

EDO Principal Correspondence Control

FROM: DUE: 02/05/09

EDO CONTROL: G20090008
DOC DT: 01/01/09
FINAL REPLY:

Thomas Saporito
Saporito Energy Consultants

TO:

Borchardt, EDO

FOR SIGNATURE OF :

** GRN **

CRC NO:

Leeds, NRR

DESC:

2.206 - Florida Power & Light Company
(EDATS: OEDO-2009-0004)

ROUTING:

Borchardt
Virgilio
Mallett
Ash
Ordaz
Cyr/Burns
Reyes, RII
Cyr, OGC
Mensah, NRR
Marco, OGC
Trocine, OEDO

DATE: 01/06/09

ASSIGNED TO:

CONTACT:

NRR

Leeds

SPECIAL INSTRUCTIONS OR REMARKS:

Template: EDO-001

E-RIDS: EDO-01

EDATS

Electronic Document and Action Tracking System

EDATS Number: OEDO-2009-0004

Source: OEDO

General Information

Assigned To: NRR

OEDO Due Date: 2/5/2009 5:00 PM

Other Assignees:

SECY Due Date: NONE

Subject: 2.206 - Florida Power and Light Company

Description:

CC Routing: Region II; OGC

ADAMS Accession Numbers - Incoming: NONE

Response/Package: NONE

Other Information

Cross Reference Number: G20090008

Staff Initiated: NO

Related Task:

Recurring Item: NO

File Routing: EDATS

Agency Lesson Learned: NO

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Process Information

Action Type: 2.206 Review

Priority: Medium

Signature Level: NRR

Sensitivity: None

Urgency: NO

OEDO Concurrence: NO

OCM Concurrence: NO

OCA Concurrence: NO

Special Instructions: Copies provided to Tonya Mensah, NRR and Catherine Marco, OGC.

Document Information

Originator Name: Thomas Saporito

Date of Incoming: 1/1/2009

Originating Organization: Saporito Energy Consultants

Document Received by OEDO Date: 1/6/2009

Addressee: Borchardt, EDO

Date Response Requested by Originator: NONE

Incoming Task Received: Letter



Saporito Energy Consultants

January 1, 2009

Executive Director for Operations
U.S. Nuclear Regulatory Commission
Washington, D.C. 20500

In re: Request for Investigation and Enforcement Action Under 10 C.F.R. 2.206 Against the Florida Power and Light Company

Specific Request

Now comes Saporito Energy Consultants ("SEC") by and through its undersigned President, Thomas Saporito, and hereby files this petition with the U.S. Nuclear Regulatory Commission ("NRC") under 10 C.F.R. 2.206 seeking an investigation and enforcement action against the Florida Power and Light Company ("FPL") regarding a whistleblower complaint filed by Gary Phipps ("Complainant") against FPL under the Energy Reorganization Act of 1974 as amended 42 U.S.C.A. §5851 ("ERA") alleging that FPL violated the ERA by illegally discriminating and retaliating against [h]im by taking adverse employment action against [h]im for having engaged in "protected activity" within the meaning of the ERA regarding FPL's nuclear operations.

Basis and Justification

An ERA complaint was filed by the Complainant on January 17, 2008 and was docketed by the U.S. Department of Labor ("DOL") as ALJ No. 2008-ERA-00013. On December 15, 2008, the presiding Administrative Law Judge ("ALJ") issued an Order Recommending Approval of Voluntary Dismissal on the grounds that a settlement had been reached between the parties. In his decision, the ALJ noted that the Complainant had a remaining issue left open where that the Complainant stated that,

"Being made whole is having my nuclear access returned to me and going back to work in my former location in the simulator at the St. Lucie Nuclear Power Plant. That position is still open."

The ALJ none-the-less dismissed the complaint at the request of the Complainant.¹ NRC regulations under 10 C.F.R. 50.7 essentially parrot those of the employee protection provisions of the ERA and make it illegal for NRC licensees like FPL to in any manner discriminate or retaliate against an employee for having engaged in protected activity by raising nuclear safety concerns directly to the NRC or to the licensee for resolution. Here, in *Phipps*, FPL clearly discriminated and retaliated against *Phipps* as a result of [h]is engagement in protected activity so-much-so that FPL was subject to an ERA complaint which was ultimately settled prior to a hearing before a DOL ALJ. Despite the settlement reached by the parties in ALJ No. 2008-ERA-00013, the NRC is herein requested to conduct an investigation to determine whether or not FPL's actions against *Phipps* with respect to his employment at FPL were due, at least in part, to *Phipps*' engagement in protected activity within the meaning of 10 C.F.R. 50.7. Petitioners also request that the NRC take enforcement action against FPL for having violated NRC regulations and requirements under 10 C.F.R. 50.7 with respect to *Phipps*.

Best regards,

Thomas Saporito, President

¹ A copy of the ALJ's decision is attached to this petition.



Issue Date: 15 December 2008

Case No.: **2008-ERA-00013**

In the Matter of

GARY PHIPPS,

Complainant,

v.

FLORIDA POWER & LIGHT COMPANY,

Respondent.

**ORDER RECOMMENDING APPROVAL OF
VOLUNTARY DISMISSAL**

This proceeding arises under the provisions of the Energy Reorganization Act of 1974 (ERA), as amended by 42 U.S.C. § 5851. The rules set forth in 29 C.F.R. Part 18 apply to this proceeding except as modified by 29 C.F.R. Part 24.

The Complainant filed a discrimination complaint on January 17, 2008. He alleged that he had been discharged in retaliation for voicing concerns related to potential nuclear safety violations by the Respondent. In a May 14, 2008 letter, the Regional Administrator of OSHA informed the parties that after investigation, OSHA determined that there was no reasonable cause to believe that Respondent had violated any statute covered by ERA and the case would be dismissed unless appealed. The Complainant filed an appeal with the Office of Administrative Law Judges on June 13, 2008, and the case was assigned to the undersigned Administrative Law Judge.

On December 1, 2008, the Complainant filed a motion to dismiss that stated:

I would like to notify the court that the Respondent has put me back to work at the Martin power plant 35 miles away as of 11/20/2008 and I would like the case to be dismissed without prejudice.

You requested to know any issues left open and below is the main issue but I will let my lawyer handle the state case.

1. Being made whole is having my nuclear access returned to me and going back to work in my former location in the simulator at the St. Lucie Nuclear Power Plant. That position is still open.

Subsequently, the Respondent's counsel informed this office that the client agreed with a dismissal and would accept a dismissal without prejudice. Accordingly, it is clear that the

Complainant no longer wishes to proceed in this matter before the Office of Administrative Law Judges and the case should be dismissed.

Voluntary dismissal of ERA whistleblower complaints are covered by Rule 41 of the Federal Rules of Civil Procedure. Rainey v. Wayne State University, 90 ERA-40 (Sec'y Jan 7, 1991) (order to show cause) Sup op. at 3, dismissed, (Sec'y Feb 27, 1991). Rule 41 applies because there are no procedures for voluntary dismissals contained in either the ERA, the implementing regulations at 29 C.F.R. Part 24, or the regulations at 29 C.F.R. Part 18. Pursuant to 29 C.F.R. § 24.6, the disposition of complaints, including Rule 41(a)(1)(i) dismissals can be effected only by final order of the Secretary. Haymes v. D.P. Associates, Inc., 94-SDW-1 (Sec'y Aug. 16, 1994).

It is Recommended, that the Complainant's request for voluntary dismissal be granted and this case be **DISMISSED**, without prejudice.

A

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ahk
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's Recommended Decision and Order. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file your Petition with the Board, you must serve it on all parties to the case as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001. *See* 29 C.F.R. § 24.8(a). You must also serve copies of the Petition and briefs on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's recommended decision becomes the final order of the Secretary of Labor. *See* 29 C.F.R. § 24.7(d).



Saporito Energy Consultants

January 1, 2009

Administrative Review Board
U.S. Department of Labor
Room S-4309
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In re: Gary Phipps v. Florida Power and Light Company
ALJ No. 2008-ERA-00013

Saporito Energy Consultants ("SEC") by and through its undersigned President, Thomas Saporito, herein submits its Motion for Leave to File Amicus Brief in the above-styled matter currently before the Administrative Review Board ("ARB").

For the reasons delineated in its motion, the ARB should grant SEC's Motion in its entirety.

Respectfully submitted,

Thomas Saporito, President
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SEC's Motion for Leave to File Amicus Brief
In re: Gary Phipps v. Florida Power and Light Company
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**UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ADMINISTRATIVE REVIEW BOARD**

IN RE:

**GARY PHIPPS,
COMPLAINANT**

DATE: 01 JAN 2009

ALJ NO. 2008-ERA-00013

V.

**FLORIDA POWER AND LIGHT COMPANY,
RESPONDENT**

**SAPORITO ENERGY CONSULTANTS MOTION
FOR LEAVE TO FILE AMICUS BRIEF**

On December 15, 2008, the Administrative Law Judge ("ALJ") in the above-styled proceeding issued an Order Recommending Approval of Voluntary Dismissal ("Decision"). For the reasons set-out below, the Administrative Review Board ("ARB") should reject the ALJ's decision in this matter and remand the case back to the ALJ for further proceedings.

STANDARD OF REVIEW

The ARB has plenary power to review an ALJ's factual and legal conclusions and is not bound by the conclusions of the ALJ and retains complete freedom to review factual and legal findings *de novo*. See, 5 U.S.C. §557(b) (West 1996); *masek v. Cadle Co.*, ARB No. 970069, ALJ No. 95-WPC-1, Dec. and Ord., Apr. 28, 2000, slip op at 7.

BACKGROUND

On January 17, 2008, Gary Phipps ("Phipps" or "Complainant") an employee of the Florida Power and Light Company ("FPL" or "Respondent") filed a complaint under the Energy Reorganization Act of 1974 as amended 42 U.S.C.A. §5851 ("ERA") against FPL alleging discrimination and retaliation by FPL against [h]im for engaging in protected activity within the meaning of the ERA. The matter was initially investigated by the Occupational Safety and Health Administration ("OSHA") and later was assigned to the Hon. Richard K. Malamphy, ALJ for a hearing on the record. On December 1, 2008, the Complainant filed a motion to dismiss his complaint. In his Decision, the ALJ took notice of Complainant's unresolved issues concerning a "make-whole" remedy to [h]is complaint. Specifically, the Complainant communicated to the ALJ that,

" . . . I would like to notify the court that the Respondent has put me back to work at the Martin power plant 35 miles away as of 11/20/2008 and I would like the case to be dismissed without prejudice. . . "

" . . . You requested to know any issues left open and below is the main issue but I will let my lawyer handle the state case. . . "

1. Being made whole is having my nuclear access returned to me and going back to work in my former location in the simulator at the St. Lucie Nuclear Power Plant. That position is still open. . . "

Id. Decision at 1.

THE AGREEMENT BETWEEN THE PARTIES FAILED TO PROVIDE COMPLAINT WITH A MAKE-WHOLE REMEDY AND IS DEVOID OF PUBLIC POLICY

Clearly, the apparent agreement between the parties reinstating the Complainant at FPL in the above-styled proceeding failed to provide the Complainant with a make-whole remedy to his ERA complaint against FPL. The ALJ was wholly aware of Complainant's concerns about not receiving a make-whole remedy but none-the-less dismissed the complaint. In dismissing the complaint, the ALJ relied on Rule 41 of the Federal Rules of Civil Procedure. *Id.* at 2. SEC contends that the ALJ abused his power and departed from relevant law in dismissing the complaint with knowledge that the complainant had significant "make-whole" remedy issues outstanding and urges the ARB to remand the case back to the ALJ for further proceedings. Notably, the Complainant advised the ALJ that FPL had reinstated [h]is employment but not at [h]is former position and location. See Decision at 2. Thus, as a public policy matter, the ALJ should have considered Complainant's request for dismissal as a request for approval of a settlement of his ERA complaint against FPL.

The ALJ should have considered whether it was in the best interest of the public to accept the dismissal request of the

Complainant rather than convene a hearing on the merits of the case to determine whether FPL's actions taken against the Complainant (reassignment to a different power plant and different position) was a violation of the ERA. See *Gary Kanost v. Fedex Freight East, Inc.*, (ARB No. 08-121, ALJ No. 2008-STA-042, November 26, 2008). In *Kanost*, the ARB reviewed the ALJ's recommendation to accept a settlement agreement made between the parties. The ARB held that,

"Under the regulations implementing the STAA, the parties may settle a case at any time after filing objections to OSHA's preliminary findings, and before those findings become final, 'if the participating parties agree to a settlement and such settlement is approved by the Administrative Review Board [ARB] . . . or the ALJ.' 29 C.F.R. §1978.111(d)(2)."

". . . we approve only the terms of the Agreement pertaining to Kanost's STAA claim. . . Furthermore, if the provisions in paragraph 10 of the Agreement were to preclude Kanost from communicating with federal or state enforcement agencies concerning alleged violations of law, they would violate public policy and therefore, constitute unacceptable 'gag' provisions.'

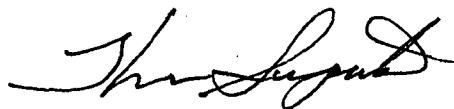
Id. at 3. Here in *Phipps*, the ALJ failed to consider whether the apparent agreement between the parties reinstating the Complainant at FPL constituted a "settlement agreement" between the parties and whether public policy was properly served as a matter of law. SEC avers that the ALJ erred in failing to review

Complainant's request for dismissal of [h]is complaint in the context of a "settlement agreement" between the parties and applying public policy considerations therein. Notably, SEC contends that if the ALJ's Decision is allowed to stand, it would irreparably harm the entire "class" of whistleblowers who raise claims under the environmental and nuclear whistleblower laws under 29 C.F.R. Part 24 and irreparably harm public policy concerns therein.

CONCLUSION

FOR ALL THE FOREGOING REASONS, SEC urges the ARB to reject the ALJ's Decision in the above-styled proceeding and remand the case back to the ALJ for further proceedings to determine whether Complainant's request for dismissal should be construed as a settlement agreement and, if so, whether it is devoid of public policy.

Respectfully submitted,



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SEC's Motion for Leave to File Amicus Brief
In re: Gary Phipps v. Florida Power and Light Company
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SERVICE SHEET

Case Name: Gary Phipps v. Florida Power and Light Company

Case Number: ALJ No. 2008-ERA-00013

Document Title: **SAPORITO ENERGY CONSULTANTS MOTION
FOR LEAVE TO FILE AMICUS BRIEF**

I **HEREBY CERTIFY** that a copy of the above-referenced document was provided to the following on this 1st day of January, 2009 as indicated below:

By: 
Thomas Saporito

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SEC's Motion for Leave to File Amicus Brief
In re: Gary Phipps v. Florida Power and Light Company
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