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Cc: Echavarria, Alex; Kirkwood, Sara
Subject: TVA Position Paper - WETZEL
Attachments: 2019-04-15 TVA Position Stmt - Wetzel.pdf

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Tennessee Valley Authority, 400 West Summit Hill Drive, Knoxville, Tennessee 37902-1401

April 15, 2019

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Re: Tennessee Valley Authority/Wetzel/4-1760-19-025

TENNESSEE VALLEY AUTHORITY'S POSITION STATEMENT

Dear Ms. Fehlman:

On December 18, 2018, Ms. Beth Wetzel filed a Complaint alleging that Tennessee Valley Authority ("TVA"), through the actions of Wetzel's supervisors, Ms. Erin Henderson (Director of Nuclear Regulatory Affairs) and Mr. Joseph Shea (Vice President of Regulatory Affairs and Henderson's supervisor), retaliated against Wetzel because she engaged in protected activities. She alleged that TVA violated the whistleblower provisions of Section 211 of the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851, and Nuclear Regulatory Commission ("NRC") Regulation 10 C.F.R. § 50.7. (Wetzel's December 18, 2018 Complaint, at 1, 12-18 ("Wetzel Compl."))

On January 14, 2019, Wetzel amended her Complaint to include an additional allegation of adverse employment action because between the time of her initial complaint on December 18, 2018 and January 14, 2019, TVA formally terminated Wetzel's employment. (Wetzel's January 14, 2019 Amended Complaint ("Wetzel Am. Compl.")) She alleged additional damages of lost wages and reduced retirement benefits because of the termination.

As set forth below, Wetzel cannot establish a *prima facie* case because she has not and cannot identify any specific "protected activity" that caused her termination. Wetzel's claims are baseless and should be dismissed.

I. Wetzel's "Protected Activities" Are Part of Her Job

While Wetzel's Complaint characterizes her activities as selfless reporting, stifled by management, that could not be further from the truth. Not only were her "protected activities" a central and required function of her job, but Wetzel was consistently encouraged to—and in some cases lauded for—those activities.¹

In 2006, Wetzel joined TVA and served as Manager in the Nuclear Licensing and Industry Affairs division. (Wetzel Compl., at 2.) Between 2006 and 2018, Wetzel was promoted within TVA a few times. (*Id.*) While her duties and responsibilities increased in relation to her promotions, the nature of her work for each successive promotion still entailed providing governance and oversight within the Nuclear Power Group. (*Id.*) In Wetzel's most recent role as Manager,² Emerging Regulatory Issues, one of her key responsibilities as part of her oversight duties was to "[p]roactively work to improve" the **safety culture** of the Corporate Nuclear Licensing business unit. (Wetzel, TVA Year End Review, 10/01/2016 – 09/30/2017, attached as Exhibit 1 ("Wetzel 2017 Eval.") (emphasis added).)

In other words, reporting safety issues, which Wetzel alleged as her "protected activities," was an important and required part of Wetzel's job. That TVA retaliated against Wetzel for doing her job both defies logic and is belied by the evidence to the contrary, which shows that Henderson encouraged Wetzel to exercise oversight and lauded her when she did so. When Henderson completed Wetzel's 2017 performance evaluation more than one year before Wetzel's Complaint, (Ex. 1.), Henderson positively evaluated Wetzel's performance of so-called "protected activities." In fact, Henderson encouraged Wetzel by rating her with a "Solid Performance" on the category of "Enhance Nuclear Safety Culture." (*Id.* at 3.) Henderson wrote: "Beth provides positive and critical feedback to her staff and has encouraged them to write [condition reports]." (*Id.*)

Furthermore, Henderson encouraged Wetzel to escalate issues and to have her staff do likewise. In Wetzel's 2017 performance evaluation, Henderson commented that "In FY18, Beth should focus on working with her staff to understand when they are escalating an issue to her in order for her to aggressively take action to address issues brought to her attention. Beth should actively engage with site and corporate managers to address those issues and escalate if she is then unable to resolve." (*Id.*)

¹ TVA does not take the position that protected activity occurring in the course of one's job functions cannot qualify as predicate protected activity within Section 211 of the ERA. Rather, there is no presumption of causation based on temporal promixity as discussed below.

² During the relevant periods in Wetzel's Complaint, Wetzel served as Manager of Regulatory Programs, and worked directly under Henderson. Henderson served as the Director of Nuclear Regulatory Affairs and worked directly under Shea, who was the Vice President of Nuclear Regulatory Affairs and Support Services.

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If Wetzel did not engage in “protected activities” by raising issues and writing condition reports and did not encourage her team to do the same, she would not be doing her job.

II. Wetzel’s Complaint of “Chilled Work Environment” is Meritless

Wetzel’s complaints about alleged violations at Watts Bar nuclear plant and Sequoyah nuclear plant are red herrings. First, Wetzel did not work at either site and was not subject to an allegedly “chilled work environment.” She worked in the TVA Corporate Nuclear Licensing business unit, where as shown above, she was encouraged to raise concerns. Second, the NRC found that there was no chilled work environment at TVA Corporate Nuclear Licensing, where Wetzel worked, or at Sequoyah nuclear plant.

In December 2018, NRC completed an investigation into whether there was a safety-conscious work environment (“SCWE”) issue at both Sequoyah Nuclear Plant and TVA Corporate Nuclear. NRC “[i]nspectors reviewed the independent safety culture assessments performed for Sequoyah Nuclear Plant in April 2018 and for TVA Corporate Nuclear in May 2018.” (December 4, 2018 Letter from Anthony D. Masters to Joseph W. Shea regarding NRC Inspection Report, at 1 & 3, attached as Exhibit 2 (“December 2018 NRC Inspection Rep.”).) The NRC inspectors “interviewed 15 TVA employees in the Licensing and Regulatory Affairs organizations at Sequoyah Nuclear Plant and TVA Corporate Nuclear, approximately 94% of the workforce in those groups.” (*Id.* at 3.) “Based on responses from the sampled group, personnel stated that they felt free to raise nuclear safety concerns without fear of retaliation.” (*Id.*)

Ultimately, in its December 4, 2018 letter to TVA, the NRC concluded that the “NRC inspectors did not identify any finding or violation of more than minor significance.” (*Id.*)

Thus, Wetzel’s claims of chilled work environment for raising safety concerns at TVA Corporate Nuclear and Sequoyah Nuclear Plant are completely meritless.

III. Wetzel Cannot Establish a *Prima Facie* Case of Retaliation

Wetzel has the burden to establish a *prima facie* case under the ERA, which requires the following four elements: “(1) that [s]he engaged in protected activity; (2) that the employer was aware of the protected activity; (3) that the employer took some adverse action against [her]; and (4) that the evidence is sufficient to permit an inference that the protected activity was the likely reason for the adverse action.” *Macktal v. U.S. Dep’t of Labor*, 171 F.3d 323, 327 (5th Cir. 1999) (citing *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989)). If Wetzel makes this showing, the burdens shifts to TVA to present clear and convincing evidence that it would have taken the same personnel action absent protected conduct. *See Trimmer v. U.S. Dep’t of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999) (citing 42 U.S.C. § 5851(b)(3)(B)).

A. Vague Allegations of Protected Activity

Although Wetzel's allegations of protected activities are vague, it appears she alleges the following protected activities in her Complaint:

1. In 2016, Wetzel vaguely addressed some issue related to NRC's fatigue rule requirement. (Wetzel Compl., at 5-6.)
2. Without any relevant time frame, Wetzel protested the failure to comply with "Fukushima" requirements at the Sequoyah nuclear power plant. (Wetzel Compl., at 6.)
3. In July 2016, Wetzel initiated a condition report to protest TVA's inadequate response to NRC's 2016 chilled work environment letter. (Wetzel Compl., at 7.)
4. In 2016 and 2017, Wetzel protested the failure to perform technical specification surveillances. (Wetzel Compl., at 8.)
5. In December 2017, Wetzel protested failures at TVA's Browns Ferry nuclear plant on two issues. (Wetzel Compl., at 8.)

Among these five alleged "protected activities," Wetzel initiated only one condition report. That report, however, was made back in July 2016, about two and a half years before her termination. The only alleged protected activity that is close to one year preceding her termination is that she purportedly protested failures at Browns Ferry nuclear plant.

B. Wetzel Has Not Sufficiently Alleged Causation and Cannot Do So

Wetzel failed to establish that any alleged "protected activity" contributed to her termination. *Benson v. N. Ala. Radiopharmacy, Inc.*, ARB Case No. 08-037, 2010 WL 1776977, at *3 (Apr. 9, 2010) (holding that plaintiff has the burden to establish causation). Wetzel offers no evidence of causation except temporal proximity, but even then all but one of her alleged "protected activities" occurred more than one year before her termination. (Wetzel Compl., at 5-8.)

In Wetzel's case, where her alleged protected activity is part and parcel to her central responsibilities, temporal proximity by itself, is insufficient to make a *prima facie* case. *Bartlik v. U.S. Dep't of Labor*, 73 F.3d 100, 103 (6th Cir. 1996). Wetzel's primary responsibility in Corporate Nuclear Licensing was to identify and report issues, which by its nature is considered protected activity. As discussed above, Wetzel received financial compensation for engaging in protected activities and encouraging her team to engage in protected activities.

The Sixth Circuit has explained why temporal proximity *by itself* is insufficient to establish a *prima facie* case where an employee's primary job is to identify safety issues, and her performance was evaluated on that basis.

Holding temporal proximity *by itself* to be sufficient to make a *prima facie* case on these facts is not justified. Essentially, anyone hired to identify safety problems who does his job and does identify problems, whose contract is not renewed would make a *prima facie* case of discriminatory retaliation. . . . [T]he making of a *prima facie* case must not be onerous, but we nonetheless think it must be something more than temporal proximity under circumstances such as those that exist in this case.

Bartlik, 73 F.3d at 103, n.7 (emphasis in original). Without more, temporal proximity is insufficient to establish causation.

Wetzel has not provided anything more than temporal proximity to support the necessary element for causation. In short, Wetzel has not and cannot allege that any specific protected activity contributed to her termination. All her alleged activities were vague and insignificant and lagged in time from her termination. She cannot establish both elements of protected activity and causation.

IV. Wetzel Routinely Sought to Undermine Her Supervisor's Authority

TVA conducted an internal investigation into a complaint filed with Human Resources by Henderson, which implicated Wetzel. The internal investigation found that Wetzel violated TVA policy against insubordination, among other policies. TVA then worked through its procedures and engaged Wetzel in discussions for a no fault separation agreement, which Wetzel initially signed and agreed but then rescinded. Ultimately, Wetzel was terminated for insubordination.

A. From the Outset, Wetzel Did Not Want Henderson to Be Wetzel's Supervisor, and It Had Nothing to Do With Protected Activities.

In 2015, TVA Corporate Nuclear had an opening for Senior Manager for Corporate Nuclear Licensing. Shea asked the Corporate Licensing Managers, including Wetzel, about whether different candidates would be qualified for the Senior Manager role. (Wetzel Compl., at 4.)

Wetzel was adamantly against Henderson's promotion to that role. As Wetzel readily admits in her Complaint, she responded that Henderson, who only had six years of experience at TVA and two years in the chemistry department at Salem/Hope Creek, lacked the necessary experience to be Senior Manager. (*Id.*) By contrast, Wetzel has over 32 years of experience in the nuclear power industry. (*Id.* at 1.) Again, two years later in 2018, after Henderson was promoted to the role of Director because of her continuously high performance, Wetzel maintained her position that Henderson was still not qualified for her job. (*Id.* at 9.)

B. TVA’s Internal Investigation Substantiated Henderson’s Complaint Against A Group of Insubordinate Employees, Including Wetzel

On March 9, 2018, Henderson filed a complaint with TVA, alleging a coordinated effort by multiple employees to retaliate against, harass and/or subject her to a hostile work environment and to otherwise undermine her professional authority (March 9, 2018 Complaint by Henderson, attached as Exhibit 4 (hereinafter, the “Henderson Compl.”)).

In response to Henderson’s complaint, the Office of the General Counsel (“OGC”) for TVA, by Senior Attorney John Slater, conducted an internal investigation of this group of employees, including Wetzel (August 10, 2018 Report of Investigation by John Slater, attached as Exhibit B (hereinafter, the “Slater Report”)).³

In the course of Slater’s investigation, he interviewed Henderson three times as well as sixteen other individuals, including members of Henderson’s staff, members of other groups with knowledge of the allegations regarding Wetzel. (See Slater Report, at p. 3, for a full list of names and titles.) Slater also reviewed emails, text messages, Employee Concerns Program (“ECP”) reports and related documents, and a Report of Investigation prepared by Human Resources. (*Id.*)

TVA Standard Programs and Processes include employee discipline policies that employees are expected to respect and support their supervisors in the performance of their duties and not to engage in conduct to undermine that work relationship. TVA Policy, TVA-SPP-11.316 Employee Discipline, Sections 1.5 through 1.5.3, provides the following:

1.5. Respectful Workplace.

Everyone at TVA is responsible for helping maintain a safe, professional, and respectful workplace. It is core to our TVA Values and it is what we expect of each other each and every day.

1.5.1. Harassment/Intimidation/Retaliation/Discrimination (HIRD).

Incidents involving HIRD of any nature are strictly prohibited. Individuals who engage in any form of HIRD will be subject to disciplinary action up to and including termination.

³ Please take notice that information in the Slater Report, ECP reports, and other attached exhibits, contain confidential personnel files, the public disclosure of which would constitute an invasion of personal privacy and which would trigger TVA’s reporting responsibilities under the Privacy Act. Any privileged and/or confidential information which may be visible should not be considered to constitute a waiver of the attorney client privilege or work product protection.

1.5.2. Abusive or Unprofessional Language or Conduct.

Abusive or unprofessional language and/or behavior directed toward other employees or others, or abusive or unprofessional conduct that adversely affects the work environment will result in disciplinary action up to and including termination.

1.5.3. Insubordination.

Insubordination by an employee will not be tolerated. A willful failure or refusal to carry out or comply with a direct order, verbal/written instruction, or TVA policy is classified as insubordination. Abusive or unprofessional language or behavior toward an employee's supervisor or others in the chain of management is also considered insubordination.

TVA-SPP-11.316, Employee Discipline, Section 1.5 through 1.5.3, at p. 24, attached as Exhibit 5.

Slater concluded that a group of employees, including Wetzel, harassed, retaliated against, and created a hostile work environment for Henderson. As for Wetzel, Slater determined she held open animosity toward Henderson and had since Henderson was selected for the supervisor job. In fact, Wetzel candidly stated that she had serious problems with Henderson, leading Slater to conclude:

[Wetzel] had a problem with Henderson from the time Henderson was selected [as Senior Manager] because, in her view, Henderson was “too young,” “too inexperienced,” and “did not have enough nuclear experience.” Wetzel also stated that her working relationship with Henderson was strained; in fact, she had been placed on a Performance Improvement Plan (PIP). Wetzel further noted that she “does not trust” Henderson and that, in her view, Henderson is “vindictive,” and Wetzel does not understand what motivates a person to pull people’s gate records and have them investigated. Moreover, Wetzel describes Corporate Licensing as “toxic” and will “only work better if [Henderson] is moved out.” Finally, Wetzel said that she took the NEI loan assignment to get away from Henderson.

(Slater Report, at 19.)

Similarly, Wetzel readily admitted in her Complaint that she believes that “Henderson was vindictive” and that even by April 2018, Henderson was not qualified for her job. (Wetzel Compl., at 9.) Wetzel also admitted that she wanted either Henderson to be moved out of Corporate Nuclear (Slater Report, at 19) or Wetzel would move to the Nuclear Energy Institute (“NEI”) “in order to get away from Henderson” (Wetzel Compl., at 9).

It is not surprising that by Wetzel's own admission she had continuously disrespected Henderson from the time Henderson became Wetzel's supervisor to the time Wetzel filed her Complaint.

C. Wetzel Sustained a Campaign of Disrespect Toward Henderson

Wetzel's animosity toward Henderson appears to have manifested itself in multiple ways. According to Slater's report, Wetzel repeatedly communicated her beliefs that Henderson is vindictive and unqualified to others in the organization in an effort to undermine Henderson's authority. Wetzel took actions contributing to a hostile work environment for Henderson. For example,

1. Without substantiation, Wetzel repeatedly told others that Henderson had retaliated against Ms. Michelle Conner by having Ms. Conner's relationship with McBrearty investigated by Human Resources. (Slater Report, at 18-19; see also Henderson Compl., at 6-7.)
2. Wetzel was supposed to attend a work meeting but indicated that she could not attend because of a conflict. (Henderson Compl., at 7.) Henderson informed Wetzel that she will take her place, but Wetzel worked with McBrearty and behind Henderson's back to insert McBrearty into the same work meeting in Henderson's organization where his presence would be more than unusual. (Henderson Compl., at 6-7 ("While [Wetzel] was not included on the email [McBrearty] sent to us, [Wetzel] forwarded his email (deleting his forwarding it to her) recommending [McBrearty's] attendance at the meeting and that he be our primary for representative and she'd be the back up.")) And by that time, as detailed in Slater's report, McBrearty had been harassing Henderson. (See generally Slater Report.)
3. Wetzel admitted that she did not trust Henderson. (Slater Report, at 19.) Based on her mistrust, Wetzel has refused to enter travel expenses into TVA's travel reimbursement system under the guise that Henderson would misuse that information against Wetzel. Moreover, she continued to engage in disrespectful conduct, a form of insubordination, by directing baseless comments to Henderson's supervisor regarding Henderson's supposed vindictiveness.

Put simply, Wetzel's continuous actions of insubordination and disrespectful conduct toward her supervisor, interfered with the ability of Ms. Henderson and others to perform their jobs. Based on that, not any protected activity, Wetzel was ultimately terminated.

V. Wetzel's Termination Had Already Been Decided Before She Filed Her Complaint

Wetzel's alleged protected activities and her Complaint to the Occupational Safety and Health Administration ("OSHA") did not contribute to her termination. As explained above, her alleged "protected activities" were required as part of her job, and her efforts to pursue them were encouraged through performance evaluations.

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As admitted by Wetzel, through mischaracterized, TVA and Wetzel engaged in discussions in October 2018 (two months before Wetzel's Complaint) regarding her voluntary departure from TVA. (Wetzel Compl., at 10-11.) At that time, TVA had already informed her about TVA's findings of her insubordination towards Henderson. (*Id.*) It was clear from these discussions that if an agreement could not be reached, Wetzel would be terminated.

After these discussions, TVA and Wetzel signed and executed the voluntary resignation agreement, which is attached as Exhibit 6 (November 15, 2018 Lettered Agreement of Voluntary Resignation ("Resignation Agreement")). The Resignation Agreement provided a seven day cancellation period. Wetzel had signed the November 15, 2018 Resignation Agreement on December 5, 2018. She exercised her right to rescind the agreement within the allotted time.

Even Wetzel acknowledged that it was her rescinding the Resignation Agreement that led to her termination. "Wetzel rejected that offer [in the Resignation Agreement], and believes that TVA is now working to terminate her employment without severance benefits." (Wetzel Compl., at 12.) Wetzel was not terminated because she filed her OSHA Complaint; it was a direct consequence of her rescinding the Resignation Agreement.

VI. TVA's Termination of Wetzel Was Appropriate Because Her Disrespectful Conduct Hindered Henderson's Ability to Perform Her Responsibilities in Leading the Nuclear Corporate Group

As discussed above, TVA had legitimate and nondiscriminatory reasons for terminating Wetzel. While Wetzel argues that TVA's reasons for terminating her were pretextual, she fails to connect a causal chain from any alleged protected activity and her termination. On the other hand, TVA determined, Wetzel engaged in a sustained campaign to disrespect Henderson, undermining Henderson's authority, poisoning Henderson's relationship with her staff, and hindering Henderson's ability to do her job. Wetzel's disrespectful and harassing conduct directed at Henderson is actionable. "[D]isrespectful conduct is unacceptable and not conducive to a stable working atmosphere, and . . . agencies are entitled to expect employees to conduct themselves in conformance with accepted standards. *Ray v. Dep't of the Army*, 97 M.S.P.R. 101, ¶ 58 (2004), *aff'd*, 176 F. App'x 110 (Fed. Cir. 2006) (internal citations omitted). "[I]nsolent disrespect towards supervisors so seriously undermines the capacity of management to maintain employee efficiency and discipline that no agency should be expected to exercise forbearance for such conduct more than once." *Lewis v. Dep't of Veterans Affairs*, 80 M.S.P.R. 472, ¶ 8 (1998).

Wetzel's alleged protected activity did not give her "carte blanche to ignore the usual obligations involved in an employer-employee relationship." *Lopez v. W. Texas Utils.*, No. 86-ERA-25, 1988 WL 524363, at *4-5 (ARB July 26, 1988). *See also Makam v. Pub. Serv. Elec. & Gas Co.*, ARB No. 99-045, ALJ No. 1998-ERA-22, 2001 WL 111607, at *4 (ARB Jan. 30, 2001) (holding that whistleblower protections are not "intended to be used by employees to shield themselves from termination actions for non-discriminatory reasons"); *Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 279 (7th Cir. 1995) ("We have consistently held that an employee's insubordination toward

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supervisors and coworkers, even when engaged in protected activity, is justification for termination.”).

VII. Wetzel’s Complaint and Amended Complaint Should Be Dismissed.

Wetzel’s Complaint should be dismissed under either 42 U.S.C. § 5851(b)(3)(A) or 42 U.S.C. § 5851(b)(3)(B). Sections 5815(b)(3)(A) and 5815(b)(3)(B) of the Energy Reorganization Act provides:

(3)(A) The Secretary shall dismiss a complaint filed under paragraph (1), and shall not conduct the investigation required under paragraph (2), unless the complainant has made a *prima facie* showing that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.

(B) Notwithstanding a finding by the Secretary that the complainant has made the showing required by subparagraph (A), no investigation required under paragraph (2) shall be conducted if the employer demonstrates, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of such behavior.

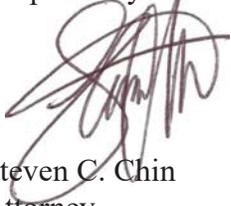
42 U.S.C. §§ 5851(b)(3)(A) and (3)(B).

Wetzel’s Complaint consists of a narrative of her primary responsibilities combined with mischaracterizations of what actually occurred. She fails to provide any evidence of causation or any reasonable inference based on temporal proximity that any alleged protected activity contributed to her termination. Accordingly, her Complaint should be dismissed under 42 U.S.C. § 5851(b)(3)(A) for failure to establish a *prima facie* case.

Alternatively, based on Slater’s detailed and thorough report, TVA has established by clear and convincing evidence that TVA would have nevertheless terminated Wetzel for serious and sustained disrespectful conduct. Accordingly, Wetzel’s Complaint should be dismissed without further investigation under 42 U.S.C. § 5851(b)(3)(B).

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Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Steven C. Chin", written over a light blue horizontal line.

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