

October 7, 2008

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
Florida Power & Light Company)	Docket Nos. 50-250
(Turkey Point Units 3 and 4))	50-251

**FLORIDA POWER & LIGHT COMPANY'S
NOTICE OF SUPPLEMENTAL AUTHORITY**

Florida Power & Light Company ("FPL") hereby notifies the Licensing Board of the enclosed "Decision and Order Dismissing Complaint" ("Order") in *Saporito v. Florida Power & Light*, 2008-ERA-00014 (Oct. 2, 2008). FPL's September 26, 2008 "Motion to Strike Saporito's Reply and for Sanctions" ("Motion to Strike") referenced an FPL "Motion to Dismiss and for Further Relief" ("Motion to Dismiss") filed with Department of Labor ("DOL") Administrative Law Judge Robert B. Rae on August 18, 2008. Motion to Strike at 6. After FPL filed its Motion to Strike in this case, Judge Rae ruled on the Motion to Dismiss in the DOL Case. In his Order, Judge Rae dismissed Complainant Thomas Saporito's Complaint, describing it as "profound abuse" of the whistleblower protection laws. Order at 4. Judge Rae denied FPL's motion for sanctions, ruling that "[u]nfortunately, this Court is not empowered to issue sanctions." *Id.* at 5.

Respectfully Submitted,

Signed (electronically) by,

Steven Hamrick
Counsel for Florida Power & Light Company

Admitted only in Maryland; Supervision by
Mitchell S. Ross, a member of the D.C. Bar

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Dated: October 7, 2008

ENCLOSURE



Issue Date: 02 October 2008

CASE NO.: 2008-ERA-00014

In the Matter of:

THOMAS SAPORITO,
Complainant,

v.

FLORIDA POWER & LIGHT,
Respondent,

DECISION AND ORDER DISMISSING COMPLAINT

BACKGROUND

This case involves a complaint filed against Respondent Florida Power & Light ("FPL") on July 4, 2008 (as amended by Complainant's July 23, 2008, letter) by *Pro Se* Complainant, Thomas Saporito, under the provisions of Section 211 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. §5851 ("ERA" or the "Act").¹

The complaint was investigated by the Occupational Safety and Health Administration ("OSHA") of the United States Department of Labor ("DOL") as a complaint alleging that the refusal of the Respondent to rehire Complainant was in reprisal for Complainant voicing his concerns to "FPL's" management and to the Nuclear Regulatory Commission and that such refusal was discriminatory under the Act. Following an investigation into the allegation, the Secretary of Labor, acting through the Regional Administrator for OSHA, dismissed the complaint (as amended) as untimely on July 30, 2008.

The Secretary's Findings stated that the parties were permitted to request a hearing and/or file any objections within 30 days, pursuant to 29 C.F.R. §24.106(a). Complainant filed an

¹ The applicable regulations, 29 C.F.R. §24.100, *et seq.*, took effect August 10, 2007. The complaint was filed after the amended regulations became effective.

objection to the findings and requested a *de novo* hearing before and Administrative Law Judge by letter dated August 5, 2008, which was received in the Office of Administrative Law Judges on August 11, 2008, and which was timely filed.

Complainant is acting *pro se* in this matter, as he has in the numerous previous cases involving this respondent and a host of other respondents. Indeed, Complainant considers himself to be an expert in these cases, having represented himself and others similarly situated many times in the past. Complainant uses letterhead throughout his various complaints captioned as "National Environmental Protection Center," an organization that, on its face, purports to be involved in "Protecting the Environment and Whistleblowers."

Nevertheless, in conducting this case, the undersigned has taken into consideration that Complainant is not an attorney and provided him significantly more latitude than would be given any attorney.

Complainant alleges that he made several applications for employment with the Respondent in 2008 and that the company refused to hire him "solely because of his recent and past whistleblowing conduct..." (See "Whistleblower Complaint of Discrimination" dated July 4, 2008). Complainant had also applied for various jobs previously and, in particular, in 2005, and was informed that it is the Respondent's policy not to rehire any employee terminated for insubordination. (See "Attachment Two" to Complainant's Brief in Response to the Respondent's Motion).

Complainant filed an "ERA" Complaint on the matter of the refusal to rehire in 2005 on December 14, 2005. Complainant subsequently requested leave to withdraw his Complaint on March 1, 2006. By his "Order Recommending Approval of Voluntary Dismissal," Judge Richard K. Malamphy recommended on March 24, 2006 that the Complainant's request for voluntary dismissal be granted. (See "Attachment Five" to the Complainant's Brief in Response to the Respondent's Motion; and "Tab 4" to the Respondent's Brief). The Recommended Order became effective ten days later without objection.

Complainant made no further attempt to contest the Respondent's determination of his ineligibility for rehire based on the Respondent's policy until July 4, 2008. Complainant again applied for employment multiple times with Respondent in March, 2008, but conspicuously failed to list his former employment with Respondent on his application. Complainant was

again, predictably, not rehired based on the company policy precluding the rehire of any employee terminated for insubordination.

MOTION TO DISMISS

Respondent moves this Court to Dismiss this Claim as being untimely filed. Respondent also asks for the imposition of sanctions against the Complainant for his filing of a “long line of specious actions.” That aspect of the motion pertaining to sanctions will be addressed in a separate section below.

Respondent requests that the Court take official notice pursuant to 29 C.F.R. §18.45 of the plethora of previous claims undertaken by the Complainant against this Respondent in deciding this motion. The previous cases are a matter of record and I have reviewed them thoroughly. I hereby take official notice of the ERA cases involving this Complainant and this Respondent since I find they are relevant to the matters at hand.

Complainant has played the lead role in each of the multitude of cases and is well aware of the matters raised therein. Complainant did not contest this particular aspect of the Respondent’s Motion in his response brief although he was certainly provided with sufficient and adequate notice, as required in §18.45.

Complainant was aware of the Respondent’s policy not to rehire employees terminated for insubordination, at least as early as December, 2005.² Indeed, the Complainant filed a claim specifically alleging the identical facts found in this claim in his December, 2005 claim. Complainant, being well-versed in the “Whistle Blower” statutes, filed a claim (ALJ No. 2006-ERA-00008) alleging a refusal to rehire as the basis for his discrimination complaint. (See “Attachment ONE” to the Complainant’s Brief in Response to Respondent’s Motion).

Pursuant to the “Act”, a complaint for relief must be filed in writing within one hundred eighty (180) days of the alleged violation. 42 U.S.C. §5851(b)(1); 29 C.F.R. §24.3.

The law states in pertinent part:

Under the Energy Reorganization Act, *within 180 days after an alleged violation of the Act occurs (i.e., when the retaliatory decision has been both made and*

² There are indications that the Respondent declared at the time of the Complainant’s termination that he was ineligible for rehire because of his insubordination. See Secretary’s Letter to the Complainant dated July 30, 2008.

communicated to the complainant), an employee who believes that he or she has been retaliated against in violation of the act may file, or have filed by any person on the employee's behalf, a complaint alleging such retaliation.

29 C.F.R. §24.103(d)(2). (emphasis added).

The limitation period begins when the Complainant is notified of the adverse action, not when it actually takes effect. *Devine v. Blue Star Enterprises, Inc.* ARB No. 04-109, ALJ No. 2004-ERA-00010 (ARB August 31, 2006).

This period began to run for the Complainant when he was first informed of the “no-rehire for employees terminated for insubordination” policy, which was, at the very latest, in December, 2005. There can be no doubt that the Complainant was well aware of the grounds for the decision not to rehire him since it was clearly and concisely communicated to him at the time by the letter he admits receiving. Complainant was aware of the policy and did not follow through with his alleged claim within the required statutory time period. No amount of subsequent online applications can resuscitate the original claim he failed to pursue.³

Complainant did not file this complaint until July 4, 2008 - over two and one-half years after the alleged discriminatory act, and well outside of the time limitations imposed by the statute.

It would be unreasonable and impractical to allow an unlimited number of claims based on this set of facts, as proposed by the Complainant. The laws relating to Whistleblowers were not designed for that type of obvious and profound abuse. Theoretically, under Complainant's argument, a discharged employee could apply hourly (or more frequently, if desired) to his or her former employer by use of the online application process and “create” new adverse actions each time. This would result in a never-ending stream of meritless litigation that would effectively put the courts into overload.

In deciding this issue, I have considered the Complainant's written brief and find it wanting. In his brief, Complainant argues that the exceptions of the “continuing violation doctrine” and “equitable tolling” doctrine apply to his case. This attempt to “bootstrap” these doctrines into the parameters of this case is not supported by any viable evidence but only self-serving conjecture and argument on the part of the Complainant, which I find meritless.

³ I do not address the merits of Complainant's original claim in case 2006ERA00008 in this decision, but merely refer to this as the “defining moment” in time when it can be stated with absolute certainty that the Complainant was made aware of the Respondent's policy with regard to not rehiring employees terminated for insubordination.

I find neither exception applicable to the facts of this claim and find specifically that the Complainant is not entitled to invoke either exception. *Belt v. United States Enrichment Corp.*, ARB No. 02-117, ALJ No. 2001-ERA-00019 (ARB Feb. 26, 2004); *Sysko v. PPL Corp.*, ARB No. 06-138, ALJ No. 2006-ERA-00023 (ARB May 27, 2008).

The Respondent's Motion to Dismiss the Complaint is **HEREBY GRANTED**. Complainant's complaint under the Energy Reorganization Act is **DISMISSED** as untimely filed.

COMPLAINANT'S SECOND AMENDED COMPLAINT

Complainant has additionally filed, without leave of Court, an additional "Amended Complaint" wherein he alleges, among other things, that counsel for the Respondent has "conspired with the Respondent" to discriminate against him by reporting him to the Florida Bar Association for investigation into the unauthorized practice of law. Without addressing the merits of such an allegation, the Second Amended Complaint is **HEREBY DISMISSED** as being a matter that this Court lacks the jurisdiction to hear.

RESPONDENT'S MOTION FOR SANCTIONS

Respondent has also moved for sanctions against the Complainant based on his "continuing vexatious pursuit of claims" by the Complainant against the Respondent for over twenty years. Unfortunately, this Court is not empowered to issue sanctions as requested by the Respondent.

The Administrative Procedure Act, § 558(b) provides that "[a] sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law." 5 U.S.C.A. § 558(b) (West 2007); *see Israel v. Schneider National Carrier*, ARB No. 06-040, ALJ No. 2005-STA-00051 (ARB July 31, 2008); *Saporito v. Florida Power & Light Co.*, 1990-ERA-027, 047, slip op. at 3 (Sec'y Aug. 8, 1994) (Rule 11 not available for Dep't of Labor ALJs); *Malpass v. General Elec. Co.*, 1985-ERA-038, 039, slip op. at 11 (Sec'y Mar. 1, 1994) (Federal Rules of Civil Procedure do not give the Secretary the authority to impose sanctions and penalties if not otherwise authorized by law); *In re Slavin*, ARB No. 02-109, ALJ No. 2002-SWD-001 (ARB June 30, 2003).

Respondent must look to those civil remedies available in federal and state courts of general jurisdiction for relief.

WHEREFORE: Respondent's motion for sanctions is **HEREBY DENIED.**

IT IS SO ORDERED.

A

ROBERT B. RAE
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW, Washington, DC 20210.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing NOTICE OF SUPPLEMENTAL AUTHORITY, dated October 7, 2008, have been served upon the following persons by the Electronic Information Exchange.

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Signed (electronically) by,

Steven Hamrick

Dated at Washington, D.C.
this 7th day of October 2008