



In the Matter of:

CURTIS C. OVERALL,

ARB CASE NO. 04-073

COMPLAINANT,

ALJ CASE NO. 99-ERA-25

v.

**DATE: July 16, 2007
(Reissued as corrected)**

TENNESSEE VALLEY AUTHORITY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

**Lynne Bernabei, Esq., Alan R. Kabat, Esq., *Bernabei & Katz, PLLC,*
Washington, District of Columbia**

For the Respondent:

**Maureen H. Dunn, General Counsel, Thomas F. Fine, Assistant General
Counsel, Brent R. Marquand, Senior Litigation Attorney, Office of the General
Counsel, *Tennessee Valley Authority,* Knoxville, Tennessee**

FINAL DECISION AND ORDER

Curtis C. Overall alleges that his employer, the Tennessee Valley Authority (TVA), violated the employee protection section of the Energy Reorganization Act (ERA or Act)¹ when TVA took various adverse employment actions against him and subjected him to a hostile work environment because he had previously engaged in activity that the ERA protects. A United States Department of Labor Administrative Law Judge (ALJ) concluded that TVA did not violate the Act. We concur and dismiss Overall's complaint.

¹ 42 U.S.C.A. § 5851 (West 2003).

BACKGROUND

Overall began work for TVA in February 1979. TVA is a federal corporation and is an agency of the United States Government. The Nuclear Regulatory Commission (NRC) licensed TVA to operate the nuclear reactor at the Watts Bar Nuclear Plant in Spring City, Tennessee.² Overall began working at Watts Bar in 1984. At that time, Watts Bar was under construction and was not operational. It did not become operational until 1996.

Beginning in 1989, Overall worked as a Power Maintenance Specialist. He was responsible for maintaining, testing, operating, constructing, and designing the ice condenser system. The critical purpose of the ice condenser system is to absorb nuclear energy released during an accident. The major part of this system is three million pounds of ice stored within 1,944 baskets located inside the contained area surrounding the nuclear reactor. These ice baskets are coupled together by pairs of screws. The ice absorbs energy released during an accident and limits the peak pressure and temperature inside the contained area. By limiting this pressure, the ice condenser system minimizes the amount of radioactive material released into the atmosphere.

In April 1995, Overall issued Problem Evaluation Report (PER) 246 because he found that ice basket screws inside the ice condenser system had failed. A PER is an internal report of a safety problem. It identifies a problem, lays out corrective action, and affords a means of verifying that the problem has been resolved. The NRC examines PERs when it audits nuclear plants. When Overall wrote PER 246, he described the failed screws problem and its safety implications, analyzed the cause, and set forth corrective action. TVA eventually transferred PER 246 to another department, and Overall had no further responsibility for it.³

In late June 1995, D. L. Koehl, TVA's Technical Support Manager, notified Overall that TVA would transfer him to TVA Services effective September 1995. TVA Services helped employees who were subject to a reduction in force or a lay off to find another job. Koehl explained that based on budget reductions resulting from changes in workforce planning, reorganizations, and standardization efforts, TVA had identified occupations and positions which would not be required in the future. Koehl informed Overall that his position, Power Maintenance Specialist, SD 04, had been identified as "at risk" and was targeted for surplus. During his time with TVA Services, Overall did not find other work. In July 1996, Overall and several other engineering employees received

² Under the ERA employee protection provisions, the term "employer" includes "a licensee" of the NRC. 42 U.S.C.A. § 5851(a)(2)(A). Therefore, the TVA is a covered employer for purposes of this case.

³ TVA closed PER 246 in August 1995 without taking corrective action and without reporting the safety issue to the NRC.

notice that TVA was laying them off due to lack of funds. TVA laid off Overall effective September 30, 1996, as part of its company-wide downsizing.

Overall filed a complaint with the United States Department of Labor in January 1997. He alleged that TVA laid him off because he issued PER 246, thus exposing a safety problem at Watts Bar. This action, claimed Overall, violated the ERA. After a hearing, a Department of Labor Administrative Law Judge (ALJ) concluded that TVA had violated the ERA. In May 1998, the ALJ ordered TVA to reinstate Overall with back pay from November 4, 1995. TVA unsuccessfully appealed, first to the Administrative Review Board and then to the United States Court of Appeals for the Sixth Circuit.

TVA reinstated Overall to his former position of “Power Maintenance Specialist SD-04” working with the ice condenser system at Watts Bar, which was now operational. Watts Bar’s Nuclear Steam Supply System (NSSS) manages the ice condenser system. Overall, however, testified that he was not assigned the same duties or responsibilities that he had performed before being laid off. Overall’s first-line supervisor at Watts Bar was Philip Smith, the Systems Engineering manager at NSSS. His second-line supervisor was Richter Wiggall, NSSS Engineering Supervisor. Smith instructed Overall to work with Gary Jordan, the NSSS engineer responsible for the ice condenser and the ice boration systems.

Because Overall had to schedule and undergo medical exams before coming back to work, he did not actually return to Watts Bar until August 1998. In the interim, he had been invited to speak at a press conference at the National Press Club in Washington, D.C. on May 26, 1998. According to Overall, he received a telephone call at his home on the eve of the conference and heard someone at the other end repeatedly blowing a whistle.⁴ Overall nevertheless spoke at the conference the next day and explained his experience reporting his safety concerns with the ice condenser system at Watts Bar.

Thereafter, according to Overall, he was subjected to several anonymous harassing telephone calls and notes left on his car and at his home, to anonymous tampering with his car, and to anonymous intrusions upon his home property. Overall testified that after his return to Watts Bar on August 5, he received additional harassing anonymous telephone calls and notes. He also testified that James Adair, Watts Bar’s lead civil engineer, attempted to intimidate him by entering a meeting between Overall and NRC inspectors and that an anonymous TVA employee left a harassing note in the men’s room in Overall’s office building. Overall also said that TVA excluded him from departmental meetings and communications.⁵

He further testified that the harassment culminated when a fake bomb was placed in his truck on September 9, 1998, while it was parked at a shopping center. Overall had taken the day off from work because he had a meeting that day with Nancy Holloway of

⁴ ALJ’s Recommended Decision and Order (R. D. & O.) at 26.

⁵ R. D. & O. at 26-45.

the Watts Bar Inspector General's office, who had been assigned to investigate the harassment. Overall had entered a store and made copies of documents that he planned to give Holloway at their meeting. When he exited the store, Overall noticed what looked like a bomb in the back of his truck. He returned to the store and reported what he saw to the store clerk. The authorities were called to the scene. Overall began to experience chest pain and was taken from the scene and hospitalized. He underwent a cardiac treatment and was referred to a psychiatrist for treatment of his emotional state. During the week of September 15, 1998, TVA granted Overall paid administrative leave due to his emotional state.⁶

On February 19, 1999, Overall filed the instant ERA whistleblower complaint with the Labor Department's Occupational Safety and Health Administration (OSHA). OSHA investigated the complaint and determined that TVA did not violate the Act. At Overall's request, an ALJ conducted a hearing. The ALJ recommended that Overall's complaint be dismissed. Overall appealed.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board to review an ALJ's recommended decision in cases arising under the ERA's whistleblower protection provision and to issue the final agency decision.⁷

Under the Administrative Procedure Act, this Board, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The Board reviews the ALJ's recommended decision de novo.⁸ It is not bound by an ALJ's findings of fact and conclusions of law because the recommended decision is advisory in nature.⁹

⁶ *Id.* at 33-34.

⁷ *See* 29 C.F.R. § 24.8 (2005). *See also* Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

⁸ *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Berkman v. U.S. Coast Guard Acad.*, ARB No. 98-056, ALJ No. 97-CAA-2, 97 CAA-9, slip op. at 15 (ARB Feb. 29, 2000).

⁹ *See* Attorney Gen. Manual on the Administrative Procedure Act, Chap. VII, § 8 pp. 83-84 (1947) ("the agency is [not] bound by a [recommended] decision of its subordinate officer; it retains complete freedom of decision as though it had heard the evidence itself"). *See generally* *Starrett v. Special Counsel*, 792 F.2d 1246, 1252 (4th Cir. 1986) (under principles of administrative law, agency or board may adopt or reject ALJ's findings and conclusions); *Mattes v. U.S. Dep't of Agric.*, 721 F.2d 1125, 1128-1130 (7th Cir. 1983)

DISCUSSION

A. Sovereign Immunity

The proposition that the United States Government and its agencies cannot be sued except by consent is deeply rooted in our jurisprudence. “The United States, as sovereign, ‘is immune from suit, save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court’s jurisdiction to entertain the suit.’”¹⁰ Sovereign immunity applies in administrative adjudications as well as in Article III adjudications.¹¹

Because sovereign immunity shields the federal government and its agencies from suit, that immunity must be waived in order for an adjudicative body to have jurisdiction. “Sovereign immunity is jurisdictional in nature. Indeed, the ‘terms of [the United States’] consent to be sued in any court define that court’s jurisdiction to entertain the suit’ It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.”¹² So if TVA’s immunity from suit for monetary damages under the ERA’s whistleblower section has not been waived, we cannot entertain Overall’s appeal. Therefore whether sovereign immunity has been waived is the first question we must consider.

The Supreme Court has set high standards for determining that sovereign immunity has been waived. To be effective, waivers of the Government’s sovereign

(relying on *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951), in rejecting argument that higher level administrative official was bound by ALJ’s decision).

¹⁰ *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)).

¹¹ *Fed. Mar. Comm’n v. South Carolina State Ports Auth.*, 535 U.S. 743, 761 (2002) (“[I]t would be quite strange to prohibit Congress from exercising its Article I powers to abrogate state sovereign immunity in Article III judicial proceedings . . . but permit the use of those same Article I powers to create court-like administrative tribunals where sovereign immunity does not apply”); *United States v. Puerto Rico*, 287 F.3d 212 (1st Cir. 2002) (holding that the United States was entitled to invoke sovereign immunity in proceedings before the administrative agency).

¹² *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (quoting *Sherwood*, 312 U.S. at 586).

immunity must be “unequivocally expressed.”¹³ The Government’s consent to be sued “must be construed strictly in favor of the sovereign”¹⁴ and not “enlarged beyond what the language requires.”¹⁵

The *Pastor* Decision

TVA argued, to the ALJ and to us, that pursuant to our decision in *Pastor v. Dep’t of Veterans Affairs*,¹⁶ it is immune from Overall’s suit because TVA is a United States government agency. TVA notes that the ERA’s employee protection provision does not explicitly waive the Federal Government’s sovereign immunity. In *Pastor* we considered whether Congress had waived sovereign immunity from a claim for money damages under 42 U.S.C.A., section 5851, the same employee protection section that Overall relies upon. *Pastor*’s employer, the Department of Veterans Affairs (DVA), is an agency of the Federal Government, and like TVA here, was an NRC licensee. We held that Congress had not waived sovereign immunity for money damages under section 5851. Therefore, because this Board did not have jurisdiction to decide *Pastor*’s appeal, we dismissed her complaint.

Here, the ALJ below criticized the *Pastor* decision and declined to apply it. Instead, he held that TVA was not immune from Overall’s claims because Congress had waived TVA’s immunity when it included a “sue and be sued” clause in TVA’s enabling legislation. R. D. & O. at 5-13. On this appeal, TVA argues that the ALJ erred in not applying *Pastor* and that we should do so and dismiss Overall’s complaint. Overall responds that the immunity issue is not properly before the Board because TVA did not file a cross-petition for review of the ALJ’s sovereign immunity holding. We reject this argument because we are obligated to inquire sua sponte whenever a doubt arises as to the existence of our subject matter jurisdiction.¹⁷ Alternatively, Overall argues that TVA is a government corporation not entitled to sovereign immunity. Reply Brief at 2-4. We conclude that TVA is not immune from Overall’s claims.

¹³ *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95 (1990) (quoting *United States v. Mitchell*, 445 U.S. 535, 538 (1980), and *United States v. King*, 395 U.S. 1, 4, (1969)) (waivers of sovereign immunity by Congress “cannot be implied but must be unequivocally expressed”).

¹⁴ *McMahon v. United States*, 342 U.S. 25, 27 (1951).

¹⁵ *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983).

¹⁶ ARB No. 99-071, ALJ No. 99-ERA-11, slip op. at 23 (ARB May 30, 2003).

¹⁷ *Pastor*, slip op. at 5.

TVA is a Federal Agency and Governmental Corporation.

TVA is an agency within the Executive Branch of the United States.¹⁸ Congress created the TVA as a governmental corporation in 1933 “in the interest of the national defense” and to develop agriculture and industry and to generate power.¹⁹ But TVA’s immunity is limited by its corporate nature. As noted, Section 4 of the TVA Act provides that TVA “[m]ay sue and be sued in its corporate name.”²⁰ This clause is to be broadly construed.²¹ TVA is a “hybrid creature.” It was created by Congress, yet structured to operate much like a private corporation.²²

Nevertheless, Congress can explicitly restrict or limit the “sue and be sued” waiver. But TVA has not provided us with authority that Congress has explicitly restricted its sue and be sued waiver.²³ Even so, TVA could still succeed on its argument that it is immune from Overall’s claims. The United States Supreme Court has held that implied limitations to the waiver of sovereign immunity under a “sue and be sued” clause may exist under three circumstances. The party asserting an implied limitation to the sovereign immunity waiver must clearly show that (1) the type of suit sought to be brought against it is not consistent with the statutory or constitutional scheme at play, or

¹⁸ *Hill v. U.S. Dep’t of Labor*, 65 F.3d 1331, 1333 (6th Cir. 1995); 11 U.S. Op. Off. Legal Counsel 70 (1987).

¹⁹ 16 U.S.C.A. § 831 *et seq.* (West 2000). TVA is authorized under 16 U.S.C.A. § 831c to construct nuclear power electric generating plants. *Young v. TVA*, 606 F.2d 143 (6th Cir. 1979).

²⁰ 16 U.S.C.A. § 831c(b).

²¹ *Queen v. TVA*, 689 F.2d 80, 85 (6th Cir. 1982); *see also F.H.A. v. Burr*, 309 U.S. 242, 245 (1940).

²² *North Carolina ex rel Cooper v. TVA*, 439 F. Supp. 2d 486, 490 (W.D.N.C. 2006) (noting that “[o]ne of the governmental features specifically denied to TVA was the right to sovereign immunity, which Congress withheld by virtue of the TVA Act’s ‘sue and be sued’ clause.”).

²³ In asserting sovereign immunity before the ALJ and to us, TVA likened itself to the United States Postal Service (USPS). The “sue and be sued” clause contained in the Postal Reorganization Act, 39 U.S.C.A. § 101 *et seq.* (West 1980), generally waives the USPS’s sovereign immunity. That waiver, however, is not absolute and instead is based upon the nature of the claims asserted. *See, e.g., Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736 (2004) (USPS not liable under Sherman Act because USPS not a “person” separate from the United States for purposes of antitrust laws.) But TVA did not argue that Congress limited its “sue and be sued” waiver. Therefore, its analogy to USPS is unavailing.

that (2) the suit would gravely interfere with the agency's performance of a governmental function, or that (3) Congress meant to use the "sue and be sued" clause in a narrow sense.²⁴

Regarding the first circumstance, Overall's complaint is made under the ERA's employee protection provision. The Supreme Court has held that "while [the ERA's employee protection provision] obviously bears some relation to the field of nuclear safety, its 'paramount' purpose was the protection of employees."²⁵ TVA has not argued or demonstrated, and we are not aware, that a claim such as Overall's is inconsistent with the TVA Act. Likewise, with respect to the second circumstance in which an implied limitation to TVA's sue and be sued waiver might exist, TVA has neither argued nor demonstrated to us that Overall's whistleblower claim would gravely interfere with its congressionally mandated power generation program at the Watts Bar nuclear facility. Finally, TVA has not provided any authority that Congress intended to use TVA's "sue and be sued" clause narrowly. In fact, as noted previously, that clause is to be construed broadly.²⁶

Thus, we find that Congress did not expressly restrict TVA's ability to sue and be sued. And since TVA has not shown any implied exception to the waiver of sovereign immunity under its "sue and be sued" clause, we therefore conclude that TVA is not immune from Overall's ERA whistleblower complaint.

B. The Legal Standard

The ERA provides, in pertinent part, that "[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . . [notifies a covered employer about an alleged violation of the ERA or the Atomic Energy Act (AEA) (42 U.S.C. § 2011 *et seq.* (2000)), refuses to engage in a practice made unlawful by the ERA or AEA, testifies regarding provisions or proposed provisions of the ERA or AEA, or commences, causes to be commenced or testifies, assists or participates in a proceeding under the ERA or AEA]."²⁷

To prevail on his ERA whistleblower claim, Overall must prove by a preponderance of evidence that he engaged in activity that the ERA protects, that TVA knew about this activity, that TVA then took adverse action against him, and that his protected activity was a contributing factor in the adverse action TVA took.²⁸

²⁴ *F.H.A. v. Burr*, 309 U.S. 242 at 245.

²⁵ *English v. General Elec. Co.*, 496 U.S. 72, 83 (1990).

²⁶ *Queen*, 689 F.2d at 85.

²⁷ 42 U.S.C.A. § 5851 (a)(1).

C. Protected Activity and TVA's Knowledge

As noted above, the whistleblower protection provision of the ERA protects an employee who commences a proceeding under the ERA. Thus, Overall engaged in protected activity when he filed his 1997 ERA whistleblower complaint. The ALJ found that Overall also engaged in protected activity when he spoke at the National Press Club's May 26, 1998 press conference about his safety concerns at Watts Bar and his case against TVA and when he met with Nuclear Regulatory Commission (NRC) inspectors during their inspection of the ice condenser system at Watts Bar from late August to early September 1998.²⁹ TVA concedes that these activities constitute protected activity.³⁰ TVA also does not dispute that it knew of Overall's protected activity. Therefore, since Overall proved that he engaged in ERA protected activity and that TVA knew about such, we examine whether he proved by a preponderance of evidence that TVA took adverse action against him.

D. Overall Alleged Discrete Adverse Actions and a Hostile Work Environment.

Overall claims that TVA took discrete adverse actions against him and also subjected him to a hostile work environment.³¹ In *National R.R. Passenger Corp. v. Morgan*,³² the United States Supreme Court analyzed what constitutes an adverse action ("unlawful employment practice") and when that action occurred. An adverse employment action may take the form of a discrete act. Discrete acts like failure to

²⁸ See *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 8 (ARB Sept. 30, 2003).

²⁹ R. D. & O. at 17-22.

³⁰ TVA Post-Hearing Brief at 130 n.43.

³¹ Overall's February 19, 1999 whistleblower complaint alleged only that TVA subjected him to a hostile work environment. TVA argues that Overall's discrete adverse action claims cannot be asserted because they were not contained in this complaint. Brief at 2. But "[w]hen issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings . . ." 29 C.F.R. § 18.5(e). Thus, since the parties developed both hearing testimony and the documentary record about these discrete adverse action claims and fully litigated them before the ALJ, though not contained in Overall's complaint, we find that these claims were tried by consent of the parties. See, e.g., Transcript (T.) 144, 205, 206, 209, 214, 224-228, 497, 1261-1262, 1267, 1271, 1860, 2723-2724, 2800-2802, 2819, 2826, 2846-2849; Complainant's Exhibits (CX) 25, 30, 42, 436-441, 465; Respondent's Exhibits (RX) 20-22, 191.

³² 536 U.S. 101 (2002).

promote, denial of transfer, termination, and refusal to hire are easy to identify.³³ “A discrete retaliatory or discriminatory act ‘occurred’ on the day that it ‘happened.’”³⁴

The Court also distinguished discrete acts from hostile work environment claims.³⁵ A hostile work environment claim, by its nature, “involves repeated conduct” or conditions that occur “over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own.”³⁶ Hostile work environment claims are based on the cumulative effect of individual acts.

E. Overall’s Discrete Adverse Action Claims

Below, Overall argued that TVA took four discrete adverse actions against him: (1) Upon his return to Watts Bar, TVA did not give him a position comparable to the one he held before or assign him appropriate work; (2) TVA excluded him from key meetings and communications when he returned; (3) TVA improperly revoked his security clearance; (4) TVA monitored his activities while he was on paid administrative leave in August 1999. R. D. & O. at 59-60, 87-88.³⁷

Not every action taken by an employer that renders an employee unhappy constitutes an adverse employment action.³⁸ To succeed, Overall must prove by a

³³ *Id.* at 114.

³⁴ *Id.* at 110.

³⁵ *Id.* at 114-115.

³⁶ *Id.* at 115.

³⁷ The allegation concerning the security clearance was contained in a complaint Overall filed separately from the one at issue here. He later withdrew this complaint when TVA restored his security clearance. In the interim, the ALJ found that TVA did not revoke the security clearance because of Overall’s protected activity. R. D. & O. at 64-67. Overall does not contest this finding in his brief to us. Therefore, he waives argument on that issue. *See Hall v. U.S. Army Dugway Proving Ground*, ARB Nos. 02-108, 03-013, ALJ No. 97-SDW-5, slip op. at 6 (ARB Dec. 30, 2004).

³⁸ *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996); *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 97-ERA-52, slip op. at 12 (ARB Feb. 29, 2000) (approving *Smart* and other cases that “make the unexceptionable point that personnel actions that cause the employee only temporary unhappiness do not have an adverse effect on compensation, terms, conditions or privileges of employment”); *cf. Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1178 (10th Cir. 1999) (the American with Disabilities Act, like Title VII, is neither a “general civility code” nor a statute making actionable ordinary tribulations of the workplace).

preponderance of the evidence that TVA took a “tangible employment action” that resulted in a significant change his employment status.³⁹ This means that Overall must prove that TVA’s action was “materially adverse,” that is, TVA’s actions must have been harmful to the point that they could well have dissuaded a reasonable worker from engaging in protected activity.⁴⁰

1. Work Assignments Upon August 5, 1998 Return to Work

Overall claims that TVA did not comply with the May 1998 order to reinstate him to his former, or substantially equivalent, position. He does not dispute that TVA gave him his former job title, schedule and grade, namely Power Maintenance Specialist SD-04 with duties involving the ice condenser system at Watts Bar. Rather, Overall claims that when he returned to Watts Bar on August 5, 1998, TVA did not give him meaningful work that was comparable to the work he had performed prior to his 1996 lay-off. Overall argues that TVA gave him “make work assignments such as writing purchase requisitions, or accompanying Mr. Jordan into the [ice condenser] system to take readings” because it wanted to keep him from reporting any deficiencies. Overall also contends that TVA did not allow him to work on any open PER that addressed problems with the ice condenser system which the NRC would be inspecting in late August. According to Overall, Adair rebuffed his request to learn about an open PER regarding the discovery of broken ice basket screws. Overall insists that no one at TVA was more qualified than he to address PERs relating to the ice condenser operation.⁴¹

The ALJ first found that TVA reinstated Overall to his former position. He then determined that because Overall took administrative and annual leave between August 5, 1998, and September 4, 1998 (when he was hospitalized and was out on leave), Overall only worked on site for approximately 12 days. The ALJ also found that TVA did not

³⁹ See *Jenkins v. United States EPA*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 20 (ARB Feb. 28, 2003); see also, e.g., *Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 1999-STA-7 (ARB Nov. 27, 2002) (holding that a supervisor’s criticism does not constitute an adverse action); *Ilgenfritz v. U.S. Coast Guard*, ARB No. 99-066, ALJ No. 1999-WPC-3, slip op. at 8 (ARB Aug. 28, 2001) (holding that a negative performance evaluation, absent tangible job consequences, is not an adverse action); *Shelton v. Oak Ridge Nat’l Labs.*, ARB No. 98-100, ALJ No. 1995-CAA-19, slip op. at 6-7 (ARB Mar. 30, 2001) (holding that in the absence of a tangible job consequence, a verbal reprimand and accompanying disciplinary memo are not adverse actions). But a whistleblower bringing a hostile work environment claim is not required to prove an “economic” or “tangible” job detriment such as that resulting from discharge, failure to hire, or reassignment to an inferior position.

⁴⁰ See *Hirst v. Se. Airlines, Inc.*, ARB Nos. 04-116, 04-160; ALJ No. 2003-AIR-47, slip op. at 9-11 (ARB Jan. 31, 2007).

⁴¹ Brief at 10-14.

assign Overall any unsupervised tasks on any open PERs because Overall had not completed the necessary training and had not obtained the required qualification card. The ALJ concluded, therefore, that TVA did not take adverse action because it had assigned Overall work appropriate to his position and level of training.⁴²

We find, as the ALJ did, that TVA assigned Overall work appropriate to his position and level of training, especially given his extended absence from work on the ice condenser system. Unlike the previous period when Overall worked there, Watts Bar was operational when Overall returned to work on August 5, 1998. Phillip Smith, Overall's supervisor, instructed Overall to work with Jordan. Overall accompanied Jordan into the ice condenser system and auxiliary building to take instrument and temperature readings. Jordan testified, and Overall acknowledged, that he gave Overall other work assignments.⁴³ Smith testified that Overall was not authorized to work on any open PER because he had not received updated training and taken a practical factors examination to earn a current qualification card.⁴⁴ Overall argues, in effect, that since he had previously been qualified to work on PERs, he was qualified to resume such work when he returned.⁴⁵ But Overall's own testimony belies this argument. On cross examination, he admits that though the qualifications for working on open PERs had been revised during his previous stint at Watts Bar, it "never crossed his mind" that those procedures could have been changed again and that, therefore, he needed additional training.⁴⁶

⁴² The ALJ wrote that an ERA whistleblower can prove that the employer's reasons for taking the adverse action are a pretext "by showing . . . that discrimination was more likely the *motivating* factor." R. D. & O. at 58 (emphasis added). If the ALJ meant that an ERA whistleblower must show that his protected activity was a *motivating* factor in the adverse action that the employer took, he erred. As Overall points out, the ERA requires that the complainant demonstrate that his protected activity was a *contributing* factor in the adverse action he alleges. Initial Brief at 31-32. See 42 U.S.C.A. § 5851(b)(3)(C). But the ALJ's error is harmless because he did not apply the erroneous motivating factor standard. That is to say, since he found that not immediately assigning Overall work comparable to that which he had previously performed was not an adverse action, he never reached the issue of whether Overall's protected activity "motivated" TVA's alleged adverse action.

⁴³ T. 214, 378, 2717-18.

⁴⁴ R. D. & O. at 25. Overall requested information from James Adair, Watts Bar's lead civil engineer in nuclear engineering, about an open PER (PER 823). Overall argued that Adair rebuffed him. PER 823, however, was not assigned to Overall's group, NSSS, but to Adair who was in the Civil Engineering group. CX 442.

⁴⁵ Initial Brief at 14.

⁴⁶ T. 2994-2995.

We find, therefore, that the record supports the ALJ's conclusion that TVA did not take adverse action when it reinstated Overall and assigned him work appropriate to his level of training. Though TVA may have initially assigned Overall mundane work, we find that such assignments were not materially adverse to Overall. That is to say, TVA's action was not so harmful that a reasonable worker would be dissuaded from engaging in activity that the ERA protects.⁴⁷

2. Exclusion From Meetings

Overall claimed that his supervisors, Smith and Wiggall, had frequent meetings and conversations about the ice condenser system, but they never asked him to participate. By way of example, Overall referred to an August 1998 discussion at Jordan's work station between Jordan, Smith, Wiggall and Paul Law, TVA's Auxiliary Unit Leader or back-up engineer. Jordan showed them photographs of debris found in the ice condenser system at the Donald C. Cook Nuclear Plant in Michigan. No one invited Overall to participate in this discussion.⁴⁸

The ALJ found that TVA did not exclude Overall from meetings that were "appropriate to his current level of training and reorientation to Watts Bar."⁴⁹ The record supports this finding. For instance, with regard to the incident where Jordan was showing the others the photographs of the debris, the record supports the ALJ's finding that Jordan later showed Overall the photos and his finding that the photos were posted on TVA's computer system and were available to any TVA employee. The record also reveals that because Overall was only at Watts Bar for approximately twelve workdays after being reinstated, and Smith and Jordan were off-site during some of that time, the days that Smith, Jordan, or TVA management could have included or excluded Overall from a meeting were limited. Furthermore, as the ALJ found, Higginbotham had assured Overall that with time, he would become more involved with the operations of NSSS, the section that Overall had only recently joined. And when Smith did invite him to attend a meeting – an August 18-20, 1998 ice condenser symposium in Chattanooga, Tennessee, convened to address issues concerning the ice condenser systems in various plants – Overall "chose not to attend."⁵⁰

Since the record supports a finding that TVA did not exclude Overall from conversations and meetings that were relevant to his responsibilities as a new member of NSSS, we conclude that TVA did not take the materially adverse action that Overall alleges.

⁴⁷ See *Hirst*, slip op. 9-11.

⁴⁸ R. D. & O. at 63.

⁴⁹ *Id.*

⁵⁰ R. D. & O. at 62-64.

3. The E-mail Lists

Overall alleged that Jordan and TVA management sought to isolate him by not adding him to the e-mail distribution list for the ice condenser utility workgroup. That group consisted of the ice condenser system engineers at other nuclear plants. Overall also claimed that TVA management excluded him from the general e-mail distribution list.⁵¹

But the ALJ concluded that not including Overall on the utility workgroup or general e-mail distribution lists did not constitute adverse action. After all, the ALJ reasoned, Overall had only recently returned to Watts Bar and could not reasonably expect to be immediately reinstated to a group that even Law, the back up engineer, did not belong. The ALJ also determined that Jordan forwarded to Overall copies of e-mails that pertained to Overall's assignments. The ALJ also found that the delay in getting Overall's name added to the general distribution list was reasonable.⁵²

Again, the record supports the ALJ's findings and reasoning. Moreover, Overall does not identify any evidence that contradicts the ALJ's findings on this point. He argues only that TVA "failed to provide any credible explanation" for his not being on the e-mail lists.⁵³ But it is Overall's burden, not TVA's, to prove by a preponderance of evidence that TVA took materially adverse action. Therefore, we too conclude that TVA did not take adverse action when it did not immediately place Overall's name on the e-mail lists.

4. Monitoring

Overall claims that Smith improperly monitored his activities in August 1999 in an attempt to prohibit Overall from attending a rally at the Donald C. Cook Nuclear Plant in Michigan where Overall was scheduled to discuss complaints and problems that were occurring there.⁵⁴ Overall was on paid administrative leave at this time.⁵⁵ Smith testified

⁵¹ R. D. & O. at 64.

⁵² *Id.*

⁵³ Brief at 13, 34.

⁵⁴ Overall argues that this monitoring was part of the hostile work environment. Brief at 37 n. 27. The ALJ found that Smith's actions pertaining to Overall and the D. C. Cook plant rally did not constitute intentional harassment or retaliation. R. D. & O. at 88. As we indicate below, the record supports these findings. Therefore, we treat this incident as a discrete adverse action.

that he received information about Overall's scheduled participation at the rally and confirmed its veracity by checking the rally's website. Smith stated that the website, which was accessible to the public, identified Overall by name. While Overall had actually declined to participate, it had been erroneously reported on the website that he would participate in the rally. Smith forwarded the information to James Maddox, Watts Bar's Nuclear Engineering Manager, and Higginbotham because he was concerned that there might be a conflict between Overall being on paid administrative leave and his decision to participate in the rally. TVA took no action.⁵⁶

The ALJ found that Smith's inquiry about Overall's publicized participation in the rally was an isolated incident for which Smith had an explanation. The ALJ also found that Overall did not show that Smith actually monitored Overall's whereabouts.⁵⁷ The record supports these findings. Therefore, since Overall did not demonstrate that Smith's activities resulted in a tangible job detriment or any change in his compensation, terms, conditions, or privileges of his employment, i.e., that Smith took materially adverse action, like the ALJ, we conclude that Smith's actions were not adverse.

F. Hostile Work Environment

In addition to the discrete adverse actions claims that we have just discussed, Overall claimed that TVA subjected him to a hostile work environment (HWE). The ALJ found that Overall established that a HWE existed at Watts Bar but concluded that TVA was not liable for it. The record supports the ALJ's finding and conclusion.

1. The Legal Standard For HWE Claims

The ERA protects employees from retaliatory harassment that creates a HWE.⁵⁸ To prevail on his HWE claim, Overall must first prove that a HWE existed. To do so, he must prove by a preponderance of the evidence: 1) that he engaged in protected activity; 2) that he suffered intentional harassment related to that activity; 3) that the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment; and 4) that the harassment would have detrimentally affected a reasonable person and did detrimentally affect him.⁵⁹

⁵⁵ Overall was on paid leave until February 2000 when he went to work for TVA at its Fossil Fuel Plant.

⁵⁶ R. D. & O. at 87-88.

⁵⁷ *Id.* at 88.

⁵⁸ *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ Nos. 97-ERA-14 et al., slip op. at 10 (ARB Nov. 13, 2002) (citations omitted); *Berkman*, slip op. at 17-18 (citations omitted).

⁵⁹ *Jenkins*, slip op. at 16-17; *Williams*, slip op. at 13 (ARB Nov. 13, 2002).

If Overall succeeds in proving that a HWE existed, he must also prove by a preponderance of evidence that TVA knew, or in the exercise of reasonable care should have known, that Overall's supervisors or co-employees were harassing Overall and that TVA failed to take prompt remedial action.⁶⁰

2. Overall Proved Intentional Harassment Related To His Protected Activity

Discourtesy or rudeness should not be confused with harassment, nor are the ordinary tribulations of the workplace, such as the sporadic use of abusive language, joking about protected status or activity, and occasional teasing actionable.⁶¹

The ALJ catalogued 28 incidents that Overall claims constituted intentional harassment. He found that 16 of these incidents either did not constitute harassment or did not constitute harassment related to Overall's protected activity: (1) the May 28, 1998 incident involving a grey car that Overall's wife saw driving slowly through the neighborhood; (2) the May 29, 1998 incident involving a car driving away from Overall's neighborhood at 2 A.M. without headlights on; (3) the June 1, 1998 incident when Overall's son discovered the gas cap on Overall's truck had been removed; (4) the June 13, 1998 incident when Overall noticed that his truck's gas tank door was open and someone was running away; (5) the June 16, 1998 telephone call to Overall's home wherein the caller laughed and breathed into the phone; (6) the June 17, 1998 incident when someone stared at Overall and his daughter as they drove in their neighborhood; (7) the August 5, 1998 incident involving an aggressive motorcycle rider who passed Overall as he drove home from work; (8) the August 25, 1998 incident when Overall questioned Adair about a PER that did not concern Overall, and Adair forcefully asked Overall why he needed such information; (9) the August 25, 1998 incident involving someone who drove behind Overall and tailgated, flashed headlights, and blew the horn; (10) the August 27, 1998 comment by TVA employee Douglas Williams to Overall to the effect that Williams had a problem being mentioned by name in Overall's 1997 whistleblower case; (11) another August 1998 incident when TVA employee Dennis Tumlin jokingly greeted Overall, "There's that whistleblower;" (12) the September 2, 1998 telephone call to Overall's home wherein the caller asked for Overall and then hung up; (13) the September 3, 1998 incident when, according to Overall, Adair interrupted and caused him to end a meeting he was having with NRC inspectors; (14) the September 9, 1998 incident when a person driving a car near Overall's home stared at Overall's daughter; (15) the September 17, 1998 anonymous note left near his home warning Overall to

⁶⁰ *Sasse v. Office of the U.S. Attorney*, ARB Nos. 02-077, 02-078, 03-044, ALJ No. 1998-CAA-7, slip op. at 35 (ARB Jan. 30, 2004).

⁶¹ *See Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998).

“watch his backside;” and (16) the August 1999 incident when Smith “monitored” Overall’s participation in the D. C. Cook plant rally.⁶²

We have examined the record and find that even if these incidents can be seen as intentional harassment, Overall did not prove by a preponderance of the evidence that they were related to his protected activity.

The ALJ did find that Overall proved intentional harassment related to his protected activity with respect to the remaining 12 incidents: (1) the May 25, 1998 anonymous telephone call to Overall’s home during which the caller repeatedly blows a whistle; (2) the May 29, 1998 anonymous note left at Overall’s home that read, “Silkwood;” (3) the June 9, 1998 anonymous note left at Overall’s home that read, “BOO;” (4) the June 11, 1998 anonymous note on Overall’s truck windshield that stated, “STOP IT NOW;” (5) the June 26, 1998 anonymous telephone call that Overall’s daughter answered in which, again, the caller blows a whistle; (6) Wiggall’s comment to Overall on August 5, 1998, the day he returned to work, “We’re here as engineers not to make up problems but to find them and correct them;” (7) the August 27, 1998 anonymous typewritten note delivered by interoffice mail to Overall’s desk that read, “Leave Watts Bar, there is no room for whistleblowers here or else;” (8) the August 29, 1998 anonymous voice mail message left on Overall’s office telephone in which the caller repeatedly blows a whistle; (9) the September 4, 1998 anonymous message left on the wall of the men’s bathroom where Overall worked that read, “Go home all whistleblowers now;” (10) the September 6, 1998 anonymous note left on Overall’s car parked at his home that read, “Did you get the message yet?;” (11) the September 9, 1998 incident when Overall found a fake bomb in the back of his truck while it was parked at a shopping center; and (12) the December 21, 2000 anonymous note left at Overall’s home that read, “You need to go” and contained a copy of Overall’s former Watts Bar identification badge.⁶³

The record supports these findings. Therefore, Overall sufficiently proved that he was subjected to intentional harassment related to his protected activity.

3. Overall Proved Altered Conditions and An Abusive Work Environment

Next, as noted, Overall must demonstrate that this harassment altered the conditions of employment and created an abusive work environment. To evaluate this element of Overall’s case, we consider factors such as the frequency and severity of the harassment: whether the harassment was physically threatening or humiliating, or merely offensive; and whether it unreasonably interfered with the Overall’s work performance.⁶⁴

⁶² R. D. & O. at 69-80, 87.

⁶³ R. D. & O. at 74-81.

⁶⁴ *Williams*, slip op. at 44, citing *Harris v Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

The intentional harassment consists of anonymous telephone calls, notes, mail, messages, the fake bomb, and the Wiggall (Overall's second line supervisor) comment. As the ALJ points out, the harassment was frequent because 11 of the 12 incidents occurred within the relatively short period of time between the May 15, 1998 anonymous telephone call to Overall's home and the September 9, 1998 fake bomb event.⁶⁵ And at least some of the harassment was undoubtedly severe. The "Silkwood" note refers to a whistleblower who died under peculiar circumstances. The "Leave Watts Bar, there is no room for whistleblowers here or else" note certainly communicated a physical threat. So did the fake bomb.

Furthermore, the intentional harassment as a whole interfered with Overall's work performance. Between August 5, when he returned to Watts Bar, and September 9, when he was hospitalized and went on extended leave after the bomb incident, Overall took leave or was otherwise not at work at least eight times. The ALJ found that Overall was absent because he had to deal with emotional issues that the harassment brought on.⁶⁶ The record supports this finding.

Therefore, Overall proved by a preponderance of evidence that the harassment created an abusive work environment because it was frequent, threatening, and interfered with his work.

4. Overall Proved Detrimental Effect and thus Proved HWE.

Overall must also prove by a preponderance of the evidence that the incidents of harassment would have affected a reasonable whistleblower in his circumstances and did detrimentally affect him. In addition to the obvious detrimental effect the "Silkwood" and "Leave . . . or else" notes and the fake bomb would have on anyone, Overall testified that after receiving the June 9, 1998 "BOO" note, he was very disturbed and angry. Overall reported this note to his attorney, the police, and the FBI.⁶⁷ Furthermore, he testified that the June 11, 1998 "STOP IT NOW" note made him nervous, shaky and frightened, and made him think that he was being watched. Overall reported the note to the authorities.⁶⁸ And the "Did you get the message yet?" note caused Overall to feel threatened. He felt it represented an escalation of the harassment he had experienced up to that point in that he felt that he would be harmed or even killed. He reported the note to several authorities.⁶⁹

⁶⁵ R. D. & O. at 82.

⁶⁶ *Id.* at 82-83.

⁶⁷ T. 174-175.

⁶⁸ T. 179-180; CX 60.

We find that these three anonymous notes themselves, not to speak of the “Silkwood,” “Leave . . . or else,” and bomb harassment, detrimentally affected Overall and would have had the same effect on any reasonable person. Therefore, having sufficiently proven that he was subjected to intentional harassment related to his protected activity, that the harassment created an abusive work environment, and that the harassment would have detrimentally affected a reasonable person and did detrimentally affect him, Overall succeeded in proving that he was subjected to a HWE.

5. TVA is not Liable for the Hostile Work Environment

Overall did not directly prove that TVA employees harassed him. Except for the Wiggall comment, the other incidents involved anonymous perpetrators. Nevertheless, we will infer that TVA employees wrote these notes, made the calls, sent the messages, and placed the fake bomb. The circumstances surrounding these incidents and the content of the notes, calls, and messages strongly suggest that this harassment was not random, but, more likely, was carried out by TVA employees

As previously noted, TVA will be liable for its employees’ harassing conduct if it knew, or in the exercise of reasonable care should have known, of the harassment and failed to take prompt remedial action.⁷⁰ To avoid liability, TVA must take both preventive and remedial measures to address workplace harassment.⁷¹ Once TVA knew about the harassment, the question becomes whether it addressed the problem adequately and effectively.⁷²

The ALJ made the following findings about TVA’s response to the harassment. In April 1998, TVA began to prepare for Overall’s return to Watts Bar and took precautions against future harassment. First, it posted a bulletin to all Watts Bar employees and contractors that encouraged them to report safety concerns. It reiterated the company’s policy that intimidation, harassment, retaliation, and discrimination would not be tolerated. The bulletin, signed by Watts Bar Vice President Richard Purcell, stated, in part, “In light of a recent adverse recommended decision by an Administrative Law Judge in the Department of Labor [i.e. the April 1998 ALJ decision that concluded that TVA had discriminated against Overall], I want to re-emphasize the importance of continuing to communicate openly, freely, and accurately without fear of retribution.”⁷³ Purcell also met with subordinate managers and stressed TVA’s zero tolerance for

⁶⁹ T. 294-295.

⁷⁰ *Sasse*, slip op. at 35; *Williams*, slip op. at 48.

⁷¹ *Williams*, slip op. at 48.

⁷² *Id.*

⁷³ RX 19.

intimidation or harassment. Management also prepared a “Plan for Returning Overall to WBN,” prepared other memoranda, and conducted meetings with supervisors and human resources staff, all of which were aimed at making sure that Overall was not subjected to harassment.⁷⁴

The ALJ found that TVA also responded to the harassment that Overall was experiencing prior to coming back to Watts Bar. On June 3, 1998, TVA’s Office of Inspector General (OIG) began to investigate the off-site harassment. OIG considered setting up a night vision camera near Overall’s home and installing a recording device on his telephone. T. 1480-82, 1563-65; CX 258; R. D. & O. at 46, 90. OIG ultimately decided against installing a camera because it could not be installed surreptitiously; it would have had to have been situated on a neighbor’s property after OIG obtained his or her permission; and its recording tape would require frequent changes, which would be obvious to anyone watching. T. 1565-66. OIG also decided that they did not need to install a recording device on Overall’s telephone because his caller identification system was sufficient and he was providing OIG with the recorded information and a description of the call. T. 1566-67, 1704. OIG also reviewed the harassing notes and employed handwriting experts to examine them. OIG investigated all of the harassment that Overall reported.⁷⁵

As for the harassment that occurred on-site, the ALJ found that TVA responded promptly and appropriately. For instance, TVA investigated the “Leave Watts Bar . . . or else” note the next day when Purcell met with the human resources staff and again emphasized the harassment issue and the Overall situation, sent another memo to the employees about the company harassment policy, and notified the NRC about the incident. And when the company found out about the “Go home all whistleblowers now” note written on the bathroom wall, it closed down the area to prevent others from seeing it, took photos of the note, and then painted the wall.⁷⁶

Thus, the ALJ found that TVA took extensive steps to protect Overall from harassment before he returned to Watts Bar and also acted promptly and appropriately to deal with both the off-site and on-site harassment that Overall reported.⁷⁷ He therefore concluded that TVA is not liable for the HWE.⁷⁸ The record fully supports the ALJ’s findings as to what TVA did to prevent and remedy the harassment. As noted above, under our precedent, TVA is not liable for a HWE claim if it addresses the harassment

⁷⁴ R. D. & O. at 89-90.

⁷⁵ *Id.* at 90-91.

⁷⁶ *Id.* at 91-95.

⁷⁷ *Id.* at 89, 91, 95.

⁷⁸ *Id.* at 95.

adequately and effectively.⁷⁹ Addressing harassment adequately and effectively means taking action reasonably calculated to end the harassment.⁸⁰ The employer is not required to achieve a result, only to take action.⁸¹ Here, though the harassment did not completely end, TVA was never indifferent to Overall's complaints. Rather, it took action reasonably calculated to end the harassment. Therefore, we find that TVA adequately and effectively addressed the harassment. As a result, it is not liable for the HWE.

Overall submits two arguments why we should find that the ALJ erred in concluding that TVA is not liable. First, he argues, in effect, that under *Pennsylvania State Police v. Suders*,⁸² TVA is strictly liable for the HWE, and that the ALJ therefore erred in applying TVA's affirmative defense that it took prompt and remedial action.⁸³ Under Title VII, when supervisors have created a HWE but have not taken a "tangible employment action" such as discharging, suspending, or demoting the employee, the employer may defend on the grounds that it exercised reasonable care to prevent and promptly correct the harassment, and that the employee unreasonably failed to take advantage of preventive or corrective opportunities that the employer provided, or failed to otherwise avoid harm.⁸⁴

In *Suders*, the United States Supreme Court resolved the split among the Circuits on the question of whether, under Title VII, a constructive discharge caused by a supervisor's harassment is a tangible employment action that therefore precludes the

⁷⁹ *Williams*, slip op. at 48.

⁸⁰ *Jackson v. Quanax Corp.*, 191 F.3d 647, 663 (6th Cir. 1999).

⁸¹ *See Blankenship v. Parke Care Ctrs.*, 123 F.3d 868, 872-873 (6th Cir. 1997) ("[W]hen an employer responds to charges of co-worker sexual harassment, the employer can be liable only if its response manifests indifference or unreasonableness in light of the facts the employer knew or should have known. The act of discrimination by the employer in such a case is not the harassment, but rather the inappropriate response to the charges of harassment. Upon the facts before the district court, the employer's good-faith response was entirely sufficient to escape liability . . ."); *Spicer v. Commonwealth of Va. Dep't of Corr.*, 66 F.3d 705, 710 (4th Cir.1995) (en banc) (employer liable for co-worker sexual harassment "only if no adequate remedial action is taken."); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir.1995) (employer generally not liable unless "the employer either provided no reasonable avenue of complaint or knew of the harassment but did nothing about it.").

⁸² 542 U.S. 129 (2004).

⁸³ Brief at 37.

⁸⁴ *Faragher*, 524 U.S. at 807; *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

employer from asserting the affirmative defense.⁸⁵ The Court held that an employer may assert this affirmative defense against a constructive discharge claim unless the employee quit “in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions.”⁸⁶ Overall argues, therefore, that the affirmative defense that the ALJ applied was not “available” to TVA because his supervisors took tangible employment action when they “officially” monitored his off-site conduct, excluded him from meaningful work, and attempted to suppress his reports about safety issues, all of which resulted in his constructive discharge from Watts Bar.⁸⁷

This argument fails for a least three reasons. First, to establish that he was constructively discharged, Overall must show that “the abusive working environment became so intolerable that . . . resignation qualified as a fitting response.”⁸⁸ Overall did not resign from Watts Bar. Therefore he was not constructively discharged. Second, unlike the case in *Suders*, Overall’s supervisors were not responsible for the HWE.⁸⁹ The ALJ found, and the record supports, that Smith’s alleged “monitoring” did not constitute intentional harassment. He also found that Wiggall did not create a HWE because his comment (“We’re here as engineers to not make up problems but to find them and correct them”) did not reach the level of severe or pervasive behavior.⁹⁰ And third, Overall did not allege or argue below that TVA constructively discharged him. Therefore, he waived this argument on appeal.⁹¹

Overall also argues that TVA is liable because its response to the harassment, far from being prompt, preventative, and remedial, was “grossly inadequate” and “failed to remedy the harassment.”⁹² According to Overall, TVA’s actions to prevent and remedy

⁸⁵ 542 U.S. at 140.

⁸⁶ *Suders*, 542 U.S. at 134.

⁸⁷ Brief at 37.

⁸⁸ *Suders*, 542 U.S. at 134.

⁸⁹ Nor did they take tangible employment action against Overall.

⁹⁰ R. D. & O. at 87-89.

⁹¹ Under our well-established precedent, we decline to consider an argument that a party raises for the first time on appeal. *Rollins v. Am. Airlines, Inc.*, ARB No. 04-140, ALJ No. 2004-AIR-009, slip op. at 4 n.11 (ARB Apr. 3, 2007 (corrected)); *Carter v. Champion Bus, Inc.*, ARB No. 05-076, ALJ No. 2005-SOX-23, slip op. at 7 (ARB Sept. 29, 2006).

⁹² Brief at 37-39.

the harassment were made “solely for public relations purposes,” and that if “TVA really intended to implement a ‘zero tolerance’ policy, it would have assigned the eminently qualified Mr. Overall to work on the troubled ice condenser system immediately and it would have encouraged him to speak with the NRC inspection team.”⁹³ Overall states that the OIG investigation was “incompetent,” and “deliberately inept” because the investigators did not follow leads and interview suspects. “In the end, it is clear that the TVA OIG investigation was not intended for Mr. Overall’s protection, but to assist TVA in defending this case.”⁹⁴

We reject Overall’s argument that TVA’s efforts to prevent and remedy the harassment were inadequate because the record demonstrates otherwise. As already noted, the record clearly shows that TVA’s efforts were extensive, prompt, and appropriate. Overall offers no record evidence to support his sweeping assertions about incompetent investigators and TVA’s motives for investigating.

Overall’s argues that TVA should be liable because it “failed to remedy the harassment.” Overall seems to argue that because TVA’s efforts did not end the harassment, it is liable. To support this argument, Overall cites language in *Berkman v. U.S. Coast Guard Academy* in which the Board wrote, “In light of Berkman’s notice to superiors about instances of harassment, and the superiors’ failure to remedy the harassment, we find that the [employer] has *respondeat superior* liability for those harassing actions.”⁹⁵ But Overall reads *Berkman* too narrowly. Berkman’s supervisors were guilty of doing nothing, or next to nothing, when Berkman complained to them about the way he was being treated.⁹⁶ The Board was pointing out that the Coast Guard Academy was liable because the supervisors took little, if any, action. As a result, they did not “remedy the harassment.” Here, however, it can hardly be said that TVA took little or no action. Our standard for determining TVA’s liability for Overall’s HWE claim is whether it addressed the harassment adequately and effectively, not whether the harassment ended.⁹⁷ As we previously pointed out, we examine the employer’s actions, not the results. Therefore, we reject Overall’s argument that because the harassment did not end, TVA is liable.

⁹³ Brief at 39.

⁹⁴ *Id.*

⁹⁵ ARB No. 98-056, ALJ Nos. 1997- CAA-2, 1997-CAA-9, slip op. at 23 (ARB Feb. 29, 2000).

⁹⁶ *Berkman*, slip op. at 5-10.

⁹⁷ *Williams*, slip op. at 48.

CONCLUSION

We have concluded that TVA is not immune from Overall's ERA whistleblower claims. Nevertheless, Overall did not prove by a preponderance of the evidence, as he must, that TVA took materially adverse action against him when it assigned him work appropriate to his level of training after he returned to Watts Bar, or when he was not invited to participate in certain meetings, or when his name was not added to the e-mail lists upon his return, or when Smith sought information about his activities concerning the rally at the Cook nuclear plant. And Overall did not prove, as he must, that TVA failed to adequately and effectively address the hostile work environment to which he was subjected. Failure to prove these essential elements of his case means that Overall cannot prevail. Therefore, we **DISMISS** this complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge