Date: April 1, 1998

In the Matter of

CURTIS C. OVERALL
Complainant

CASE NO.: 97-ERA-53

v.

TENNESSEE VALLEY AUTHORITY
Respondent

APPEARANCES:

Charles W. VanBeke, Esq.
Wagner, Myers, &Sanger
For the Complainant

Thomas F. Fine Esq.
Assistant General Counsel
Angela Tyson Floyd, Esq.
Office of General Counsel
Tennessee Valley Authority
For the Respondent

BEFORE:

CLEMENT J. KENNINGTON
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises out of a complaint filed by Complainant, Curtis C. Overall (herein Overall) under the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. Section 5851, and implementing regulations at 29 C.F.R. Part 24. The ERA affords employees in the nuclear industry protection against employment discrimination because of their actions in commencing, testifying at,

or participating in proceedings or other actions to carry out the purposes of the ERA or the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011, et. seq. including "whistleblower " activity such as the participation in the identification of nuclear safety concerns and quality problems. Hill v. U.S. Dept. of Labor, 65 F.3d 1331,1335 (6th Cir. 1995).

I. STATEMENT OF CASE

On January 15, 1997, Overall filed a complaint with the Wage and Hour Division, Employment Standards Administration, alleging a discriminatory reduction in force by Tennessee Valley Authority (herein TVA) on July 24, 1996, because of his initiation of a problem evaluation report # 9500246 (herein PER 246). (Jt. Ex. 1).[1] On April 3, 1997, Overall amended the complaint to include his transfer to TVA Services organization effective September 18, 1995. (Jt. Ex. 2). On June 13, 1997, the Assistant District Director of the Wage and Hour Division, after conducting an investigation, issued a decision finding that TVA had discriminated against Overall when it notified and subsequently laid off Overall on July 24 and September 30, 1996, respectively. (Jt. Ex.3). On June 18, 1997, TVA appealed the Assistant District Director's decision and requested a hearing before the Office of Administrative Law Judges resulting in the hearing before me in Knoxville, Tennessee on December 16, 17, and 18, 1997.

At the hearing Overall and TVA were well represented by attorneys Charles W. VanBeke and Thomas F. Fine, respectively. Claimant testified and introduced 43 exhibits (CX. Ex.1-37,42-47) and called the following witnesses: Gary Thomas Jordan, Vernon Paul Law, Amanda Leigh Overall, Joseph C. Overall, and Janice Overall . TVA introduced 15 exhibits (RX. Ex. 1-9, 10-12, 14-17) and called the following witnesses: Vonda Sisson, Daryl Allan Smith, Terry Ray Woods, James E. Swindell, Dennis Lee Koehl, Ulysses White and Landy McCormick.[2] The parties filed timely post hearing briefs.[3] The findings and conclusions set forth below are based upon my observation of

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[1] The exhibits introduced at the hearing were identified as follows: joint exhibits of the parties (Jt.Ex.); Complainant exhibits (CX.Ex.); Respondent exhibits (RX.Ex).

[2] Like Complainant, witnesses Gary Thomas Jordan, Vernon Paul Law, Vonda Sisson, Darryl Allan Smith, Terry Ray Woods, James E. Swindell, Dennis Lee Koehl, Ulysses White, and Landy McCormick are referred to by their last names.

[3] Post hearing briefs were originally due on February 18, 1998. Overall sought and was granted an extension until March 12, 1998 due to a late receipt of the transcript. In his brief Mr. Van Beke moved to admit as CX. Ex. 48, a NRC Web-site document, dated February 14, 1998, which was not available at the time of this hearing. This document shows the D.C. Cook ice condensers being declared inoperable because of missing ice condenser screws. Since this is the same issue involved in the present proceeding, i.e, missing or defective ice condenser screws at a similar Westinghouse ice condenser system, and it is directly related to Overall's testimony about a generic ice condenser screw problem involving not only Watts Bar but other nuclear facilities

witness appearance and demeanor and a careful analysis of the entire record including the arguments presented, and applicable statutes, regulations and pertinent case law.

Prior to the hearing, TVA filed a motion and brief in support for a summary decision contending Overall failed to (1) timely appeal the Wage and Hour decision relative to September 1995 transfer from Watts Bar to TVA Services; (2) file a complaint within 180 days of his transfer as required by Section 211 of the ERA; and (3) establish a *prima facie* case of discrimination by showing a causal link between his protected activity and the adverse action he suffered. Overall filed an opposition to this motion and a motion to supplement complaint alleging that on June 16, 1997, TVA discriminatorily refusal to recall him for work on its Watts Bar ice condenser system (Jt. Ex. 5-7). On September 17, 1997, I issued an Order Granting Overall's Motion to Supplement Complaint and postponed a ruling on TVA's motion for summary judgment pending completion of discovery by Overall.

During the hearing TVA again moved for dismissal contending that the allegation of a discriminatory September 1995 transfer was untimely filed and further that the transfer to TVA Services was voluntary and to a separate organization having no connection with and or knowledge of Overall's prior protected activities. Overall objected, contending that his transfer to TVA Services was involuntary, being accepted only when confronted with an involuntary transfer to Services as an "at risk" employee and further that a *prima facie* case of discrimination had been established showing a continuing pattern of discrimination from the initial notice of involuntary transfer through the subsequent layoff and subsequent refusal to recall in June 1997. Based upon the evidence presented by Overall, I denied TVA's motion. (Tr. 464). [4]

II. ISSUES

1. Whether TVA engaged in a concerted attempt to conceal significant safety deficits in its Watts Bar ice condenser system.

2. If so, whether TVA in furtherance of its concealment efforts discriminatorily transferred, laid off , and thereafter refused to recall Overall because of his attempt at exposing and correcting safety deficits in the Watts Bar ice condenser system.

3. The appropriate remedy.

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including D.C. Cook, Sequoyah, Duke Power, Catawba as well as plants in Finland and Japan, I find CX. Ex. 48 relevant to this proceeding. Since it was not available for admission during the hearing, I admit it pursuant to 29 C.F.R. § 18.54 (c) noting no TVA objections thereto.

[4] References to transcript pages from the hearing are designated as Tr. __

III. STIPULATIONS

The stipulations as set forth in Jt. Ex. 9 are incorporated into the Factual Background and Findings of Fact, Section IV and V of this decision.

IV. FACTUAL BACKGROUND

A. *Overall's Work History and Educational Background*

After receiving a 2 year associate degree in architectural pre-engineering from Cleveland State Community College in Cleveland, Tennessee, Overall began working as an engineering draftsman for the City of Chattanooga Department of Public Works in 1973. Overall kept this position until 1979 when TVA hired him to work in its Chattanooga Fossil and Hydro Division. He remained there until 1981 when he voluntarily transferred to the TVA Nuclear Division. From 1981 to December 1984 Overall worked as an SE-3, engineering aide at various plants in Chattanooga and surrounding vicinity, including TVA's Sequoyah nuclear power plant. His duties included work on plant outages, ice condensers, cooling towers, refilling apparatus, reactor seal tables, preventive maintenance on pumps and valves throughout the plants together with installation of HVAC heating and ventilation systems. (Tr. 56, 57).

In December 1984, Overall voluntarily transferred to the Watts Bar nuclear facility where he worked an associate engineer responsible for air and heat systems and general mechanical maintenance throughout the plant, bearing the title of power plant maintenance specialist with a SD2 and 3 classification. (Tr. 58,59) As a power plant maintenance specialist, Overall performed a wide range of job duties spending 35 % of his time performing maintenance and monitoring on the ice condenser system which consisted of 1944 ice baskets located around the nuclear core. The remaining time was spent doing the following: identifying design changes to enhance nuclear plant operation and reliability (10%); preparing and revising work instructions for repair of equipment (5%); performing inspections, taking measurements, drawing sketches, taking photographs, and designing special tools and jigs (5%); performing special projects in the mechanical maintenance section (5%); reviewing plant equipment and vendor manuals, determining and procuring spare parts for mechanical equipment systems (5%); providing technical guidance to craft and maintenance engineers in the area of ice condenser maintenance and other assigned systems as well as preparing preventive maintenance instructions for mechanical equipment, preparing and revising plant maintenance instructions, and serving as a TVA representative at industry wide conference concerning the ice condenser system (7%). (CX. Ex. 1).

Overall worked as a power plant maintenance specialist until November 20, 1989 when TVA transferred him into Technical Support at Watts Bar. (Tr. 58-60). Overall was reclassified as a power maintenance specialist and promoted to a SD-4 classification. (CX. Ex.2). As a power maintenance specialist, Overall was primarily responsible for the maintenance, testing, operation, construction and design of ice condenser, 61 system maintaining a constant awareness of the system's status, writing

and revising site instructions, ensuring proper testing, and initiating appropriate action and documentation to resolve system problems including investigation of and determinations of root causes of abnormal events with recommendations for corrective action. In addition, Overall functioned as a project manager interfacing with other project managers on capital projects and served as a backup systems engineer on other plant systems when the primary system engineer was on a leave status . (Tr. 68, 69). Overall was expected

> ....to work to a high quality standard by doing the right thing the first time. [He] was accountable for the quality results of [his] own work and...[had] personal responsibility to ensure that quality problems [he] encounter[ed] ...[were] identified and resolved promptly....
>
> (CX. Ex. 2 page 3).

To qualify for this position Overall had to have an associate degree in engineering technology plus 8 years of experience in the operation, maintenance, and testing of power plant maintenance systems of which a minimum of 5 years had to be related to ice condenser maintenance and operation. (CX. Ex. 2, page 8).

On paper Overall was administratively transferred to TVA Services on September 18, 1995, but physically remained in Technical Support at Watts Bar until November 3, 1995, completing paper work and training his replacement, Jordan. (Jt. Ex. 9). From November 4, 1995 until September 30, 1996 when he was laid off, Overall worked in TVA Services as a SD-4, program administrator. Thereafter, Overall has been unable to secure any further work from TVA.

While working in Technical Support, Overall reported to McCormick, NSSS Engineer Supervisor who in turn reported Koehl, Technical Support Manager. In September, 1995, Koehl was promoted to Assistant Plant Manager at Watts Barr and held that position for one year after which he was again promoted to Operations Plant Manager at Watts Bar. On June 3, 1997, Koehl was again promoted to the position of assistant plant manager at Sequoyah. (Tr. 592-594). In like manner McCormick moved up the corporate ladder advancing to Senior Reactor Operator in April 1996 and then in September 1996 transferring back to Component Engineering where he has continued to work. (Tr. 761). At TVA Services Overall worked under the supervision of Rich Miller, Manager of Engineering. In April 1996 TVA Services transferred about 100 field engineering personnel including Overall to the supervision of Gary Pitzel (herein Pitzel) who reported to Swindell, Manager of Plant Services. (Tr. 568-570).

Throughout his tenure at TVA which commenced in 1979 and ended in a September 30, 1996 layoff , Overall maintained an impressive work record receiving numerous and consistent favorable

job appraisals. (CX. Ex. 6-20)[5]. He was regarded by both management and coworkers as an expert on the ice condenser system and received awards for superior job performance for his work on the Watts Bar Ice Condenser. (CX. Ex 4, 5 and 6). For example, McCormick nominated Overall in March 1995 for "The Power of Excellence" award commending Overall for the successful completion of ice condenser ice loading noting Overall's ability to implement contracts, purchase material, train personnel , test components, set up computer functions, operate, troubleshoot, and repair all equipment requiring significant coordination and effort among on and off-site personnel while maintaining both scheduling and safety priorities. (CX. Ex. 3).

Overall's formal education, as noted previously, consisted of a 2 year associate degree in architectural pre-engineering. While at TVA Koehl and McCormick encouraged Overall to get his 4 year engineering degree telling him that TVA would provide tuition reimbursement and modify his work schedule to permit the additional training. However, neither Koehl nor any one in management indicated to Overall that obtaining a degree was necessary for continued employment. (Tr. 265-268). Overall never got a B.S. in Engineering but did complete most of TVA in-house system engineering training except for some practical factors involving home study. At the time of his involuntary transfer notice Overall was working on completing the practical factors part of this training. (Tr. 843-845). McCormick, who allegedly made the decision to involuntarily transfer Overall to TVA Services, had no knowledge of what factors Overall needed to complete as part of the TVA in-house training.

More significantly, Overall had the same total score (1325) as fellow employee John Ferguson on an equivalency evaluation performed by Human Resources. Like Overall, Ferguson was slated for involuntary transfer to Services in June 1995 but somehow was spared this fate by being given an equivalency engineer rating changing his classification from an SD-4 maintenance specialist to a SC-4 system engineer and kept in Technical Support. (Tr. 723-730, CX. Ex. 45). TVA called no one from Human Services to explain the difference between Overall and Ferguson's classifications.

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[5] Overall last job evaluation at Watts Bar, which was provided him on November 22, 1995, after his transfer to TVA Services, was a generally favorable review but for the first time indicated that improvement was needed in the area of developing and maintaining system file notebook, performing paperwork timely on Sis/MI, and timely closing PERs (problem evaluation reports). TVA gave Overall several time extensions to resolve PER 246 relative to the ice condenser screw issue. As discussed in greater detail, *infra*, PER 246 was taken away from Overall before his corrective suggestions could be implemented. Overall did not testify concerning this appraisal. McCormick on the other hand indicated that the evaluation form utilized in 1995 was different in that it included for the first time a category of "meets some expectations" and that when evaluating all personnel under his supervision he had been instructed by Koehl to be less lenient than in the past. Accordingly, McCormick rated Overall as needing improvement in the above cited areas. (Tr. 794-800). Since there is no evidence of any discriminatory intent in the issuance of his appraisal, I find that this appraisal did not constitute part of TVA's discriminatory treatment of Overall.

B. The Watts Bar Ice Condenser

As described in the parties joint stipulation, the ice condenser was a safety system utilized at Watts Barr and Sequoyah nuclear power plants. Both of these plants which operate pressurized water reactors utilize identical ice condenser systems manufactured by Westinghouse. In the event of a large steam leak in the reactor containment vessel, pressure could rise to a sufficiently high level rupturing the containment vessel, allowing radioactive steam to escape into the environment beyond the plant. To guard against this possibility, the ice condenser system maintained about 3 million pounds of ice treated with boron which absorbed neutrons and helped to maintain radioactive iodine in solution. The borated ice was placed in a series of 1944 ice baskets located around the interior of the containment vessel. The ice baskets were large metal structures each 12 inches in diameter and 48 feet high. When properly operating, steam from a major leak was channeled through the ice, condensing the steam back to water, thus lowering the temperature and reducing the pressure to manageable levels. The ice melt solution also served as an additional control over the criticality of the reactor. (Jt. Ex. 9, para. 4).

TVA operated one pressurized water reactor at Watt Barr and two such reactors at Sequoyah. Watts Bar has two reactor units but only one is currently licensed to operate. (Tr. 245, 246). The Watts Bar ice condenser was housed in the primary containment building and cantilevered off of a crane wall in a horse shoe , 300 degree configuration around the reactor vessel. The 1944 ice baskets were divided into 24 bays consisting of 81 individual baskets. Each basket consisted of 4 twelve foot perforated sheet metal sections housing the borated ice. Holding the basket together were a series of metal rings or couplings located every 6 feet and approximately 186,624 sheet metal screws. (CX Ex. 21). Ice must be properly spaced and balanced within the baskets and constantly monitored to achieve the necessary cooling effect. (Tr. 77-85). The sheet metal screws secured and maintained the ice basket assembly in its proper configuration thus insuring the integrity and reliability of the ice condenser system. (Tr. 118-120).

In addition to the ice baskets, the ice condenser system contained a system of air handling units with 60 fans per unit and extensive air duct work that transported cold air from 35 ton chillers together with numerous valves and pumps and an lower inlet door system. Demineralized water, service air glycol, boration, and sodium tetra borate systems also comprised part of the ice condenser system and were found in other areas of the plant. (Tr. 69-74).

Proper operation of the ice condenser was a *sine qua non* for plant operations for without a functional and approved ice condenser, Watts Bar could not go on line and produce power. In fact, Watts Bar could not even pressure test its safety equipment without an operable ice condenser. (Tr. 387-389, 828,829).

C. Overall's Protected Activities and TVA's Response

In December 1994, Overall commenced ice loading in the 1944 ice condenser baskets. The loading was a 24 hour around the clock procedure and was not completed until February 1995. This was the second time that ice had been loaded in the baskets with the first loading operations occurring in 1984. The ice loading was accomplished by a gravity fed system with each basket taking between 7 to 12 minutes to fill and involved the proper placement of 3 million pounds of borated ice. During this process excess ice and debris was collected and inspected for the first time. On April 12, 1995, while inspecting a ice melt tank, Overall discovered 171 ice basket screw heads and 32 complete ice basket screws. (Tr. 97,98, CX Ex. 24).

Overall reported his discovery to Westinghouse representatives, Gordon Yetter and Chuck Scrabis.[6] (herein Yetter and Scrabis). Scrabis remarked that if the screws were in fact ice basket screws (as they were found to be) such a finding could have a major impact on fuel loading not only at Watts Bar but at 6 other nuclear plants which used similar Westinghouse ice condenser systems with screws from the same supplier. These plants included Sequoyah, Duke Power, Catawba, Donald C. Cook[7] and two other plants in Japan and Finland. (Tr. 98-101).

Overall was not able to report his findings to McCormick until April 13. In the meantime, he contacted his counterpart at Duke Power, Alex Smith, and found that Smith had discovered hundreds of ice condenser sheet metal screws in their ice melt tank but had failed to report the condition to management because of its potential effect upon plant operations. Overall then called counterparts at D.C. Cook (Art Tetzlaff and Brenda Sheares) and found out they had the same screw problem and had to use nuts and bolts to hold the baskets together. (Tr. 103-105).

When Overall finally discussed the screw problem with McCormick, McCormick agreed with Overall that he, Overall, should initiate a Problem Evaluation Report (herein PER)[8]. (Tr. 107). Overall filed PER 950426 (herein PER 26) on April 21, 1995 in which he described his finding. (CX. Ex. 23, page 5.) On April 26, 1995, McCormick confirmed Overall's finding and indicated that the condition was potentially reportable. Koehl acknowledged the report on the same day. (Tr. 380).

On May 11, 1995, Koehl called a meeting of Technical Support employees including McCormick, Overall, and Law. Overall testified that during this meeting either Koehl or another management official told employees that money was tight and that all employees needed to save money

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[6] Yetter was an on-site representative for Westinghouse while Scrabis was located in Pittsburgh.

[7] As indicated in fn. 3, above, the D.C. Cook plant is currently inoperable due to missing ice condenser screws.

[8] A PER is an internal administrative procedure within TVA wherein safety and other significant problems are identified and hopefully corrected.

by reducing overtime and closing out open items including work requests, design change notices, work requests, and PERs, and further that PERs were not to be initiated unless they related to fuel loading. (Tr. 173-179). Law recalled Koehl telling employees to avoid delays by doing things correctly the first time. (Tr. 426).

Koehl testified that he told employees that money was tight and the plant was not meeting its original target fuel loading date to bring the reactor into commercial operation during the summer of 1995. Thus, employees were expected to minimize expenditures, travel and design changes. If a problem arose with fuel loading management would authorize expenditures. Concerning PERs, Koehl testified that he repeated over and over that if there was a problem, management wanted it identified, put on the table and resolved but that they were not looking for problems or items to arise especially at the last minute. However, if a problem arose, management wanted it placed in a PER so that it could be quickly resolved. Koehl denied telling any Tech Support employees not to bring up PERs unless they related directly to fuel loading. (Tr. 678-680). McCormick, who was in attendance at the meeting along with other supervisors and tech support employees and who testified at length for TVA about the decision to transfer Overall to TVA Services , did not testify about this meeting.

Thus, the record contains contradictory testimony about what was discussed. However it clear from the unrebutted testimony of Law, who served as Overall's ice condenser back up, that PER 246 was viewed by many Watts Bar employees as involving extensive repairs and delays that could easily lead to plant closure. (Tr. 423, 424).

As part of PER 246, Overall on May 18, 1995, recommended a four fold procedure to evaluate the screw problem. First, Nuclear Engineering should perform metallurgical test to evaluate mode of screw failure. Second, Technical Support should conduct a camera inspection of 389 baskets with the aid of mechanical maintenance to determine the presence or absence of screws. Third, Westinghouse should evaluate the results. Fourth, Tech Support should review and write new procedures to correct the problem. (Tr. 111, 112, CX. Ex. 23, page 11). On the same day Overall met with maintenance planner George Russell and agreed upon a random selection of baskets for camera inspection. (Tr. 114). However, neither Overall or anyone from TVA or Westinghouse every did a camera inspection. (Tr. 121, 122). Overall's failure to complete the inspection was due in large part to his removal from PER 246 on July 10, 1995 as discussed in greater detail below.

On the following day, May 19, 1995, Overall formulated a probable cause of the screw failure: inadvertent over tightening of the screws, and expansion and contraction during ice loading and melt down phases. (Tr. 109, CX. Ex. 23, page 10). On the same day Overall consulted with TVA's on-site metallurgical engineer, Sisson, and together they gathered and transferred 8 sets of screws for analysis to TVA's Central Laboratories in Chattanooga. (Tr. 114). These screws include fractured screw heads, 12 new screws, and 12 other screws removed from Bays 1, 12, and 24.

On June 2, 1995, Central Laboratories, sent Sisson their analysis which was prepared by Smith and approved by Delsa L. Frazier. (CX. Ex. 22). The report determined the mode of failure to be intergranular separation and the mechanism was stress overload. The following 7 causes were

noted to be probable causes of the screw failure:

1. Low temperatures when the screws are in service (lowering the ductility of the screws).
2. Stresses higher than design limits, specifically at the threat roots (due to possible overtorquing).
3. The presence of stress concentrators present at the thread roots (lapping from rolling process).
4. A corrosive environment that breaks down the zinc plating and initiates rust around the threads.
5. Elevated carbon content, thus higher hardness values (again lowering the screws's ductility).
6. The presence of quench cracks in the screws upon receipt from the manufacturer.
7. Thermal cycling which may have initiated micro-cracking or propagation of the pre-existent cracks.

The June 2, 1995 report, consisting of 16 pages, described in detail the methods used to evaluate the screws including x-ray analysis, induction furnace combustion techniques, material hardness findings, plus a series of detailed photographs showing screw defects. (Tr. 124, 125).

Upon receiving the June 2 metallurgy report from Sisson, Overall faxed a copy of the report to Westinghouse officials and gave another copy to Yetter on June 9, 1995, and suggested a meeting to discuss the screw issue which they agreed was appropriate. Then Overall called his counterpart at Sequoyah, John Rathjen, told him what he had discovered about the ice basket screws and asked for 12 of their ice basket screws. Rathjen replied that his supervisor, John Casey, would have to authorized the release. Overall then requested the screws from Casey and was told by Casey that he could not release the screws because to do so would shut down their operations at Sequoyah. (Tr. 126-129).

Casey did not testified. Rathjen testified by deposition that as system engineer at Sequoyah, he held a comparable position to Overall, being responsible for operation of the ice condenser system and that 99% of his time is spent with the ice condenser system. Rathjen admitted receiving a request from Overall for 10 of Sequoyah's ice basket screws in connection with PER 246 but told him that Sequoyah was not using screws supplied by Westinghouse. Rathjen had no knowledge of missing or broken screws at Sequoyah but admitted doing limited basket inspection. Rathjen also admitted that Casey instructed him not to send screws to Overeall for testing allegedly because the screws would be off site and out of his control and, being aware that the screw request had the potential for plant shut down. (RX Ex. 10).

On June 14, 1995, Overall attended a meeting with a number of TVA personnel in the Watts Bar Interim Office Building, Room C-100. Attending were Woods, manger of TVA's corporate metallurgical division, Yetter, and additional personnel from Technical Support and Nuclear Design.

Overall testified that Woods dominated the meeting stressing that the basket screw problem was not a safety issue and not a 5059 issue which was reportable to the Nuclear Regulatory Commission (herein NRC). Overall tried to express his opinion about probable causes and solutions but was not permitted to do so. Woods demanded that Westinghouse get Scrabis involved with the problem and come up with a solution since Westinghouse had designed the ice condenser system. Woods rescinded the June 2 metallurgy report and dismissed Sisson, and other members of the metallurgical team including Theresa Chapman and Dave Briggs. Woods then discussed the 7 potential causes of the screw failure as documented in the June 2 report stating that Central lab personnel were not qualified to make those conclusions. (Tr. 130-135).

Although called as a witness by TVA, Woods failed to testify about June 14 meeting at Watts Bar. Sisson testified that Woods was very assertive during the June 14 meeting but could not recall Woods stating that the defective screws were not a safety issue. However, Sisson admitted neither she or other metallurgical personnel with the exception of Woods stayed for the entire meeting. (Tr. 479, 480). Sisson testified that she was asked to leave the meeting because of a determination that metallurgy had nothing further to contribute to resolving the screw issue and that the screw issue would be resolved by someone else determining how many screws were required for each basket. (Tr. 479). TVA called no witnesses to support Sisson's version of this meeting.

Concerning the June 2 report, Sisson admitted that over-torquing, stressing a screw beyond design limits, low temperatures when a screw was placed in service, stress concentrators at threat roots, corrosive environment, elevated carbon content, the presence of quench cracks upon receipt and thermal cycling, were all possible causes for the screw failure requiring further inquiry. (Tr. 483-489). Further that metallurgical engineers were concerned with the issue of causation and in the past had gone to the site to work with personnel such as Overall to determine the cause. In fact Sisson had a number of conversations with Overall but was never able to determine the cause of screw failure. (Tr. 501-503).

Woods later testified that sometime after the June 2 report issued, James Adair, lead civil engineer at Watts Bar Engineering Division called him about the report asking Woods to review it concerning the 7 reasons listed as probable causes for the screw failure. Woods reviewed the report and called a meeting at corporate Central Lab. Attending were Smith who prepared the report , Delsa Frazier, who approved the report, Robert Philips and Leslie Blankenship and Sisson. Woods agreed that Smith could conclude that low temperatures when the screws were in service led to the intergranular separation but did not see how Smith could conclude either than the screws were subjected to stresses beyond design limits or that thermal cycling had caused screw fractures. When questioned by Woods about design limits Smith admitted that he did not know the design limits of the screws and relied upon information supplied from Watts Bar concerning thermal cycling being told by Watts Bar personnel that the screws were cyclically cooled and warmed between 15 degrees and room temperature. According to Woods, all in attendance agreed that they were "over zealous" in putting the report together and that a new "factual" report would be issued which would not address the cause of the screw failure because the lab could not determine the cause without more information from the site and actual working under site conditions. (Tr. 545-549). Woods made no attempt to

secure additional site information.

On June 19, 1995, Smith prepared a modified screw report which was approved by his supervisor, Delsa Frazier. (CX. Ex. 23, pages 26-47). This report omitted reference to any possible cause for the screw failure or intergranular separation. Smith testified about the June 2 and 19 reports admitting a poor memory of the June 14 meeting and also admitting no recollection of anyone telling him to revise or expedite the report because of Overall's PER. Smith stated that he was told to report facts and not provide conjecture in his reports and to leave the determination of the cause of screw failure to other personnel at Watts Bar who were more familiar with the problem. Smith admitted that his second report omitted reference to possible causes of screw failure although it was certainly within his training as a metallurgical engineer to provide possible cause and more importantly that causes were omitted to avoid unwelcomed questioning by the NRC. (Tr. 521-523). In essence, TVA required its metallurgical engineers to function as lab technicians rather than utilize their full professional engineering skills. (Tr. 520).

Woods incredibly denied any contact with either Koehl or McCormick about the June 2 or 19 reports or any knowledge that these reports were connected with a PER. Woods also incredibly denied seeing the revised June 19 report until a month before the hearing. (Tr. 549-550). [9] Sisson testified that she attended the corporate metallurgy meeting with Woods and that a second report issued which allegedly "corrected" the problems identified in the first report. Sisson denied receiving any pressure to minimize the screw problem or expedite the report because of Overall's PER. (Tr. 476-477). Smith never testified about the corporate metallurgy meeting.

On June 22, 1995, J. W. Irons, Westinghouse Manager for the TVA Watts Bar Project, issued an assessment of the broken ice basket metal screws. This 7 page report concluded, without any ice basket inspection, that the ice condenser was operable because (1) the statistical probability of ice basket coupling failure was remote based upon the discovery of only 162 sheet metal screws from 1944 ice baskets; (2) if ejected during a loss of cooling accident (herein LOCA) ice baskets were not capable of reaching the top deck; (3) if ejected, ice baskets would still maintain proper ice bed geometry not compromising flow bypass paths; (4) intermediate deck structures would stop ice baskets from ejecting out of ice bed; and (5) ice baskets could maintain their integrity with only 10 out of 12 sheet metal screws per mechanical or metal coupling. (Tr.143-145, 853. CX.Ex. 23, pages 49-56.) This evaluation was never provided to Overall or McCormick until the current litigation. McCormick, who has a degree in mathematics was moreover unable to explain the Westinghouse statistical analysis. (Tr. 842, 843).

Not only did the Westinghouse assessment fail to provide for any basket inspection, it also failed to account for the uncontested and credible testimony of Overall that 30 percent of the baskets

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[9] I find it highly unlikely that Woods would involve himself to the extent he did with the screw issue and not be aware, as was his staff, that the screw issue was directly related to PER 246. Further, I find it highly unlikely that he would not be aware of revised June 19 report until a month before the hearing when the report was revised at his insistence.

were ejectable and could become missiles that could prevent ice condenser doors from opening to let steam enter and be condensed or alternatively in the event of over pressurization penetrate the containment vessel causing radioactive gases to escape. (Tr. 121,122, 148-156, 853, CX Ex.23, page 18). Moreover, baskets could and had been inspected by cameras in the past and in fact the only other way to determine the condition of basket screws was to take the baskets apart. (Tr.165, 340, 341, 345, 348-349).

McCormick acknowledged the screws were a safety issue directly related to escapement of radioactive gases and further that a basket inspection was necessary to determine the number of missing screws. (Tr. 812-815, 827). Further, McCormick admitted there was a potential for all basket screws to be affected but neither Westinghouse nor Nuclear Engineering to whom the PER was transferred on July 12, 1995, ever made any such basket inspection and that during a LOCA ice baskets were capable of penetrating the containment vessel. (Tr. 812-815, 840, 849).

Other TVA personnel recognized the importance of the screw issue as witnessed by a July 7, 1995 meeting between Overall, Frank Koontz and metallurgist Theresa Chapman. Overall testified that he met with Koontz and Chapman to develop a recurrence control, i.e., a method to avoid recurrence of the screw problem. Koontz and Chapman asked Overall that if the screws in stock could be used as replacement screws, and how many screws were in fact missing. Overall replied that Westinghouse needed to provide that data. (Tr. 184, 185). Neither Koontz or Chapman testified about this meeting.

When PER 246 was transferred on July 12, 1995, it went from McCormick's control in Technical Support to Nuclear Engineering under the control of James Adair. (CX. Ex. 23, page 6) This transfer was admittedly highly unusual for although other organizations within TVA worked on a individual PER to bring it to final resolution, no other PERs had been removed from the organization that initiated the investigation. (Tr. 185, 316-319, 433, 434, 809, 810). McCormick, who allegedly made the PER transfer decision, testified that he made the decision to transfer because Technical Support (1) was not resolving the problem, (2) did not have the authority to do the basket inspection because this would involve help from mechanical maintenance, (3) did not have a good plan for basket inspection, (4) lacked the necessary expertise, (5) and there was no agreement from upper level management on what to do. (Tr. 816-823). None of these explanations withhold scrutiny, for Overall was making progress in analyzing and suggesting ways to address the problem. Overall had a feasible plan for basket inspection utilizing the help of mechanical maintenance and had already worked successful with metallurgy in determining possible causes for the screw failure. (Tr. 114, 115).

The only plausible and credible explanation for TVA's refusal to do camera or actual basket inspection was that given by Overall. Overall testified without contradiction that a camera inspection would have delayed fuel loading from 6 month to a year resulting in considerable loss of revenue. (Tr. 169- 172, 183). Indeed, meeting fuel-load dates was a factor affecting bonuses awarded to TVA nuclear managers in fiscal years 1995 and 1996. (CX. Ex. 43, admission #7).

McCormick was aware not only of the need for camera inspection but also of TVA's desire to quickly dispose of PER 246 by having Westinghouse favorably resolve the issue. In fact, TVA officials told Westinghouse representative, Chuck Scrabis "...to get the skids greased and get the wheels turning for them to crank out a report to put this issue [PER] to bed." (Tr. 182, 183). McCormick even told Overall: " We need to give this PER over to Nuclear Engineering and I sure hope NRC doesn't review this one, the way it was handled here recently." (Tr. 330-335, CX. Ex.24, page 24). McCormick denied any concern about NRC reviewed but never denied this conversation with Overall and admitted being concerned about the length of time it was taking to resolve PER 246. (Tr. 825-827).

Following the PER transfer to Nuclear Engineering, no further corrective action was taken. Rather, Nuclear Engineering merely accepted the Westinghouse assessment despite its obvious flaws and closed out the PER on August 10, 1995. (Tr. 156, CX. Ex. 23, page 20-22). The PER was closed out without any report being made to the NRC. (Tr. 390-402). Subsequently on November 3, 1995, the NRC issued a statement finding in part that the Watts Bar ice condenser was acceptable without any reference made to the screw issue. The NRC noted, however, that if ice weight was less than specified a plant shut down could occur. (CX. Ex. 30, page 16). Prior to this date on June 23, 1995, TVA system engineers certified the correct functioning of the ice condenser. (CX. Ex. 28).

D. Overall's transfer to TVA Services, Subsequent Layoff and Inability to Secure Employment with TVA

In June, 1995, while in the midst of investigating the defective basket screw issue, Overall testified that Rich Miller, a supervisor with TVA Technical Service Group in corporate offices at Chattanooga, telephoned and offered him a permanent position in Services. Miller told Overall that he was aware of Overall's ice condenser experience from previous conversations with Koehl and as such was a highly marketable individual for whom Miller would create or tailor a permanent position within the core group at TVA Services. Prior to the call, Overall never heard of Miller but knew as an at-risk employee his employment with TVA would not last more than a year after his reclassification to that status. As a permanent employee Miller told Overall that he would remain with the core group within Services. (Tr. 196- 197, 295-302, RX. Ex. 9). Subsequently, TVA Services posted a position as project administrator which fit exactly Overall's qualifications. (RX. Ex. 10).

On June 14, 1995, Overall received two anonymous harassing telephone calls. The first call came at work and accused Overall of "picking a fine time to bring up the screw issue". Overall received the second call later that evening at home and was told that the screw issue would not prevent Watts Bar from operating. (Tr.130,180). On June 19, 1995, Overall received a third anonymous harassing call at home stating the person was glad that Overall was leaving Watts Bar. (Tr. 193). Overall reported the phone calls to McCormick who in turn reported them to Employee

Concerns staff. No further action was taken. (Tr. 181, 793).[10]

On June 16, 1995, Overall testified that Koehl met him in a hallway of the NPIO building and handed him the following letter:

> June 23, 1995
> CURTIS C. OVERALL, 414-92-8369
> NPB-1B-WBN, SPRING CITY
>
> WRITTEN NOTIFICATION OF AT RISK & TRANSFER TO SERVICES ORGANIZATION
>
> Based on budget reductions resulting from changes in workforce planning, reorganizations, and/or standardization efforts, we have identified occupation and positions within our organization which will not be required to support our future business needs. Your current position of PR MAINT SPEC, SD 04, has been identified as at risk and is targeted for surplus. You will transfer to the Services organization effective Monday, September 18, 1995.
>
> During your assignment to Services organization, you will remain at your current schedule and grade in the same competitive area and level as your current position until other job opportunities become available.
>
> Please contact your immediate supervisor if you have questions or concerns that have not been addressed.
>
> (CX. Ex. 25).

Overall looked at the letter and asked Koehl to step inside a nearby office to discuss the letter which Koehl agreed to do. Both men went into supervisor Steve Woods old office. Overall asked why he was being transferred as an "at risk" employee because there was no justification for it. Koehl responded that there was not enough work to warrant a full time person in Overall's position. Overall disagreed saying that he had been over the ice condenser since 1984 and that the ice condenser system still had to function requiring a full time person to operate it. Koehl said he understood how Overall felt but someone else was going to take over the job. (Tr. 187, 188).

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[10] Employee Concerns is an organization within TVA where employees can voice their complaints on various personnel issues including safety and problems with supervision. In his brief Mr. Van Beke contends that TVA failed to investigate or prevent further calls thereby creating a hostile work environment. Considering the limited number and nature of the calls, I do not agree with Mr. Van Beke's position.

Overall continued to work on the ice condenser with Law (Overall's back up), and in September with Gary Jordan, who eventually replaced Overall as the ice condenser specialist in November, 1995. In the meantime Overall continued to operate the ice condenser and complete paper work related to the system, transferring his knowledge of the system to Jordan who had no practical knowledge about its operation. (Tr. 189).

Koehl testified that he did not give out the letter until June 23, 1995 because Human Resources which generated the letter did not prepare it before June 23, 1995. (Tr. 671). Koehl had no recollection of the June 16, 1995 meeting with Overall but insisted that he told Overall on several unspecified occasions that his transfer was necessitated by the nature of his job which did not require a full man year of work (2000 hours) plus the need to retain engineers who were more flexible in their work assignments and could be assigned to tasks outside of the ice condenser system. (Tr. 659-664). Admittedly, Koehl testified from memory alone. (Tr. 672). Overall, however, provided notes taken from a daily Franklin Planner diary in support of his testimony. (CX. Ex.24, page 23, 24).

TVA called no witnesses to support Koehl's testimony nor did TVA call Human Resources Manager, Howard Cutshaw, to deny a June 21, 1995, conversation he had with Overall regarding the transfer as an "at risk" employee. Overall testified that he talked with Cutshaw on June 21 about the transfer and the reason given , i. e., no need for a full time ice condenser specialist. Cutshaw said the decision was wrong but "You know Dennis". (Tr. 195). Jordan, moreover, credibly testified that after replacing Overall he spent 95% of his time on the ice condenser and 5% of his time on flood mode boration which Overall was qualified to perform. (Tr. 214, 215).

When comparing Overall's specific testimony, exhibits and demeanor versus Koehl vague testimony and demeanor, I find Overall's testimony more credible and completely consistent with Cutshaw's June 21 comments which were never denied by TVA. It was also consistent with the June 19 anonymous call telling Overall the caller was glad he was being transferred to TVA Services and with Overall's action in boxing up his possessions on June 16, 1995, for transfer to TVA Services. (Tr. 194, CX. Ex. 24, page 25).

Furthermore, Overall's testimony was consistent with his action in confronting McCormick about the transfer decision on June 16, 1995, after receiving the letter from Koehl. Overall testified that after receiving the letter and talking to Koehl he confronted McCormick about the letter. McCormick looked bewildered and said " You know, I tried to talk to Dennis about doing this, that it wasn't the right thing, but you know Dennis." (Tr. 192-193). McCormick could not recall any conversation he had with Overall about the transfer notice. (Tr. 788, 789).

After being informed of Koehl's decision to involuntarily transfer him to TVA Services as an "at risk" employee, Overall on June 16, 1995, applied for the newly created position of project manager in TVA Services. (Tr. 304, RX. Ex. 11). On October 2, 1995, Overall was offered and

accepted this permanent position.[11] (Tr. 305, Jt. Ex. 9, 10).

On August 24, 1995, Overall attended a meeting with TVA Labor Relations Specialist, A. V. Black and union representative Caren Mullins, to discuss issue the involuntary transfer to Services and Overall's qualifications as a system engineer.[12] Overall contended that he had equivalent experience and training as an SC-4, system engineer, and protested his involuntary transfer to Services. Black responded by letter dated September 18, 1995, that Overall did not have the necessary education under ANSI Standard 3.1 and BP-105 to qualify as a system engineer and further that there was not enough work to warrant a full time , ice condenser system engineer, SD-4. (Overall's current classification). Overall had arranged this meeting because of Koehl's refusal to give him a written reason for his involuntary transfer to TVA Services. (Tr. 189-191, CX.Ex. 26). Allegedly, Howard Cutshaw, Human Resources Officer for TVA, had reviewed Overall's education and training and found that he did not have the necessary qualifications (training, work, and education) to meet the equivalency requirements to be considered an engineer. However, the record shows as noted above that a fellow SD employee, John Ferguson, with the same overall evaluation of 1325 points was given an engineer rating and spared the transfer. TVA failed to call Cutshaw to explain either the rating system or how Ferguson, who possessed no formal engineering training, was able to be classified as a system engineer.

While at TVA Services Overall worked under the supervision of Miller and in April 1996 under the supervision of Gary Pitzel. There he attempted on many occasion to market his service both within and outside of TVA. Overall drafted business plans, set up meetings with plant personnel, put together brochures, visited both Watts Bar and Sequoyah plants but received no work. (Tr. 197, 198, CX. Ex. 35). In addition, Overall applied for announced vacant, non-ice condenser positions at both Watts Bar and Sequoyah but without success. (CX. Ex. 37). Overall also sought work outside of TVA but with no success. (Tr. 197-200, CX. Ex. 36). On July 24, 1996, Ricky B. Kennedy, Manager of Human Resources, for TVA Services notified Overall and 20 other engineering employees that they were laid off because of a shortage of funds. In the same lay off, TVA Services laid off 479 employees of which 115 held permanent positions within TVA. (Tr. 575 , CX. Ex. 27).

Swindell, who rarely had direct employee contact at TVA Services, testified that the mission of TVA Services was to assist employees whose jobs were being eliminated to find new opportunities within TVA including the acquisition of new training and skills. TVA Services was designed to be financially self-supporting by generating revenues from the sale of their services through contracts within and outside of the TVA organization. As of July 1996, Overall had not been able to acquire any contracts for his services for fiscal year 1997. (Jt. Ex. 9). Accordingly, Swindell testified that

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[11] As a project manager for TVA Services, Overall had a permanent job with the same status as every other full-time TVA employee who had not been classified as "at risk" and subject to termination with 12 months.

[12] Overall was a member and designated union representative of the Engineering Association, a labor organization limited to TVA employees.

Overall was let go because there was no work opportunities to sustain and cover his cost for the 1997 fiscal year. (Tr. 573-575).

Overall confirmed Swindell's statements wherein the latter told employees that they needed to market their skills and generate revenues. Concerning layoffs, Overall testified that prior to the layoff his supervisor, Pitzel, told him that his job had been budgeted for fiscal year 1997 and he, Overall did not have to worry about layoffs because Swindell had informed him, Pitzel, that Overall services and skills were still in demand. (Tr. 309). TVA never called Pitzel as a witness. Moreover, Swindell testified that he could not recalling telling either Pitzel or Overall that his job was budgeted for fiscal 1997. (Tr. 576). Swindell testified that he attempted but unsuccessfully to find work for Overall both within TVA at Sequoyah and Watts Bar and other locations. According to Swindell, Pitzel dealt directly with personnel at Watts Bar and Sequoyah and that both Watts Bar and Sequoyah allegedly decided to do all of their ice condenser work with their own staff. (Tr. 578, 579).

Following the layoff, Overall continued searching for work contacting personnel within and outside of TVA but was unsuccessful in finding work. (Jt. Ex.9, page 16). In April 1997, Ulysses White, Task Manager for Modifications at Watts Bar telephoned Overall about possible work with TVA's main contractor at Watts Bar, Stone and Webster, concerning work on the ice condenser during a refueling outage. According to White, both Jordan and Law were tied up with other work and Stone and Webster had been chosen to do the work. White agreed to provide Stone and Webster with Overall's resume which he did upon receipt of one from Overall. White turned the resume over to George Lowry of Stone and Webster. About 4 weeks later White learned that Stone and Webster had allegedly chosen to use their own engineers who had no ice condenser experience to do the work and so advised Overall. (Tr. 199, 200, 629-633). On cross White admitted that TVA would normally have done the outage work with their own personnel. White also admitted telling Overall that following the outage there was a possibility for additional ice condenser work with Stone and Webster.

White also testified that while working as Task Manager for the past 4 years, he had listened to a presentation that Overall made in June 1996 while employed by Services for work during a mid-cycle outage. Law and Jordan were also present. After listening to Overall's presentation which included his ice condenser expertise, White recommended against using Overall. When asked why White replied: "...the money value that probably Service would be charging for us, we only had a certain amount of dollar values to do this project and the short time that we had to do it in, we just felt that, you know, we didn't need their services at this particular time." White never provided any other explanation for his recommendation and denied knowledge of any safety issues raised by Overall concerning the ice condenser. (Tr. 628, 629).

This was the only time during the hearing that TVA attempted any explanation for refusing Overall's services. White's explanation was vague and never supported by any documentation. His denial of knowledge of safety issues was refuted by White's presence at the June 14, 1995 meeting wherein ice condenser safety was discussed. (CX.Ex. 33).

E. TVA's Defense and Overall's Response

TVA presented both procedural and substantive defenses. Procedurally, TVA argued that Overall failed to timely file a complaint on his transfer to TVA Services within either 180 days of the date he was notified of the transfer or within 180 days of the actual transfer.[13] In the alternative TVA argued that the transfer was voluntarily and that if as alleged, the transfer was discriminatory or in retaliation for filing and pursuing PER 246, it constituted a discrete act. Overall argued that the transfer was part of continuing violation of discriminatory acts starting with the initial transfer and leading to his layoff from TVA Services in September 1996 followed by a refusal to re-employ him instead using Stone and Webster who had no ice condenser experience. Further, TVA argued that equitable estoppel was not applicable because Overall knew he had a right to file charges with DOL over the safety issue and neglected to timely do so pursuing other avenues such as grievances and EEOC charges.

Procedurally TVA pointed to Overall's status as a union representative participating in a class action grievance concerning the issue of whether Technical Support personnel such as Overall that had been involuntarily transferred in 1989 from Maintenance to Technical Support should have to rebid on maintenance vacancies involving work they had been doing prior to their involuntary transfer. The grievance was filed on February 15, 1996 and denied by TVA on August 26, 1996. (Tr. 269-283, RX. Ex. 3 and 4). TVA also notes Overall's unsuccessful EEOC grievances filed in December 1996 relative to his transfer to TVA Services in 1995 and subsequent layoffs. (Tr. 288-293, 293, RX. Ex. 6,7,8). Admittedly, Overall was aware of his right to file charges with DOL if he considered his transfer and layoff related to safety issues. (Tr. 379).

TVA's substantive arguments centered around an alleged (1) permanent decision to transfer Overall made in either the late summer or September 1994; [14] (2) an alleged "voluntary" transfer to TVA Services by Overall in 1995; and (3) alleged legitimate reasons for the transfer to TVA Services and subsequent layoff combined with a lack of knowledge by certain supervisors of Overall's protected activities.[15]

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[13] Overall stated that his first notice of the transfer was on June 16, 1995, whereas TVA contended that he was notified on June 23, 1995. The transfer to TVA Services physically occurred on November 3, 1995.

[14] In his brief for TVA, Mr. Fine asserted at page 12 that the decision to transfer Overall to TVA Services was made in the late summer of 1994.

[15] At page 18 of his brief, Mr. Fine asserted that Overall's protected activities in initiating and processing PER 246 had little significance in this proceeding. As stated herein, I find this argument unpersuasive for indeed it was precisely Overall's protected activities that prompted TVA to transfer, layoff and failure to recall Overall.

TVA's primary defenses witnesses were Koehl, McCormick and Swindell. Sisson, Smith, Woods and White's testimony has already been discussed at length. Koehl testified that within Technical Support there were 4 employee classifications: managers (PG); engineers (SC); power plant specialists (SD); engineering aides (SE) and clerks or secretaries (SB). (Tr. 601, 602). From 1989 through September, 1994, Technical Support had 3 reductions in force from about 80 to 60 TVA employees. The reductions were brought about by reduced budgets as Watts Bar went from a start-up to a constructions mode of operations. Various positions were eliminated including SCs and SDs. (Tr. 603, 604, 609-611). In August and September 1994, Koehl met with his managers or section supervisors and gave them a head count for their sections while at the same time eliminating the engineering component and consolidating work between maintenance and technical support.

On September 15, 1994, Koehl, who was serving as acting plant manager, gave out 19 at risk notices to employees including Overall which read as follows:

> WRITTEN NOTIFICATION OF POTENTIAL AT- RISK STATUS
>
> Based on workforce planning projections, we have identified occupations and positions within our organization which will not be required to support our future business needs. Your current position of Power Maintenance Specialist, SD-04, has been identified as potentially at-risk and is targeted for surplus as of July 3, 1995. As a result, we may assign you to the Services organization effective July 3, 1995, unless you have reassignment rights to another position and elect to exercise those or the acceptance of another employee's offer to volunteer through the early out incentive program affects your retention standing.
>
> During your temporary assignment to Services organization, you will remain at your current schedule and grade and in the same competitive area and level as your current position until other job opportunities become available.
>
> Please contact your immediate supervisor if you have questions or concerns that have not been addressed.
>
> (RX. Ex.2.) [16]

Koehl then met individually with these employees telling them that TVA had funded Services for a two year period and that while in Services they would receive extensive training. According to Koehl, Overall received the at-risk notice with no apparent emotion or concern. (Tr. 665,666).

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[16] As noted above, Overall elected to contest this notice through a class action union grievance asserting transfer rights back to maintenance.

According to Koehl once he gave the section supervisors their respective head counts, he then let the supervisors determine who was to be kept or let go. McCormick allegedly made the decision to let Overall go by eliminating all SD positions in the NSSS section where Overall worked. Koehl in turn supported this decision. (Tr. 612-615, 639-642). Allegedly, McCormick chose to let Overall go because McCormick did not need a full time person (2000 man hours per year) as a ice condenser specialist and Overall lacked a 4 year engineering degree or its equivalency making him less flexible than an engineer in performing other assignments outside of ice condenser system due to the engineer's superior educational background, which in turn allowed for quicker training time on new assignments (Tr. 642-648). Allegedly, Koehl in the past had ordered Human Resources to do three job equivalency evaluations on Overall and on all three occasions Overall was found not to possess an engineering equivalency. Overall was moreover encouraged to get additional training by attending school and did not do so. (Tr. 617-618).

McCormick testified, however, that the alleged decision to transfer Overall to TVA Services was because of an alleged lack of flexibility as a SD employee in being assigned other plant systems and not because the position of ice condenser specialist did not justify a full time position. (Tr. 777-779). McCormick even estimated that Jordan spent at least 80% of his time on the ice condenser. (Tr. 805, 807). TVA called no witnesses to support McCormick's lack of flexibility assertion. Koehl, moreover, admitted that Overall had worked back up systems in the past. (Tr. 737).

Koehl incredibly testified that by June 1995 there had been no change in the head counts although the number of employees in his section continued to diminish as employees left, resigned, or bid on other jobs with only 4 out of the original 19 employees, including Overall, receiving actual "at risk" transfer notices. (Tr. 667, 678). Of these 4, John Ferguson, was exempted from the transfer because of a last minute engineering equivalency rating. (Tr. 723-726). Interestingly, both Ferguson and Overall had the same total score but no attempt was made to re-evaluate Overall's status. (Tr. 741). Koehl admitted that Overall's completion of in-house training since 1991 should have been factored into his equivalency score but was apparently not done. (Tr.738-743).

Koehl had no recollection of talking to anyone in TVA Services or other organizations about Overall's skills or abilities. Koehl denied any conversations with Stone and Webster about Overall and the need for his services during work outages in 1997 and allegedly had no dealings with TVA Services concerning Overall's attempt to market his services at Watts Bar although admittedly he had worked with Stone and Webster in the past and had frequent conversations with personnel in TVA Services and as technical support manager, assistant plant manager, and operations manager he certainly was in a position to directly influence Overall's work opportunities at Watts Bar. (Tr. 592, 593, 599, 711, 712).

McCormick's testimony concerning Overall's inability to be assigned other systems was not only contradicted by Koehl it was nonsensical. McCormick testified that Overall could not work other systems because if he worked on other systems he would seek a reclassification to the SC schedule which would be unsuccessful. (Tr. 765-767, 779). Overall, moreover, credibly testified that not only did his position allow him to work on systems other than the ice condenser but it fact he had

worked on such systems including diesel generation. (Tr. 68, 69). Further, the ice condenser systems incorporated many other systems located throughout the plant. (Tr. 70-72).

McCormick was unable to recall his conversations with Overall about his transfer to TVA Services but consistently denied that it had anything to do with the safety concerns raised by Overall with PER 246. (Tr.786-788, 804). On cross, McCormick admitted that Overall's job description permitted him to be assigned backup systems. Further, Overall at the time of notice of involuntary transfer to TVA Services was in the completion of in-house training lacking only the completion of practical factors which could be completed by home study. (Tr. 843-846).

Swindell's testimony, as discussed previously, was that TVA laid off Overall because Overall had been unsuccessful in marketing his services. Swindell had no recollection call of telling anyone that Overall's position had been budgeted for 1997. (Tr. 576). Swindell's testimony about Watts Bar doing all of their ice condenser work in 1997 was obviously incorrect and conflicted with White's testimony showing Watts Bar subcontracting ice condenser outage work with Stone and Webster. Swindell denied having any knowledge of Overall protected safety activity or any conversations with McCormick or Koehl about Overall. This is highly unlikely since Koehl had frequent conversations with TVA Service personnel and in fact negotiated directly with Swindell concerning the price that Technical Support would have to reimburse TVA services from September 18-November 3, 1995 while Overall continued to work in Technical Support performing paperwork and training his replacement, Jordan. (Tr. 751-753).

In response to the asserted reasons for his transfer and eventual layoff from TVA Services Overall credibly testified that on August 10, 1994, he had a conversation with McCormick in which the future elimination of SD positions from his NSSS section was discussed. McCormick told Overall not to worry because things could easily change since there was always a need for an ice condenser specialist. (Tr. 253-255). Moreover, there was no company policy of letting employees go who did not have a 4 year engineering degree as shown by Overall's avoidance of 3 prior layoffs involving SC 4 year degree engineers and SE personnel. (Tr. 256-262). Indeed TVA continued to employ Technical Support SD employees Ronnie Schouggins and Doug Williams at Watts Bar after June 1995. Williams, who has no degree, was assigned from Technical Support (component engineering) to maintenance prior to the June 1995 transfers and since the June 1995 transfers has performed worked on the ice condenser. Schouggins has no degree and has continued to work up to the present performing maintenance work on pumps and turbines. (Tr. 738-740).

Furthermore, Overall correctly noted that on June 16, 1995 and June 21, 1995, both McCormick and Cutshaw indicated that Koehl and not McCormick made the decision to transfer Overall to Services. (Tr. 192, 195). Once transferred to TVA Services supervisor, Pitzel, told Overall
that Swindell had budgeted his position for the 1997 fiscal year. (Tr. 309, 310).

V. FINDINGS OF FACT

Based upon my review of the testimony and exhibits as set forth above, I make the following factual and credibility findings:

1. TVA, an agency and instrumentality of the United States government, operates pressurized water reactor nuclear power plants in Tennessee at Watts Bar and Sequoyah. The primary facility involved in this proceeding is Watts Bar. Sequoyah operates two reactor units while Watts Bar has in operation only one reactor unit. Both the Sequoyah and Watts Bar reactors utilized the same ice condenser system manufactured by Westinghouse.

2. Overall worked for TVA from 1979 to September 30, 1996 at various divisions and locations including the fossil and hydro division in Chattanooga and nuclear division including Sequoyah and Watts Barr facilities and TVA Services.

3. At Watts Bar Overall worked as a power plant maintenance specialist (SD2 and SD3) in the Mechanical Maintenance organization from December 1984 to November 20, 1989 responsible air and heat systems and general mechanical maintenance throughout the plant. In this position Overall performed a wide range of duties including maintenance and monitoring of the ice condenser system, identifying design changes, preparing and revising equipment repair instructions; inspecting, measuring, drawing sketches, photographing and designing special tools and jigs; reviewing plant equipment and vendor manuals; procuring spare parts for mechanical equipment; and serving as a TVA representative at industry wide conferences concerning the ice condenser system.

4. From November 20, 1989 to November 3, 1995, Overall worked in the Watts Bar Technical Support organization as a power maintenance specialist (SD 4) for a majority of the time under the immediate supervision of McCormick, NSSS Engineer Supervisor, who in turn reported to Koehl, Technical Support Manager. As a power maintenance specialist Overall's primary responsibility was maintenance, operation, construction and design of the ice condenser 61 system with additional duties as project manager on capital projects and backup systems engineer on other plant systems in the absence of engineer primarily assigned to these systems.

5. Throughout his tenure with TVA, Overall maintained an impressive work record receiving numerous and consistent favorable job appraisals.

6. Overall had a 2 year, associate degree in architectural pre-engineering plus additional in-house engineering training and at the time of his transfer to Services was working on the completion of practical factors of this training.

7. The last time that Overall was evaluated by Human Resources at Watts Bar to determine

whether he had equivalent training and experience to be rated an engineer was in 1991.

8. Employee John Ferguson, who had no formal engineering education, but rather a 4 year degree in business and who had the same total score of 1325 points as Overall was given an engineering equivalency rating in June 1995 and elevated to the SC scale and not transferred to TVA Services as an at-risk employee.

9. TVA personnel including McCormick recognized Overall as a dedicated and conscientious, ice condenser expert requiring no supervision and possessing good forethought reqarding ice condenser problems and their solutions. (Jt.Ex.9, page 9).

10. The ice condenser was one the primary safety systems at Watts Bar. Without its proper operation, fuel could not be loaded and nuclear power produced.

11. On April 12, 1995, Overall discovered and reported to TVA management the presence of 171 ice basket screw heads and 32 complete ice basket screws in the ice melt talk. Thereafter, on April 21, 1995, Overall filed a Problem Evaluation Report, PER 246 with TVA .

12. On May 11, 1995, at a meeting of Technical Support personnel Koehl told employees that they were behind schedule in fuel loading and needed to eliminate all necessary expenditures by reducing overtime and closing out open items such as work requests, design changes, work requests and PERs.[17]

13. In May, 1995, Overall attempted to find a reason for the screw failure by securing a report from TVA Central Laboratories metallurgical engineers on the mode and causes of screw failure. On June 2, 1995, Central Labs issued a report finding both a mode of screw failure (intergranular separation) and 7 probable causes.

14. On June 14, 1995, TVA metallurgical supervisor, Woods, rescinded the June 2, 1995, metallurgical report and directed TVA metallurgical engineers to issue a revised report listing only the mode of screw failure while omitting all 7 causes, 5 of which Woods had no objection thereto.

15. On June 19, 1995, Central Labs issued a revised report omitting references to any cause of screw failure so as to avoid reporting such an issue to the NRC or having the NRC discover the screw defect prior to issuing an operational license.

16. On June 22, 1995, Westinghouse's Manager of Domestic Customer Projects at TVA's Watts Bar Project, J. W. Irons, at TVA's insistence, issued a superficial and inaccurate assessment

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[17] Koehl admitted telling employees to minimize expenses and that if a problem arose he wanted it put in a PER and resolved quickly but denying discouraging employees from filing PERs. No other employees including McCormick testified about this meeting except Law who stated that Koehl emphasized that he wanted to avoid delays as much as possible. (Tr. 246). '

of the screw issue concluding without any inspection of the ice baskets to determine the number of missing or faulty screws that the statistical probability of ice basket failure was remote. McCormick, who had a degree in mathematics, was unable to explain the so called statistical analysis. The report, moreover, inaccurately concluded that the ice baskets were not ejectable whereas the credible testimony of Overall showed that the ice baskets were not only ejectable but when ejected could prevent the proper functioning of ice condenser doors and penetrate the containment vessel allowing for the escape of radioactive gases.

17. On July 10, 1995, McCormick, without any credible explanation, transferred PER 246 to TVA's Nuclear Engineering organization under the supervision of James G. Adair and Larry A. Katchum who in turn recommended closure of PER 246 without taking any corrective action to assess and/or replace defective ice basket screws.

18. On August 10, 1995, TVA supervisor, Tom McCollum, closed out or completed the investigation of PER 246 without taking any corrective action and inaccurately concluding that the ice baskets in question were inaccessible whereas the credible testimony of Overall showed that the ice baskets were accessible.

19. Following closure of PER 246, TVA supervisors never advised the NRC of the safety issue raised by the defective ice basket screws and accordingly thereafter received an operating license from the NRC.

20. In June, 1995, TVA Services supervisor, Miller, at the prompting of Koehl, created a permanent position of program administrator at TVA Services and offered such a position to Overall telling Overall because of his experience in ice condensers he was a very marketable individual.

21. On June 14 and 19, 1995, Overall received 3 anonymous, harassing telephone calls because of his initiation and participation in PER 246.

22. On June 16, 1995, Koehl told Overall that he was going to be involuntarily transferred to TVA Services as an at-risk employee allegedly because there was not enough work to warrant a full time person in Overall current ice condenser, power plant maintenance specialist position.

23. When faced with an involuntary at-risk transfer, Overall decided to apply for the position of program administrator at TVA Services. The decision to apply was obviously not a voluntary decision.

24. Overall physically transferred to TVA Services on November 4, 1995 and was replaced at Watts Bar by Jordan who had no previous practical ice condenser experience. As Overall's replacement, Jordan has spent 95% of his time devoted to the ice condenser with the remaining 5% being devoted to a flood mode boration system which Overall was also qualified to run.

25. Overall worked in TVA Services until his layoff on September 30, 1996. During that time

he unsuccessfully attempted to market his services both to the Watts Bar and Sequoyah plants and other plants outside of the TVA organization.

26. Swindell told TVA Services employees that it was necessary to generate revenues from the sale of their services in order to keep their jobs. On July 24, 1996, Ricky B. Kennedy, Manager of Human Resources for TVA Service notified Overall and 20 other engineering employees they were being laid off because of a shortage of funds. Prior to this notification, TVA Services supervisor, Pitzel, told Overall that his position had been budgeted for the 1997 fiscal year.

27. Following his layoff Overall diligently attempted to secure work at Watts Bar , Sequoyah and other non-TVA facilities but without success. In June, 1997, TVA officials at Watts Bar chose an outside contractor, Stone and Webster, to do ice condenser outage work despite the fact that Stone and Webster had no employees with previous condenser experience.

28. Koehl denied making the decision to transfer Overall to TVA Services stating the decision was made by McCormick because of Overall's lack of an engineering degree or its equivalent and because the ice condenser specialist position did not require a full time person or 2000 man hours of work. Koehl's denial was incredible and conflicted with the statements of McCormick and Howard Cutshaw who in conversations with Overall on June 16 and 21, attributed the decision to Koehl.

29. Moreover, Koehl never informed Overall that his lack of an engineering degree played any part in the transfer decision. McCormick, on the other hand, testified that the reason he allegedly chose Overall was not because Overall's position did not required a full time person but allegedly because of Overall's lack of flexibility in job assignments since as SD employee he could not be assigned other back up systems.

30. Overall's job description and duties not only required flexibility by working other systems than ice condenser but in fact Overall had worked other systems including plant wide maintenance and diesel generation. Further, many of the systems within ice condenser were located throughout the plant.

31. Koehl and not McCormick made the decision to transfer Overall to Services on June 16, 1995. The written notification given by Koehl to McCormick on September 15, 1994, was no more than a potential notice of future transfers.[18]

32. TVA officials concealed the existence of significant safety hazzards with the use of defective Westinghouse screws so as to permit it to pass a NRC inspection and prevent a shut down of the Watts Bar facility. Had a proper ice basket screw inspection been conducted Watts Bar could

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[18] When questioned about the September, 1994, at-risk notices and whether he told Overall that he would be definitely transferred as opposed to just possibly being transferred, McCormick was unable to recall what he told Overall or to explain the meaning of "potentially at-risk". (Tr. 782).

easily have been shut down for a period of 6 to 12 months.

VI. ANALYSIS

A. Credibility

I made the foregoing and subsequent credibility findings taking into account (1) the rationality and consistency of the witness testimony, (2) the degree to which the testimony supports or detracts from other relevant and probative record evidence and (3) the fact that I am not bound to believe or disbelieve the entirety of a witness' testimony. Altemose Construction Company v. NLRB, 514 F.2d 8, 16 n.5 (3rd Cir. 1975); See Frady v. Tennessee Valley Authority, Case No. 92-ERA-19 (Sec'y. Dec. Oct.23, 1995). In addition, I have considered witness demeanor having the unique advantage of seeing the witnesses and hearing testimony first hand.

Credibility is that quality which renders a witness' testimony worthy of belief. To be worthy of belief evidence must proceed not only from a credible source but must be reasonable and probable in view of the transaction which it describes or relates so as to make it easy to believe and plausible. Indiana Metal Products v. NLRB, 442 F. 2d 46, 51 (7th Cir. 1971).

In general, I was very impressed with Overall's testimony and demeanor. He testified in a straight forward, detailed, sincere and consistent manner. On the other hand, TVA's primary witnesses, Koehl, McCormick, Woods and Swindell, presented either inconsistent, vague, or illogical testimony as previously noted.

B. Burden of Proof and Production

Claims brought under the ERA are subject to the following burdens of proof and production: (1) the complainant must first establish a *prima facie* case of discrimination. DeFord v. Secretary of Labor, 700 F.2d 281 (1983). Once complainant establishes a *prima facie* case, the burden shifts to the respondent to articulate some legitimate, non-discriminatory reason for its actions against complainant. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 249 (1981). Once this is accomplished, complainant must then demonstrate by a preponderance of the evidence that the articulated reason for the adverse employment action was a pretext for discrimination. Burdine, 450 U.S.at 249, 257; Zinn v. University of Missouri, Case No. 93-ERA-34 and 36 (Sec'y. Dec. January 18, 1996).

Complainant may demonstrate that the articulated reasons constitute a pretext for discriminatory treatment by showing that discrimination was more likely the motivating factor or by showing that the proffered explanation was not worthy of credence. 42 U.S.C. § 5851 (b)(3)(c); Zinn, Case No. 93-ERA-34 and 36, slip. op. at 5; Yellow Freight Systems v. Reich, 27 F.3rd 1133, 1139 (6th Cir. 1994). The finding that a respondent's asserted reasons are pretextual, however, does not compel a finding in favor of complainant. Complainant still retains the ultimate burden of proving, by

a preponderance of the evidence, that the adverse action was in retaliation for the protected activity in which he was engaged. St Mary's Honor Center v. Hicks , 509 U.S. 499, 511 (1993). If there is evidence that respondent was motivated by both legitimate and prohibited reason, then a dual analysis is necessary. Mt. Healthy Sch. Dist. v. Doyle, 429 U.S. 274 (1977); Dysert v. Florida Power Corp., Case No. 93-ERA-21. (Sec'y. Dec. August 7, 1995).

C. Equitable Estoppel or Continuing Violation

Before proceeding to the substantive issues, it is necessary to first address the procedural issue of timeliness raised by TVA. TVA asserts that since Overall was informed in June, 1995, of his definite transfer to TVA Services he was required to file a charge of discrimination within 180 days of this notice. Inasmuch as Overall did not file the instant complaint until January 15, 1997, he failed to comply with the requirements of Section 211 of the ERA and is thus time barred from contesting the transfer.[19]

If the transfer to TVA Services was merely a discrete, isolated , and completed act, then TVA is correct is asserting that it should be considered an individual violation which should have been brought within 180 days of notification. If, on the other hand, TVA fraudulently concealed it actions which it turn prevented Overall from discovering the operative facts that form the basis of the cause of action within the limitations period despite due diligence on Overall's part, then the application of equitable estoppel requires an extension of time limits or as the Court in Hill stated: " The application of equitable estoppel is warranted when a defendant fraudulently conceals its action misleading a plaintiff respecting the plaintiff's cause of action." 65 F.3d at 1335. In order to rely upon fraudulent concealment, Overall is required to prove (1) wrongful concealment of TVA's action; (2) failure of Overall to discover the operative facts that were the basis of his cause of action within the limitations period; and (3) due diligence until discovery of the facts.

Tolling based upon fraudulent concealment, however, is narrowly applied. It is not enough for TVA to have concealed from Overall its discriminatory motive. For indeed that is precisely what TVA did. Rather, it is necessary to show that TVA fraudulently concealed from Overall facts respecting the accrual or merits of his case. Hill, 65 F.3rd at *1337*.

In the instant case I find that on June 16, 1995, Overall knew that he was going to be transferred to TVA Services. He also knew by that date that management (Woods) was attempting to cover up the issue of screw safety and that the reasons advanced by Koehl for his transfer, i.e., not enough work for one full time ice condenser specialist, was false. Overall was also aware that he had the right to file a complaint with DOL because of adverse employment actions by TVA. Accordingly, I find that although TVA concealed its true motive in transferring him, Overall had enough information to realize that he had a cause of action under ERA. Thus the equitable principle of fraudulent concealment does not apply.

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[19] 42 U.S.C. §5851 (b)(1) (1992).

Regarding Overall's primary argument that of a continuing violation, however, I find merit.[20] The courts have not formulated a clear standard for determining when alleged discriminatory acts are related closely enough to constitute a continuing violation or when they constitute isolated, discrete and separate violations. In order to prove a series of continuous violations constituting an organized scheme leading to a current violation, it is necessary to consider the facts of each case including the type of discriminatory conduct, its frequency and most important the degree of permanence of the acts. Berry v. Board of Sup'rs of L.S. U. , 715 F.2d 971 (1983)

In this case the facts clearly show an organized scheme to remove Overall from the Watt Bar facility by transferring him to TVA Services. Once there TVA's plan was to lay him off and never recall him to either TVA Services or more importantly to Watts Bar. The credible evidence in this case indicates a broad coverup of significant safety hazzards caused by the use of defective ice basket condenser screws. Those management officials involved in the coverup were (1) Woods who directed the issuance of revised and incomplete screw report omitting reference to any possible cause for screw failure so as to avoid questioning by NRC investigators; (2) McCormick who transferred PER 246 to nuclear engineering so as to remove it from Overall's control and responsibility; (3) Koehl who transferred Overall to TVA Services under the pretext of lack of need for a full time ice condenser specialist; (4) J.W. Irons, Westinghouse representative, who at the insistence of TVA officials issued a superficial and misleading report attesting the safety of the ice condenser; (5) James G. Adair and Larry A. Katchum's recommendation that PER 246 be closed without taking any corrective action to assess or replace the defective ice basket screws; (6) Tom McCollum's subsequent action in closing out or competing the investigation of PER 246 without taking any corrective action and inaccurately concluding that the ice baskets were not accessible; (7) Woods, McCormick, Koehl, Adair, Katchum and McCollum's failure to advise the NRC of the safety issue raised by the defective ice basket screws which in turn led the NRC to subsequently issue an operating license to TVA for the Watts Bar plant; (8) Rich Miller's attempt to lure Overall away from Watts Bar by creating a position in TVA Services at the urging of Koehl; (9) Swindell's layoff of Overall for pretextual reasons stating an alleged lack of funds when it truth funds had been set aside for Overall's position; (10) TVA's refusal to re-employ Overall at any of its ice condenser facilities including Watts Bar using instead inexperienced outside contractors to do ice condenser work.[21]

Thus, Overall's transfer to TVA Services, subsequent layoff and refusal to re-employ or recall were part of a organized scheme to prevent Overall's continued involvement with the Watts Bar or

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[20] Thus I reject Mr. Fine's argument at pages 25-36 of his brief that the complaint was time barred or that the main claim of the complaint relative to Overall's 1995 transfer to TVA Services was not timely filed.

[21] Indeed as stated in Webb v. Carolina Power and Light Co., Case No. 93-ERA-42 slip. op. at 7 (ARB August 26, 1997): "Systematically excluding an individual from consideration for employment, by its very nature, is a continuing course of conduct and may constitute a continuing violation if it is based upon an employee's protected activity."

any other TVA ice condenser system so as to permit operation of such condensers without regard for significant operational safety concerns raised by the use of defective Westinghouse ice basket screws. Moreover, the permanency of the transfer resulting in no further ice condenser work and eventual layoff did not become apparent until Overall received his notice of layoff on July 24, 1996. Prior to that time Overall had been assured by TVA that his services were not only valuable but marketable as well. In reality Overall found only a consistent pattern of rejection by TVA for no apparent reason other than its desire to eliminate him from its ice condenser workforce. In reality there was no realistic possibility of Overall returning to Watts Bar for as section supervisor Jim Yates told Law, TVA would not bring back employees to work on the ice condenser who had been transferred to TVA Services because to do so would be tantamount to an admission of an improper or bad decision in sending Overall to TVA Services in the first place. (Tr. 427).

D. Prima Facie Case of Discrimination

The essential elements of a *prima facie* case of illegal discrimination involves a showing by either direct or circumstantial evidence that (1) respondent is an employer subject to the Act; (2) complainant engaged in protected activity; (3) respondent subjected complainant to adverse employment action; and (4) a nexus between the protected activity and the discharge. Deford, 700 F.2d at 286; Moon v Transport Drivers, Inc., 836 F.2d 226 (6th Cir. 1987); see also Kahn v. Secretary of Labor, 64 F.3d 271, 277 (7th Cir. 1995); Simon v Simmons Foods, Inc. 49 F.3d 386, 389 (8th Cir. 1995); and Bechtel Constr. Co. v. Secretary of Labor, 50 F.3d 926, 933-934 (11th Cir. 1995).

In this case TVA admitted in its pretrial motion for summary judgment that is was governed by the ERA. Further, TVA holds several licenses including one at Watts Bar from the NRC and is accordingly subject to the ERA, 42 U.S.C. § 5851 (a)(2) (A). There is also no dispute that Overall by filing and processing PER 246 was engaged in protected activities with the knowledge of TVA officials and that he suffered adverse employment action by his at-risk transfer to TVA Services and subsequent layoff. (Jt. Ex. 5 page 9).

TVA contends, however, that there is no causal link between Overall's protected activity and PER 246 inasmuch as (1) his position was identified as surplus or potentially at risk in September 1994, (2) he was not singled out for disparate treatment with other SD employees being eliminated from Technical Support, (3) he voluntarily applied for transfer to TVA Services and (4) management officials at TVA Services had no knowledge of Overall's protected activity. Further, Respondent argues that it has the right to establish job responsibilities and to take adverse employment action for legitimate business reasons. Overall voiced no objection to TVA's right to either establish job responsibilities or take adverse employment actions for legitimate business reasons. However, as indicated above, Overall strenuously contests TVA other assertions.

Regarding the so called voluntary transfer to TVA Services, the credible evidence shows that Overall applied for a transfer to a permanent position with TVA Services on June 16, 1996 only after being informed by Koehl that he was going to be involuntarily transferred to TVA Services as an at-risk employee. Faced with being treated as an at-risk employee with little hope of retention versus a

permanent position that was budgeted at least for a two year period, Overall chose the lesser of two evils. Under such conditions the transfer application may be rightly compared to a situation where an employee faced between resignation and termination "voluntarily" elects resignation. Schultz v. United States Navy, 810 F. 2d 1133, 1136 (Fed. Cir. 1987); Christie v. United States, 518 F.2d 584, 588 (Ct. Cl. 1975).

Regarding the arguments about being selected for layoff in 1994, lack of disparate treatment and lack of knowledge by the supervisors who made the adverse employment decision, the credible evidence showed that when Overall received his 1994 at-risk notice, he was told by McCormick not to worry because it was not a definite decision. The decision became definite only when Overall engaged in protected activity by initiating PER 246. TVA then treated Overall disparately and in violation of its alleged policy of eliminating all SD positions by retaining and overnight upgrading SD employee John Ferguson while allowing SD employees Ronnie Schouggins and Doug Williams the opportunity to transfer to other positions within Watt Bar while retaining full time employment. Ferguson was upgraded to a SC engineer position although he had no formal engineering training as did Overall. Neither Schouggins or Williams had any degrees. Moreover, Koehl and McCormick clearly had knowledge of Overall's protected activity since they initially participated in PER 246.

I discredit Swindell's denial of knowledge of Overall's protected activity for such knowledge was widespread involving Watts Bar, Sequoyah, and corporate office officials. If properly investigated PER 246 had the potential of shutting down Watts Bar for 6 to 12 months while ice baskets were removed and inspected for defective screws. Moreover, Koehl had direct contacts with Swindell and other TVA Service supervisors on a frequent basis and in fact negotiated Overall's rate of pay with Swindell. Indeed it was Koehl who was responsible for TVA Services creating a position for Overall so as to remove him from processing PER 246.

However, it is not necessary to establish Swindell's knowledge of Overall's protected activities because in large part Overall's failure to secure ice condenser work stemmed from Watts Bar officials refusal to accept Overall's services while instead employing inexperienced contract personnel to perform ice condenser work. Following Overall's transfer to TVA Services, Koehl assumed even greater authority and control at Watts Bar, and eventually Sequoyah, being promoted to assistant plant manager and operations manager at Watts Bar and in June 1997 assigned to the position of assistant plant manager at Sequoyah.

This is not the first case wherein TVA used the defense of lack of knowledge to shield itself from adverse findings of ERA violations. In Jocher v. Tennessee Valley Authority, Case No. 94-ERA-24 (ALJ July 31, 1996) (ARB June 24, 1996), TVA at the same facility denied knowledge of protected activities when its Vice President of Nuclear operations, Joseph Bynum, unlawfully discharged William F. Jocker. Judge Robert L.Hillyard found that Bynum had knowledge through his handling of safety related concerns. Jocker, like Overall, engaged in activity exposing system wide defects and was the first person to initiate investigative and corrective action. By doing so, he exposed significant safety issues that TVA management officials had neglected resulting like the present case in an inordinate amount of unfavorable attention from TVA management.

In Klock v. Tennessee Valley Authority, Case No. 95- ERA- 20 (ALJ Sept.29 1995)(ARB May 30, 1996) TVA also asserted lack of knowledge in the discharged Robert O. Klock. In that case, like the present one, Koehl played a key role in establishing TVA's knowledge of protected activities and role in dealing with safety issues. Koehl was part of the management team that ignored safety concerns telling personnel to accept safety defects as they were and reacting angrily when safety concerns were brought directly to the attention of the NRC.

Nexus is moreover established by the proximity in time between the protected activity and the adverse employment action. Bechtel, 50 F.3d at 934; see also Bartlick v. United States Department of Labor, 73 F.3d 100 (6th Cir. 1996). To determine "proximity in time" the trier of fact must analyze the particular facts of each case. See Couty v. U.S. Dept of Labor, Sec'y Dole, 886 F.2d 147, 148 (8th Cir. 1966) (2 month interval between protected activity and adverse employment action held sufficient nexus); Zinn, Case No. 93-ERA-34 and 36, slip. op. at 36 (6 month interval sufficient to establish nexus); Thomas v. Arizona Public Serv. Co., Case No. 89-ERA-19 (Sec'y. Dec. Sept. 17, 1993) (12 month interval sufficient to establish nexus).

In this case Overall was notified of his involuntary transfer by Koehl on June 16, 1995, at which time Overall was intimately involved with the processing of PER 246 and only two days after Woods announced that PER 246 was not a safety issue. This is clearly close enough in time to establish solid evidence of causation sufficient to raise an inference of retaliatory motive.

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E. Rebuttal of Prima Facie Case

Once complainant establishes a *prima facie* case as Overall has done herein, the burden shifts to TVA to produce evidence of a legitimate, non-discriminatory reason for the adverse employment action. St Mary Honor Center v. Hicks, 509 U.S. 502 (1993). To meet this burden TVA need only produce evidence of some legitimate ground for the involuntary transfer, subsequent layoff and refusal to recall. It does not have to prove that it was actually motivated by the proffered reasons. Burdine, 450 U.S. at 254-255.

In this case TVA through the testimony of Koehl, McCormick and Swindell produced a variety of legitimate, non-discriminatory reasons, i.e., lack of a need for a full time ice condenser specialist, lack of flexibility in work assignments, and lack of funding caused by an inability of Overall to secure work. As such, TVA articulated non-discriminatory reasons and rebutted the prima facie case.

F. Pretextual transfer, layoff, and refusal to recall

Once TVA articulated a legitimate, non-discriminatory reason for transferring, laying off and thereafter refusing to recall Overall, the burden shifted back to Overall to show that the proffered reasons were a pretext for discrimination rather than the true reasons for his adverse treatment. Burdine, 450 U.S. at 249. Pretext can be established by showing (1) that discrimination was more likely the motivating factor or (2) that the proffered explanation was not worthy of belief. Proof must go beyond disbelief of the asserted reasons. There must be a finding of discrimination. In other

words, I, as the fact finder, must believe on the basis of evidence presented that TVA intentionally discriminated against Overall because of his protected activity. St. Mary's Honor Center, 509 U.S. at 509 (1993); Frady v. Tennessee Valley Authority, Case No. 92-ERA-19 and 34 (Sec'y. Dec. October 23, 1995).

As the Supreme Court stated in St. Mary's Honor Center 509 U.S. at 511:

> The fact finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may together with the elements of a prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination...[without the submission of additional proof of discrimination].

Applying the foregoing principles to this case, Overall asserts that none of the reasons alleged by TVA are credible but rather are accompanied by such mendacity as to clearly show evidence of intentional discrimination.

My review of the credible testimony convinces me all the reasons cited by TVA, including its denials of discriminatory motive, are false and clearly associated with that degree of mendacity to establish a strong circumstantial case of intentional discrimination. TVA advanced inconsistent reasons for the transfer with Koehl stating it was because there was no need for a full time ice condenser specialist while McCormick claimed it was because a lack of flexibility in work assignments. Both reasons were clearly false as established by Overall's replacement, Jordan, who working as ice condenser specialist has spent at least 95% of his time on the ice condenser and the remaining 5% on flood mode boration, which Overall was qualified to do. The lack of flexibility was contradicted by Overall's work outside of ice condenser systems and the fact that many of the ice condenser systems were located in other plant wide systems. More importantly, TVA chose an inexperienced person, Jordan, to operate it most important safety system when professing to place safety as its number one priority. The disparate treatment afforded Overall in not trying to upgrade his position with the last attempted upgrade in 1991 while hastily qualifying Ferguson as an engineer who had the same total score as Overall also strongly suggests intentional discrimination. The retention of SD employees Ronnie Schouggins and Doug Williams, who had no degrees, also conflicted with McCormick and Koehl's professed desire to retain only 4 year degree personnel.

In addition, the following facts are indicative of false motives: (1) TVA's attempt to attribute the decision to transfer Overall to McCormick rather than to Koehl; (2) TVA's assertion that lack of funds resulted in laying off Overall when in fact his position had been budgeted for; and (3) TVA's refusal to re-employ Overall to work on the ice condenser choosing instead inexperienced Stone and Webster personnel for such work. Regarding the lack of funds defense, I note that TVA failed to call Pitzel to refute his conversation with Overall in which he clearly indicated, contrary to Swindell's assertions, that funds had been set aside for Overall's position. It is well established that when a party has relevant evidence within its control which it fails to produce, that failure gives rise to an inference

that the evidence is unfavorable to said party. See, e.g. Interstate Circuit, Inc.,v. United States, 306 U.S. 208 (1939); Perkins v. State of Mississippi, 455 F.2d 7 (5th Cir. 1972); Brown v. Pacific Dry Dock, 22 BRBS 284 (1989); Hansen v. Oilfield Safety, Inc., 9 BRBS 490 (1978).

When these factors are considered in the context of a concerted effort to conceal major safety hazzards by the use of defective ice condenser screws as detailed above and Overall's admitted zeal and competence in dealing with ice condenser problems, I am convinced that the only plausible and credible reason for adverse employment actions, i. e., transfer, layoff and refusal to recall was a desire by TVA officials to retaliate against and prevent Overall from engaging in protected activities.

Assuming, *arguendo*, that the facts of this case show a dual motive of both discriminatory and non-discriminatory reasons for the adverse employment actions, a position I do not accept, TVA is nonetheless required to show by clear and convincing evidence that it would have taken the adverse personnel action in the absence of protected activity. Mount Healthy School Dist. v. Doyle, 429 U.S. 274 (1977); Stone and Webster Engineering Corp. v. Herman, 115 F.3d 1568, 1572 (11th Cir. 1997). Although the courts have never precisely defined "clear and convincing", the courts have indicated that it is higher than "preponderance of the evidence" and less than "beyond a reasonable doubt." Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 22 n.11 (1991); Grogran v. Garner, 498 U.S. 279, 282 (1991). In this case TVA failed to demonstrate by clear and convincing evidence that the sole reason the Overall's transfer, layoff and subsequent refusal by TVA to re-employ him was because of either a lack of need for a full time ice condenser specialist, a lack of work flexibility, or a shortage of funds. Accordingly, I find that Respondent failed to satisfy the dual motive burden.

VII. CONCLUSION

Respondent, TVA, violated Section 210 of the ERA by transferring, laying off and refusal to recall Overall as set forth herein.

VIII. REMEDY

A successful ERA complainant is entitled to affirmative action to abate the violation including reinstatement to his former job, back pay, costs, attorney fees and where appropriate compensatory damages. 42 U.S.C.§ 5851 (b)(2) (B). In the absence of a strong reason for not returning Claimant to his former position, reinstatement should be ordered. Ductile v. Tighe Trucking, Inc. ,Case No. 93-STA-31 (Sec'y. Dec. Oct. 31, 1994); West v. Systems Applications International, Case No. 94-CAA-15 (Sec'y. Dec. Apr. 19, 1995). Since there is no compelling reason for not ordering reinstatement, I hereby direct TVA to reinstate Overall to his former position of power maintenance specialist (SD-4) over the ice condenser system.

Overall is entitled to back pay from date of his transfer from Technical Support at Watts Bar to TVA Service until properly reinstated at Watts Bar with interest on the back pay at the rate

specified for underpayment of federal income tax at 26 U.S.C. § 6621. Creekmore v. ABB Power Systems Energy Service, Inc., Case No. 93-ERA-24 (Dep. Sec'y. Dec., February 14, 1996); Blackburn v. Metric Constructors, Inc. , Case No. 86-ERA-4 (Sec'y. Dec. Oct. 30, 1991) affirmed in relevant part and rev'd on other grounds, Blackburn v. Martin, 982 F.2d 125 (4th Cir. 1992); Sprague v. American Nuclear Resources, Inc. Case No. 92-ERA-37 (Sec'y. Dec. Dec. 1, 1994). Appropriate deductions should be made for any wages TVA paid Overall while employed in TVA Services and interim earnings from other employment subsequent to his layoff from TVA Services, which earnings could not have been made if Overall had not been unlawfully laid off.

Overall is entitled to recover for any loss of health, pension and other related benefits that he suffered as a result of either his transfer or layoff by TVA together with reasonable costs, expenses and attorney fees incurred in connection with his complaint. 42 U.S.C. 5851 (b)(2)(B).

Overall is also entitled to compensatory damages under the Act. To recover compensatory damages, Overall must show that he experienced mental and emotional distress caused by TVA's adverse employment action. Deford, 700 F. 2d at 283, Blackburn v. Martin, 982 F.2d 125, 131 (4th Cir. 1992, citing Carey v. Piphus, 435 U. S. 247, 263-264 and n.20 (1978); Creekmore, Case No. 93-ERA-24, slip. op. at 12. An award may be supported by the circumstances of the retaliatory action including emotional pain and suffering, mental anguish, embarrassment, and humiliation. Id.; Lederhaus v. Paschen, Case No. 91-ERA-13 (Sec'y. Dec. Oct. 26, 1992). Testimony of medical experts is not necessary, but it can strengthen a case for entitlement to compensatory damages. Busche v. Burkee, 649, F. 2d 509, 519 n.12 (7th Cir. 1981), cert. denied, 454 U. S. 897 (1981).

Overall credibly testified that as a result of the adverse employment actions, he has suffered from depression, loss of self esteem and anxiety and has had to seek the services of psychologist Dr. Gary Leigh and take anti-anxiety medication. Associated with the depression was increased irritability, thoughts of suicide, and lack of interest in sex, hobbies and family affairs. Emotional stress has been increased because of loss of income requiring his son to drop out of college and his wife and daughter to take additional jobs. Even with their help Overall is still in arrears on mortgage and car payments (Tr 203-209). This was confirmed by the uncontradicted and credible testimony of his wife, son and daughter. Dr. Leigh credibly testified that he treated Overall for an adjustment disorder with repressed mood and mixed emotional features and dysthymia associated with problems brought about by his employment situation with TVA. (Tr. 435-451; Jt.Ex. 11).

In determining the amount of compensatory damages to assess, it is necessary to consider the facts of this case and the awards made in comparable cases. EEOC v. AIC Security Investigations, Ltd., 55 F. 3d 1276, 1285 (7th Cir. 1995); Lederhaus, Case No. 91-ERA-13, slip. op. at 13. The Secretary has awarded compensatory damages in the following amounts for mental and emotional distress: Smith v. Littenberg, Case No. 92-ERA-52, (Sec'y. Dec., Sept. 9, 1995), appealed docketed Littenberg v. U. S. Dep't of Labor, No. 95-70725 (9th Cir. Sept. 1995) ($10,000 for mental and emotional stress for discharge); Deford v. TVA, Case No. 81-ERA-1, (Sec'y. Dec., April 30, 1984) ($10,000 for emotional distress and damage to reputation); McCuistion v. TVA, Case No. 89-ERA-6, (Sec'y. Dec. Nov. 13, 1991) ($10,000 for emotional distress for harassment, blacklisting and

discharge); Marcus v. TVA, 92 TSC-5, (Sec'y. Dec., July 3, 1995) ($50,000 for mental anguish, depression, aggressive and intimidating treatment and potential damage to reputation); Graballa v. Arizona Public Service Co., Case No. 94-ERA-9, (Sec'y. Dec. January 18, 1996) ($75,000 reduced to $25,000 because of payment of prior compensation for emotional distress); Doyle v Hydro Nuclear Services, Case No. 89-ERA-22 (ARB Dec., Sept. 6, 1996) ($40,000 for pain and suffering). Considering the impact of TVA's discriminatory conduct upon Overall and his family, I find that Overall is entitled to $50,000 in compensatory damages for pain and suffering.[22]

In order for me to determine the appropriate amount of back pay, attorney's fees and other costs, Counsel for Complainant shall file within 30 days of this Recommended Decision and Order the following information: (1) a documented list of all back pay due to Claimant together with any income that would act as an offset; (2) a documented fee petition and bill of costs; (3) a documented list of all damages incurred because of a loss of fringe benefits including health, pension and other related benefits associated with Complainant's discriminatory layoff. TVA will then have twenty (20) days thereafter to file any comments and/or objections with this Office. Thereafter, a supplemental Order for fees and costs will issue.

IX. RECOMMENDED ORDER

Accordingly I hereby RECOMMEND that the Secretary of Labor issue an ORDER providing that:

(1) TVA shall reinstate Overall to his former position of power plant maintenance specialists (SD-4)at Watts Bar, or, if no longer available, to a substantially equivalent position with back pay from November 4, 1995, until his reinstatement and provide him with such other benefits as he would have been entitled to had he not been discriminated against. TVA shall receive credit for all compensation and wages heretofore paid with the exception of his earnings from unemployment compensation.

(2) TVA shall pay interest on the back pay at the rate specified in 26 U.S.C. § 6621 through

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[22] At page 40 of his brief, Mr. Fine conceded that Overall made a diligent attempt to find interim employment but that (1) there was little demand for a non-degree ice condensor specialist in the open market, (2) Overall had no guarantee of continued employment at TVA even if he had not been transferred to TVA Services, and (3) Overall mental condition has not required hospitalization. I am not persuaded by any of these arguments since there is no need to show hospitalization in order to recover compensatory damages nor is there any showing that Overall's lack of success in finding ice condenser work had anything to do with his lack of an engineering degree. Further, Overall's job is currently being performed on a full time basis by Jordan who replaced Overall after the discriminatory transfer. In like manner I do not agree with Mr. Van Beke that Overall is entitled to $150,000 in compensatory damage for as Mr. Fine pointed out Overall was not hospitalized and neither the facts of this case or precedent supports such a sum.

the date of compliance with this order.

(3) TVA shall reimburse Overall for the costs he incurred for health insurance, medical costs, life insurance, and retirement fund.

(4) TVA shall expunge from Overall's personnel records all derogatory or negative information relating to his employment with TVA with the exception of Overall's November 22, 195 job evaluation which did not constitute part of TVA's discriminatory treatment of Overall.

(5) TVA shall pay Overall $50,000 in compensatory damages.

(6) Overall is granted 20 days from receipt of this Recommended Decision and Order in which to file and serve a fully supported application for costs and expenses including attorney fees. Thereafter TVA shall have 10 days from receipt of the application in which to file a response.

(7) TVA shall post the attached Recommended Notice to Employees (Appendix 1) on all bulletin boards at its Watts Bar and TVA Services facilities, where TVA's official documents are posted, for 60 days ensuring that it is not altered, defaced or covered by other material.

ORDERED this 1st day of April, 1998, at Metairie, Louisiana.

_____
CLEMENT J. KENNINGTON
Administrative Law Judge

NOTICE

This Recommended Decision and Order will automatically become the final order of the Secrfetary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614(1998).

RECOMMENDED NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
AN AGENCY OF THE UNITED STATES GOVERNMENT

After a hearing in which all participants had the opportunity to present evidence, the Administrative Review Board, U. S. Department of Labor, has found that Tennessee Valley Authority, (Respondent) violated the law, and has ordered the posting of this notice.

The Employee Protection Provision of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851 (1992), prohibits an Employer from discharging or otherwise discriminating against any employee with respect to his/her compensation, terms, conditions, or privileges of employment because the employee:

(A) notified his employer of an alleged violation of the ERA;

(B) refused to engage in any practice made unlawful by the ERA, if the employee has identified the alleged illegality to the employer;

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of the ERA;

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under the ERA, or a proceeding for the administration or enforcement of any requirement imposed under the ERA;

(E) testified or is about to testify in any such proceeding, or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of the ERA.

WE WILL NOT discharge or otherwise discriminate against employees because they engage in protected activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights under the Employee Protection Provision of the ERA as enumerated above.

WE WILL unconditionally offer Curtis C. Overall immediate and full reinstatement to his former job as a power plant specialist, or if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

WE WILL make Curtis C. Overall whole for any loss of earnings, benefits or other forms of compensation he may have lost, plus interest thereon, because we discriminated against him.

WE WILL pay Curtis C. Overall $50,000.00 in compensatory damages because of the mental or emotional distress imposed upon him as a result of our discriminatory, adverse employment action.

WE WILL expunge from our records all pertinent derogatory or negative information relating to Curtis C. Overall.

WE WILL reimburse Curtis C. Overall for costs and expenses, including attorney's fees, incurred in the prosecution of his complaint against Tennessee Valley Authority.

Tennessee Valley Authority
Respondent

Dated: _____ By: _____
(Representative) (Title)