

**DOL/OALJ REPORTER**

*Thomas v. Arizona Public Service Co.*, 89-ERA-19 (ALJ Apr. 13, 1989)

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**U.S. Department of Labor**  
Office of Administrative Law Judges  
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Government 8-454-0514

DATE: APR 13 1989  
CASE NO. 89-ERA-19

IN THE MATTER OF

SARAH THOMAS  
Complainant

v.

ARIZONA PUBLIC SERVICE CO.,  
Respondent

Appearances

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For the Claimant

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P. O. Box 53999  
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Before: Thomas Schneider  
Administrative Law Judge

## RECOMMENDED DECISION AND ORDER

This case arises under § 210 of the Energy Reorganization Act of 1974 (the Act), 42 USC § 5851, the Employee Protection, or "whistleblower," provisions, and the implementing regulations in 29

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CFR Part 24. A trial was held in Phoenix, Arizona, on February 28 and March 1 and 2, 1989. Both parties appeared with counsel.

### Timeliness

On October 21, 1988 Complainant ("Thomas") mailed a letter, certified mail, return receipt requested, to the Office of the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, complaining against the respondent employer for the following reasons:

- "1. Withdrawal of LLRT certifications.
  2. Failure to promote.
  3. Harassment on the job.
  4. Back wages."
- (CX 32.<sup>1</sup>)

This procedure constituted a filing of a complaint under the Act. § 24.3.<sup>2</sup> If any of the acts that are alleged to constitute discrimination occurred within thirty days of the filing of the complaint the filing is timely. § 24.3(b). As described below, I find that the withdrawal of LLRT certifications on September 29, 1988 constituted discrimination. The complaint was therefore timely. Another document (ALJ 2) on DOL Form WH-3 was dated 12/2/88 and apparently was the basis of the investigation undertaken by the Wage and Hour Division (ALJ 1). It does not serve to time-bar the earlier complaint.

### Substantive issues

It has been said that six items establish a *prima facie* case of discrimination under the whistleblower statutes:

- 1) that the party charged with discrimination is an employer subject to the Act;
  - 2) that the complainant was an employee under the Act;
  - 3) that the complaining employee was discriminated against with respect to a condition of employment;
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- 4) that the employee engaged in protected activity;
- 5) that the employer knew or had knowledge that the employee engaged in protected activity; and
- 6) that the discrimination was retaliation, motivated, at least in part, by the employee's engaging in protected activity.

Stephen Kohn, Protecting Environmental & Nuclear Whistleblowers: A Litigation Manual, Nuclear Information and Resource Service - Government Accountability Project (1985), p. 17.

In this case there is no question that the respondent, Arizona Public Service (APS) operates the Palo Verde Nuclear Generating Station, and is an employer under the Act and that the complainant is an employee and was such at all relevant times. The other elements are the ones litigated here.

### Background

Sarah Thomas testified that she is 41 years old, has been married for 19 years, and has two children aged 15 and 12. (TR 47.) She moved to Phoenix when her husband was transferred there in 1981. (TR 52.) She worked for a time for a contractor at the Palo Verde Nuclear Power Plant and in 1983 was hired directly by the respondent as a radiation waste aide. (TR 54-55.) She bid for and got the job of "Engineering Technician - Nuclear" on June 6, 1984. (TR 55.) One of the reasons she wanted the job in Engineering was that it very rarely required night shift work, in contrast to the radiation waste work which called for night shift work regularly. (TR 56.) She disliked night shift work because of her family responsibilities.

As an engineering technician she worked with an engineer by the name of Gary Irick ("Irick") and under the supervision of Ronald Kropp ("Kropp"). The three summaries of employee performance appraisal filled out by Kropp (EX 6, 7, 8) for

each of the first two-and-a-half years of her employment in engineering rated her as "superior" on a scale that went down from "exceptional" to "superior" to "competent" to "acceptable" to "marginal." There was testimony from another supervisor that he only rated one out of seven employees "exceptional." (TR 624.)

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In addition to the overall rating of "superior," the appraisals included highly complimentary comments such as "Her files proved to be invaluable." "She acted independently with the Licensing dept. to close out items ... two months ahead of schedule." "Overall, Sarah is hardworking, intelligent, and a fast learner. She requires minimum supervision. Her strong point is that she stick [sic] with a job until its done." (CX 6.)

"Very helpful during the program development ... She became very knowledgable of the computer programs on TSO and independently scheduled and monitored unit 2's valve test program. ... She is able to disposition many of the control room concerns without engineering assistance. ... She interfaces well with all engineering personnel and other depts. She is currently training the Engineering Aide to take over this responsibility. ... Sarah has trained the Aide sufficiently to permit the Aide to independently work on the IBM-PC to enter data and assist the engineers as needed ... her performance is always superior ... Sarah operated with considerable independence of action as a data taker, or lead technician of a procedure. readily accepts responsibility and performs in a superior manner. She excels [sic] at testing and data management and likes to get out in the field and test. She works well with all the engineers and interfaces well with other departments." In the space entitled "career development plan" Kropp noted: "Sarah needs training on ASME XI, Snubbers and LLRT testing to fully diversify and needs to work with engineers and learn more of the technical basis for the testing programs" (CX 7.)

In requesting a salary increase for Thomas in 1985, Kropp wrote: "She gives 150% to her job." (CX 5; TR 63.)

In short, until the Fall of 1986, the middle of her third appraisal period, complainant's performance was really superior. There was evidence that performance appraisals are truthful and taken seriously by supervisory personnel. (TR 625.)

The events leading up to the activity that complainant contends is protected activity began in the Fall of 1986.

Complainant's job was part of so-called Section XI testing. Section XI refers to a section of the regulations that governs testing of valve stroke times. Valve stroke times indicate the speed with which valves open and close. Valves are essential to the safe operation of the plant and their proper functioning is

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critical. Valves are tested every 90 days and their stroke times recorded. When a valve's stroke times show a certain degradation the valve must then be tested every 30 days. It is obvious that such testing has significant safety implications.

### **ALLEGED PROTECTED ACTIVITY**

In discussing the two controversies that are the focus of the alleged protected activities, it must be remembered that it is not my function to determine whether complainant's position on a technical matter is correct. An activity is protected if done as part of "particip[ation] in any manner ... in any action to carry out the purposes [of the Act] . " § 24.2(b)(3). A good faith or reasonable belief that a problem related to the Act exists is sufficient. "The merits of a charge made against an employer is irrelevant to its protected status." *Womack v. Munson*, 619 F.2d 1292, 1298 (8th Cir. 1980.) Respondent does not question Thomas' good faith. (TR 37.)

#### TSO-PC Controversy

The first cluster of events involves the TSO-PC controversy. Until the fall of 1986 the valve data was tracked on a mainframe computer, referred to as TSO (Time Sharing Option). At that time Supervisor Kropp had installed an IBM PC computer. He wrote a program for the PC to track the data (TR 78, 434, 559). Thomas and engineer Irick complained that the PC did not work well. It would sometimes lose data; it did not easily display previous valve stroke times; input was slow; and it failed to disclose defects that it should have caught. (TR 78-80, 272.) Kropp testified that the PC worked well, but that Thomas and Irick refused to learn the program. (TR 366.) Tom Weber, the lead engineer, shared that opinion. (TR 500-501, 618.) Irick testified that Kropp had pride of authorship in the PC program and did not want to believe it didn't work. (TR 274.) Thomas insisted that she did her best and knew perfectly well how to operate the PC. (TR 684.)

In any event, Irick and Thomas met with Kropp on October 8, 1986 to discuss the problem and again on November 25. On December 2 Kropp instructed them no longer to use the old TSO system and to use the PC exclusively, although Thomas and Irick reiterated their objections. (TR 77, 82, 271, 368; CX 9.)

On February 18, 1987 Irick, Thomas and an engineer from another

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group were discussing problems with "S.T." (surveillance tracking) packages produced with the PC computer. Kropp came in during this discussion and, according to credible testimony, became very angry and told Thomas and Irick "to throw S.T. packages in the garbage" if they were not properly completed. As complainant understood this remark, it would violate regulations, in that it called for destroying documents that were required to be kept (TR 175), that were not blank. (TR 646.) According to Kropp, all he meant was to destroy blank documents. (TR 373.) But he was "upset" when Thomas failed "to clear the control room out." (TR 372.) Six months later, in a meeting with Thomas and Mr. Rodriguez from Personnel, Kropp apologized to Thomas for having raised his voice at her in February. (TR 375.)

In any event, Irick and Thomas were disturbed by Kropp's remark and immediately went to see Gerald Sowers, Kropp's supervisor. Sowers told them to resume use of the TSO and to feed it the data that had only been fed into the PC. (TR 86, 276; CX 9.) Complainant contends that this appeal to Sowers was one instance of protected activity. Kropp referred to this appeal to Sowers as "going behind my back." (TR 369.) He testified he was "hurt" rather than angry. (TR 371, 374.)

Sowers did not testify, but there was evidence that the primary reason for ordering the use of the TSO was that its data were accessible to more people in the facility than the PC's data. (TR 619, 685.)

Complainant immediately began to feed the data into TSO as instructed by Sowers. By March 31, 1987 this task was completed for Unit 1. (The Palo Verde facility has 3 units.) In completing this task, complainant found that three valves which had been cleared by the PC program actually required being put on a 30 day testing schedule. (TR 80, 90.) In other words, by using the TSO complainant had discovered defects, which reflected violations of regulations, that she had not discovered by using the PC. Irick and Thomas reported this problem to Kropp. (TR 91.) Kropp told them to "engineer it away." (CX 9; TR 92.) Irick and complainant understood this order to mean that they should go over the work carefully to see if they had made any mistakes. (TR 92, 178. ) Finding no mistakes, they again met with Sowers. He told them to write a PRO (Potentially Reportable Occurrence) immediately, which they did. (CX 9, CX 10.) A PRO is a document that must be filed if a problem comes up that may indicate a violation of a regulation, whether or

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not further investigation shows an actual problem. The significance of complainant's testimony is that Kropp should have told her to write a PRO, but that he did not want a PRO filed, and that Sowers again overruled his subordinate, Kropp. (TR 93-94, 255.)

Thomas testified that Kropp was "very livid" and upset when he found out that Irick and Thomas had again gone to Sowers. (TR 94.) Irick described it as Kropp's "just incredible outward show of anger." (TR 281.)

After the PRO was filed the matter was further investigated and a so-called LER (Licensee Event Report) (CX 11) was filed with the NRC on April 27, 1987. It was prepared on the basis of the PRO written by Thomas and Irick and with input from Kropp and others, but the final version was not seen by complainant or Irick before it was filed. (TR 100.) In their view the LER did not accurately state who and what was responsible for the incident. It blamed "a cognitive personnel error by the test engineer," (that would be Irick) rather than Kropp's failure to heed Thomas' and Irick's complaints (TR 101), and three other similar statements (TR 101-103) which counsel referred to as "massaging the language" (TR 379) to deflect the blame. Complainant called this to the attention of Kropp's supervisor in a memo dated May 6, 1987. (CX 9). Complainant and Irick decided that they need not call this LER incident to the attention of the NRC (TR 330), but had performed their duty by calling it to the attention of management. (TR 171, 340.)

#### Date of valve review

The second cluster of events alleged to be protected activity revolves around the date of valve review. As mentioned, valves have to be tested regularly, at 90 day or 30 day intervals, with a 25% leeway. If valves are tested individually it is clear when the period begins to run. However, in 1986 valves were scheduled for testing in groups, and the testing period could extend for as long as six weeks. All valves in the group that passed the test were then accepted on the same day. In this way it was possible for a valve that was "exercised" (tested) at the beginning of a six week schedule, to be accepted six weeks later, and to then be scheduled for retesting 30 or 90 days from the date of acceptance, which would be more than 30 or 90 days from the date it was exercised. (TR 268-269.) Since the APS procedure was to calculate the next

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scheduled test on the basis of the date of acceptance, complainant was concerned that some valves would be tested less frequently than required by regulation. (TR 72-75.)

Complainant testified that she discussed this matter with Kropp in October 1986, and was instructed to use the acceptance review date. (TR 75.) She also testified that she raised this concern with an on-site inspector from the NRC (Nuclear Regulatory Commission.) (TR 76, 96-97. ) The NRC did investigate this concern, and Kropp was aware of the investigation. (TR 356, 361; RX 4, p. 1; CX 12.) Although Kropp denied knowledge that Thomas had complained to the NRC (TR 405) he admitted that Thomas and Irick had discussed the valve review date question with him. (TR 431.) And he knew that Jay Ball of the NRC was also concerned about this question. (RX 4.) He further testified that the question had never been raised before Thomas and Irick raised it. (TR 352.) I therefore infer that Kropp believed that Thomas had raised the question with the NRC.

Thomas and Irick also discussed this concern with Sowers at the same meeting in which they discussed the TSO-PC problem, on February 18, 1987. Sowers instructed them to use the exercise date of the valve. (TR 86.)

#### Other alleged protected activity

Complainant also reported to the NRC that her engineer, Jim Cantrell, her lead engineer, Tom Weber and her supervisor, Kropp, may not be qualified to supervise LLRT technicians because they allegedly have less than the required four years of experience in the discipline of LLRT. (CX 13, TR 647.) She also complained to NRC about being asked to use acceptance procedure that had not been approved. (TR 135-138; CX 13.) Since these activities apparently took place after the last incident of alleged discrimination, or after the complaint was filed with the Department of Labor, I do not consider them further here.

### **SUPERVISOR RON KROPP'S MOTIVATION AND KNOWLEDGE**

I find that Thomas embarrassed Kropp repeatedly. She complained to Sowers about Kropp insisting on the exclusive use of the PC, about his order to destroy S.T. packages, and about the practice of using acceptance review dates in scheduling tests. Sowers apparently was generally diplomatic and tried to "keep the

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family happy" (TR 592), but he unquestionably countermanded Kropp's order about using the PC, and apparently implicitly supported Thomas' other points. Sowers

further ordered a PRO to be written about an event that Kropp hoped could be "engineered away," which was followed by an LER, which is a report that something went wrong in Kropp's department. The fact that the LER was worded to minimize blame suggests that it is an embarrassing document.

As explained, Kropp also knew that Thomas discussed her concerns about valve review dates with the NRC, and this question remained an active concern for Kropp as late as March 15, 1988. (RX 4, p. 2.)

One of the reasons I believe Kropp had a retaliatory motive is because that is very understandable and human. Thomas was a mere technician with a high school education, attempting to get an associate degree in her spare time. Kropp was an engineer with two masters' degrees and at least 11 years engineering experience. (RX 2). In these circumstances it was embarrassing and annoying to have her report what she considered his mistakes to his supervisor and to the NRC, and then to have those people give them serious consideration and make more work for him.

The discriminatory treatment here was not as egregious as that in many of the reported cases. Thomas was not fired or suspended, or overtly disciplined. In fact, it is to respondent's credit that management, as personified by Sowers, responded quickly and decisively to her complaints, and, except for Kropp, appears not to have discriminated against her. But, of course, Kropp is part of management, and his conduct taken as a whole, evidences conduct that would chill the freedom to bring complaints either to management (see *Mackowiak v. University Nuclear Systems, Inc.*, 735 F2d 1159 (9th Cir. 1984) or to the NRC. This conduct is what Section 210 of the Act is designed to prevent.

### **ALLEGED DISCRIMINATORY TREATMENT**

Complainant felt that Kropp's attitude towards her changed after she complained to Sowers. (TR 87.) Before, Kropp had been friendly and communicative. (TR 57-58.) Afterwards he became unfriendly and would avoid any unnecessary conversation. (TR 88, 95, 108.) Thomas felt she could not talk to him at all. (TR 238.) Irick corroborated this change in attitude. (TR 277.)

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This basic change of attitude permeated all subsequent relations between Thomas and Kropp and manifested itself in several specific instances of discrimination, as well as being generally unpleasant. That attitude continued until after the filing of the complaint and is the basis for a claim of continuing discrimination. (TR 669.)

Each of the following items, by itself, would not support a finding of discrimination or disparate treatment. Only when viewed together, when each item is viewed in light of all other items and in light of Kropp's understandable hostility to Thomas does each item appear as an item of discrimination.

The specific instances of discrimination alleged are these: (1) Complainant was reassigned to LLRT (Local Leak Rate Testing) without a specific limitation in terms of time or achieving a certain level of competence; (2) she was not promoted to Senior Technician; (3) although the claim of discrimination respecting Thomas' lack of promotion to associate engineer was dropped, the evidence showed that Thomas' absenteeism was considered disqualifying for her, but not disqualifying for the person who was appointed to the position; (4) Complainant was assigned to be retrained on the PC for several weeks, which was demeaning since she did not need the training and had herself trained the aide who was then assigned to train her; and (5) on September 29, 1988 all her certifications for doing certain tests were suspended, even though she had trouble with only one test.

Complainant alleged that she was discriminated against after that as well. For example, she was denied a day off to go to the doctor in December 1988. However, I shall not consider events after the complaint was filed with the Department of Labor on October 21, 1988. (CX 32.)

#### Cross-training in LLRT

On October 1, 1987 Kropp issued a memo reassigning Thomas from Section XI testing to LLRT and reassigning an LLRT technician, Larry Trouy, to Section XI testing, effective January 1, 1988. (CX 14.) The reasons given for this reassignment were: "[1] Reduction in department exposure if a member of the LLRT or Pump and Valve team were to depart. There are currently no back-ups within ANPP [another acronym for respondent] for either Technician position. [2] Diversification of training and experience for both

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Technicians." (CX 14.) As recently as the time of trial, Kropp testified: "The only way I could survive was to have the three technicians under Tom Weber fully cross trained with LLRT and Section XI." (TR 410.) Yet that rationale is questionable.

For Thomas this reassignment meant doing heavier work, working night shifts, being exposed to more radiation, etc. (TR 126-127, 616.) She contends the motives for the reassignment were pretextual or, at best, mixed. She points out that no other

technicians have been reassigned in this way before or since. (TR 124, 294.) John Kern, another LLRT technician, has never been cross-trained in Section XI testing. (TR 448.) On a bid sheet for test technician/senior test technician that was posted in December 1987 no mention is made of a cross training requirement. (CX 28.) I infer that Kropp did not intend to require cross-training of all technicians under his supervision.

Larry Trouy, who was performing well in LLRT has learned Section XI and has not been reassigned back, even though Thomas is allegedly not qualified for LLRT, and even though Kern has not been trained in Section XI. Before 1986, cross-training was done without reassignment, on an informal basis. (TR 233, 236, 436-437, 642-643.) Sandra Henry, a senior technician in Kropp's department, has not been trained in either LLRT or Section XI. (TR 111-112.)

An "outage" occurs when a unit is shut down, usually for refuelling. Much maintenance and testing is done during outages. For the outage scheduled for April 1989, all the LLRT technicians' work will be done by outside contractors. (TR 128, 293, 450.) The implication is, and I find, that the back-ups mentioned in the Kropp memo are not needed.

Complainant contends that from the viewpoint of overall plant safety and proper functioning the transfer makes no sense. Before the transfer Thomas was doing superior work in Section XI testing and Trouy was apparently happy in LLRT. After the transfer Thomas was not doing nearly as well. There was some evidence that Trouy was not doing perfectly in LLRT. (TR 295-297.) Why not move Thomas back to where she was doing so well, and was happy? If this were an isolated incident, or if I did not find that Kropp had strong discriminatory motives (see above, pp. 7-8) I would consider the reassignment a rational management decision which I should not second guess. But in the whole context of this case I am persuaded that Kropp was motivated, at least in part, by a desire to give

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Thomas a dirtier job, or at least, not to have her back in Section XI where she embarrassed him significantly.

Not only was LLRT more disagreeable work than Section XI, but Thomas was transferred to it without being told a time when the transfer might end. She asked whether it was temporary or permanent, but was not given an answer. (TR 237, 410.)

Failure to promote to Senior Technician

The engineer who worked most closely with Thomas in Section XI was Gary Irick. He knew her work. In Spring 1987 he thought that she was a Senior Technician. (TR 120, 287.) Apparently, so did Ms. Robinson, a woman from Personnel whom complainant consulted. (TR 120, 184.) In fact, Irick had enough confidence in Thomas to have her be the person for others to consult when he was not available. (TR 120-121, 266.) Tom Weber, the lead engineer, testified that he did not know of this arrangement (TR 544), but I credit complainant when she testified that he must have known. (TR 672-673.) Irick suggested that she apply for the position of associate engineer, which would have been the next step up from Senior Technician. (TR 288.) She did apply, and was ranked fifth out of seventeen applicants. (TR 384.) This fact alone supports the proposition that she was well qualified to be a Senior Technician, a step below associate engineer. (TR 640-641.)

Kropp testified that Thomas was not yet qualified to be a Senior Technician because she lacked initiative, diversification, competence, willingness to work overtime, and similar intangibles. (TR 385, 400.) This testimony is suspect because Kropp had attributed these very qualities to her in 1985 and 1986, before the protected activities. (CX 5, 6, 7.) Kropp also said Thomas had done no physical testing before her transfer to LLRT. (TR 401.) This was not correct. (TR 642-643.) Thomas testified that she had more education and experience than any other technician on site. (TR 109, 187.)

There was uncontradicted testimony that Sandra Henry, a senior technician under Kropp's supervision, was less qualified than Thomas. (TR 111-112, 189, 290, 456-457.) Kropp testified that she was already a Senior Technician when he took over. (TR 348.) The implication is that since Kropp did not promote Henry he did not discriminate by not promoting Thomas.

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It is difficult to label a failure to promote as discriminatory, just as, (in the words of the playwright, Athol Fugard) it is impossible to name the day a drought began. But, by the time complainant clearly asked to be promoted, in a meeting in October 1987 with her, Kropp and Mr. Rodriguez from Personnel (TR 384), Kropp was angry, or hurt, or cold vis-a-vis complainant. It is a reasonable inference that, absent Thomas' protected activity, i.e., embarrassing Kropp before his supervisors, she would have been granted the promotion to Senior Technician by October 1987.

### Absenteeism

Thomas applied for the position of Associate Engineer, was ranked 5 out of 17, and therefore did not get the job. (TR 384.) At one point she alleged that the failure to give her the job was discrimination but she withdrew this claim at trial. (TR 180.) However, in discussing the "matrix" (a form for evaluating applicants for a position) prepared for Thomas and the one prepared for Mr. Rafferty, the person who was chosen for the position, Kropp revealed actual discrimination.

RX 5 is the matrix for Thomas. CX 41 is the matrix for Rafferty. Both matrixes show a minus sign (-) for the line labeled "attendance." Kropp, when questioned about the minus sign on Thomas' matrix, testified that it meant that Thomas was disqualified on the ground of her absenteeism. (TR 425.) He was then shown Rafferty's matrix, and he attempted to explain the significance differently. (TR 428.)

I find that Kropp judged complainant's absenteeism to be disqualifying, but judged Rafferty's relatively similar absenteeism record not to be disqualifying.

#### Training on the PC

On October 7, 1987 Kropp directed that Thomas be trained on the IBM-PC. He wrote a follow up memo on November 5, 1987, because, apparently, nothing had happened in response to the first memo. (CX 23.) The program required 2 hours of supervised training per week for four weeks, with 10 hours of practice and actual data input the last week. Thomas testified that these requirements were silly for her and demeaning. She knew how to do all the things required, had done them for a long time, and was to be trained by the Aide she had trained on the same equipment. (TR 658-661; CX 7[¶ 6], CX 23.) Nothing in the record explains this except a retaliatory motive.

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#### Withdrawal of certifications

On September 29, 1988 Kropp issued a memorandum notifying complainant that "your certifications for all LLRT procedures are temporarily suspended. All tests performed in the future will require the presence of a qualified technician or Engineer until your certifications are re-validated." (Cx 32.)

This action resulted from an incident on September 26, 1988. On that day Thomas was assigned by her engineer, Jim Cantrell, to conduct a certain test, referred to at the hearing as CLO-6. According to Thomas, she requested Cantrell to assign one of the other technicians to her as "back up," and this request was "treated lightly and

denied." (CX 32.) She later testified that she made the request because she felt lightheaded and ill (TR 139, 252), although she did not mention this feeling in her memo to Kropp of October 4, 1988. (RX 1.) Her lead engineer, Tom Weber, testified that he thought she wanted back up in case the test failed. (TR 540.) He also testified that he found out she felt ill on the day of the incident (TR 623), or the next day. (TR 624.) I find that she really felt ill on that day, before the test began. Since Cantrell did not testify, I do not know his reason for not assigning help from the beginning. His memo (RX 14) does not mention her request.

All witnesses agreed that the mechanics who hooked up the test did so in a manner that was not the preferred manner (RX 14; TR 529), and one that Thomas asked them to change. An argument ensued, and Thomas called Cantrell and Weber, who failed to answer their phones. (TR 650.) She reached John Miller, an experienced technician. In response, Weber, the lead engineer, contacted Thomas, and then dispatched engineer Cantrell and technician Kern to the scene. (TR 523.) Kern instructed the mechanics to connect the hoses in the standard way (TR 473-474; RX 14 ), and the test was successfully completed (TR 524), with Thomas signing off on it. (TR 667.) Apparently, during this controversy, the pressure in one of the valves went as high as 72 psig or 87 psig, when the proper pressure is 50 psig. No damage was done.

Weber, the lead engineer, believed that Thomas' certification to do this test (CLO-6) should be withdrawn, but not that her certificates for all tests should be withdrawn. (TR 533, 541, 594; RX 15.) (The other tests are designated CLO-1, 3, 5, and 7. (TR 130-134.)) Weber testified that he thought that Thomas confessed a lack of confidence in her ability to do all tests involving "the

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panel." (TR 536.) Thomas denied this (TR 666, 692); however she had only done the CLO-6 test twice before. (CX 32.)

Kropp testified that he suspended all of Thomas' certificates because of this lack of confidence and because all the tests are similar in that they all involve the panel. (TR 414-415, 467, 478.) However, this rationale is discredited because not all the tests involve the panel (TR 645), and furthermore, Thomas had used the panel hundreds of times (TR 488, 645) and was very familiar and comfortable with it. Thus, Weber's thought that Thomas' certification for CLO-6 should be suspended is reasonable. Kropp's action in suspending all her certifications is less so, and is best explained by his hostile attitude.

As a result, Thomas was required to be retrained in all the tests (TR 419-420), even though she was fully qualified in almost all of them. (TR 412.) This retraining, like the PC retraining, was humiliating. (TR 135.)

Furthermore, if Thomas' testimony is believed, and I believe it, the net effect of this incident is to discourage people from asking for help if they need it. Thomas had been hoping to complete her training in LLRT, and to be retransferred to Section XI. By September 1988, just before this incident, she had been certified in CLO-3 through 7, with the exception of the door adjustment on CLO-3. (TR 208.) On the day of the incident she felt ill, asked for back up in advance, which was denied, and when she had difficulties she was sent back to square one in her training in LLRT. Her hope for early transfer back to Section XI was dashed.

### **FREEDOM TO CONTACT THE NRC**

The record contains two memoranda that I do not find were aimed at Thomas specifically, but which could be interpreted as discouraging free contact with the NRC.

The first is dated April 11, 1988 and is directed to all "Engineering Evaluations Department Personnel." (CX 18.) This memorandum expressly states that all correspondence leaving the department must have the supervisor's signature, and the Manager and the Director must receive copies. Obviously, if this directive includes correspondence to the NRC, it inhibits free contact with the NRC.

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The second is a three page memo, dated January 18, 1989 to "Distribution" and is entitled "Setting the Tone." (CX 17.) It contains the following statements:

The second [enclosure] is a briefing paper I have used in the past to calibrate personnel on an appropriate way to interact with outside organizations so that the results of the outsider's efforts are not unduly biased by a few vocal individuals venting frustration. It is unfortunately typical for unsophisticated individuals to believe that some outsider can do more to resolve their frustrations than [sic- than] their own organization can. They are inevitably surprised when the results turn out to be very different than they had hoped for and not personally helpful at all!

\* \* \*

Be sure to debrief your supervisor carefully of your interface activities with an outside group. Be sensitive to their reactions especially when they seem to be surprised or question you closely about your actions or procedural requirements.

Again, it is obvious that if "outside organizations" includes the NRC, this memorandum discourages personnel from contacting the NRC freely about perceived problems, and requires personnel to report contacts with the NRC to a supervisor.

### **RELIEF**

Thomas requests the following relief (TR 30, 725, 745-746):

- (1) Promotion to Senior Technician, retroactively with back pay.
- (2) Reassignment to Section XI.
- (3) Damages for emotional distress.
- (4) That an order issue guaranteeing free access to the NRC.
- (5) Modification of her evaluations to eliminate reference to absenteeism.

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(6) Sealing her 1988 performance review, or having her 1989 performance review include only work she will have done in Section XI.

Section 201 of the Act provides that the Secretary shall give the following relief for violations of the section:

"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, and the Secretary may order such person to provide compensatory damages to the complainant." (42 USC § 5851(b)(2)(B).]

Requests for relief (1) [Promotion] and (2) [Reassignment] seem to be contemplated by the statute, inasmuch as I have found both the transfer to LLRT and the failure to promote to be discrimination based on Kropp's desire not to have Thomas work in Section XI where she embarrassed him.

Although the Secretary may order compensatory damages, I find the evidence insufficient in this case to recommend such an award. Therefore, request for relief (3) is denied.

Request for relief (4) [order re contact with NSC] is contemplated by the "affirmative action" clause in the Act.

Requests for relief (5) and (6) [modification of evaluations] is denied. Thomas' 1988 evaluation (CX 16) contains her explanation of all negative items, including the reference to absenteeism, which, together with this recommended decision and order, should suffice to set the record straight.

#### Promotion and back pay

I have found that absent her protected activity Thomas would have been promoted to Senior Technician no later than October 1987. She should now be promoted retroactively to October 1, 1987. Thomas calculated that she would have earned \$6,500 more by the time of trial had she been promoted. (TR 111ff, 211ff.) This calculation was based on the assumption she would have been promoted in May of 1987. The parties should confer immediately and attempt to arrive

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at the appropriate pay level within that job classification and at a figure for the amount Thomas would have earned had she been promoted to Senior Technician on October 1, 1987. If they cannot agree within 15 days, they should separately state their respective positions on this point to the undersigned or to the Secretary, whoever shall have jurisdiction, within 20 days.

#### Reassignment

I have found that Kropp was motivated, at least in part, to transfer Thomas to LLRT because of Thomas' protected activity. She can continue to be fully trained in LLRT by temporary assignments in that section, but she should be reassigned back to Section XI as a Senior Technician.

#### Freedom to contact the NRC

CX 17 and CX 18 were the only documents introduced to indicate that anyone higher than Kropp had discouraged complainant, or anyone else, from freely contacting the NRC. To remedy this "chilling" the following should be done:

(1) A memorandum written and distributed to the same "distribution" as the memorandum of January 18, 1989 (CX 17) from an official occupying a position at least at the level of W.C. Marsh, referring to the memorandum of January 18, 1989, and stating:

"Nothing in that memorandum or in the 'Guidelines for Conduct of Plant Personnel During Visits by Outside Agencies' that were attached to the memorandum should be construed to discourage any personnel from freely discussing their concerns with representatives of the NRC; nor is there any requirement that a supervisor be informed of any contact you may have with the NRC or its representatives."

(2) A memorandum written and distributed to the same distribution as the memorandum of April 11, 1988 (CX 18) from an official occupying a position at least at the level of G.W. Sowers, referring to the memorandum of April 11, 1988 and stating:

"Regardless of anything contained in that memorandum, all personnel are free to correspond with representatives of the NRC without knowledge or approval of anyone in management."

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## RECOMMENDED ORDER

1. Respondent is ordered to promote complainant to the position of Senior Technician, retroactively to October 1, 1987. The parties are ordered immediately to confer and attempt to arrive at the appropriate pay level within that job classification and at a figure for the amount Thomas would have earned had she been promoted to Senior Technician on October 1, 1987, and to implement such agreement. If they cannot agree within 15 days, they should separately state their respective positions on this point to the administrative law judge or to the Secretary, whoever shall have jurisdiction, within 20 days.

2. Respondent is ordered to transfer complainant to Section XI testing.

3. Respondent is ordered to issue memoranda as described in the recommended decision of the administrative law judge at page 16 under the heading "Freedom to contact the NRC."

Thomas Schneider  
Administrative Law Judge [ENDNOTES]

<sup>1</sup>Complainant's exhibits are designated CX; respondent's, RX; Administrative Law Judge's, ALJ. TR refers to the transcript by page.

<sup>2</sup>Section references are to 29 CFR.