UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Paul S. Ryerson, Chairman
E. Roy Hawkens
Dr. Sue H. Abreu

In the Matter of	Docket Nos. EA-20-006 and EA-20-007
TENNESSEE VALLEY AUTHORITY	ASLBP No. 21-969-01-EA-BD01
(Enforcement Action)	November 3, 2021

MEMORANDUM AND ORDER
(Granting Summary Disposition of Violations 1, 2, and 3 and of Violation 4 in Part)

Before the Board, in this enforcement proceeding, are motions by the Tennessee Valley Authority (TVA) for: (1) summary disposition of Violations 1, 2, and 3; and (2) summary disposition of Violation 4.[1] The NRC Staff opposes the motions.[2]

We grant TVA's motion to summarily dispose of Violations 1, 2, and 3 for failure to assert an adverse action as a matter of law. For the same reason, we grant TVA's motion for summary disposition of Violation 4 in part, insofar as Violation 4 is based on TVA's decision to place Beth Wetzel on paid administrative leave. We deny the motion insofar as Violation 4 is based on TVA's decision to terminate Ms. Wetzel's employment, because material facts are in dispute.

[1] Tennessee Valley Authority's Motion for Summary Disposition of Violations 1, 2, and 3 (Lack of Adverse Employment Action) (Aug. 16, 2021) [hereinafter TVA Motion Violations 1, 2, and 3]; Tennessee Valley Authority's Motion for Summary Disposition of Violation 4 (Lack of Nuclear Safety-Related Protected Activity) (Aug. 16, 2021) [hereinafter TVA Motion Violation 4].

[2] NRC Staff's Consolidated Response in Opposition to TVA's Motions for Summary Disposition (Sept. 15, 2021) [hereinafter NRC Staff Response].

I. BACKGROUND

A. Factual Background

The facts concerning the NRC Staff's enforcement action against TVA have been previously described in orders of this Board,[3] of another licensing board,[4] and of the Commission.[5] Although the parties disagree about motivation and intent, important facts are not otherwise disputed.

On March 9, 2018, Erin Henderson (then TVA's Director of Corporate Nuclear Licensing) submitted a written complaint to her supervisor, Joseph Shea (then TVA's Vice President of Regulatory Affairs and Support Services), and to TVA's Corporate Director of Nuclear Human Resources, Amanda Poland.[6] Ms. Henderson alleged that individuals in the organization she directly supervised (including Beth Wetzel) and one individual in the onsite licensing organization at the Sequoyah Nuclear Power Plant (Michael McBrearty) had exhibited inappropriate and unprofessional workplace behavior toward her.

Specifically, Ms. Henderson asserted that these individuals "have either directly or indirectly acted in [an] attempt to intimidate and undermine me in my role as a senior regulatory leader."[7] Among other things, she expressed her belief that Mr. McBrearty, in particular, intentionally targeted her because she had previously initiated an investigation into whether Mr. McBrearty's relationship with another TVA employee was inappropriately close.[8] She claimed

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[3] See LBP-21-3, 93 NRC 153, 155–58 (2021).

[4] See Joseph Shea (Order Prohibiting Involvement in NRC-Licensed Activities Immediately Effective), LBP-20-11, 92 NRC 409, 411–14 (2020).

[5] See Joseph Shea (Order Prohibiting Involvement in NRC-Licensed Activities Immediately Effective), CLI-21-3, 93 NRC 89, 91–94 (2021).

[6] See TVA Motion Violations 1, 2, and 3, attach. 6, Formal Complaint of Erin Henderson (Mar. 9, 2018) [hereinafter Henderson Complaint].

[7] Id. at 1.

[8] Id. at 4.

that the named employees were creating a hostile work environment such that her "ability to fully perform the responsibilities outlined in [her] job description ha[d] been impacted."[9]

1. Mr. McBrearty's Resignation

TVA decided that its Office of General Counsel (TVA OGC) would conduct an investigation, which was assigned to and carried out by TVA OGC attorney John Slater. His initial report, dated May 25, 2018, concluded, as to Mr. McBrearty, that "Ms. Henderson's allegation of harassment and retaliation is substantiated, and Mr. McBrearty's conduct and behavior violated two Federal statutes, a Federal regulation, and three TVA policies."[10] After reviewing the initial report, TVA management placed Mr. McBrearty on paid administrative leave, pending further steps.

Mr. Slater's final investigative report was released on August 10, 2018.[11] Before TVA could consider further steps, however, on August 16, 2018 Mr. McBrearty resigned to take another position.[12]

2. Termination of Ms. Wetzel's Employment

Mr. Slater's May 25, 2018 report did not reach any conclusions concerning Ms. Wetzel's actions. However, his final investigative report addressed actions that Ms. Wetzel took after Ms. Henderson submitted her March 9, 2018 complaint.

On May 7, 2018—approximately one week after Ms. Wetzel began an 18-month "loanee" assignment at the Nuclear Energy Institute in Washington, D.C.—she emailed Mr.

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[9] Id. at 1.

[10] TVA Motion Violations 1, 2, and 3, attach. 7, Report of Investigation of Erin Henderson's Allegations of Harassment and Hostile Work Environment at 32 (May 25, 2018) [hereinafter Initial Slater Report].

[11] See TVA Motion Violations 1, 2, and 3, attach. 8, Report of Investigation of Erin Henderson's Allegations of Harassment and Hostile Work Environment (Aug. 10, 2018) [hereinafter Final Slater Report].

[12] TVA Motion Violations 1, 2, and 3, attach. 1, Statement of Undisputed Material Facts ¶ 5 [hereinafter TVA Violations 1, 2, and 3 Statement of Undisputed Material Facts]; TVA Motion Violations 1, 2, and 3, attach. 5, Resignation Letter of Michael McBrearty (Aug. 16, 2018).

Shea concerning Ms. Henderson.[13] According to Ms. Wetzel, Ms. Henderson "used HR to investigate people, reported people to [the Employee Concerns Program], threatened to have people for cause drug tested, pulled badging gate records and probably a lot more actions that I'm not aware of."[14] Ms. Wetzel claimed Ms. Henderson "has demonstrated a longstanding pattern of using TVA processes as punitive and retaliatory tools."[15] Ms. Wetzel made similarly critical comments about Ms. Henderson to Mr. Shea in an email dated June 9, 2018,[16] and in text messages later that month and the next.[17]

In his August 10, 2018 investigative report, Mr. Slater addressed the criticisms of Ms. Henderson in Ms. Wetzel's May 7, 2018 email.[18] He found some criticisms to be unsubstantiated and others to be merely "more of the same, with no details" that did not warrant further investigation, and concluded that "Ms. Wetzel continues to make the same allegations regarding Ms. Henderson to Mr. Shea to the point that it rises to the level of disrespectful conduct."[19]

On August 30, 2018, TVA OGC provided Mr. Shea with a memorandum that evaluated Ms. Wetzel's conduct by TVA lawyers other than Mr. Slater and recommended that Ms. Wetzel's "employment with TVA be terminated as a result of her involvement in a pattern of

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[13] TVA Motion Violation 4, attach. 5, Email from Beth Wetzel to Joseph Shea at 2–3 (May 7, 2018).

[14] Id. at 2.

[15] Id.

[16] See TVA Motion Violation 4, attach. 7, Email from Beth Wetzel to Joseph Shea (June 9, 2018).

[17] See TVA Motion Violation 4, attach. 8, Text Messages from Beth Wetzel to Joseph Shea.

[18] Final Slater Report at 19 n.69.

[19] Id. at 20 n.69

harassment and retaliation directed at Erin Henderson."[20] Mr. Shea decided to separate Ms. Wetzel from her employment by TVA in accordance with TVA OGC's recommendations.

On September 19, 2018, Mr. Shea presented a proposed disciplinary action concerning Ms. Wetzel to a TVA Executive Review Board. The purpose of such reviewing boards is to ensure that a proposed personnel action is consistent with company practices and not taken in retaliation for protected activities.[21] An Executive Review Board consists of TVA employees who are independent of the proposed action; typically, it includes a Senior Vice President; representatives from Human Resources, TVA OGC, and the Employee Concerns Program; and the Chairperson of TVA's Nuclear Safety Culture Monitoring Panel.[22] The proposal under consideration was first to provide Ms. Wetzel "[a]n offer of a no fault separation agreement," but "[i]f not accepted, termination will be implemented."[23]

The Executive Review Board expressly considered whether Ms. Wetzel's "involvement in a protected activity contributed in any way to the proposed action recommendation," and concluded that it did not.[24] It further found that terminating Ms. Wetzel's employment was "based on legitimate, non-retaliatory reasons," and "compliant with TVA policies, procedures and/or past practices."[25]

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[20] TVA Motion Violation 4, attach. 11, Investigation into Harassment and Hostile Work Environment Allegations in Nuclear Licensing Organization – Involvement of Beth Wetzel at 1 (Aug. 30, 2018).

[21] TVA Motion Violation 4, attach. 2, Wetzel Executive Review Board Package at 4 (Sept. 19, 2018) [hereinafter Wetzel ERB Package].

[22] Id. at 10–12.

[23] Id. at 1.

[24] Id. at 8.

[25] Id. at 23.

On October 15, 2018, TVA placed Ms. Wetzel on paid administrative leave and offered her a no-fault separation agreement.[26] Ms. Wetzel signed such an agreement on December 5, 2018, but rescinded her signature on December 11, 2018.[27] An Executive Review Board update took place in December 2018, which again did not raise any objection to the proposed personnel action.[28] TVA terminated Ms. Wetzel's employment on January 14, 2019.[29]

B. Procedural History

The NRC Staff claims that TVA's actions were really a "pretext" to punish Mr. McBrearty and Ms. Wetzel for raising various safety concerns.[30] After conducting its own investigation, the NRC Staff initiated three separate enforcement actions that resulted in enforcement orders or notices of violations.

First, based on his role in the termination of Ms. Wetzel's employment, the NRC Staff issued an order, effective immediately, banning Mr. Shea from any involvement in NRC-licensed activities for five years.[31] The NRC Staff justified making the Shea Enforcement Order immediately effective—even before a licensing board could conduct a hearing to which Mr. Shea was entitled—because of "the significance of the underlying issues, Mr. Joseph Shea's position within TVA that has a very broad sphere of influence, and the deliberate nature of the actions."[32] The Shea Enforcement Order concluded that "the NRC lacks the requisite

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[26] TVA Motion Violation 4, attach. 1, Statement of Undisputed Material Facts ¶ 8 [hereinafter TVA Violation 4 Statement of Undisputed Material Facts].

[27] Id. ¶ 9.

[28] Id. ¶ 10; see TVA Motion Violation 4, attach. 12, Wetzel Executive Review Board Package Update (Dec. 18, 2018).

[29] TVA Violation 4 Statement of Undisputed Material Facts ¶ 11.

[30] TVA Order for Civil Penalty, Appendix at 2, 4 (Oct. 29, 2020) (ADAMS Accession No. ML20297A552) [hereinafter TVA Order Appendix].

[31] Order Prohibiting Involvement in NRC-Licensed Activities Immediately Effective (Aug. 24, 2020) (ADAMS Accession No. ML20219A676) [hereinafter Shea Enforcement Order].

[32] Id. at 3.

reasonable assurance that licensed activities can be conducted in compliance with the Commission's requirements and that the health and safety of the public will be protected if Mr. Joseph Shea were permitted at this time to be involved in NRC-licensed activities."[33]

The Licensing Board assigned to Mr. Shea's request for a hearing on the Shea Enforcement Order disagreed.[34] Ruling at the outset only on whether the NRC Staff had justified making the Shea Enforcement Order immediately effective, the Board majority concluded "that the [NRC] Staff ha[d] not provided any evidence to support its inference that the [Executive Review Board] and [TVA] OGC acted as 'cover' to hide deliberate misconduct by Mr. Shea."[35] Without such evidence, the Licensing Board ruled the conclusions of the Executive Review Board and TVA OGC "support Mr. Shea's assertions that he believed he was taking the proper action."[36] On review, the Commission affirmed unanimously.[37]

Thereafter, rather than defend its Shea Enforcement Order in a hearing on the merits, the NRC Staff decided to abandon its case against Mr. Shea completely. On January 22, 2021, the NRC Staff informed Mr. Shea that, "[u]pon further review of the facts of your case and in light of the Commission's ruling [in CLI-21-3], we are hereby rescinding the August 24, 2020, Order in its entirety."[38]

Second, the NRC Staff issued a notice of violation to Ms. Henderson, charging her with deliberate misconduct based on her role concerning Mr. McBrearty and Ms. Wetzel.[39] The NRC

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[33] Id. at 3–4.

[34] See Shea, LBP-20-11, 92 NRC at 418–22.

[35] Id. at 421–22.

[36] Id. at 422.

[37] See Shea, CLI-21-3, 93 NRC at 96–99.

[38] Letter from George A. Wilson, NRC, to Joseph Shea at 1 (Jan. 22, 2021) (ADAMS Accession No. ML21021A351).

[39] Cover Letter and Notice of Violation to Ms. Erin Henderson re: Notice of Violation, NRC Office of Investigations Report Nos. 2-2018-033 and 2-2019-015 (IA-20-009) (Aug. 24, 2020) (ADAMS Accession No. ML20218A584).

Staff stated that it declined to issue an order prohibiting Ms. Henderson from involvement in NRC-licensed activities, however, "because [she was] not the decisionmaker that placed the former employees on paid administrative leave or terminated the former corporate employee."[40] Nonetheless, the notice publicly identified Ms. Henderson by name and warned that "additional deliberate violations could result in more significant enforcement action or criminal penalties."[41]

After the Commission's ruling in Mr. Shea's case,[42] the NRC Staff likewise decided to abandon its claims against Ms. Henderson. On January 22, 2021, the NRC Staff informed Ms. Henderson that, "[u]pon further review of the facts of your case and in light of the January 15, 2021, Commission ruling in CLI-21-03, we are hereby rescinding the August 24, 2020, Notice of Violation."[43]

Third, on October 29, 2020, the NRC Staff issued an Order to TVA assessing a Civil Penalty of $606,942 (the "Order")—the matter that remains pending before this Board.[44] As explained in the Appendix to the Order,[45] the penalty imposed on TVA is based on four alleged violations of 10 C.F.R. § 50.7 and Section 211 of the Energy Reorganization Act.[46]

Violation 1 charges that Ms. Henderson's March 9, 2018 complaint discriminated against Mr. McBrearty for engaging in protected activity. Violation 1 further charges that her complaint

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[40] Id. at 2.

[41] Id.

[42] See Shea, CLI-21-3, 93 NRC at 96–99.

[43] Letter from George A. Wilson, NRC, to Erin Henderson at 1 (Jan. 22, 2021) (ADAMS Accession No. ML21021A368).

[44] In the Matter of Tennessee Valley Authority, Chattanooga, TN, 85 Fed. Reg. 70,203 (Nov 4, 2020); TVA Order for Civil Penalty (Oct. 29, 2020) (ADAMS Accession No. ML20297A544) [hereinafter TVA Order].

[45] See TVA Order Appendix at 1–6.

[46] Energy Reorganization Act § 211, 42 U.S.C. § 5851.

triggered an investigation by the TVA OGC based, at least in part, on Mr. McBrearty's engaging in protected activity.[47]

Violation 2 charges that TVA discriminated against Mr. McBrearty when, on May 25, 2018, it placed him on paid administrative leave based, at least in part, on his engaging in protected activity.[48]

Violation 3 charges that Ms. Henderson's March 9, 2018 complaint discriminated against Ms. Wetzel for engaging in protected activity.[49] It further charges that her complaint triggered an investigation by TVA OGC that resulted in Ms. Wetzel being placed on paid administrative leave followed by termination of her employment based, at least in part, on her engaging in protected activity.[50] (Insofar as Violation 3 addresses Ms. Wetzel's administrative leave and termination of her employment, it duplicates Violation 4.)

Violation 4 charges that TVA discriminated against Ms. Wetzel when it placed her on paid administrative leave and terminated her employment, based, at least in part, on her engaging in protected activity.[51]

Notwithstanding the NRC Staff's decision to abandon its claims of deliberate misconduct against Mr. Shea and Ms. Henderson individually, the NRC Staff acknowledges that it pursues civil monetary penalties against TVA on the same theory: that is, that the TVA OGC investigation and Executive Review Board process were merely "cover" for TVA's unlawful discrimination against Mr. McBrearty and Ms. Wetzel for engaging in protected activity.[52] TVA's internal investigations, the NRC Staff claims, "were not objective, serious inquiries, but instead

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[47] TVA Order Appendix at 1–2.

[48] Id. at 2–3.

[49] Id. at 3–4.

[50] Id.

[51] Id. at 4.

[52] Tr. at 77 (Ms. Kirkwood).

sought from the outset to validate pre-formed conclusions in order to substantiate Ms. Henderson's complaint."[53] According to the NRC Staff, TVA intended to "gather evidence in a biased and incomplete manner to use as reasons to terminate both Mr. McBrearty's and Ms. Wetzel's employment."[54]

TVA disputes the NRC Staff's claimed violations and has exercised its right to demand an evidentiary hearing.[55] After the close of discovery, including substantial document disclosures, interrogatories, and depositions of some nineteen individuals, TVA submitted its pending motions, which together seek summary disposition of all four asserted violations.[56] The Board heard oral argument on October 14, 2021.[57]

II. LEGAL STANDARDS

A. Summary Disposition

In this Subpart G proceeding, the standards for summary disposition are set forth in 10 C.F.R. § 2.710 and "are based upon those the federal courts apply to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure."[58] The Board may grant summary disposition if the relevant pleadings "show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law."[59]

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[53] NRC Staff Response at 3.

[54] Id.

[55] See Tennessee Valley Authority's Answer and Request for Hearing (Nov. 30, 2020).

[56] To permit consideration of TVA's summary disposition motions, the Board briefly paused the hearing schedule. See Licensing Board Order (Suspending Scheduling Order and Directing Responses to Summary Disposition Motions) (Aug. 18, 2021) (unpublished).

[57] Tr. at 142–212.

[58] Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 297 (2010); see Advanced Med. Sys., Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102–03 (1993).

[59] 10 C.F.R. § 2.710(d)(2).

In response to a motion for summary disposition, an opposing party "may not rest upon . . . mere allegations or denials," but "must set forth specific facts showing that there is a genuine issue of fact" for hearing.[60] At the same time, however, all facts must be construed in the light most favorable to the nonmoving party, and any doubt as to the existence of a genuine issue of material fact should be resolved against summary disposition.[61] As the Commission directs, "[c]aution should be exercised in granting summary disposition, which may be denied 'if there is reason to believe that the better course would be to proceed to a full [hearing].'"[62]

B. Retaliation for Protected Activity

To understand the scope of the NRC's authority and responsibility, "[w]e look first to the statute."[63]

Section 211 of the Energy Reorganization Act of 1974 (ERA) (42 U.S.C. § 5851) and the NRC's implementing regulation (10 C.F.R. § 50.7) are not as broad as the antiretaliation provisions in some other statutes. ERA Section 211 states that "[n]o employer may discharge . . . or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment" because of the employee's participation in protected activity.[64] Likewise, 10 C.F.R. § 50.7(a) states that "[d]iscrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment."[65] Therefore, ERA Section 211 and 10 C.F.R. § 50.7 prohibit only retaliation that

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[60] Id. § 2.710(b).

[61] Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962); Pilgrim, CLI-10-11, 71 NRC at 297–98; Advanced Med. Sys., CLI-93-22, 38 NRC at 102; Progress Energy Fla., Inc. (Levy Cty. Nuclear Power Plant, Units 1 & 2), LBP-10-20, 72 NRC 571, 579 (2010).

[62] Pilgrim, CLI-10-11, 71 NRC at 298 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986)).

[63] U.S. Dep't of Energy (High-Level Waste Repository), LBP-10-11, 71 NRC 609, 618 (2010).

[64] Energy Reorganization Act § 211(a)(1), 42 U.S.C. § 5851(a)(1).

[65] 10 C.F.R. § 50.7(a).

takes the form of an adverse change in the terms and conditions of employment, and not every type of retaliation that might be possible.

Other statutes that are not at issue make additional kinds of retaliatory conduct unlawful. For example, the antiretaliation provisions of the False Claims Act expressly protect an employee who is "suspended, threatened [or] harassed."[66] On their face, ERA Section 211 and 10 C.F.R. § 50.7 do not address such conduct. Likewise, the provisions of Title VII of the Civil Rights Act of 1964 provide broader protection for victims of retaliation than for those who are victims of discrimination itself.[67] Yet it is the latter provision in Title VII—the narrower prohibition against employment discrimination itself—that is virtually identical to the language of ERA Section 211 and 10 C.F.R. § 50.7.[68]

A non-exhaustive list of protected activity is set forth in 10 C.F.R. § 50.7(a)(1) that includes such actions as providing information about alleged violations to the Commission or to an NRC licensee, testifying in Commission and other proceedings, and refusing to engage in an unlawful practice.[69] The touchstone for protected activity is that it "must implicate safety definitively and specifically."[70]

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[66] 31 U.S.C. § 3730(h)(1).

[67] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67 (2006).

[68] Compare Civil Rights Act of 1964 § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1), with Energy Reorganization Act of 1974 § 211(a)(1), 42 U.S.C. § 5851(a)(1).

[69] See 10 C.F.R. § 50.7(a)(1)(i)–(v).

[70] Am. Nuclear Res., Inc. v. U.S. Dep't of Labor, 134 F.3d 1292, 1295 (6th Cir. 1998); see Hoffman v. NextEra Energy, Inc., 2013 WL 6979709, ARB No. 12-062, ALJ No. 2010-ERA-011, at *6 (ARB Dec. 17, 2013) (noting that courts have construed the ERA's "catch-all" provision "as requiring, in light of the ERA's overarching purpose of protecting acts implicating nuclear safety, that an employee's actions must implicate safety 'definitively and specifically' to constitute whistleblower protected activity under [42 U.S.C. § 5851(a)(1)(F)]").

III. DISCUSSION

A. Violation 1

Violation 1 is based on two separate but related actions: (1) Ms. Henderson's March 9, 2018 complaint (insofar as it addressed Mr. McBrearty's conduct); and (2) TVA's investigation of Mr. McBrearty's conduct in response to Ms. Henderson's complaint. It therefore raises two issues.

First, did Ms. Henderson's act of complaining about Mr. McBrearty's conduct, in itself, change his "compensation, terms, conditions, or privileges of employment," as required to violate ERA Section 211 and 10 C.F.R. § 50.7? We conclude that it did not.

When Ms. Henderson submitted her complaint on March 9, 2018, although it led to a subsequent investigation, it did not at that moment affect the terms or conditions of Mr. McBrearty's employment in any way. To our knowledge, no federal court or administrative tribunal has ever interpreted the act of an employee complaining about another employee as impacting "compensation, terms, conditions, or privileges of employment," and the NRC Staff cites none.

The NRC Staff's theory that an employee's complaint might constitute a violation of ERA Section 211 and 10 C.F.R. § 50.7 is novel and unprecedented, and it has no support in the language of those provisions. In contrast, courts have consistently ruled that a violation of ERA Section 211 must involve a personnel action that has a tangible impact, such as termination of employment, failure to hire, demotion, or an unwanted transfer.[71]

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[71] See, e.g., English v. Gen. Elec. Co., 496 U.S. 72 (1990) (involving termination of employment); Tamosaitis v. URS Inc., 781 F.3d 468 (9th Cir. 2015) (involving involuntary transfer with lost compensation); Hasan v. U.S. Dep't of Labor, 400 F.3d 1001 (7th Cir. 2005) (involving failure to hire); Hasan v. U.S. Dep't of Labor, 298 F.3d 914 (10th Cir. 2002) (involving failure to hire); Doyle v. U.S. Sec'y of Labor, 285 F.3d 243 (3d Cir. 2002) (involving failure to hire); Am. Nuclear Res., 134 F.3d at 1294 (involving termination of employment); DeFord v. Sec'y of Labor, 700 F.2d 281 (6th Cir. 1983) (involving a transfer deemed a demotion); Consol. Edison Co. of N.Y., Inc. v. Donovan, 673 F.2d 61 (2d Cir. 1982) (involving termination of employment).

Second, did TVA's investigation of Ms. Henderson's complaint about Mr. McBrearty's conduct change his "compensation, terms, conditions, or privileges of employment"? Again, we conclude that it did not.

TVA policy requires employees to cooperate with such investigations.[72] As the United States Court of Appeals for the Sixth Circuit (which includes Tennessee, where the alleged retaliation in this case occurred) ruled in Kuhn v. Washtenaw County, an investigation cannot be a violation when its subject "suffered no disciplinary action, demotion, or change in job responsibilities during the course of the investigation."[73]

Apart from TVA's decision to place Mr. McBrearty on paid administrative leave after the investigation's preliminary findings (which we address below), the NRC Staff does not explain how TVA's investigation of Mr. McBrearty impacted his employment in the tangible way necessary to violate ERA Section 211 and 10 C.F.R. § 50.7. Mr. McBrearty voluntarily resigned from TVA, to accept another position, before the investigation was concluded.

Moreover, as a practical matter, how would an employer know whether protected activity is the basis for a complaint before investigating it? On their face, a small number of Ms. Henderson's allegations suggest that she was unhappy with Mr. McBrearty's possible role in prompting an NRC safety inspection.[74] But, more broadly, Ms. Henderson claimed that various individuals were creating a hostile work environment that was adversely affecting her job performance.[75] She expressed her belief that Mr. McBrearty, in particular, intentionally targeted

[72] TVA Motion Violations 1, 2, and 3, attach. 14, Employee Discipline Policy, TVA-SPP-11.316, Rev. 0005 app'x B at 3 (Effective Date July 2, 2017).

[73] 709 F.3d 612, 626 (6th Cir. 2013).

[74] NRC Staff Response at 11.

[75] Henderson Complaint at 1.

her because she had previously initiated an investigation into whether Mr. McBrearty's relationship with another TVA employee was inappropriately close.[76]

Thus, Ms. Henderson herself alleged retaliatory conduct that it was incumbent on TVA to investigate.

The NRC Staff's arguments that Ms. Henderson's complaint and TVA's investigation nonetheless violate ERA Section 211 and 10 C.F.R. § 50.7 are not persuasive. According to the NRC Staff, "the relevant legal inquiry is not whether an employee was ultimately discharged or demoted, but instead, whether the challenged action would deter a reasonable worker from engaging in protected activity."[77]

That may be the relevant legal inquiry under other statutes, but not under the statute with which the NRC Staff has charged TVA. In asserting that the impact on other employees is the only relevant inquiry under ERA Section 211 and 10 C.F.R. § 50.7, the NRC Staff ignores the language of these provisions and misreads relevant caselaw.

For example, the NRC Staff purports to rely on the Supreme Court's decision in Burlington Northern & Santa Fe Railroad Co. v. White, which interpreted the antiretaliation provision of Title VII of the Civil Rights Act of 1964, for the proposition that a prohibition limited to employment-related actions would not deter many other forms of retaliation.[78] But the Supreme Court did not say that this Board should rewrite ERA Section 211 to cover additional forms of retaliation. The Supreme Court said just the opposite: that normally we should presume that "Congress intended its different words to make a legal difference."[79]

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[76] Id. at 4.

[77] NRC Staff Response at 17 (citing Vander Boegh v. EnergySolutions, Inc., 536 F. App'x 522, 529 (6th Cir. 2013)).

[78] Id. at 16–17.

[79] Burlington N., 548 U.S. at 62–63.

Precisely because "[t]he language of the substantive [antidiscrimination] provision differs from that of the antiretaliation provision in important ways,"[80] the Supreme Court ruled that the antiretaliation provision[81] of Title VII reaches conduct not covered by the substantive antidiscrimination provision. Specifically, the Supreme Court held that the substantive antidiscrimination provision of Title VII is limited in scope to "actions that affect employment or alter the conditions of the workplace," while "[n]o such limiting words appear in the antiretaliation provision."[82]

The language of ERA Section 211 and 10 C.F.R. § 50.7 is virtually identical to the language of the substantive antidiscrimination provision of Title VII, not to the broader antiretaliation provision.[83] Thus, when confronted with virtually the same language as in ERA Section 211 and 10 C.F.R. § 50.7, the Supreme Court interpreted such language to reach only "actions that affect employment or alter the conditions of the workplace."[84] The NRC Staff's contention that the Board should disregard these limitations in the relevant statutory language is not at all supported by the Supreme Court's decision, which directs the opposite.

Similarly unsupported is the NRC Staff's claim that controlling caselaw in the United States Court of Appeals for the Sixth Circuit now applies the broader antiretaliation test of Title VII to determine whether an action is adverse under ERA Section 211.[85] Purportedly in support,

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[80] Id. at 61.

[81] See Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e-3(a).

[82] Burlington N., 548 U.S. at 62.

[83] Compare Civil Rights Act of 1964 § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) ("It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]"), with Energy Reorganization Act of 1974 § 211(a)(1), 42 U.S.C. § 5851(a)(1) ("No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee [engaged in protected activity.]").

[84] Burlington N., 548 U.S. at 62.

[85] NRC Staff Response at 16–18.

the NRC Staff cites Vander Boegh v. EnergySolutions, Inc.[86] But Vander Boegh does not support the NRC Staff's claim for several reasons.

First, as an unpublished decision, Vander Boegh is not binding precedent under the Sixth Circuit's rules.[87] Regardless what the case says, it cannot accurately be described as "the most recent caselaw in the Sixth Circuit that governs the interpretation of ERA Section 211," as the NRC Staff claims.[88]

Second, Vander Boegh involved not only ERA claims, but also claims under the False Claims Act and various environmental statutes.[89] As NRC Staff counsel conceded at oral argument,[90] the court's unpublished decision does not distinguish among these differing causes of action when it speaks of an "adverse employment action."

Yet, as explained above, other statutes address broader categories of retaliation than ERA Section 211 does. Indeed, the provisions of the False Claims Act expressly protect an employee who is "suspended, threatened [or] harassed,"[91] regardless whether retaliation takes the form of a concrete employment action. So, because it lumped various causes of action together, one cannot tell how the Vander Boegh court would have interpreted ERA Section 211 standing alone.

Third, whether Mr. Vander Boegh had suffered an adverse employment action was not even disputed.[92] As the Sixth Circuit explained: "Undisputedly, the decision not to hire Vander Boegh constitutes an adverse employment action."[93] On its facts, Vander Boegh says nothing

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[86] 536 F. App'x at 529.

[87] 6 Cir. R. 32.1(b).

[88] NRC Staff Response at 16.

[89] Vander Boegh, 536 F. App'x at 527.

[90] Tr. at 184 (Mr. Gillespie).

[91] 31 U.S.C. § 3730(h)(1).

[92] Vander Boegh, 536 F. App'x at 528.

[93] Id. at 529.

at all about whether an employee's complaint or an employer's investigation of that complaint can violate ERA Section 211.

Likewise unsupported is the NRC Staff's claim that the Department of Labor Administrative Review Board holds that the sole test for a violation of ERA Section 211 is whether an employer's action "could well have dissuaded a reasonable worker from engaging in protected activity."[94] Purportedly in support, the NRC Staff cites Overall v. Tennessee Valley Authority.[95]

But that is not what Overall says. Rather, in applying ERA Section 211 (and ruling in TVA's favor), the Overall Administrative Review Board said that the test for an adverse employment action is (1) whether the employer (TVA) "took a 'tangible employment action' that resulted in a significant change [in Mr. Overall's] employment status;"[96] and (2) whether TVA's actions were "harmful to the point that they could well have dissuaded a reasonable worker from engaging in protected activity."[97] By focusing on the second part of the test—and simply ignoring the first—the NRC Staff misreads Overall and misapprehends what it stands for.

The NRC Staff cites several cases[98] for the proposition that, in appropriate circumstances, a retaliatory investigation can be a violation of other statutes, such as the broader antiretaliation provision of Title VII, discussed above, or the even broader prohibitions of the Whistleblower Protection Act.[99] But the NRC Staff cites no case that interprets the language

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[94] NRC Staff Response at 18 (citing Overall v. Tenn. Valley Auth., ARB No. 04-073, ALJ No. 1999-ERA-025, slip op. at 11 (ARB July 16, 2007)).

[95] Overall, 1999-ERA-025, slip op. at 11.

[96] Id.

[97] Id.

[98] See NRC Staff Response at 37–44.

[99] Compare 5 U.S.C. § 2302(a)(2)(A)(i)–(xiii) (listing more than a dozen prohibited personnel actions), with Energy Reorganization Act of 1974 § 211(a)(1)(A)–(F), 42 U.S.C. § 5851(a)(1)(A)–(F).

of ERA Section 211 and 10 C.F.R. § 50.7 (or similar provisions in any other statute) to create a violation based on an employee's complaint or an employer's investigation of that complaint.

As a matter of law, we grant summary disposition of Violation 1 in favor of TVA.

B. Violation 2

Violation 2 is based on TVA's placing Mr. McBrearty on administrative leave, with full pay and benefits, for 83 days. It therefore raises this issue: Did Mr. McBrearty's administrative leave change his "compensation, terms, conditions or privileges of employment," as required to violate ERA Section 211 and 10 C.F.R. § 50.7?

Overwhelming caselaw—most of it decided by federal courts of appeals affirming summary judgments in favor of employers—directs that it did not. As the United States Court of Appeals for the Third Circuit recently observed, when applying the substantive antidiscrimination provision of Title VII (the provision that is essentially identical to ERA Section 211), "other courts of appeals have unanimously concluded that 'placing an employee on paid administrative leave where there is no presumption of termination' is not an adverse employment action."[100]

As the Third Circuit explained, "[a] paid suspension is neither a refusal to hire nor a termination, and by design it does not change compensation."[101] Likewise, the Third Circuit ruled, it does not effect a "'serious and tangible' alteration of the 'terms, conditions, or privileges of employment.'"[102] As the court concluded: "We therefore agree with our sister courts that a suspension with pay, 'without more,' is not an adverse employment action."[103]

For the same reasons, courts of appeals in at least four other circuits (including the Sixth Circuit, where the relevant events took place) have affirmed summary judgment on the ground

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[100] Jones v. Se. Pa. Transp. Auth., 796 F.3d 323, 326 (3d Cir. 2015) (quoting Jones v. Se. Pa. Transp. Auth., No. 12-CV-6582-WY, 2014 WL 3887747, at *4 (E.D. Pa. Aug. 7, 2014)).

[101] Id.

[102] Id. (quoting Storey v. Burns Int'l Sec. Servs., 390 F.3d 760, 764 (3d Cir. 2004)).

[103] Id. (quoting Joseph v. Leavitt, 465 F.3d 87, 91 (2d Cir. 2006)).

that placing an employee on leave, with full pay and benefits, is not an adverse employment action.[104] In the face of this unanimous authority, the NRC Staff cites not a single appellate decision that interprets the language of ERA Section 211 and 10 C.F.R. § 50.7 (or similar provisions of any other statute) to create a violation based on placing an employee on administrative leave with full pay and benefits.[105]

The only cited case that involved statutory language similar to ERA Section 211, in which summary judgment was denied, is Richardson v. Petasis.[106] In Richardson, the district court denied summary judgment based not solely on the imposition of administrative leave, "but also its conditions."[107] Specifically, the court determined that "continued employment was explicitly conditioned upon [plaintiff's] completion of certain tasks," and "uncontroverted evidence" demonstrated that the employer had prevented the plaintiff from completing those necessary tasks.[108] Richardson does not challenge the well-established rule that paid administrative leave, without more, is not a violation of the provisions of ERA Section 211.

In the absence of supporting precedents, the NRC Staff nonetheless contends that "determination of what constitutes an adverse action is dependent on the context."[109] It is true

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[104] See, e.g., Michael v. Caterpillar Fin. Servs. Corp., 496 F.3d 584, 594 (6th Cir. 2007); Dendinger v. Ohio, 207 F. App'x 521, 527 (6th Cir. 2006); Joseph, 465 F.3d at 91; Singletary v. Mo. Dep't of Corr., 423 F.3d 886, 891–92 (8th Cir. 2005); Peltier v. U.S., 388 F.3d 984, 988 (6th Cir. 2004); Von Gunten v. Md., 243 F.3d 858, 869 (4th Cir. 2001); Bowman v. Shawnee State Univ., 220 F.3d 456, 461–62 (6th Cir. 2000). Although some of these decisions failed to anticipate the Supreme Court's ruling in Burlington Northern, 548 U.S. at 62, insofar as they address the language of the substantive antidiscrimination provision of Title VII (which is virtually identical to the language of ERA Section 211), and not the broader language of Title VII's antiretaliation provision, their reasoning remains sound.

[105] See NRC Staff Response at 20–29.

[106] 160 F. Supp. 3d 88 (D.D.C. 2015).

[107] Id. at 118.

[108] Id.

[109] NRC Staff Response at 22 (citing Burlington N., 548 U.S. at 69).

that courts have implied that the imposition of administrative leave must be "reasonable,"[110] and have cautioned that an "exceptionally dilatory" investigation while an employee is on leave might give rise to a violation.[111]

But no such facts were found to prevent summary judgment in other cases, and no such facts exist here. Indeed, almost half the administrative leave cases discussed in the NRC Staff's brief involved administrative leave that lasted as long or longer than Mr. McBrearty's 83 days.[112] Like the many federal courts of appeals that have affirmed summary judgment on this issue, we do not conclude that the NRC Staff has raised a genuine dispute for hearing on Violation 2.

As a matter of law, we grant summary disposition of Violation 2 in favor of TVA.

C. Violation 3

Much like Violation 1, Violation 3 is based on two separate but related actions: (1) Ms. Henderson's March 9, 2018 complaint (insofar as it addressed Ms. Wetzel's conduct); and (2) TVA's investigation of Ms. Wetzel's conduct. For the same reasons we grant summary disposition of Violation 1, as explained above, we grant summary disposition of Violation 3 in favor of TVA as a matter of law.

Insofar as Violation 3 also addresses Ms. Wetzel's administrative leave and termination of her employment, it duplicates Violation 4 and is dismissed for that reason.

D. Violation 4

Violation 4 charges that TVA discriminated against Ms. Wetzel when it placed her on administrative leave and terminated her employment, allegedly based, at least in part, on her engaging in protected activity. Insofar as Violation 4 is based on placing Ms. Wetzel on paid

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[110] Joseph, 465 F.3d at 91–92.

[111] Id. at 92.

[112] See NRC Staff Response at 20–29; Tr. at 163–65 (Mr. Lepre).

administrative leave, we grant summary disposition in favor of TVA as a matter of law for the same reasons we grant summary disposition of Violation 2, as explained above.

We deny summary disposition of Violation 4 with respect to TVA's termination of Ms. Wetzel's employment. Although to date the NRC Staff has come forward with scant evidence of TVA's having terminated Ms. Wetzel's employment for engaging in protected activity, we cannot say (construing the evidence in favor of the NRC Staff, as we must at this stage) that there can be no doubt as to the existence of genuine issues of material fact.

For example, Ms. Henderson's March 9, 2018 complaint to Mr. Shea contained at least one allegation that mentioned Ms. Wetzel's protected activity: that is, that Ms. Wetzel might have initiated an NRC inspection of her organization.[113] Also undisputed is that Ms. Henderson's complaint was the reason that Mr. Shea asked TVA OGC to investigate. Mr. Shea denies that the allegations in Ms. Henderson's complaint ultimately were the grounds for terminating Ms. Wetzel's employment,[114] but that necessarily raises issues of witness credibility and inferences to be drawn from the evidence.

Similar issues are raised as to whether Ms. Wetzel's complaints about Ms. Henderson after March 9, 2018 were related to safety. TVA contends that, on their face, they were not related to safety at all.[115] Yet the NRC Staff responds with the charge that "TVA presents Ms. Wetzel's protected activities as individually siloed occurrences."[116] According to the NRC Staff, Ms. Wetzel's protected activities were interrelated: "They build on each other and should be considered in their proper context—as a series of linked complaints addressing Ms. Wetzel's

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[113] NRC Staff Response, attach. 1, Statement of Disputed Material Facts ¶ 14 [hereinafter NRC Staff Statement of Disputed Material Facts]; Henderson Complaint at 6–7.

[114] See TVA Motion Violation 4 at 28 (citing TVA Motion Violation 4, attach. 15, Excerpts from Joseph Shea's Pre-Decisional Enforcement Conference Transcript at 144–46 (June 25, 2020)).

[115] See id. at 14–23.

[116] NRC Staff Response at 54.

persistent concerns about a chilled work environment at TVA."[117] Whether this is so, the Board concludes, would best be decided on the facts developed at an evidentiary hearing.

Additional fact issues exist concerning Mr. Shea's role with the Executive Review Board. Mr. Shea's evaluation was presented to the Executive Review Board as the basis for decision.[118] Although TVA claims that "the undisputed facts show that the [Executive Review Board] was unaware that Ms. Wetzel had allegedly contacted the NRC,"[119] in actuality the NRC Staff does dispute this conclusion, based on Mr. Shea's involvement in the process and his familiarity with the content of Ms. Henderson's March 9, 2018 complaint.[120]

Finally, we are not persuaded to dismiss Violation 4, at this time, based on the difference between Violation 4 as originally noticed and as later clarified or expanded in the TVA Order Appendix. Specifically, the TVA Order Appendix alleges protected activity by Ms. Wetzel—"alleged contact with the NRC"[121]—that is not explicitly mentioned in either TVA's notice of violation or in the restatement of Violation 4 set forth in the TVA Order Appendix itself.

TVA contended at oral argument that the difference deprived TVA of its full right to present its case to the NRC enforcement staff prior to a formal hearing, as guaranteed by Section 234(b) of the Atomic Energy Act of 1954, 42 U.S.C § 2282(b).[122] Likewise, TVA claimed its notice of violation failed to include all information required by 10 C.F.R. § 2.205.[123]

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[117] Id.

[118] TVA Motion Violation 4 at 7; NRC Staff Statement of Disputed Material Facts ¶ 60.

[119] TVA Motion Violation 4 at 29; Wetzel ERB Package at 5.

[120] NRC Staff Response at 56.

[121] TVA Order Appendix at 4.

[122] Tr. at 156 (Ms. Leidich).

[123] Tr. at 206–07 (Ms. Leidich).

As TVA counsel acknowledged, it advanced these arguments for the first time at oral argument.[124] Yet TVA was previously aware of the basis for them.[125]

Because TVA failed to make these arguments in its summary disposition motion or to seek permission to make them in a reply brief—and because these issues also might be better decided on the facts developed at an evidentiary hearing—we do not decide them now. If it chooses, TVA may raise these arguments again in its hearing briefs or in motions to exclude evidence.

Otherwise, the evidentiary hearing on Violation 4 shall address two issues: (1) whether the NRC Staff can demonstrate by a preponderance of the evidence that TVA terminated Ms. Wetzel's employment based, at least in part, on her engaging in protected activity; and (2) if so, whether TVA can demonstrate by clear and convincing evidence that it would have terminated her employment regardless of the protected activity.[126]

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[124] Tr. at 157 (Ms. Leidich).

[125] TVA Motion Violation 4 at 15 n.70, 26–29.

[126] See Shea, CLI-21-3, 93 NRC at 93 n.18.

IV. ORDER

For the foregoing reasons:

TVA's motion for summary disposition of Violation 1 is granted.

TVA's motion for summary disposition of Violation 2 is granted.

TVA's motion for summary disposition of Violation 3 is granted.

TVA's motion for summary disposition of Violation 4 is granted in part, insofar as Violation 4 is based on TVA's decision to place Ms. Wetzel on paid administrative leave.

TVA's motion for summary disposition of Violation 4 is denied insofar as Violation 4 is based on TVA's decision to terminate Ms. Wetzel's employment.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Paul S. Ryerson, Chairman
ADMINISTRATIVE JUDGE

/RA/

E. Roy Hawkens
ADMINISTRATIVE JUDGE

/RA/

Dr. Sue H. Abreu
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 3, 2021

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
TENNESSEE VALLEY AUTHORITY	)	Docket Nos. EA-20-006 and 20-007-EA
	)	
(Enforcement Action)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Memorandum and Order (Granting Summary Disposition of Violations 1, 2, and 3 and of Violation 4 in Part) (LBP-21-06)** have been served upon the following persons by Electronic Information Exchange.

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TENNESSEE VALLEY AUTHORITY
Docket Nos. EA-20-006 and 20-007-EA
Memorandum and Order (Granting Summary Disposition of Violations 1, 2, and 3 and of Violation 4 in Part) (LBP-21-06)

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Dated at Rockville, Maryland,
this 3rd day of November 2021.

Krupskaya T. Castellon
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Office of the Secretary of the Commission