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NUCLEAR REGULATORY COMMISSION

Title: Tennessee Valley Authority

Docket Number: EA-20-006 and EA-20-007

ASLBP Number: 21-969-01-EA-BD01

Location: teleconference

Date: Thursday, October 14, 2021

Work Order No.: NRC-1709 Pages 142-212

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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

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.

JUDGE RYERSON: Thank you, Judge.

And, Judge Abreu?

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

JUDGE RYERSON: Thank you.

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

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

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

And who do we have for the NRC staff?

MR. GILLESPIE: Good afternoon, Your Honor.

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

JUDGE RYERSON: Okay. Thank you. And welcome.

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

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

Judge Hawkens, anything before we proceed?

JUDGE HAWKENS: No, thank you.

JUDGE RYERSON: Thank you.

And, Judge Abreu?

JUDGE ABREU: No, thank you.

JUDGE RYERSON: Thank you.

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

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

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

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

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

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

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

ARGUMENT ON BEHALF OF TENNESSEE VALLEY AUTHORITY

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

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

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

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

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

MS. LEIDICH: Yes.

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

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

the same language as well.

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

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

JUDGE HAWKENS: All right. Thank you.

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

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

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

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

JUDGE RYERSON: Okay.

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

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

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

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

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

JUDGE RYERSON: All right. Thank you.

All right. I'm sorry. Continue.

MS. LEIDICH: Thank you.

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

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

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

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

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

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

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

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

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

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

There must be a right to complain of such behavior.

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

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

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

JUDGE RYERSON: Yes, one question for you,

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

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

JUDGE RYERSON: Okay. Thank you.

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

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

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

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

MR. LEPRE: Sure.

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

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

JUDGE RYERSON: Right.

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

JUDGE RYERSON: Okay. Please continue.

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

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

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

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

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

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

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

So, those are the examples from case law,

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

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

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

JUDGE RYERSON: Yes.

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

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

How do you respond to the staff's argument

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

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

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

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

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

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

JUDGE HAWKENS: Thank you.

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

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

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

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

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

Just to run through it real quick: the

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

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

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

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

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

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

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

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

JUDGE HAWKENS: Okay. Thank you.

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

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

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

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

So, there's no allegation that he applied

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

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

Thank you.

JUDGE RYERSON: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Isn't there enough there, given the

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

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

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

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

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

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

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

JUDGE RYERSON: Judge Ryerson, again.

But was that a summary disposition case?

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

a summary disposition case.

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

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

JUDGE RYERSON: Yes.

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

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

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

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

issues --

JUDGE RYERSON: Uh-hum.

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

JUDGE RYERSON: Okay.

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

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

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

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

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

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

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

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

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

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

JUDGE RYERSON: Thank you, Mr. Walsh.

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

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

JUDGE RYERSON: Okay. Judge Abreu?

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

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

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

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

ARGUMENT ON BEHALF OF NRC STAFF

MR. GILLESPIE: Thank you, Your Honors.

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

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

programs.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUDGE RYERSON: Mr. Gillespie?

MR. GILLESPIE: Yes?

JUDGE RYERSON: This is Judge Ryerson.

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

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

violation.

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

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

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

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

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

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

JUDGE RYERSON: Not binding?

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

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

MR. GILLESPIE: I'm not sure.

JUDGE RYERSON: In other words, is this

Board bound by the rules in the 6th Circuit?

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

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

MR. GILLESPIE: Yes.

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

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

JUDGE RYERSON: Okay.

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

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

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

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

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

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

JUDGE RYERSON: Okay.

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

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

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

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

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

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

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

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

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

protected activity."

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

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

(Pause.)

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

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

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

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

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

JUDGE RYERSON: Yes. Okay.

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

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

activity."

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

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

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

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

Well, proceed, if you want.

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

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

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

JUDGE RYERSON: Okay.

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

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

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

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

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

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

MR. GILLESPIE: Your Honor --

JUDGE HAWKENS: Is that right? Yes or no?

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

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

Burlington case.

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

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

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

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

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

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

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

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

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

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

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

JUDGE HAWKENS: No, please go ahead.

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

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

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

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

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

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

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

conducted, is that correct?

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

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

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

JUDGE RYERSON: Okay. The staff is not

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

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

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

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

I have one more question for either of you

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

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

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

(Pause.)

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

that we discuss in the 50.5 violation.

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

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

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

(Pause.)

Oh, well. All right.

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

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

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

JUDGE HAWKENS: None. Thank you.

JUDGE RYERSON: Judge Abreu?

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

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

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

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

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

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

MR. ROACH: Just a moment.

(Pause.)

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

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

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

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

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

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

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

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

MR. ROACH: Yes.

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

(Pause.)

MR. ROACH: Yes, you're correct.

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

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

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

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

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

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

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

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

MR. ROACH: But one CP.

JUDGE ABREU: One CP?

MR. ROACH: One civil penalty.

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

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

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

MR. ROACH: Yes, that's correct.

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

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

JUDGE ABREU: Thank you for your input.

MR. ROACH: Thank you.

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

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

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

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

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

JUDGE RYERSON: Thank you.

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

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

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

REBUTTAL ON BEHALF OF THE TENNESSEE VALLEY AUTHORITY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Also, Mr. Gillespie, I think he said

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

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

made that statement in the PEC.

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

Thank you.

JUDGE RYERSON: Thank you, Mr. Lepre.

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

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

JUDGE RYERSON: Thank you.

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

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

JUDGE RYERSON: And, Judge Abreu?

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

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

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

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

So, while we have the parties today, is

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

TVA, anything we should be taking up right now?

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

JUDGE RYERSON: Thank you.

And, NRC Staff?

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

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

JUDGE RYERSON: Oh, I --

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

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

MS. KIRKWOOD: Okay.

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

MS. KIRKWOOD: Thank you, Your Honor.

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

MS. KIRKWOOD: Yes, Your Honor.

JUDGE RYERSON: Judge Hawkens, anything further?

JUDGE HAWKENS: No, thank you.

JUDGE RYERSON: Judge Abreu?

JUDGE ABREU: Nothing further. Thank you.

JUDGE RYERSON: All right. Thank you.

Well, we stand adjourned. Thank you.

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