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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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HEARING

-----x Docket Nos.

In the Matter of: : EA-20-006 and

TENNESSEE VALLEY : EA-20-007

AUTHORITY : ASLBP No.

(Enforcement Action) : 21-969-01-EA-BD01

-----x

Thursday, October 14, 2021

Teleconference

BEFORE:

PAUL S. RYERSON, Chair

E. ROY HAWKENS, Administrative Judge

SUE H. ABREU, Administrative Judge

1 APPEARANCES:

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P R O C E E D I N G S

12:58 p.m.

JUDGE RYERSON: We are on the record.

Good afternoon. We're here on this teleconference on TVA's challenge to an NRC civil enforcement order. Specifically, we're here for argument on TVA's Motions for Summary Disposition of All Asserted Violations.

I'm Judge Ryerson, and also on the line are the other Board members, Judge Hawkens and Judge Abreu.

Before we take appearances, I'd just like to go over a few administrative matters.

Please identify yourself when speaking. This proceeding will be transcribed and transcripts will be available on the NRC website in a few days.

And we have also made available listen-only telephone lines, so that interested members of the public can follow along in real time.

I'll go over how we intend to proceed after we take appearances.

But, with that in mind, Judge Hawkens, do you have anything to add at this point?

JUDGE HAWKENS: No, I do not, Judge Ryerson. Thank you.

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1 JUDGE RYERSON: Thank you, Judge.

2 And, Judge Abreu?

3 JUDGE ABREU: I have nothing to add.
4 Thank you, Judge Ryerson.

5 JUDGE RYERSON: Thank you.

6 All right. Well, let's take appearances,
7 starting with TVA. Who do we have today for TVA?

8 MS. LEIDICH: Your Honor, this is Anne
9 Leidich with Pillsbury Winthrop Shaw Pittman,
10 representing Tennessee Valley Authority. With me are
11 my colleagues Michael Lepre, Timothy Walsh, and Meghan
12 Hammond. And on the phone, also, are our co-counsel
13 at O'Melveny, Laurel Rimon and Mary Pat Brown.

14 JUDGE RYERSON: Thank you. Welcome to all
15 of you.

16 And who do we have for the NRC staff?

17 MR. GILLESPIE: Good afternoon, Your
18 Honor.

19 This is Joe Gillespie from the NRC staff.
20 Along with me on the phone is Kevin Roach, who will be
21 answering some questions today, and also with me is
22 Sara Kirkwood. And also on the phone are Thomas
23 Steinfeldt and Joe McManus.

24 JUDGE RYERSON: Okay. Thank you. And
25 welcome.

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1 All right. Well, I think we set forth the
2 very simple rules in our recent order. We'll begin
3 with counsel for TVA, who will have up to 30 minutes,
4 and TVA counsel may reserve some time for rebuttal, if
5 they wish. And then, after the opening by TVA, we'll
6 hear counsel for the NRC staff.

7 Just to alert you, I think that the Board
8 will have questions throughout the arguments, and
9 we're not going to reserve all our questions to the
10 end, but just ask questions as matters come up. And
11 then, after your formal time is over, it's also
12 possible that we'll have a few questions after your
13 formal arguments.

14 Judge Hawkens, anything before we proceed?

15 JUDGE HAWKENS: No, thank you.

16 JUDGE RYERSON: Thank you.

17 And, Judge Abreu?

18 JUDGE ABREU: No, thank you.

19 JUDGE RYERSON: Thank you.

20 All right. Well, who will be arguing for
21 TVA?

22 MS. LEIDICH: This is Anne Leidich. I
23 will be starting the argument for TVA. We have
24 divided our argument into three parts. I will be
25 addressing Violations 1 and 3. Mr. Lepre will be

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1 addressing Violation 2. Mr. Walsh will be addressing
2 Violation 4, and Ms. Hammond may participate as
3 needed.

4 JUDGE RYERSON: Okay. Well, welcome to
5 your team again.

6 All right, Ms. Leidich, if you'd begin?
7 And would you like to reserve some time for some or
8 all of you at the end, a rebuttal?

9 MS. LEIDICH: Yes, Your Honor. We aim to
10 reserve approximately 10 minutes for rebuttal.

11 JUDGE RYERSON: Ten minutes. All right.
12 Well, I will be the informal timekeeper, and you have
13 collectively about 20 minutes right now to start. So,
14 please do.

15 ARGUMENT ON BEHALF OF TENNESSEE VALLEY AUTHORITY

16 MS. LEIDICH: May it please the Court, TVA
17 is entitled to summary disposition on Violations 1 and
18 3 because the staff has failed to establish an adverse
19 action under Energy Reorganization Act, Section 211.
20 Under that section, the staff must assert an adverse
21 action that is either discharge or discrimination
22 against an employee with respect to his compensation,
23 terms, conditions, or privileges of employment.

24 This is a well-known, well-established,
25 and well-defined standard, as the same wording was

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1 used by Congress in the Title VII anti-discrimination
2 provision. Thus, Congress clearly intended for the
3 ERA to encompass the same set of adverse actions as
4 Title VII discrimination claims.

5 Under that standard, filing a complaint is
6 not an adverse action, and either is an investigation.
7 The inquiry should end here. Yet, we are here today
8 because the NRC --

9 JUDGE HAWKENS: Ms. Leidich, this is Judge
10 Hawkens. May I interrupt you for a quick question?

11 MS. LEIDICH: Yes.

12 JUDGE HAWKENS: Neither Mr. McBrearty or
13 Ms. Wetzel are alleging discrimination as a member of
14 a protected class. So, putting aside there's
15 identical language in 703(a) of Title VII to the 211
16 language we're using here, are there policy reasons
17 why the Title VII anti-discrimination standard should
18 apply in this anti-retaliation case?

19 MS. LEIDICH: Your Honor, the Commission
20 has previously determined that ERA Section 211 governs
21 NRC actions in terms of whistleblower discrimination
22 cases. However, in addition, 10 CFR 50.7 uses
23 equivalent language as well. It says, "other actions
24 that relate to terms, conditions, or privileges of
25 employment." So, the NRC staff's own regulation uses

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1 the same language as well.

2 JUDGE HAWKENS: I understand, but are
3 there policy reasons, aside from the language itself,
4 policy reasons which should support the more narrow
5 provision here, which we have in our anti-retaliation
6 statute and regulation, rather than the policy reasons
7 supporting the anti-retaliation provision in Title
8 VII?

9 MS. LEIDICH: Yes, Your Honor. When
10 Congress created Section 211, they were clearly
11 concerned with balancing employee rights versus
12 employer rights. In particular, Section 211's
13 evidentiary standard and the requirement for a prima
14 facie case was titled in the public law "avoidance of
15 frivolous complaints." To eliminate the prima facie
16 requirement for an adverse action that meets the
17 Section 211 standard would not serve the purpose of
18 avoiding frivolous complaints in the manner that
19 Congress intended, and it would, essentially,
20 eliminate the gatekeeping function in Section 211
21 itself.

22 JUDGE HAWKENS: All right. Thank you.

23 JUDGE RYERSON: Let me follow up with one
24 question while we have you, Ms. Leidich. The staff
25 has alleged that an unpublished decision -- I think

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1 it's Vander Boegh -- represents the controlling 6th
2 Circuit interpretation of 211. Well, I have a bunch
3 of questions about that.

4 But the first ones I have are: you assert
5 that 6th Circuit law controls, but, unlike most of
6 your brief which was lots of footnotes, you cite no
7 authority for that. What is the authority for the 6th
8 Circuit law applying? I suppose if someone challenged
9 NRC action in the D.C. Circuit, would it necessarily
10 apply 6th Circuit law just because the actions
11 occurred in the 6th Circuit?

12 MS. LEIDICH: Your Honor, I believe
13 actions are appealable both to the D.C. Circuit and to
14 the local circuit in which the violation was issued.
15 And in particular, I believe that the staff
16 enforcement decisions are different from licensing
17 proceedings, and I don't believe they necessarily
18 default to the Hobbs Act in the same way that would
19 grant the D.C. Circuit jurisdiction. I think they may
20 actually go to the local circuit for jurisdiction
21 first --

22 JUDGE RYERSON: Okay.

23 MS. LEIDICH: -- because the Hobbs Act
24 controls over licensing decisions, and this,
25 technically, is not a licensing decision per se. I

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1 think it's open to some interpretation, of course, but
2 the 6th Circuit certainly would have a chance of
3 controlling.

4 JUDGE RYERSON: Okay. Thank you. We'll
5 ask the staff about that when we get to them, but I
6 noticed they did not disagree with you at all on that
7 point.

8 Well, a followup question about the 6th
9 Circuit is that the staff seems to rely quite heavily,
10 at least in my view, on the Vander Boegh decision,
11 which is not published. And I believe they assert
12 that that represents the current status of 6th Circuit
13 law. And my question for you, first, is, do
14 unpublished decisions constitute binding precedent
15 within the 6th Circuit, or frankly, anywhere?

16 MS. LEIDICH: Your Honor, I have quite a
17 bit to say about the Vander Boegh decision, but
18 unpublished decisions in the 6th Circuit are treated
19 on a circuit-by-circuit level. And unpublished
20 decisions in the 6th Circuit, in particular, under
21 their local rules, are persuasive, but not binding
22 authority or non-precedential authority.

23 JUDGE RYERSON: All right. Thank you.

24 All right. I'm sorry. Continue.

25 MS. LEIDICH: Thank you.

1 We are here today because the NRC staff
2 has found an employee complaint, and the investigation
3 flowing from that complaint, to be an adverse action
4 and a violation of NRC rules. The practical
5 consequences of this decision cannot be understated.
6 Supervisory employees may be chilled from raising
7 concerns over inappropriate, harassing, or aggressive
8 behavior. And employers may be forced to ignore
9 complaints, giving rise to further allegations of
10 retaliation and harassment. This is an untenable
11 situation for employers.

12 Yet, the staff would make this decision
13 based on language from the broadly worded Title VII
14 anti-retaliation standard, which has entirely
15 different statutory language than that explicitly used
16 in the Energy Reorganization Act. Clearly, the
17 staff's claims based on non-analogous statute should
18 be rejected.

19 As the Supreme Court has admonished in the
20 case Connecticut National Bank v. Germain, quote,
21 "Courts must presume that a legislature says in a
22 statute what it means and means in a statute what it
23 says there; when the words of a statute are
24 unambiguous, then, this first canon is also the last:
25 judicial inquiry is complete." End quote.

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1 However, in an effort to escape the plain
2 language of the ERA, the staff relies on one
3 unpublished, non-precedential decision from the 6th
4 Circuit and two Department of Labor decisions to claim
5 that the Title VII anti-retaliation standard should
6 apply to the ERA. However, the staff-cited cases do
7 not stand for the proposition that the Board should
8 ignore the plain language of the statute.

9 In Vander Boegh decision, the 6th Circuit
10 decided to apply a single retaliation standard to
11 claims arising under five different environmental
12 statutes with different statutory language and the
13 False Claims Act. In the DOL cases, the DOL applied
14 a hybrid standard, including both discrimination and
15 retaliation standards. This can be seen in the
16 overall case of Slip Op 15, where a claim was rejected
17 based on the discrimination standard, and in the
18 Melton case analysis at Slip Op 23 to 24.

19 Nor does Burlington Northern support the
20 staff's use of a retaliation standard, if the staff
21 wants the Board to find that Burlington Northern
22 intended the anti-retaliation standard to apply to the
23 ERA, no matter the language in the governing statute.
24 Yet, that argument completely ignores the fact that
25 the Supreme Court expressly found that the words in

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1 the anti-discrimination provision "discharge
2 compensation, terms, conditions, or privileges of
3 employment" limit the scope of that provision to
4 actions that affect employment or alter the conditions
5 of the workplace. The Court found, and I quote, "no
6 such limiting words appear in the anti-retaliation
7 provision." End quote. But those limiting words do
8 appear in Section 211 and 10 CFR 50.7, and they
9 require an employment-related adverse action.

10 In sum, the discrimination standard
11 applies to the ERA, and the staff has failed to assert
12 an adverse action under that standard. Nonetheless,
13 even if the Board were to find that the staff's
14 retaliation standard were to apply, there still is no
15 adverse action in Violations 1 and 3.

16 As to Ms. Henderson's complaint, the staff
17 simply relies on Ms. Henderson's mention of protected
18 activities to allege an adverse action. The staff
19 cites no case law in support of its assertion that
20 there is no need for a harm or that an employee
21 complaint can be an adverse action. And frankly, the
22 staff's argument defines logic.

23 As indicated by the Kahn case, under the
24 ERA, which we cited in our brief, harassing behavior
25 can occur even during otherwise protected activity.

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1 There must be a right to complain of such behavior.

2 But the staff's argument takes it even one
3 step further and makes it a violation for TVA to
4 investigate such a claim. But none of the Title VII
5 retaliation cases cited by the staff support the
6 assertion that a complaint or investigation alone,
7 without additional impact, can be an adverse action.
8 Yet, Violations 1 and 3, by their very own terms, are
9 based solely on the complaint and the investigation
10 alone, and thus, cannot be an adverse action.

11 I have one final point to make before I
12 turn it over to Mr. Lepre. Under *Fiser*, the staff
13 cannot change its adverse action mid-course in a case
14 or add protected activities, or adopt entirely new
15 enforcement theories. Doing so midstream deprives TVA
16 of its statutory right to make its case to the NRC
17 enforcement staff prior to a hearing, as guaranteed by
18 the Atomic Energy Act in Section 234(b). In addition,
19 it's also a jurisdictional default for the staff to
20 extend those claims. As such, the Board should
21 evaluate the staff's claims here based solely on the
22 bounds of the Notice of Violation.

23 And with that, I will turn it over to Mr.
24 Lepre.

25 JUDGE RYERSON: Yes, one question for you,

1 Ms. Leidich. Is that argument made in your briefs as
2 sort of a due process argument? I might have missed
3 it, but I don't recall that.

4 MS. LEIDICH: Your Honor, at the time of
5 our brief, we were unaware that the NRC staff would be
6 attempting to extend its adverse actions beyond the
7 scope of the Notice of Violation and Order. Of
8 course, there's been limited briefing in this case,
9 and the first time that we were made aware of the
10 basis for the NRC staff's claim was in their response
11 to our brief.

12 JUDGE RYERSON: Okay. Thank you.

13 MR. LEPRE: Judge Ryerson, Judge Abreu,
14 Judge Hawkens, good afternoon.

15 I'm Mike Lepre, counsel for TVA with
16 Pillsbury, and I'm going to address our Motion to
17 Dismiss, Violation 2.

18 Violation 2 should be dismissed as a
19 matter of law because placing Mr. McBrearty on paid
20 administrative leave was not an adverse employment
21 action under Section 211 of the ERA. As we stated in
22 our Motion --

23 JUDGE RYERSON: If I could stop you -- Mr.
24 Lepre, let me give you my bottom-line question for you
25 first.

1 MR. LEPRE: Sure.

2 JUDGE RYERSON: Do you contend that paid
3 administrative leave with full pay and benefits can
4 never, never, ever, ever be an adverse action under
5 211 as a matter of law, or could there be an adverse
6 action in sufficiently egregious circumstances, which
7 I assume you contend do not exist here?

8 MR. LEPRE: There could be in sufficiently
9 egregious circumstances, but you have to have
10 something more than just the paid leave.

11 JUDGE RYERSON: Right.

12 MR. LEPRE: And, of course, our position
13 is there is not that "something more" here. I will
14 say that many courts have found, in and of itself,
15 that paid leave isn't an adverse action. So, there is
16 a need for something more.

17 JUDGE RYERSON: Okay. Please continue.

18 JUDGE HAWKENS: Mr. Lepre, this is Judge
19 Hawkens.

20 Can you give me some examples of what you
21 would determine are the extreme circumstances or
22 "something more" adverse action?

23 MR. LEPRE: Sure. In fact, I'll point out
24 a couple of the cases that the staff cites to. In the
25 cases that the staff cites, the Court said perhaps

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1 these types of things could turn something into an
2 adverse action.

3 In the Dahlia case, the police chief was
4 required to forfeit on-call and holiday pay. He
5 missed out on a sergeant's exam. He missed out on
6 training opportunities. The Court said those types of
7 things could, if true, turn an adverse action -- turn
8 paid leave into an adverse action.

9 The Court cites another case where a
10 person was put on a Performance Plan and had to
11 complete an assignment while they were on that
12 Performance Plan if they wanted to come back to work,
13 but the employer made it impossible for the person to
14 actually complete the assignment because they didn't
15 allow access to the computer system. So, that's one,
16 again, the courts have recognized could be
17 significant. That's the Richardson case.

18 And then, the other case is the Michael v.
19 Caterpillar case that the staff cites as well. And
20 there, the Court said maybe putting somebody on paid
21 leave, plus a 90-day Performance Plan that required a
22 whole bunch of different restrictions on the person,
23 requirements that the person had to meet, that could
24 be as well.

25 So, those are the examples from case law,

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1 and those are the cases that the staff relies on, none
2 of which are analogous here.

3 JUDGE RYERSON: Mr. Lepre, if I recall
4 correctly, there's a 2nd Circuit case arising out of
5 the Eastern District of New York where one of the
6 judges, concurring in result, went out of his way to
7 say that he wasn't too happy with the majority view
8 that sounded almost as though that paid administrative
9 leave with full benefits could never be a violation,
10 as a matter of law, but he continued with a statement
11 to the effect that it might be the rare employer who,
12 out of spite, would inflict a paid vacation on an
13 employee. Would you agree with that analysis?

14 MR. LEPRE: I suppose there might be a
15 rare employer who would do that. You know, there
16 would have to certainly be evidence --

17 JUDGE RYERSON: Yes.

18 MR. LEPRE: -- that the employer was doing
19 it out of spite. And I think that, in general, it
20 would be a very -- you certainly would have to
21 demonstrate that it was done out of spite. It would
22 be a relatively high bar to meet.

23 JUDGE HAWKENS: Mr. Lepre, this is Judge
24 Hawkens again.

25 How do you respond to the staff's argument

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1 that the stigma, loss of confidence among colleagues,
2 loss of confidence in the NRC, constitutes that
3 "something extra" which would render this actionable?

4 MR. LEPRE: So, Your Honor, I don't see a
5 case that the staff has pointed to or that we have
6 found where stigma rendered paid leave an adverse
7 action. The staff cites to a couple of cases where
8 stigma was mentioned. That stigma might attach to
9 being put on paid leave, and that might be enough, but
10 there's not a case -- and that was just indicta --
11 there's not a case where there's a holding that stigma
12 was enough to turn it into an adverse action.

13 Also, the staff hasn't presented anything
14 close to adequate evidence here of stigma to survive
15 summary judgment. Look at Mr. McBrearty; he found a
16 job in the nuclear industry while he was on paid
17 leave. So, I don't see where the stigma or the
18 reputational harm is there.

19 They cite to something in Mr. Dodd's where
20 Mr. Dodd said that one employee, that he said that one
21 employee told him that that employee was concerned
22 about Mr. McBrearty's reputation. Surely, that's not
23 enough evidence to have a hearing. And also, that
24 concern, again, is not valid because Mr. McBrearty was
25 able to find that job.

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1 The other point I would make about stigma
2 is that it is a very subjective standard whether
3 stigma attached to a particular activity. And the
4 Court in Burlington says that the standard that you
5 apply in these cases -- and again, this is on the
6 retaliation side -- that the standard you apply, it's
7 got to be an objective standard.

8 So, on top of everything else, I think
9 having stigma be one of the factors to look into is
10 very difficult to apply and it's not objective.

11 JUDGE HAWKENS: Thank you.

12 MR. LEPRE: I was discussing how the
13 various circuits have dealt with this issue. And I
14 just would like to point out that, in Jones v. SEPTA,
15 which is a 3rd Circuit case, the 3rd Circuit examined
16 the issue as one of first impression under Burlington
17 Northern. And it pointed out that, quote, "Other
18 courts of appeals have unanimously concluded that
19 placing an employee on paid administrative leave,
20 where there's no presumption of termination, is not an
21 adverse employment action."

22 Similarly, the Court in Hornsby, which is
23 a case cited by the staff -- and it's also after
24 Burlington Northern -- that case stated that there is,
25 quote, "a near universal consensus that placing an

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1 employee on paid administrative leave does not, in and
2 of itself, constitute a material adverse action." The
3 Court, then, applied that principle in both the
4 discrimination and the retaliation context under Title
5 VII.

6 The staff answer raises a number of
7 points. I think I adequately addressed the stigma
8 point in response to Judge Hawkens' question. The two
9 other points that the staff raised -- one is that they
10 are claiming that Mr. McBrearty's paid leave makes it
11 an adverse action, and the second one is that the
12 staff appears to be implying, although it's not
13 entirely clear, that the paid leave was an adverse
14 action because Mr. McBrearty missed a promotion when
15 he was removed from succession planning.

16 So, regarding the leave's duration, the
17 staff argues three times in its brief that Mr.
18 McBrearty's 83 days of paid leave was longer than,
19 quote, "nearly all" or, quote, "almost all" of the
20 paid leave in the cases that TVA cites. And that's
21 clearly a mixed characterization of the case law. In
22 four of the 10 paid leave cases that TVA cites, the
23 paid leave was as long as or longer than Mr.
24 McBrearty's.

25 Just to run through it real quick: the

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1 Jones case from the 3rd Circuit, paid leave was 83
2 days. The Singletary case from the 8th Circuit, paid
3 leave was 89 days. The Joseph case from the 2nd
4 Circuit, paid leave was five months. And the
5 Pelletier -- if that's how you say it -- Pelletier
6 case from the 6th Circuit, paid leave was six months.

7 So, these cases, obviously, recognize that
8 organizations need time to resolve factual in
9 personnel issues where there are competing interests
10 that have to be balanced. All these cases show that
11 it would be well within existing precedent for the
12 Board to find that the duration of Mr. McBrearty's 83
13 days with paid leave does not make it an adverse
14 action.

15 JUDGE HAWKENS: Mr. Lepre, Judge Hawkens
16 here again.

17 Was the timing for placing Mr. McBrearty
18 on paid administrative leave, and the reason for
19 placing him on paid administrative leave at that
20 particular time, consistent with the standard practice
21 and policy of TVA?

22 MR. LEPRE: TVA's policy is to investigate
23 (audio interference). Generally, it would investigate
24 the allegation, and then, decide whether to put the
25 person on paid leave. The timing, I don't have the

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1 facts as to the timing of how long people are
2 generally placed on paid leave for TVA, but there's
3 been no indication by the staff, there's been no
4 evidence. Staff says it was not timely, but they
5 haven't advanced any evidence to demonstrate that this
6 was exceptionally dilatory, which is the standard at
7 least one of the cases says, or any evidence such as
8 that.

9 I think, too, it's not unreasonable to
10 expect that a large organization like TVA, it would
11 take them time to determine, to make a decision as to
12 what to do. It's a very difficult decision whether
13 they're going to terminate somebody. It could lead to
14 legal proceedings. You know, as we have seen, there's
15 Human Resources, OGC, the site, the corporate -- all
16 those folks have to weigh in.

17 So, while I can't say for sure -- we
18 haven't done a study (audio interference). While we
19 can't say whether it's consistent with what TVA has
20 done, there's no evidence in the record or no reason
21 to think that this amount of time was unreasonable.
22 And as I'll point out in these other cases, the courts
23 have found the same thing with respect to this length
24 of time or even longer.

25 JUDGE HAWKENS: Okay. Thank you.

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1 JUDGE RYERSON: All right. This is Judge
2 Ryerson, again, Mr. Lepre.

3 Are you about finished? We don't want to
4 take up all of Mr. Walsh's time. The judges may have
5 a few questions after you're all finished with your
6 opening remarks.

7 MR. LEPRE: I appreciate that, and I think
8 we covered the issues that I had planned to cover.
9 There is one, very briefly, that I'd like to suggest,
10 that I'd like to add, in case it comes up.

11 The staff also appears to claim that Mr.
12 McBrearty's paid leave may have caused him to miss a
13 promotion or took him out of TVA's succession
14 planning. They rely on certain texts between Mr. Shea
15 and Mr. Czufin. Those texts don't show that Mr.
16 McBrearty missed out on a promotion on their face.
17 And you can just read the texts, and on their face,
18 they show that Mr. Shea and Mr. Czufin were actually
19 trying to find a place in the organization to bring
20 Mr. McBrearty back. Mr Shea was even talking about
21 creating a position for him, not that he was up for a
22 promotion that was denied. It wasn't an announced or
23 an advertised position or an open position or filled
24 by somebody else.

25 So, there's no allegation that he applied

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1 for a promotion. Again, it was interrupted because he
2 was put on paid leave. In fact, those texts even show
3 the only reason Mr. Shea was even thinking about that
4 job for Mr. McBrearty was because he was on paid
5 leave.

6 And also, the staff, I'd just like to add
7 finally that the staff offered no evidence whatsoever
8 showing that Mr. McBrearty was removed from future
9 succession planning. That text exchange doesn't show
10 that at all, and we don't know for sure what would
11 have happened on succession planning for Mr. McBrearty
12 because he resigned.

13 Thank you.

14 JUDGE RYERSON: Thank you.

15 MR. WALSH: All right. Thank you, Your
16 Honors. This is Tim Walsh here, and I'll be speaking
17 to TVA's Motion for Summary Disposition on Violation
18 4.

19 As TVA explained in its motion,
20 controlling precedent from the 6th Circuit American
21 Nuclear Resources decision holds that activity
22 protected under Section 211 of the Energy
23 Reorganization Act must implicate nuclear safety
24 definitely and specifically. This means that the
25 protected activity must be sufficiently

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1 understandable, such that an employer can identify the
2 safety concern, as was the case in the 11th Circuit
3 Bechtel decision, where the Court found repeated
4 concerns about safety procedures for handling
5 radioactively contaminated tools were protected. In
6 American Nuclear Resources, the Court differently held
7 that generalized concerns that never alleged the
8 licensee was violating nuclear laws or regulations
9 were not protected.

10 In our case, TVA demonstrated that it was
11 entitled to summary disposition of Violation 4 because
12 the conduct for which Ms. Wetzel's employment was
13 terminated did not meet the American Nuclear Resources
14 standard. None of her conduct raised any nuclear
15 safety concern or any fear of retaliation for raising
16 concerns.

17 While the staff's opposition pays lip
18 service to American Nuclear Resources, the staff,
19 instead, argues that a different and incorrect
20 standard ought to apply. The staff argues, without
21 legal support, that Ms. Wetzel's conduct should be
22 viewed in proper context in order to determine whether
23 she raised nuclear safety concerns definitively and
24 specifically. But the staff's argument is precisely
25 what American Nuclear Resources prohibited when it

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1 ruled that Section 211, quote, "does not protect every
2 incidental inquiry or superficial suggestion that
3 somehow in some way may possibly implicate a safety
4 concern." Close quote.

5 Indeed, the fact that the staff requires
6 pages of ink to attempt to explain how Ms. Wetzel's
7 conducted allegedly related to nuclear safety shows
8 that her conduct did not do so, let alone do so
9 definitively or specifically.

10 Take, for one example, Ms. Wetzel's June
11 9th, 2018 email. According to the staff, only when
12 viewed in context does this email definitively and
13 specifically express fear of retaliation for raising
14 nuclear safety concerns. But no nuclear safety
15 concerns are stated in the email, nor any fear of
16 retaliation for raising such concerns. And the
17 staff's claim is further belied by the text of the
18 email itself which indisputably states, quote, "I
19 don't even try to understand my boss and why she does
20 what she does." Close quote.

21 JUDGE RYERSON: Mr. Walsh, if I can stop
22 you there? This is Judge Ryerson.

23 Let's put aside for a moment the staff's
24 argument that we should look at these, arguably, non-
25 safety-related statements in context. Let's assume,

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1 hypothetically, that you're correct that that's really
2 not permissible under American Nuclear.

3 But the staff makes, I think, some other
4 arguments suggesting that, at least as to the
5 termination of Ms. Wetzel, there are some disputed
6 facts. And one is that Mr Shea, of course, actually
7 received Ms. Henderson's original complaint, which did
8 contain some allegations pertaining to -- that on its
9 face, arguably, was complaining about safety-related
10 complaints having been made to the NRC.

11 Now, if you read Mr. Shea's, yes, Mr.
12 Shea's deposition testimony, his testimony is to the
13 effect, as I recall, that there was nothing that he
14 considered prior to Ms. Henderson's complaint. In
15 other words, he's saying he didn't consider any of
16 those earlier safety-related statements by Wetzel.
17 But wouldn't that be a disputed factual issue that
18 precludes summary disposition?

19 And let me get to the next one. It is
20 that there are, I believe, statements in some of the
21 depositions to the effect that Mr. Shea was somehow
22 indirectly involved in the whole ERB process,
23 Executive Review Board, process, and perhaps the OGC
24 process.

25 Isn't there enough there, given the

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1 Commission's statement that close cases go to
2 proceeding to a hearing? Isn't there enough there to
3 justify having a hearing on the question of whether
4 Ms. Wetzel was improperly terminated?

5 MR. WALSH: The answer to that is no, Your
6 Honor, and let me explain. I'll try to address all
7 your points, but please let me know if I've missed
8 anything.

9 So, the staff has alleged that one
10 statement in one paragraph of Ms. Henderson's eight-
11 page, single-spaced complaint is protected activity
12 that possibly contributed to the decision to terminate
13 Ms. Wetzel's employment. Mr. Shea had said, at his
14 predecisional enforcement conference, that there was
15 nothing earlier than the March 29th, 2018 email that
16 Ms. Wetzel sent to him in this determination here, and
17 Ms. Henderson's complaint was filed on March 9th. In
18 his deposition, Mr. Shea said, "I received the
19 complaint and read it, and I understood it as Ms.
20 Henderson's perception."

21 The bottom line here is that the staff is
22 essentially claiming that Mr. Shea's knowledge of the
23 contents of Ms. Henderson's complaint is enough, but
24 that is not the case. Knowledge is only one of the
25 essential elements that the NRC staff must have

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1 evidence of. The other essential element that's
2 lacking here is a contributing factor. And absence
3 any evidence of a contributing factor, they have not
4 provided enough information to withstand summary
5 disposition here.

6 The Supreme Court held in the Celotex
7 Corp. case, the case cited in TVA's motion, that
8 summary judgment is proper when the party opposing
9 summary disposition, quote, "fails to make a
10 sufficient showing to establish the existence of an
11 element essential to that party's case, and on which
12 that party will bear the burden of proof at trial."
13 Close quote.

14 Again, the essential element that's
15 missing here is contributing factor. Knowledge of
16 protected activity is not enough to demonstrate a
17 contributing factor, as the Commission explicitly held
18 in the Fiser case, CLI-04-24, when it said, quote,
19 "Mere employer or supervisor knowledge of the
20 protected activity does not suffice as a contributing
21 factor, nor does the equivalent of adding a drop of
22 water into the ocean." Close quote.

23 JUDGE RYERSON: Judge Ryerson, again.

24 But was that a summary disposition case?

25 MR. WALSH: The Fiser case, no, it was not

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1 a summary disposition case.

2 JUDGE RYERSON: Yes, yes. And here is the
3 issue: you cite the Pilgrim case -- I don't know, 10
4 or 12 years ago -- as leading Commission law on the
5 standards for summary disposition, and I think it
6 correctly states the standard. But, in actual fact,
7 in the Pilgrim case, the Commission reversed a Board
8 for having granted summary disposition. And I'm not
9 aware of any Commission decision that has, in fact,
10 affirmed a summary disposition in the last 10 or 20
11 years. Are you?

12 MR. WALSH: Has the Commission affirmed a
13 summary disposition --

14 JUDGE RYERSON: Yes.

15 MR. WALSH: -- in the last 10 years? I'm
16 not aware --

17 JUDGE RYERSON: I don't think you'd find
18 any.

19 MR. WALSH: -- of that in my case. But I
20 will point out that the Sanders case from the 9th
21 Circuit, Sanders v. Energy Northwest, did affirm a
22 finding of summary disposition in a discrimination
23 case, affirmed a finding in favor of the licensee.

24 And the Pilgrim case, by the way, was a
25 case involving SAMA analysis and complex technical

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1 issues --

2 JUDGE RYERSON: Uh-hum.

3 MR. WALSH: -- involving competing expert
4 declaration. Here, the question is whether or not Ms.
5 Wetzel definitively and specifically raised nuclear
6 safety concerns. And those emails that she sent to
7 Mr. Shea contain no such definitive or specific
8 nuclear safety concern.

9 JUDGE RYERSON: Okay.

10 MR. WALSH: I will say, Your Honor, the
11 staff merely asserts, on page 56 of his opposition,
12 that whether Mr. Shea's knowledge of the contents of
13 Erin Henderson's complaint contributed to the decision
14 depends on weighing evidence and assessing witness
15 credibility at trial. They skipped a step there.
16 They haven't come forward with their own evidence
17 showing that this is actually a genuine dispute on a
18 material issue.

19 The staff's bare assertion that we need to
20 start weighing evidence, when they've come forward
21 with no evidence to weigh, is not sufficient to
22 withstand summary disposition. And the staff's bare
23 assertion that witness credibility is at issue is
24 itself unsupported, and thus, insufficient to defeat
25 summary disposition.

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1 The Supreme Court held, in Anderson v.
2 Liberty Lobby, a case cited by both TVA and the staff,
3 it rejected that summary disposition could be defeated
4 by merely asserting that the fact-finder might
5 disbelieve a defendant. That's at pages 256 and 257
6 of that decision.

7 If the staff had affirmative evidence
8 calling into question any witness' credibility, it was
9 obligated to come forward with it to properly support
10 its opposition. It did not, and this bare assertion
11 by the staff should be disregarded by the Board.

12 I would like to return briefly to the
13 issue of context. The staff says we need to look at
14 context, but, again, no amount of context can
15 transform the words Ms. Wetzel used to say something
16 that the staff thinks they say.

17 If you look at another example, Ms.
18 Wetzel's May 7th, 2018 unsolicited email to Mr. Shea
19 wherein she made multiple assertions against her
20 supervisor, Ms. Henderson, and stated her unilateral
21 intent to no longer report to Ms. Henderson, and
22 instead, to Mr. Shea -- let's look at the immediate
23 context of that email.

24 On that date, Ms. Wetzel was not in the
25 Tennessee Valley corporate nuclear licensing office or

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1 working at any TVA nuclear facility. She was on loan
2 to the industry trade association in Washington, D.C.,
3 hundreds of miles away from TVA and its NRC-licensed
4 activities. While on loan, she had to process her
5 expense vouchers, and that's what she wrote about.
6 Nothing about the immediate context of her email
7 suggests anything allegedly relating back to a
8 foundation of nuclear safety, as the staff argues.

9 Rather than look at immediate context, the
10 staff claims we must reach back to Ms. Wetzel's July
11 2017 NRC allegation for context, but that does not
12 show that Ms. Wetzel definitively and specifically
13 engaged in protected activity 10 months later. If Ms.
14 Wetzel's NRC allegation would provide any material
15 context at all, it is this: when Ms. Wetzel wanted to
16 definitively and specifically raise a chilled work
17 environment concern, she apparently knew how to do so.
18 So, with that context in mind, there is no basis to
19 contort Ms. Wetzel's statements 10 months later to
20 mean something they don't say.

21 I think I have covered the points I wanted
22 to make in my opening statement, Your Honor, and that
23 concludes our presentation. And we respectfully
24 request to reserve the remainder of our time.

25 JUDGE RYERSON: Thank you, Mr. Walsh.

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1 Judge Hawkens, did you have any further
2 questions at this time for any of the TVA lawyers?

3 JUDGE HAWKENS: No, I do not. Thank you.

4 JUDGE RYERSON: Okay. Judge Abreu?

5 JUDGE ABREU: No, I do not. Thank you.

6 JUDGE RYERSON: Okay. Let's proceed with
7 the NRC staff then. Who will be arguing for the NRC
8 staff?

9 MR. GILLESPIE: Yes, Your Honor, this is
10 Joe Gillespie from the NRC staff, and I'll be leading
11 the argument today.

12 JUDGE RYERSON: Okay. Thank you. Please
13 proceed, and you have half an hour.

14 ARGUMENT ON BEHALF OF NRC STAFF

15 MR. GILLESPIE: Thank you, Your Honors.

16 The issue here today is whether TVA has
17 met its burden of showing that there are no relevant,
18 material facts in dispute. Not only has TVA not met
19 that burden, the evidence put forward demonstrates
20 that, indeed, TVA did discriminate against Beth Wetzel
21 and Michael McBrearty for raising safety concerns.

22 The issue also directly bears on whether
23 Section 211 of the Energy Reorganization Act protects
24 nuclear workers who raise safety and compliance
25 concerns to their management and employee concern

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1 programs.

2 The Commission has stated in CLI-04-24
3 that Section 211 is a remedial statute that should be
4 broadly construed in order to accomplish its goal of
5 safeguarding those who engage in protected activity.
6 And accordingly, the Commission has said that no magic
7 words are needed to engage in protected activity, nor
8 has the Commission or any court required that the
9 licensee knew that they were engaging in unlawful
10 conduct, only that their actions were motivated in
11 part by the protected activity.

12 And when we look to the facts of this
13 case, the adverse actions here become clear. Michael
14 McBrearty, over a period of years, raised multiple
15 concerns to TVA about potential ongoing noncompliance
16 with NRC regulations. He raised them with (audio
17 interference), he wrote CRs, and he went to the
18 Employee Concerns Program.

19 But, in response, a TVA (audio
20 interference) complained that Mr. McBrearty's concerns
21 and his attempts to reach resolution on these issues
22 were personally harassing. TVA took a complaint,
23 performed an investigation that was inconsistent with
24 their own practices, and placed Mr. McBrearty on paid
25 administrative leave for 83 days.

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1 During that time, he was given little
2 information on his status or the reason for his leave.
3 He was told termination was on the table. He was
4 prohibited from accessing the site. He was instructed
5 not to speak to his coworkers. And he never had the
6 opportunity to provide information in his defense.

7 And not only was this a direct impact on
8 Mr. McBrearty, the record evidence that's been
9 included in our answer shows that others feared they
10 would be retaliated against if they raised similar
11 safety or compliance concerns.

12 In terms of Ms. Wetzel, after going to the
13 NRC about a potential chilled work environment, Ms.
14 Henderson named her in the same complaint, referencing
15 her primarily by repeating a statement from another
16 employee that she and Mr. McBrearty were the reasons
17 for the NRC's safety-conscious work environment
18 inspection at TVA corporate nuclear licensing.

19 The complaint identified this NRC
20 inspection as Ms. Wetzel's harassing behavior. And
21 when asked by the investigator, who did not disclose
22 she was under investigation, Ms. Wetzel provided her
23 opinion on Ms. Henderson.

24 As she continued to raise these concerns
25 about the retaliatory environment in corporate nuclear

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1 licensing, TVA, instead, twisted this on its head and
2 terminated her employment for raising her concerns and
3 providing candid feedback about TVA's work
4 environment.

5 The reality is that Ms. Henderson's
6 complaint and the actions taken by TVA rely directly
7 upon Mr. McBrearty's and Ms. Wetzel's protected
8 activity. Finding that Mr. McBrearty and Ms. Wetzel
9 did not suffer adverse actions or did not engage in
10 protected activity would provide a simple roadmap for
11 future employers to retaliate against employees that
12 raise safety concerns.

13 JUDGE HAWKENS: Mr. Gillespie, this is
14 Judge Hawkens. I'd like to ask you a quick question.

15 The staffs ask the Board to engraft on
16 Section 211, the anti-retaliation provision from
17 Section 704(a) of Title VII. To me, that seems like
18 a rewriting of the statute, which is beyond our
19 authority. How do you respond to that?

20 MR. GILLESPIE: Your Honor, the staff's
21 position is that this is not inconsistent with the
22 text of the statute. The Commission spoke to the
23 anti-retaliatory purpose of the statute. Title VII
24 and the Energy Reorganization Act are different
25 statutes, and Section 211 should be broadly construed

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1 to accomplish these goals. And other courts, as we
2 point out in our intro, courts in the 6th Circuit who
3 looked at this and the Department of Labor have both
4 held that this objective deterrence standard is the
5 proper standard to be looking at when evaluating a
6 claim under Section 211. And at no point has TVA
7 identified a clear case for this in opposite.

8 JUDGE RYERSON: Mr. Gillespie?

9 MR. GILLESPIE: Yes?

10 JUDGE RYERSON: This is Judge Ryerson.

11 Let me look at the language of 211 just
12 for a second and see what you're saying. 211 says
13 there's a violation if an employer "discharges any
14 employee" -- and let's talk about Mr. McBrearty first;
15 that didn't happen -- "or otherwise discriminates
16 against an employee with respect to his compensation,
17 terms, conditions, or privileges of employment because
18 of the employee's protected activity."

19 Now are you saying that -- well, you're
20 alleging, as to McBrearty, you're alleging three
21 violations, I think. You're alleging that Ms.
22 Henderson's complaint was a violation. You're
23 alleging that the investigation that followed the
24 complaint was a violation, and you're alleging that
25 administrative leave with both pay and benefits was a

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1 violation.

2 Now are you contending that some of those
3 things are actually discrimination with respect to
4 compensation, terms, conditions, or privileges of
5 employment? Is that your contention?

6 MR. GILLESPIE: Yes, Your Honor, it is.

7 JUDGE RYERSON: Okay. And your principal
8 case for that, I think -- maybe I'm mischaracterizing
9 you -- is Vander Boegh, is that correct?

10 MR. GILLESPIE: That's correct, and along
11 with the Department of Labor cases. But Vander Boegh
12 is the most on point and --

13 JUDGE RYERSON: Okay. Well, let's talk
14 about Vander Boegh for just a second. First of all,
15 this is an unpublished decision. Do you disagree that
16 it is not binding precedent in the 6th Circuit?

17 MR. GILLESPIE: That is correct; it is not
18 binding precedent.

19 JUDGE RYERSON: Not binding?

20 MR. GILLESPIE: I mean, there's very
21 little case law on this point in the first place.

22 JUDGE RYERSON: Okay. And you agree that
23 6th Circuit law controls here?

24 MR. GILLESPIE: I'm not sure.

25 JUDGE RYERSON: In other words, is this

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1 Board bound by the rules in the 6th Circuit?

2 MR. GILLESPIE: The staff believes the 6th
3 Circuit case law is persuasive, given the location of
4 where the actions took place.

5 JUDGE RYERSON: It maybe persuasive. Are
6 we bound by it? Do we have discretion to look at
7 other law?

8 MR. GILLESPIE: Yes.

9 JUDGE RYERSON: You don't address that in
10 your brief, I believe.

11 MR. GILLESPIE: Your Honor, it is not
12 binding on the Board or the Commission --

13 JUDGE RYERSON: Okay.

14 MR. GILLESPIE: -- and there is the
15 ability to look at other circuits.

16 JUDGE RYERSON: Okay. Well, let's talk
17 about Vander Boegh, which is within the 6th Circuit,
18 which is a 6th Circuit case, unpublished. But the
19 actions, the causes of actions in Vander Boegh were
20 under multiple statutes, including, I believe, the
21 False Claims Act, is that correct?

22 MR. GILLESPIE: Yes, Your Honor, that is
23 correct.

24 JUDGE RYERSON: Okay. And doesn't the
25 Circuit Court in its unpublished decision conflate

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1 these standards under various environmental statutes,
2 211, the False Claims Act? Does the Court really
3 distinguish between the statutes that it's applying in
4 Vander Boegh?

5 MR. GILLESPIE: Your Honor, the Court in
6 that case does not clearly distinguish between these
7 different statutes.

8 JUDGE RYERSON: Okay.

9 MR. GILLESPIE: However, it is also
10 consistent with the previous 6th Circuit case, and
11 McNeill was also by that standard.

12 JUDGE RYERSON: Well, I am more familiar
13 with Vander Boegh. And I'm just sort of troubled that
14 the False Claims Act protects a whistleblower
15 explicitly, who is -- and I am quoting -- "suspended,"
16 quoting, "threatened," or, quoting, "harassed," which
17 is all well and good and would be consistent with the
18 policy determinations in Burlington Northern under
19 different language from the discrimination terms, but
20 the discrimination terms are the identical ones that
21 we're dealing with in 211.

22 So, do we know, when we look at the
23 unpublished decision of the 6th Circuit in Vander
24 Boegh, whether it's talking about the language of 211
25 or whether it's talking about the vastly more wide

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1 prohibitions of the False Claims Act? Can we tell
2 from that decision?

3 MR. GILLESPIE: Your Honor, the decision
4 does not explicitly identify which statute. As I say,
5 it doesn't draw any explicit distinction between these
6 different --

7 JUDGE RYERSON: Right. So, we don't know,
8 in other words, what the Court was relying on, whether
9 it was relying on 211 or whether it was relying upon
10 the much wider prohibitions in the False Claims Act.

11 Let me ask you a couple of questions about
12 Overall. Now we are not bound, I know that, by DOL
13 decisions. But, nonetheless, I read this decision in
14 Overall somewhat differently than the staff does. I
15 mean, I see it as establishing two tests under 211.

16 And the first is, and I'm quoting from the
17 decision, the first test is whether the employer,
18 which actually was TVA in that case, took a, quote,
19 "tangible employment action that resulted in a
20 significant change in Mr. Overall's employment
21 status."

22 And then, the second test is whether that
23 employer's actions were "harmful" -- and I'm quoting
24 now -- "harmful to the point where they could well
25 have dissuaded a reasonable worker from engaging in

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1 protected activity."

2 So, I'm wondering whether your brief
3 doesn't seize on the second point and say that's
4 sufficient; whereas, I read the decision as saying
5 that's necessary, but not sufficient, but that you
6 also have to have -- quoting from Overall -- "a
7 tangible employment action that resulted in a
8 significant change in Mr. Overall's employment
9 status," which gets us back to the literal language of
10 211. Am I misreading Overall?

11 MR. GILLESPIE: Your Honor, if I can have
12 a moment?

13 (Pause.)

14 Your Honor, I'll just make two points
15 about that.

16 The first is that, while we're not bound
17 by Department of Labor case law, the Commission has
18 stated that it is highly persuasive in interpreting
19 the meaning of Section 211.

20 In this case, there are tangible
21 employment effects, right, tangible employment actions
22 that affected Ms. Wetzel and Mr. McBrearty -- Ms.
23 Wetzel, certainly, because she was terminated, and Mr.
24 McBrearty's ultimate placement on 83 days of paid
25 administrative leave and his access being removed.

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1 JUDGE RYERSON: Okay. So, you wish the
2 Board, this Board, to interpret the language of 211 as
3 including paid administrative leave, investigation,
4 complaint, all as changes in employment status? Is
5 that correct?

6 MR. GILLESPIE: Your Honor, in this
7 circumstance, obviously, as we made the point in the
8 brief, this is a very fact-dependent situation. And
9 certainly, at this stage, when it comes to a summary
10 disposition motion, where these factors still are in
11 dispute and haven't been fully heard, yes, the staff's
12 position is that it should be denied at this point.

13 JUDGE RYERSON: Yes. Okay.

14 Let me jump back for one moment to Vander
15 Boegh because I forgot to make a point there. In
16 addition to the Court, arguably, conflating the
17 standards of different statutes, the Court,
18 ultimately -- a summary judgment had been granted at
19 the trial court level, all defendants. And the Court
20 of Appeals reversed in part. And it reversed against
21 one party, Energy Solutions.

22 But, then, I'm quoting again from the
23 decision. And it's a complicated decision, I'll admit
24 that. But I'm quoting, "Energy Solutions does not
25 dispute that Vander Boegh engaged in protected

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1 activity."

2 So, I mean, is this unpublished decision
3 in which the party that lost was not disputing what's
4 an adverse decision, is this the centerstone of your
5 argument? Or am I misreading this case?

6 MR. GILLESPIE: Your Honor, the quote
7 you're reading was related to Mr. Vander Boegh's
8 protected activity. I don't think the dispute today
9 with respect to Violations 1, 2, and 3 is related to
10 whether or not Mr. McBrearty engaged in protected
11 activity, why the adverse action, whether paid
12 administrative leave or a complaint of
13 investigation --

14 JUDGE RYERSON: Oh, I'm sorry, I didn't
15 read far enough. "Doesn't dispute that he engaged in
16 protected activity and suffered an adverse employment
17 action."

18 So, in other words, Energy Solutions was
19 not disputing that the individual there had suffered
20 an adverse employment action. So, it seems to have
21 limited precedential value, if any, on what's an
22 adverse employment action, as to Energy Solutions.

23 Well, proceed, if you want.

24 MR. GILLESPIE: Yes. Your Honor, my
25 understanding of that case was that the question of

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1 whether or not it was an adverse action was in
2 dispute, but I can, we can -- when that occurred.

3 But, again, Your Honor, I just want to go
4 back to a point you made earlier or a question you had
5 earlier about the conflating of different statutes.
6 And one thing I will point out is that I think it's
7 instructive in the Vander Boegh case, despite the fact
8 that they mentioned these multiple statutes, including
9 the False Claims Act, which lists specific potential
10 types of adverse actions, they applied the anti-
11 retaliation test that the Supreme Court identified in
12 Burlington Northern. And again, as we said, that was
13 also the standard that the 6th Circuit applied in the
14 appeal with respect to McNeill.

15 JUDGE RYERSON: Okay.

16 MR. GILLESPIE: To go back to our original
17 point, instead of denying, I mean, granting summary
18 disposition at this stage, without understanding the
19 context in which it takes place, really provides a
20 roadmap for employers to retaliate against employees
21 who raise safety concerns.

22 JUDGE HAWKENS: Mr. Gillespie, this is
23 Judge Hawkens again.

24 Can you address the complaint and the
25 investigation, and then, the paid administrative leave

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1 with full benefits individually and explain why each
2 one of them changed the conditions of employment for
3 the employees, consistent with Section 211?

4 MR. GILLESPIE: Yes, Your Honor. One item
5 is that, with respect to Mr. McBrearty and Ms. Wetzel
6 and Violations 1 and 3, the complaint and the
7 investigation are, as represented in (audio
8 interference), a single action. But, with respect to
9 how they affect his current conditions of employment,
10 the test to apply, as we say in the brief, is whether
11 or not it would deter a reasonable employee from
12 engaging in protected activity. And when we look into
13 that --

14 JUDGE HAWKENS: Yes, I'm glad you brought
15 that up. So, Mr. Gillespie, your argument really
16 hinges on your view that the Supreme Court's
17 interpretation of 704(a) of Title VII should be
18 engrafted onto Section 211?

19 MR. GILLESPIE: Your Honor --

20 JUDGE HAWKENS: Is that right? Yes or no?

21 MR. GILLESPIE: No, that is not the case.

22 JUDGE HAWKENS: Okay. Explain why. I
23 understood you to say that the complaint and the
24 investigation fell under Section 211, in light of the
25 Supreme Court's interpretation of Title VII in the

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1 Burlington case.

2 MR. GILLESPIE: Your Honor, the complaint
3 and the investigation led to the later actions by TVA.
4 And the fact of the matter is the test in every court,
5 the 6th Circuit and the Department, that have applied
6 Section 211 in these contexts have used the standard
7 as to whether it would deter someone in engaging in
8 protected activity. As we have record evidence --

9 JUDGE HAWKENS: What? I'm sorry. Could
10 you say that again, please? You said the case law in
11 the 6th Circuit provides what?

12 MR. GILLESPIE: McNeill and Vander Boegh
13 both apply the test as to whether or not it would
14 deter a reasonable employee from engaging in protected
15 activity. And using that standard is the appropriate
16 one for Section 211. And in this case, what happened
17 is that the investigation occurred after a direct
18 complaint about Mr. McBrearty's and Ms. Wetzel's
19 protected activities that did not comport with TVA's
20 own practice in performing these investigations and,
21 ultimately, led to 83 days of base McBrearty and
22 termination for Ms. Wetzel.

23 JUDGE HAWKENS: In the TVA case, the
24 Browns Ferry 2004 Commission case, the Commission said
25 its touchstone in the nuclear whistleblowing case is

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1 a statutory framework Congress established in Section
2 211. So, in applying the whistleblowing statute, the
3 Commission has explicitly stated that it's focusing on
4 the language used by Congress in Section 211. It's
5 not looking out to interpretation of Title VII or any
6 other statute. And so, I'm wondering why we should
7 incorporate interpretations from Title VII into our
8 interpretation of Section 211.

9 MR. GILLESPIE: Your Honor, again, the
10 cases that have looked at that, the standard, have
11 borrowed from Title VII in these cases and used that
12 standard when it comes to cases of employee
13 retaliation and it is a change in their terms,
14 conditions, privileges of employment.

15 JUDGE HAWKENS: Can you refresh my memory
16 on the McNeill case, please? Are those the two
17 principal 6th Circuit cases you're relying on, Vander
18 Boegh and McNeill?

19 MR. GILLESPIE: Yes, Your Honor. And
20 McNeill was a case of an employee at D.C. Cook who was
21 brought onto the -- refused to perform work at a site.
22 The immediate supervisor told him to go home, and he
23 was placed on, I think, ultimately, placed on paid
24 administrative leave for, I think, up to five days.
25 But he knew within a matter of hours that he was not

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1 terminated. He was immediately called by multiple
2 managers to reassure him and he was brought back and
3 asked to return to the site the following Monday. I
4 think the action took place on a Wednesday.

5 And compared to here, 83 days is
6 completely different, is a much longer time than five
7 days. Unlike the individual in McNeill, Mr. McBrearty
8 was not provided some level of communication. He was
9 given very minimal information as to what was going
10 on. And the ultimate reason for his resignation is
11 because he identified the adverse impacts that this
12 had to him at the time in terms of reputation, stigma,
13 and his future with the company. And he was
14 repeatedly told that his termination was on the table.

15 JUDGE RYERSON: Judge Hawkens, are you
16 finished? I don't want to interrupt. I've got a
17 couple of questions for Mr. Gillespie.

18 JUDGE HAWKENS: No, please go ahead.

19 JUDGE RYERSON: Okay. Judge Ryerson, Mr.
20 Gillespie.

21 I have two questions. So, I understand
22 the staff's position here. I know the staff is
23 unhappy with the investigation that TVA performed
24 after Ms. Henderson's complaint. But I don't
25 understand, is the staff's position that, because

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1 there were, arguably, improper allegations among the
2 allegations in that complaint, that the TVA should not
3 have done any investigation or merely that the staff
4 contends that, as a factual matter, the investigation
5 that was performed was, in fact, flawed in some way?
6 Is that question clear?

7 MR. GILLESPIE: Your Honor, if you could
8 repeat it again? I apologize.

9 JUDGE RYERSON: Okay. My question is, is
10 the staff's position that TVA should have done no
11 investigation of Ms. Henderson's complaint? Or is the
12 staff's position that, as a factual matter, the
13 investigation that TVA did do was flawed?

14 MR. GILLESPIE: Your Honor, the staff's
15 position is the manner in which the investigation took
16 place and what it did not do that was flawed. And
17 again, this is a fact-intensive point that is more
18 appropriately resolved in a hearing. The
19 investigation was incomplete and at its core it was
20 retaliatory by recommending adverse actions based on
21 protected activity.

22 JUDGE RYERSON: So, the staff is not
23 saying that TVA necessarily committed a violation by
24 conducting an investigation? And the staff disagrees
25 with the way the violation was conducted or not

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1 conducted, is that correct?

2 MR. GILLESPIE: Yes, Your Honor.
3 Specifically, the fact that the complaint identified
4 multiple protected activities in its complaint, and
5 the investigator overlooked and took no action based
6 on that. They had multiple opportunities to go and
7 recognize the protected activity and to treat it
8 appropriately. But, instead, the ultimate
9 investigation uncritically relied on the complaint and
10 specifically identified those protected activities in
11 its final recommendations.

12 JUDGE RYERSON: Okay. Let me ask my
13 question one more time. One of the enforcement people
14 -- there were 19 depositions in this case, I think --
15 one of the enforcement people seemed to say that it
16 was wrong to even conduct an investigation. And I'm
17 trying to determine whether the staff agrees with that
18 or whether the staff's view is that, no, it would be
19 appropriate to conduct an investigation of all of
20 those allegations in Ms. Henderson's complaint, but
21 that here the staff's position is the investigation
22 was conducted improperly.

23 MR. GILLESPIE: I believe my colleague,
24 Kevin Roach, will be answering this question.

25 JUDGE RYERSON: Okay. The staff is not

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1 saying that it was necessarily per se wrong to conduct
2 an investigation of the complaint? The staff is
3 saying -- correct me if I'm wrong -- the staff is
4 saying that the investigation that was performed was
5 flawed?

6 MR. ROACH: Kevin Roach for the staff,
7 Your Honor.

8 The staff is not purporting to prescribe
9 some sort of manner for how TVA should have conducted
10 its investigation. It simply was obligated to comply
11 with the requirements in 50.7. And it has the
12 opportunity to, you know, once TVA recognized that
13 there was allegations of protected activity that were
14 bound up in this set of circumstances, it should have
15 proceeded with care, so that it was not in the
16 situation of violating 50.7. But, rather than take
17 that care, it relied on a flawed investigation that
18 included the very protected activity that's at the
19 heart of the violations in the investigation. There
20 were numerous opportunities for TVA to conduct a
21 proper investigation that didn't rely on protected
22 activity, but TVA did not take those opportunities.

23 JUDGE RYERSON: Okay. Thank you, Mr.
24 Roach.

25 I have one more question for either of you

1 or anyone on the staff side. The Notice of Violation
2 that was issued to Ms. Henderson stated -- and this
3 was after, I assume, a full investigation by the
4 enforcement people -- that, although Ms. Henderson was
5 being issued a Notice of Violation, the staff was not
6 issuing an order as against her because she was, and
7 I'm quoting, "not the decisionmaker that placed the
8 former employees on paid administrative leave or
9 terminated the former corporate employee." -- now
10 referring to McBrearty and Wetzel.

11 And then, when in this proceeding TVA
12 asserted as one of its seemingly uncontested facts
13 exact the same thing, that Ms. Henderson was not the
14 decisionmaker on those matters, the staff now
15 disagrees or doesn't agree that that's uncontested.
16 And could one of you explain the change of position?

17 MR. ROACH: Yes, if you'd give me one
18 minute?

19 (Pause.)

20 Your Honor, I think part of the element of
21 that is the fact that Ms. Henderson was in that case
22 being cited for deliberate misconduct under 50.5.
23 Here, we're looking at licensee TVA under 50.7, and
24 the role she took and the actions that we're talking
25 about here are different than her role in the actions

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1 that we discuss in the 50.5 violation.

2 JUDGE RYERSON: So, she could be a
3 decisionmaker, not a decisionmaker for purposes of
4 50.5, but a decisionmaker for purposes of 50.7? Is
5 that your position?

6 MR. ROACH: Your Honor, I think she was
7 not the full decisionmaker. We identified in our
8 answers that, even though it is disputed that she may
9 not have been the sole decisionmaker, but she did play
10 a direct role in the events that were at issue,
11 including filing her complaint.

12 JUDGE RYERSON: Uh-hum, but wouldn't the
13 staff have found that relevant, if she's being charged
14 with a 50.5 violation, willful misconduct? I don't
15 see why it would be relevant in one and not the other.

16 (Pause.)

17 Oh, well. All right.

18 MR. ROACH: Your Honor, I'm happy to give
19 an answer to that if I could --

20 JUDGE RYERSON: That's all right. If the
21 Board has any followup questions, we will issue an
22 order. But let's leave it at that. Yes, the Board
23 will confer after this argument, and if there's
24 anything we want further filings on, we will ask for
25 them.

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1 Judge Hawkens, did you have further
2 questions for the TVA lawyers (sic) at this time?

3 JUDGE HAWKENS: None. Thank you.

4 JUDGE RYERSON: Judge Abreu?

5 JUDGE ABREU: I do have a question, Judge
6 Ryerson. And this is for the NRC staff.

7 In Violation 4, in the statement of the
8 violation, it refers to specifically that the
9 protected activities were that the former corporate
10 employee engaged in protected activity by raising
11 concerns of a chilled work environment to the former
12 Vice President of Regulatory Affairs and the TVA
13 attorney during an OGC, the TVA OGC investigation.
14 So, it's like, to me, two specific things.

15 But, then, later in the further discussion
16 of Violation 4, there are three things. It adds the
17 employee's alleged contact with the NRC regarding
18 concerns of a chilled work environment.

19 So, which is the basis for the violation,
20 the two things or the three things?

21 MR. ROACH: Your Honor, the basis for the
22 violation is that the former employee engaged in
23 protected activity by raising concerns of a chilled
24 work environment. That is the broad basis for the
25 violation.

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1 JUDGE ABREU: But that's not what it says
2 in the Statement of Violation 4, and that's the part
3 I want you to help me with. Because it said,
4 "specifically," and then, listed two things and
5 excluded that third one for some reason. And I don't
6 understand why it was excluded in one place, but added
7 in the other.

8 MR. ROACH: Just a moment.

9 (Pause.)

10 The purpose of the explanation in the
11 appendix to the order was to provide TVA with greater
12 clarity, in light of its response to the violation.
13 So, the Notice of Violation should be read together
14 with the order and its appendix.

15 JUDGE ABREU: So, are you saying the
16 Notice of Violation did not use that wording?

17 MR. ROACH: The Notice of Violation stated
18 broadly the former corporate employee engaged in
19 protected activity by raising concerns of a chilled
20 work environment.

21 JUDGE ABREU: And so, that is the summary
22 of the violation then?

23 MR. ROACH: The summary of the violation
24 I believe you're referring to is in the appendix to
25 the order.

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1 JUDGE ABREU: That was the part I was
2 reading, yes.

3 MR. ROACH: Okay. I'm reading from the
4 Notice of Violation. "Specifically, the former
5 corporate employee engaged in protected activity by
6 raising concerns of a chilled work environment." The
7 appendix to the order fleshes out exactly what the
8 staff was referring to.

9 JUDGE ABREU: In the NOV, I think you're
10 reading from B(1)?

11 MR. ROACH: Yes.

12 JUDGE ABREU: But we're talking about
13 Violation 4, which isn't that B(2)?

14 (Pause.)

15 MR. ROACH: Yes, you're correct.

16 JUDGE ABREU: So, in B(2), when it talks
17 about raising concerns of a chilled work environment,
18 it specifically relates it to things during the OGC
19 investigation. It does not mention the employee's
20 allegations to the NRC in B(2).

21 MR. ROACH: And then, in the appendix to
22 the order, the NRC clarified both B(1) and B(2).

23 JUDGE ABREU: In the appendix to the
24 order, the restatement of the violation parallels B(2)
25 in the NOV, but, then, it broadens it when they talk

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1 about the NRC's response, or the NRC's evaluation of
2 the licensee's response. But isn't the violation
3 based, isn't the statement of the violation what is in
4 the NOV?

5 MR. ROACH: The NOV and the order and the
6 appendix are to be read together. The appendix to the
7 order provides clarification of what the violations
8 are.

9 JUDGE ABREU: So, in B(1) and B(2) in the
10 NOV, the explanation of the violation is different
11 because they are two separate violations. But are you
12 saying that what it says in B(1) about the allegation
13 to the NRC being part of B(1) is somehow implied to be
14 part of B(2) as well, because there's later this
15 explanation in the appendix to the order? What I'm
16 trying to understand is, why wasn't it in there in the
17 beginning? If it's such an important part of the
18 Violation B(2), why wasn't it stated? Why would it
19 say specifically two things, if it really meant all of
20 them?

21 MR. ROACH: Well, there's one violation
22 and there's two examples. So, it's not two separate
23 violations here that we're --

24 JUDGE ABREU: Well, we have B(1) and B(2),
25 right?

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1 MR. ROACH: But one CP.

2 JUDGE ABREU: One CP?

3 MR. ROACH: One civil penalty.

4 JUDGE ABREU: Right, but we're having a
5 discussion about four violations, correct?

6 MR. ROACH: Yes, but Violation 4 is one
7 problem with two examples.

8 JUDGE ABREU: Oh, so you're saying that
9 those are just examples and not the entire basis for
10 the fourth violation?

11 MR. ROACH: Yes, that's correct.

12 JUDGE ABREU: So, the term "specifically,"
13 those two, it says those are two specific examples,
14 but there's sort of an implication of "but there's
15 more." But, wait, there's more. Is that sort of what
16 you're saying?

17 MR. ROACH: Yes, it should all be read
18 together.

19 JUDGE ABREU: Thank you for your input.

20 MR. ROACH: Thank you.

21 JUDGE RYERSON: All right. This is Judge
22 Ryerson again.

23 Judge Hawkens, do you have any further
24 questions for the NRC staff?

25 JUDGE HAWKENS: No, I do not. Thank you.

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1 JUDGE RYERSON: And, Judge Abreu, do you
2 have any further questions?

3 JUDGE ABREU: I do not at this time.
4 Thank you.

5 JUDGE RYERSON: Thank you.

6 Well, let's go back, then, to TVA, which
7 reserved 10 minutes. I know our questions took up a
8 fair amount of time. So, we'll give you up to 10
9 minutes.

10 And who would like to speak for TVA at
11 this point?

12 MS. LEIDICH: Yes, Your Honor, this is
13 Anne Leidich, and I'll be starting off. I promise we
14 will be as brief as we can.

15 REBUTTAL ON BEHALF OF THE TENNESSEE VALLEY AUTHORITY

16 MS. LEIDICH: Just to begin with, the NRC
17 staff asserted that one of the cases that it's relying
18 on in the 6th Circuit is the McNeill case, where it
19 says that the 6th Circuit decided to apply the
20 retaliation standard to the Energy Reorganization Act,
21 I just want to read from the end of that decision on
22 pincite 102.

23 And in that decision, the Court said,
24 "Assuming, without deciding, that the standards
25 announced by the Supreme Court in White apply to the

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1 case at bar, we are unable to conclude that McNeill is
2 unable to show that the ARB erred in finding," et
3 cetera.

4 So, the Court in that case explicitly did
5 not decide which standard to apply to the case at bar.
6 That does make sense. Both of the parties did not
7 dispute it, leading into that case. So, it was not an
8 issue that was decided. I also want to point out that
9 it is also an unpublished decision.

10 In terms of the NRC staff's general claims
11 that context matters, and that there's a pretext, and
12 that this is a factual decision to be resolved at
13 trial, I just wanted to set forth the fact that it's
14 very important in a contributing factor case under the
15 ERA to establish specific adverse actions in advance.
16 We have to defend the adverse action and the
17 decisionmaking that goes into the adverse action.

18 So, having a nebulous set of facts that
19 may or may not be adverse actions, and may or may not
20 combine into some sort of adverse action, really puts
21 the licensee at a significant disadvantage, when it
22 comes to the evidentiary standard that's applied in
23 the ERA. And a lot of these cases on which the staff
24 relies, or attempts to rely, are Title VII cases that
25 don't make use of that evidentiary standard. They're

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1 McDonnell Douglas cases that use a pretext standard.
2 That's why the word "pretext" gets thrown around.

3 That doesn't mean that it's actually
4 applicable to this case. And also, it's just jumping
5 past the requirement for an adverse action and jumping
6 straight into the evidentiary analysis.

7 One final note that I want to make. In
8 terms of whether the Notice of Violation establishes
9 the grounds of this proceeding, I wanted to point to
10 footnote 109 of the Fiser case, 60 NRC 160. And in
11 that footnote, it says, "The staff's argument that TVA
12 had an opportunity at the hearing to rebut the staff's
13 new protected activity claim fails to carry the day
14 because (1) the staff deprived TVA of an opportunity
15 to make its case to the NRC enforcement staff prior to
16 a hearing, as guaranteed under Section 234(b); and
17 (2), the staff's failure to include sufficient detail
18 in its charging documents is a jurisdictional default,
19 depriving the Board of authority to adjudicate the new
20 claims." And that's the end of the quote.

21 The only point at which TVA gets an
22 opportunity to make its case to the NRC enforcement
23 staff is after the Notice of Violation. It does not
24 get an opportunity to do so after the order appendix
25 is issued. We go straight to a hearing proceeding at

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1 that point. So, really, the last opportunity is at
2 the Notice of Violation.

3 This is consistent with 10 CFR 2.205,
4 which requires that the Notice of Violation shall
5 specify the date or dates, facts, and the nature of
6 the alleged act or omission with which the person is
7 charged.

8 That's it for me. I believe that Mr.
9 Lepre and Mr. Walsh may have some short points of
10 rebuttal as well, or at least Mr. Lepre. So, I will
11 pass it over to him.

12 MR. LEPRE: Thank you. Thanks, Ms.
13 Leidich.

14 Just real briefly, I want to reemphasize
15 that none of the cases in the briefs regarding paid
16 leave held that paid leave, in and of itself, was
17 related to terms, conditions, and privileges of
18 employment. The staff said in its rebuttal that here
19 there were certain circumstances, that under these
20 circumstances, the paid leave should be viewed
21 differently. I would just say that the staff hasn't
22 provided any facts, or certainly, not sufficient
23 facts, regarding circumstances that turned paid leave
24 into an adverse action here.

25 Also, Mr. Gillespie, I think he said

1 something like TVA employees were afraid to raise
2 issues because of what happened to Mr. McBrearty.
3 Even if the impact on third parties is relevant here,
4 which it's not, there's no evidence to that, either.
5 I think the staff cites to one statement by Mr. Dodd
6 where he said somebody said to him, "I don't know what
7 I can or can't say anymore." First of all, that's
8 hearsay. And second of all, that one supposed
9 statement is hardly sufficient evidence to go forward
10 with a hearing.

11 On the length of paid leave, I would like
12 to point out the length of the paid leave here. I
13 would like to point out that, in its predecisional
14 enforcement conference, TVA referenced to the staff a
15 GAO report in 2014. And granted, that's a little out-
16 of-date. But that report found that thousands of
17 federal employees across multiple agencies were on
18 paid leave for as long as three to six months.
19 Several federal agencies even had employees on paid
20 leave for as long as three years. And that's a report
21 out of the United States Government Accountability
22 Office. It's called, "Federal Paid Administrative
23 Leave," dated October 24, at page 46. That can be
24 found on their website. And again, we referenced
25 that, gave the staff that information in the PEC, or

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1 made that statement in the PEC.

2 The last point I want to make is that none
3 of the paid leave cases that I've seen relied on
4 evidence of what is typical employer practice
5 regarding duration of paid leave. The standard that's
6 applied is what's a reasonable standard under the
7 circumstances, and the courts have generally given the
8 employers leeway to conduct an investigation and make
9 these decisions.

10 Thank you.

11 JUDGE RYERSON: Thank you, Mr. Lepre.

12 Mr. Walsh, do we have anything further
13 from you?

14 MR. WALSH: Nothing further from me, Your
15 Honor. Thank you.

16 JUDGE RYERSON: Thank you.

17 And again, Judge Hawkens, do you have any
18 final questions for TVA?

19 JUDGE HAWKENS: No final questions for
20 either. I just thank them and the staff for their
21 written and oral presentations.

22 JUDGE RYERSON: And, Judge Abreu?

23 JUDGE ABREU: I have no further questions,
24 but would echo Judge Hawkens' thanks to both sides for
25 their presentations today.

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1 JUDGE RYERSON: And I, as well. This is
2 an uncommonly complex situation, I think. It's
3 outside of what we -- we shouldn't say it's outside of
4 what we normally deal with, but, clearly, our
5 contention admissibility issues are often somewhat
6 more straightforward.

7 Well, let me tell you where we go from
8 here. Under the rules, it is the Board's
9 responsibility to have a decision on a Motion for
10 Summary Disposition within 40 days of the argument,
11 and we will certainly try to do that. If we, for any
12 reason, are unable to do that, we will issue a notice,
13 presumably, projecting when we would have a decision.

14 And I think -- and don't just take
15 anything I say here right now as projecting any one
16 outcome or another -- but if, in fact, the case
17 proceeds, in whole or in part, after we decide summary
18 disposition, then I think at that point we would just
19 schedule promptly another prehearing conference to see
20 what the best course of proceeding towards an
21 evidentiary hearing would be at that point. But,
22 clearly, the Board's immediate responsibility is to
23 decide these two motions covering four violations for
24 summary disposition.

25 So, while we have the parties today, is

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1 there anything else we should be talking about? I
2 suspect not, but let me ask.

3 TVA, anything we should be taking up right
4 now?

5 MR. LEPRE: Not from our perspective, Your
6 Honor. Thank you.

7 JUDGE RYERSON: Thank you.

8 And, NRC Staff?

9 MS. KIRKWOOD: Your Honor, this is Sara
10 Kirkwood for the NRC -- sorry, Your Honor, I've lost
11 my voice.

12 My only question as to what you were just
13 saying, is there any chance that you would expect us
14 to do our trial briefs before -- like how much time
15 will we get after the prehearing conference? I guess
16 I'm just trying to figure out how much we need to have
17 done now.

18 JUDGE RYERSON: Oh, I --

19 MS. KIRKWOOD: Not committing, but are you
20 going to want them before the holidays?

21 JUDGE RYERSON: I think we will end up
22 scheduling something after the holidays, again, if
23 there's anything further. I'm not commenting on that
24 one way or the other.

25 MS. KIRKWOOD: Okay.

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1 JUDGE RYERSON: So, I think you found the
2 Board to be reasonable. We try to proceed vigorously,
3 but not unreasonably, with schedules. And again,
4 that's something that we would be dealing with, if at
5 all, after a decision on summary disposition.

6 MS. KIRKWOOD: Thank you, Your Honor.

7 JUDGE RYERSON: So, well, I hope that's
8 somewhat helpful, but I really can't predict at this
9 time.

10 MS. KIRKWOOD: Yes, Your Honor.

11 JUDGE RYERSON: Judge Hawkens, anything
12 further?

13 JUDGE HAWKENS: No, thank you.

14 JUDGE RYERSON: Judge Abreu?

15 JUDGE ABREU: Nothing further. Thank you.

16 JUDGE RYERSON: All right. Thank you.

17 Well, we stand adjourned. Thank you.

18 (Whereupon, at 2:30 p.m., the proceedings
19 in the above-entitled matter were adjourned.)
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