



**Issue Date: 05 March 2015**

Case No.: 2013-ERA-00013

*In the Matter of:*

SHERYL A. SWEET,

Complainant

v.

TENNESSEE VALLEY AUTHORITY,

Respondent.

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

This matter arises under the whistleblower protection provisions of Section 211 of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851, and the regulations promulgated pursuant to and set forth at 20 C.F.R. §1978. The Complainant, Ms. Sheryl Sweet, filed a complaint of violation of Section 211. She alleged that her employment was terminated in retaliation for filing a complaint with the Nuclear Regulatory Commission (NRC) reporting potential flooding problems at a nuclear power plant owned by the Respondent Tennessee Valley Authority (TVA). The Occupational Safety and Health Administration (OSHA) investigated the complaint and dismissed it. Ms. Sweet filed an objection to the OSHA determination.

On September 30, 2014, the Respondent filed a motion for summary decision. On October 8, 2014, I issued written notice to inform the Complainant of the rules concerning motions for summary decision. In that notice I granted Ms. Sweet, who is not represented by counsel, 30 days to respond to the motion. To date, no response to the motion has been received from Ms. Sweet.

**SUMMARY DECISION STANDARD**

Summary decision may be granted where it is shown that the non-moving party cannot prove an essential element of the claim, so that there is no genuine issue of fact to be determined at trial. 29 C.F.R. §18.41. A genuine issue of material fact is presented when the record, taken as a whole, could lead a rational trier-of-fact to find for the non-moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The moving party, TVA in this case, has the burden of production to prove that the non-moving party cannot make a showing sufficient to establish an essential element of his 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* at 324.

A judge may grant summary decision when the record (i.e., pleadings, affidavits and declarations offered with the motion and evidence developed in discovery) demonstrates that there are no genuine issues of material fact, and that the moving party is entitled to disposition as a matter of law. 29 C.F.R. § §18.40(d), 18.41(a); Fed. R. Civ. P. 56 (c). In determining whether there is a triable dispute of material fact, a court must review all of the evidence and construe all inferences in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). However, a court should not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150 (2000). The party who brings the motion for summary decision bears the burden of production to prove that the non-moving party cannot make a showing sufficient to establish an essential element of the case.

### **STATUTORY PROVISION**

Section 211 of the ERA encourages employees in the nuclear industry to report safety violations and provides a mechanism for protecting them against retaliation for doing so. *See English v. General Electric Co.*, 496 U.S. 72, 82 (1990). That section states in relevant part:

#### **(a) Discrimination against employee.**

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)

(A) notified his employer of an alleged violation of this chapter;

(B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954 (42 U.S.C. §2011 et seq., 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 this chapter or the Atomic Energy Act of 1954;

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(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 the Atomic Energy Act of 1954, as amended.

42 U.S.C. § 5851(a)(1).

The TVA operates several nuclear power plants, including the Watts Bar, Tennessee facility at which Ms. Sweet was employed. It is an employer subject to Section 211. *DeFord v. Sec'y of Labor*, 700 F. 2d 281 (6<sup>th</sup> Cir. 1983); *Elliott v. Tennessee Valley Authority*, ARB No. 14-020, ALJ No. 2013-ERA-00016 (ARB Sep 17, 2014).

### **BACKGROUND**

This background summary is taken from Ms. Sweet's statement to the OSHA investigation. She was hired by TVA as a Site Licensing Engineer at Watts Bar on June 20, 2011. Her duties included filing necessary paperwork with the Nuclear Regulatory Commission (NRC) and serving as liaison to the NRC residents on site.

Shortly after Ms. Sweet was hired a new manager, Donna Guinn, was put in charge of her group. On September 25, 2011, Ms. Sweet had her first performance review from her original manager and received satisfactory ratings. During the same month it became clear to Ms. Sweet that she was having difficulty communicating with Ms. Guinn.

At about this time the NRC residents asked Ms. Sweet to answer certain questions about the seismic qualifications of circuit breakers used at the facility. She took those questions to the Electrical Group, who did not provide her with the answers. Because of this, she went to Ms. Guinn, hoping she would rectify the situation, but Ms. Guinn failed to provide her with the necessary assistance.

Shortly after this, an analysis of potential flooding risk was conducted. In May of 2012, the NRC resident inspectors asked her about sand baskets near a dam on TVA property. The sand baskets were a flooding precaution and Ms. Sweet asked questions about the flood level. She had difficulty in getting answers and her relationship with Ms. Guinn worsened.

On June 25, 2012, she received a poor rating on her performance evaluation. She was placed on a Performance Improvement Plan (PIP) which required, among other things, weekly meetings with Ms. Guinn. After she missed a meeting she was terminated on November 15, 2012.

### **EMPLOYER'S MOTION FOR SUMMARY DECISION**

TVA has cited two grounds for summary decision. First, that Ms. Sweet did not engage in protected activity that was known to the TVA decisionmakers involved in her termination. Second, TVA asserts that even if she could make a prima facie case, there was a legitimate non-discriminatory reason for her termination, based on uncooperative and insubordinate refusal to comply with her PIP. This second basis would require weighing of evidence and assessments of witness credibility that are not appropriate for a summary decision motion and I will not consider it further.

With regard to its first basis for seeking summary decision, TVA offered several statements in support of the motion:

*Statement of Christopher Riedel*

Mr. Riedel is a TVA employee who was Acting Licensing Manager at the Watts Bar plant in 2011. The Licensing Staff ensures that the plant meets current and new regulatory requirements, tracks commitments to regulatory agencies, and manages licensing issues. In addition, it prepares, coordinates, and reviews responses to the NRC. The NRC maintains an office at Watts Bar where resident inspectors and visiting inspectors work. The plant's Licensing Staff is responsible for interfacing with the inspectors. Ms. Sweet's responsibilities included transitioning issues that the NRC listed on a white board in its office to TVA's computerized system for tracking those issues. These items were listed in the computer system as Problem Evaluation Reports (PER).

TVA performed safety analyses on each of its nuclear power plants in the 1970s and 1980s in accordance with NRC licensing requirements. Those analyses included hydrology studies to assure that each facility would be protected or could safely shut down in the event of a worst probable maximum flood of the Tennessee River in the vicinity of the plant.

The white board as of July, 2012 (Riedel Declaration, Exhibit 2) listed four issues related to hydrology and flooding potential. On July 11 and 13, 2012, Ms. Sweet initiated Service Requests that became PERs. The four PERs are substantially verbatim restatements of the items from the NRC white board and in each case the issue is listed as "NRC identified." Those are the only four PERs related to hydrology that Ms. Sweet initiated while employed on the Licensing Staff.

*Statement of Kenneth Miller*

Mr. Miller is an inspector employed by the NRC who works as a Resident Inspector (RI) at the Watts Bar plant. He is familiar with Ms. Sweet through her work as a liaison between the TVA and the NRC. She did not personally raise safety issues, rather she tried to get the answers to the safety concerns brought by the NRC. When Ms. Sweet would ask questions of TVA employees, they would have known that the questions were actually coming from the NRC and not from Ms. Sweet personally.

Mr. Miller has heard reports of the difficult professional relationship between Ms. Sweet and Ms. Guinn. Ms. Sweet believed that Ms. Guinn had a low level of technical knowledge and was not a particularly good manager. He is unclear as to why Ms. Sweet received the treatment that she did from Ms. Guinn, including being placed on a performance plan, as he considered Ms. Sweet to be a hard worker, who attempted to get the NRC information from the engineering department when they asked.

### *Statement of Robert Monk*

Mr. Monk is a NRC RI at the Watts Bar plant. He is familiar with Ms. Sweet from her liaison work between the NRC and TVA. While she was at Watts Bar, most of the problems the NRC was focusing on centered around flooding concerns.

Mr. Monk wrote that “[i]n regards to Ms. Sweet’s termination, although I do not know anything definitively, it should be pointed out that it was the NRC and NOT Ms. Sweet who actually raising [sic] the flooding questions.” [capitalization in original]

It was clear to Mr. Monk that Ms. Sweet did not get along with Ms. Guinn. She considered Ms. Guinn to have an autocratic leadership style and weak technical abilities.

Mr. Monk believed that the problems between Ms. Guinn and Ms. Sweet had to do with them simply working together and nothing to do with the flooding issue itself. His opinion is based upon the understanding that TVA knew that the NRC, rather than Ms. Sweet, was asking the flooding questions. He viewed their problem as a personality clash.

### **DISCUSSION**

The hydrological concerns for potential flooding at the Watts Bar were a safety concern within the scope of the statute. However, all of the evidence is that the issues were raised by the NRC inspectors. The TVA personnel who learned of the issues and the inspectors who raised them all understood that Ms. Sweet was transmitting the inspector’s concerns, in accordance with her assignment as a liaison, and not raising them on her own.

It might be argued that in transmitting the issues posted on the NRC white board to TVA management Ms. Sweet was within Section 211’s definition of protected activity because she “notified [her] employer of an alleged violation of this chapter.” 42 U.S.C. § 5851(a)(1)(A). However, it is clear from the evidence submitted that the white board system was designed to make TVA aware of issues. The NRC inspectors, by posting their issues on the white board were the ones who “notified” TVA. TVA’s internal recordkeeping system involved someone entering the NRC white board issues into its computer system. That could have been done by any employee, or even by the NRC inspectors themselves if that had been the arrangement worked out between the agency and the company. It was done in this case by Ms. Sweet.

It would be possible to bring Ms. Sweet’s activity within the scope of the statute by construing the word “notified” in Section 211(a)(1)(A) very broadly. Such a broad definition would mean that someone like Ms. Sweet, assigned as a liaison representative, would become a protected whistleblower any time she performed her assigned duties. This would be so whether or not she agreed with the inspectors’ concerns. Such a construction could be extended even further to a data entry clerk inputting the concern into the company’s data base. To accord whistleblower protection, the notification referred to in Section 211(a)(1)(A) should involve more than passively transmitting safety concerns raised by government regulators.

## ORDER

The Respondent's Motion for Summary decision is **GRANTED** and the complaint is **DISMISSED**.

KENNETH A. KRANTZ  
Administrative Law Judge

KAK/mrc

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

At the time you file the Petition with the Board, you must serve it on all parties 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 20001-8002. You must also serve 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. *See* 29 C.F.R. § 1979.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an

original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b). *Benson v. North Alabama Radiopharmacy, Inc.*, ARB No. 08-037, ALJ No. 2006-ERA-1