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Issue Date: 03 March 2005

CARL R. PATRICKSON
Complainant

2003-ERA-00022

v.

ENTERGY NUCLEAR OPERATIONS, INC.
Respondent

RECOMMENDED DECISION AND ORDER

This proceeding arises from a claim of whistleblower protection under the Energy Reorganization Act of 1974 ("ERA"), as amended, 42 U.S.C. § 5851. This statute and implementing regulations at 29 CFR Part 24 protects employees from discrimination in retaliation for engaging in protected activity such as reporting health, safety or environmental violations. In this case, the Complainant, Carl R. Patrickson, alleges that his Employer, Entergy Nuclear Operations, Inc. ("Entergy"), took adverse action against him because he reported a problem with the emergency service water ("ESW") pump room ventilation at the FitzPatrick plant ("FitzPatrick") to the Nuclear Regulatory Commission ("NRC").

Mr. Patrickson filed a complaint with the Occupational Safety and Health Administration of the Department of Labor ("OSHA") on April 22, 2003.[1] He alleged that Entergy "discriminated and retaliated against him in retaliation for complaining to management and governmental agencies such as the Nuclear Regulatory Commission and OSHA about various nuclear and safety related issues during his employment with Respondent." *Secretary's Findings and Preliminary Order* at 1. He also claimed that Entergy "further discriminated and retaliated against him for filing a January 13, 2003 OSHA safety complaint." *Id*. Specifically, Mr. Patrickson alleged that he received poor performance reviews, was placed on administrative leave in March 2003, and required to submit to a "not random" drug test and psychological evaluation as retaliation for his complaints. *Id*.

On July 17, 2003, the Regional Administrator for OSHA issued his findings on the complaint. The Administrator stated that the investigation did not find evidence to support Mr. Patrickson's claim that Entergy violated his rights under the ERA. *Id*. The Administrator wrote:

> The bulk of credible evidence fails to support his claims that any of the above employment actions that took place were in reprisal for his complaints to management, or to the Nuclear Regulatory Commission or OSHA. Instead, the bulk of credible evidence indicates that Respondent legitimately directed him to take a drug test and psychological evaluation due to their concern about his out of the ordinary behavior toward management shortly before and following his receipt on March 19, 2003 of the findings of OSHA's inspection of the plant.

[1] On May 8, 2003, Mr. Patrickson also provided a *Statement* to OSHA outlining his complaint.

> Pursuant to the results of the evaluation, he was allowed to return to work under the condition of adhering to guidelines involving stress management and extensive behavioral observation. The evidence also indicates that the evaluations that Complainant received on his 2002 Performance Review were in response to deficiencies in aspects of his job performance, and in light of the need for improvement in those aspects.

Id. at 2.

On July 21, 2003, the Complainant, through counsel, appealed the OSHA findings by means of a Notice of Appeal and Request for Hearing transmitted to the Office of Administrative Law Judges ("OALJ"). This case was originally set for hearing on October 21-23, 2003, in Syracuse, New York. However, the parties jointly requested a continuance of the hearing to permit further discovery, and the hearing date was rescheduled for January 13-15, 2004, in Syracuse, New York. In the meantime, on December 29, 2003, counsel for the Complainant advised that Mr. Patrickson had been terminated by Entergy on November 20, 2003, and that the termination had "dramatically changed the nature of his claims" against the company. Accordingly, it was requested that leave to amend the complaint be granted to include claims related to termination. In addition, another continuance was requested to allow time to amend the complaint and conduct further discovery. On December 31, 2003, the Respondent indicated that, in the interest of judicial economy, it had no objection to the Complainant's requests. On January 9, 2004, I granted another continuance and the hearing was subsequently rescheduled for March 30, 2004, in Syracuse, New York. On or about March 4, 2003, the Complainant, through counsel, filed an amended complaint. On or about March 19, 2004, the case was rescheduled for hearing on April 27-29, 2004, in Syracuse, New York, due to witnesses being unavailable for the previously scheduled March 30, 2004 date.

I conducted a hearing on this claim on April 27-28. 2004, in Syracuse, New York. The Complainant was represented by Lawrence M. Ordway, Esq., Green & Seifter, Attorneys, PLLC, Syracuse, New York. The Respondent was represented by Douglas Levenway, Esq., Wise, Carter, Child & Caraway, Jackson, Mississippi. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges, 29 CFR Part 18. At the hearing, Complainant's Exhibits ("CX") 1-77 were admitted into evidence, and Respondent's Exhibits ("RX") 1-20 were admitted into evidence without objection. Transcript ("Tr.") at 267, 399. In addition, Administrative Law Judge ("ALJ") Exhibits 1-2 were admitted into evidence.[2] Tr. at 268. The record was held open after the hearing to allow the parties to submit closing and reply briefs. All parties submitted briefs by October 28, 2004, and the record is now closed. In reaching my decision, I have reviewed and considered the entire record, including all exhibits admitted into evidence, the testimony at hearing and the arguments of the parties.

APPLICABLE STANDARDS

In order to prevail on his claim, Mr. Patrickson must establish by a preponderance of the evidence that the Respondent, Entergy, took adverse employment action against him because he engaged in protected activity. *Carroll v. U.S. Dep't of Labor,* 78 F.3d 352, 356 (8th Cir. 1996); *Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 277-278 (7th Cir. 1995). Whistleblower cases are analyzed under the framework of precedent developed in retaliation cases under Title VII of the

[2] ALJ 1 consists of Mr. Patrickson's Amended Complaint. ALJ 2 consists of the Amended Notice of Hearing. *See* Tr. at 268.

Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq and other anti-discrimination statutes. *See Overall v. Tennessee Valley Authority*, USDOL/OALJ Reporter (HTML), ARB Nos.1998-111, 128, ALJ No. 1997-ERA-53, at 12-13 (ARB Apr. 30, 2001), citing, inter alia, *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248 (1981); *St. Mary's Honor Center v. Hicks,* 450 U.S. 502 (1993); and *Reeves v. Sanderson Plumbing Products, Inc.,* 120 S.Ct. 2097 (2000). Where there is direct evidence of discrimination, then the complainant prevails unless the respondent can establish an affirmative defense. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 997 (2002) (Title VII case)*; Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121-122 (1985) (Age Discrimination in Employment Act ("ADEA") case).

When direct evidence of discrimination is not available, a complainant first must create an inference of unlawful discrimination by establishing a *prima facie* case of discrimination, by showing that the respondent is subject to the Act; that the complainant engaged in protected activity; that he suffered adverse employment action; and that a nexus exists between the protected activity and adverse action. The complainant must show that the respondent had knowledge of the protected activity to establish a *prima facie* case. *See Bartlik v. U.S. Dept. of Labor*, 73 F.3d 100, 102, 103 n. 6 (6th Cir. 1996); *Carroll v. U.S. Dept. of Labor*, 78 F.3d 352, 356 (8th Cir. 1995); *Cohen v. Fred Meyer, Inc.*, 686 F. 2d 793, 796 (9th Cir. 1982); 29 CFR § 24.5(a)(2). The burden then shifts to the respondent to produce evidence that it took adverse action for a legitimate, nondiscriminatory reason. Under the ERA, which contains an affirmative defense which the other whistleblower statutes do not, once a complainant has made a showing that protected activity "was a contributing factor" in the adverse action, the burden of persuasion shifts to the employer to demonstrate "by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of such behavior."[3] 42 U.S.C. § 5851(b)(3)(A) and (B). This defense appears to be a statutory adoption of the dual or mixed motive analysis in *Mt. Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S. 274, 287 (1977) (First Amendment case).

Finally, under the traditional Title VII analysis, the burden of persuasion remains at all times with the complainant, who must prove by a preponderance of the evidence that the respondent's proffered reasons were not the true reasons and constitute a pretext for discrimination. *Burdine*, 450 U.S. at 253.

SUMMARY OF THE EVIDENCE AND SEQUENCE OF EVENTS

Background

At the time of hearing, the Complainant, Carl R. Patrickson, was an engineer living in Mexico, New York. Tr. at 8, 12. For a substantial part of his career, Mr. Patrickson worked at

[3] A lesser standard may govern the employer's burden in a mixed motive case under the Clean Air Act (42 U.S.C. §7622), the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. § 9610), the Federal Water Pollution Control Act (33 U.S.C. § 1367), the Safe Drinking Water Act (42 U.S.C. § 300(j)-9(i)), the Solid Waste Disposal Act (also known as the Resource Conservation and Recovery Act)(42 U.S.C. § 6971), and the Toxic Substances Control Act (15 U.S.C. § 2622).

In a mixed motive Title VII case, the burden on the employer is to prove "by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258. (1989). Of course, if the employer can establish the defense under the ERA standard, then the complaint under all the alleged statutes must fail.

the FitzPatrick plant, both while it was owned by the New York Power Authority ("NYPA"), prior to November 2000, and after it was sold to Entergy, in November 2000. *See Respondent's Post-Hearing Brief* at 6. Notably, when Entergy bought FitzPatrick in November 2000, much of the management, particularly the senior corporate nuclear management as well as the Site Vice-President and General Manager of Plant Operations, changed. *Id*.

In 1989, when Mr. Patrickson first started working at FitzPatrick, he served as a maintenance engineer. Tr. at 15-16. After one and a half (1 ½) years, he became a field engineer. *Id*. at 16-17. He worked as a field engineer for approximately nine and a half (9 ½) years, from 1991 to 2000. *Id*. As a field engineer, his job duties were to "monitor modifications" as they were "being installed in the plant." *Id*. In May 2000, Mr. Patrickson left the field engineering group and began working in the system engineering group where his job title was "assistant engineer." *Id*. at 17. He worked in the system engineering group for approximately three (3) years; this was the last position he held at FitzPatrick. *Id*. at 17-18. His job duties entailed "monitoring systems" for "proper operation, proper maintenance, to insure that they were operating the way they should be." *Id*. at 17. Throughout his tenure at FitzPatrick, Mr. Patrickson was, as even he admitted, a "prolific reporter of problems." *Id*. at 106. In addition to the nuclear-related concern at issue in this case, Mr. Patrickson had, over the years, reported various other safety issues at the plant. *See id*. at 49-52. He was also known to voice his concerns regarding what he believed to be the inaccuracy of some of his performance reviews. Mr. Patrickson raised these concerns, relating to safety and relating to his performance reviews, both while FitzPatrick was under NYPA management, prior to November 2000, and while it was under Entergy management, post November 2000.[4]

Internal Reporting Mechanisms at Entergy

Mr. Patrickson testified about some of the internal reporting mechanisms at the plant to give employees an opportunity to voice their safety concerns. FitzPatrick had a "deviation member report system" (now called a "condition report system") and an Ethics Hotline to which employees could report their concerns directly to the plant. Tr. at 55. In addition, many

[4] Mr. Patrickson received his first performance evaluation at FitzPatrick in 1990. Tr. at 18; CX 14. He believed the evaluation was "mostly positive," but still "did not totally agree" with it. Tr. at 20. Therefore, he felt it necessary to prepare a rebuttal to the evaluation. Tr. at 20-21; CX 13. Later, in 1996, Mr. Patrickson again received a performance evaluation for which he felt it necessary to prepare a rebuttal. CX 6. Mr. Patrickson's rebuttal included two "Diller" cartoons. Tr. at 22. According to Mr. Patrickson, he included the cartoons because he believed the Respondent did not take his point seriously and thought the cartoons captured the difference of opinion. *Id*. At hearing, Mr. Patrickson testified that he was unaware of how the Respondent reacted to the cartoons. He further stated that he could not recall the Respondent ever indicating that it was unusual for him to prepare a rebuttal including cartoons. *Id*. at 22-23.

He nonetheless admitted that in 1996 he received an overall rating of "meets expectations" and that, while he received a "did not meet" for communication (CX 6:2), this was the only category for which he "did not meet." *Id*. at 111-112. He further admitted that he had been rated a "did not meet" for communication on numerous evaluations before this one. *Id*. Mr. Patrickson admitted to being "pretty upset" about this evaluation (*see e.g.* CX 6:5). Notably, he submitted his rebuttal to the 1996 performance evaluation three (3) days prior to first advising the Nuclear Regulatory Commission ("NRC") of the nuclear-related concern at issue in this case. *Id*. at 113-114. Mr. Patrickson also testified that prior to receiving his 1996 performance evaluation, he had reported approximately thirty to fifty (30 to 50) safety violations at the plant. *Id*. at 155-156. However, prior to the 1996 performance evaluation, he had not raised the ventilation issue with his supervisors. *Id*. at 156. According to Mr. Patrickson, his reason for not raising the ventilation issue until after he received his 1996 performance evaluation was that he "had a change in perspective" and did not think that FitzPatrick was "really serious about safety problems." *Id*.

witnesses, including Mr. Patrickson, referred to an employee ethics code in place at FitzPatrick known as the "Code of Entegrity" (hereinafter "the Code"). Mr. Patrickson testified that according to Section 3(b) of the Code, which is entitled "Your Compliance Responsibilities," employees are directed to "promptly notify the Company of any known, suspected or potential violations of the Code or any System Policy in accordance with Entergy System Policy Reporting Violations." Tr. at 57-58; CX 16. As a result of this directive, Mr. Patrickson believed that it was his duty to report suspected or potential violations of the Code. Tr. at 58.

Also of note, Section 5 of the Code, entitled "Reporting Violations," articulates that retaliation against an employee for making a complaint or report is strictly prohibited. CX 16. An internal document produced by the plant entitled "You and the Workplace," also addresses the issue of retaliation in connection with the Code. Tr. at 59; CX 15. Specifically, it prohibits "retaliation against an individual who makes a complaint or report under the policy, participates in an investigation under the policy or otherwise acts to enforce or uphold the policy." *Id*. It further states that if an employee believes he/she has "witnessed or experienced a violation of policy," then that employee must "immediately report the incident or incidents to one of the following: director of human resources, a human resources representative in [the employee's] business unit or the ethics line." *Id*. Finally, it advises that "nuclear employees may also report such contacts or incidents to [the] local Employee Concerns Coordinator" and that if an employee is "not satisfied with the resolution of [a] complaint," then that employee should call the ethics line. *Id*.

Complainant Raises Ventilation Issue in 1997

In 1997, when NYPA still owned FitzPatrick, Mr. Patrickson reported a problem at the plant to the Nuclear Regulatory Commission ("NRC"). Specifically, he reported a problem with the emergency service water ("ESW") pump room ventilation at FitzPatrick.[5] Tr. at 31. At hearing, Mr. Patrickson provided background as to what led him to be concerned about this issue. He testified that the ESW pump room was located in a building at FitzPatrick known as the Screenwell Building or Screenwell House. Tr. at 31-32. Inside the ESW pump room were the emergency service water pumps. *Id*. The purpose of the pumps was, in case of an accident or emergency, to cool the steam and/or hot water in the reactor. *Id*. at 32. According to Mr. Patrickson, the Screenwell House also housed the normal service water pumps, which "cool[ed] down steam in the reactor" on a regular, hourly basis. *Id*. Mr. Patrickson testified that if the normal service water pumps and the emergency service water pumps were to fail for any reason, then "you could end up with a nuclear meltdown." *Id*. at 33. He testified:"[i]f you don't have the – either of those waters to cool it and your equipment – your normal equipment that's required for cooling the reactor and auxiliary equipment overheat and eventually you won't have a plant." *Id*.

Mr. Patrickson provided testimony on what might cause the normal service water pumps and emergency water service pumps to fail. He explained that fire dampers are used to "stop fire from moving from one area to the other, similar to a fire door." Tr. at 34. In the context of the pump rooms, he stated that, typically, there is ventilation from the Screenwell area into the pump room by way of fire dampers. *Id*. However, when the fire dampers close, that path of ventilation is no longer available, and consequently ventilation ceases. *Id*. A fire in the Screenwell would be one way, for example, in which the fire dampers could close. Mr. Patrickson explained that, while the pumps are running, they give off a "significant quantity of heat" and, without

[5] Referred to throughout as the "ventilation issue."

ventilation, will heat up the air in the pump room such that it "exceeds the designed maximum temperature of the motors and the motors fail." *Id*. Mr. Patrickson stated that this was the sum and substance of the ventilation issue that he reported to the NRC in 1997. *Id*. at 34-35.

According to the testimony provided by Mr. Patrickson, this issue was a problem at FitzPatrick prior to his reporting it to the NRC in 1997. In fact, after he reported the problem in 1997, he learned of a Licensed Event Report ("LER") that had been prepared in connection with the fire dampers in 1991. Tr. at 35. That LER had been prompted by an incident during which the fire dampers had been inadvertently left closed during their modification, and consequently signaled an alarm in the control room.[6] *Id*. As such, the NRC was advised of the problem. Thereafter, New York Power Authority ("NYPA"), which then owned FitzPatrick, requested a temporary exemption from the NRC regarding the ESW pump room ventilation. *Id*. at 36, 38; CX 61:6. The exemption was necessary until the modifications could be completed to assure that "one division of RHRSW and ESW pumps and either the electric-driven fire pump or diesel-driven fire pump and their associated ventilation systems will be available in the event of a fire." CX 61:6-7. The modifications were scheduled to be completed prior to October 1993. CX 61:7; Tr. at 37. Additionally, interim compensatory actions were to be implemented until the modifications were completed. CX 61:7.

On September 10, 1992, the NRC granted a temporary exemption regarding the pump room ventilation at FitzPatrick. Tr. at 36-38; CX 61:7-8. In evaluating the request, the NRC noted that a fire in the Screenwell House could eventually cause the pumps to "overheat and fail."[7] CX 61:7. That notwithstanding, the NRC recognized that NYPA was in the process of developing modifications to insure that the necessary ventilation was available in the event of a fire. *Id*. The NRC also recognized that the modifications were anticipated to be extensive and "due to the procurement of long lead time equipment [would] require approximately eighteen (18) months to complete." *Id*.

According to Mr. Patrickson, although the temporary modifications were completed, there had also been two permanent modifications proposed at that time, neither of which had been completed when he checked just prior to his termination on November 20, 2003.[8] Tr. at 37-38. He testified that one of the proposed permanent modifications was to install unicoolers in the ESW pump bays. *Id*. at 37. The second was to provide outside air for combustion for the diesel fire pumps. *Id*. At hearing, Mr. Patrickson referred to a list of modifications from FitzPatrick,

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[6] Mr. Patrickson admitted that FitzPatrick did self-identify the problem to the extent that it filed the LER once the problem arose and pledged to address it. Tr. at 116. He further testified that, while he had been the modification engineer assigned to the modification, he did not file an LER or any type of problem identification report. *Id*. at 117. Thus, he was not the one who originally advised the NRC of the problem in 1991. *Id*. However, he also noted that FitzPatrick had been required by law to report the incident and therefore had no choice but to report it. *Id*. at 157.

[7] Specifically, the NRC noted that a fire in the Screenwell House could damage the Control Panels which could degenerize the exhaust fans. CX 61:7. Additionally, the fire could close the dampers in the room air intakes. *Id*. A fire in the East Cable Tunnel could damage cables which could degenerize the exhaust fans. The loss of cooling to these compartments when the pumps are operating could cause the pumps to overheat and fail. *Id*.

[8] Mr. Patrickson was aware that they had not been completed because he had been the engineer responsible for checking waters in that same general area and would "fairly often" go into the emergency service fire pump bays to check out other things. Tr. at 37-38.

dated June 3, 2003, which he claimed demonstrated that the modifications requested by FitzPatrick in 1991 and approved by the NRC were never performed. CX 47; Tr. at 47. It appears from the June 3, 2003 list of modifications (CX 47) that "RHRSW/ESW Pump Room Unit Cooler Installation" was indeed canceled. CX 47. It also appears that "Install Outside Air Supply to Diesel Fire Pump Room" was cancelled as well. *Id*.

On June 16, 1993, an intra-office memorandum was drafted at NYPA. CX 62; Tr. at 38. Along with the intra-office memorandum was an attachment, which consisted of correspondence from the Nuclear Utility Services ("NUS") to their participant members.[9] Tr. at 39; CX 62. The correspondence posed various questions to the participant members, the last of which solicited any "additional remarks." Tr. at 40; CX 62. Mr. Patrickson noted that one of the participant members, Toledo Edison, provided the additional remark that, "Toledo is able to use calculation to make many problems go away." Tr. at 40. Initially, Mr. Patrickson did not see any significance to this remark in the context of his concerns at FitzPatrick, however, he testified that he later drew a connection between this remark and the ventilation problem he perceived at FitzPatrick. *Id*. at 40-41. Specifically, he believed that NYPA "did a calculation that they used to justify not doing the permanent modifications."[10] *Id*. at 41.

To that end, on September 23, 1994, an outside company called Hughes and Associates prepared a document for the plant entitled "Screenwell Smoke and Hot Gas Analysis." Tr. at 42; CX 63. This document consisted of an analysis of the ventilation issue at FitzPatrick. Tr. at 42. It addressed what would happen to the ESW pump rooms if there were a fire. *Id*. Mr. Patrickson claimed that this document supported his contention that a fire in the ESW pump room could cause the pumps in the pump room to fail.[11] Tr. at 43.

On March 16, 1995, another NYPA intra-office memorandum was drafted. CX 64; Tr. at 45. This intra-office memorandum suggests abandonment of the modifications articulated in the temporary exemption. CX 64; Tr. at 45-46. Subsequently, toward the end of that month, on March 28, 1995, NYPA composed a letter to the NRC. CX 65. According to Mr. Patrickson, this letter called for abandonment of the modifications, which had been requested by FitzPatrick in 1991, and which had been approved by the NRC. CX 65; Tr. at 46. The reason stated for abandonment was that a recent analysis undertaken by NYPA (*i.e.* the Hughes and Associates analysis) showed that pump performance would not be degraded in the event of ventilation system loss due to a postulated fire in the Screenwell House. Tr. at 46; CX 65. In other words, NYPA had undertaken an analysis (CX 63), and based in part on that analysis, sought an exemption from what it had previously admitted to the NRC was in need of repair.[12] Tr. at 133-134.

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[9] According to Mr. Patrickson, NUS was "like a service company to nuclear power plants" and, at that time, FitzPatrick was a member of NUS. Tr. at 39-40.

[10] He explained that a ventilation problem can be "corrected" with a calculation by showing that "the issue does not create a fire significant enough to cause the plant to have a problem with the … emergency service water pumps." Tr. at 41.

[11] Specifically, a table within the document entitled "Time to Critical and Maximum Temperatures" demonstrated, according to Mr. Patrickson, that the ESW pumps in the emergency service water pump room could fail in approximately four (4) minutes after a fire started. Tr. at 44-45; CX 63:25.

[12] Mr. Patrickson testified that he did not think an exemption was proper, notwithstanding that the Hughes calculation and the calculation he obtained from GE regarding the temperature at which the motors would fail were

In 1997, Mr. Patrickson raised the ventilation issue with the NRC and then directly with the plant on July 25, 1997. Specifically, he provided a list of nineteen (19) concerns about the plant. Tr. at 137; CX 66. The ventilation issue was listed as Concern No. Fifteen (15). Tr. at 137-138. Mr. Patrickson admitted that when he reported the ventilation issue to the NRC in 1997, he never looked to see what the licensee's response to the NRC was and never looked to see what calculations had been done or whether it had been fixed. Tr. at 138, 142-143. He indicated that he did not do so because he did not have time. Tr. at 158.

On August 14, 1997, the NRC wrote to NYPA advising that it was aware NYPA had undertaken inspections or investigations necessary to reasonably prove or disprove the concerns articulated on July 25, 1997.[13] CX 66. It further requested that NYPA inform a specific NRC regional representative of the resolution of the matter. *Id*. Mr. Patrickson testified that after he reported the ventilation problem to the NRC in 1997, the NRC declined to conduct an investigation. Tr. at 47. He also testified that around the time he provided information to the NRC, he provided the same information to an official at NYPA. *Id*. at 47-48. According to Mr. Patrickson, when he provided the information to that official, he disclosed the fact that he had filed a complaint with the NRC. *Id*. at 48-49. That official conducted an internal investigation within NYPA, notwithstanding that the NRC had declined to conduct an investigation. *Id*. at 47-48. As a result of the internal investigation, NYPA found there to be no problem. *Id*. at 48. Mr. Patrickson testified that the NRC ultimately went along with NYPA's finding that there was no problem with the ventilation issue. *Id*. at 49. Nevertheless, Mr. Patrickson continued to be concerned because "the problem was still there, the fire dampers had been closed and overheated the room and nothing had been done as far as modifications to correct the problem." *Id*. at 36.

Complainant's Performance Issues

In the years that followed his reporting the ventilation issue in 1997, Mr. Patrickson was documented as having had performance issues at the plant. In 1997, after reporting the ventilation issue, he received what he felt to be an unfavorable performance evaluation. Tr. at 23-24; CX 5. In fact, he felt it was "much worse" than his previous evaluation and that it was "half as good." Tr. at 24. Mr. Patrickson believed that he received such a negative evaluation on account of the fact that he had reported to the NRC. *Id*.

Later, on January 1, 2000, Mr. Patrickson was placed on a performance improvement plan (PIP or implement plan) due to his 1999 performance review. Tr. at 26; CX 4. Mr. Patrickson met with his supervisor at the time regarding the PIP. Tr. at 26. His supervisor explained that he was being placed on a PIP to "try to improve and bring [his] performance back up to standards." *Id*. at 27. Mr. Patrickson testified that he and his supervisor met periodically, approximately once a month or once every six (6) weeks, to discuss his PIP. *Id*. at 28.

Again in 2001, Mr. Patrickson received a performance evaluation that he did not feel to be a totally fair and accurate representation of his performance. *Id*. at 28-29. He alleges that "it did not take into account the work [he] did on the condenser fouling issue." *Id*. Mr. Patrickson testified that he had worked on the condenser fouling problem throughout that year and was able to take care of "about 90 plus percent" of the problem. *Id*. He prepared a rebuttal to his 2001 evaluation and indicated that his work on the condenser fouling problem was the main reason he disagreed with his review. *Id*. at 30.

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consistent: both calculations said that the motors would fail at two hundred twelve (212) degrees Fahrenheit. Tr. at 46; 154-155.

[13] The NRC attached to the letter the list of concerns provided by Mr. Patrickson.

Complainant Raises Ventilation Issue Again in 2002

Mr. Patrickson testified that in the first part of 2002, he prepared and e-mailed to Mr. Brian O'Grady, the general manager of plant operations, a list of concerns entitled "Short List of Problems in Order of Importance, Decreasing" ("Short List").[14] Tr. at 52-54; CX 51. He testified that he was "pretty sure" he also provided a copy to Mr. Ted Sullivan, who was then the vice president of the plant, and to Mr. Ron Davis, who was then the manager of system engineering. Tr. at 52. The specific concerns on the list were "the ESW pump room ventilation, problem with plant roofs, problems with the lack of – preventers in the City water system." *Id*. at 52-53. Mr. Patrickson testified that his reason for reporting these problems was that, at that time, "Entergy was a fairly new owner to the plant and most of the people were from outside of the spectrum, people that [he] reported these problems to, and [he] wanted them to know about these other problems that they might not have heard about." *Id*. at 53. With regard to whether anyone at the plant ever addressed his concerns on the "Short List," Mr. Patrickson testified that "they had started to work on the plant roofs that established – and they were starting to work on one of the back flow preventers." *Id*. at 55. However, in terms of whether anyone ever addressed his concern about the ventilation issue, he testified that several people "walked it down" with him and "kept promising they would fix it" but "nothing ever happened." *Id*. at 63.

Specifically, the Complainant "walked down the problems with [Mr.] Davis in March of 2002" and told him his concern about the Screenwell. Tr. at 53-54. Mr. Patrickson testified that this was the same problem he had identified in 1997, and he raised it again in 2002 because of the intervening event of the September 11th terrorist attack on the World Trade Center. *Id*. He testified that, especially in light the terrorist attack, the 1997 determination by FitzPatrick and the NRC, holding that that a fire in the Screenwell House could not cause a pump failure in the ESW pump rooms, was incorrect. *Id*. at 54. He testified that if a terrorist were to fly a plane into the Screenwell House, for example, there would be "a large quantity of fuel and a combustion source" in the Screenwell, which would start a fire that is "not part of the fire protection program." *Id*. In other words, Mr. Patrickson felt that the investigation performed in 1997 did not take into account a September 11th scenario. *Id*. Thus, when mentioning the problem to Mr. Davis, Mr. Patrickson claims to have mentioned it in the context of a possible terrorist attack, noting the events of September 11th had occurred about three (3) or four (4) months earlier.[15] *Id*. at 159.

Although Mr. Patrickson claims to have mentioned the ventilation issue in the context of September 11th to Mr. Davis, he admits that there was nothing contained in the Short List relating to how a terrorist attack, such as September 11th, could impact the ventilation issue. Tr. at 142. Mr. Patrickson testified that Mr. Davis responded to his concern by stating that "he was

[14] Mr. Patrickson admitted that he may have sent the list to Mr. O'Grady as an attachment to an e-mail (he could not recall specifically); he definitely did not personally give the list to Mr. O'Grady nor did he ever have a discussion with Mr. O'Grady about the list. Tr. at 141.

[15] However, he did not raise the terrorist element in 1997 or when he later raised the ventilation issue again in 2003, nor did he raise it in the form of an LER or DER as there was no "hard and fast deviation" or "measurable condition" that he would have needed to prepare one of those documents. Tr. at 159-160.

going to have the HVAC people look at it." *Id*. at 54. However, to Mr. Patrickson's knowledge, no one from the HVAC department ever reviewed the problem.[16] *Id*. at 55.

Mr. Patrickson Files Complaint with Ethics Hotline in June 2002

In June 2002, Mr. Patrickson reported what he believed to be six (6) violations of OSHA regulations to the Ethics Hotline. Tr. at 55-56. These violations dealt primarily with "back flow preventers" and "safety hazards in the Screen Weld." *Id*. at 56. Mr. Patrickson testified that he filed his concerns both by telephone and by letter. *Id*. He testified that he "took a chance" of reporting additional safety concerns in this manner because the company had changed the Code of Entegrity, adding the requirement that employees were obligated to report any violations of federal or state law. *Id*. at 57.

Complainant's 2002 Mid-Year Review and PIP

According to Mr. Patrickson, after he filed his concerns with the Ethics Hotline, his supervisor at the time, Mr. Sherard Anderson "marked him down" in his midyear review on account of having filed these concerns. Tr. at 60-61. Mr. Patrickson testified that Mr. Anderson "put up a sketch on a board" and told him that he was "below average in behavior performance." *Id*. at 60. Mr. Patrickson testified that Mr. Anderson presented this "just verbally in this sketch on a whiteboard." *Id*. at 60-61. He further testified that the only example provided by Mr. Anderson for his performance being below average was the fact that he had taken time to insure that his safety concerns were addressed. *Id*. According to Mr. Patrickson, he then reported to the Ethics Hotline what he perceived to be discrimination in terms of his 2002 midyear review. *Id*. at 62. As a result of his 2002 midyear review, Mr. Patrickson was placed on a PIP. *Id*. at 94-95, 118.

December 11, 2002: Complainant Reports OSHA Violations to Respondent

On December 11, 2002, Mr. Patrickson wrote a letter to Mr. Mike Kansler, who was then the Chief Operating Officer of Entergy Nuclear Northeast. Tr. at 119; CX 26. The letter indicated that Mr. Patrickson did not feel he was adequately compensated or recognized for his recent achievements at work, particularly with regard to the condenser fouling problem. CX 26; Tr. at 158. Attached to the letter, Mr. Patrickson included a document entitled the "major problems with traveling water screens," which was meant to support his contentions in the letter. Tr. at 121; CX 26. In addition to that attachment, Mr. Patrickson also included a September 17, 2002 letter that he had sent to Mr. Alan Smith of the Ethics Hotline at Entergy. *Id*. Specifically, the September 17, 2002 consisted of a follow-up letter to correspondence that he had sent Mr. Smith approximately three (3) months earlier in June 2002. Tr. at 121-122, 126-127; CX 26. Mr. Patrickson admitted, however, that none of this correspondence (*i.e.* his December 2002 letter to Mr. Kansler, his September 2002 letter to Mr. Smith, nor his June 2002 letter to Mr. Smith) mentioned the ventilation issue. Tr. at 122-123. According to Mr. Patrickson, Mr. Kansler responded to his December 2002 letter by having him speak with Mr. Sullivan. Tr. at 62. Mr. Sullivan promised to resolve the problems. *Id*.

January 2003: Respondent Conducts Investigation

The following month, in January 2003, Mr. Sullivan requested that Mr. Glen Zimmerman, the director of human resources, speak with Mr. Patrickson regarding his

[16] Mr. Patrickson testified as to how he believed the ventilation issue could be addressed such that the plant would be less vulnerable in the event of a terrorist attack. He thought that the plant should install camcorders in the two (2) pumps rooms and an outside air supply as proposed in the 1991 LER. Tr. at 106-107. He further stated the plant could "concrete over" the openings in the ceiling of the pump room where the fire dampers are and create a type of "fallout shelter" to prevent "flaming fuel" from reaching the pump room. *Id*.

allegations of discrimination in connection with his performance reviews.[17] Tr. at 228. Mr. Zimmerman testified that Mr. Sullivan had noted the seriousness of the matter and instructed that it be given "immediate attention." *Id*. According to Mr. Zimmerman, Mr. Patrickson claimed that the discrimination/retaliation had occurred "over a number of years [and] that his performance reviews had been negatively impacted by [reason of his] safety concerns." *Id*. at 228-229. Mr. Patrickson was particularly concerned with his 2002 midyear review. *Id*.

In the course of his initial investigation, Mr. Zimmerman examined all of Mr. Patrickson's performance reviews, beginning in July 1989. *Id*. He concluded there to be no basis for linking Mr. Patrickson's performance reviews to his safety concerns.[18] Tr. at 231. Mr. Zimmerman did notice, however, a consistent behavior pattern throughout the performance reviews demonstrating Mr. Patrickson's problems with communication and bringing projects to completion. *Id*. Mr. Zimmerman testified that he interviewed Mr. Patrickson's supervisors as part of the investigation. *Id*. He consulted with Mr. Anderson, who had conducted the 2002 midyear performance review, and specifically asked him about Mr. Patrickson's bringing forth safety concerns and whether he had been rated down as a result. *Id*. at 231-232. Mr. Anderson conveyed that he had been supportive of Mr. Patrickson bringing forth safety concerns. *Id*. at 232. However, he also wanted Mr. Patrickson to focus on results and getting his job done. *Id*.

Mr. Zimmerman later composed a memorandum to file, on March 27, 2003, regarding his investigation. CX 19; Tr. at 80. He noted that during the initial investigation intake, Mr. Patrickson stated that he had been "demotivated" after his 1997 performance review and that he "kind of used the NRC thing as a – shield for a year or two." CX 19:1; Tr. at 80-81. According to the memorandum, Mr. Patrickson stated that he was "kind of spiteful." *Id*. However, at hearing, Mr. Patrickson testified that, while he may have said "something similar to that," he believed that "spiteful" was too strong a word to describe his sentiments. Tr. at 81. He admitted, though, that he was "demotivated" on account of the treatment he received in the 1996 and 1997 calendar years. *Id*.

January 13, 2003: Complainant Reports to OSHA

By January 13, 2003, Mr. Patrickson had become "impatient" because he believed his OSHA concerns were not being addressed by the plant. He therefore filed a "letter report" with OSHA, identifying the same six (6) concerns he had reported to the Ethics Hotline in June, 2002. Tr. at 63-64; CX 27.

January 15, 2003: Complainant Randomly Tested for Drugs and Alcohol

Mr. Patrickson testified that on January 15, 2003, he was randomly tested for drugs and alcohol. Tr. at 74. He testified that while employed at FitzPatrick, he was required to undergo

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[17] This is how Mr. Zimmerman first came to know Mr. Patrickson. Mr. Zimmerman described his relationship with Mr. Patrickson as a "working relationship." Tr. at 206. In describing Mr. Patrickson's personality, Mr. Zimmerman stated: "Mr. Patrickson is a professional individual. He's an engineer. He's a quiet individual." *Id*. Mr. Zimmerman testified that he considered Mr. Patrickson a "calm person" and not an "excitable person." *Id*. However, Mr. Zimmerman also testified that Mr. Patrickson was passionate about safety issues at FitzPatrick. *Id*. at 260.

[18] Mr. Zimmerman testified that he did not recall any specific reference in these performance evaluations to safety issues or to his having reported safety issues, though he admitted that "there may have been." Tr. at 260. *See*, *e.g*. CX 9, Mr. Patrickson's 1994 performance evaluation, which notes the fact that Mr. Patrickson had in the past identified plant concerns (*i.e.* safety issues). Tr. at 260-261.

random drug and alcohol testing between two (2) and five (5) times per year throughout his fourteen (14) years of employment. *Id*.

January 16, 2003: Complainant Provides OSHA Information to Respondent

Mr. Patrickson testified that on January 16, 2003, he provided to Mr. Wayne Leonard, Chief Executive Officer of Entergy, via facsimile, a copy of the same information he had provided to OSHA on January 13, 2003.[19] CX 27; Tr. at 63-64. Mr. Patrickson admitted that nothing on the cover page of the facsimile, nor anything contained within the information provided to OSHA, addressed the ventilation issue. CX 27; Tr. at 124-125. He testified that he never received a response from Mr. Leonard or anyone else at FitzPatrick.

February 25, 2003: Complainant Randomly Tested for Drugs and Alcohol

On February 25, 2003, Mr. Patrickson was again randomly tested for drugs and alcohol. Tr. at 74. This was approximately six (6) weeks after he reported his safety concerns to OSHA. *Id*.

March 2003: OSHA Performs Inspection of Plant and Issues Citation

According to Mr. Patrickson, in March 2003, OSHA performed an inspection of the plant and thereafter cited it. Tr. at 64-65. Mr. Patrickson also claimed that the plant did correct the safety problem as a result of the citation.

March 24, 2003: Respondent Approached With OSHA Information

On March 24, 2003, Mr. Patrickson approached Mr. Zimmerman with a copy of the OSHA information. According to Mr. Zimmerman, Mr. Patrickson was "quite unhappy" and "upset with the findings." Tr. at 232-233. Although the company had received a de minimis fine for one of the violations, there were other allegations, which were dismissed, and Mr. Patrickson took exception to those. *Id*.

March 25, 2003: Mr. Patrickson Contacts Mr. Leonard Regarding OSHA Citation

On March 25, 2003, Mr. Patrickson sent Mr. Leonard a letter via facsimile, which included a copy of the OSHA citation as well as correspondence that OSHA had sent to Mr. Patrickson regarding his safety concerns. CX 28; Tr. at 66. According to Mr. Patrickson, the substance of the OSHA letter indicated that the plant had been given citations for "the OSHA problems that the plant had not fixed in that eight (8) months since [Mr. Patrickson] first reported [them] …" Tr. at 66. The OSHA letter also found the plant in violation of three (3) items, one of which prompted a fine. Tr. at 66. While OSHA identified Mr. Patrickson by name in the letter it sent to him, he was not identified in the copy of the letter it sent to the plant. Tr. at 66-67. However, Mr. Patrickson claimed that he himself disclosed to Mr. Leonard that he reported these issues to OSHA. Tr. at 67. Mr. Patrickson admitted that the concerns contained in his letter were non-nuclear safety issues (*i.e.* the ventilation issue was not mentioned).[20] Tr. at 128.

March 25-27, 2003: Incident Involving Mr. O'Grady and Related E-mails

On either Tuesday, March 25, 2003 or Wednesday, March 26, 2003, Mr. Patrickson and Mr. O'Grady, the general manager of plant operations, had a "run-in" outside the washroom at the plant. Tr. at 67, 82, 160. Mr. Patrickson and Mr. O'Grady provide varying accounts of the

[19] As part of the facsimile, Mr. Patrickson also included a copy of his June 2002 letter to Mr. Smith. Tr. at 125; CX 27. Mr. Patrickson again admitted that this had to do with the ventilation issue. Tr. at 126.

[20] He also admitted that, while his letter indicates he "had not heard one word" on his report of discrimination, it was actually true that he had met with Mr. Zimmerman and had given him extensive information on the subject. Tr. at 129.

encounter and differ on whether it took place on March 25, 2003 or March 26, 2003. In any event, according to Mr. Patrickson, it was during this encounter that he asked Mr. O'Grady whether he knew that the plant was getting a citation.[21] *Id*. In addition, they also discussed the "city back bumper bender issue." *Id*. at 82. Mr. Patrickson testified that he was concerned about these issues, and therefore discussed them with Mr. O'Grady, since "that was already Tuesday, OSHA had signed the citation on the 19th, several days before, and since he didn't know about it, I was concerned that the plant hadn't started to do anything about the OSHA citation at that time." *Id*. Mr. Patrickson testified that during his conversation with Mr. O'Grady, he felt that his emotional state was "normal." *Id*. at 82-83. He denied having been agitated or excited. *Id*. at 83. He denied that there was anything unusual about his demeanor. *Id*.

Mr. O'Grady provided a different version of the encounter. He testified that, during the run-in, he and Mr. Patrickson "got in a conversation about an OSHA investigation" and as they "walked out of the bathroom," they "talked about a number of different issues," including the "back flow preventers for the city water, which is an issue at FitzPatrick." Tr. at 274. Mr. O'Grady further stated that when they got out into the hallway, he continued to ask questions of Mr. Patrickson, who "started getting a little bit excited, raised his voice, got closer to [his] face and he seemed angry ..." *Id*. Mr. O'Grady further testified that during this discussion, Mr. Patrickon was nearly yelling at him. *Id*. Mr. O'Grady testified: "I wouldn't say screaming, you know, crazy but definitely out of character for [Mr. Patrickson]." *Id*.

Thereafter, on March 26, 2003, Mr. O'Grady sent an e-mail to the engineering director, Mr. Limpias, describing his discussion with Mr. Patrickson and noting that he appeared to be "in an excited emotional state, which is different than how he normally behaves."[22] RX 5; Tr. at 274-275. That same day, March 26, 2003, Mr. O'Grady received an e-mail from Mr. Patrickson concerning one of the questions Mr. O'Grady had asked him in connection with the city water issue.[23] RX 6; Tr. at 276.

The next morning, Thursday, March 27, 2003, Mr. O'Grady received another e-mail from Mr. Patrickson. RX 7; Tr. at 277. The first paragraph of the e-mail read as follows: "Mr. O'Grady, you were not happy with what I was telling you yesterday, that [sic] you should really not like the attached Internet website. I've seen this before and probably put it at the back of my head so I could at least sleep **some at night**!!" Tr. at 277. Mr. Patrickson testified that the attached internet website, a "planning website" that was part of the internal computer system for the plant, contained a document entitled "JF OSHA WR"[24] (CX 22). *Id*. at 71-72. According to

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[21] Although he did not inform Mr. O'Grady that he had made the complaint to OSHA, Mr. Patrickson did deliver a copy of OSHA's citation letter to Mr. O'Grady's mailbox (with his name "blacked out" on the letter). Tr. at 67. Mr. O'Grady admitted knowing about Mr. Patrickson's OSHA complaint. Tr. at 291-292.

[22] Mr. O'Grady testified that he felt it necessary to send such an e-mail to Mr. Limpias, since it was his practice to let management know whenever he observed an employee doing something out of the ordinary, whether it be good or bad. Tr. at 275-276. Thus, it was not unusual for Mr. O'Grady to have sent such an e-mail. *Id*.

[23] Specifically, Mr. O'Grady had asked Mr. Patrickson whether he had any knowledge of the city water system being "depressured." Tr. at 276-277. At the time of their discussion, Mr. Patrickson had not known of any, and therefore subsequently sent Mr. O'Grady the e-mail. Tr. at 276-277.

[24] WR stands for "work report." Tr. at 68.

Mr. Patrickson, this document contained a list of safety problems at the plant. *Id*. at 68. Mr. O'Grady testified as to his impression of Mr. Patrickson's March 27, 2003 e-mail.[25] He testified: "The way I read this, when somebody bolds and caps and exclamates, it's like yelling in writing to me." *Id*. at 278. As a result of his concerns about the e-mail, Mr. O'Grady forwarded it to Mr. Limpias and Mr. Zimmerman, and indicated that it warranted some discussion. *Id*. at 277-278.

March 27, 2003: Meeting is Held Regarding Complainant; Entergy Headquarters is Contacted; Decision to Test Complainant "For Cause"

As a result of Mr. O'Grady's encounter with Mr. Patrickson, a meeting was held among Mr. Zimmerman, Mr. O'Grady, Mr. Limpias, and Mr. Sullivan. Tr. at 235. Documents were reviewed and a discussion was had regarding Mr. O'Grady's encounter with Mr. Patrickson in an effort to determine what action, if any, should be taken. *Id*. According to Mr. Zimmerman, Mr. O'Grady was particularly concerned, as was Mr. Sullivan, about Mr. Patrickson's difference in behavior.[26] *Id*. Given the circumstances, it was determined that Entergy Headquarters[27] should be contacted. A conference call with Entergy Headquarters was conducted, and it was decided that Mr. Patrickson needed to be evaluated psychologically as well as undergo for-cause drug and alcohol testing. *Id*. at 220-221, 238. Mr. Zimmerman specified that the decision to require for-cause testing was prompted by the fact that the company was "unsure as to whether Mr. Patrickson's aberrant behavior was related to drug and alcohol abuse." *Id*.

Several individuals who had been present during the conference call testified at hearing as to the policies and procedures that guided the decision to test Mr. Patrickson for-cause. In terms of for-cause testing, Mr. Zimmerman stated that Entergy determines whether employees are "fit for duty" based on a policy known as "AP 11.01" (CX 17) (also referred to as the "fitness for duty program").[28] This policy is derived from "10 C.F.R" to insure that Entergy tests its employees for drug and alcohol use in accordance with federal policy.[29] *Id*.

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[25] Mr. Patrickson, for his part, claimed that, while Mr. O'Grady never responded to the March 27, 2003 e-mail message, he did have occasion to ask Mr. O'Grady whether he received a copy of the OSHA citation letter and "JF OSHA WR." Tr. at 72. There is significant confusion surrounding when this conversation took place (*see* Tr. at 73, 144-145, 152-153), and I decline to analyze this issue thoroughly because it has no impact on the outcome of this case.

[26] In addition, Mr. Zimmerman stated that his "personal interaction" with Mr. Patrickson on Monday, March 24, 2003, had also raised some level of concern. Tr. at 235-236. Mr. Zimmerman admitted that without the other incidents, he "wouldn't have thought that much of" his interaction with Mr. Patrickson; however, in the context of Mr. O'Grady's encounter with Mr. Patrickson, the e-mails exchanged, and through speaking with Mr. Howse, Mr. Patrickson's supervisor, Mr. Zimmerman felt that his interaction with Mr. Patrickson also "raised the level of concern." *Id*.

[27] "Entergy Headquarters" refers to Entergy Nuclear Northeast in White Plains, New York.

[28] By way of background, Mr. Zimmerman testified that Entergy engaged in both random drug testing and for-cause testing. Because he was not involved in the random testing program, he could not state how many times a year an employee would be randomly tested. Tr. at 213.

[29] Mr. Zimmerman testified that the fitness for duty program (AP 11.01) applied to bargaining unit and non-bargaining unit employees, which would include Mr. Patrickson. Tr. at 214; CX 17. This particular version of the program (CX 17) was revision 10 and came into effect on January 31, 2002. Tr. at 213-214. This was the fitness for duty procedure applicable at the time of Mr. Patrickson's incident and it was still in effect at the time of hearing. *Id*.

Section 8.3.2 of the policy entitled "fitness for duty factors" states: "Supervisors and managers shall take appropriate action to relieve an individual from duty when they observe or receive credible information that an individual is unfit to safely perform his or her job because of mental stress, fatigue …" *Id*. at 225. Section 7.3.4 states: "For cause testing is performed on individuals (1) involved in specific events involving failure in performance following the event; (2) exhibiting behavior changes; (3) upon receipt of credible information concerning the individual." Tr. at 214-215; CX 17: 21.

Mr. Zimmerman also referred to the Entergy ENN Nuclear Management Manual (CX 18), which addressed testing for-cause in Section 5.6.1.[30] Tr. at 226-227. Section 5.6.1, entitled "Testing For-Cause (Reasonable Suspicion)," notes that "[d]ue to the sensitive nature of for-cause testing, specific criteria have been established to determine when for-cause testing is warranted."[31] CX 18:23; Tr. at 258-259. It further notes that "[e]very attempt is made to rely on objective and credible evidence that can be substantiated prior to requiring an individual to participate in a for-cause test." *Id*. Section 5.6.1 also provides the factors and circumstances under which an employee will be tested for-cause. Tr. at 218. Some of those factors are "observed aberrant behavior; pattern of abnormal conduct, or physical symptoms of being under the influence of drugs or alcohol."

Mr. Zimmerman, Mr. O'Grady, and Mr. Sullivan all testified that Mr. Patrickson had exhibited "aberrant behavior" such that for-cause testing was deemed appropriate. According to Mr. Zimmerman, Entergy's evidence demonstrating that Mr. Patrickson was "suffering mental stress" and that he was "unfit for duty" consisted of the "behavioral observations" during the week of March 24, 2003. Tr. at 257-258. Mr. O'Grady testified that it was believed for-cause testing was the "right thing to do" because in a "worst case scenario" somebody "acting crazed in the plant" could injure another person or tamper with the plant. Tr. at 278-279. Faced with this worst case scenario, and the examples of Mr. Patrickson's aberrant behavior, it was decided that Mr. Patrickson should be processed for fitness for duty. *Id*. To that end, Mr. O'Grady completed a for-cause form, which outlined the nature of the situation. RX 19:3; Tr. at 280.

At the time that he completed the for-cause form and it was decided that Mr. Patrickson should be tested for-cause, Mr. O'Grady testified that he was unaware of any

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at 214, 223-224. Mr. Zimmerman testified that insofar as drug and alcohol testing was concerned, he was aware only of the fitness for duty program and was not aware of any other company policy requiring employees to submit to drug and alcohol testing. *Id*.

[30] Mr. Zimmerman indicated that the fitness for duty program (CX 17) and the Entergy ENN Nuclear Management Manual (CX 18) were meant to work together. *See* Tr. at 225-226. It seems that the fitness for duty program was the policy in place at FitzPatrick prior to Entergy acquiring the plant in November 2000. The Entergy ENN Nuclear Management was the new policy being put into effect once Entergy took over the plant. To that end, Mr. Zimmerman explained that "as is the case in most acquisition time periods, it takes a certain number of years to turn an acquired company into a new company's policies and procedures." *Id*. The Entergy ENN Nuclear Management Manual was not meant to supersede the fitness for duty program to the extent that it was not consistent with it. CX 18:3; Tr. at 226. However, it seems that, ultimately, the fitness for duty program was to be replaced by the Entergy ENN Nuclear Management Manual.

[31] Mr. Zimmerman testified that a reasonable suspicion of drug and alcohol abuse was required before an employee could be tested. Tr. at 218-219. However, he also noted that "AP 11.01 takes into consideration stress, emotional and mental fatigue." *Id*. He further testified that the company can be justified in testing for drug and alcohol abuse based on "both that and psychological evaluation." *Id*.

nuclear safety issues raised by Mr. Patrickson. Tr. at 281, 292. In fact, he testified that while he was general plant manager, the ventilation issue was never brought to his attention by Mr. Patrickson or anyone else while Mr. Patrickson was employed at the plant.[32] Tr. at 281. In general, Mr. O'Grady testified that, while he might be questioned by the NRC if a problem is reported about the plant, the NRC would not indicate who had reported the problem. Tr. at 292. Moreover, in this case, Mr. O'Grady had never had an exchange with Mr. Patrickson, nor the NRC, on any nuclear safety issue raised by Mr. Patrickson. *Id*. He did not know whether, under any circumstances, the NRC would advise Entergy of who filed the claim but stated that he had never been in a situation where that had happened. *Id*. He did not know how the NRC ultimately informed Entergy of the ventilation issue and could only testify that he learned of it during "the corrective action program." *Id*. at 293.

Mr. Sullivan testified that he too was involved in the decision to have Mr. Patrickson tested for-cause. Tr. at 305-306. Specifically, once Mr. Patrickson's aberrant behavior was observed, Mr. Sullivan was "brought into the loop" to assess what should be done. *Id*. at 306. He enlisted the help of Mr. O'Grady, Mr. Zimmerman, Mr. Limpias, and Mr. Howse, who was Mr. Patrickson's supervisor at the time. However, Mr. Sullivan testified that, in the end, it was his decision to test Mr. Patrickson for-cause. *Id*. Mr. Sullivan testified that he felt the decision had been appropriate because he had observed Mr. Patrickson to be a quiet person who "never really said much" and this was how he had been described by others as well. *Id*. Thus, for Mr. Patrickson to have "come out of character" in the manner described was an example of aberrant behavior. *Id*. Mr. Sullivan testified that it was his responsibility to protect the health and safety of the plant, and since he took that responsibility "very seriously," he had a genuine concern that Mr. Patrickson "could do harm to himself to prove a point or do harm to some of the equipment to prove a point." *Id*. at 306-307. Mr. Sullivan admitted, however, that as far as he knew, Mr. Patrickson had never harmed equipment at FitzPatrick in the past. *Id*. at 312.

Instances of Other Employees Who Had Been Tested For-Cause

Mr. Zimmerman testified that he was unaware of the exact number of employees that had been tested for-cause since Entergy purchased FitzPatrick in 2000 but stated: "I would say several. A few." Tr. at 264. He admitted that it numbered less than five (5) employees. *Id*. at 264-265.

Mr. O'Grady testified that he was aware of employees being tested for aberrant behavior on at least three (3) or four (4) occasions. Insofar as the type behavior exhibited by these other employees, Mr. O'Grady stated that one employee, who had been making sexual comments, was processed for-cause and ended up resigning from the company. Tr. at 279-280. Another employee, who had appeared to be tampering with plant equipment, was processed for-cause and also ended up resigning. *Id*. at 279-280. Finally, another employee, who had shown patterns of aberrant behavior by not showing up to work at times, was processed for-cause and tested positive for alcohol. *Id*. That employee underwent rehabilitation and was back at work. *Id*.

[32] However, Mr. O'Grady had engaged in many discussions with Mr. Patrickson about industrial safety issues. Tr. at 281. In fact, at the time that Mr. Patrickson was sent for for-cause testing, Mr. O'Grady was aware that Mr. Patrickson filed a complaint with OSHA regarding several safety issues at FitzPatrick. Tr. at 291-292. However, he testified that Mr. Patrickson's involvement with raising safety issues had absolutely no influence on his decision to have him evaluated under the fitness for duty program. *Id*. at 281-282. Mr. O'Grady testified: "They're separate issues. In fact, bringing up safety issues is something that we encourage." *Id*. at 282.

March 27, 2003: Complainant Sent to
For-Cause Drug and Alcohol Testing and Psychological Testing

At approximately 2:25 PM on March 27, 2003, Mr. Patrickson was escorted to the medical department at Entergy by his supervisor, Mr. Howse. Tr. at 75, 221; RX 19.[33] According to Mr. Patrickson, Mr. Howse advised him that he would be accompanying him to the training building for testing. Tr. at 75. Mr. Patrickson testified that this was not normal procedure in terms of random drug testing; rather, under normal procedure he would have been advised that he must provide a random sample, and then he would have reported to the training building in as short a time as possible, usually within one (1) to two (2) hours. *Id*. Mr. Patrickson testified that when he was told he was to be tested, he recalled thinking it was "a little unusual time of the day" and that "it was a little unusual for [his] supervisor to go with [him] to the training building," but he "didn't think anything else of it." *Id*. at 75-76. A memorandum drafted by Mr. Zimmerman regarding the events of March 27, 2003 states that when Mr. Patrickson was told by his supervisor that he needed to report to the medical office, his first reaction was "who complained about me?". CX 19:3; Tr. at 81. However, at hearing, Mr. Patrickson denied having reacted as such. Tr. at 81. Instead, he testified that he had asked his supervisor what was going on and his supervisor claimed not to know. *Id*. As a result, Mr. Patrickson was surprised by what he encountered once he got to the medical building. *Id*.

Specifically, once Mr. Patrickson arrived at the medical building, he was advised by Mr. Zimmerman that he was being for-cause tested and that he would be "off until the results of the drug test came back.[34] *Id*. at 76. Mr. Patrickson, for his part, testified that he had never been on drugs or alcohol, nor had he ever undergone for-cause testing before. *Id*. at 78. Mr. Patrickson testified that once he finished his for-cause testing and his breathalyzer test came back negative, he was advised by Mr. Zimmerman that he was being referred for a psychological evaluation through EMAX, a third party vendor that Entergy had hired to set up employees with psychological services when necessary and to provide psychological evaluations. Mr. Patrickson was also advised that he would be contacted on Monday, March 31, 2003, after his drug screen results were obtained. RX 19; Tr. at 258. To set up Mr. Patrickson's referral, Mr. Zimmerman contacted Dr. Peter-Paul Seidenschnur, vice president of EMAX, who would assign a counselor in the Employee Assistance Program ("EAP") to Mr. Patrickson for psychological evaluation. Tr. at 238. Dr. Seidenschnur requested that Mr. Zimmerman provide some background information on Mr. Patrickson to allow for proper selection of one of the counselors. *Id*. at 219-220. In accordance with this request, on March 27, 2003, Mr. Zimmerman prepared a memorandum summarizing the background events leading up to Mr. Patrickson's for-cause testing.[35] CX 19; Tr. at 219-220.

March 27, 2003: Complainant is Placed on Administrative Leave

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[33] RX 19 consisted of a memorandum to file, drafted on March 28, 2003, by Debra J. Caltabiano, one of the plant nurses, recapitulating the sequence of events with regard to Mr. Patrickson's testing.

[34] RX 19 similarly notes that Mr. Patrickson was, at that point, brought into the office and told that he would be taking a for-cause drug and alcohol test due to his aberrant behavior, and that his access to the plant would be denied until the results of the drug screen were received. RX 19.

[35] The memorandum included information on the length of Mr. Patrickson's employment, his performance ratings, some of the comments made by Mr. Patrickson during Mr. Zimmerman's initial intake, and Mr. Patrickson's history of reporting safety problems at FitzPatrick. CX 19; Tr. at 221-222.

Mr. Patrickson testified that after the for-cause test was conducted, he was sent home on paid administrative leave for thirty one (31) days. Tr. at 77. Although Mr. Zimmerman had advised that he was being placed on paid administrative leave, Mr. Patrickson assumed, at that time, that he would be permitted to return to work after the results were returned in three (3) or four (4) days, and he was shown to test negative. *Id*. at 77-78. Mr. Patrickson testified that no one ever advised how long it would actually take for him to return to work. *Id*. at 78.

March 28, 2003: Complainant Would Have Received 2002 Performance Review

On or about March 28, 2003, Mr. Patrickson would have received his performance review for 2002 had he not been on administrative leave. Tr. at 118. Mr. Steven Bono, system engineer manager, testified that the performance review had already been completed by Mr. Patrickson's supervisor and was scheduled to be conveyed to Mr. Patrickson on the day that he went out on administrative leave. *Id*. at 251.

March 31, 2003: Complainant Reports the Ventilation Issue to the NRC Again

On March 31, 2003, four (4) days after he was placed on administrative leave, Mr. Patrickson again brought the ventilation issue to the attention of the NRC. Tr. at 118, 157. Specifically, he reported his concern to Mr. Leonard Cline, who was the NRC Resident Inspector at FitzPatrick.[36] CX 29; Tr. at 85. Mr. Patrickson explained that he waited until after he had been suspended to report to the NRC again because his suspension was "like a wake-up call." Tr. at 157. After he was suspended, he realized that FitzPatrick had not been "serious" in purporting that "safety is the most important thing." *Id*. He also stated that he reported the ventilation issue again after having done so in 1997 because "the terrorism aspect of it changed the whole perspective of what the problem with the Screenwell would be." *Id*. at 85-86. Accordingly, Mr. Patrickson claimed that when he reported this concern to Mr. Cline he specifically referenced terrorism.

April 1, 2003: Plant Nurse Advises Complainant That He Tested Negative;
April 2, 2003: Complainant Required to Meet With a Psychologist

On April 1, 2003, the Tuesday following the for-cause testing, the plant nurse called Mr. Patrickson to inform him that his test results were negative. Tr. at 78. Mr. Patrickson testified that on April 2, 2002, the day after he received the call from the plant nurse, he was required to see a psychologist. *Id*. at 78-79.

April 3, 2003: EMAX Provides Psychological Evaluation of Complainant

On April 3, 2003, Dr. Seidenschnur sent the first and only report to Entergy in connection with Mr. Patrickson's psychological evaluation.[37] RX 10; Tr. at 242-243. In essence, the report concluded that "there were no significant pathologies or anything of that nature" with respect to Mr. Patrickson. RX 10; Tr. at 244. The report recommended, however, that Mr. Patrickson obtain "some short term counseling to deal with stress." *Id*. It also recommended that he be placed in an intense behavioral observation program for no less than six (6) months. *Id*. The report stated that "pending adherence to these recommendations," Mr. Patrickson would appear to be capable of performing his normal

[36] Mr. Patrickson testified that as the Resident Inspector, Mr. Cline was in charge of monitoring the plant and insuring that it was being operated safely and in compliance with all regulations. Tr. at 85.

[37] Although Dr. Seidenschnur drafted the written evaluation for Entergy, Mr. Patrickson had been seen not by Dr. Seidenschnur but by a local psychologist, Dr. Joel Richman. Tr. at 79, 243; CX 20. Dr. Richman never sent Entergy a copy of his report; instead, Entergy was provided only with Dr. Seidenschnur's written evaluation (RX 10). *Id*.

duties. *Id*. According to Mr. Zimmerman, this meant that Mr. Patrickson's return to work was conditioned upon his obtaining stress management and undergoing the increased behavioral observation program. Tr. at 244-245.

April 22, 2003: Complainant Files a Complaint with OSHA Concerning Discrimination/Retaliation on the Part of Entergy

On April 22, 2003, while on administrative leave, Mr. Patrickson wrote a letter to OSHA stating that his intent was to "file a formal complaint against Entergy Corporation, specifically the FitzPatrick Nuclear Power Plant … for discrimination/retaliation against [him] for reporting of safety problems at the plant to the Syracuse office of OSHA." CX 55. The letter explains in detail Mr. Patrickson's efforts to report safety problems at the plant. *Id*. Significantly, it mentions both his OSHA related concerns and his NRC related concern (*i.e.* the ventilation issue). *Id*.

April 28, 2003: Mr. Vito of the NRC Sends Letter to Complainant

On April 28, 2003, Mr. David J. Vito, a Senior Allegation Coordinator at the NRC, indicated that he was contacting Mr. Patrickson as a follow-up to Mr. Patrickson's conversation with Mr. Cline on March 31, 2003. CX 29; Tr. at 86-87. [38] Mr. Vito stated that it seemed as though Mr. Patrickson was essentially raising the same concern that he had raised in 1997, which the NRC had previously determined was adequately resolved by NYPA. Thus, Mr. Vito wrote: "Absent additional information to indicate that the corrective actions in response to the [1991] LER have not been completed and/or were unsuccessful in resolving the problem, [the NRC has] no basis to revise [its] earlier conclusion that the potential problems identified in the LER were valid, but were adequately addressed by implemented corrective actions." CX 29; Tr. at 87.

April 28, 2003: Complainant Permitted to Return to Work

Also, on April 28, 2003, Mr. Patrickson was permitted to return to work. Tr. at 78, 84. He testified that he did not know why it took so long for him to return to work. *Id*. He was not aware of any other employee at the company that was forced to remain on administrative leave for such a lengthy period of time after having tested negative. *Id*. at 84. To return to work, he was required to sign a "return to work agreement," which stated that he would undergo "six (6) months of intensified behavioral observation and attend stress counseling sessions."[39] CX 20; Tr. at 84. Mr. Patrickson was not aware of any other employee at the company who was required to submit to behavioral observation and stress counseling after having tested negative. Tr. at 84-85.

Mr. Zimmerman provided testimony on Entergy's policies regarding allowing employees to return to work after for-cause testing. He stated that when an employee tests negative for drug and alcohol abuse after having undergone a for-cause procedure, that employee is permitted to return to work generally "fourteen (14) days or soon after a release can be generated." Tr. at 219. However, he did not believe the policy stated a specific length of time after which an employee can be reinstated. On the other hand, when an

[38] Mr. Patrickson's concern regarding the ventilation issue, which he had reported to Mr. Cline, was identified in the letter as "Concern No. 1." CX 29:2; Tr. at 87.

[39] Mr. Patrickson testified that the document he signed regarding the conditions by which he was permitted to return to work (CX 20) was dated April 24, 2003. Tr. at 146. However, he did not return to work until April 28, 2004. Tr. at 147. It is still unclear from the testimony why there is a four (4) day difference in between when he signed the document and when he returned to work. Tr. at 147.

employee tests positive after having undergone a for-cause procedure, that employee would be referred to the EAP for evaluation by professionals through EMAX. *Id*. at 216. After the evaluation, the professionals would make recommendations to the company as to the appropriate course of action for the employee. Mr. Zimmerman testified that the employee is not permitted to return to work unless the recommendations are followed. *Id*. at 212. Internally, the employee is suspended pending feedback from the outside professionals. Tr. at 216-217. However, the employee would be eligible for reinstatement. Tr. at 217. Mr. Zimmerman testified that the earliest reinstatement would take place would be ten (10) to fourteen (14) days after the employee tests positive. *Id*.

At hearing, Mr. Zimmerman provided several reasons to justify why it took an unusually long time for Mr. Patrickson to be permitted to return to work. First, he claimed that it was brought to the plant's attention that Mr. Patrickson's spouse had been involved in the evaluation proceedings with the psychologist. Since this was "unusual and kind of out of the ordinary," Entergy felt it had to contact Dr. Seidenschnur to insure that this would not influence or change his recommendation. Tr. at 245-247. Second, according to Mr. Zimmerman, this was the first time that Entergy had ever heard of an "intensified behavioral observation program." *Id*. He further stated that "given the nuclear industry and the reports and protocols," Entergy needed to get a full understanding of what it entailed before permitting Mr. Patrickson to return to work. *Id*. Local plant security was first contacted, then corporate headquarters in White Plains, New York, was contacted, and finally Dr. Seidenschnur was contacted before it was made clear that an "intensified behavioral observation program" consists of monitoring and documenting the actions of the employee for a total of six (6) months. *Id*. Subsequent to learning what the program entailed, the plant was responsible for contacting headquarters and getting approval for the program, since adopting a program at one plant had broader implications for the company. *Id*. By the time of all this was accomplished, and factoring in the intervening holiday with people on vacation, several weeks passed before Mr. Patrickson was permitted to return to work.[40] *Id*.

May 5: 2003: Mr. Bono to Supervise Complainant's
Intensified Behavioral Observation Program

On May 5, 2003, Mr. Zimmerman drafted a memorandum regarding the supervision of Mr. Patrickson once he returned to work. RX 11; Tr. at 248-249. The memorandum referenced the short-term counseling and intensified behavioral observation program, and noted that Mr. Bono would assume responsibility for supervising both the intensified behavioral observation program and Mr. Patrickson's PIP with input from Mr. Howse. RX 11; Tr. at 326-327. The reason stated for this arrangement was that "[i]n consideration of the EAP program in which Mr. Howse was participating,[41] the site vice president and director of

[40] Mr. Sullivan provided similar testimony. He stated that he was also involved in formulating the conditions under which Mr. Patrickson returned to the plant. Tr. at 307. To that end, he testified that first an analysis was performed on Mr. Patrickson, which took "some time to come back." *Id*. at 307-308. As a result of the analysis, Mr. Patrickson was required to participate in some anger management counseling and an aggressive management observation program. *Id*. Since Entergy did not really understand what that entailed, they called other sites to get information. *Id*.

[41] Mr. Zimmerman testified that Mr. Howse had himself been referred to the EAP; he had been drug and alcohol tested, and as a result of that, he had been referred to EAP. Tr. at 249-250. Thus, Mr. Howse was actually out on leave at the time that Mr. Patrickson returned from administrative leave. *Id*. at 250. While Mr.

engineering concluded that it would be inappropriate for him to have direct responsibility for Mr. Patrickson's intensified behavioral observation program and 2002 PIP. Tr. at 326-327. Accordingly, "the next level of management," (*i.e.* system engineering manager, Mr. Bono), would assume supervisory responsibility in that capacity with input from Mr. Howse." *Id*.

May 2003: Complainant Receives his 2002 Performance Evaluation

While Mr. Patrickson typically received his performance evaluations during the first part of the year, he received his 2002 performance evaluation in May 2003, after he returned from administrative leave. Tr. at 91. Other than this one instance, he had never received a performance evaluation in the month of May. *Id*. Mr. Patrickson testified that Mr. Bono and Mr. Zimmerman presented him with his 2002 performance evaluation, notwithstanding that they had never done so in the past. *Id*. at 92. Rather, only his supervisor, with no one else present, had ever provided him with his performance evaluations. *Id*.

Mr. Bono testified as to why he and Mr. Zimmerman presented Mr. Patrickson's 2002 performance review and why it was presented so unusually late. He stated that, although Mr. Patrickson's performance review had been prepared prior to his going on administrative leave,[42] his supervisor, Mr. Howse, was not on site once Mr. Patrickson returned from administrative leave. Tr. at 323, 325. Since Mr. Patrickson's administrative leave had already delayed delivery of his performance evaluation, and since his supervisor was not on site when he returned, it was decided that Mr. Bono should deliver the performance evaluation to provide Mr. Patrickson with as timely feedback as possible.[43] *Id*. at 325. In addition, Mr. Bono asked Mr. Zimmerman to sit in on the performance evaluation, since it was "abnormal" for a manager to be delivering a performance review, and since Mr. Zimmerman was more knowledgeable on the PIP process. *Id*. at 325-326.

May 8, 2003: Complainant Prepares Rebuttal to 2002 Performance Evaluation and Attaches April 22, 2003 letter to OSHA

Mr. Patrickson did not consider his 2002 performance evaluation (CX 1) to be an accurate representation of his performance. Tr. at 92-93. In fact, he considered it to be a poor reflection of his performance and felt that it was "much worse" than his previous evaluations and was "probably twice as bad" as his 2001 performance evaluation. *Id*. at 93. He believed the reason for this was related to his reporting the plant both to OSHA and to the NRC. *Id*. On May 8, 2003, he prepared a rebuttal to the 2002 performance evaluation. CX 1. In the final paragraph of the rebuttal, he stated that, overall he considered this to be a continuation of the discrimination and/or retaliation for his reporting safety problems. *Id*. He then referenced his April 22, 2003 letter to OSHA, and noted that he was attaching it to his rebuttal. *Id*.

Howse had been tested for drugs and alcohol, he had not been for-cause tested for drugs (*i.e.* it had been a random test). *Id*. at 264. Mr. Howse tested positive for alcohol and was still employed by FitzPatrick. *Id*.

[42] Thus, according to Mr. Bono, Mr. Patrickson's 2002 performance rating of "needs improvement" had already been determined prior to his going on administrative leave. Tr. at 223-224.

[43] Mr. Bono testified that he consulted with Mr. Zimmerman and Mr. Limpias about this decision, and that it was determined that Mr. Bono should deliver the performance evaluation, since Mr. Patrickson was his "direct report" and he was "familiar with the plan." Tr. at 325.

Complainant Placed on a 2003 PIP
In Connection with his 2002 Performance Evaluation

As a result of his "needs improvement" rating on his 2002 performance evaluation, Mr. Patrickson was placed on a PIP for 2003. Tr. at 323-324. Mr. Patrickson's 2003 PIP had been designated as "Revision 1" (as opposed to his PIP in connection with his 2002 midyear review which was designated as "Revision 0"). This meant that his 2003 PIP was considerably more aggressive and required Mr. Patrickson to make significant performance improvements within a shorter period of time. *See* Complainant's Post-Hearing Brief at 9; Tr. at 96, 98. The 2003 PIP was developed by Mr. Bono with input from Mr. Patrickson and Mr. Howse.[44] Tr. at 327. According to Mr. Bono, during the performance evaluation session, he gave Mr. Patrickson a draft copy of the PIP to which Mr. Patrickson was to add comments and determine a reasonable date for completing the tasks on the PIP.[45] *Id*. at 335.

The 2003 PIP noted that Mr. Patrickson's job performance needed improvement in system knowledge and system monitoring. Tr. at 96. It also stated that he needed improvement in communication, accountability, and issue resolution. *Id*. at 96-97. It also required Mr. Patrickson to have biweekly update meetings with his supervisors. *Id*. at 98. These updates were to be attended by Mr. Howse and Mr. Bono. *Id*. at 99.

Specifics of the 2003 PIP

The first section of Mr. Patrickson's 2003 PIP, which summarized his overall performance, was meant to recognize areas where Mr. Patrickson had met expectations and performed well. Tr. at 327-328. It demonstrated that he "apparently [had] the technical skill and experience to become a good system engineer." *Id*. This section is followed by areas needing improvement, which include communication, accountability and issue resolution. *Id*. Finally, the PIP addresses what are to be the "expectations" of Mr. Patrickson in his problem areas.

Mr. Bono testified that the category of "personal communication," where Mr. Patrickson needed improvement, involved "more than just [Mr. Patrickson] speaking to his peers." Tr. at 328-329. It also included written documents, since the system engineering department issued "a lot of reports" and "system health presentations."[46] *Id*. Mr. Bono testified that "personal communication" also involved "issue resolution," another area in which Mr. Patrickson encountered "various roadblocks." *Id*. at 329. It further involved Mr. Patrickson informing his supervisor of the type of problem at hand to facilitate resolution of the issue. *Id*.

Mr. Bono testified that in the category of "accountability," where Mr. Patrickson also needed improvement, one problem was that Mr. Patrickson's plan for resolution of the hot water boiler system issue was deemed ineffective, according to a peer review of the plan. Tr. at 330-331. Specifically, Mr. Bono testified that in discussions with a supervisor, it became

[44] Mr. Zimmerman was not involved in developing the PIP per se. Tr. at 251.

[45] In other words, all the handwritten dates were dates that Mr. Bono and Mr. Patrickson had agreed were the appropriate date by which these items needed to be done. Tr. at 335.

[46] Mr. Bono explained that the system health presentation is a weekly meeting in which system engineers present their systems to station management. Tr. at 345-346. The system health presentation served as a forum for the system engineer to present his system, and the problems within his system, to provide management with an understanding of what those problems were and the support required to resolve them. *Id*.

apparent that the plan was not progressing as expected and milestone dates were being missed. *Id*. Another problem in the "accountability" area was that Mr. Patrickson was not up-to-date with his system health reports. Tr. at 331; RX 1:10. According to Mr. Bono, Mr. Patrickson would only address this issue when prodded by Mr. Bono to do so. *See* Tr. at 331.

At the same time, Mr. Bono admitted that Mr. Patrickson was not the only employee failing to complete his system health reports on time. Tr. at 331. In fact, on February 8, 2003, Mr. Bono had sent an e-mail to all of the employees with overdue system health reports requesting that they meet with their supervisors about the problem and follow up with him, which none of them did. *Id*. at 331-332. As a result, on February 13, 2003, Mr. Bono sent another email to these employees. RX 17; Tr. at 332. The following day, Mr. Bono had a discussion with Mr. Patrickson and his supervisor, Mr. Howse, about how the system health reports were a "core function" and how not having them up-to-date is "kind of a liability for the department." Tr. at 332-333; RX 17. At that time, Mr. Patrickson responded that he had provided a draft for his supervisor but that his supervisor had not approved it. Tr. at 333. Mr. Bono testified that he was not satisfied with Mr. Patrickson's response because he felt that there should be "a little bit of accountability on both sides [from] the supervisor and [from] Mr. Patrickson to follow up … [to] make sure they were received and to see how Mr. Patrickson was progressing." Tr. at 333.

In the category of "issue resolution," where Mr. Patrickson also needed improvement, Mr. Bono again raised the problem of Mr. Patrickson's "efforts toward closure of the design change modification package for the hot water boiler system," which had been deemed unsatisfactory. Tr. at 333; RX 1:11. Prior to Mr. Bono becoming a part of the system engineering department, there had been a design change installed in the plant, but the configuration had not been updated to reflect it. Tr. at 334. Also prior to Mr. Bono becoming a part of the system engineering department, Mr. Patrickson had been assigned the task of "get[ting] that configuration back in order so that the operators and mechanics and those type of people had an accurate configuration or accurate documentation." *Id*. Mr. Bono testified that, although the task had been due the prior year, Mr. Patrickson still had not completed it. *Id*.

For each of the problem areas noted above, the PIP addresses what are to be the "expectations" of Mr. Patrickson. Tr. at 334; RX 1:11. With regard to "communication skills," Mr. Patrickson was expected to maintain system health reports in a timely manner. Tr. at 335. Further, written documents required as part of his normal duties were to be provided for review and approval prior to the due date.[47] Tr. at 336. Mr. Patrickson was also to provide "complete and accurate presentations" and was to be "prepared to answer questions, anticipate the type of questions he would get, and if desired, perform a 'dry run' with his supervisor prior to the [system health] presentation." *Id*.

With regard to "accountability," Mr. Patrickson was expected to "take ownership of [his] assigned system and apply system related issues to resolution in a timely manner." RX 1:11; Tr. at 336-337. Specifically, he was to "complete the design change package, close out hot water boiler project, which was a 'carryover' from the previous year." Tr. at 337. By

[47] Mr. Bono testified that because supervisors had to review many documents in a certain amount of time, they needed those documents before the actual due dates to give them ample time to provide a quality review. Tr. at 336. Thus, providing documents to a supervisor on the due date was "kind of not acceptable." *Id*.

November 1, 2003, Mr. Patrickson was to "insure all items in the A(1) action plan are completed and/or properly scheduled." RX 1:11; Tr. at 337. Finally, Mr. Patrickson was to "continuously improve assigned system's health indicator until green," which meant that the system would be operating in its best performance mode.[48] Tr. at 338.

With regard to "issue resolution," Mr. Patrickson was expected to identify issues and put plans together that consisted of "small steps" to drive the issue to resolution. Tr. at 338-339; RX 1:12. To that end, three (3) to five (5) "critical improvement areas for each system" were to be identified by June 9, 2003, with an improvement plan to achieve those goals. Tr. at 338-339. Mr. Bono testified that once the plan was developed, it was then to be reviewed to identify potential problems and, as necessary, develop contingencies. Tr. at 339. Mr. Patrickson agreed to present his final plan for Mr. Bono's approval by July 9, 2003. RX 1:12; Tr. at 339.

The fourth and final area under "expectations" was "core functions." RX 1:12. Mr. Bono testified that, "[b]ecause some of the 2002 performance issues dealt with expectations that were put in place for certain system engineer core functions," those expectations were outlined in this section." Tr. at 339-340.

Lastly, the PIP outlined how Mr. Patrickson's progress would be monitored in a section called "progress expectations." Tr. at 340; RX 1:12. First, biweekly updates on the plan were to be provided and Mr. Patrickson was to provide a written progress summary. RX 1:12; Tr. at 340-341. Second, the supervisor was to provide assistance for facilitating efforts of the action plan and assistance with tracking due dates. *Id*. Third, if and when initiatives stalled, Mr. Patrickson was to advise his supervisor/management in an effort to "remove the barriers" to the plan's completion. Tr. at 341. Finally, the PIP stated that failure to demonstrate immediate sustained performance would lead to further disciplinary action. RX 1:12; Tr. at 341. According to Mr. Bono, this statement was standard in all of the system engineering PIPs. Tr. at 340-342.

May 29, 2003: Mr. Vito of the NRC Drafts a Letter to Complainant

In a letter dated May 29, 2003, Mr. Vito of the NRC again wrote to Mr. Patrickson, this time concerning his discriminaiton complaint filed with OSHA on April 22, 2003. CX 30; Tr. at 90. Since the OSHA complaint had mentioned the ventilation issue, the NRC had been provided with a copy of the complaint, notwithstanding that it had been originally filed with OSHA. CX 30. Mr. Vito stated that, while the matter was being evaluated by OSHA, the NRC also need to be involved to the extent that Mr. Patrickson's OSHA complaint "did identify a safety concern [he] had raised that involved activities regulated by the NRC" (*i.e.* the ventilation issue). *Id*. Mr. Vito wrote:

> The specific "safety issue" you mentioned was an issue you had previously identified to the NRC in 1997 (NRC Allegation RI-1997-A-0126) and more recently in 2003 (NRC Allegation RI-2003-A-0053) about the functionality of fire dampers and exhaust fans for the fire and safety related pump rooms at

[48] Mr. Patrickson was also to "obtain monthly comprehensive feedback from [his] customers on [his] performance using an instrument approved by Manager." Tr. at 338; RX 1:11. Mr. Bono testified that "[p]art of the information we received is that [Mr. Patrickson] was not receptive to feedback during the A1 action plan development." Tr. at 338. However, as system engineers often end up "interfacing with a lot of organizations," being receptive to feedback is helpful to one's job performance. Tr. at 338.

> FitzPatrick. In a recent letter to you dated April 28, 2003, we informed you that we had previously reviewed this technical matter and rendered a conclusion as to whether appropriate corrective actions had been taken. We informed you that absent additional specific information to indicate that the corrective actions in response to the related 1991 licensee event report (LER) have not been completed and/or were unsuccessful in resolving the problem, we had no basis to revise our earlier conclusion that the potential problems identified in the LER were valid, but were adequately addressed by implemented corrective actions.
>
> Notwithstanding our current conclusions with regard to this technical matter, the NRC will be evaluating your assertion of discrimination.

CX 30.

Finally, Mr. Vito noted that, because Mr. Patrickson had raised a concern of employment discrimination for raising safety concerns, an evaluation of the matter without identifying him would be extremely difficult. CX 30; Tr. at 91. Thus, Mr. Patrickson's identity would be disclosed as part of the NRC's investigation. CX 30.

2003 PIP: Bi-Weekly Update Meetings and Notes Associated Therewith

As part of his 2003 PIP, Mr. Patrickson met with Mr. Bono and Mr. Howse on a bi-weekly basis. Mr. Patrickson testified that, while the purpose of these updates was to improve his performance, the atmosphere was "very hostile, very derogatory, very negative." Tr. at 99. As a result, he testified that the updates did not assist him in meeting the expectations of his PIP.[49] Tr. at 99. Specifically, there was "never any constructive feedback of anything that I had done that was anything good, and all the meetings were was [sic] like I say, like a meeting and the – never anything positive about it." Tr. at 99.

Both Mr. Bono and Mr. Howse kept notes of their bi-weekly meetings with Mr. Patrickson. These notes reflect how Mr. Patrickson appeared to be failing to meet the expectations of his 2003 PIP. RX 16; RX 13; Tr. at 342. Mr. Bono's notes from a May 29, 2003 bi-weekly meeting indicate that he "did not feel action of PIP was accomplished." Tr. at 347-348; RX 16:10. In essence, Mr. Bono felt that, while Mr. Patrickson had met the May 28, 2003 deadline to "maintain and present to station management, system health reports and the current and accurate status," there were "quality issues" outstanding. Tr. at 347-348. Mr. Bono felt that there were a number of instances in which Mr. Patrickson was failing to meet expectations. Tr. at 343. First, Mr. Patrickson attempted to provide updates on his progress via e-mail; this was "corrected immediately" once the meetings with Mr. Bono and Mr. Howse were arranged. *Id*. According to Mr. Bono, there was also an episode around "the end of May" where Mr. Patrickson stated in his health presentation that he had been "lied to by another system engineer." Tr. at 343-344. Mr. Bono testified that Mr. Patrickson then admitted during a biweekly update meeting, that "he had not been given any false information." Tr. at 343-344. Mr. Bono further testified that when he asked Mr. Patrickson if he would use the phrase "lied to" with the alleged liar in the room, Mr. Patrickson "basically said he would not …" Tr. at 343-344; RX 16:8-9 (5/29/03 entry). Mr. Bono thought it inappropriate for Mr. Patrickson to have "accused one of his peers of lying in front of senior management." *Id*. Another problem was that Mr. Patrickson had charged his time to a capital project on which he had not been working. RX 16:6. Mr. Bono stated that Mr.

[49] Mr. Patrickson testified that in total he attended approximately twelve (12) or thirteen (13) biweekly updates over a six (6)-month period. Tr. at 103.

Patrickson did admit that he "did not have authorization" when questioned about this. Tr. at 344-345; RX 16:6.

Mr. Bono also noted an incident where Mr. Patrickson failed to mention a safety issue regarding the chlorine injection system in his system health presentation. Tr. at 346-347; RX 16:9. This incident was actually brought to Mr. Bono's attention in a June 6, 2003 e-mail from Mr. O'Grady wherein Mr. O'Grady indicated that he had held a meeting with Mr. Patrickson that day as a follow up to the system health meeting from the prior week. Tr. at 282. In the system health report discussed at that meeting, there had been no mention of a chlorine safety issue on which Mr. Patrickson had been working. Tr. at 283-284. Mr. O'Grady was surprised that, based on Mr. Patrickson's record with industrial safety issues, he had not raised the issue. *Id*. He therefore held a meeting with Mr. Patrickson to insure that he was not feeling intimidated to raise safety concerns. *Id*. Mr. Bono testified that when he confronted Mr. Patrickson about this, Mr. Patrickson did not recognize the chlorine system as an industrial safety issue. Tr. at 347; RX 16:9.

Mr. Bono's notes from a June 9, 2003 bi-weekly update meeting reflect that Mr. Patrickson had failed to complete an "action item." Tr. at 349; RX 16:11. Specifically, under "issue resolution," Mr. Patrickson was to "identify three (3) to five (5) critical improvement areas for assigned systems and develop the plans to achieve the goals by June 9, 2003." Tr. at 349; RX 16:11. Mr. Bono stated that, while three (3) to five (5) critical improvement areas had been identified, Mr. Patrickson had not fulfilled the other part of the task, which was to develop discrete steps with deadlines for each step. Tr. at 349; RX 16:11. At hearing, Mr. Patrickson admitted that, while he did "get behind" on this expectation, he believed that the terms of his 2003 PIP were unreasonable. Tr. at 102. He stated that he was given "extra work above and beyond" what he had already been required to do and no consideration had been given to the amount of work these expectations entailed. *Id*.

Mr. Patrickson testified that in addition to identifying three (3) to five (5) "highest priority" items to improve his assigned systems, he was also, as part of his ongoing work, expected to become a testing engineer for the hot water boiler modification. Tr. at 102. According to Mr. Patrickson, these extra assignments required him to perform the functions of a testing engineer when he had not been trained as one. Tr. at 102-103. Rather, he had been trained as a mechanical engineer or modification engineer.[50] Tr. at 103. As a result, he was unable to complete the test engineer functions he had been assigned. Tr. at 103.

Mr. Bono's notes from a June 9, 2003 biweekly update meeting also indicate that Mr. Patrickson had "provided a written update and appears to be on track for boiler mod closeout." Tr. at 349-350; RX 16:11. However, the notes further indicate that there were some "interface issues." Tr. at 349-350; RX 16:12. Mr. Bono wrote that Mr. Patrickson "received input from a peer and did not validate using procedures or processes." Tr. at 349-350; RX 16:12. He further wrote: "[Mr. Patrickson] does not assume any responsibility or accountability (similar to health presentation – 'he lied to me'). These are examples of continued poor performance as described in the PIP." Tr. at 349-350; RX 16:11.

Mr. Bono's notes from a June 23, 2003 bi-weekly update meeting indicate that there had been no progress with regard to the fuse control program issue and "interfacing" with other engineers. RX 16:13; Tr. at 350-351. Further, Mr. Bono had been unaware that the issue had stalled, though as part of the PIP, Mr. Patrickson was supposed to consult a supervisor or Mr. Bono when that happened. RX 16:13; Tr. at 350-351. The notes also

[50] Mr. Patrickson did have some minor experience as a testing engineer in a previous job. Tr. at 103.

indicate that progress on "the hot water boiler line close out" seemed to be behind schedule. Tr. at 351; RX 16:13. The notes indicate that Mr. Patrickson "admit[ted] he could have been more proactive" regarding certain items during the week of June 9, 2003." RX 16:13; Tr. at 351-352. Mr. Bono noted that without his "constant prodding," certain issues would not be resolved prior to heating season. Tr. at 352; RX 16:14. Mr. Bono also referenced the fact that Mr. Patrickson had completed his assigned "peer cause evaluation" in an incorrect format. Tr. at 353. Mr. Bono noted that Mr. Patrickson had done peer cause evaluations in the past, and thus it was assumed that he was aware of the proper requirements. *Id*. According to Mr. Bono, Mr. Patrickson provided no explanation as to why he did not meet the policy. *Id*.

Mr. Bono's notes from a July 7, 2003 bi-weekly update meeting indicate a problem with the "hot water boiler fuel oil project."[51] Tr. at 355. Mr. Bono testified that this was an issue where the boiler could not reach rating capacity. According to Mr. Bono's notes, it had been two (2) weeks since June 23, 2003, and there had been no progress, no work planned, no "work scope." Tr. at 355. Mr. Bono was concerned about having to constantly be involved in this as it was almost to the heating season. Tr. at 355. With regard to whether this was clearly Mr. Patrickson's responsibility as system engineer, Mr. Bono testified: "The work scope selection and the work that's done on your system is every system engineer's responsibility at the station. It's the system engineers that determine what's the right work to do to maintain their systems performing well." Tr. at 355-356.

Mr. Bono's notes from a July 7, 2003 bi-weekly update meeting also indicate issues with the hot water boiler modification close out. Specifically, it was two (2) days prior to the action item in the PIP being due and there was "significant testing" remaining. These issues had been identified six (6) years prior and entered into the corrective action program. Mr. Patrickson had closed an item in the program stating that all testing requirements had been specified in the existing modification. Tr. at 356. However, Mr. Bono testified it was clear, based on Mr. Bishop's report that "that closure is not in fact an actual closure." *Id*. Accordingly, a condition report[52] was entered identifying that the mod, which had been due to be closed on July 9, 2003, was issued without identifying any test requirements in violation of station procedures. Tr. at 356-357; RX 18. Mr. Bono stated that the condition report identified the fact that, "without identifying test requirements for our procedures, we had still performed testing." Tr. at 356-357.

Mr. Bono's notes also show that Mr, Patrickson failed to close a hot water boiler modification by July 9, 2003, and failed to update his supervisor or manager that he was behind schedule. *Id*. at 358-359. His notes from a July 21, 2003 bi-weekly meeting, demonstrate that there was still no clear direction on how to resolve the fuel oil issue with the September heating season being only a month away. In addition, Mr. Patrickson still was not adequately "interfacing" with other organizations. *Id*. at 360-361.

Mr. Bono's notes from an August 4, 2003 bi-weekly update meeting show that the deadline for the hot water boiler modification had been four (4) weeks ago and still no progress had been made on that issue. *Id*. at 361-362. His notes from a September 2, 2003 bi-weekly update meeting state that the hot water boiler modification issue still was not resolved and was now two (2) months overdue. In addition, the hot water boiler fuel issue was clearly not going to

[51] This project was separate from the hot water boiler mod. Tr. at 355.

[52] At the time this was called a deficiency report.

be resolved before the heating season. His notes from a September 15, 2003 bi-weekly update meeting demonstrate that the hot water boiler modification issue was still unresolved. *Id*. at 363. In addition, no progress, work scope, or work schedule had been produced for the hot water boiler fuel issue. *Id*. Finally, Mr. Patrickson had missed all of the expectations that had been set out in the two (2)-week period, but had committed to help out another engineer with a project outside of his work scope without conferring with Mr. Bono or his supervisor about doing that project instead of the items he was so seriously behind on. *Id*. at 364.

Mr. Bono's notes from a September 23, 2003 bi-weekly update meeting demonstrate that Mr. Patrickson was late for training on September 23, 2003, and met with a supervisor on September 24, 2003, to discuss this serious failure to meet requirements for training. In that meeting, the Mr. Patrickson acknowledged receiving two (2) reminders of the training schedule prior to the training, but stated that he forgot about the training. Tr. at 366.

The week of September 29, 2003, marks what Mr. Bono deemed to be the worst two (2) weeks of performance since Mr. Patrickson started having his bi-weekly update meetings. *See* Tr. at 366-367. Specifically, the testing for the chlorine injection system modification was weeks behind schedule, even though Mr. Patrickson had agreed to complete it by September 29, 2003. *Id*. The hot water boiler modification project was almost three (3) months overdue. *Id*. Accordingly, at that point, Mr. Bono informed Mr. Patrickson that he was considering pursuing with Human Resources "some type of elevated approach" to improve his performance other than the PIP. *Id*.

On September 30, 2003, Mr. Bono noted his discovery that the testing for the chlorine modification that Mr. Patrickson had supposedly performed was in fact a "cut and paste" of test requirements for a different modification. *Id*. On October 1, 2003, Mr. Bono met with Mr. Patrickson and his supervisor to clarify the situation. *Id*. at 26-27. At this meeting, Mr. Patrickson admitted that he had misled Mr. Bono regarding the status of his projects. *Id*. at 27. Thereafter, Mr. Bono met with Mr. Limpias to recommend taking further action against Mr. Patrickson. *Id*. at 28. On October 6, 2003, Mr. Bono initiated a request to terminate Mr. Patrickson. *Id*. *citing* Tr. at 372; RX 20.

Rodney Angus: Another Employee on a PIP at Entergy

Rodney D. Angus, another Entergy employee who had been on a PIP, testified at hearing. In total, Mr. Angus had worked as an engineer thirty seven (37) years, and the majority of his career was spent in the nuclear area. Tr. at 173. He currently worked for FitzPatrick and had worked there since December 1997.[53] *Id*. at 173-174.

Mr. Angus testified that he had been placed on a PIP for the last three (3) years. *Id*. at 176. He was initially placed on the PIP in approximately 2000 and had been on the plan consistently for the entire time. *Id*. The reasons he was placed on the PIP were "communication" and "ownership of the problem." *Id*. at 177-178. Mr. Angus testified that he believed he was placed on the PIP in connection with his 2000 mid-cycle review. *Id*. at 178.

Mr. Angus stated that the PIP required him to sign and agree to its terms, but he viewed it as a tool for the company to eliminate him. *Id*. He testified that on the three (3) or four (4) of the performance reviews he had received while on the PIP, his performance was rated as improving but not up to full standards or expectations. Tr. at 179. With regard to

[53] Throughout his entire tenure at FitzPatrick, Mr. Angus had worked as a fire protection assistant engineer in which capacity he monitored fire protection systems, trending the performance of the systems. Tr. at 174.

whether his performance still needed improvement according to his employer, Mr. Angus testified:

> I'm towards the end now. Hopefully it's the end unless it gets revised. Last year I met all my criteria, all the dates, it's complete all the way through, and -- of my performance review added additional items into that performance, added additional qualification to do a -- receive my qualifications to perform a fire hazard analysis and perform and assist the fire protection programs engineer. A dual purpose. So it's an additional requirements, and that's what I'm working on right now to achieve that qualification. I've done this at other facilities but, of course, we have to meet Entergy's requirements for performance of that.

Tr. at 179-180.

Mr. Angus testified that he met with his most recent supervisor, Mr. Bono, every two (2) weeks, lasting anywhere from twenty (20) minutes to one (1) hour, in connection with his PIP. *Id*. at 180. He testified that he felt many times in the past four (4) months that he was close to meeting the expectations of the PIP, and that his improvement had been excellent, but his manager did not see it that way. *Id*. at 181. Accordingly, he had not been taken off the PIP yet. *Id*.

Mr. Angus testified that he was never asked to perform functions outside of his area of expertise as a fire protections engineer. *Id*. at 182. For example, he was never asked to perform the functions of a testing engineer. *Id*.

Mr. Angus testified that from the time he was placed on the PIP up until the current time, he still felt as though he was in danger of being terminated. Tr. at 183. However, he did not feel that he had made any serious mistakes during the time that he had been on the PIP. *Id*. He then testified, nevertheless, that he had been told he had made mistakes and that he had been the one to identify the mistakes. *Id*. Mr. Angus also testified that throughout the time he had been on a PIP, he had tried his best to improve his performance. Tr. at 185. He had met the due dates and the expectations that were established in his PIP up until Rev 3, for which there were additional items on the performance plan. *Id*. He was working toward completing those additional items. *Id*.

Thomas G. Graham: Another Employee at Entergy Who Had Been Rated as "Needs Improvement" on his Performance Review But Was Not Placed on a PIP

Thomas G. Graham, another Entergy employee, testified at hearing. He had worked in the nuclear industry for most of his career and was currently employed as a senior system engineer at FitzPatrick. Tr. at 187, 189. Mr. Graham had worked at FitzPatrick for five (5) years and five (5) months. *Id*. at 189. He had held the position of senior system engineer for two (2) years.[54] *Id*.

Mr. Graham testified that he understood a performance improvement plan ("PIP") to be "a plan that has specific goals, timetable and requires that you meet more frequent than normal amount to make sure somebody gets proper coaching and correction to make sure that they're successful." *Id*. He was aware that certain employees at FitzPatrick had been placed on PIPs because they were rated as "needs improvement" on their

[54] As a senior system engineer, Mr. Graham was responsible for monitoring plant systems, reviewing design changes, performing as a test engineer, writing, post modification test procedures, and managing the work performed his systems. Tr. at 189-190.

performance reviews. Tr. at 191-192. Mr. Graham knew that at that time, Rodney Angus, John Bradshaw, Dave Callum (ph.), and Charlie Murr (ph.) had all been placed on PIPs. *Id*. at 192. Mr. Graham was also aware that the Complainant had been placed on a PIP. *Id*. at 192-193.

Mr. Graham testified that in his 2002 performance review, he was rated as "needs improvement;" however, he was not placed on a PIP in connection with this performance rating. Tr. at 193. He specified that he was rated as "needs improvement" in two categories: results oriented and communication. *Id*. These were also areas that were designated as critically important. *Id*. He also received comments/criticism from his supervisors at his 2002 midyear review but was able to "dispel" this comment/criticism.[55] Tr. at 194.

Mr. Graham testified that he was required to prepare system health reports as part of his duties.[56] Tr. at 195. He testified that during the first two (2) years of his employment, turning in his system health reports was a "relatively low priority." *Id*. He further stated: "It was something that if there was an emergent issue, or something of higher priority, that they might not have been done on time, and it was done less frequently." *Id*. In other words, he did not always complete his reports in a timely fashion. *Id*. at 196. Mr. Graham testified that he never received any criticism from his supervisors for not preparing these reports in a timely fashion until his 2002 review. *Id*. In fact, this was one of the negative comments listed in his 2002 review. *Id*. He admitted that, technically, he had failed to complete other aspects of his job duties in a timely fashion, but that in each case "there was a business reason for that." *Id*. He was not placed on a PIP in connection with his 2002 performance review. *Id*. With regard to whether he believed he should have been placed on a PIP, Mr. Graham stated: "Based on my actual performance, no. Based on the policies of the company, yes." *Id*. at 197.

Mr. Graham testified that at one point he asked his supervisor, Mr. Howse, if he could be placed on a PIP. *Id*. At that time, he had been given a larger system load than the average system engineer. *Id*. He felt that if he was having difficulty, then "the last thing they should be doing is doubling [his] system load." *Id*. Mr. Graham further testified that it was "fair to say" he did not agree with his 2002 performance review, and that he accordingly asked to be placed on a PIP, and to have his system load reduced. *Id*. at 197-198. However, both of those requests were denied, and he therefore he filed a memo (*i.e.* a rebuttal) with human resources and his supervisor to refute the results of the review. Tr. at 198. According to Mr. Graham, his employer "did not react" to his rebuttal. *Id*. The only explanation he received for why he was not placed on a PIP pursuant to his request was that he "didn't need to be on one." *Id*.

On cross examination, Mr. Graham admitted that his performance rating for 2003 was "valued contributor" and that he received a merit pay increase for 2003. *Id*. at 199. He further admitted that he had also received a merit pay increase for 2002. *Id*. He did not

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[55] Specifically, he was criticized that he was "spending too much time talking to the component engineers." Tr. at 194. He "explained that there was a business basis for [his] spending more than normal time with them." *Id*. at 194-195.

[56] Quarterly health reports were performed within the first thirty (30) days of a new quarter; semiannual health reports were performed the first thirty (30) days of that six (6) month period; annual health reports were performed the first thirty (30) days of the next period. Tr. at 195. When questioned as to whether there was a written rule stating this procedure, Mr. Graham testified: "I believe we now have a procedure that does state that." *Id*.

know whether he would be eligible for a merit pay increase if he was rated as "needs improvement." *Id*.

November 20, 2003: Complainant is Terminated

Mr. Patrickson's final bi-weekly update meeting took place just before his termination on November 20, 2003. Tr. at 103-104. Mr. Patrickson testified that Mr. Bono's stated reason for the termination was that "there was no longer a position for [him] in system engineering at FitzPatrick." *Id*. at 105. His understanding was that another engineer, who had been a maintenance supervisor, would be taking over the position. *Id*.

According to the testimony provided at hearing, several individuals were involved in the decision to terminate Mr. Patrickson. Mr. Zimmerman was one of those individuals.[57] He testified that his role in the termination was to "facilitate the process and make sure that the appropriate parties were brought in on the termination." Tr. at 252. His role was also to offer his opinion on whether termination was appropriate based on the performance feedback. *Id*. As Mr. Zimmerman understood it, the basis for terminating Mr. Patrickson "had to do with his continuing not to meet expectations. In fact, degrading performance, a lot lower performance."[58] *Id*. Mr. Zimmerman concurred in the decision to terminate Mr. Patrickson and thought it was based on appropriate performance and business reasons. *Id*. at 253.

Mr. O'Grady was also involved in the decision to terminate Mr. Patrickson.[59] Tr. at 285. He testified that the decision to terminate an employee is one that "goes through a chain of command and elaborate approval process, part of which he weighs in on." *Id*. at 285-286. He further stated that, in this case, he reviewed the documentation, including the PIP and commentary on Mr. Patrickson's failure to improve his performance. *Id*. He testified that Mr. Patrickson was terminated strictly for his job performance and that the decision to terminate him "had nothing to do with industrial or nuclear safety concerns." *Id*.

Mr. Sullivan was also involved in the decision to terminate Mr. Patrickson. Tr. at 308. He explained that a recommendation for termination is "moved up the chain" and that it

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[57] Mr. Zimmerman provided testimony on the "decision process" for terminating an employee at Entergy. He described the process as "quite lengthy and involved." Tr. at 252-253. First, the "line of management decide and agree that the person is not going to meet expectations." *Id*. at 252-253. He added that the "whole idea of a performance improvement plan is to help people meet expectations. It's not to help them find a way to the door." *Id*. Thus, the local line of management must be satisfied that it has provided "a person ample opportunity to address the issues, the issues have been made clear, and the person simply is either unable or unwilling to meet the performance expectations." *Id*. at 253-254. Mr. Zimmerman testified this process, which involves the site vice president, also involves collecting information and discussing it with the director of human resources for Entergy Nuclear Northeast. *Id*. It further involves discussing the circumstances and the recommendation that the vice president of human resources for Entergy Nuclear North and South. It further involves a review by internal counsel and, and ultimately it involves authorization by the chief operating officer and the chief executive officer at Entergy Nuclear Northeast. *Id*.

[58] There were some specific factors cited as well but Mr. Zimmerman could not recall those at hearing. Tr. at 252.

[59] However, Mr. O'Grady had in no way been involved in the development or oversight of Mr. Patrickson's 2003 PIP. Tr. at 285. Mr. O'Grady testified that he would not be involved in a PIP for an employee in the engineering department. *Id*. Rather, as the plant general manager, he was responsible for operations, maintenance, chemistry, radiation protection, and industrial safety. *Id*. He further explained that engineering issues were addressed by Mr. Limpias, and that they both reported to the site vice president, Mr. Sullivan. *Id*. Therefore, performance issues relating to the engineers were handled by a different chain of command. *Id*.

actually "goes above" him.[60] Tr. at 308. When the facts were presented to him by Mr. Bono and Mr. Limpias, he agreed with the recommendation for termination. *Id*. at 308-309. Mr. Sullivan noted that this had been Mr. Patrickson's second time in a PIP and that he had demonstrated no improvement in five (5) or six (6) months. *Id*. at 308. Although he did not specifically review the PIP itself, Mr. Sullivan had "complete confidence" in the ability of Mr. Bono and Mr. Limpias to manage the situation. *Id*. at 309. Mr. Sullivan testified that it was not uncommon for employees at FitzPatrick to be on PIPs, but that, in most cases, those employees improve their performance. *Id*.

Mr. Sullivan testified that it was only in preparing for the hearing that he became aware that Mr. Patrickson claimed to have "previously put in a nuclear safety concern." Tr. at 310, 312. He further testified that he would not specifically know who, if anyone, at FitzPatrick would have known that Mr. Patrickson had reported an issue to the NRC. *Id*. at 313. To that end, at first, Mr. Sullivan admitted knowing that in April 2003, the NRC had been on site conducting an investigation at FitzPatrick regarding the ventilation issue. *Id*. He further stated: "Yeah, I was involved. They did come on site, and I was involved in the investigation." *Id*. However, he then testified that it had been OSHA that was investigating. *Id*. at 314. Finally, he testified that he "did not know it to be a fact" that the NRC conducted an investigation of the ventilation issue. *Id*. Mr. Sullivan testified that the investigation conducted by the Office of Investigation of the NRC was an investigation into Mr. Patrickson's complaint of discrimination and retaliation. *Id*. He further stated that he had gotten confused "with that and the OSHA investigation on the safety." *Id*. He could not state with certainty when the investigation due to Mr. Patrickson's discrimination complaint by the Office of Investigation took place, though he believed it was "somewhere around in December of this past year." *Id*. at 314-315.

Damages

Mr. Patrickson testified that his annual salary at FitzPatrick was $75,000. Tr. at 108. He was fifty three (53) years old at the time of hearing. He testified that the normal retirement age at Fitzpatrick was sixty two (62) and that he had planned to retire from FitzPatrick at around that age. *Id*. He testified that if he had retired at that time, he would have been entitled to approximately $4000.00 or $4500.00 per month, which would have been considered a full retirement benefit. *Id*. Although he was not certain of the requirements, he believed he would have been eligible for a full retirement benefit at either age sixty two (62) or sixty five (65); however, since he had been terminated, he would be eligible for approximately $1700.00 per month. *Id*. at 108-109. Mr. Patrickson further testified that if he had retired at age sixty two (62), he would have been eligible for annual increases had he not been placed on the PIP. *Id*. at 109. The year of the PIP, he believes the increases were about two (2) to three (3) percent. *Id*. Thus, if he had worked until his planned retirement age, his final retirement salary at age sixty two (62) would have been approximately $100,000. *Id*.

Since his termination, Mr. Patrickson had been unable to find employment, although he had looked for jobs through various temporary job placement agencies. *See* Tr. at 104. In a document entitled "work search record" (CX 77), which was a document he had created for the New York State Department of Labor, Mr. Patrickson listed all the jobs to which he had applied. *Id*. He testified that thus far his job search had not been too costly, since most of it was by internet, e-mailing companies, and job placement agencies. *Id*. at 104-105. In addition, Mr.

[60] Mr. Sullivan stated that the recommendation goes to the Chief Operating Officer and the Head of Human Resources. Tr. at 308.

Patrickson had sought professional assistance in his job search by signing on with Bernard Helding (ph.) and Associates, an employment consultant and improvement company, to improve his resume and improve his "job search potentials." *Id*. at 105, 160. He testified that for this service, he signed a contract with them for $2700.00. *Id*. at 105.

FINDINGS

Timeline

The following represents a timeline of the crucial events of this case:

- 1996: Mr. Patrickson prepares a rebuttal to his performance review.
- July 1997: Mr. Patrickson raises ventilation issue for the first time.
- 1997-2000: Mr. Patrickson is noted in his yearly reviews as having performance problems.
- January 2000: Mr. Patrickson is placed on a PIP.
- November 2000: FitzPatrick is sold to Entergy.
- 2001: Mr. Patrickson disagrees with another performance review.
- Early 2002: Mr. Patrickson allegedly transmits the "Short List" to Mr. O'Grady, and possibly other supervisors at the plant, and brings the ventilation issue to their attention.
- June 2002: Mr. Patrickson files complaint with Ethics Hotline regarding six (6) alleged OSHA violations. No nuclear-related concerns are mentioned at this time.
- Summer 2002: Mr. Patrickson receives negative mid-year performance review and is placed on a PIP.
- December 2002: Mr. Patrickson writes a letter to Mr. Kansler regarding, among other things, his OSHA concerns. No nuclear-related concerns are mentioned at this time.
- January 2003: Mr. Zimmerman begins his investigation into Mr. Patrickson's complaint of discrimination/retaliation and concludes there is no merit to his complaint.
- March 25-27 2003 Mr. Patrickson has a run-in with Mr. O'Grady and related emails are exchanged. None of this, however, has to do with nuclear-related concerns.
- March 27, 2003: Mr. Patrickson is tested for-cause and placed on administrative leave.
- March 31, 2003: Mr. Patrickson speaks to Mr. Cine, the NRC Resident Inspector for Fitzpatrick, regarding the ventilation issue.
- April 1, 2003: Mr. Patrickson is advised by the plant nurse that he tested negative.
- April 3 2003: Mr. Patrickson meets with a psychologist pursuant to plant orders.
- April 22, 2003: Mr. Patrickson files a complaint with OSHA alleging discrimination/retaliation due to both his OSHA-related and nuclear-related concerns.
- April 28, 2003: Mr. Vito of the NRC writes to Mr. Patrickson as a follow-up to the March 31, 2003 discussion with Mr. Cline. Mr. Vito states that the NRC concluded there to be no reason to believe the ventilation

issue had not been resolved in 1997 absent further information from Mr. Patrickson.

- April 28, 2003: Mr. Patrickson returns to work.
- Early May 2003: Mr. Patrickson receives his 2002 performance review from Mr. Bono and is placed on a PIP.
- May 8, 2003: Mr. Patrickson prepares rebuttal to his 2002 performance review. He notes his belief that the plant was discriminating against him for his OSHA and nuclear-related concerns. He attaches his April 22, 2003 letter to OSHA to the rebuttal.
- May 29, 2003: Mr. Vito again writes to Mr. Patrickson alerting him that the NRC will investigate his claim of discrimination notwithstanding its position on the technical matter he alleged. Mr. Vito also advises that he will need to disclose Mr. Patrickson's identity in order to conduct the investigation.
- May-October 2003: Mr. Patrickson attends bi-weekly meetings with Mr. Bono and Mr. Howse in connection with his 2003 PIP.
- November 20, 2003: Mr. Patrickson is terminated.

Protected Activity

In a claim of retaliation or discrimination arising under the ERA, the complainant must demonstrate that he participated in protected activity which furthers the purpose of the ERA. *See* 42 U.S.C. § 5851 (1)-(3); 29 C.F.R. § 24.2. Where Complainant's complaint to management "touched on" subjects regulated by the pertinent statutes, the complaint constitutes protected activity. *See Nathaniel v. Westinghouse Hanford Co.*, 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9. In *Jenkins v. United States Environmental Protection Agency*, ARB No. 98 146, ALJ No. 1988 SWD 2 (ARB Feb. 28, 2003), the Administrative Review Board ("ARB") found it unnecessary to rule individually on each of numerous documents submitted by complainant at hearing to demonstrate protected activity, holding that it was sufficient to find complainant had meet her burden of showing protected activity with regard to at least one of the articulated instances.[61] Finally, to establish that he engaged in protected activity, the complainant must show that the respondent had knowledge of the protected activity. *See Bartlik v. U.S. Dept. of Labor*, 73 F.3d 100, 102, 103 n. 6 (6th Cir. 1996); *Carroll v. U.S. Dept. of Labor*, 78 F.3d 352, 356 (8th Cir. 1995); *Cohen v. Fred Meyer, Inc.*, 686 F. 2d 793, 796 (9th Cir. 1982); 29 CFR § 24.5(a)(2).

In this case, the Respondent stipulated that the Complainant engaged in protected activity by reporting his concern about the ventilation issue to the NRC in 1997 and again in 2003. In its post-hearing brief, the Respondent's analysis begins with a discussion of how the Complainant

[61] Specifically, the ARB found that complainant's petitioning congressional subcommittees about alleged diminished Resource Conservation and Recovery Act ("RCRA") regulation by the U.S. Environmental Protection Agency ("EPA"), and complaining internally about inadequate and inappropriate regulation were protected activity. The ARB held that protection "may" extend to complainant's efforts to obtain a legal opinion from EPA's Office of General Counsel as to the legality of certain considerations in rulemaking where the effort advanced concern about inappropriate and inadequate regulation; however, it was unnecessary to establish whether this instance constituted additional protected activity.

failed to prove a nexus between his protected activity and the adverse employment action; however, the Respondent never disputes that the Complainant, at a minimum, engaged in this protected activity. *See* Respondent's Post-Hearing Brief at 4. One may conclude, from the absence of argument to the contrary, that the Respondent has stipulated to this aspect of Mr. Patrickson's *prima facie* claim. However, even if such a stipulation were found not to exist, the following facts apply to demonstrate that Mr. Patrickson engaged in protected activity.

Throughout his tenure at FitzPatrick, Mr. Patrickson was, as even he admitted, a "prolific reporter of problems." Tr. at 106. In addition to the nuclear-related concern at issue in this case, Mr. Patrickson had, over the years, reported various other safety issues at the plant. Tr. at 49. He reported safety problems at FitzPatrick both while it was owned by NYPA, prior to 2000, and after it was sold to Entergy, in November 2000. *See Respondent's Post-Hearing Brief* at 6. Notably, after the sale of FitzPatrick to Entergy in November 2000, much of the management, particularly the senior corporate nuclear management as well as the Site Vice-President and General Manager of Plant Operations, changed. *See Respondent's Post-Hearing Brief* at 6. This is significant because, as noted above, in order to establish that he engaged in protected activity, Mr. Patrickson must establish that Respondent had knowledge of the protected activity. Accordingly, Mr. Patrickson's assertion that his 1997 complaint to the NRC constitutes protected activity has no merit, since those in management at the time, who may have had knowledge of the 1997 complaint, were NYPA management and not Entergy management.[62] For reasons set forth below, I further find Mr. Patrickson's assertion that he engaged in protected activity in 2002 without merit. Although by that point in time, Entergy management had been installed at FitzPatrick, I still find that the Complainant failed to meet the requisite burden with regard to the alleged activity in 2002. However, I find that Mr. Patrickson did prove he engaged in protected activity in 2003. I note here that, according to *Jenkins*, it makes no difference that Mr. Patrickson failed to prove that he engaged in protected activity on all three (3) occasions. What matters is that he was able to establish a *prima facie* case of protected activity with regard to at least one occasion.

1997: Complainant Failed to Demonstrate That He Engaged in Protected Activity

Prior to receiving his 1996 performance evaluation, Mr. Patrickson testified that he had reported approximately thirty to fifty (30 to 50) safety violations at the plant. Tr. at 155-156. The year 1997, however, marked the first time that Mr. Patrickson advised the NRC of the specific nuclear-related concern at issue in this case. *Id*. at 113-114. He also reported the issue to the plant directly on July 25, 1997. Tr. at 137; CX 66. At hearing, Mr. Patrickson explained that after reporting the ventilation issue to the NRC in 1997, he learned that the problem had, in fact, been self-reported by the plant in 1991. *See* Tr. at 116. Apparently, at that time, the plant had requested certain temporary exemptions from the NRC to allow time to address the problem through proposed modifications. *See* Tr. at 36, 38; CX 61:6. The NRC granted the temporary exemptions. Tr. at 36-38; CX 61:7-8. However, after the temporary exemptions were granted, the plant later determined, through an analysis performed by an outside company, that the problem for which the plant had requested and received an exemption did not in fact exist. *See* Tr. at 46, 133-134. As a result, the plant advised the NRC that it no longer planned to undertake the proposed modifications, and the NRC acquiesced. *See* Tr. at 47-49; CX 66. That notwithstanding, Mr. Patrickson continued to be concerned about the ventilation issue. Tr. at 36.

I find that, while it seems Mr. Patrickson engaged in protected activity by reporting the

[62] This fatal flaw is more fully addressed below.

ventilation issue to the NRC in 1997,[63] the fact that much of FitzPatrick's management changed once it was bought by Entergy in November 2000 is critical. This means that many of those in management when Mr. Patrickson reported the issue in 1997 were no longer at the plant when the alleged adverse action transpired in 2002 and 2003. Therefore, I do not find that Mr. Patrickson engaged in protected activity in 1997.

2002: Complainant Failed to Demonstrate That He Engaged in Protected Activity

According to Mr. Patrickson, he raised the ventilation issue again in the first part of 2002 when he transmitted to Mr. O'Grady the "Short List," which included the ventilation issue among other problems at the plant. Tr. at 52, 53-54; CX 51. I note that Mr. Patrickson appeared indecisive on the precise manner by which he transmitted the "Short List" to Mr. O'Grady and admitted that he definitely did not personally give the "Short List" to Mr. O'Grady, nor did he ever have a discussion with Mr. O'Grady about the "Short List." Tr. at 141. Mr. Patrickson further admitted that his sole communication to Mr. O'Grady regarding the ventilation issue was the "Short List." Tr. at 142. I also note that Mr. Patrickson appeared somewhat indecisive when testifying as to whether he also provided a copy of the "Short List" to Mr. Sullivan and Mr. Davis. Tr. at 52.

Mr. Patrickson testified that his reason for reporting these problems in 2002 was that Entergy was a "fairly new owner to the plant" and therefore most of the people in management may not have been aware of the problems. Tr. at 53. In addition to there being new management, Mr. Patrickson testified that he also re-reported the problem on account of the "intervening event of the September 11th terrorist attack on the World Trade Center." Tr. at 53-54. In short, he felt that the investigation performed in 1997 on the ventilation issue did not take into account a September 11th scenario. Tr. at 54.

Mr. Patrickson claimed that management never responded to the ventilation issue despite promises to attend to it. Tr. at 55, 63. He testified that he specifically went over the ventilation issue with Mr. Davis in 2002. Tr. at 53, 54. Mr. Patrickson claimed that when mentioning the problem to Mr. Davis he noted it in the context of a September 11th scenario, however, he admitted that nothing in the "Short List" mentioned the ventilation issue in the context of a September 11th scenario. Tr. at 142. Mr. Patrickson testified that Mr. Davis responded to his concern by stating that "he was going to have the HVAC people look at it." Tr. at 54. However, to Mr. Patrickson's knowledge, no one from the HVAC department ever reviewed the problem. Tr. at 55. At the time of hearing, Mr. Davis was no longer at FitzPatrick; he was also no longer at FitzPatrick when Mr. Patrickson was placed on administrative leave and terminated in 2003. *See* Respondent's Brief at 9.

In weighing the testimony of witnesses, the fact-finder considers the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported

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[63] Reporting a nuclear-related concern to the NRC falls squarely within the types of acts protected by the ERA. Specifically, it is protected activity for an employee either to testify or participate in an NRC enforcement proceeding, or to file a complaint or charge of employer retaliation [with the DOL] because of safety and quality control activities. 42 U.S.C. § 5851(a)(1)-(3); *McCuistion v. TVA*, 89-ERA-6 (Sec'y Nov. 13, 1991).

or contradicted by other credible evidence. *Jenkins v. United States Envtl. Pro. Agency*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 10 (ARB Feb. 28, 2003) (citations omitted).

Applying these concepts to the issue here, I find Mr. Patrickson's claim that he brought the ventilation issue to the attention of his supervisors by way of the "Short List" in 2002 speculative at best. As noted above, Mr. Patrickson appeared indecisive on the precise manner by which he transmitted the "Short List" to Mr. O'Grady, and admitted that he definitely did not personally give the "Short List" to Mr. O'Grady, nor did he ever have a discussion with Mr. O'Grady about the "Short List." Tr. at 141. Mr. Patrickson further admitted that his sole communication to Mr. O'Grady regarding the ventilation issue was the "Short List." Tr. at 142. Meanwhile, Mr. O'Grady testified that the ventilation issue was never brought to his attention. Tr. at 281. It appears somewhat more likely that Mr. Patrickson articulated his concern regarding the ventilation issue to Mr. Davis; however, Mr. Davis did not testify at hearing and was not present at the plant when the alleged adverse action took place. Accordingly, I conclude that Mr. Patrickson did not engage in protected activity in 2002.

2003: Complainant Engaged in Protected Activity

Contrary to the 1997 and 2002 instances of alleged protected activity, I find that Mr. Patrickson proved that he engaged in protected activity in 2003. The significance of his 2003 protected activity is most visible in the context of other unprotected activity that occurred in 2002 and 2003. In June 2002, Mr. Patrickson reported what he believed to be six (6) violations of OSHA regulations to the Ethics Hotline. Tr. at 55-56. As these were alleged OSHA violations, they plainly do not qualify as protected activity under the ERA.

Then, on December 11, 2002, Mr. Patrickson drafted a letter to Mr. Kansler, which admittedly did not reference the ventilation issue or any other nuclear-related concern; rather, it dealt with Mr. Patrickson's allegation that he had been under-compensated for his work on the condenser fouling issue and it also dealt with his OSHA concerns. *See* Tr. at 122-123; CX 26. As a result of the December 11, 2002 letter, Mr. Kansler directed Mr. Sullivan to speak with Mr. Patrickson. *See* Tr. at 62. Soon thereafter, in January 2003, Mr. Sullivan directed Mr. Zimmerman to look into Mr. Patrickson's concerns regarding retaliation. Tr. at 228. In January 2003, Mr. Zimmerman began his investigation into Mr. Patrickson's complaints of retaliation.

On January 13, 2003, Mr. Patrickson filed a "letter report" with OSHA identifying the same six (6) concerns he had reported to the Ethics Hotline in June 2002. Again, these concerns do not qualify as protected activity under the Act. On January 16, 2003, Mr. Patrickson claims that he provided to Mr. Leonard via facsimile a copy of the same information he had provided to OSHA. In March 2003, OSHA performed an inspection of the plant and thereafter cited it, according to Mr. Patrickson. Mr. Patrickson also claimed that the plant did correct the safety problems as a result of the citation. I reiterate that nothing up to this point in time qualifies as protected activity under the Act.

The week of March 24, 2003 represents the beginning of the precipitous downfall in Mr. Patrickson's career at Entergy. On March 24, 2003, Mr. Patrickson approached Mr. Zimmerman with a copy of the information he had sent to OSHA. According to Mr. Zimmerman, Mr. Patrickson was "quite unhappy" and "upset with [OSHA's] findings" in that Entergy had received only a *de minimis* fine. Later that week, on either March 25 or March 26, 2003, Mr. Patrickson had his run-in with Mr. O'Grady. Although the facts surrounding that encounter are largely disputed, it is undisputed that no nuclear concerns were discussed at this time. Subsequent e-mails relating to the incident were exchanged. On March 26, 2003, Mr. O'Grady sent an e-mail to Mr. Limpias describing the incident and claiming that Mr.

Patrickson seemed to be in an "excited emotional state." That same day, Mr. Patrickson e-mailed Mr. O'Grady regarding the city water issue, which had been discussed during the run-in.

The next morning, March 27, 2003, Mr. Patrickson sent Mr. O'Grady another e-mail in which he wrote: "Mr. O'Grady, you were not happy with what I was telling you yesterday, that [sic] you should really not like the attached Internet [sic] website. I've seen this before and probably put it at the back of my head so I could at least sleep **some at night**!!" Tr. at 277. Mr. Patrickson testified that the attached internet website contained a list of safety problems at the plant, none of which mentions the ventilation issue. Tr. at 68. Mr. Patrickson testified that, while Mr. O'Grady never responded to the March 27, 2003 e-mail, he did have occasion to ask Mr. O'Grady whether he received a copy of the OSHA citation letter and "JF OSHA WR" (*i.e.* the list of non-nuclear safety issues at the plant). Tr. at 72. As noted previously, significant confusion stems from Mr. Patrickson's testimony regarding when exactly this alleged conversation took place. According to Mr. Patrickson, Mr. O'Grady "seemed to get upset" and "his voice got kind of sharper and higher" when being questioned about this. Tr. at 73.

In any event, after Mr. O'Grady received Mr. Patrickson's March 27, 2003 e-mail, he forwarded it to Mr. Limpias and Mr. Zimmerman, and indicated that it warranted some discussion. Mr. O'Grady testified: "The way I read [the March 27, 2003 email], when somebody bolds and caps and exclamates, it's like yelling in writing to me." Tr. at 278. That day, a meeting was held regarding Mr. Patrickson's "aberrant behavior" and what to do about it. Present at the meeting were Mr. O'Grady, Mr. Zimmerman, Mr. Limpias, and Mr. Sullivan. Tr. at 235. Ultimately, Entergy Headquarters was contacted and it was decided that Mr. Patrickson should be evaluated psychologically as well as undergo for-cause drug and alcohol testing.

That day, at approximately 2:25 PM, Mr. Patrickson was escorted to the medical department at Entergy by his supervisor, Mr. Howse. When Mr. Patrickson arrived at the medical department, he was advised by Mr. Zimmerman that he was being for-cause tested and that he would be "off until the results of the drug test came back. His breathalyzer test came back negative, and he was then told by Mr. Zimmerman that he was being referred for a psychological evaluation and that he would be contacted on Monday, March 31, 2003, after his drug screen results were obtained. I note again here that nothing up to this point in time qualifies as protected activity under the Act. The only notable "activity" in which Mr. Patrickson had engaged by this point related to OSHA concerns, which are not protected by the ERA.

Thereafter, Mr. Patrickson was placed on paid administrative leave. On March 31, 2003, four (4) days after he was placed on administrative leave, Mr. Patrickson again brought the ventilation issue to the attention of the NRC. Specifically, he reported his concern to Mr. Leonard Cline, who was, according to Mr. Patrickson, the resident inspector for FitzPatrick at the NRC. Although the plant was not immediately put on notice of Mr. Patrickson's complaint to Mr. Cline, they were later put on notice, as discussed below.

On April 1, 2003, the Tuesday following the for-cause testing, the plant nurse called Mr. Patrickson to inform him that his test results were negative. Tr. at 78. Mr. Patrickson testified that on April 2, 2003, the day after he received the call from the plant nurse, he was required to see a psychologist. Tr. at 78-79. On April 3, 2003, EMAX sent the first and only report to Entergy in connection with Mr. Patrickson's psychological evaluation. In essence, the report concluded that "there were no significant pathologies or anything of that nature" with respect to Mr. Patrickson. The report recommended, however, that Mr. Patrickson obtain "some short term counseling to deal with stress." It also recommended that he be placed in an

intense behavioral observation program for no less than six (6) months. The report stated that "pending adherence to these recommendations," Mr. Patrickson would appear to be capable of performing his normal duties.

On April 22, 2003, while still on administrative leave, Mr. Patrickson wrote a letter to OSHA stating that his correspondence was intended to serve as a "formal complaint against Entergy Corporation, specifically the FitzPatrick Nuclear Power Plant … for discrimination/retaliation against [him] for reporting of safety problems at the plant to the Syracuse office of OSHA." The letter explained in detail Mr. Patrickson's efforts to report safety problems at the plant. Significantly, the letter mentioned both his OSHA related concerns and his nuclear-related concern (*i.e.* the ventilation issue). While typically a letter to OSHA would not constitute protected activity under the ERA, Mr. Patrickson's letter is distinguishable because he specifically mentioned his nuclear related-concern as another basis for discrimination, which led the NRC to become involved in the matter, as will be discussed below.

In a letter dated April 28, 2003, Mr. David J. Vito, a Senior Allegation Coordinator at the NRC, wrote to Mr. Patrickson as a follow-up to Mr. Patrickson's discussion with Mr. Cline on March 31, 2003.[64] CX 29; Tr. at 86-87. Mr. Vito stated that it seemed as though Mr. Patrickson was essentially raising the same concern that he had raised in 1997 and that the NRC had previously determined was adequately resolved by NYPA. Thus, Mr. Vito wrote: "Absent additional information to indicate that the corrective actions in response to the [1991] LER have not been completed and/or were unsuccessful in resolving the problem, [the NRC had] no basis to revise [its] earlier conclusion that the potential problems identified in the LER were valid, but were adequately addressed by implemented corrective actions." CX 29; Tr. at 87.

Also on April 28, 2003, Mr. Patrickson was permitted to return to work. In order to return to work, however, he was required to sign a "return to work agreement," which stated that he would undergo "six (6) months of intensified behavioral observation and attend stress counseling sessions." It was also determined that Mr. Bono would assume responsibility for supervision of Mr. Patrickson's intensified behavioral observation program and PIP with input from Mr. Howse, who was himself participating in the EAP.

Upon returning to work in May 2003, Mr. Patrickson was presented with his 2002 performance evaluation.[65] Mr. Bono and Mr. Zimmerman presented the performance evaluation, notwithstanding that they had never done so in the past. He received a rating of "needs improvement," which, according to Mr. Bono, had already been determined prior to his going on administrative leave. Mr. Patrickson was displeased with the evaluation and prepared a rebuttal to it on May 8, 2003. In the final paragraph of the rebuttal, Mr. Patrickson stated that, overall he considered this to be a continuation of the discrimination and/or retaliation for his reporting safety problems. He then referenced his April 22, 2003 letter to OSHA, which references the ventilation issue, and noted that he was attaching it to his rebuttal. In so doing, Mr. Patrickson himself provided plant management with notice of his protected activity, since the April 22, 2003 letter makes specific reference to the fact that he had reported the ventilation issue to the NRC.

Moreover, in a letter dated May 29, 2003, Mr. Vito of the NRC wrote to Mr. Patrickson concerning the discrimination complaint filed with OSHA on April 22, 2003. CX 30; Tr. at 90.

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[64] Mr. Patrickson's concern regarding the ventilation issue, which he had reported to Mr. Cline, was identified in the letter as "Concern No. 1." CX 29:2; Tr. at 87.

[65] Even though he typically received his performance evaluations during the first part of the year.

Mr. Vito explained that the NRC had been forwarded a copy of the OSHA complaint because it mentioned the ventilation issue as part and parcel of the reason Mr. Patrickson believed he had been discriminated against. Mr. Vito stated that, while the matter was being evaluated by OSHA, the NRC also need to be involved to the extent that Mr. Patrickson's OSHA complaint "did identify a safety concern [he] had raised that involved activities regulated by the NRC" (*i.e.* the ventilation issue). Mr. Vito wrote:

> The specific "safety issue" you mentioned was an issue you had previously identified to the NRC in 1997 (NRC Allegation RI-1997-A-0126) and more recently in 2003 (NRC Allegation RI-2003-A-0053) about the functionality of fire dampers and exhaust fans for the fire and safety related pump rooms at FitzPatrick. In a recent letter to you dated April 28, 2003, we informed you that we had previously reviewed this technical matter and rendered a conclusion as to whether appropriate corrective actions had been taken. We informed you that absent additional specific information to indicate that the corrective actions in response to the related 1991 licensee event report (LER) have not been completed and/or were unsuccessful in resolving the problem, we had no basis to revise our earlier conclusion that the potential problems identified in the LER were valid, but were adequately addressed by implemented corrective actions.
>
> Notwithstanding our current conclusions with regard to this technical matter, the NRC will be evaluating your assertion of discrimination.

CX 30 (emphasis added).

Finally, Mr. Vito noted that, because he had raised a concern of employment discrimination for raising safety concerns, an evaluation of the matter without identifying Mr. Patrickson would be extremely difficult. Thus, his identity would be disclosed as part of the NRC's investigation.

Mr. Vito's May 29, 2003 letter to Mr. Patrickson is crucial in establishing that Mr. Patrickson engaged in protected activity. While it is true that the letter primarily addresses Mr. Patrickson's discrimination complaint, it plainly references his complaints to the NRC, both in 1997 (NRC Allegation RI-1997-A-0126) and more recently in 2003 (NRC Allegation RI-2003-A-0053). It even spells out the precise issue about which Mr. Patrickson had complained: the functionality of fire dampers and exhaust fans for the fire and safety related pump rooms at FitzPatrick. Finally, Mr. Vito advises Mr. Patrickson that his identity would be disclosed as part of the investigation. While the investigation was to focus, of course, on Mr. Patrickson's allegation of discrimination, his complaints to the NRC, which represented the underlying basis for his complaint of discrimination, would thereby come to the attention of Entergy.

Reasonable Belief

The Complainant must establish a reasonable belief that his employer was violating the law to present a cognizable whistleblower complainant. *Rivers v. Midas Muffler Center,* 94-CAA-5 (Sec'y Aug. 4, 1995). The raising of employee safety and health complaints constitutes activity protected by the environmental acts when such complaints touch on the concerns for the environment and public health and safety that are addressed by those statutes. *Jones v. EG&G Defense Materials, Inc*., ARB Case No. 97-129, Sept. 29, 1998, slip op. at 7, aff'd on recon., Dec. 24, 1998 (arising under the CAA, the TSCA and the Resource Conservation and Recovery

Act, 42 U.S.C. §6971 (1994)).[66] However, it is not enough that the employee believes the environment may be negatively impacted by the employer's conduct; rather, the employee's complaints must be grounded in conditions reasonably perceived to be violations of the environmental acts. In addition, there can be jurisdictional limits to employees' complaints as "the environmental whistleblower provisions are intended to apply to environmental and not other types of concerns." *Minard v. Nerco Delamar Co.,* 92-SWD-1 (Sec'y Jan. 25, 1994), Slip op. at 9, *citing Decresci v. Lukens Steel Co.,* 87-ERA-13 (Sec'y Dec. 16, 1993) (ERA whistleblower complaint not raised by allegations of race or sex discrimination); *Aurich v. Consolidated Edison Co. of New York, Inc.,* 86-CAA-2 (Sec'y Apr. 23, 1987) (remand order)(emissions to outside air covered by CAA whistleblower provision; emissions as an occupational hazard not covered).

In *Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 2001-CER-1 (ARB Apr. 30, 2004), the ARB addressed the issue of whether a complainant may be found to have held a reasonable belief where the respondent has already acknowledged and investigated the complainant's belief of a violation. In *Schlagel*, the complainant sent an e-mail to everyone at the facility where he worked attaching prior e-mails in which he had raised safety concerns. At the time the complainant sent that e-mail, the respondent had already investigated the complainant's safety and environmental concerns and complaints. Thus, the ARB noted that "a viable argument may be raised that [the complainant's] attachment of [prior e-mails in which he had raised safety concerns] to [the later, post investigation e-mails] was not protected, since [the complainant] would seemingly no longer have a reasonable, good faith belief that [the respondent] had not addressed the safety and environmental hazards he raised." USDOL/OALJ Reporter at n.5 (citations omitted).

In the April 28, 2003 letter, Mr. Vito of the NRC wrote that Mr. Patrickson's original concerns (*i.e* his 1997 concerns) regarding the ventilation issue were valid but had been adequately addressed by implemented corrective actions at the plant. CX 29; Tr. at 87. Thus, it would appear that at least Mr. Patrickson's initial concerns regarding the ventilation issue were reasonable in that they were deemed valid by the NRC. The relevant issue, here, however, is whether his belief that the ventilation issue persisted as a problem in 2003[67] was reasonable. *Schlagel* indicates that it is logical to assume a complainant no longer has a reasonable belief in a violation where the respondent has already acknowledged and investigated the complainant's belief. However, the case at bar is distinguishable from *Schlagel* because, at the time Mr. Patrickson raised his concerns again in 2003, the underlying reason for those concerns had changed. Specifically, Mr. Patrickson believed that the 1997 investigation into the ventilation issue did not take into account a September 11th scenario.[68] Tr. at 54. In other words, when he re-alleged his concerns in 2003, he did not re-allege the same complaint that had already been

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[66] Cases arising under whistleblower laws protect a complainant's opposition to acts by an employer that he reasonably believes violate the law, even if investigation proves the employer never violated a law. This is so whether the employer never did what the employee complained about, or because the employer's actions were legal. *Id*.; *Minard v. Nerco Delama Co*., 92-SWD-1 (Sec'y Jan. 25, 1994); *Clement v. Milwaukee Transport Services, Inc*., 2001-STA-6 (ALJ Nov. 29, 2001)(slip op. at 39).

[67] *i.e*. At the time when he engaged in protected activity under the Act

[68] He testified that if a terrorist were to fly a plane into the Screenwell House, for example, there would be "a large quantity of fuel and a combustion source" in the Screenwell, which would start a fire that is "not part of the fire protection program." Tr. at 54.

addressed by the plant and the NRC in 1997. Rather, Mr. Patrickson had new reasons for believing that the ventilation issue persisted as a problem. Accordingly, I find that Mr. Patrickson's 2003 concerns raised a new and reasonable belief regarding the ventilation issue.

Adverse Action

While there are multiple instances of adverse action in this case, the only relevant instances are those that took place after Mr. Patrickson and the NRC made the plant aware of Mr. Patrickson's protected activity in May, 2003. Specifically, on May 8, 2003, Mr. Patrickson submitted his 2002 performance evaluation rebuttal with the April 22, 2003 letter attached to it. Not long thereafter, on May 29, 2003, Mr. Patrickson received a letter from Mr. Vito of the NRC stating that his identity would be disclosed in connection with his complaint of discrimination, which, as noted earlier, naturally brings his NRC complaint to the attention of Entergy. Thus, Mr. Vito's May 29, 2003 letter substantiates the fact that Entergy was on notice of Mr. Patrickson's nuclear-related complaint, if not by May 8, 2003, when he submitted his rebuttal with the April 22, 2003 letter, than certainly on or about May 29, 2003, when Mr. Vito made clear that Mr. Patrickson's identity would be disclosed as part of the NRC's investigation into his complaint of discrimination.

While any adverse action against Mr. Patrickson occurring before May, 2003, is irrelevant to Mr. Patrickson's ERA claim, those instances of adverse action are nevertheless useful to put in context the adverse action from which he suffered after May, 2003. On March 27, 2003, Mr. Patrickson underwent for-cause drug and alcohol testing, and was told that he would be evaluated by a psychologist, and was sent home on paid administrative leave for what ended up being approximately a month. Although the legitimacy of Entergy's motives in taking these actions against Mr. Patrickson is irrelevant insofar as his ERA complaint is concerned, I note that in taking these actions against Mr. Patrickson, Entergy treated him as though his for-cause testing had turned out positive, which, of course, it did not.[69]

In any event, whether Entergy took this action because it legitimately feared that Mr. Patrickson had a substance abuse problem or because it did not care for his OSHA-related complaints is irrelevant for purposes of determining adverse action under this fact pattern. What is relevant is that once Mr. Patrickson returned from administrative leave on April 28, 2003, and once he submitted his rebuttal to his 2002 performance evaluation with the attached April 22, 2003 letter on May 8, 2003, and once the NRC revealed that it would disclose his identity to Entergy on May 29, 2003, Entergy continued to engage in a rigorous and consistent pattern of discrimination against Mr. Patrickson, culminating in his termination on November 20, 2003. Mr. Patrickson was placed on a PIP on May 8, 2003, during his performance review meeting, which, admittedly, took place before Entergy necessarily became aware of his protected activity.

[69] Specifically, Mr. Zimmerman testified that Entergy's policies allow employees who test negative after for-cause testing to return to work generally fourteen (14) days or soon after a release can be generated. Employees who test positive, however, are referred to EAP for evaluation by professionals through EMAX, which is exactly what happened to Mr. Patrickson. After the evaluation, the professionals make recommendations to Entergy as to the appropriate course of action for the employee. The employee is not permitted to return to work unless the recommendations are followed. This, of course, is the reason Entergy provides for why it took so long for Mr. Patrickson to be permitted to return to work: The company was taking the time to carefully follow EMAX's recommendations. However, such an excuse begs the issue, since Mr. Patrickson, who tested negative, should never have been sent to EMAX in the first place.

However, as a result of being on that PIP, Mr. Patrickson participated in numerous bi-weekly meetings with Mr. Bono and Mr. Howse, which, according to Mr. Patrickson, were hostile, derogatory, and negative. Ultimately, Mr. Patrickson was terminated on November 20, 2003. Thus, in this case, the relevant adverse action consists of the bi-weekly meetings and, of course, Mr. Patrickson's eventual termination, both of which took place after Entergy became aware of Mr. Patrickson's protected activity.

Nexus Between the Protected Activity and Adverse Action

The complainant has the burden to prove that a causal connection existed between the protected activity and the adverse action. *Matvia v. Bald Head Island Mgmt, Inc*., 259 F.3d 261, 271 (4th Cir. 2001); *Causey v. Balog*, 162 F.3d 795, 803 (4th Cir. 1998). A complainant may establish causation by showing direct or circumstantial evidence of anti-whistleblower animus on the part of a respondent and its managers. *Dillard v. Tennessee Valley Authority*, 90-ERA-31 (Sec'y July 21, 1994). In *Hobby v. Georgia Power Co*., 90-ERA-30 (Sec'y Aug. 4, 1995), the Secretary held that it was error to consider the Respondent's proffered reasons for terminating the employment of the complainant in determining whether a *prima facie* case had been established. The Secretary wrote: "An employer's reason for the adverse action goes not to the causal element of a *prima facie* case but to the ultimate question of whether Respondent retaliated against Complainant because he engaged in protected activity." Slip op. at 8-9 n. 5.

Generally proximity in time is relevant in whistleblower complainants to demonstrate nexus and to develop a *prima facie* case. In making a *prima facie* case, temporal proximity between the protected activities and the adverse action may be sufficient to establish the inference that the protected activity was the likely motivation for the adverse action. *Overall v. Tennessee Valley Authority*, ARB No. 98-111, ALJ No. 1997-ERA-53 (ARB Apr. 30, 2001); *Abu-Hjeli v. Potomac Electric Power Co*., 89-WPC-1 (Sec'y Sept. 24, 1993); *White v. The Osage Tribal Council*, 95-SDW-1, slip op. at 4 (ARB Aug. 8, 1997). A ten (10)-month lapse between the protected activity and the adverse action *may* be sufficient to raise an inference for a *prima facie* case under a Part 24 whistleblower complaint. *Carson v. Tyler Pipe Co*., 93-WPC-11 (Sec'y Mar. 24, 1995).

Discrimination against a whistleblower does not have to be the only basis or even a substantial basis to perfect a *prima facia* claim. In *Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993), interpreting the Whistleblower Protection Act, 5 U.S.C. § 1221(e)(1), the Court observed:

> The words "a contributing factor" . . . mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action in order to overturn that action.

2 F.3d at 1140 (citations omitted).

Finally, the issue of whether a complainant's motives in reporting a violation have any bearing on establishing nexus (or lack thereof) is addressed in *Carter v. Electrical District No. 2 of Pinal County***,** 92-TSC-11 (Sec'y July 26, 1995). In *Carter*, the Secretary held that "[i]f a complainant had a reasonable belief that the respondent was in violation of an environmental act, that he or she may have other motives for engaging in protected activity is irrelevant. The

Secretary further concluded that if a complainant is engaged in protected activity which "also furthers an employee[']s own selfish agenda, so be it."[70]

In this case, the Respondent argues that the Complainant failed to establish a nexus between his reporting the ventilation issue to the NRC in 2003 and the alleged adverse action because he reported to the NRC the day after he was put on administrative leave in March 2003. *See* Respondent's Post-Hearing Brief at 6 (emphasis added). Based on this sequence of events, the Respondent seems to allege that the Complainant reported to the NRC as a means of retaliating against the plant for being placed on administrative leave. The implication is that, because the adverse action (*i.e.* being placed on administrative leave) took place before the protected activity (*i.e.* reporting to the NRC in 2003), there is no nexus.

First, according to *Carter*, it makes no difference whether the Complainant had other motives for engaging in protected activity so long as he held a reasonable belief in a violation of an environmental act. Thus, even if it is correct to assume that Mr. Patrickson wished in some way to retaliate against the plant for being placed on administrative leave by reporting to the NRC, this makes no difference so long as he held a reasonable belief regarding the ventilation issue. Second, while the Respondent is correct in asserting that Mr. Patrickson was placed on administrative leave before engaging in protected activity in 2003, the plant took further adverse action against the Complainant once it learned of his protected activity and once the Complainant returned from administrative leave. Thus, while I accept that there is no nexus between Mr. Patrickson's protected activity in 2003 and the fact that he was placed on administrative leave, I nevertheless find there to be a nexus between his protected activity and the adverse action that later ensued.

In other words, Entergy's reasons for subjecting Mr. Patrickson to for-cause testing, having him evaluated by a psychologist, and sending him on paid administrative leave, all of which took place before he engaged in protected activity, are unclear. Moreover, I decline to analyze the possible reasons, since that adverse action is irrelevant insofar as his ERA complaint is concerned. Sufficed to say that this "irrelevant" adverse action took place in March 2003 and April 2003, Mr. Patrickson returned to work in late April 2003, and on May 8, 2003, Mr. Patrickson alerted Entergy that he had filed a nuclear-related complaint with the NRC by providing Entergy with his April 22, 2003 letter to OSHA with his rebuttal.

Then, on May 29, 2003, Mr. Vito made clear that Mr. Patrickson's identity would be disclosed to Entergy as part of its investigation into his discrimination complaint and, presumably, on or around that date, Entergy was advised by the NRC of Mr. Patrickson's interactions with the NRC. Significantly, Mr. Patrickson's bi-weekly meetings with Mr. Bono and Mr. Howse, which Mr. Patrickson described as hostile, derogatory, and negative, as well as Mr. Bono's and Mr. Howse's notes of those meetings, which articulate how Mr. Patrickson was failing to meet the expectations of his PIP, begin on or about May 29, 2003. From then on in, for the following six (6) months, the meetings and notes of those meetings persisted until November 20, 2003, when Mr. Patrickson was ultimately terminated. As stated earlier, a ten (10)-month lapse between the protected activity and the adverse action *may* be sufficient to raise an inference for a *prima facie* case under a Part 24 whistleblower complaint. Here, there was not even a ten

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[70] In *Carter*, there was some evidence to indicate that complainant's motives were to retaliate against respondent because of a wage dispute with a new manager.

(10)-month lapse, but rather a six (6)-month period of intensive adverse action taken against Mr. Patrickson as he was on the PIP from May, 2003 until his termination on November 20, 2003. The sequence of events once Mr. Patrickson returned from administrative leave in May 2003 demonstrate that the Complainant has met his *prima facie* burden of proving that his protected activity was, at the very least, a contributing factor in the adverse action taken against him by Entergy.

Respondent's Legitimate, Non-Discriminatory Reason

Once the complainant establishes a *prima facie* case, which Mr. Patrickson has done, then the burden of proof shifts to respondent to proffer evidence of a legitimate, nondiscriminatory reason for taking the adverse action. *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 190 (4th Cir. 2001); *Belt v. United States Enrichment Corp*., ARB No. 02 117 (2004); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). With respect to the precise burden that the respondent faces, significantly under the ERA, the respondent must demonstrate "by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of [the protected activity]." 42 U.S.C. § 5851(b)(3)(A) and (B).

Entergy's main contention regarding why it subjected Mr. Patrickson to a PIP in 2003, forced him to participate in bi-weekly meetings as part of that PIP, and ultimately terminated him on November 20, 2003, is that Mr. Patrickson had performance problems. These alleged performance problems are articulated in the 2003 PIP itself as well as in the bi-weekly meeting notes. The specific performance problems noted by Mr. Bono included:

(1) Failure to meet expectations in communications;
(2) Stating that another system engineer had lied to him during his system health presentation in front of station management and then conceding later that he had not been lied to;
(3) Making capital charges to a project for which he was not authorized to work;
(4) Failing to bring an industrial safety issue involving the chlorine injection system to the attention of management during his system health presentation;
(5) Failure to maintain accurate system health reports by failing to include a circulating water pump trip in his system health report;
(6) Failure to identify three (3) to five (5) critical improvement areas for his system and to present a step-by-step process for achieving those improvement goals by June 9, 2003;
(7) Failure to promptly interface with an electrical engineer on the fuse control program;
(8) Failure to notify supervisors of a lack of progress on a resolution of the fuse control program issue; and
(9) Failure to make progress on the hot water boiler mod close-out.

Respondent's Post-Hearing Brief at 20-21; Tr. at 345-351.

Respondent also relies on Mr. Bono's testimony that after two (2) months in the PIP all of the same performance problems that existed at the inception of the PIP continued to exist. *Respondent's Post-Hearing Brief* at 21 *citing* Tr. at 352. In its *Post-Hearing Brief*, Respondent cites additional specific examples of Mr. Patrickson's failure to meet the requirements of his PIP:

(1) The Complainant failed to follow procedure in a root cause evaluation, which was the fourth case of his not following procedures in six (6) weeks. Tr. at 353.

(2) The Complainant failed to meet the assigned deadline for the hot water boiler fuel oil project. Tr. at 355. Two (2) days prior to the closeout for the hot water boiler modification it was discovered that significant testing had not been performed and that the Complainant had verified six (6) years ago in the corrective action program that all testing requirements had been specified in the existing modification, which was not true. Tr. at 356; RX 18.
(3) The Complainant failed to close a hot water boiler modification by July 9, 2003, and failed to update his supervisor or manager that he was behind schedule. Tr. at 358-359.
(4) Notes from a July 21, 2003 bi-weekly update meeting, demonstrate that there was still no clear direction on how to resolve the fuel oil issue with the September heating season being only a month away. In addition, the Complainant still was not adequately "interfacing" with other organizations. Tr. at 360-361.
(5) Notes from an August 4, 2003 bi-weekly update meeting show that the deadline for the hot water boiler modification had been four (4) weeks ago and still no progress had been made on that issue. Tr. at 361-362.
(6) Notes from a September 2, 2003 bi-weekly update meeting demonstrate that the hot water boiler modification issue still was not resolved and was now two (2) months overdue. In addition, the hot water boiler fuel issue was clearly not going to be resolved before the heating season.
(7) Notes from a September 15, 2003 bi-weekly update meeting demonstrate that the hot water boiler modification issue was still unresolved. Tr. at 363. In addition, no progress, work scope, or work schedule had been produced for the hot water boiler fuel issue. Tr. at 363. Finally, Mr. Patrickson had missed all of the expectations that had been set out in the two (2)-week period, but had committed to help out another engineer with a project outside of his work scope without conferring with Mr. Bono or his supervisor about doing that project instead of the items he was so seriously behind on. Tr. at 364.
(8) Notes from a September 23, 2003 bi-weekly update meeting demonstrate that the Complainant was late for training on September 23, 2003, and met with a supervisor on September 24, 2003, to discuss this serious failure to meet requirements for training. In that meeting, the Complainant acknowledged receiving two (2) reminders of the training schedule prior to the training, but stated that he forgot about the training. Tr. at 366.

Respondent's Post-Hearing Brief at 22-25.

Respondent asserts that the week of September 29, 2003, marks what Mr. Bono deemed to be the worst two (2) weeks of performance since Mr. Patrickson started having his bi-weekly update meetings. *See id*. at 26 *citing* Tr. at 366-367. Specifically, the testing for the chlorine injection system modification was weeks behind schedule, even though Mr. Patrickson had agreed to complete it by September 29, 2003. *Id*. The hot water boiler modification project was almost three (3) months overdue. *Id*. Accordingly, at that point, Mr. Bono informed Mr. Patrickson that he was considering pursuing with Human Resources "some type of elevated approach" to improve his performance other than the PIP. *Id*.

On September 30, 2003, Mr. Bono noted his discovery that the testing for the chlorine modification that Mr. Patrickson had supposedly performed was in fact a "cut and paste" of test

requirements for a different modification. *Id*. On October 1, 2003, Mr. Bono met with Mr. Patrickson and Mr. Patrickson's supervisor to clarify the situation. *Id*. at 26-27. At that meeting, Mr. Patrickson admitted that he had misled Mr. Bono regarding the status of his projects. *Id*. at 27. Thereafter, Mr. Bono met with Mr. Limpias to recommend taking further action against Mr. Patrickson. *Id*. at 28. On October 6, 2003, Mr. Bono initiated a request to terminate Mr. Patrickson. *Id*. *citing* Tr. at 372; RX 20. Finally, on November 20, 2003, Mr. Patrickson was terminated. Tr. at 103-104.

As noted above, since this case was brought under the ERA, Entergy has the burden of proving by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of Mr. Patrickson's protected activity. In other words, Entergy must prove by clear and convincing evidence that it would have taken the same action on Mr. Patrickson's 2003 PIP and would have ultimately terminated him on November 20, 2003, based strictly on his performance problems. I find that Entergy has failed to do so.

While on the surface, Entergy is able to recite a long litany of performance problems, I find that many of these alleged problems are specious. As observed by the Complainant, Entergy relies chiefly on the testimony of Mr. Bono, who depicts an unfavorable portrait of Mr. Patrickson's performance. *Complainant's Post-Hearing Brief* at 27. I note again that in weighing the testimony of witnesses, the fact-finder considers the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *Jenkins v. United States Envtl. Pro. Agency*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 10 (ARB Feb. 28, 2003) (citations omitted).

Mr. Bono indicates, as does the 2003 PIP itself, that the Complainant's performance problems were in the areas of communication, issue resolution, and accountability. However, I do not find these categorizations particularly useful because they tend to blend into each other. Therefore, in analyzing the alleged performance problems, it is more telling to focus on the specific examples alleged by Entergy. First, Entergy has alleged what I will refer to as several "one-time incidents." In that category, Entergy has alleged that Mr. Patrickson was guilty of: (1) Stating that another system engineer had lied to him during his system health presentation in front of station management and then conceding later that he had not been lied to; (2) Making capital charges to a project for which he was not authorized to work; (3) Failing to bring an industrial safety issue involving the chlorine injection system to the attention of management during his system health presentation; (4) Failing to identify three to five critical improvement areas for his system and to present a step-by-step process for achieving those improvement goals by June 9, 2003; and (5) Being late for training on one particular occasion. Second, Entergy has alleged what I will refer to as "systemic problems." These are general problems that appeared to persist throughout Mr. Patrickson's 2003 PIP. In that category, Entergy has alleged that Mr. Patrickson was guilty of: (1) Failing to be up-to-date with his system health reports; (2) Failing to resolve the hot water boiler modification issue.

I note that there is little dispute regarding the "one-time incidents" listed above. Neither through testimony nor through post-hearing argument did the Complainant attempt to challenge most of these allegations. However, Mr. Patrickson did note with regard to his failure to identify and present a step-by-step process for achieving three to five critical improvement areas by June 9, 2003, that he got behind on this expectation because the terms of his 2003 PIP were unreasonable. Tr. at 102. He alleged that he was given "extra work above and beyond" what he

had already been required to do and no consideration had been given to the amount of work these expectations entailed. *Id*. In any event, I find that, while the "one-time incidents" certainly do not reflect positively on Mr. Patrickson's work performance, they alone would not suffice to justify the adverse action in this case.

Thus, I turn to the "systemic problems" alleged by Entergy in analyzing whether they serve to further justify the adverse action taken against the Complainant. Mr. Patrickson's first "systemic problem" was that he was not up-to-date with his system health reports. However, even according to Mr. Bono, Mr. Patrickson was not the only employee failing to complete his system health reports on time. Tr. at 331. In fact, Mr. Bono admitted that he actually emailed several employees who had been overdue on their system health reports and that none of those employees worked toward resolving the problem immediately. *Id*. at 331-332. Mr. Bono further stated that when he met with Mr. Patrickson regarding the problem, Mr. Patrickson indicated that he had provided a draft for his supervisor but that his supervisor had not approved it. *Id*. at 333. Mr. Bono found this response unsatisfactory and believed there should be "a little bit of accountability on both sides [from] the supervisor and [from] Mr. Patrickson to follow up … [to] make sure they were received and to see how Mr. Patrickson was progressing." *Id*.

Rather than serving as a legitimate reason to take adverse action against Mr. Patrickson, I find that the issue of the system health reports demonstrates exactly how Entergy was treating Mr. Patrickson differently than other similarly situated employees. When Mr. Patrickson indicated that his system health report was untimely because he had provided a draft to his supervisor and was waiting on approval, Mr. Bono held Mr. Patrickson accountable for not following up with his supervisor. In so doing, it seems that Mr. Bono essentially held Mr. Patrickson, the subordinate, largely accountable for the failings of his supervisor. Thus, I do not find Mr. Patrickson's untimely system health reports particularly persuasive in demonstrating that Entergy had good cause for the adverse action it waged against the Complainant.

Mr. Patrickson's second "systemic problem" was that he continually failed to resolve the hot water boiler modification issue. However, according to Mr. Patrickson, there was a good reason for his failure to complete these modifications. Specifically, he alleged that he had first been involved in these modifications when he worked previously in another department at Fitzpatrick, Project Engineering. *See Complainant's Post-Hearing Brief* at 12. As a condition of his transfer to System Engineering in 2000, he was compelled to take responsibility for these modifications in his new position. *See id*. However, such responsibility, according to the Complainant, is generally left in the responsible department when an employee transfers. *See id*. As a result, Mr. Patrickson was the only System Engineer responsible for a Project Engineering modification. *See id*. at 12-13. These modifications remained a low priority for Entergy in part because of the extensive amount of time that would be required to complete them. *See id*. at 13. However, they suddenly became a priority and were included in Mr. Patrickson's 2003 PIP. *See id*. The Respondent neither admits nor refutes Mr. Patrickson's claim regarding the reason he failed to resolve the hot water boiler modification issue. Taking the Complainant's version of the facts as true, however, would demonstrate yet another way in which Entergy was treating Mr. Patrickson differently than other similarly situated employees.

The most compelling evidence demonstrating that Entergy would not have taken the same adverse action against Mr. Patrickson in the absence of his protected activity is the fact that Mr. Angus, who had been on a PIP for three (3) years, had not been terminated by Entergy. Mr. Angus was initially placed on the PIP in approximately 2000 and had been on it consistently

for the entire time. The performance reasons he was placed on the PIP were "communication" and "ownership of the problem." He testified that on three (3) or four (4) of the performance reviews he had received while on the PIP, his performance was rated as improving but not up to full standards or expectations. Thus, he remained on the PIP. By contrast, Mr. Patrickson, who had been on a PIP for far less time, was nonethteless terminated by Entergy. The Respondent attempts to distinguish Mr. Patrickson's situation from Mr. Angus' situation by emphasizing that Mr. Angus had tried his best to improve his performance, unlike Mr. Patrickson. However, this argument is unavailing if one takes Mr. Patrickson's point of view that the terms of his 2003 PIP were unreasonable in requiring him to perform functions outside of his department. Notably, Mr. Angus testified that he had never asked to perform functions outside of his area of expertise. Tr. at 182.

In sum, it appears that, although Entergy may have had some legitimate reasons for finding fault with Mr. Patrickson's work performance, it failed to prove by clear and convincing evidence that it would have taken the same adverse action in the absence of his protected activity. Ironically, while Mr. Zimmerman testified that the "whole idea of a performance improvement plan is to help people meet expectations" and "not to help them find a way to the door," it appears that Mr. Patrickson's PIP was designed precisely to do just that. *Id*. at 252-253. For the foregoing reasons, I find that the Respondent has failed to meet its burden in this regard.

Pretext

Although I have determined that the Respondent failed to prove by clear and convincing evidence that it would have taken the same adverse action in the absence of Mr. Patrickson's protected activity, I conclude that, even if one were to accept that the Entergy met its burden of production, the Complainant would still prevail based on the concept of pretext. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 139-140 (2000). With regard to pretext, the complainant has the burden of proving by a preponderance of the evidence that the respondent's proffered reasons are "incredible and constitute pretext for discrimination." *Overall v. Tennessee Valley Auth*., Case No. 1997-ERA-53 at 13. For the reasons set forth in the preceding section, the Complainant has by a preponderance of the evidence shown that, notwithstanding any performance problems Entergy may legitimately claim in connection with Mr. Patrickson, the sequence of events demonstrates that Entergy used those performance problems as a pretext for discrimination.

Damages

In the event that a respondent is found to have violated the ERA, "the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment . . . ." 42 U.S.C. § 5851(b)(2)(B). *See generally Wells v. Kansas Gas & Elec. Co*., 85-ERA-72 (Sec'y Mar. 21, 1991), slip op. at 17. In addition, "the Secretary may order such person to provide compensatory damages to the complainant." *Id*. Finally, the Secretary shall assess costs and expenses, including attorney's fees, reasonably incurred in bringing the complaint. *Id*.; *DeFord v. Secretary of Labor*, 700 F.2d 281, 288-289, 191 (6th Cir. 1983).

Once I find that the complaint has merit, I am required under 29 C.F.R. § 24.7(c)(2) to issue a preliminary order granting interim relief such as reinstatement, back pay, and such other

actions as may be necessary to abate the violation, but not compensatory damages. This preliminary order shall constitute the preliminary order of the Secretary and shall be effective immediately.

Reinstatement

With regard to relief requested, the Complainant has called for reinstatement to his former position at Entergy. *See* Complainant's Post-Hearing Brief at 28. As this form of relief is permissible under 29 C.F.R. § 24.7(c)(2), the Complainant's request for reinstatement is granted.

Back Pay

The purpose of a back pay award is to make the employee whole, to restore the employee to the same position he would have been if not subjected to discrimination. *See Blackburn v. Metric Constructors, Inc.*, 86-ERA-4 (Sec'y Oct. 30, 1991), slip op. at 11. However, Mr. Patrickson did not expressly request back pay in his complaint. A complainant has the burden of establishing the amount of back pay that a respondent owes. *Pillow v. Bechtel Construction, Inc.*, 87-ERA-35 (Sec'y July 19, 1993).

As the Complainant did not request them, and did not establish any amount due, I am therefore precluded from awarding back pay. *Larry v. Detroit Edison Co*., 86-ERA-32 (Sec'y June 28, 1991).

Compensatory Damages

Section 5851(b)(2)(B) of the Energy Reorganization Act permits the award of compensatory damages in addition to back pay. *DeFord v. Secretary of Labor*, 700 F.2d 281, 288 (6th Cir. 1983); *English v. Whitfield*, 858 F.2d 957, 964 (4th Cir. 1988); *see also* 42 U.S.C. § 5851(b)(2)(B)(ii); 29 C.F.R. § 24.6(2); *Blackburn v. Metric Constructors, Inc*., 86-ERA-4 (Sec'y Oct. 30, 1991).

However, the Complainant failed to demand or prove compensatory damages. Therefore, I am again precluded from awarding them.

Punitive Damages

Exemplary damages do not lie under the ERA. *Smith v. Esicorp, Inc*.,1993-ERA-16 (ARB Aug. 27, 1998).

Abatement and Other Equitable Relief

These may include expungement of personnel records and the posting of my decision and may include further a recommendation for criminal sanctions and the ordering of a further investigation or monitoring of Respondent. However, as the Complainant did not seek them, I will not address them.

RECOMMENDED ORDER

Accordingly, **IT IS RECOMMENDED** that Respondent Entergy Nuclear Operations, Inc.:

1. Reinstate Complainant to full employment status;

2. Pay to Complainant, costs and expenses, including reasonable attorney fees incurred by her in connection with this proceeding. Counsel for Complainant will have thirty (30) 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. Respondent will have fifteen (15) days following receipt of the application to file objections.

SO ORDERED

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DANIEL F. SOLOMON
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and