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Mitchell v. Arizona Public Service Co., 91-ERA-9 (ALJ July 2, 1992)

U.S. Department of Labor
Office of Administrative Law Judges
525 Vine Street, Suite 900
Cincinnati, Ohio 45202

DATE: July 2, 1992
CASE NO: 91-ERA-9

In the Matter of

LINDA E. MITCHELL
Complainant

versus

ARIZONA PUBLIC SERVICE COMPANY
and
ARIZONA NUCLEAR POWER PROJECT
Respondents

APPEARANCES:

David K. Colapinto, Esq.
Stephen M. Kohn, Esq.
Kohn, Kohn and Colapinto, P.C.
Washington, D.C.

Alice L. Bendheim, Esq.
Phoenix, Arizona
Attorneys for Complainant

George H. Lyons, Esq.
Steve C. Thornton, Esq.
Snell and Wilmer
Phoenix, Arizona

Attorneys for Respondents

BEFORE: Rudolf L. Jansen
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises out of a complaint of discrimination filed pursuant to Section 210 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C.A. Section 5851, *et seq.*, hereinafter called the ERA. The implementing regulations are found at 29 C.F.R. Part 24. The ERA affords protection from employment discrimination to employees in the nuclear industry who commence, testify at, or participate 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.A. Section 2011 *et seq.* The law is designed to protect "whistleblower" employees from retaliatory or discriminatory actions by the employer.

On September 24, 1990, Linda E. Mitchell (hereinafter LEM) directed a complaint against the Respondents. Following a fact-finding investigation, the Acting District Director, U.S. Department of Labor concluded that the complaint allegations could not be substantiated because:

No evidence has been found which would support the allegation of discriminatory acts taken against Linda Mitchell by Arizona Public Service. Other factors, unrelated to Ms. Mitchell's contact with the Nuclear Regulatory Commission regarding safety issues, appear to be the basis for Ms. Mitchell's allegations.

A telegram appeal was taken by LEM of that determination which gave rise to the proceeding here.

Pursuant to notice, a hearing was held in this case from July 8 through July 12, 1991 and August 26 through August 29, 1991 in Phoenix, Arizona. Subsequently, on October 21, 1991 the final testimony was received in Cincinnati, Ohio. Both original and reply briefs were submitted by the parties and the record of this case was finally closed on January 24, 1992. At the time of hearing, the parties were afforded full opportunity to present evidence¹ and argument.

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The findings of fact and conclusions of law which follow are based upon my observation of the appearance and demeanor of the many witnesses who testified at the hearing and upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Each exhibit received into evidence, although perhaps not specifically mentioned in this decision, has been carefully reviewed.

CREDIBILITY FINDINGS

The transcript of the hearing in this case contains 1,856 pages. Numerous witnesses testified. Although the record contains some inconsistencies in testimony, I find the separate testimonies of the twenty-nine individual witnesses to be credible with the exception of those witnesses specifically enumerated below. I specifically find that the testimony of Linda Mitchell was credible. Immediately following the taking of the testimony of all witnesses, I made individual credibility findings as to each witness.

I specifically find the testimony of Patricia L. Gibbons and Stephen Miller to have been less than forthright and honest. Significant portions of the testimony of these two individuals appeared to me to have been self serving, biased, inconsistent with either documentary or other testimonial evidence, and I choose not to believe any of it. I believed none of Miller's testimony as it related to a conversation he allegedly had with Abdy Kahnpour. Therefore, no weight will be given to the testimony of these two individuals.

I also find the testimony of Kerry Johnson to be essentially credible but he seemed to be less than spontaneous with his responses. My impression was that he wanted to give the right answer. Therefore, I discount his testimony accordingly.

Finally, I also give no weight to the testimony of Blaine Ballard as it relates to the critical meeting in the office of Jim Reilly. His recollection of events is simply not consistent with other testimony in this case. His testimony in other areas, however, appeared to me to have been credible and I so find.

ISSUES

1. Whether Respondents discriminated against Linda Mitchell by lowering her 1990 employee performance appraisal in retaliation for having engaged in protected activity.
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2. Whether Respondents discriminated against Linda Mitchell by subjecting her to a hostile work environment in retaliation for having engaged in protected activity.
3. Whether all instances of harassment comprising the hostile work environment claim, excepting the Tim Hall incident, are time barred.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

GENERAL BACKGROUND

Linda E. Mitchell (hereinafter LEM) was 46 years of age at the time of the hearing. She is married and has four children. She is a high school graduate. Prior to commencing work at the Palo Verde Nuclear Generating Station (hereinafter PV) she worked for the Daniel Construction Co., Bechtel Power Corporation and also Vitro Corporation of America. The work with both Daniel and Bechtel was in the nuclear power industry and the work at Vitro involved detailed layout in the drafting of circuits used in the manufacture of missile systems for the United States Navy.

Her work for Daniel took her to the Calloway Nuclear Power Plant in Missouri where she was in a supervisory position and also to the Wolf Creek Nuclear Power Plant in Kansas where she

held a supervisory position. Her work location for Bechtel was the Calvert Cliffs Nuclear Power Plant in Maryland where she held a variety of engineering related positions.

Although LEM did not have formal training as an engineer at the college level, she did participate in a variety of corporate training programs. Her work record supports a finding that she had been placed in consistently more responsible positions by each of these companies and that she did perform considerable supervisory-type work.

In January 1985, LEM accepted a position with Arizona Public Service Company (hereinafter APS) as a senior electrical engineer technician in the Operations Engineering Department at PV. She was subsequently promoted to the positions of associate engineer, engineer ICC, engineer-electrical systems, mechanical engineer II and finally an electrical engineer II. She was hired on January 28, 1985 and progressed through these positions receiving her

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last promotion on August 11, 1990, her earnings had increased from \$25,200 to \$44,640 in annual compensation. Her record of earning increases was uninterrupted over the years.

The nuclear operation at PV consisted of three separate nuclear power plants. LEM was employed at Unit 3 as a Systems Engineer in the areas of emergency lighting, essential lighting, normal lighting, and security lighting. The Systems Engineer is responsible for initiating documents to take care of plant problems, resolving issues with maintenance, interfacing with the appropriate departments as necessary, initiating design change requests and generally is required to be knowledgeable of all events relating to the operation of the systems. She was personally involved in the maintenance of all lighting systems.

LEM's position brought her into contact with other groups within the organization.² She interfaced with the Quality Assurance Department (hereinafter QA) on numerous occasions and also with the Compliance Department. QA is in charge of assuring that the quality of the product is sustained and they also are responsible for the Employees' Concerns Program. Compliance, on the other hand, is in charge of issuing Licensing Event Reports (hereinafter LER's) and they also carry the responsibility of dealing with all of the governmental regulatory agencies. Additionally, LEM also had contact with the Nuclear Engineering Department (hereinafter NED). That was the organization which did the design work for the nuclear facility. She was involved in coordinating design changes.

CHRONOLOGY OF EVENTS

The record of this case contains evidence relating to the activities of LEM from as far back as late 1985 and extending through October of 1990. However, on brief the Complainant argues that "The record demonstrates that between September 1989 and September 1990 Mrs. Mitchell was subjected to a series of escalating incidents, which taken together, constitute pervasive or severe hostility to her whistleblowing activities." Therefore, it would appear that the Complainant has conceded that all incidents occurring prior to September of 1989 are not

actionable either independently or as part of a continuing violation by APS. However, this evidence may be considered as relevant background evidence of past practices which might be

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useful in analyzing present patterns of behavior. *Malhotra v. Cotter & Co.*, 885 F.2d 1305 (7th Cir. 1989). Thus for purposes of this decision, I will not make detailed findings of the incidents which occurred prior to September of 1989. I will, however, make summary findings of these events for purposes of evaluating that evidence as being relevant background information.

LEM's initial whistleblowing activity occurred in late 1985 when she reported to the Nuclear Regulatory Commission (hereinafter NRC) a problem at PV involving the failure of emergency lights to burn for a required eight hour period. LEM testified that this was the first occasion in all of her years of employment in the nuclear industry that she had carried a safety problem to the NRC. Following testing by APS of the emergency lights involved, APS prepared a LER to document the incident. An LER is required by federal regulation to be submitted to the NRC by nuclear utilities when events of some consequence occur at a facility. An LER can result in the NRC imposing civil penalties upon the utility. This record shows that management at APS scrutinize very seriously both the facts relating to the filing of the LER and also the consequences from the filing of an LER. Following the issuance of the LER concerning the emergency lighting event, LEM testified that she later questioned whether the content of the LER was entirely accurate. She noted a change in the attitude of some management personnel following this sequence of events.

Also in 1985, LEM questioned the EE 580 Computer Program which maintained the configuration of all electrical equipment for the entire job site. She previously had experience with the system as a result of her employment with another company prior to arriving at PV. LEM had also expressed concern about vendor manuals not being available at PV and in other instances the manuals were not currently updated.

In 1987, LEM raised concerns with management regarding the configuration control of plant drawings and also once again regarding the EE 580 Computer Program. She authored a letter to management noting frustration with the manner in which the EE 580 concern was being addressed and threatened to take the problem to higher levels of management. The letter was directed to a Mr. E. C. Sterling, Manager of NED. NED is the Nuclear Engineering Design Department within APS which was responsible for the design of the entire PV facility. LEM testified concerning a cooling of

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the relationship between her group and also that of NED following the issuance of this letter. However, approximately one week later she directed a letter to an APS vice president once again raising the configuration control and EE 580 concerns to a higher level. After sending that letter, she attended an early morning meeting with NED management. She testified to an unfriendly

attitude toward her by management representatives at that meeting. Following that meeting, APS established a task force to study the concerns raised and a written report was later issued by that group. LEM also carried her concern in this area to the NRC.

On March 31, 1988, LEM wrote a memorandum to NED concerning control wiring diagrams (hereinafter CWD). She expressed concern about NED's recommendation for implementing a CWD program at PV. There was testimony that the NED supervisor involved with responding to the memorandum of LEM was upset with her comments.

The Sowers Memorandum

On April 11, 1988, a memorandum was issued by Gerald Sowers (hereinafter Sowers) to the entire Engineering Evaluations Department (hereinafter EED) concerning the routing of department-generated correspondence. It required that all correspondence leaving the department must go out at least under the discipline supervisor's signature and that the manager and director were to be copied. (CX 5) This new policy would in effect prevent employees from corresponding with others without obtaining a supervisor's signature on the material. The memorandum itself contains no restrictions as to its applicability. LEM interpreted this memorandum to mean that management would no longer tolerate her having written contacts with the NRC or other groups without first obtaining the approval of her discipline supervisor.

The Marsh Memorandum

On January 18, 1989, a memorandum was issued by Walter C. Marsh (hereinafter Marsh) who is an APS manager. The memorandum contains two ideas. Initially, he makes a statement concerning his personal management philosophy and secondly, he directs a method as to:

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[A]n appropriate way to interact with outside organizations so that the results of the outsider's efforts are not unduly biased by a few vocal individuals venting frustration. It is unfortunately typical for unsophisticated individuals to believe that some outsider can do more to resolve their frustrations than their own organization can

(CX 7) This memorandum was issued by Marsh immediately prior to an INPO appraisal of the facility. INPO stands for the Institute for Nuclear Operations. INPO is a nuclear industry supported organization which conducts inspections of nuclear power plants to assess plant weaknesses. The reports of INPO are issued to the utility itself and also to the NRC. As a result of the implementation of policy stated in the Marsh and Sowers memorandums, LEM was later prevented from bringing to management's attention a problem concerning the emergency lighting inverter. (CX 8) LEM later came to believe that management at APS had not properly addressed the emergency lighting inverter problem identified in her written memorandum and she subsequently filed a complaint with the QA Hotline and also with the NRC.

Unit Shutdowns

In the latter part of February, 1990, William F. Conway (hereinafter Conway) advised company personnel that Unit 3 may have to be shut down because of emergency lighting problems. Daniel W. Smyers (hereinafter Smyers) did not believe that the company had a very good understanding of the nature of the emergency lighting problems. (Tr. 1392) The meeting with Conway followed the AADV event which caused Unit 3 to be closed down. The concern of management and apparently other employees was that the unit would be held down. That concern was based, at least in part, upon emergency lighting problems.

All three units had previously been shut down. On March 3, 1989, Unit 3 was shut down due to an interruption of offsite power. (Tr. 373; Holiday Tr. 49) The problems included the steam control bypass system, the atmospheric dump valve operation, the reactor-power cutback system, the load-shedding device, the charging-pump, and the lighting. (Tr. 374-75)

Unit 1 tripped two days later on March 5, 1989 because one of the twelve atmospheric dump valves failed to work. (Tr. 375-76)

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On March 15, 1989, Unit 2 was also taken off line because the dump valves had not operated in Unit 3 and one had failed in Unit 1. (Tr. 376) APS was not allowed to restart the units until certain actions were completed to the satisfaction of the NRC. (Holiday Tr. 54-55)

As of early summer 1989, all three PV generating units were not running. (Tr. 1091) It was common knowledge that it was important to APS from a financial standpoint to have PV operating. (Tr. 1092) So, Conway's announcement in February of 1990 concerning a possible shutdown was considered to be a very serious matter.

EVENTS OCCURRING BETWEEN SEPTEMBER 1989 and SEPTEMBER 1990

The Blaine Ballard Incident

By way of background, on September 5, 1989, Blaine E. Ballard (hereinafter Ballard) received from the NRC a Notice of Violation and Proposed Imposition of Civil Penalty. The asserted penalty amount was \$250,000 of which \$100,000 related to emergency lighting deficiencies. (CX 24)

LEM used the QA Hotline to raise safety concerns on a relatively regular basis. She had made approximately fifty complaints by September of 1989 and there is evidence that Hotline personnel were hostile toward her. Ballard, who was responsible for ensuring that employees were not harassed or retaliated against for raising safety concerns, personally met with LEM in April of 1989 concerning some of her complaints. That was the first occasion that Ballard had met Ms. Mitchell and the meeting related to a complaint that someone had removed material from her desk. They also discussed an LER which LEM did not believe adequately apprised the NRC of the event. During the course of that meeting, LEM questioned the competence of the highest levels of management at APS. Later, Ballard spoke with the Director of Technical

Services concerning questions raised by LEM at this meeting. There is also evidence that Ballard telephoned LEM on more than one occasion in 1989 seeking to speak with her.

Henry Johnson (hereinafter Johnson) was a co-worker of LEM who shared a cubicle and a phone with her between 1988 and 1989. On September 14, 1989, Johnson was waiting outside the office of

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James Reilly (hereinafter Reilly) who was the Acting Director of EED. Credible testimony shows that Sowers, a manager in EED was in Reilly's office and the door was open. Kerry Johnson, who was a supervisor in EED, was also waiting in a corridor outside the Office and he later entered the office to converse with Reilly and Sowers. Later, Ballard moved down the corridor and stopped, in front of the door leading to Reilly's office and stated "that bitch Linda Mitchell is causing me and my people trouble." He also indicated that LEM was "telling a lot of lies." Ballard demonstrated an angry demeanor when he spoke about LEM and his voice was loud. Apparently, Ballard indicated that because APS was experiencing so many problems with the emergency lighting system, that the System Engineers in that area "should be fired." One of the System Engineers was LEM.

Kerry Johnson testified that he was uncomfortable about what was being said by Ballard and he ushered Ballard into his office and closed the door so as to make the conversation private. Prior to this conversation in Reilly's office, Ballard had just returned from a meeting with senior management officials where NRC violations for emergency lighting had been discussed. The formal copy of that notice was mentioned earlier and resulted in the fines as indicated. Upon learning of this incident, the record shows that LEM was disturbed by these events.

Following this incident, Keith Davis (hereinafter Davis), who is the Director of Human Resources at PV, investigated the incident as one of potential employee harassment. He spoke with Ballard and Reilly concerning the events surrounding the discussion in Reilly's office and based upon these two interviews, he concluded that allegations of harassment against LEM were unfounded.

Conway first became aware of the Ballard incident by way of word of mouth from one of his subordinates. Apparently later he received a handwritten note from LEM together with an attachment containing her version of the incident which she apparently referred to the NRC. (RX 3) Upon learning of the incident, Conway sought out Ballard and had a discussion with him concerning the incident. He advised Ballard that he did not consider the conduct to be professional or acceptable, if in fact it occurred.

He initiated an investigation by a private firm. At the

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same time, he had Davis, the Human Resources Director, conduct a separate investigation. In his conversation with Ballard, Ballard denied making the derogatory comments about LEM. Ballard was not given a reprimand in writing nor was any type of an oral reprimand given by Conway as a result of this incident. Conway did not speak to any other individual personally about the events concerning the Ballard incident. Conway was aware that LEM was not a party to the conversation at the time it occurred. Davis, who was the Human Resources Director for the PV facility, interviewed Ballard and Reilly about the incident but he did not interview Henry Johnson, Kerry Johnson or Gerald Sowers who were also witnesses.

Smyer's Warning to Keep a Low Profile

LEM also testified concerning a conversation she had with Smyers concerning her standing with the management of APS. Smyers was her, immediate supervisor. She initially testified that on January 19, 1990, she had a conversation with Smyers in which he warned her that management was going to get rid of her and she should therefore keep a low profile. (Holiday Tr. 92; CX 11 p. 73) LEM testified that she made handwritten notes of her conversation with Smyers at the time the conversation was transpiring and that she later recorded it in a more readable fashion at lunch time. Therefore, her testimony was that the recording was made contemporaneously with the conversation. However, following the resolution of an evidentiary problem relating to the admissibility of all of her diary notes, she was once again questioned on her written memorandum and testified that the conversation took place on or around July 13, 1990. Additionally, her handwritten note also carries the date July 13, 1990. (Holiday Tr. 98; CX 11 p. 73) I believe that the conversation occurred, but the date is uncertain.

Smyers acknowledged advising LEM to "keep a low profile." In fact he did that on several occasions. He was concerned that other employees would be talking about her activities while not fully understanding the nature of what she had been doing. Therefore, he suggested that she keep a low profile in order to diminish the office conversation concerning her whistleblowing activities. This record contains evidence establishing that there existed substantial newspaper accounts together with radio-talk show appearances by LEM which would have raised her profile in regard to her whistleblowing activities.

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Ramsey's Testimony and the Yellow Stickies

Charles B. Ramsey (hereinafter Ramsey), a former NRC Investigator, also testified. He is currently employed by the U.S. Department of Energy, Office of Nuclear Safety but was with the NRC from 1982 until July of 1990. His specialty was fire protection and nuclear safety which included responsibility for emergency lighting. Before being employed by the NRC he worked for five years in a position which related to fire protection. I found Ramsey to be a forthright and honest witness. I will give substantial weight to his testimony in view of the fact that he was an outside investigator assigned to an investigatory function at the PV facility, and I believe that his objective view of circumstances at PV as they relate to LEM was perceptive.

As previously noted, in March of 1989, APS had experienced a reactor trip and loss of power, and the unit was unable to establish natural circulation because the emergency lighting needed to open atmospheric dump valves had failed. In 1990, Ramsey was sent to PV to inspect the emergency lighting, modifications made to the atmospheric dump valves, and the emergency diesel generator. He was assigned to PV because he had more background in Appendix R, which relates to an acceptable fire protection system. The regulation is intended to preclude the fire and fission process from becoming simultaneous problems as occurred at Chernobyl.

Ramsey identified the confirmatory action letter, (JX 14), issued on March 7, 1989 which instructed APS to incorporate lessons learned from the March 3, 1989 event in Unit 1 before it was restarted. Ramsey explained that APS must conform to the points made in the letter in order to operate the facility. It was his job to see that these things were accomplished.

On February 7, 1990, he conducted an inspection of the emergency lighting system. Following a period of inspection, Ramsey voiced some displeasure at both the quality of and the ability to maintain the emergency lighting system.

He requested LEM to provide documentation pertaining to the record of failures, the EERS, and the technical manual relating to the light operation. This material was accumulated in a folder which she provided to Ramsey. The contents of the file provided by LEM contained nothing secretive. Some of the

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documents contradicted statements by management concerning the emergency lighting. The Compliance Section never acknowledged the existence of those documents. Data concerning the breakdown or failure rates on the emergency lighting was not a company document, but that data was generally highlighted by LEM. She had highlighted one of the documents in the folder by placing a three-by-five inch yellow sticky on the material so as to call his attention to it. That document related to the emergency lights.

Prior to the time that Ramsey left APS following his inspection tour, someone inquired as to whether he could photocopy the inspection documents that Ramsey had accumulated and mail all the material back to him. Ramsey agreed and gave the file folder to a representative of the Compliance Section.

In all, thirty to forty people provided information to Ramsey at PV. Many of the documents he was given were not routed through Compliance which he indicated frequently happens on inspections. He also testified that it is not unusual that Compliance at a nuclear power plant will ask for copies of documents that the NRC takes following an inspection. The purpose of this is to allow the company to keep track of what the NRC had been provided.

Several days after the file folder had been given to Ramsey, it was returned to Smyers by Duane Kanitz (hereinafter Kanitz) of APS Compliance. Smyers was asked to review the file contents. Kanitz expressed concern that the yellow sticky in the folder contained the editorial

comments of LEM. Smyers later removed the yellow sticky himself in the presence of LEM and indicated to her that the editorial comments were not necessary. Smyers testified that he told LEM that she didn't need to make editorial comments with the material. The sticky was apparently removed in the presence of LEM by Smyers. A complete copy of the file was retained by Smyers after he returned the original file to Kanitz. Later LEM advised Smyers that some document or documents had been removed from the folder and Smyers advised her to copy those items and provide Ramsey with the material. (Tr. 1348, 1349) Later, LEM transmitted the folder once again to Ramsey.

After Ramsey gave the original file provided to him by LEM to members of management, portions of the file were removed, including the yellow stickies which contained the handwritten

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notations made by LEM. The data which had been removed from the file concerned the failure history of the emergency lights. The substance of Ramsey's testimony was that the information being provided by LEM concerning the inadequacy of the emergency lights was valid and would have been helpful in arriving at his conclusions. He had observed a problem with the lighting system at PV in hot areas. He thought APS ought to be doing more frequent preventive maintenance surveillances. APS believed that they only had a five percent failure rate, but the NRC saw the failure problem as being more prevalent and also questioned the suitability of the design limitations on the units. In Ramsey's opinion, APS would not own up to the emergency light problem. The results of the walk-down were codified in an April 24, 1990 letter from the NRC to APS in regard to the inspection of the PV Units 1, 2 and 3.

Following another routine inspection in May and June of 1990, the NRC issued its findings by way of letter dated July 5, 1990. (CX 30) The condition of some aspects of the emergency lighting system is explained in one of the paragraphs included within the body of that letter. That paragraph reads as follows:

We are concerned about the apparent unreliable performance of the Palo Verde emergency lighting system, as evidenced by numerous failures of emergency lighting system components. Excessive failures and the adequacy of the emergency lighting system design implementation were addressed by ANPP in LER 86-059. Problems have been identified in the emergency lighting system by the NRC and by your staff since 1984. The same problems have continued to exist over a six year period, and were a topic of escalated enforcement action and a civil penalty documented in our letter to you dated September 1, 1989 (EA 89-88). Furthermore, emergency lighting failure data originally provided to NRC inspectors in March 1990, needed to be revised on several occasions, with the most recent revision occurring on June 29, 1990. The need for repeated revision of this data appears to be another indicator of the need for greater engineering and quality oversight involvement with the emergency lighting system.

Clearly, the problems associated with the emergency lighting

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system were serious and were a longstanding concern to both management and the NRC.

Ramsey has known LEM since 1984. Between 1984 and 1990, he only saw LEM about six or eight times and during that time he spoke to her fewer than six times. He indicated that he had a good working relationship with LEM and that she had provided him significant information concerning the matters that he was charged with investigating. He found her to be an enthusiastic employee who would inquire about even minor problems. Ramsey had no personal knowledge of LEM's alleged harassment at PV. He only observed LEM once or twice a year in the presence of her co-workers. He was aware of allegations of harassment directed against her, and although the NRC was investigating those allegations, he did not pay much attention to them. However, he believed that there were times when LEM had misconceptions about the jurisdictional limits of the NRC. Ramsey thought that she had perceptions of technical issues that were not relevant to his investigative role at APS.

Ramsey also testified that most of the contacts he had at PV were favorable. He had found management to be cooperative but was surprised that despite the overwhelming objective evidence, they still denied having a problem with the emergency lighting system. He was suspicious of things that he was being told by company representatives.

Ramsey also testified concerning tensions which existed between the NRC and APS. APS management did not believe that the NRC had given them credit for some of the corrective actions which they had taken in the area of fire protection. Ramsey indicated that APS should not have been surprised by the NRC findings since he briefed management daily on his activities. APS had indicated that Ramsey was aggressive, reviewed issues in detail disproportionate to their safety significance, and lacked interpersonal skills. Obviously, Ramsey disagreed with these contentions.

Order to Destroy Emergency Lighting Report

On February 26, 1990, LEM and Smyers concluded a report entitled "PVNGS Lighting System Evaluation." One of Ramsey's stated purposes for conducting his inspection during this same month was to inspect the condition of the emergency lighting system. The report contains a basic introduction, a paragraph

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dealing with an initiating event which refers to the Unit 3 trip on March 3, 1989, a problems section, an evaluation of corrective actions taken and recommendations made by the authors. Ramsey indicated that there was truth in the problems identified in this report. The report served as a basis for a second NRC inspection of the emergency lighting and fire protection systems at PV in March of 1990.

Smyers considered the report as being a "cover your ass" or "C.Y.A." document. He was concerned with problems associated with the emergency lighting system identified by the NRC and feared they would be blamed upon him. The document discussed a variety of safety issues

also related to emergency lighting at PV. The document also expressed concern that APS may be in potential violation of its Final Safety Analysis Report (hereinafter FSAR), which is a licensing document that also relates to safe shutdown procedures. These are extremely serious matters in that an FSAR is required to be submitted to the NRC by a licensee before an NRC license can be issued.

On February 26, 1990, Smyers presented a copy of the report to management. He was directed to limit the distribution of the document because there was too much information out on problems associated with the emergency lighting system already. Immediately following the meeting with his superiors, Smyers directed his subordinates to erase the document from the computer and to get rid of all excess copies. Both Smyers and Mitchell retained a copy which Smyers suggested was his "C.Y.A." memorandum.

At the time that this report was submitted to management, APS was conducting testing on emergency lighting on all three units. As was evidenced by Ramsey's presence at the facility during this period, the NRC was interested in these test results. Smyers had retained a copy because he believed that the subject of emergency lighting was not concluded and that he probably would have an opportunity to present the document to management at a later date.

Peer Pressure Memorandum

For many years, APS had in place at PV a Quality Assurance Hotline Program which was primarily an employee program for use when an individual felt he had a concern with safety and that

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concern was not being addressed by either his immediate supervision or management generally. The program had as many as twelve investigators and supervisors but when Ballard arrived in March of 1989, only three employees were involved. The QA Hotline only took safety concerns from employees. Ballard had full responsibility for this program.

In late 1989, APS introduced a new Employee Concerns Program which was a broader version of the QA Hotline Program. The Employee Concerns Program replaced the QA Hotline. This Program was implemented in order to incorporate management into the resolution of questions raised by employees. Concerns raised in this program were not investigated by an employee's immediate supervisor but rather a management individual who was a level or two above. Management was directly involved in resolving questions raised through this program and that distinguished it from the old QA Hotline Program. An effort was made by APS to maintain the confidentiality of employees who called either the QA Hotline or the Employee Concerns Program. However, there is evidence that the confidentiality was being compromised.

Conway introduced the Employee Concerns Program by way of a video which was shown to employees. (RX 1 p. 164) Conway's comments indicate that any concern involving safety or quality at PV should be reported, and the employees were advised that they were protected

against harassment, intimidation or retaliation for identifying safety concerns. Conway suggests that APS be given the first opportunity to hear and respond to the concerns of employees but that the employee also has the right to take those concerns directly to the NRC.

APS also had provided a written statement to employees captioned "Expectations for All Employees." (RX 1 p. 168) The document is not dated nor is the author identified. The preliminary note indicates:

These expectations are fundamental to the way we do business. How well we meet these expectations will determine how successful we are in meeting personal, departmental and company objectives.

The individual paragraphs of the statement deal with the subjects of ethical and professional conduct, accountability and continuous improvement in performance, community involvement,

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communication and other employee improvement subjects. In addition, the statement also contains a section captioned "Loyalty to APS, to Management and to Each Other - Team Work." That section suggests that the employee should maintain a positive attitude and stand up and support the organization. It also contains a notation to "initiate peer pressure on the constant complainers." The statement contains another section captioned "seek out, identify, and solve problems at the lowest appropriate level." This section suggests that management be made aware of problems and that the problems be taken to the individual's boss. It is urged that problems be solved within the individual's area of responsibility.

APS Memoranda in February and March, 1990

In late February or early March of 1990, Conway testified that he had been made aware that LEM had expressed concern for her personal safety. He could not recall that specific measures were instituted to have those fears investigated but rather he relied upon written policy statements of the company indicating that employees ought to be able to perform their jobs without being admonished for it. (Tr. 832, 833)

The record also contains a memorandum authored apparently by T. H. Cogburn and concurred in by Sowers which indicated that these two individuals had met with LEM to discuss her concerns relative to her personal safety as a result of problems with the emergency lighting at PV. (CX 13) These two managers assured her that the issues she had raised seemed to be accurate and appropriate but they questioned her need to contact her attorney rather than approaching management to resolve the problem. LEM was apparently receiving, on a second-hand basis, derogatory comments from the staffs of all three units about her "trying to shut Palo Verde down again." She experienced some problems with getting work orders in Unit 3 and during a walk-down of the emergency lighting system in Unit 2. The memorandum also codifies verbal harassment of LEM in Unit 1. LEM requested that Sowers and Cogburn issue a memorandum commending all employees on their recent efforts in the emergency lighting issue.

Conway testified that although this is the type of information he would like to receive and although the memorandum shows that he was provided a copy, he did not recall receiving one. The memorandum requested by LEM to soothe employee animosity toward her was never issued.

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This incident was investigated by George Weiman, (hereinafter Weiman) who is a security investigator for APS. Weiman telephoned LEM who refused to give him any information but rather referred him to her attorney. LEM advised Weiman that the matter had been discussed with Cogburn, so Weiman coordinated the investigation through Cogburn. Cogburn indicated that after discussing the situation with LEM, he believed that her concerns never really materialized. (Tr. 1201) Weiman offered a report of his investigation which was dated March 6, 1990 which was the day after Cogburn's meeting with LEM. (RX 12) Weiman did not seek to determine the identity of the person or persons who made any of the alleged threats.

1989 Memoranda

APS management had issued a variety of memoranda dealing with management concerns relating to safety, harassment and the professional treatment of workers. On July 14, 1989, a memorandum was issued concerning the QA Hotline. The memorandum indicates that confidentiality of individuals who present concerns would be maintained. (JX 26) On May 18, 1989, Conway issued a memorandum dealing with his standards and expectations of all employees. The memorandum indicates that he expects all employees to commit to the standards shown. (JX 34) On June 8, 1989, Conway issued a memorandum on employee nuclear safety concerns. The memorandum indicates that each employee is responsible to maintain nuclear safety and to report safety concerns. The cover letter for the policy indicates:

This policy applies to management, supervisory, and working-level personnel including contract employees. Harassment, intimidation, discrimination, or any other form of retaliation against persons who raise safety concerns will not be tolerated.

The policy statement was attached to this memorandum. The policy statement indicates that it is APS company policy to encourage employees with nuclear safety concerns to bring those concerns forward. (JX 35) On September 21, 1989, Conway issued another memorandum dealing with the subject of reporting employee concerns relating to safety issues. The memorandum notes that employees are protected by law against harassment, intimidation or retaliation for identifying nuclear safety concerns within the units. (JX 36) On October 13, 1989, Levine issued a policy

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statement which indicates in part:

[W]e failed to achieve the degree of excellence necessary in the areas of vigorous self-criticism, of creating a work environment where criticism is eagerly sought, analyzed and acted upon, of creating a work atmosphere that encourages thoughtful, critical assessment of all phases of plan operation, and one in which operations are conducted in a formal, conservative manner. Our failure to do the aforementioned things acceptably resulted in the problems we had in the early part of this year. We are now embarked upon a vigorous effort to improve our performance in these critical areas.

On October 25, 1989, another memorandum was issued by A.N. Howard in the Contracts Department which was directed to companies providing contract labor assistance to Palo Verde. The subject of the memorandum was the company policy on employee communications and concerns. A copy of the company policy was attached to this memorandum and distributed to employees performing contract labor to APS.

The Tom Berlin Incident

On February 28, 1990, an incident allegedly occurred involving a Thomas W. Berlin (hereinafter Berlin) in the Unit 3 work control trailer. The incident relates to a conversation which Berlin had with Patricia Gibbons and which involved LEM. Ms. Gibbons prepared a written memorandum of this alleged conversation. (CX 21) As was noted earlier, I did not find the testimony of Ms. Gibbons to be credible in any way and, therefore, I will not consider it as it relates to this alleged incident.

Berlin testified concerning a conversation that he had with Ms. Gibbons on approximately this date. He denied using the type of profanity included in the memorandum written by Ms. Gibbons and indicated that Ms. Gibbons was agitated at the time she entered the work trailer. He acknowledged kidding her about certain aspects of her job. The conversation lasted no more than a couple of minutes and apparently only incidental remarks about LEM were made. The record does not indicate that any of those remarks were derogatory.

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The Gerald Sowers Incident

Gregg R. Overbeck (hereinafter Overbeck) testified at some length concerning the budgetary problems being experienced by APS during this period. He noted that the PV facility was experiencing large overtime rates on the order of twenty-five percent and high absenteeism. It also became necessary to release some of the large contingency of contract engineers which had been hired to resolve the numerous problems they had experienced. He testified that in the early summer of 1990, the APS operation was moving into a new phase. Following the shutdowns of the three units, the company was looking forward to having all three units operating. Unquestionably, based upon the Overbeck testimony, APS was experiencing a significant financial drain from this operation. However, he denied that there existed any linkage between the financial problems experienced by APS and the whistleblowing activities of LEM.

On July 5, 1990, NRC Region V issued an inspection report for PV Units 1, 2 and 3. (JX 89) The report notes that the NRC inspection found that several of the PV activities were not conducted in full compliance with NRC requirements. The report notes concern that the PV emergency lighting system was apparently unreliable based upon numerous failures of components, and that the problems dated back to 1984.

LEM first saw a copy of this report on July 6, 1990 as a result of her participation in a conference at APS corporate headquarters. Also participating were Craig Cooper, Gerald Sowers and Dan Smyers. The purpose of the conference was to assist Sowers in preparing for a presentation at the NRC enforcement conference to be held on July 10, 1990. After spending some time reading Joint Exhibit 89 in the presence of LEM and Cooper, Sowers made a comment about "we shot ourselves again" and at the same time he made his fingers into the shape of a gun and pointed it at his own head. Sowers conceded that the content of the inspection report was not favorable to APS.

Lowering of Linda Mitchell's 1990 Employee Performance Appraisal

The record contains LEM's employee performance appraisal reports for the period extending from January 1985 through August 1990. (JX 49-55) Each of these appraisal reports tends to confirm my suspicion that LEM was a competent, dedicated, conscientious and questioning employee who cared about her work

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product as well as her company. The first six of these reports carry an overall rating of either "superior" or "exceeds most standards" which appears to be an equivalent rating. These six appraisals contain numerous superlatives associated with the manner in which LEM discharged her responsibilities. They indicate that her work is superior and that her knowledge of her job is exceptional. There are indications, however, that she experienced attitude problems giving rise to a depression which could have negatively impacted herself and also those around her. (JX 49, 50, 51, 52, 54)

LEM filed a 10 C.F.R. Section 2.206 petition with the NRC which alleged serious misconduct by APS officials on May 22, 1990. That filing could have resulted in a revocation, suspension or modification of APS' license to operate PV. In response to the petition filing, the NRC Office of Inspector General and the Office of investigations investigated her allegations of wrongdoing on the part of APS. That matter was still pending as of the time of the hearing in this case. The entire matter became one of high visibility at the PV facility.

LEM received a performance appraisal in August of 1990. In basic content, that appraisal would appear to be no different from the others in that it contains numerous superlatives related to her job performance and it also mentions her attitude problem. However, the appraisal gives her an overall rating of "standards met consistently." That rating is in contrast with the superior or exceeds most standards ratings which had been given in prior years. Therefore, although the

content of the individual sections of the evaluation would appear to be generally the same as had been given in earlier years, the overall evaluation rating was reduced by one category.

This last evaluation which was made by Smyers who was her supervisor at the time, contains the notation in his handwriting that:

This review reflects a change in the policy in doing reviews. Linda continues to perform at the same level as last year.

The rating of "standards met consistently" represents a one-level downgrade from the ratings which she had earned in earlier years. Smyers, who was the electrical supervisor in the Site Engineering

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Department, testified that the company implemented a change in the manner in which employee performance appraisals were to be performed. The change was addressed in a President's series meeting and also was later reaffirmed by his immediate supervisor in a staff meeting. (Tr. 1328) It was his understanding that management desired to tighten up the appraisals because throughout the company they were too high and not everybody should be rated above average. Smyers indicated that he had told the members of his group about the change in policy which sparked multiple conversations and critical commentary among the workers he supervised.

Smyers testified that LEM was not singled out in any way as a result of her performance appraisal in that all of the employees in his group received the same treatment. It was his testimony that of the 13 employees he supervised, 12 of the individuals were downgraded one performance level and the other individual retained the same overall performance rating. Smyers himself was downgraded two levels by his management as a result of the policy change.

The testimony of Smyers, who authored the appraisal report over which the complaint was filed, was verified by other members of management. Conway, testified concerning changes in management evaluation procedures which took place following his arrival in May of 1989. He reviewed a large number of the performance evaluation reports of employees. He discovered that the evaluations were contradictory to the competency which he found in the overall operation of the nuclear facility. He discovered that appraisal reports were generally very high whereas the overall operation of the nuclear facility was average at best. Conway, who is responsible for the nuclear operation of APS at PV, in turn, communicated those concerns to his subordinates. He requested that the supervisors be advised that the employees were to be fairly and honestly evaluated based upon their true job performance.

Conway's testimony was supported by his subordinates. Although there did not appear to be a defined company policy requiring ratings to be lowered to conform to a bell shaped curve, and although there were no written directives implementing this policy, it was clear from the testimony of the APS managers that a policy change had, in fact, occurred. James M. Levine, the Nuclear Production Vice President, Ballard and Smyers, all

verified the change in management policy. Sowers, who is the technical assistant to Levine, testified that he was aware of the Conway change in policy and that he interpreted that change as requiring the managers to raise the expectations that they had for their employees and to evaluate employees fairly against those expectations. He also implemented this policy in engineering evaluations beginning in 1990.

Conway also testified concerning the status of the PV operation at the time of his arrival on May 8, 1989. Apparently all three of the separate nuclear generating power units were shut down. He identified numerous problems associated with the operation of the facility including emergency lighting, valves, maintenance, hardware problems, and overall training programs for employees. Generally speaking, there were problems related to ownership's ability to properly manage the facility. In evaluating Conway's testimony, I am left with the distinct impression that the operation of the facility was apparently a mess at the time he assumed control.

The record establishes that although Conway sought to implement a more objective evaluation process, his new approach was not implemented uniformly among all groups. Apparently, only Smyers downgraded the evaluations of employees throughout his entire group. The other systems engineering groups may not have been subjected to the same process. In 1990, Site Technical Support was headed by Overbeck. LEM was in one of the Systems Engineering Groups which comprised the Site Technical Support Group. (JX 95) Systems Engineering was headed by Jeffrey S. Summy (hereinafter Summy). Summy had five different groups reporting to him. One of these groups was the Electrical Systems Group of which LEM was a member, and that group was supervised by Smyers. The record shows that insignificant changes were made to the individual evaluations of the 25 Systems Engineers who worked in groups other than Complainant's for the year 1990 appraisal period. (JX 93) The overall changes between 1989 and 1990 indicate that five individuals were actually upgraded but six individuals were downgraded. Fourteen others retained the same overall evaluation. (CX 20) The statistical data would seem to indicate that there were variations in the way in which the company's evaluation policy was administered within Systems Engineering.

The Tim Hall Incident

On September 18, 1990, Tim Hall (hereinafter Hall), an APS employee, made a comment to Sarah Thomas during a break in a training class. Hall motioned for Ms. Thomas to come over to where he was standing and when she approached, he pointed to a fire protection dummy/mannequin that was laying on a stack of fire hoses. (JX 5) The dummy was not in very good condition in that its arms and legs were twisted and appeared to be burned from previous training sessions. Hall acknowledged that he said to Ms. Thomas something to the effect that "[t]his is what will happen to Linda if she doesn't do her job." (CX 1 p. 35) The reference to Linda was to LEM. LEM was also attending the same training session. Hall was aware that Ms. Thomas and LEM were friends.

In the written statement given shortly after the incident, Hall indicated that he was not upset with LEM for any reason and that he did not understand the implications of his comment until later. He considered the comment to have been a joke and later apologized to LEM for the incident.

Hall's deposition was taken on August 16, 1991. (RX 15) Hall was initially employed by APS in May of 1985 in the Systems Engineering Group. He knew LEM on a casual basis from his early years with APS and on occasion, in later years, he did visit with her in her cubicle. The same was true with Ms. Thomas. The comment made by Hall to Ms. Thomas was to the effect that "that could happen to Linda if she doesn't get her act together." (RX 15 p. 11) The day after the incident, Hall attempted to meet with Smyers who was LEM's supervisor because he apparently detected that LEM was upset over the incident. Smyers suggested he not talk to LEM immediately but rather wait until after the company commenced its investigation. Hall testified that he believed he knew both LEM and Ms. Thomas well enough that he could joke around with them. He was unaware that anyone else might be attempting to harm LEM, and it was not his intent to hurt or harm her. He did not consider the consequences of the remark at the time it was made. Following the company investigation of the incident, Hall sought out LEM and apologized to her.

As a result of the company's investigation of the incident, Hall received a written reprimand from the Director of his division. A written reprimand is a second level of discipline under the positive discipline program. The written reminder

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indicates that it is management's expectation that no employee shall discriminate or intimidate any other employee, particularly one who may have addressed a safety related concern at PV. The written reminder also expresses confidences that Hall would immediately correct his conduct deficiency. (JX 84)

Prior to the dummy incident, Hall had voluntarily gone to the APS Employee Assistance Program for the purpose of seeing a counselor for job stress. (RX 15 p. 37) He saw a psychologist or counselor for approximately six months and was apparently moved to a less stressful job for a period of time.

The day following the incident, LEM went to the office of Smyers and told him that she was very upset about what Hall had said to her the previous day. Smyers attempted to contact Hall immediately. However, he did not speak with Hall until the next day at which time he told him that he considered what had happened to be very serious and that the issue would be taken to management. An internal investigation which was carried out by Kerry Johnson followed. Overbeck, on September 20, 1990, had directed him to conduct a fact-finding meeting and if necessary to get security help to investigate the threat. Overbeck monitored the development of the investigation. (RX 1 p. 138) On September 21, 1990, Johnson submitted a written report to Overbeck concerning the Hall incident. (RX 1 p. 131) The report indicates that on September 20,

he interviewed both Hall and Ms. Thomas and on September 21, he interviewed LEM and Hall for a second time. His conclusions and recommendations include the following:

1. I believe Tim's comment was purely spur of the moment and was not intended to mean any harm towards Linda Mitchell in any way. I do not believe that Tim's comment was based on a fear (from Tim's perspective) for Linda's well-being. I don't think Tim was trying to 'warn' her of impending dangers.
2. I believe Tim's comment was in poor taste and showed a definite lack of common sense and good judgment.
3. I believe Linda Mitchell was genuinely concerned about physical threats because of her situation

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with the I.G. office and APS. I can certainly understand why she is concerned about threats and their seriousness since by her admission she has been on the receiving end of several. I believe she acted properly in bringing up the situation to her supervisor as soon as possible.

4. I believe Jim Samuels and Dan Smyers acted properly when contacted by Linda.
5. I believe that Linda thinks the message from Mr. Conway with respect to the Linda Mitchell case has not been implemented throughout APS/ANPP organization.

Following receipt of the written report, Overbeck called Levine and Davis to apprise them of the results of Johnson's fact-finding and also to advise them of Overbeck's recommendation to issue a written warning to Hall. (RX 1 p. 139) On September 24, 1990, Overbeck, together with Johnson, met with Hall for the purpose of reviewing the incident and the results of the fact-finding. Hall was apparently apologetic and understood that a written warning to him would be issued. Subsequently, Overbeck met with LEM and Smyers to discuss the incident. She apparently was told that management found the incident regrettable and totally unacceptable. Reportedly, LEM recommended that management go easy on Hall so as not to make the situation worse.

LEM also apparently told Overbeck in conjunction with other incidents of harassment that some managers and supervisors counsel their employees to avoid her rather than maintaining a professional attitude about her activities. During a manager's meeting held on September 26, 1990, Overbeck mentioned to them that the message had not gotten across that all employees be treated as professionals and not be segregated because of their beliefs. (RX 1 p. 140) On September 27, 1990, Hall was issued the written letter of reminder.

The record also contains evidence that APS management did not believe that it had gotten its message across that all employees were to be treated as professionals and were not to be harassed for whistleblowing activities. (Tr. 905, 906, 907) Following the Hall incident, Overbeck met with approximately 250 of his management team to convey that message. Kerry Johnson, who

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conducted the Tim Hall investigation, concurred in the belief that it was necessary to remind management that all employees must be treated professionally. (Tr. 971) Overbeck believed, as a result of the Hall incident, that although he had communicated the company message concerning the no harassment policy, the workers had not really gotten the message. Both LEM and management believed that some workers had been trying to avoid her. Following the Hall incident there was no written statement issued to all employees at PV. The oral statement was made by Overbeck in his group meetings with his personnel. Additionally, top level management was apprised of the incident.

Narrative Psychological Reports

The record also contains a report written by Dr. William F. Amberg who is a certified psychologist and a Diplomate in Industrial and Organizational Psychology. (RX 5) His doctorate is in Counseling Psychology. Dr. Amberg's report is very narrowly constructed in that it is based upon his evaluation and conclusions "regarding normal co-worker reactions to Ms. Linda Mitchell's high profile activities." His report, therefore, does not constitute a full person psychological profile of LEM. The report addresses four main points. Initially, the fact that LEM is a highly visible whistleblower; secondly, on the behavior of a single group member whose views are in marked contrast to those of the majority; thirdly, that it is an entirely normal, expected human reaction that such an individual would generate negative reactions; and fourthly, based on the material that he reviewed, APS management supported LEM to the maximum.

The report notes a variety of documents which he considered in arriving at the conclusions stated. The documents basically relate to legal proceedings involving LEM and APS. In addition he considered newspaper clippings and the transcript of a radio talk show appearance by LEM and a deposition given by LEM. He also mentions the "document list" of the law firm representing APS in this matter, but I am not certain to which list he makes reference. Dr. Amberg also notes that he has reviewed the most relevant psychological research pertaining to the organizational dynamics of this case and then lists six published works on which he apparently consulted.

He concludes that the name Mitchell is virtually synonymous with conflict when it comes to her relationship with APS. She is

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extremely high profile and enjoys the publicity which results from that activity. He concludes that LEM is a "group deviant" which directly leads to her rejection and ostracism by co-workers. He states that when APS is being attacked externally, as the media has done for a lengthy period of time, the tendency of other employees is to fight the critics. Dr. Amberg concludes that common sense, personal experience, and research show that deviants are naturally ostracized and excluded from the group. He also concludes that APS management, in general, and human resource personnel in particular, responded in a timely and professional manner to the activities of LEM. He bases that conclusion on APS' investigation, reports, discipline, education, and

employee communication as evidenced by a report written by another individual. The specific factual data upon which that conclusion is based is not stated.

I accept the report of Dr. Amberg as being exactly what it is stated to be. It represents his conclusions as to normal co-worker reactions to LEM's high profile activities. In other words, it is his conclusion that these reactions are negative. His conclusions in that regard are accepted since they were not severely tested at the time of his testimony. His report is not received as a psychological profile of LEM. He testified that he has never met LEM or spoken to any of her co-workers or to any of APS management concerning her activities. He knew nothing of LEM's medical or psychological histories. His conclusion that she is a "group deviant" is based upon an examination of documents provided to him by representatives of APS, his perspective as a consulting industrial/organizational psychologist to many business organizations, and as an expert on organization dynamics. Since I do not know what his "perspective" is as a consulting industrial/organizational psychologist and his own expertise, whatever that may be, I must question his opinion in that regard. His data base for arriving at this conclusion was something considerably less than what I would hope a disinterested psychologist would require to arrive at the conclusion stated.

Once again, I give weight to his report for the narrow purpose of considering normal co-worker reaction to LEM's high profile activities. He finds that reaction to be negative. I do not find his report to be overwhelmingly useful in any sense, but since it has not really been tested, I do give it some weight.

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The record also contains a psychological report of LEM which was prepared by Dr. C. Brady Wilson. Dr. Wilson is a Clinical Psychologist who devotes about half of his practice to working with clients who have experienced some traumatic event at work or within a group setting. Dr. Wilson holds a Ph.D. in psychology from Boston University and a Master of Theology, Psychology and Religion from Boston University School of Theology. His undergraduate degree was in Psychology. He is a Certified Psychologist within the state of Arizona. He also holds membership and offices in a variety of state and national organizations. He is in private practice in Arizona and that practice is based upon direct patient referral and professional referrals from physicians, corporations and attorneys. He specializes in the employment area, including employee stress, cumulative workplace trauma, employment correction, counseling, terminations and adjustment.

Dr. Wilson examined the Complainant in October, 1990. He prepared his psychological evaluation on March 22, 1991. (CX 17) Based on symptomatology, a psychological history, a social history, a work history, a mental status examination, the Minnesota Multiphasic Personality Inventory-2 (MMPI), a Symptom Checklist 90 Revised (SCL-90-R), and an Occupational Stress Inventory (OSI), he diagnosed post traumatic stress disorder (PTSD) and a somewhat dependent personality style.

He noted that her attitude during his evaluation was of a person motivated to restore herself professionally and emotionally. He found her to have good psychological integration and little global psychological distress. In his opinion, her reported history of distress and her history do not constitute sufficient cause for her present symptomatology. He diagnosed PTSD because her physical and anxiety symptoms were determined to be a true condition and not under her voluntary control. He described PTSD as a maladaptive reaction to the psychosocial stressors she reports. These stressors, he indicated, were the acts of harassment to which reportedly she had been subjected to at APS.

He recommended that she pursue a course of therapy including stress inoculation therapy and supportive group intervention. He found that a medical referral may be warranted if her sleep disorder persists. He further recommended a multiplicity of therapeutic services for all the symptoms due to PTSD. He opined

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that if LEM were unable to pursue therapy and reestablish herself emotionally and in an appropriate work environment, her prognosis was guarded. However, he found her long-term prognosis to be good. He anticipated that she would require one therapy session a week for six to twelve months.

Dr. Wilson testified that he had personal contact with LEM on three different occasions. She terminated the therapy. He had given her written questions to take home to answer because she was not a continuing client and, therefore, he could not evaluate her response-consistency. It was his belief that her responses are reliable.

It was the conclusion of Dr. Wilson that LEM perceived the Tim Hall incident as a threat to her personal safety. She interpreted that sequence of events as being a message to back away from her whistleblowing complaints. Her reaction to that event would be the same as any other individual who was severely threatened. He does not consider her to be a group deviant, nor did he believe that she was faking any of the responses to questions posed in order to make her condition appear worse than it actually was.

Dr. Wilson related LEM's problems to stress but did not know to what the stress was attributable or how long she had experienced it. (Tr. 230) He disagreed with the MNPI computerized results even though it was the only test he used which was not capable of being subjectively influenced. He disagreed with the diagnosis but not the personality traits which it assigned her. He believes that she has exhibitionistic traits.

I find Dr. Wilson to have been a credible and knowledgeable witness. He was forthright in his responses. Although his personal contact with LEM was limited and he did not include her medical history in his evaluation, I am impressed with his testing and also the other objective data on which he relied in arriving at his conclusions. He has good credentials and is published. I will give significant weight to his opinion.

Finally, the record also contains an opinion submitted by Dr. Darold L. Shutt. (RX 6) Dr. Shutt holds a B.A. in Pre-Medicine from the University of Illinois and an M.A. and doctorate in Education in Counseling/Clinical Psychology also from the

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University of Illinois. He has held a variety of positions in both the academic and private sectors. He is a Certified Psychologist within the state of Arizona and is a Diplomate of the American Board of Professional Psychology. He is a Fellow and Diplomate of the American Board of Medical Psychotherapists. He also holds membership in a variety of psychological associations in both the state of Arizona and nationally. His report is limited to a discussion of whether LEM was damaged as a result of the APS work environment and secondly, if she was not damaged, then what evidence was discovered which led to that conclusion. He concluded that she was not damaged as a result of the APS work environment and that the material presented to him did not support her complaint of work-induced injury.

Dr. Shutt reviewed Dr. Wilson's deposition, case notes, and test results. (RX 6) Based also on medical records, LEM's performance appraisals, and current research data, he opined that LEM was not damaged as a result of the APS work environment. He criticized Dr. Wilson's notes as skimpy, inadequate, and evidence of cursory effort.

He feels LEM's answers to questions could be invalid since she completed the tests at home and could have been coached. He feels LEM did not complete the self-report under proper supervision. He criticized Dr. Wilson in that he did not consider LEM's medical, intellectual, academic, emotional, or behavioral functioning levels, which could have impacted his conclusions. He feels the evaluation was not comprehensive or even minimally adequate. He opined that the data does not support a diagnosis of PTSD. The only objective test was the MMPI-2 and Dr. Wilson chose to ignore the computerized findings of conversion disorder or somatization disorder, and assigned his own diagnosis, which Dr. Shutt thinks may have differed if Dr. Wilson had reviewed her medical history. For example, her medical history may reveal that she was anxious or had chronic stress due to having survived cancer and the possibility of facing it again. She had a breast biopsy in June, 1990. A person with conversion or somatization disorders tend to make up physical symptoms, and such disorders are not unusual for a cancer survivor. He believes LEM has a need for secondary gain as evidenced by her complaints and lawsuits. He also added that the OSI does not tell much as it has only been used on hundreds of people, as opposed to the thousands who have taken the MNPI.

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At the hearing, Dr. Shutt testified that he never actually saw Dr. Wilson's report. He never saw LEM, although he had wanted to. In drawing his conclusions, he considered that LEM was a heavy coffee drinker which was information provided by APS' legal representative. The record does not show what is meant by "a heavy coffee drinker." He stated that Dr. Wilson's notes were inadequate for him to ascertain what happened in Dr. Wilson's meeting with LEM. Dr. Shutt also

revealed that an ethics complaint concerning his use of the MMPI has recently been raised against him. Otherwise, his report was not discredited on cross-examination.

Dr. Shutt's criticism of Dr. Wilson for not noting LEM's medical and other histories is probably valid. His conclusions, however, are based neither on a personal interview with LEM nor Dr. Wilson's final report. His criticism of Dr. Wilson's use of the MMPI-2 results is questionable as he himself has been charged with misusing the MMPI. I also note in reading his report that many of the conclusions stated are couched in terms of "could," "may have differed," "may suggest" or other terminology which tends to diminish the conclusions stated. Additionally, his report was also written strictly from the perspective of responding to the referral question, that being, as to whether LEM was damaged as a result of the APS work environment. His report is not intended to be a psychological profile but rather strictly a critique of Dr. Wilson's work product. I accept it for what it is. I also note that many of the conclusions stated by Dr. Shutt, which are couched in terms of "could," "may suggest," etc., have not been proven by him based upon any other objective data or test results. Although his report is entitled to some weight, I do not consider it to be of sufficient value to materially dispute the conclusions stated by Dr. Wilson.

In evaluating the psychological evidence included within the three reports, I conclude that LEM is an exhibitionist who receives a negative reaction from co-workers in the form of rejection and ostracism. LEM perceived the Tim Hall incident as a threat to her personal safety. She suffers from PTSD which was caused by stresses in her life potentially related at least in part to the work environment experienced at APS. LEM is not a group deviant.

CONCLUSIONS OF LAW

Whether Respondents Discriminated Against Linda Mitchell by Lowering Her 1990 Employee Performance Appraisal in Retaliation for having Engaged in Protected Activity

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This action arises under the Energy Reorganization Act of 1974, Section 210(a), as amended, 42 U.S.C.A. Section 5851 (hereinafter referred to as ERA), which provides, in pertinent part, as follows:

(a) Discrimination against employees

No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, 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) --

(1) 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 (42 U.S.C.A. Section 2011 *et seq.*), or a proceeding for the administration or

enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

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

(3) 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 this chapter or the Atomic Energy Act of 1954, as amended (42 U.S.C.A. Section 2011 et seq.).

This case arises in the Ninth Judicial Circuit which has yet to determine the allocation of proof burdens in an Energy Reorganization Act whistleblower case. The evaluation issue requires application of the "dual motive theory" in establishing violations under the Act. In these cases, the evidence provides two possible motives for the termination of the Complainant, one being a legitimate management reason, and the other being an impermissible motive of retaliation for a protected activity. The applicable burden of proof standards adopted by the Secretary

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in "dual motive" cases are those expressed by the National Labor Relations Board in *Wright Line, a Division of Wright Line, Inc.*, 1980 CCH NLRB #17,356 (1980), affirmed *sub. nom. NLRB v. Wright Line*, 662 F.2d 889 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), and approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 103 S.Ct. 2469 (1983). The standards set forth in *Wright Line* have been made applicable to proceedings arising under Section 5851 of the ERA. *Consolidated Edison Company of New York, Inc. v. Donovan*, 673 F.2d 61 (2d Cir. 1982). A variety of other Circuits have also applied these same standards in disposing of dual motive cases.

In applying *Wright Line* to this case, it was incumbent upon the Complainants to initially establish a *prima facie* case of discrimination against Respondents by way of proof of the following:

1. That the party charged with discrimination is an employer subject to the Act(s);
2. That the complainant was an employee under the Act(s);
3. That the complaining employee was discharged or otherwise discriminated against with respect to his or her compensation, terms, conditions, or privileges of employment;
4. That the employee engaged in "protected activity;"
5. That the employer knew or had knowledge that the employee engaged in protected activity; and
6. That the retaliation against the employee was motivated, at least in part, by the employee's engaging in protected activity.

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed. 2d 207 (1981); *Dean Dartey v. Zack Company of Chicago*, 82-ERA-2, final Decision and Order of the Secretary issued April 25, 1983, slip op. at 6-9. Once the Complainants have established a *prima facie* case, the burden of production then shifts to the Employer to show that the discharge or other adverse action would have occurred in any event

regardless of the forbidden motivation. If the Employer satisfies this intermediate proof burden, then the burden shifts back to the employee to establish that the preferred legitimate business reasons for the termination were merely pretextual in explaining the discharge. Although both parties bear proof burdens under this standard, the burden of proving by a preponderance of all of the evidence that retaliation for protected activities was a motivating factor in the employee's action always remains with the Complainant and never shifts to the Employer. *Dean Dartey v. Zack Company of Chicago, supra*.

Wright Line makes it clear that the employee must prove the employer's guilt by a preponderance of the evidence. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 87 S.Ct. 1792 (1967). The opinion by the circuit Court in *Wright Line* explained that the only burden which could acceptably be placed upon the employer is a "burden of production" which was described as a responsibility of going forward with credible evidence to rebut or meet the *prima facie* case. That responsibility has been characterized as an obligation upon the employer to "come forward with enough evidence to convince the trier-of-fact that, under the circumstances, there is no longer a preponderance of evidence establishing a violation." *NLRB v. Amber Delivery Service*, 651 F.2d 57 (1st Cir. 1981) The Court, in *Wright Line*, concluded that the "burden" referred to in making reference to the Employer's obligations is merely a burden of going forward to meet the *prima facie* case, not a burden of persuasion on the ultimate issue of the existence of a violation.

The parties have stipulated that the subject matter of the complaint confers jurisdiction upon this office. It has also been stipulated that LEM and the Respondents were in an employee/employer relationship at the time of the incident. (JX 94, par. 2) The stipulation also contains the employment history of LEM with APS up to the date of the hearing. (JX 94, par. 3, 4) On brief, Respondents acknowledged that the Complainant engaged in protected activity in May of 1990 as the result of the filing of a 10 C.F.R. Section 2.206 petition with the NRC. In addition, Respondents concede that the fact of that filing was widely publicized by the news media and also by Complainant, and therefore, the Employer knew or had knowledge of the protected activity of LEM. The Employer contends that the Complainant has failed to establish that she was discriminated against with respect to her compensation, terms, conditions or privileges of

employment. It is also contended that LEM has failed to show that the alleged discrimination was motivated, even in part, by her engaging in protected activity.

There is no question that the overall appraisal rating of LEM was downgraded in 1990 from one of either "superior" or "exceeds most standards" to one of "standards met consistently." The standards met consistently rating appears to be an average rating in terms of those offered by the rating form. Therefore, LEM's overall appraisal rating was clearly downgraded from the one which she had earned the prior year. I find that action to be evidence of discrimination against

her with respect to the terms, conditions or privileges of employment. Under whistleblower laws, unlawful discrimination is given an inclusive definition. *Deford v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983); *Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563 (8th Cir. 1980).

It is next incumbent upon LEM to prove that the downgrading in her evaluation was motivated, at least in part, by her having engaged in protected activity. Improper motive can be established by circumstantial evidence. *Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563.(8th Cir. 1980), *cert. denied* 450 U.S. 1040 (1981). An inference of retaliatory motive can arise strictly as a result of the proximity of the protected activity to the date of the discriminatory action. *Couty v. Dole*, 886 F.2d 147 (8th Cir. 1989); *Keys v. Lutheran Family and Children Services of Missouri*, 668 F.2d 356 (8th Cir. 1981); *Womack v. Munson*, 619 F.2d 1292 (8th Cir. 1980); *cert. denied* 450 U.S. 979 (1981); *Davis v. State University of New York*, 802 F.2d 638 (2d Cir. 1986).

The record shows that LEM, on May 22, 1990, filed a 2.206 petition with the NRC to institute formal proceedings which could result in a revocation, suspension or modification of APS' license to operate PV. The employee evaluation of LEM was signed by Smyers on August 14, 1990 and by LEM on August 23, 1990. Therefore, the downgrade in her evaluation took place between two to three months immediately following her filing of the petition with the NRC. The proximity of these actions, I find, raises an inference of retaliatory motive on the part of Respondents. In addition, this record shows a long history of other protected activity engaged in by LEM over a period of years. That activity, all of which is fully described in the discussion

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relating to the hostile work environment issue, was also well known to management employees of APS. Taken together, I conclude that the Complainant has established a *prima facie* case of discrimination by Respondents as a result of their having lowered her employee performance appraisal.

Since the Complainant has established a *prima facie* case, the burden of production now shifts to the Employer to show that the downgrading in the overall evaluation of LEM in 1990 would have occurred regardless of any forbidden motivation. It is incumbent upon the employer to move forward with credible evidence to rebut or to meet the *prima facie* case. Following an evaluation of the Employer's evidence, it is my conclusion that evidence has been produced, under the circumstances of this case, so that there would no longer exist a preponderance of evidence establishing a violation.

In listening to the testimony of Conway, there was no question in my mind of his sincerity or of his credibility in elaborating upon his attitude toward the overall evaluation of employees at APS. I believe that he did, in fact, communicate a policy change to the APS management employees. The record demonstrates that the policy as implemented at the employee level was inequitably applied. It seems fair to say that Smyers accepted his instruction from his superiors at face value whereas other managers did not. It seems equally clear to me that with respect to this

question, as I will conclude with respect to other questions, that communication problems existed within the management of APS.

This record contains no evidence that management intended to discriminate against the entire working group of which LEM was a member. There is no evidence that LEM was singled out in any way for purposes of her evaluation. In fact, the opposite is true in that she was treated identically as the other members of her group including Smyers with the exception of one individual. LEM's evaluation form contained numerous positive comments as had been given in prior years. There is no evidence that her immediate earnings had been impacted by this evaluation downgrade.

When Conway assumed control in May of 1989, the operation of the PV facility could charitably be characterized as being a mess. All three of the reactors were shut down. The facility

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was experiencing problems with certain valves, training programs were inadequate, there were management problems as well as maintenance and hardware problems. Consistent with his findings in that regard, I would consider a new employee evaluation program as being entirely reasonable. Changes were clearly warranted. Conway, I believe, attempted to make those changes. The change in evaluation approach represents one step. I find no evidence that his policy of evaluation change was made applicable only to individuals or to groups because they had been complainers or had approached the NRC. The evaluation policy was changed because it needed to be changed.

For all of these reasons, I conclude that the Respondents have demonstrated a legitimate non-discriminatory reason for the downgrading in the evaluation of LEM. Respondents have demonstrated that the evaluation downgrade would have occurred in any event, regardless of any forbidden motivation.

Since the Employer has now established that there is no longer a preponderance of evidence establishing a violation, it is now incumbent upon LEM to produce evidence of "disparate treatment." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Wright Line, supra*; *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977). Disparate treatment simply means that an employee who engages in protected activity was treated differently, or disciplined more harshly, than an employee who did not engage in the protected activity. *Donovan o.b.o. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

In considering this record as a whole for purposes of the evaluation issue, I find no evidence that disparate treatment was afforded any employee. LEM was treated no differently than any of the other employees within her group including her supervisor. The impression that I glean from considering the record as a whole is that Conway initiated a new policy which was to have been equitably and fully implemented by the managers beneath him. There is evidence that the policy was not equitably administered by all managers. LEM appears to have been in the unfortunate circumstance of being a member of a group which was managed by an individual who followed

the directions that were given to him. Rather than consider that action to be detrimental to the company's interest, I suspect that Conway would have hoped that the rest of his management team were as competent.

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In my judgment, the action initiated by Conway was demanded by his best business judgment. The mess which he inherited demanded decisive action to save a sinking ship and perhaps to avert disaster. The picture was not pretty and the change in evaluation policy was but one small step in righting an intolerable situation. I find no evidence of disparate treatment in this record as it relates to the overall evaluation of LEM for the period ending in the middle of the year in 1990.

Based upon my findings in this regard, I conclude that Respondents did not discriminate against LEM by lowering her evaluation.

Whether All Instances of Harassment Comprising the
Hostile Work Environment Claim, Excepting the
Tim Hall Incident, are Time Barred
and
Whether Respondents Discriminated Against Linda Mitchell
By Subjecting Her to a Hostile Work Environment in
Retaliation for Having Engaged in Protected Activity

The Energy Reorganization Act requires that complaints of retaliation for protected activities must be filed "within thirty days after such violation occurs." 42 U.S.C. Section 5851(b)(1). The record of this case contains evidence relating to events occurring as early as the latter part of 1985 and extending through October of 1990. Complainant argues that the facts alleged support a finding that Respondent has committed a continuing violation which would support the consideration of events occurring outside of the 30-day statute of limitations. This contention is based upon the respondents' having created a "hostile work environment" which gave rise to discriminatory conduct against complainant. On brief, Complainant argues that "all of the incidents alleged here which occurred between September 1989 and September 1990 are related rather than separate acts. Taken as a whole, these incidents formed a single act of a hostile environment. All of the alleged incidents should be treated as timely filed under the continuing violation theory given that it is conceded the last act falls within the limitations period." Therefore, Complainant has conceded that the evidence in this case relating to events extending from the latter part of 1985 through August of 1989 are not to be considered as a part of the continuing violation.

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Evidence of discriminatory actions which pre-date the filing date of a complaint under this section, but found not to be continuing in nature, nevertheless may constitute relevant

background evidence suggesting present patterns of behavior. *Malhotra v. Cotter & Co.*, 885 F.2d 1305 (7th Cir. 1989). Therefore, some events relating to potential discriminatory conduct by APS will be considered only as relevant background evidence. Thus, evidence relating to events occurring between the latter part of 1985 and August of 1989 will be considered only within that context.

Complainant argues that a series of events occurring between September of 1989 and September of 1990 constitute the basis for a finding of a continuing violation against Respondent. Any number of those events occurred outside of the statutory 30-day period for filing a claim under this Act. Respondent raises the question as to whether any of those acts should be considered. Complainant argues that since a continuing violation has been established that all of those acts should be considered in weighing the continuing violation theory.

In disposing of the statute of limitations issue, it is first necessary to consider whether the actions of respondent might constitute a continuing violation. *Egenrieder v. Metropolitan Edison Company/G.P.U.*, 85-ERA-23, (Secretary's Order of Remand issued April 20, 1987). The Secretary cites with approval the cases of *Erdmann v. Board of Education Union County Regional High School District No. 1*, 541 F.Supp. 388 (D.C. N.J. 1982) and *Tyson v. Sun Refining and Marketing Company*, 599 F.Supp. 136 (E.D. Pa. 1984).

Courts have generally recognized an equitable exception to the statutory limitations period for continuing violations "where the unlawful employment practice manifests itself over time, rather than as a series of discrete acts." *Waltman v. Int'l Paper Co.*, 875 F.2d 468 (5th Cir. 1989). In order for Complainant to invoke the exception, she must show that an ongoing violation, and not just the effects of a previous violation, extended into the statutory period. *Bruno v. Western Electric Co.*, 829 F.2d 957 (10th Cir. 1987); see *English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988); see also *Held v. Gulf Oil Co.*, 684 F.2d 427 (6th Cir. 1982). the Secretary has also cited approvingly the case of *Van Heest v. McNeilab Inc.*, 624 F.Supp. 891 (D. Del. 1985) in which it is indicated that the

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continuing violation theory recognizes that past discriminatory acts have occurred outside the limitations period and that the Complainant's awareness of those acts is irrelevant. What is important is that the plaintiff file her complaint within the statutory period of the last discriminatory act in a course of conduct. In that event, Complainant will be allowed to litigate all claims that are part of that continuing violation, because she filed within the statutory period of the end of the violation.

The following three factors have been identified as bearing on the determination as to whether a continuing violation has occurred. See *Berry v. Board of Supervisors of LSU*, 715 F.2d 971 (5th Cir. 1983), *cert. denied*, 479 U.S. 868 (1986).

(1) *Identity of Subject Matter*. Do the acts "involve the same type of discrimination, tending to connect them in a continuing violation?" See also *Graham v. Adams*, 640

F.Supp. 535 (D.D.C. 1986) which includes that continuing violation allegations must connect remote claims to incidents addressed by claims timely filed.

(2) *Frequency of Incidents Alleged*. Are the acts "recurring . . . or more in the nature of an isolated work assignment or employment decision?"

A complainant can establish a continuing violation either through a series of discriminatory acts against an individual or a respondent's policy of discrimination against a group of individuals. *Green v. Los Angeles City Superintendent of Schools*, 883 F.2d 1472 (9th Cir. 1989). The distinction to be made here is between a sporadic outbreak of discrimination and a dogged pattern. *Bruno*, 829 F.2d at 957.

(3) *Quality of Permanence*. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continuing existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?

In considering this item, the court in *Waltman*, 875 F.2d at 468, stated that:

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Acts of harassment that create an offensive or hostile environment generally do not have the same degree of permanence as, for example, the loss of a promotion. If the person harassing a plaintiff leaves his job, the harassment ends; the harassment is dependent on a continuing intent to harass. In contrast, when a person who denies a plaintiff a promotion leaves, the plaintiff is still without a promotion even though there is no longer any intent to discriminate. In this latter example, there is an element of permanence to the discriminatory action, which should, in most cases, alert a plaintiff that her rights have been violated.

However, before I can determine whether a continuing violation has occurred, I must first determine whether any violation has occurred. Complainant contends that she experienced discrimination in violation of Section 210 of the ERA by being subjected to a hostile work environment. To establish a *prima facie* case of hostile work environment, LEM must establish the following elements:

1. Membership in a protected category or in a Section 210 case evidence of protected activity;
2. Unwelcome harassment;
3. The harassment resulted from having engaged in protected activity;
4. That the harassment effected a term, condition or privilege of employment; and
5. That the Employer knew or should have known of the harassment and failed to take prompt, effective remedial action.

See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399 (1986); *Henson v. City of Dundee*, 682 F.2d 897 (11 Cir. 1982); *English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988). In

Meritor, the Court recognized under the third element that a complainant could establish that certain pervasive acts were so severe that

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they created an environment which altered the terms, conditions and privileges of employment. LEM's case was heard in the Ninth Federal Judicial Circuit. That circuit has not addressed the question as to whether a "hostile work environment" is an independent claim of discrimination under Section 210 of the Energy Reorganization Act. Only the Fourth Circuit has considered this type of claim. *English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988)

The Ninth Circuit has applied the standards enunciated in *Meritor*, to claims of sexual harassment. *Vasconcelos v. Meese*, 907 F.2d 111 (9th Cir. 1990); *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991). As Complainant pointed out in her brief, the law in the hostile work environment area is still evolving and the Federal Courts have yet to determine a uniform concept of what constitutes a hostile work environment. Since there are no Ninth Circuit cases applying Section 210 of the ERA to a hostile work environment theory, we are left with attempting to glean a theory for that circuit from cases decided under Title VII. In considering the arguments of counsel made on brief, clearly different interpretations were given to the Ninth Circuit's approach in *Ellison*. *Ellison* represents a 1991 pronouncement by the Ninth Circuit in a hostile work environment case. Therefore, I feel compelled to follow the principles enunciated in that case even though it relates to Title VII.

Complainant argues that a subjective approach should be given to the evidence in this case whereas the Respondent contends that an objective approach to the evidence should be taken. Complainant also contends that Section 210 of the ERA *requires* the Respondent to *encourage employees* to raise safety concerns. I find that argument to be imaginative but not the law. While employers do carry some legal obligations under the anti-discrimination statutes, encouraging employees to raise safety concerns has never been raised to the dignity of a legal duty. Therefore, I reject Complainant's contentions in that regard.

The Court in *Ellison* adopted a reasonable victim standard as observed from the perspective of the victim. I agree with Respondent that the reasonable victim standard is comparable to a "reasonable person standard" applied in other areas. I also believe that the standard should be gender neutral. Respondent argues that Complainant must show that she encountered a work atmosphere in which harassing conduct was so severe or pervasive

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that a reasonable nuclear power plant worker would have believed it stifled her liberty to raise safety concerns to the NRC and altered the terms, conditions or privileges of her employment. I agree with that summary of the law. It is not necessary that the harassers realize that their conduct creates a hostile working environment.

The Ninth-Circuit in *Ellison* also made an expression concerning how it will determine what conduct unreasonably interferes with working conditions. The Court stated:

The required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct Although a single act can be enough, . . . generally, repeated incidents create a stronger claim of hostile environment, with the strength of the claim depending on the number of incidents and the intensity of each incident.

William F. Conway, who is the Executive Vice President in charge of Nuclear at APS arrived at PV in May of 1989. I found him to be an honest, forthright and impressive witness. He had excellent experience in the nuclear field prior to his arrival. The Complainant is alleging that the discrimination is based upon events occurring between September 1989 and September of 1990. Thus, Conway had only been employed by APS a short period of time prior to the first event in September of 1989. By way of background, the record shows that in September of 1989, all of the top managers at PV had only short periods of service with the company. Conway arrived in May of 1989, Levine, who was the Vice President of Nuclear Production arrived in September of 1989, Ballard who was the Director of Quality Assurance commenced employment in March of 1989 and Overbeck the Director of Site Technical Support was hired in April of 1990. Smyers who was LEM's immediate supervisor in the Electrical Systems had been with the company since 1981. Thus, none of these individuals with the exception of Smyers had any longevity in dealing with LEM prior to September of 1989.

When Conway arrived, the picture produced by this record as to circumstances at PV was critical to say the least. In March of 1989, all three of the reactors had been shut down due to mechanical problems. Levine indicated that all of the employees

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at PV were aware of a financial strain placed upon the company as a result of the shutdowns. The units remained inoperable as late as the early part of summer 1989. The problems were apparently not being solved. This record contains a substantial amount of evidence devoted to the question of emergency lights. Conway characterized the emergency lights as being "garbage" and considered that problem area to be serious. The NRC notes that the problems had persisted since 1984. Conway also makes reference to communication problems and perhaps some of this difficulty can be directly related to his re-evaluation of the Employee Evaluation Program. It is always difficult to point fingers, but obviously the individuals running this operation were new at this time and thus, top APS management must have believed when Conway was hired that serious problems existed in the operation of this facility.

I believe that the record shows that APS had a codified nondiscrimination policy in effect at the time Conway arrived but I question whether that policy had been properly implemented. The QA Hotline, which was to have been used to permit employees to express their concern with potential safety problems, was replaced by Ballard with an Employee Concerns Program. The record shows that some employees believed that the QA Hotline did not protect the

confidentiality of the caller. I suspect that it was that problem in part which caused the implementation of the New Employee Concerns Program.

Complicating matters even further for APS, was the extent to which the PV facility was receiving adverse newspaper publicity. The record documents negative newspaper publicity and, in addition on June 5, 1990, Complainant, her husband and her attorney appeared on a radio talk show in Phoenix which gave considerable adverse publicity to the PV operation. Suffice it to say that during the period from March of 1989 through 1990, that things were not going well for APS at the PV operation.

LEM arrived at the PV facility in January of 1985. Her performance appraisal reports demonstrate that she was a competent, dedicated, conscientious and questioning employee. They also demonstrate that she did experience attitude problems giving rise to a depression which could have negatively impacted herself and also those around her. My feeling is that LEM was an outstanding employee of APS who wanted to do things right but who could not get the attention of management to properly correct

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problems in her area of jurisdiction. Ballard testified that in his personal conversation with LEM, that she indicated that it was her opinion that upper management at APS was incompetent. I believe that to be a fair appraisal of her feelings.

Since she was unable to correct the problems that she perceived to be threatening the facility by way of management action, LEM then turned to the NRC for redress. As a result of that action, she not only got the attention of the NRC but also of the management of APS together with the attention of her co-workers. Unquestionably, and based upon the testimony of numerous witnesses, a hostility developed at the PV facility against LEM since the possibility existed that the financial strain caused by the reactor shutdowns could also cause other employees to lose their jobs. That possibility gave rise to the creation of hostile feelings toward LEM by a significant number of PV employees. LEM's exhibitionist tendencies and high profile throughout the facility only exacerbated the situation. She was a small fish in a big pond and it was her intention to close the place down as evidenced by the filing of the 10 C.F.R. Section 2.206 petition with the NRC. Her profile was enhanced by the fact that she went on practically every walk-down with the NRC team throughout this period. Other employees saw that and some made negative comments concerning her relationship with the NRC officials. The 2.206 petition alleged serious misconduct by APS officials and could result in a revocation, suspension or modification of APS' license to operate PV.

I will now consider whether LEM has established a *prima facie* case of hostile work environment. Initially, there is no question but that she has engaged in protected activity. Respondents had acknowledged this item. Secondly, there is no question but that she has been the subject of unwelcome harassment from both management and co-workers. Ballard's reference to her as a "bitch" and his suggestion that she be fired occurred in September of 1989. In January of 1990, Smyers gave LEM a friendly reminder that APS was interested in getting rid of her.

Therefore she should keep a low profile. I don't think that Smyers' personal intention was to harass, but rather to warn. However, the conveyance of the impression that *management* was out to get her is intimidation and that constitutes harassment. The yellow sticky incident involving Inspector Ramsey occurred in February of 1990. That incident represents a deprivation by a member of management of a

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disclosure right of LEM to assist the NRC in its inspection process. A deprivation of that right constitutes harassment. The Tom Berlin incident I do not find to be meaningful for purposes of this case. The incident involving Sowers occurred on July 6, 1990 and I interpret Sowers' mannerism as conveying the possible impression that LEM was partly responsible for the negative inspection report. That action constitutes harassment. The Tim Hall incident occurred on September 18, 1990 and that clearly represents employee harassment. In summary, this record contains obvious evidence of unwelcome harassment.

Thirdly, LEM is required to establish that the harassment resulted from her having engaged in protected activity. Unquestionably, that is the case here. As was noted earlier, LEM maintained a very high profile at the APS facility due to her activity in reporting safety concerns. The record is replete with comments from management and workers alike to the effect that LEM was held, at least in part, responsible for a potential shutdown of the entire PV operation due to her having expressed safety concerns to the NRC. The Ballard incident evidences a hostile management attitude toward her. There is evidence that management was ignoring some safety concerns and LEM and her group were trying to push things forward as best they could. (CX 3, 4) I recognize that the psychologist has indicated that LEM is an exhibitionist and enjoys the personal exposure that goes with that territory. However, that personality characteristic cannot diminish the fact that the harassment has occurred and it resulted from LEM's protected activity. Her supervisor, Smyers, told her to "keep a low profile" and I interpret that comment not as being harassment by Smyers, but rather as an indication of the company attitude toward her during this period.

Fourthly, LEM is required to establish that the harassment effected a term, condition or privilege of employment. An actionable hostile work environment claim requires a showing by the Complainant that the harassment was severe enough to interfere with LEM's ability to work effectively, thus creating an abusive or hostile working environment. The hostility which existed during the one year period extending from September of 1989 to September of 1990 had begun to develop prior to that twelve month period. The record contains evidence as background relating to LEM's activities concerning the emergency lighting problems which date back to the latter part of 1985. I find compelling the testimony of Ramsey that some data provided him by

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APS was not accurate. He felt uncomfortable with this information because he knew it was wrong. Something is amiss here. There is a cancer growing which if allowed to continue could become catastrophic. The Walter Marsh memorandum was issued in January of 1989 which was

critical of complaining employees, and there is evidence that LEM met with Ballard in April of 1989 concerning safety concerns with respect to the QA Hotline. I suspect that her reputation as a whistleblower had long preceded her prior to September of 1989.

The test under this section may be satisfied by a showing that the harassment was sufficiently severe or persistent to seriously effect LEM'S psychological well-being. *Sparks v. Pilot Freight Carriers, Inc*, 830 F.2d 1554 (11th Cir. 1987). This is a question to be determined with regard to the totality of the circumstances. *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982). This record does contain evidence that LEM visited a psychologist in October of 1990. Although that visit came after the Tim Hall incident, I think it is evidence of her mental frame as of September 18, 1990. There is evidence in the record that LEM refrained from going to the separate units by herself after February of 1990. At that time, she was concerned for her personal safety. Conway was made aware in late February or early March of 1990 about LEM having expressed concern for her personal safety. T. H. Cogburn and Sowers met with her on March 5, 1990 to discuss her concerns relative to her personal safety. Although many of the comments that she may have received came to her second hand, none-the-less, her awareness was raised as to potential safety concerns existing. The Tim Hall incident which frightened her, and justifiably so, represented the culmination of a series of events which made the atmosphere in her work place hostile. In weighing the totality of the evidence under this standard, I believe that LEM has demonstrated that she encountered a work atmosphere in which the harassing conduct was so severe or pervasive that a reasonable nuclear power plant worker would have believed that it stifled her liberty to raise safety concerns and thus altered the terms, conditions or privileges of her employment.

Finally, it is also incumbent upon LEM to establish that the Employer knew or should have known of the harassment and failed to take prompt, effective remedial action. This case is interesting because it presents facts demonstrating harassment by both co-workers and management. As was noted earlier, the

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atmosphere toward LEM at APS during this twelve month period was ugly. Management was aware of that atmosphere. Ballard had met with LEM in April of 1989 because of her safety concerns. She again met in March of 1990 with Sowers and Cogburn for the same reason. The remedies effectuated by management should have been reasonably calculated to end the harassment. *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991). When harassment pervades the workplace, or is *condoned* by supervisory personnel, it becomes illegal and a discriminatory condition of employment that poisons the work environment. *Katz v. Dole, supra*. The Employer's remedy should have persuade individual harassers to discontinue unlawful conduct even though dismissal may not have been warranted. The penalties should have been sufficient to assure a work place which was free from the harassment. Blaine Ballard was the Director of Quality Assurance. He was directly involved with the Employee Concerns Program and the QA Hotline. His example should have been impeccable. Although the Ballard incident in which he referred to LEM as a "bitch" was investigated by management, that action was wholly inadequate and did not serve to set a proper

example for other employees. Conway testified that he gave Ballard a verbal lashing but that was simply not enough considering the volatile circumstances that existed.

The record shows that the company and Conway, in particular, had in place a series of written memoranda which expressed APS' position with regard to the harassment of whistleblowers. As compelling as the written memoranda may be, the testimony of the powers that be at APS indicated to me that there existed a serious communication problem within the company and I attribute a part of the harassment attitude to that problem.

Conway issued a memorandum on safety on September 21, 1989 probably as a result of the Ballard incident, but basically that memorandum was too little too late. With all of the problems being experienced by the PV facility in regard to each of the reactors during the twelve month period involved in this case, I would have expected management to assume a more pronounced position in regard to protecting those individuals who exercise their right to express safety concerns. I find no fault with the way in which the Tim Hall incident was handled and resolved by management. There is testimony that management was aware that there existed a feeling among the workers at PV that LEM was being held responsible for keeping the units shut down as a

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result of emergency lighting problems. If that attitude was prevalent, management had an obligation to address it in a much more vocal way. The company investigation of circumstances which gave rise to LEM meeting with Cogburn and Sowers in March of 1990 was also wholly inadequate. The investigator did not seek to determine the identity of the person or persons who made any of the alleged threats against LEM. Although there is evidence of a company complaint procedure and a policy against discrimination, I suspect that due to the communication problems which existed within APS during this period, that some complaints were not properly investigated and the overall hostile attitude, problem was never addressed. The record is clear that APS knew of the harassment of LEM during this one year period and failed to take prompt, effective or remedial action to stop it.

In view of the above findings, Complainant has established a *prima facie* case of discrimination against her based upon the presence of a hostile work environment. We must draw a fine line between the need under the law to foster openness in the workplace as to the NRC for safety purposes and the need to follow some internal organizational procedures for voicing concerns. APS had NED, Compliance, the LER group and memoranda issued by management to express the safety concerns and to define the guidelines. But better organization in coordinating these activities was needed. Conway recognized the severity of the problems that existed when he arrived in May of 1989. He acknowledged that APS did not do very well in the areas of problem resolution and communication. He attempted to implement an open door policy and positive attitude development. However, reversing an entrenched policy of inaction or denial of existing problems could not be accomplished overnight. I do not fault Conway for the attitudes which have given rise to the violations here. Respondents have not rebutted Complainants evidence establishing discrimination in this case.

I must now consider whether a continuing violation has occurred based upon the law as stated earlier. I find that the identity of the subject matter is the same with respect to all of these incidents. Each of the incidents relate to some activity which was caused by the pervasive negative attitude toward LEM which was present at PV. The Tim Hall incident was a subtle reminder that her protected activities were unappreciated. The Blaine Ballard incident was provoked by the same activity. Harassment based upon the removal of information which she had

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provided to the NRC also arose as a result of her protected activity. Her numerous meetings with management concerning safety concerns were all directly related to her concern for safety at the plant. I find there exists an identity of subject matter during this twelve month period.

Also, I do not view these activities as being sporadic in nature but rather there is a pattern to them. That pattern developed as a result of the pervasive nature of the atmosphere at the plant toward LEM. This series of discriminatory acts coupled with management's inadvertence in dealing with the problem causes them to be recurring. Finally, the incidents involved in this case lack the quality of permanence which could have placed LEM on notice and created a duty on her part to file her claim at an earlier date. As was noted in the evaluation discussion, LEM was not denied promotions nor was her pay interrupted in any way during these periods. The discrimination involved in this case was subtle and although the incidents are clearly related due to the pervasiveness of the discriminatory atmosphere that persisted at PV, I find that none of these incidents should have alerted LEM that a complaint should have been filed. The Tim Hall incident basically represents the icing on the cake. At that point, she was frightened, concerned for her personal safety and needed to take some action. The acts involved here were not of a permanent nature but rather served to perpetuate the scheme of discrimination that preceded her complaint filing.

In view of the findings in this regard, I conclude that LEM has established that a continuing violation occurred. Therefore, each of the events extending from September 14, 1989 through September 18, 1990 should be considered in determining whether LEM was discriminated against as the result of the presence of a hostile work environment at the PV facility. She did file her complaint within the statutory period of the last discriminatory act in a course of conduct. Thus, she is allowed to litigate all claims that form a part of the continuing violation.

DAMAGES

Since LEM has prevailed on the hostile work environment issue, she is entitled to damages. The law provides the following remedies:

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1. An abatement of the discrimination;
2. Restoration of an employee to her job with all attendant benefits, including backpay;

3. An award of compensatory damages; and
4. All reasonable expenses incurred in pursuit of the claim.

Deford v. Secretary of Labor, 700 F.2d 281 (6th Cir. 1983); 29 C.F.R. Section 24.6(b)(3). Since LEM did not lose her position at APS, she is not entitled to backpay.

In her petition, LEM requests the following remedies:

- a. To have her 1990 EPA ratings restored to those received in her 1989 EPA and to have her 1990 EPA expunged;
- b. One million dollars in compensatory damages;
- c. That APS be ordered to inform its employees not to harass, intimidate, retaliate, or threaten LEM;
- d. Reasonable attorney fees and costs;
- e. To order the Respondents to take affirmative action to abate the harassment and threats against LEM; and
- f. Any further relief as deemed appropriate.

Concerning these requests, Item (a) can not be granted since LEM did not prevail on the evaluation issue.

The request for one million dollars in compensatory damages is totally unreasonable and out-of-line with all precedent in this area. In non-discharge discrimination cases, an award of approximately \$40,000 to \$50,000 appears to be appropriate. Forty-thousand dollars was awarded for emotional distress in *Fleming v. County of Kane State of Ill.*, 898 F.2d 553 (7th Cir. 1990). In *Wulf v. City of Wichita*, 883 F.2d 842 (10th Cir. 1989) \$50,000 was awarded where the Complainant was under emotional strain and experienced significant financial difficulties. Fifty-two thousand dollars was found reasonable for emotional

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distress and suffering in the case of *Muldrew v. Anheuser-Busch, Inc.*, 728 F.2d 989 (8th Cir. 1984). However, that was a discharge case.

LEM offers as evidence of the emotional distress that she has suffered each of the following items:

Relationships with co-workers have deteriorated;
She became upset and nervous over the warnings that she keep a low profile;
She has become physically ill and nervous over several of the incidents involved;
Dr. Wilson has indicated that she responded like someone who has been severely threatened, and it was his opinion that she suffers from post traumatic stress disorder.
Complainant contends that she is less involved in life, that work is a serious problematic life event for her, that she has less enjoyment for food and sex, that she has a sleep disorder and that she has trouble remembering events and finds it difficult to concentrate.

The record shows that she has suffered emotional pain and suffering, mental anguish, emotional distress, and her professional reputation has been damaged as a direct result of the discrimination established in this case.

In view of the above, I concluded that LEM is entitled to \$50,000 in compensatory damages. Punitive damages are not included as a remedy available under the Energy Reorganization Act. *Norris v. Lumbermen's Mutual Casualty Co.*, 881 F.2d 1144 (1st Cir. 1989).

ATTORNEY FEES AND COSTS

Attorney fees which are reasonably incurred by Complainant in connection with bringing the complaint upon which the order was issued will be awarded. *Deford v. Secretary of Labor*, 42 U.S.C. Section 5851(b)(2)(B). A reasonable fee is not necessarily that agreed to by the Complainant and her counsel. *Blanchard v. Bergeron*, 489 U.S. 87 (1989); *Blackburn v. Metric Constructors, Inc.*, 86-ERA-4 (Sec'y October 30, 1991).

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Factors to be considered in awarding fees are:

1. Time and labor required;
2. Customary fee;
3. Novelty and difficulty of the questions;
4. The skill requisite to perform the legal service properly;
5. Preclusion of other employment by the attorney due to acceptance of the case;
6. Limitations imposed by the client or the legal circumstances. Priority work that delays the lawyer's other legal work is entitled to some premium;
7. Amount involved and the results obtained;
8. Experience, reputation, and ability of the attorney;
9. "Undesirability" of the case;
10. Awards in similar cases;
11. Whether the fee is fixed or contingent; and
12. Nature and length of the professional relationship with the client.

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 718 (5th Cir. 1974).

In addition, litigation costs and expenses are also reimburseable including monies reasonably spent in pursuing the cause of action. *Goldstein v. Ebasco Constructors, Inc.* No. 86-ERA-36 (May 17, 1988). This includes lodging, paralegal expenses, and the Complainant's transportation expenses to and from the hearing.

ORDER

Accordingly, IT IS ORDERED that:

1. Respondents pay to Complainant compensatory damages in the amount of \$50,000 in compensation for distress suffered as a result of the harassment and discrimination endured.

2. Take affirmative action to cease and desist from any discrimination against Complainant including acts to harass, intimidate, retaliate against, or threaten her.

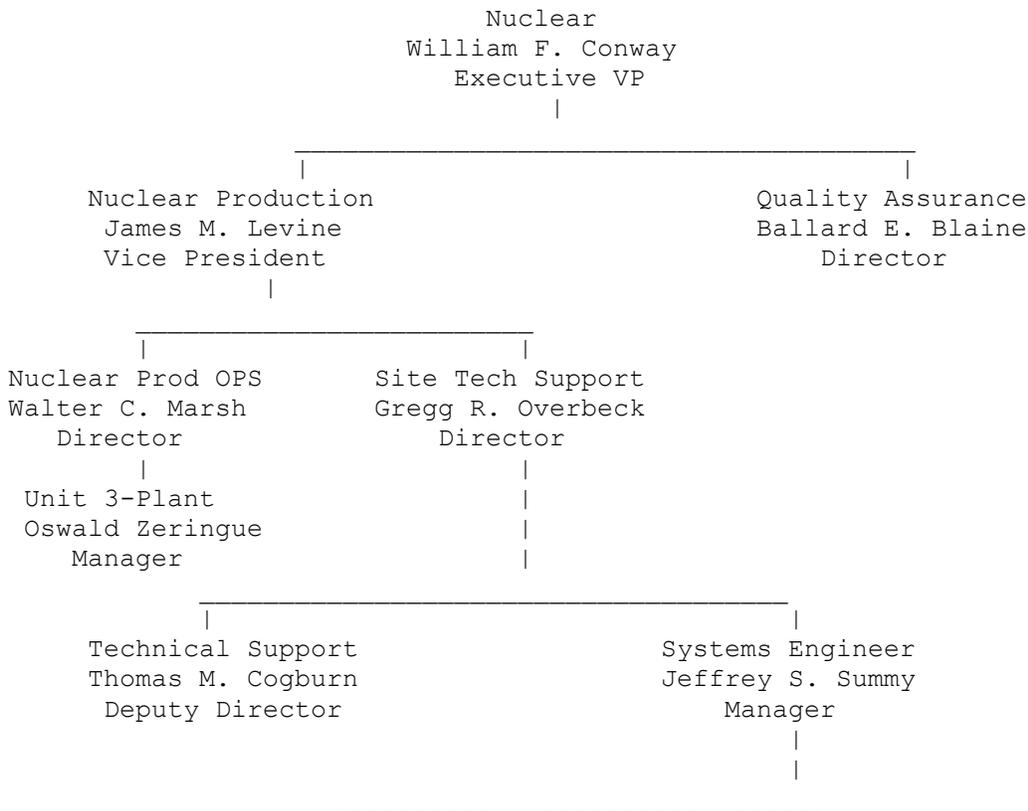
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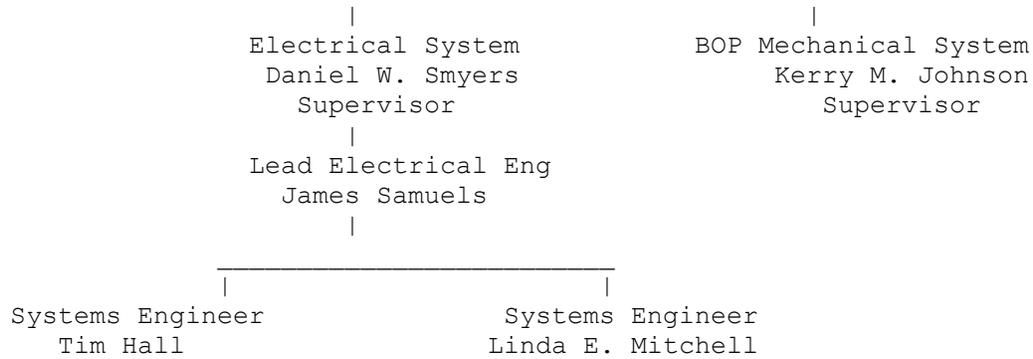
3. Inform all employees that they are to cease and desist from any discrimination against Complainant including any acts to harass, intimidate, retaliate against, or threaten her. This company statement is to be released only with the full participation and consent of Complainant.

4. Pay to Complainant, all costs and expenses, including reasonable attorney fees incurred by her in connection with this proceeding.

Counsel for Complainant will have thirty days from the date of this Order in which to submit an application for attorney fees and expenses reasonably incurred in connection with this proceeding. A service sheet showing that proper service has been made upon the Respondents and Complainant must accompany the application. Each other party will then have fifteen days following receipt of the application within which to file objections.

RUDOLPH L. JANSEN
Administrative Law Judge





APS ORGANIZATIONAL CHART
 January, 1989 - July, 1990
 (JX 44, 46-48; RX 1, p. 126)

EXHIBIT A

[ENDNOTES]

¹ In this decision, "JX" refers to the Joint Exhibits, "CX" refers to Complainant Exhibits, "RX" refers to the Respondent Exhibits, and "Tr." refers to the Transcript of Hearing. The transcript of testimony heard in the afternoon of July 8, 1991 is not paginated to conform with the other volumes of the transcript. The transcript was prepared by Holiday & Associates and will be referred to as Holiday Tr.

² Attached as Exhibit A is an APS Organizational Chart. The chart lists the positions held by individuals who were involved in one way or another with the events giving rise to the complaint being filed by LEM.