4), complainant states that "Harvey told [him] that McGrath would not release him" to transfer to Sequoyah. As shown by Mr. Harvey's declaration (¶ 3), that is simply untrue--he was unaware who made the decision not to transfer him to Sequoyah or what the basis for the decision was. In his entry for June 5, 1996 (at 4), complainant states that David Voeller, the Watts Bar Chemistry Manager, told him that Mr. Harvey told him that he would be working a lot closer with him in the future since he would be one of the two chemists left in corporate. Apart from the double hearsay, that statement is only a half-truth. In fact, as shown by Mr. Harvey's declaration (¶ 4), he told Mr. Voeller that he would be working with him a lot more (if he got the job) or not at all (if he did not get the job). Mr. Harvey also told Mr. Voeller that if he was not selected, he would be contacting him for employment references (*id.*).

Complainant's sequence of events fails to mention a conversation he had with Mr. Harvey shortly after the June 17, 1996, "all hands" meeting conducted by Mr. McGrath. In that conversation, complainant "blew up" at Mr. Harvey and accused him of being preselected and having been guaranteed the job. Harvey decl. ¶ 5. As

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shown by Mr. Harvey's declaration (*id.*), he denied any preselection and stated that he had to apply for the position just like anybody else. Complainant told Mr. Harvey that he had written the job description with himself in mind by specifying the duties which he had been performing. Complainant also said that he felt that someone was out to get him, but that "he knew how the system worked and he was going to take advantage of it" (*id.*).

Complainant's assertions that TVA posted his job and that Mr. Harvey was preselected for the position are simply speculation with no factual basis. Likewise, complainant's claim that "McGrath was orchestrating everything just to teach me a lesson" has no basis (compl. "Sequence of Events" at 4). The selection review board that recommended candidates for the PWR Chemistry Program Manager position was free of any animosity towards complainant and that board, not Mr. McGrath or Dr. McArthur, determined that complainant was not one of the two top-ranked candidates. There is simply no evidence of discriminatory intent toward complainant in TVA's reorganization and his nonselection. Moreover, complainant's rejection of the job when it was unconditionally offered to him precludes the finding of any liability or the award of any relief to complainant.

ARGUMENT

I

The Applicable Legal Standard for Summary Decision

TVA has moved for summary decision on the merits as to complainant's claims that TVA's reorganization and his nonselection for the PWR Chemistry Program Manager position occurred because complainant had engaged in some form of protected

activity. They are due to be dismissed on the merits. Under the Supreme Court's decisions in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), complainant must prove the essential elements of a prima facie ERA case.

Even if complainant could establish his prima facie case, he creates only a "rebuttable presumption" of discrimination (*Burdine*, 450 U.S. at 254 n.7), which "drops from the case" when TVA "articulates lawful reasons for [its] action" (*id.* at 255 n.10, 257-58). The complainant must then prove that such reasons "lack[] a factual basis" and are "pretext[ual]" (*id.* at 257-58). As the Supreme Court recently explained in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993), this means that complainant must prove "both that the reason was false, and that discrimination was the real reason" (emphasis by the Court). These principles become particularly pertinent in a summary judgment case like this one. The *St. Mary's-Burdine-McDonnell Douglas* test has procedural as well as substantive significance. Indeed, the "allocation of burdens in Title VII . . . actions . . . enable[s] the district courts to identify meritless suits and dispense with them short of trial," and summary judgment is a procedural "vehicle for accomplishing this objective." *Foster v. Arcata Assocs., Inc.*, 772 F.2d 1453, 1459 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986). *Accord Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir.), *cert. denied*, 474 U.S. 829 (1985).

The United States Supreme Court clarified the standards for summary judgment under Rule 56 in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 242 (1986); and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The Sixth Circuit adopted that trilogy of cases in the context of discrimination law in *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989), as establishing a "new era" for summary judgment. Under

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Celotex, a “moving party is ‘entitled to a judgment as a matter of law’ ” when “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” (477 U.S. at 323). Under *Anderson*, a properly supported summary judgment motion can be defeated only by complainant’s presenting “affirmative evidence” (477 U.S. at 257).

The claim that a case may involve issues of good-faith belief, or “state of mind,” or “motive,” does not any longer provide any basis to defer summary judgment (*id.*; *Anderson*, 477 U.S. at 245-46, 256-57; *Matsushita*, 475 U.S. at 595, 597). That complainant might protest that he might ultimately cause a factfinder to “disbelieve the defendant[]” or render the defendant’s testimony “discredited” is no basis for denial of summary judgment (*Anderson*, 477 U.S. at 256). Indeed, a “plaintiff must present *affirmative evidence* in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery” (*id.* at 257). See also *Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F.3d 1382, 1387-90 (6th Cir. 1993); *Mauro v. Borgess Medical Ctr.*, 886 F. Supp. 1349 (W.D. Mich. 1995); *Hall v. Martin Marietta Energy Sys., Inc.*, 856 F. Supp. 1207 (W.D. Ky. 1994).

Such affirmative evidence “must do more than simply show that there is some metaphysical doubt as to the material facts” (*Matsushita*, 475 U.S. at 586). Summary judgment should be granted where, on “the record taken as a whole . . . there is no ‘*genuine issue for trial*’ ”; that is, where “the factual context renders . . . [a] claim *implausible*” and complainant does not “come forward with more persuasive evidence” (*id.* at 587), dismissal is proper. If complainant’s “evidence is merely colorable . . . or is not *significantly* probative, . . . summary judgment may be granted” (*Anderson*, 477 U.S. at 249-50; citations omitted).

The summary judgment standards worked out by the Supreme Court and the Sixth Circuit apply with full vigor to this proceeding. In *Howard v. TVA*, No. 90-ERA-24 (July 3, 1991), *aff'd sub nom. Howard v. United States Dep't of Labor*, 959 F.2d 234 (6th Cir. 1992), the Secretary adopted Sixth Circuit summary judgment law under Rule 56 and made it applicable to summary dispositions in ERA proceedings. In applying that law, the Secretary has also made it clear that, when an ERA complainant fails to make the required showing in responding to a motion for summary judgment, the employer is "entitled" to summary judgment dismissing the claim. *Gore v. CDI Corp.*, No. 91-ERA-14 (July 8, 1992). *See also Treiber v. TVA*, No. 87-ERA-25, at 11 (Sept. 9, 1993) (Where complainant "has not met his burden of presenting affirmative evidence to defeat the properly supported motions for summary judgment . . . [r]espondents are entitled to judgment as a matter of law.").

II

Complainant Cannot Bear His Burden of Proving His Claims of Discrimination.

In this case, complainant cannot make a "prima facie showing" (42 U.S.C. § 5851(b)(3)(A), (B) (1994)) of any nexus between his claimed protected activity and any adverse action. Further, the evidence is undisputed that the reorganization which eliminated his position was Nuclear Power wide and was undertaken without regard to any protected activity in which he may have engaged. Moreover, the evidence is clear that he was not selected because, in the opinion of the selection review board, he was not the best candidate. Since the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the [complainant] *remains at all times* with the [complainant]" (*Burdine*, 450 U.S. at 253),

complainant's ERA discrimination claims about the reorganization and his nonselection fail as a matter of law.

Complainant cannot establish an essential element of his prima facie case--that the persons who made the reorganization decision and the different persons on the selection review board were motivated by his protected activity. The Secretary of Labor's decision in *Bartlik v. TVA*, No. 88-ERA-15 (Dec. 6, 1991, and Apr. 7, 1993), *aff'd sub nom. Bartlik v. United States Dep't of Labor*, 73 F.3d 100 (6th Cir. 1996), expressly holds that the complainant must prove "that responsible managers knew" of his "protected activity" and were driven by "discriminatory motive[s]" by evidence of "the record" (Apr. 7, 1993, slip op. at 2). Here, there is no evidence that all of the members of the selection board knew of complainant's protected activity. Indeed, Heyward R. Rogers knew nothing of complainant's previous ERA complaint or any other protected activity (decl. ¶ 2). Moreover, there were no questions or discussion by the board of any protected activity (Rogers decl. ¶ 3; Corey decl. ¶¶ 2-3). *See also Robinson v. Adams*, 847 F.2d 1315, 1316 (9th Cir. 1987) ("An employer cannot intentionally discriminate against a job applicant based on race unless the employer knows the applicant's race."); *Gibson v. Frank*, 785 F. Supp. 677, 682 (S.D. Ohio 1990); *Dodson v. Marsh*, 678 F. Supp. 768, 772 (S.D. Ind. 1988) ("The plaintiff cannot prove that she was a victim of [race] discrimination . . . when the selecting official did not even know the plaintiff's race."). Further, the complaint asserts "speculative assumptions," or "illogical, unsupported, inferences," or "suppositions" (*Bartlik*, slip op. at 4, 8-10, 19), which cannot serve to prove his ERA prima facie case. Since the complaint does not even name any alleged discriminating officials on the selection board, much less whether the "decision-makers even knew of [complainant's] . . . activities," it must be dismissed. *See Bartlik v. Dep't of Labor*, 73 F.3d at 102.

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Complainant asserts that his telling the NSRB in 1992 of his inability to provide certain requested data was a protected activity. He is wrong. As discussed above, the NSRB was established pursuant to NRC and industry guidelines to provide safety oversight to nuclear plants. As he admits in his complaint ("Sequence of Events" at 1-2), complainant's organization at Sequoyah discontinued providing daily information to the Sequoyah plant operators which the NSRB felt would contribute to safe operation. Complainant refused to resume providing that information, not because he felt it would cause a safety problem, but because of the administrative inconvenience to him. According to the Secretary of Labor, management is entitled to establish job responsibilities and work schedules, and an employee's lack of performance is not protected by simply claiming an inability to meet those expectations. *Skelly v. TVA*, No. 87-ERA-8, slip op. at 8 (ALJ Feb. 22, 1989), *adopted*, (Sec'y Mar. 21, 1994) ("[T]he complaints Skelly voiced to his co-workers and supervisors related to the quantity of work Skelly was required to produce" "was not at the expense of safety and thus no safety issue is involved" and "cannot conceivably be perceived as being protected by Section 5851.").

Complainant was not entitled to refuse to provide the requested data simply because he felt it was inconvenient or difficult. The Secretary has held time and again that an employee's refusal to work loses any protected quality it may have had once it has been determined that no *work* hazard exists. *Sutherland v. Spray Sys. Envtl.*, No. 95-CAA-1, slip op. at 5-6 (Sec'y Feb. 26, 1996) ("Management has the prerogative to determine which means it deems to be most effective provided such means comport with requisite safety and health standards. There is no requirement for management to engage in a dialog with the refusing workers as to which procedure would be most efficacious."). In this case, of course, complainant never even told the NSRB that there was any nuclear safety hazard in providing the requested data. *See*

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Crosby v. United States Dep't of Labor, 53 F.3d 338, 1995 U.S. App. LEXIS 9164 (9th Cir. 1995), *aff'g Crosby v. Hughes Aircraft Co.*, No. 85-TSC-2 (Sec'y Aug. 17, 1993), in which the court affirmed the Secretary's determination that the complainant was discharged for proper reasons when he refused to work on a project because he did not like the protocol. In this case, it would indeed be anomalous if an employee such as complainant could excuse his poor performance in refusing to provide information helpful to safely operate a nuclear plant by claiming that his refusal to fulfill his job responsibilities entitled him to immunity under the ERA.

Even if complainant's refusal in January 1992 to provide the requested data was somehow a protected activity, there is no causal link between that activity and the elimination of his position in August 1996 from which one could reasonably infer a discriminatory intent. The Secretary of Labor has held that the proximity in time of the protected activity and the adverse action can give rise to an inference of discriminatory intent. In *Mandreger v. Detroit Edison Co.*, No. 88-ERA-17 (Sec'y Mar. 30, 1994), the Secretary held that six months between an initial internal complaint and a job transfer constituted a sufficient temporal nexus between protected activity and adverse action to raise the inference of causation. However, the Secretary has gone on to hold that where nearly a year had elapsed between a complainant's filing of several reports and the decision to terminate his employment, the evidence was insufficient to establish that the termination decision was inspired by the protected activity. *Evans v. Washington Pub. Power Supply Sys.*, No. 95-ERA-52 (ARB July 30, 1996). *See also Varnadore v. Oak Ridge Nat'l Lab.*, Nos. 92-CAA-2 and 5 and 93-CAA-1, slip op. at 87 (Sec'y Jan. 26, 1996) ("A finding that adverse action closely followed protected activity gives rise to a reasonable presumption that the protected activity caused the adverse action. However, if the adverse action is distant in time from the protected activity, doubt arises as to whether the alleged retaliator could have still been acting out

of retaliatory motives.”). In a case against TVA, the Secretary has also held that the passage of a year and a half between the protected activity and the adverse action is too long to give rise to an inference of discrimination. *Dillard v. TVA*, No. 90-ERA-31 (Sec’y July 21, 1994). In this case, more than four years had passed between complainant’s claimed protected activity, his January 1992 default, and the 1996 reorganization and elimination of his position. Clearly the passage of time negates any inference of discrimination.

Further, TVA had legitimate nondiscriminatory reasons for the actions it took. TVA’s 1996 reorganization and complainant’s nonselection were undertaken without regard to any 1992 protected activity in which complainant may have engaged. Even where a complainant has engaged in protected activity, that does not obligate TVA to confer special privileges upon him. Rather, his alleged protected activity is irrelevant where TVA’s decisionmakers had nondiscriminatory reasons for their actions, as they did here.

Here, the facts are indisputable that TVA was reorganizing its entire Nuclear Power organization, including its corporate Chemistry organization, to be more productive, hold rates stable, and be competitive in the electric utility industry. “Where the employer has a legitimate management reason for taking adverse action against the employee, the employer is not required to hold off such action simply because the employee is engaged in a protected activity.” *Ashcraft v. University of Cincinnati*, No. 83-ERA-7, dec. at 18 (Nov. 1, 1984); *Dunham v. Brown & Root, Inc.*, No. 84-ERA-1, rec. dec. at 13 (Nov. 30, 1984), *adopted by the Secretary* (June 21, 1985), *aff’d*, 794 F.2d 1037 (5th Cir. 1986). In defending to the Eleventh Circuit the Secretary’s final order in TVA’s favor in *Sellers v. TVA*, No. 90-ERA-14 (Apr. 18, 1991), *aff’d sub nom. Sellers v. Martin & TVA*, No. 91-7474 (Mar. 30, 1992), the Deputy Solicitor of Labor stated to the court:

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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." 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 [br. at 22; citations omitted].

The Deputy Solicitor added:

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" [br. at 30; citations omitted; cited pages attached].

Since protected activity does not shield an employee against a "discharge for non-discriminatory reasons," it is clear that reorganizing a workforce, as was done here, is not wrongful discrimination. Simply stated, the record does not contain any facts to support an inference that the legitimate reasons for TVA's reorganization and nonselection of complainant were a pretext for discrimination under the two-prong test set by *St. Mary's Honor Ctr.*, 509 U.S. at 515: "[A] reason cannot be proved to be 'a pretext for discrimination' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason" (emphasis by the Court).

Indeed, whether TVA in fact needed one fewer Chemistry Program Manager, measured by "objective" standards or the standards of another decisionmaker, is irrelevant. "What is relevant is that TVA, in fact, acted on its good faith belief" in the need for its actions, and there is no evidence to the contrary. *Pesterfield v. TVA*, 941 F.2d 437, 443 (6th Cir. 1991). Other decisions are in accord. See, e.g., *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1186-87 (11th Cir. 1984); *Jones v. Orleans Parish Sch. Bd.*, 679 F.2d 32, 38, *modified on other grounds*, 688 F.2d 342 (5th Cir. 1982), *cert. denied*, 461 U.S. 951 (1983) ("Whether the Board was wrong in believing that Jones had abandoned his job is irrelevant to the Title VII claim as long as the belief, rather than racial animus, was the basis of the

discharge.”); *Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025, 1036 (5th Cir. 1980) (“[W]hether HCCAA was wrong in its determination that Jefferies acted in violation of HCCAA guidelines . . . is irrelevant. . . . [W]here an employer *wrongly* believes an employee has violated company policy, it does not discriminate in violation of Title VII if it acts on that belief” (emphasis in original).); *Williams v. Southwestern Bell Tel. Co.*, 718 F.2d 715, 718 (5th Cir. 1983) (“The trier of fact is to determine the defendant’s intent, not adjudicate the merits of the facts or suspicions upon which it is predicated.”); *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1116 (2d Cir. 1988) (“[T]he reasons tendered need not be well-advised, but merely truthful.”); *Fahie v. Thornburgh*, 746 F. Supp. 310, 315 (S.D.N.Y. 1990) (“[T]he Bureau’s honestly held, although *erroneous*, conviction that [plaintiff] was not a good employee is a legitimate ground for [his] dismissal.”).

III

Complainant’s Rejection of an Unconditional Job Offer Precludes Any Liability or Relief.

Although TVA denies that it engaged in discrimination against complainant, on September 27, 1996, TVA unconditionally offered complainant the position of PWR Chemistry Program Manager--the same position he is claiming that he was discriminatorily denied. Instead of withdrawing his resignation and accepting the position, complainant proceeded with his resignation to accept a year’s salary, severance pay, and lump-sum payment for his annual leave. The law is well settled that his rejection of that offer has two independent legal effects. First, since TVA’s response to his complaint was appropriate and complete, his rejection of TVA’s offer precludes any finding of liability for discrimination. Second, his rejection of TVA’s

unconditional offer of employment, as a matter of law, tolls any backpay which he would be entitled to receive even if he could prove discrimination.

With respect to the first point, in analyzing ERA cases, the Secretary of Labor long ago adopted the paradigm used for Title VII cases. *Darley v. Zack Co.*, No. 82-ERA-2, slip op. at 7-8 (Apr. 25, 1983). The Courts of Appeals, including the Sixth Circuit, have held that an employer in a Title VII case has no liability where the employer “. . . implements prompt and appropriate corrective action” (*Blankenship v. Parke Care Ctrs., Inc.*, 123 F.3d 868, 872 (6th Cir. 1997)). See *Bell v. Chesapeake & Ohio Ry.*, 929 F.2d 220 (6th Cir. 1991); *Farley v. American Cast Iron Pipe Co.*, 115 F.3d 1548, 1554-55 (11th Cir. 1997); *Wilson v. Southern Nat'l Bank of N.C., Inc.*, 900 F. Supp. 803, 809-10 (W.D.N.C. 1995). While TVA does not concede that there was any discrimination directed towards complainant, TVA did offer him everything he demanded regardless of the fact that he was not the best-qualified applicant.

As to the second point, the law has been settled since the Supreme Court's decision in *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982), that an employer tolls the running of backpay by making an unconditional offer to the complainant of a job substantially equivalent to the one he or she was denied. See *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 908-10 (2d Cir. 1997); *Bolden v. Southeastern Penn. Transp. Auth.*, 953 F.2d 807, 829 (3d Cir. 1991); *Shore v. Federal Express Corp.*, 42 F.3d 373, 378-79 (6th Cir. 1994). The Secretary of Labor applied this rule in *Williams v. ITW Fabricating & Machining, Inc.*, No. 88-SWD-3, slip op. at 5-6 (June 24, 1992) (“Refusal of an unconditional offer of reinstatement to a substantially equivalent position constitutes a breach of the obligation to mitigate damages. . . . Accordingly, the back pay period for Williams is tolled on August 14, 1989, when he declined to return to work.”); *Harrison v. Stone & Webster Eng'g Group*, No. 93-ERA-44 (Aug. 22, 1995), *aff'd*, No. 95-6850, 1997 U.S. App. LEXIS

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16225 (11th Cir. 1997) (Where an employee quits rather than accept a demotion, unless constructively discharged, the employee is not eligible for post-resignation damages and backpay or for reinstatement.). Here, complainant was offered the identical position which he claims he was discriminatorily denied. Since the running of backpay is tolled from the date of the offer, which was made before the effective date of his resignation from TVA, he would have no right to any backpay, even if he could prove discrimination.

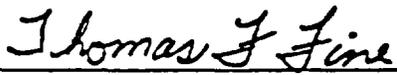
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CONCLUSION

Based on the foregoing reasons and upon the authorities cited, TVA's motion for summary decision should be granted, and a recommended order dismissing the complaint should be entered.

Respectfully submitted,

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APPENDIX I

Complainant Was Not Subjected to Discrimination in 1992.

The fact that complainant had an earlier complaint which was settled is not evidence that he was previously discriminated against. The Department of Labor has expressly adopted by regulation (29 C.F.R. § 18.408 (1996)) the clear cut rule of law in the United States that settlements or offers of settlement cannot be considered to establish a party's liability.¹ Even if that were not the law, nothing could be further from the truth. He was not discriminated against and the facts disproving that claim are abundant.

Contrary to complainant's statement that he "never received any unfavorable evaluations of my performance form [sic] anyone at TVA" (compl. at 1), he was removed from the position of Sequoyah Chemistry Manager only after it had been well documented that he was not successfully managing that organization. As stated in the Supervisor's Summary Statement in his January 1989 performance evaluation:

The overall performance of the Chemistry Group is not acceptable. Although Mr. Fiser has expended a great deal of effort in developing an improvement program, very little implementation has taken place. Extensive effort will be required to make the necessary

¹ The Secretary of Labor has expressly held that a settlement offer may not be used to establish retaliatory intent since evidence of offers to settle a complaint are not admissible for the purpose of establishing liability under 29 C.F.R. § 18.408. *Remusat v. Bartlett Nuclear, Inc.*, slip op. at 4, No. 94-ERA-36 (Sec'y Feb. 26, 1996) ("I note that evidence of offers to settle a complaint are not admissible for the purpose of establishing liability under 29 C.F.R. § 18.408."). Likewise, offers under Rule 68 of the Federal Rules of Civil Procedure are not admissible. In this regard, TVA's unconditional offer to create a second PWR Chemistry Program Manager position for complainant may not be used to establish TVA's liability.

progress in 1989 [Westbrook decl. ¶ 5, ex. 1, at 7; emphasis added throughout].

With respect to performance improvement, the evaluation stated:

Mr. Fiser must become more aggressive in the performance of his duties. Many discrepancies in equipment and personnel performance should have been corrected in a more timely manner. Mr. Fiser has a tendency to wait for corporate assistance in many areas where assistance is either not required or forthcoming [*id.* at 8].

His overall evaluation placed his performance in the next to the bottom category.

Complainant's September 1989 employee appraisal (Westbrook decl. ¶ 5, ex. 2) continued to reflect the same problems. For example, the Summary Statement said:

Through this period *he demonstrated continued weaknesses in aggressiveness and communication skills. Following specific discussions and coaching in these areas, I have noted improvements, although not to the degree I would have expected. Personnel-related action is not taken spontaneously. While actual chemistry results are good, the weaknesses noted last year persist. Material condition improvements of chemistry equipment is not being pushed adequately [id. at 1].*

Management attempted to develop complainant's leadership skills by rotating him to a different position for a short period in 1991. However, the hoped-for improvement did not occur and the Summary Statement in his October 1991 evaluation (Westbrook decl. ¶ 5, ex. 3) reflected that his skills had not improved:

[Mr. Fiser] [i]s having difficulty operating independently outside the Chemistry area. Is not using the authority of his position as an Outage Manager effectively. Will be given feedback and [his] performance will be monitored during the outage [id. at 1].

The evaluation for the final fiscal quarter of 1991 states:

Efforts to prepare for the outage have been good overall, but Mr. Fiser is having trouble operating independently. *Was given several major*

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activities to manage and was unable to effectively bring any to completion [id. at 9].

In addition to his weak performance evaluations, deficiencies and weaknesses in the Sequoyah Chemistry Program, which was under complainant's management, became increasingly apparent to top management during 1991 and early 1992, as the documentation shows. For example, at the May 22-23, 1991, NSRB meeting (McArthur decl. ¶ 4, ex. 1), two critical items were identified that needed to be addressed by Sequoyah Chemistry: (1) PASS training for technicians "to ensure original design criteria can be met in accordance with [NRC requirements]," and (2) "effluent analysis and pathway monitoring" (ex. 1 at 14).² At the August 21-22, 1991, meeting (McArthur decl. ¶ 4, ex. 2), the NSRB found that the two previously identified issues of "unmonitored radiation release . . . pathways" and PASS "training concerns" had not been addressed (ex. 2 at 14-15). At the November 20-21, 1991, NSRB meeting (McArthur decl. ¶ 4, ex. 3), the very first matter noted by the NSRB in its Executive Summary was that "a number of site responses were incomplete, inaccurate, or did not address the specific NSRB concerns" (*id.* at i). The NSRB also singled out the Site Chemistry Program as one of the "key items from the meeting," stating: "significant problems existed in the Sequoyah [Nuclear Plant] Chemistry Program which, if not promptly corrected, could impact plant chemistry control. For example, required data trend analyses were not being performed, chemicals were purchased to incorrect specifications, some training was delinquent, and several procedure preparation and use deficiencies were identified" (*id.*). The NSRB found that Site Chemistry had still not addressed the issues of PASS training and unmonitored

² PASS refers to a system for sampling the reactor core in the event of an accident to determine the extent of damage, while "effluent analysis and pathway monitoring" refers to the potential for releasing radiation into the river, a problem which complainant's Chemistry organization called "trivial."

radiation release (*id.* at 3-4, 23). NSRB noted further deficiencies in the Site Chemistry Program including: "inadequate procedures, failure to follow procedures, unauthorized changes to QA records, lack of management oversight in laboratory operations, training deficiencies, failure to perform required analyses, and poor data trending" (*id.* at 21).

Thus, complainant's performance as Chemistry Manager at Sequoyah was criticized a number of times, contrary to the implication in his complaint, long before his 1992 refusal to provide operating data which he claims precipitated his removal from Sequoyah. Indeed, at its February 19-20, 1992, meeting (McArthur decl. ¶ 4, ex. 4), the NSRB noted that the "deficiencies and weaknesses in the Sequoyah Plant (SQN) Chemistry Program" had required the intervention of the Plant Manager to develop and implement a corrective action plan (*id.* at i).

The attachment to the complaint confuses the reason that complainant was removed from the position of Sequoyah Site Chemistry Manager. He suggests that he was removed because his organization had discontinued providing certain chemistry data to the plant and, in January 1992, he refused to agree with the NSRB's suggestion to resume providing that information. In fact, as discussed above, complainant's inability to provide "trending analyses" was only one of the program deficiencies noted by the NSRB which had required the intervention of upper management. Because of his weak management skills, complainant was rotated from the Sequoyah Site Chemistry Manager position to the position of Corporate Chemistry Manager. The Summary Statement in his 1992 performance appraisal (Westbrook decl. ¶ 5, ex. 4 at 1) states:

[Mr. Fiser] was rotated from [Sequoyah] to the Corporate Manager of Chemistry position for 12 months. [Sequoyah] needs a different

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approach to solving problems in Chemistry and the rotation was initiated to face that issue.³

The minutes of the NSRB's May 21-22, 1992, meeting (McArthur decl. ¶ 5, ex. 5), also show that complainant was replaced as the Sequoyah Chemistry Manager because of the problems in his organization which needed to be corrected:

At the previous NSRB meeting, weaknesses in the Sequoyah Chemistry Program were discussed which, if not corrected, could impact chemistry control. The Plant Manager approved a comprehensive plan to prioritize and implement corrective actions to improve the chemistry program. The Corporate Chemistry Manager was assigned as the Site Chemistry Manager at Sequoyah to manage those activities and implement the Chemistry Improvement Program [*id.* at 2].

As discussed above, complainant's claim that his removal from the position of Sequoyah Chemistry Manager was discriminatory is without merit. His removal was warranted and the reasons are well documented.

³ His 1992 performance appraisal notes continued problems with his weak leadership skills while serving as the acting Corporate Chemistry Manager. For example, "Sometimes has to be motivated to fully accept and solve a problem"; "Has some difficulty in relating to site Chemistry managers"; "Full knowledge of the Chemistry area needs to be developed"; "During his tenure as Chemistry Manager these differences [a strong split among those employees he supervised] have not improved"; and "technical leadership needs attention" (*id.* at 4, 5, 6).