



**Issue Date: 13 February 2006**

Case No.: 2006-CAA-0003

In the matter of:

STEPHEN P. DURHAM,  
Complainant,

v.

TENNESSEE VALLEY AUTHORITY,  
Respondent.

**RECOMMENDED DECISION AND ORDER GRANTING  
RESPONDENT'S MOTION FOR SUMMARY DECISION**

This case arises under the employee protection provisions of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9610 (CERCLA), the Federal Water Pollution Control Act, 33 U.S.C. § 1367 (FWPCA), and the Clean Air Act, 42 U.S.C. § 7622 (CAA) (collectively referred to as the Acts), and the implementing regulations at 29 C.F.R. Part 24. In his complaint, Stephen P. Durham (Complainant) alleges he was denied disability by the Tennessee Valley Authority in retaliation for his prior whistleblowing complaints and his complaints to OSHA, Alabama Department of Environmental Management and the Alabama Air Quality Department. On January 17, 2006, Tennessee Valley Authority (Respondent) filed a Motion for Summary Decision, pursuant to 29 C.F.R. §§ 18.40 and 18.41(a). Respondent seeks dismissal of the complaint as the undisputed facts show that (1) Respondent did not deny Complainant's disability retirement application, rather, the decision was made by the TVA Retirement System (TVARS), a legal entity separate and distinct from Respondent; (2) TVARS was not Complainant's employer; (3) TVARS determinations are subject to review in Federal court under the arbitrary and capricious standard; (4) Complainant cannot prove a prima facie case since TVARS decision makers had no knowledge of his purported protected activity; (5) the TVARS decision to deny disability retirement to Complainant was made for legitimate nondiscriminatory reasons; and (6) TVARS decision was not a pretext for discrimination. On January 21, 2006, Complainant filed an Answer to Respondent's Motion for Summary Decision.

## FACTS

The following facts are not disputed:

1. Complainant had filed a previous whistleblower complaint, Case No. 2006-CAA-0001.

2. Pursuant to Section 3 of the TVA Act, as amended, 16 U.S.C. §§ 831-831ee (2000 & Supp. III 2003), TVA, a federal agency, established TVARS in 1939 as an independent entity to provide various employment-related benefits to TVA employees, including retirement, death, and disability benefits. TVARS is a separate and distinct legal entity from TVA. TVARS is not controlled by TVA and has its own independent Board of Directors and its own separate funds from which benefits are paid. TVARS benefits are administered pursuant to Rules and Regulations promulgated by TVARS, and such membership is a condition of their TVA employment. (Affidavit of Randy A. Snyder).

3. Under the Rules and Regulations, the TVARS Board of Directors has "sole and exclusive responsibility for determining . . . what benefits are payable by the Retirement System and to whom they shall be paid" (Rule 3.7), which includes the authorizing of a disability retirement allowance by the TVARS Board of Directors for members who are permanently disabled. Section 6.C.1 of the Rules governs such disability and provides in relevant part:

*Any member with 5 or more years of creditable service may, upon the application of TVA or upon his own application, filed with the board while the member is in service or not later than 60 days after he ceases to be in service, be retired by the board on a disability retirement allowance upon a determination by the board which shall include the consideration of a report either by the Medical Board or by the Director of the TVA Division of Medical Services and information from the TVA Employment Branch that the member cannot be continued in his present position because of a physical or mental disability that is likely to be permanent and that there is no other position available for which he is qualified and can perform with the member's medical restrictions [emphasis added].*

The Medical Board referred to in the rule consists of three independent doctors who are not employees of TVA or TVARS and who are not eligible to participate in the Retirement System. (Affidavit of Randy A. Snyder).

4. After TVARS receives an application for a disability retirement allowance, the TVARS staff obtains pertinent information from the applicant and other sources, including medical documentation and material from TVA about the applicant's qualifications and ability to perform TVA work. TVA's Director of Medical Services reviews the available information. If the Director of Medical Services recommends approval of the application, the independent Medical board is not usually consulted. If the Director of Medical Services concludes that an applicant is not permanently disabled, or the evidence is conflicting, the disability issue is reviewed by the members of the Medical Board, who provide their opinions to TVARS. The TVARS staff then submits the evidence, along with their recommendation to either approve or

disapprove the application, to the TVARS Retirement Committee, which consists of three members of the TVARS Board of Directors. After review, the Retirement Committee provides the evidence and a recommended course of action to the full TVARS Board, which votes upon the matter. (Affidavit of Randy A. Snyder).

5. On April 15, 2005, TVARS received a disability retirement application from Stephen Durham, who had been employed by TVA as an Assistant Unit Operator (AUO) at Widows Creek Fossil Plant in Stevenson, Alabama. According to his supporting statement, Mr. Durham was not even aware of the purported injury or illness which he was claiming until February 3, 2005, nearly two months after he had left work. Mr. Durham has been employed by TVA, not TVARS. (Affidavit of Randy A. Snyder).

6. At TVARS's request, TVA's Human Resources (HR) organization provided a copy of the Job Description and General Position Requirements for an AUO. The General Position Requirements detail the work environment and the physical requirements for the position. HR also provided TVARS with a report indicating that Mr. Durham had been "able to perform assigned duties satisfactorily." In addition, Mr. Durham's supervisor, Gregory A. Barbee, provided a report to TVARS stating that, when Durham worked at the plant, he was "not aware of Mr. Durham having a disability," that he was not "aware of applicant's inability to perform the required job duties," and that he was "not aware of any job duties Mr. Durham can not perform." Both HR and Mr. Barbee indicated that Mr. Durham had previously been terminated for disciplinary reasons. (Affidavit of Randy A. Snyder and Exhibits A, B, C attached thereto).

7. The TVARS staff obtained TVA's medical file maintained for Mr. Durham. That file showed that prior to December 8, 2004, Mr. Durham had not reported any claimed disability. The medical file contained copies of his annual TVA medical evaluations. That evaluation shows that he was approved to work without any medical constraints and that he received two special medical clearances: S03 to wear a "respirator" and S04 to wear a "respirator/stressful." The S04 "respirator/stressful" is the medical clearance to wear the Self Contained Breathing Apparatus (SCBA) used by the plant fire fighting brigade. (Affidavit of Randy A. Snyder and Exhibit D attached thereto).

8. The TVARS staff also obtained reports from two doctors identified in Mr. Durham's application. Both doctors indicated that Mr. Durham had not even consulted them about his alleged problem until after his last day of work. While both doctors reported that Mr. Durham claimed to have neck pain, his family practitioner indicated the possibility of "improvement with surgical intervention," while his orthopedist said he would "need a F.C.E. [Functional Capacity Evaluation] to determine restrictions." (Affidavit of Randy A. Snyder and Exhibit E attached thereto).

9. The available information on Mr. Durham's application was reviewed by the doctor that TVA contracts with to act in place of the Director of Medical Services and the three doctors on the independent Medical Board, all of whom concluded that the medical evidence did not support Mr. Durham's claim for disability retirement. None of the four doctors knew Mr.

Durham or of his claimed protected activity. (Affidavit of Randy A. Snyder and Exhibit F attached thereto).

10. Because Mr. Durham's orthopedist had stated that an F.C.E. would be necessary to determine restrictions, the TVARS staff scheduled Durham for such an evaluation. The July 28, 2005, report of the F.C.E. concluded that Durham "demonstrates ability to perform strength activities in the Heavy Physical Demand Classification . . . [and] ability to perform all aspects of his job description." (Affidavit of Randy A. Snyder and Exhibit G attached thereto).

11. Because the F.C.E. showed that Mr. Durham reported neck discomfort wearing the SBCA respirator, the TVARS staff contacted HR which stated that the consistent policy was not to assign fire brigade duties to individuals who had restrictions wearing SCBA. Accordingly, the TVARS staff determined that had he not been terminated for misconduct, any medical restrictions on using the SBCA that might have been imposed by Mr. Durham's doctors could have been accommodated.

12. After the F.C.E., the TVA doctor and the independent Medical Board again reviewed Mr. Durham's disability application file and again concluded that he did not meet the requirements for a TVARS disability retirement. Mr. Durham's orthopedist was also contacted after the F.C.E. He indicated that surgery was scheduled with "good results anticipated." Based on the available information the TVARS staff recommended that the TVARS Board disapprove Mr. Durham's application, which it did. None of the TVARS Board members that participated in the decision knew of Mr. Durham or his asserted protected activity. John Long, one of the TVARS Board members, recused himself from consideration, discussion and voting on the application based on the fact that Mr. Durham had made allegations against him in a previous complaint. (Affidavit of Randy A. Snyder and Exhibits H and I attached thereto).

13. On September 20, 2005, Randy A. Snyder sent a letter on behalf of TVARS informing Mr. Durham that his application for disability benefits had been denied. (Affidavit of Randy A. Snyder and Exhibit J attached thereto).

## DISCUSSION OF LAW AND FACTS

Any party may move with or without supporting affidavits for summary decision on all or part of the proceeding. 29 C.F.R. § 18.40(a) (2004). Summary judgment is granted for either party if the administrative law judge finds "the pleadings, affidavits, material obtained by discovery or otherwise show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." *Id.* Thus, in order for a motion for summary decision to be granted, there must be no disputed material facts and the moving party must be entitled to prevail as a matter of law.

In deciding a motion for summary decision, the court must consider all the material submitted by both parties, drawing all reasonable inferences in a manner most favorable to the non-moving party. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).

The moving party has the burden of production to prove that the non-moving party cannot make a showing sufficient to establish an essential element of the case. Once the moving party has met its burden of production, the non-moving party must show by evidence beyond the pleadings themselves that there is a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). A court shall render summary judgment when there is no genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds could come to but one conclusion, which is adverse to the party against whom the motion is made. Lincoln v. Reksten Mgmt., 354 F.3d 262 (4th Cir. 2003). However, granting a summary decision is not appropriate where the information submitted is insufficient to determine if material facts are at issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

I find Respondent's motion for summary decision should be granted because the undisputed facts demonstrate that Complainant is unable to prove all the necessary elements under the Acts. To receive protection under the Acts, a complainant must establish by a preponderance of the evidence that: (1) he engaged in protected activity; (2) his employer was aware of the protected activity; (3) his employer took some adverse employment action against him; and (4) circumstances are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action. See Jenkins v. United States Env'tl. Prot. Agency, ARB No. 98-146, ALJ No. 88-SWD-2 (ARB Feb. 28, 2003); 29 C.F.R. § 1980.104(b).

In order to prevail on its motion for summary decision, Respondent has the initial burden of showing that undisputed facts establish that one or more of the aforementioned elements is not established. If Respondent succeeds, Complainant may rebut this showing by setting forth specific facts establishing that there is a genuine issue for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

#### *Respondent Took No Adverse Employment Action Against Complainant*

In its motion for summary decision, Respondent asserts that Complainant's claim fails because Respondent did not deny Complainant's disability retirement application, rather, the decision was made by the TVA Retirement System (TVARS), a legal entity separate and distinct from Respondent. The undisputed facts and legal precedent establish that TVARS is a separate and distinct legal entity from Respondent. Tidwell v. TVARS, No. CV-98-J-1178-NW (N.D. Ala. June 7, 1999). The decision to deny Complainant's disability retirement application was made by TVARS. While Complainant alleges (without any proof) that the TVARS Board is comprised of a majority of senior TVA officials, the undisputed evidence shows that none of the TVARS Board members that participated in the decision knew of Complainant or of his asserted protected activity. The undisputed facts show that Respondent, TVA, did not subject Complainant to the alleged adverse action.

#### *TVARS Was Not Complainant's Employer*

The Court would first note that the complaint was filed against the TVA. TVARS has never been made a respondent in this action. Even if TVARS had been properly made a respondent, the complaint must fail as the undisputed facts show that Complainant was never employed by TVARS. To prevail on a complaint of unlawful discrimination under the

whistleblower protection provisions of the Acts, a complainant must establish that he is an employee and the respondent is his employer. Complainant has presented no evidence or allegation that TVARS was his employer under any of the Acts.

The Court would further hold that even if TVARS had been properly before this Court, any decision by TVARS to deny Complainant retirement benefits would only be subject to review in federal district court under the arbitrary and capricious standard. *See Beaman v. Retirement System of TVA*, No. 90-5377 (6<sup>th</sup> Cir. Mar. 26, 1991).

*TVARS Decision Makers Had No Knowledge of Complainant Protected Activity*

I find that there is no genuine issue of material fact as to the decision makers lack of knowledge of Complainant's whistleblowing activities. The issue before TVARS was whether Mr. Durham was entitled to disability retirement. The available information on Mr. Durham's application was reviewed by the doctor that TVA contracts with to act in place of the Director of Medical Services and the three doctors on the independent Medical Board, all of whom concluded that the medical evidence did not support Mr. Durham's claim for disability retirement. It is undisputed that none of these four doctors knew Mr. Durham or of his claimed protected activity.

The final decision on Complainant entitlement to disability retirement was made by the TVARS Board. It is undisputed that none of the TVARS Board members that participated in the decision knew of Mr. Durham or his asserted protected activity. John Long, one of the TVARS Board members, recused himself from consideration, discussion and voting on the application based on the fact that Mr. Durham had made allegations against him in a previous complaint. I find that Complainant has failed to establish a *prima facie* case for discrimination, because the undisputed facts show that the doctors that concluded that he did not meet the requirements for a TVARS disability retirement and the individuals on the TVARS Board that disapproved his application for disability retirement had no knowledge of Complainant's whistleblower status.

Based on the foregoing discussion, construing all facts in the light most favorable to Complainant, the Court finds that Respondent TVA did not take an adverse employment action against Complainant. The Court further finds that the decision makers had no knowledge of Complainant's whistleblower status.

Respondent is thus entitled to summary decision as a matter of law.

## RECOMMENDED DECISION AND ORDER

It is RECOMMENDED that Respondent's Motion for Summary Decision be GRANTED.

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LARRY W. PRICE  
Administrative Law Judge

LWP/lpr  
Newport News, Virginia

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's Recommended Decision and Order. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file your Petition with the Board, you must serve it on all parties to the case as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001. *See* 29 C.F.R. § 24.8(a). You must also serve copies of the Petition and briefs on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's recommended decision becomes the final order of the Secretary of Labor. *See* 29 C.F.R. § 24.7(d).