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Tennessee Valley Authority, Post Office Box 2000, Spring City, Tennessee 37381-2000

FEB 1 4 2000

U.S. Nuclear Regulatory Commission
ATTN: Document Control Desk
Washington, D.C. 20555

Gentlemen:

In the Matter of	)	Docket No. 50-390
Tennessee Valley Authority	)	

WATTS BAR NUCLEAR PLANT (WBN) UNIT 1 - DEPARTMENT OF LABOR (DOL) CASE NO. 1999-ERA-25 (CURTIS C. OVERALL V. TENNESSEE VALLEY AUTHORITY)

In letters to J. A. Scalice dated July 17, 1998, and September 4, 1998, NRC requested that TVA provide copies of future fillings made to DOL by TVA in connection with Curtis C. Overall's Case No. 97-ERA-53. TVA has provided NRC with copies of each of its filings in that case.

As you have been made aware, Mr. Overall has filed a second DOL complaint which, although separate, involves issues closely related to his first complaint. For your information, TVA has enclosed its latest filing entitled "Tennessee Valley Authority's Brief in Support of Motion to Compel Handwriting Exemplars."

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If you should have any questions concerning this matter, please telephone me at (423) 365-1824.

Sincerely,

Paul L. Pace
Manager, Site Licensing
and Industry Affairs

Enclosure
cc: (Enclosure):

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ENCLOSURE

ADMINISTRATIVE LAW JUDGES BRIEF
CURTIS C. OVERALL - CASE NO. 1999-ERA-25

TENNESSEE VALLEY AUTHORITY'S BRIEF IN SUPPORT OF MOTION
TO COMPEL HANDWRITING EXEMPLARS

BEFORE THE OFFICE OF ADMINISTRATIVE LAW JUDGES
UNITED STATES OF AMERICA
DEPARTMENT OF LABOR

IN THE MATTER OF	)	
	)	
CURTIS C. OVERALL	)	
	)	
Complainant	)	
	)	
v.	)	Case No. 1999-ERA-25
	)	
	)	
TENNESSEE VALLEY AUTHORITY	)	
	)	
Respondent	)	

TENNESSEE VALLEY AUTHORITY'S BRIEF IN SUPPORT OF MOTION TO COMPEL HANDWRITING EXEMPLARS

STATEMENT

This matter is before the Court, pursuant to 29 C.F.R. § 18.21 (1999) and Rules 26, 35, and 37, FED. R. CIV. P., on the motion of respondent Tennessee Valley Authority (TVA) for the entry of an order compelling complainant to provide handwriting exemplars as directed by an expert document examiner retained by TVA. Complainant's brief in opposition to that motion appears to contain a number of factual and legal inaccuracies.

In this proceeding, complainant Curtis C. Overall claims that TVA is liable to him for money damages because, he alleges, TVA violated Section 211 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (1994) (ERA), by subjecting him to a "hostile work environment" (Feb. 19, 1999, compl. at 2). According to complainant, he was harassed both at work and away from work and TVA "fail[ed] to

conduct an adequate investigation of these incidents of harassment." The alleged harassment included complainant's receipt of six anonymous notes, several of which appear to have disguised handwriting and which he has characterized as "life-threatening."[1]

Complainant filed a previous ERA complaint against TVA, No. 97-ERA-53, which resulted in an April 1, 1998, recommended decision requiring TVA to return complainant to work. Complainant claims that the "current round of harassment" (Feb. 19, 1999, compl. at 2) began shortly after the ALJ's decision. He also claims that TVA is responsible for "sending, or permitting the sending of, life-threatening notes" to him at work and at home (complainant's Jan. 20, 2000, br. at 2).

As soon as TVA learned of the alleged harassment and long before complainant filed his February 19, 1999, complaint in this proceeding, TVA's Office of Inspector General (OIG) was requested to investigate complainant's allegations of harassment. One of the steps in investigating such an allegation is to determine whether the person making the allegation may be responsible for the alleged activity. The OIG submitted copies of the allegedly threatening notes complainant claimed to have received to two document examiners to compare with samples of complainant's known business writings. Both of the document examiners retained by the OIG found significant similarities between complainant's known handwriting and some of the handwriting on the alleged threatening notes received by complainant. The document examiners also indicated that due to the disguised nature of the handwriting on the alleged threatening notes, they needed additional known specimens of complainant's handwriting, including attempts to disguise his handwriting. Complainant refused to

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1 Five of the notes are handwritten and were found at complainant's home or on his vehicle away from the TVA worksite. Complainant received one typewritten note in the interoffice mail while at work at TVA. The envelope in which that note was found had a handwritten address.

cooperate with the OIG in its investigation of his allegations of harassment by refusing to be interviewed or to provide additional handwriting samples.

TVA has retained for this proceeding an additional expert document examiner, Larry S. Miller, Ph.D., a Professor of Criminal Justice at East Tennessee State University, as an expert witness in this proceeding. At TVA's request, Dr. Miller compared copies of the allegedly threatening notes with complainant's known business writings. Dr. Miller has indicated that there are a number of significant similarities between the questioned handwriting and complainant's handwriting. Dr. Miller has also indicated that due to the disguised nature of the questioned handwriting and the relative size of the handwriting, he needs additional specimens of complainant's handwriting to make additional comparisons. Dr. Miller has stated that he would like to personally obtain those specimens from complainant to observe the manner in which he executes his handwriting as well as obtaining specific letter and word formation.

The Occupational Safety and Health Administration (OSHA) investigated the complaint in this proceeding and issued a July 27, 1999, decision (a copy of which is attached) which concluded that "discrimination was [not] a factor in the actions comprising your complaint" (at 2). One of the bases stated by OSHA for its decision was that:

> You have alleged that the OIG has failed to conduct an adequate investigation of noted harassment towards you. Examination of the OIG investigatory files did not substantiate this allegation, and you did not present any substantive evidence which would demonstrate that the investigation has been inadequate. You further contended that the OIG has named you as suspect in it's investigation, and that the OIG request that you provide additional handwriting exemplars and submit to a polygraph examination constituted harassment. Though possibly unpleasant for crime victims, it is standard practice during a criminal investigation to obtain evidence that will eliminate the alleger as a possible suspect. In light of requests from two handwriting experts that the OIG obtain additional handwriting exemplars from you, it does not appear that the request for handwriting exemplars was inappropriate.

> With respect to the request that you submit to a polygraph examination, the results of such a polygraph examination, although inadmissible as evidence during court proceedings, are regularly utilized as an investigatory tool during criminal investigations.

Immediately following complainant's appeal of OSHA's decision, TVA served complainant with formal requests for production. As noted in TVA's motion to compel, TVA requested that complainant produce a sample of his handwriting at the direction of a handwriting examiner selected by TVA. Complainant's formal response to TVA's request, subject to certain objections, was that he would comply "at a mutually agreeable time, date and place" (attached as exhibit B to TVA's motion).

Subsequent to TVA's service of its requests for production, complainant served TVA with extensive discovery in the form of interrogatories and requests for production of documents. As the Court knows, the discovery propounded by complainant far exceeded the number of interrogatories and requests for production allowed by Rules 33 and 34 of the FEDERAL RULES OF CIVIL PROCEDURE.[2] Based on the complainant's representation that he was willing to cooperate in responding to TVA's discovery and despite the burdensome nature of complainant's discovery, TVA has made every reasonable effort to answer interrogatories and produce the documents requested.

Despite the fact that complainant initiated this proceeding and has charged TVA with sending or allowing to be sent alleged harassing notes, despite the fact that the identity of the author of the notes is a critical issue to this case, and despite the fact that three document examiners have noted sufficient similarities between complainant's handwriting and the handwriting on the anonymous notes to conclude that he probably wrote one or more of the documents, complainant refuses to produce

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2 The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 C.F.R. pt. 18 (1999), specifically provide for application of the FEDERAL RULES OF CIVIL PROCEDURE in situations not otherwise provided for. 29 C.F.R. § 18.1(a).

the handwriting exemplars requested by TVA and which he earlier agreed to produce. Accordingly, TVA filed its motion to compel. This brief is in support of that motion and in opposition to complainant's brief.

ARGUMENT

I

The Identity of the Author of the Anonymous Notes May Be a Central Issue in This Proceeding.

Complainant's brief asserts that "TVA has engaged in a campaign of retaliation and harassment against Mr. Overall . . . by sending, or permitting the sending of, life-threatening notes" (br. at 2). This is only inflammatory rhetoric. Complainant's allegations were investigated by OSHA and TVA's OIG which did not find any evidence that TVA had harassed complainant or allowed others to harass him.[3] In addition, discovery has been underway for many months. To date, complainant has not produced any evidence of any retaliation or harassment *by TVA*. Similarly, complainant has produced no evidence that *TVA sent or permitted the sending* of the notes he received.[4] Indeed, complainant has not come forward with any

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3 The OSHA decision found "no evidence implicating TVA and/or their employees in any of the acts of harassment" and "that TVA has taken prompt and appropriate action to address the harassment which you brought to their attention" (July 27, 1999, dec. at 2).

4 There has been only one incident of alleged harassment in which complainant or someone on his behalf provided any identification of the person responsible. In that instance, "a white pickup truck driving slowly by our house" was spotted, and the license plate and driver's description were reported to the sheriff's department (compl. at 1, n.2). However, complainant did not even report that incident to TVA. When the OIG learned of the incident, their investigation identified the driver of the truck. When the driver was interviewed by the OIG, it was learned that he was not a TVA

evidence to connect the alleged anonymous harassment with anyone employed by TVA.[5]

In this proceeding, complainant bears the burden to prove that he was subjected to a hostile work environment. He also has the burden to prove either (1) that TVA management was responsible for creating a hostile environment or (2) that if a nonmanagerial coemployee(s) was responsible for creating a hostile work environment, that TVA has *respondeat superior* liability. Complainant's brief incorrectly asserts that TVA "is attempting to claim that Mr. Overall sent himself these threatening notes to 'set up' TVA" (br. at 2). Given that complainant has the burden of proof, it is his burden to disprove any inference that he is responsible for the alleged threatening notes. All of the handwritten notes are alleged to have been found at complainant's house or on his vehicle away from TVA facilities. There is no automatic presumption in this case that TVA management or that one of complainant's peers placed anonymous harassing notes on his house or vehicle.

Complainant attempts to stonewall discovery on the issue of whether he could be responsible for the handwritten notes by claiming that there is "no real evidence linking Mr. Overall to the notes" (br. at 3). However, that argument begs the question. The identity of the person responsible for the notes is a critical issue in this case. All three of the experts who examined the questioned writings found similarities to complainant's known handwriting and could not exclude him as the author. At least two of the experts indicated that complainant wrote at least one of the notes. All three

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(. . . continued) employee, but an employee of a security company who had been checking a neighbor's security system.

5 Thirteen of the fifteen incidents described by complainant in the "Chronology of Harassment" attached to his complaint occurred off TVA facilities. A copy of the chronology with each incident separately numbered is attached hereto. Only item Nos. 12 and 13 are alleged to have occurred on TVA premises.

experts stated that their analyses would be assisted by obtaining "disguised" samples by complainant. Complainant cannot avoid discovery on this key issue by ignoring it.

II

Compelled Handwriting Exemplars Are Authorized by the Federal Rules of Civil Procedure.

Complainant asserts he should not be compelled to provide "disguised" samples of his handwriting since TVA "already has in its possession hundreds of pages of known samples of Mr. Overall's handwriting" (br. at 4). Once again complainant attempts to duck the issue. As complainant acknowledges, all three forensic document examiners found similarities between the questioned documents and complainant's known business writings. However, all three examiners have indicated that they could render more definitive opinions by comparing the questioned documents to "disguised" exemplars from complainant.

Complainant argues that "the production of additional handwriting exemplars exceeds the parameters of discoverable material under the Federal Rules of Civil procedure" (br. at 4). That argument is frivolous. As pointed out in TVA's motion (at 3):

> Handwriting exemplars are within the scope of Rule 26(b) as long as they are relevant to the claims asserted and reasonably calculated to lead to admissible evidence. FED. R. CIV. P. 26(b). For purposes of discovery, "it is difficult to imagine any document or thing which could not be ordered produced under appropriate circumstances" [*Wilstein v. San Tropai Condominium Master Ass'n*, 1999 U.S. Dist. LEXIS 16376, at *30-31(N.D. Ill. Oct. 7, 1999)].

In *United States v. Euge*, 444 U.S. 707 (1980), the Supreme Court construed the statutory authority of the Internal Revenue Service as authorizing compelled production of handwriting exemplars. The Court expressly held that the IRS

statutory authority was a codification of the common law duty of a witness to provide evidence, and that that duty includes providing physical evidence, such as exhibiting physical characteristics and, specifically, handwriting exemplars:

> The scope of the "testimonial"[6] or evidentiary duty imposed by common law or statute has traditionally been interpreted as an expansive duty limited principally by relevance and privilege. . . . One application of this broad duty to provide relevant evidence has been the recognition, since early times, of an obligation to provide certain forms of nontestimonial physical evidence.[7] In *Holt v. United States*, 218 U. S. 245, 252-253 (1910) (Holmes, J.), the Court found that the common-law evidentiary duty permitted the compulsion of various forms of physical evidence. In *Schmerber v. California*, 384 U. S. 757, 764 (1966), this Court observed that traditionally witnesses could be compelled, in both state and federal courts, to submit to "fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." See also *United States v. Wade*, 388 U. S. 218 (1967). In *Gilbert v. California*, 388 U. S. 263, 266-267 (1967), handwriting was held, "like the . . . body itself" to be an "identifying physical characteristic," subject to production. In *United States v. Dionisio*, 410 U. S. 1 (1973), and *United States v. Mara*, 410 U. S. 19 (1973), this Court again confirmed that handwriting is in the nature of physical evidence which can be compelled by a grand jury in the exercise of its subpoena power.
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> 6 The word "testimony" has been used loosely in this context to refer to physical and documentary, as well as oral, evidence. See 8 J. Wigmore, Evidence § 2194, p. 76 (McNaughton Rev. 1961).
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> 7 Wigmore has identified the testimonial duty as including an obligation "to disclose for the purpose of justice all that is in his control which can serve the ascertainment of the truth, [and] this duty includes not only mental impressions preserved in his brain and the documents preserved in his hands, but also the corporal facts existing on his *body*." *Ibid.* [444 U.S. at 712-13].

Complainant chooses to ignore (br. at 4, n.2) Rule 35, FED. R. CIV. P., as a basis for TVA's motion. That rule provides that when the physical or mental condition of a party is in controversy, the court may order a physical or mental examination by a "licensed or certified examiner." As the Supreme Court taught in *Euge*, "handwriting was held, 'like the . . . body itself' to be an 'identifying physical

characteristic,' subject to production" (444 U.S. at 713). We can imagine no stronger argument for the application of Rule 35 to the giving of handwriting exemplars.

Complainant also argues that the production of handwriting exemplars cannot be compelled under Rule 34, FED. R. CIV. P. Complainant cites two district court decisions that hold that a party cannot be compelled to create handwriting exemplars under Rule 34 since that rule applies only to the production of *existing* evidence. That argument is in conflict with and was rejected by the Supreme Court in *Euge*:

> Respondent argues that the language of § 7602 suggests that it only requires the production of documents already in existence. Since handwriting exemplars must be created by the witness, it is argued that the statute is inapplicable. First, we do not view the exhibition of physical characteristics to be equivalent to the creation of documentary evidence. See *United States v. Dionisio*, 401 U. S. 1, 6 (1973). Further, the statute obviously contemplates the transformation of some evidence not formerly tangible, since it obligates the summoned individual to provide testimony. The testimony, of course, creates evidence not previously in existence. We see no difference between the nature of the evidence created when the witness is ordered to talk and that created when he is ordered to write.
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> We express no opinion on the scope of the Service's authority to otherwise order the witness to generate previously nonexistent documentation under § 7602. The Service in fact has expressly disclaimed any intention to order the creation of documents. The Internal Revenue Manual § 4022.64 (4) (CCH 1977) provides that an administrative summons
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> > "should not require the witness to do anything other than to appear on a given date to give testimony and to bring with him/her existing books, papers and records. A witness cannot be required to prepare or create documents."
>
> The section states, however, that "[t]he giving of exemplars, for example, handwriting exemplars, at an appearance pursuant to a summons is not 'creating a document.'" [444 U.S. at 717 n.11].

III

The Discoverability and Not the Admissibility of Compelled Handwriting Exemplars Is the Only Issue Before the Court.

Complainant argues (br. at 9) that disguised handwriting exemplars cannot be compelled since they are not "reasonably calculated to lead to the discovery of admissible evidence" and do not have a basis in fact. That argument is without merit. As discussed above, a key issue in this case is the identity of the person(s) responsible for writing the alleged harassing notes. Given the similarities already noted by three experts between complainant's known handwriting and the handwriting on the anonymous notes, the request for handwriting exemplars is clearly not the "fishing expedition" that complainant alleges (br at 12). Instead, a comparison of "disguised" exemplars provided by complainant with the anonymous notes may be highly probative on the "life-threatening" notes complainant claims to have received.

Complainant makes three misconceived arguments that "disguised" handwriting exemplars are inadmissible. First, complainant argues (br. at 10, 11) that testimony about "disguised" handwriting comparisons would be inadmissible since it is "exceedingly unusual" and "has absolutely none of the indicia of reliability required" by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 (1999).[6] Second, complainant hypothesizes (br. at 11) that the exemplar process has the "potential for prejudice and unreliability," would be an "exercise easily manipulated by the examiner," and "lacks all procedural

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6 We think complainant's arguments regarding the admissibility of expert testimony about handwriting comparisons strange, given that both the United States Code and the Federal Rules of Evidence expressly provide for the admission of testimony about handwriting. See 28 U.S.C. § 1731; Rule 901(b)(2), FED. R. EVID.

safeguards to insure against false identifications."[7] Third, complainant characterizes *United States v. Starzecpyzel*, 880 F. Supp. 1027 (S.D.N.Y. 1995), and *United States v. Hines*, 55 F. Supp. 2d 62 (D. Mass 1999), as though to suggest that those cases condemned the admissibility and reliability of expert testimony on handwriting comparisons, when in fact the cases held directly to the contrary.

All three of complainant's arguments confuse two separate issues, the scope of discovery and the admissibility of evidence at trial. The decisions in *Daubert* and *Kumho Tire* dealt only with the admissibility of evidence offered at trial by an expert under Rule 702, FED. R. EVID., not whether certain evidence is subject to discovery. The rule of evidence applicable in this proceeding is substantially the same. *See* 29 C.F.R. § 18.702 (1999). Further, the courts that have considered the question of admissibility of expert testimony on handwriting comparisons have held it admissible under Rule 702. The United States Court of Appeals for the Sixth Circuit, the court with jurisdiction under 42 U.S.C. § 5851(c)(1)(1994) to review this proceeding, has expressly held that expert testimony on handwriting analysis is admissible under the Federal Rules of Evidence and *Daubert*. *United States v. Jones*, 107 F.3d 1147, 1159-61, *cert. denied*, 521 U.S. 1127 (1997). Whether the proposed expert testimony is reliable is not a basis to preclude discovery, rather it is a matter for cross-examination. As the Supreme Court held in *Daubert*: "Vigorous

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7 Complainant's attempt to set up a straw man argument should be recognized for what it is. He argues that he should not "be compelled to create additional evidence ***which Respondent seeks to manipulate*** to serve its position" and that "***TVA will go to all lengths to incriminate Mr. Overall***" (br. at 8, 11; emphasis added). These assertions, which lack any factual basis, are outrageous. Complainant mischaracterizes the manner in which the handwriting exemplars will be produced in order to prejudice the Court, by stating that TVA intends to ask "him to disguise his writing in an identical manner" (br. at 11), and "'to imitate the questioned handwriting'" (br. at 17). TVA has no intent to request complainant to imitate the style of the questioned writings. Its sole intent is to obtain complainant's attempts to "disguise" his handwriting and to make comparisons with the questioned writings.

cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence" (509 U.S. at 596). *See also Jones*, 107 F.3d at 1161 ("just because the threshold for admissibility under Rule 702 has been crossed, a party is not prevented from challenging the reliability of the admitted evidence"); and *United States v. Velasquez*, 64 F.3d 844, 852 (3d Cir. 1995) (the district court erred by refusing to allow defendant's expert document examiner to testify in response to the government's document examiner). Complainant's arguments (br. at 11) that the production of exemplars is "fraught with potential for prejudice and unreliability," that it is "easily manipulated by the examiner," and "lacks all procedural safeguards to insure against false identifications" was rejected by the United States Supreme Court in *Gilbert v. California*, 388 U.S. 263, 267 (1967). In that case, the Court found that the production of exemplars was not even a critical stage requiring the presence of counsel, finding only a "minimal risk that the absence of counsel might derogate from [a] right to a fair trial." The Court concluded that fears about the fairness of the process in which exemplars were produced was not a basis to preclude the taking of the exemplars, instead if "for some reason, an unrepresentative exemplar is taken, this can be brought out and corrected through the adversary process at trial since the accused can make an unlimited number of additional exemplars for analysis and comparison by government and defense handwriting experts."

Complainant quotes from two district court cases and argues (br. at 12) that they show that the "scope of [handwriting comparisons'] relevance and admissibility has been considerably diminished." In both cases, *United States v. Starzecpyzel* and *United States v. Hines*, the district courts conducted *Daubert* hearings. In both cases, the courts found that handwriting analysis was not "scientific" expert testimony within the meaning of Rule 702, FED. R. EVID. However, those courts further held that handwriting analysis was sufficiently reliable to be admissible under

the second prong of Rule 702 as "technical or other specialized knowledge." This is precisely the teaching of *Kumho Tire*.[8] Not only did the Supreme Court hold in that case that nonscientific expert testimony was admissible under Rule 702, but the Court expressly stated that "handwriting analysis" was one of the types of nonscientific expertise subject to the rule (*Kumho*, 119 S.Ct. at 1175). *See also United States v. Paul*, 175 F.3d 906 (11th Cir. 1999) (handwriting expert's testimony admissible at trial under Rule 702 applying the *Daubert* and *Kumho Tire* standards).

IV

"Disguised" Handwriting Exemplars Will Not Violate Complainant's Fifth Amendment Rights.

Complainant argues (br. at 14-17) that requiring him to execute handwriting exemplars and to disguise his handwriting in a particular fashion will violate his Fifth Amendment privilege against self-incrimination. Complainant correctly admits (br. at 14-15) that the Supreme Court has held that requiring handwriting exemplars does not violate the Fifth Amendment privilege against self-incrimination (*Gilbert v. California*, 388 U.S. 263 (1967)).[9]

Complainant argues (br. at 15) that the Fifth Amendment is violated where the request for an exemplar "introduces an element of deliberation," relying upon *United States v. Campbell*, 732 F.2d 1017, 1021 (1st Cir. 1994). That case is

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8 "We conclude that *Daubert's* general holding--setting forth the trial judge's general 'gatekeeping' obligation--applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge" (119 S.Ct. 1167, 1171 (1999)).

9 Complainant fails to harmonize his argument that he cannot be compelled to provide handwriting exemplars with his acknowledgment that the Supreme Court apparently thinks that such exemplars can be compelled.

limited to a holding that giving dictation "to discover defendant's choice of spelling" was testimonial and therefore protected by the Fifth Amendment. The court there recognized that compelled handwriting exemplars do not violate the Fifth Amendment since the only thing involved in the "physical form" are "handwriting idiosyncrasies" (732 F.2d at 1021).[10]

After the decision in *Campbell*, three different courts all held that exemplars given by a defendant who was instructed to write in a different manner than normal were admissible. *In re Special Federal Grand Jury*, 809 F.2d 1023 (3d Cir. 1987); *United States v. Richardson*, 755 F.2d 685 (8th Cir. 1985); *United States v. Sumpter*, 133 F.R.D. 580 (D. Neb. 1990). Complainant's attempts to distinguish *Special Federal Grand Jury* and *Sumpter* are to no avail. Complainant's assertion that *Sumpter* dealt only with a due process argument and not the Fifth Amendment argument raised here is patently wrong. In *Sumpter*, the defendant, who "was required to provide handwriting exemplars" (at 582), sought to exclude them on the ground that, because they were contrived, they offended due process. The court not only rejected the due process argument, but also characterized (133 F.R.D. at 582) the Supreme Court's decision in *Gilbert v. California* as holding that "compelling handwriting exemplars was not protected by the privilege against self-incrimination." The court went on to reject the argument that compelled handwriting exemplars which were a

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10 Complainant's assertion of a Fifth Amendment privilege is inconsistent with his burden to prove his allegations. He has alleged that TVA is liable for a hostile work environment and that TVA is responsible for sending, or allowing to be sent, anonymous notes. We do not see how he can on the one hand claim that TVA is responsible for the notes while objecting, on the basis of the Fifth Amendment, to discovery as to any possible involvement he may have had in authoring those notes. *See Brown v. United States*, 356 U.S. 148, 155 (1958) ("'[Defendant] has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts.' . . . The reasoning of these cases applies to a witness in any proceeding who voluntarily takes the stand and offers testimony in his own behalf.").

"'reproduction of the very instruments used in the commission of the crime'" did not violate the Fifth Amendment privilege. *Sumpter* then cited the Supreme Court's holding in *United States v. Wade*, 388 U.S. 218, 222-23 (1967), that a compelled voice exemplar using particular words was not testimonial and thus did not violate the Fifth Amendment. The *Sumpter* court also noted that the Supreme Court treats voice and handwriting exemplars with no distinctions. See *United States v. Mara*, 410 U.S. 19, 21 (1973) ("Handwriting, like speech, is repeatedly shown to the public, and there is no more expectation of privacy in physical characteristics of a person's script than is in the tone of his voice.").

Complainant's attempt to distinguish *Special Federal Grand Jury* (br. at 15-16) is a play on semantics. Complainant argues that, unlike the disguised exemplars requested here, "the government was not requesting disguised handwriting, but simply a handwriting sample that was 'uncontrived' and had a backward slant" (br. at 15). In fact, the Government was seeking a handwriting sample in a manner which was not normal to the witness. The court held that there was no Fifth Amendment privilege involved in compelling a handwriting exemplar based on the "mere fact that a style of writing is one which a witness would not normally display" (809 F.2d at 1027).

Finally, complainant cites *In re Layden*, 446 F. Supp. 53 (N.D. Ill. 1978), for the proposition that asking a witness to provide a writing sample that resembles a questioned document violates the witness's Fourth and Fifth Amendment rights (br. at 16-17). *Layden* is a 22-year-old case that was rejected by the very court that wrote it.[11] *United States v. Camp*, 698 F. Supp. 715 (N.D. Ill. 1988). In *Camp*, the court had to decide whether unnatural voice exemplars violated the Fifth Amendment privilege against self-incrimination. The court there held that :

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11 *Layden* was also rejected by *Special Grand Jury*, 809 F.2d at 1027.

> [The] Fifth Amendment protection does not extend to compulsion "to *write or speak* for identification, to appear in court, to stand, to assume a stance, to walk or to make a particular gesture" (*id.*, citing *Schmerber v. California*, 384 U.S. 757, 764, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)).
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> Nothing in that catalogue requires that the compelled actions--none of which violates the privilege against self-incrimination--must be natural. Under the teaching of *Dionisio* [*United States v. Dionisio*, 410 U.S. 1, 6 (1973)] Dunmore could be called on to speak in a certain way, whether or not it is a "natural" manner for him, without violating his Fifth Amendment rights. And the resulting exemplars, when used to compare his voice to that of "George Kramer," were no more testimonial than a blood sample or a fingerprint [*Dunmore v. Camp*, 698 F. Supp. at 717].

V

TVA Has Not Engaged in a Pattern of Discovery Abuse.

Complainant asserts that TVA has engaged in a "PATTERN OF DISCOVERY ABUSE INTENDED TO DENY MR. OVERALL DUE PROCESS UNDER THE LAW" (br. at 18). This bald assertion is unsupported by the facts or the law. In fact, it is complainant who is refusing to provide discovery. As stated in our motion to compel, TVA served a formal request for complainant to produce handwriting exemplars on August 17, 1999. Complainant's formal response stated that he would comply with the request. After being contacted to schedule a date for the production, complainant's counsel objected and continues to object to the production.

Although complainant's claim is that he was harassed by his receipt of anonymous notes, subsequent to TVA's request for handwriting exemplars, he propounded extensive discovery to TVA with little or no relevance to his allegations. Nevertheless, TVA has produced more than nine thousand documents. Included among

the discovery TVA has provided are the handwriting analyses by all three expert forensic document examiners who were retained by the OIG and TVA.[12]

TVA has withheld one anonymous "writing" which it intercepted and which complainant may never have seen.[13] TVA is willing to produce the writing and the experts' opinions with respect to it after complainant has provided the discovery that TVA requested first--"disguised" handwriting exemplars. It is TVA's position that the handwriting comparison may have more value if complainant provides exemplars without being allowed to first study the "writing." As pointed out in our motion to compel, TVA formally requested complainant to provide handwriting exemplars prior to any discovery from complainant.

Rule 26(c) and (d), FED. R. CIV. P., governs the granting of protective orders and the sequence of discovery. Rule 26(c)(2) and (5) grant the court authority to order that "discovery may be only on specified terms and conditions" and "that discovery be conducted with no one present except persons designated by the Court." Rule 26(d) allows the Court to determine the sequence of discovery. Here, TVA's formal request for handwriting exemplars has priority in time over discovery from complainant. Further, given the credibility questions inherent in this case, the Court should exercise its discretion and order complainant to provide exemplars and answer questions about the writings prior to TVA making further discovery. *See* 29 C.F.R. § 18.13 (1999), which gives the ALJ authority to issue an order governing the

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12 We would note that complainant's discovery responses refused to identify any expert witnesses he has retained or the subject matter of their testimony and that his counsel has refused to provide supplemental responses identifying any such experts.

13 The OIG invoked its privilege to not disclose matters under criminal investigation since disclosure of the writing could prejudice the OIG's investigation.

sequence of discovery.[14] As stated by the court in *Beacon v. R.M. Jones Apartment Rentals*, 79 F.R.D. 141, 141-42 (N.D. Ohio 1978):

> It is clear that under Rule 26(c)(5) the Court has the authority to limit who may attend depositions even to the exclusion of parties to the suit. . . . It is the opinion of the Court that in a Title VIII housing discrimination action the subtle and sophisticated questions of whether the defendants have engaged in unlawful discriminatory housing practices present good cause for the entry of such an order. Questions of credibility are inherent in such actions, and this route, which is the equivalent of an order of separation of witnesses, made routinely in trials, will permit the greatest opportunity for evaluation of the testimony secured.

See also Hendrick v. Avis Rent A Car Sys., Inc., 916 F. Supp. 256, 260 (W.D. N.Y. 1996) (discovery of prior witness statements delayed until after witnesses were deposed so that their unrefreshed recollections could be tested.); *Galella v. Onassis*, 487 F.2d 986, 997 (2d Cir. 1973); *Metal Foil Prods. Mfg. Co. v. Reynolds Metals Co.*, 55 F.R.D. 491 (E.D. Va. 1970); *Dunlap v. Reading Co.*, 30 F.R.D. 129, 131-32 (E.D. Pa. 1962); *United States v. Osidach*, 513 F. Supp. 51, 89 n.22 (E.D. Pa. 1981); 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2041 (2d ed. 1994).

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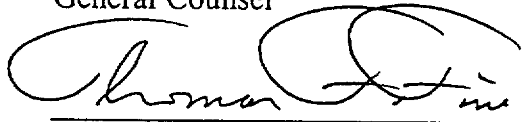
14 In *Reid v. Secretary of Labor*, No. 95-3648 (6th Cir. Dec. 20, 1996) (1996 U.S. App. LEXIS 33984), the Sixth Circuit affirmed the ALJ's stay of discovery in No. 93-CAA-4 until after the underlying jurisdictional issue of whether complainant was a covered employee was decided. *See also Freels v. Lockheed Martin Energy Systems, Inc.*, No. 95-CAA-2, 94-ERA-6 (ARB Dec. 4, 1996), in which the Board implied that the ALJ properly denied discovery on certain matters where there were pending dispositive motions for summary decision on unrelated issues.

CONCLUSION

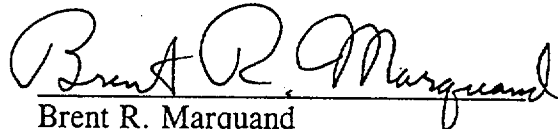
For the foregoing reasons and upon the authorities cited, TVA's motion to compel complainant to produce handwriting exemplars at the direction of an expert document examiner should be granted.

Respectfully submitted,

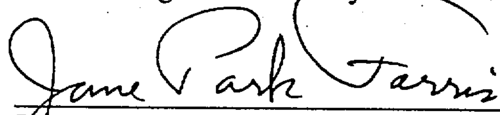
Edward S. Christenbury
General Counsel



Thomas F. Fine
Assistant General Counsel



Brent R. Marquand
Senior Litigation Attorney



Jane Park Farris
Attorney

Tennessee Valley Authority
400 West Summit Hill Drive
Knoxville, Tennessee 37902-1499
Telephone No. 865-632-2061

Attorneys for Respondent

003673375

CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief has been served on complainant by mailing a copy thereof to:

Lynne Bernabei, Esq.
Bernabei, Katz & Balaran, PLLC
1773 T Street, NW
Washington, D.C. 20009

This 8th day of February, 2000.

Attorney for Respondent

U.S. Department of Labor

Occupational Safety and Health Administration
61 Forsyth Street SW
Atlanta, Georgia 30303

JUL 27 1999

Curtis C. Overall
3533 Ozark Avenue, N.W.
Cleveland, TN 37312

Re: Tennessee Valley Authority/Overall/1167576

Dear Mr. Overall:

This is to notify you of the results of the investigation in the above noted case, in which you alleged violations of Section 211 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. 5851. Our initial efforts to conciliate the matter did not result in a mutually agreeable settlement. A fact finding investigation was then conducted. The investigation did not verify that discrimination was a factor in the actions comprising your complaint. Consequently, it is determined that your allegations cannot be substantiated for the following reasons:

You allege in your initial filing that the Tennessee Valley Authority(TVA) violated the Energy Reorganization Act(ERA) by failing to prevent a hostile work environment and related harassment outside your workplace, and by failing to conduct an adequate investigation of the incidents of harassment. You further allege that after your initial filing, TVA has engaged in harassment by naming you as a possible suspect in an investigation, and by requesting that you submit to a polygraph examination and provide handwriting exemplars.

In order to establish a prima facie case, you have an obligation of meeting the requisite elements of proof established for demonstrating that a hostile work environment exists. The Secretary of Labor applies a five-part test that was articulated in *West v. Philadelphia Elec. Co.*, 45 F 3d 744, 753(3d Cir. 1995). The Complainant must demonstrate:

1.) The employee engaged in protected activity and suffered intentional retaliation as a result,

2.) The retaliation was pervasive and regular,

3.) The retaliation detrimentally affect the employee,

4.) The retaliation would have detrimentally affected other reasonable whistleblowers in that position, and

5.) The existence of respondent superior liability.

It does not appear that in the instant discrimination allegation, you can meet the first and fifth elements of proof. The investigation adduced no evidence implicating TVA and/or their employees in any of the acts of harassment. Contrary to your contentions, TVA took immediate and significant steps to address the harassment which occurred following your return to work. These steps included the initiation of a TVA Office of the Inspector General(OIG), investigation, and reporting the harassment to the Watts Bar Nuclear Plant Site Vice President. That individual subsequently conducted a meeting with all Watts Bar managers and supervisors to express concern about the harassment, and to emphasize that there would be no tolerance of intimidation or harassment of employees. The Site Vice President directed the attendees to "roll down" the message to their subordinates. The same day as that meeting, a memorandum from the Site Vice President was sent to all TVA Nuclear senior managers, noting zero tolerance of intimidation and harassment of employees who raise safety concerns. The Site Vice President also met with all Watts Bar employees to express his concern regarding your noted harassment and to advise employees of TVA's referenced zero tolerance policy. In mid-September 1998, the Site Vice President instituted a mandatory training class intended to foster a work environment in which all employees could raise safety and health concerns without fear of reprisal. That class is mandatory for all Watts Bar nuclear employees. Finally, TVA complied with your request that you be placed in paid non-work status until you were capable of returning to work.

You have alleged that the OIG has failed to conduct an adequate investigation of noted harassment towards you. Examination of the OIG investigatory files did not substantiate this allegation, and you did not present any substantive evidence which would demonstrate that the investigation has been inadequate. You further contended that the OIG has named you as suspect in it's investigation, and that the OIG request that you provide additional handwriting exemplars and submit to a polygraph examination constituted harassment. Though possibly unpleasant for crime victims, it is standard practice during a criminal investigation to obtain evidence that will eliminate the alleger as a possible suspect. In light of requests from two handwriting experts that the OIG obtain additional handwriting exemplars from you, it does not appear that the request for handwriting exemplars was inappropriate. With respect to the request that you submit to a polygraph examination, the results of such a polygraph examination, although inadmissable as evidence during court proceedings, are regularly utilized as an investigatory tool during criminal investigations.

In view of the foregoing, it appears that TVA has taken prompt and appropriate action to address the harassment which you brought to their attention, and has thus discharged it's legal duty, ***Baskerville v. Culligan Int'l Co.,*** 50 F. 3d 431(1995), and ***Boudrie v. Commonwealth Edison*** 75-ERA-15(ALJ Dec. 11, 1995). The evidence also fails to establish a hostile work environment.

In view of the foregoing, it is our finding that you did not suffer any discrimination as alleged under the referenced statutes.

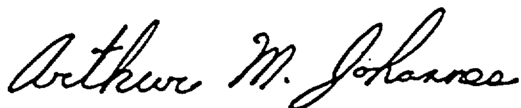
This letter is notification to you that, if you wish to appeal the above findings you have the right to a formal hearing on the record. To exercise this right you must, within five (5) calendar days of receipt of this letter, file your request for a hearing by facsimile, overnight/next day delivery mail or telegram to:

Chief Administrative Law Judge
U.S.Department of Labor
Suite 400, Techworld Building
800 K Street
Washington D.C. 20001-8002
Phone: (202) 565-5341
FAX: (202) 565-5325

Unless a request for appeal is received by the Administrative Law Judge within the five-day period, this notice of determination will become the final Order of the Secretary of Labor. The Tennessee Valley Authority is being advised of the determination in this case and the right to a hearing. A copy of this letter has also been sent to the Chief Administrative Law Judge with your complaint. If you decide to request a hearing, it will be necessary for you to send copies of the request to the Tennessee Valley Authority and to this office at the address noted in the above letterhead. After copies of your request are received, appropriate preparations can be made. If you have any questions, please do not hesitate to call me at (404) 562-2260.

It should be made clear to all parties that the U.S.Department of Labor does not represent any of the parties in a hearing. The hearing is an adversarial proceeding in which the parties will be allowed an opportunity to present their evidence for the record. The Administrative Law Judge who conducts the hearing will issue a recommended decision to the Secretary based on the evidence, testimony, and arguments presented by the parties at the hearing. The Final Order of the Secretary will then be issued after consideration of the Administrative Law Judge's recommended decision and the record developed at the hearing and will either provide for appropriate relief or dismiss the complaint.

Sincerely,



ARTHUR M. JOHANNES
Regional Supervisory Investigator

cc: Michael C. Subit, Esq.
Bernabei & Katz
1773 T Street, N.W.
Washington, D.C. 20009

OVERALL V. TVA
ATTACHMENT TO COMPLAINT
CHRONOLOGY OF HARASSMENT

DATE	SUMMARY	DOCUMENTATION
December 14-16, 1997	Hearing	
04/01/98	RD&O	
05/25/98	Telephone call; whistle sound; Mr. Overall called FBI	Mr. Overall's notes
05/28/98	Gray Mercedes drove slowly past Mr. Overall's house	Mr. Overall's notes
05/29/98	Mr. Overall heard dog barking at approximately 2:00 am, went outside and saw a car (no lights) pulling away; later a note was found on Mr. Overall's truck, it said SILKWOOD; Mr. Overall called police and FBI and filed police report	Mr. Overall's notes, copy of the note and police report
06/01/98 06/02/98	Just before midnight, Mr. Overall's son noticed that gas cap and door were open on Mr. Overall's truck; Mr. Overall called police and FBI	Mr. Overall's notes and police report
06/09/98	A note was found attached to Mr. Overall's storm door; it read BOO!; Mr. Overall called police and FBI	Mr. Overall's notes, copy of the note and police report
06/11/98 06/12/98	A note was found on Mr. Overall's truck while it was parked at Walmart; it said STOP IT NOW; Mr. Overall called police and FBI	Mr. Overall's notes, a copy of the note and police report
06/13/98	Mr. Overall spotted someone running across neighbor's yard; they had attempted to take the gas cap off his vehicle but he had installed a lock; Mr. Overall called the police.	Mr. Overall's notes
06/16/98	Mr. Overall's daughter received a call at home; there was breathing and laughing; Mr. Overall called police	Mr. Overall's notes
06/17/98 06/18/98	Mr. Overall noticed a suspicious car while out driving with daughter; he called TVA/ IG office; the FBI was contacted	Mr. Overall's notes

06/26/98	Mr. Overall received a harassing phone call; he called police, FBI, TVA/IG and NRC	Mr. Overall's notes
08/25/98	While driving home from work, pickup truck wanted him to pull over; it flashed its lights and would not pass; Mr. Overall called TVA/IG office the next day	Mr. Overall's notes
08/27/98	Mr. Overall received note in TVA inter-office mail which read LEAVE WATTS BAR THERE IS NO ROOM FOR WHISTLEBLOWERS HERE OR ELSE; Mr. Overall reported note to Robbie Gray, Phil Smith, Site Security, Rick Wiggal, and TVA/IG's office; Mr. Overall suffered chest pain; Mr. Overall was escorted home; Doug Williams expressed his concern that Mr. Overall had used his name during the hearing	Witness statement of Gray and Smith, copy of the note and Mr. Overall's notes
08/30/98	Mr. Overall had a message on his voice mail at work; it was someone blowing a whistle over and over; Mr. Overall called Phil Smith, his supervisor, and TVA/IG's office	Mr. Overall's notes
09/06/98	A note was found on the car in Mr. Overall's front yard; it read DID YOU GET THE MESSAGE YET; Mr. Overall called TVA/IG's office, his supervisor Phil Smith, police and FBI; Mr. Overall will file police report 09/08/98	Mr. Overall's notes
09/09/98	A fake bomb was placed in Mr. Overall's truck while it was parked in Office Max parking lot; Mr. Overall was taken to the hospital with chest pains; the police, FBI, NRC, Bureau of Alcohol, Tobacco and Firearms were called	police report