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**PAPER NUMBER:** LTR-09-0238 **LOGGING DATE:** 05/29/2009  
**ACTION OFFICE:** OGC  
  
**AUTHOR:** Thomas Saporito  
**AFFILIATION:** FL  
**ADDRESSEE:** Gordon Heddell...OIG, Dept of Labor  
**SUBJECT:** Second complaint against the Occupational Safety and Health Administration; and C. Kugler; and D. Fossum for failure to properly conduct investigations under the Energy Reorganization Act of 1974, as Amended, 42 U.S.C.A.  
  
**ACTION:** Information  
**DISTRIBUTION:** Chairman, Comrs, OIG  
  
**LETTER DATE:** 05/28/2009  
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CASE NO: ALJ No. 2009-ERA-00006

DATE: 29 MAY 2009

*In the Matter of:*

SAPORITO ENERGY CONSULTANTS, INC. and  
THOMAS SAPORITO,  
Complainants,

v.

FLORIDA POWER AND LIGHT COMPANY,  
NEXTERA ENERGY RESOURCES, LLC,  
LEWIS HAY III, MITCHELL S. ROSS,  
ANTONIO FERNANDEZ, STEVEN HAMRICK, and  
U.S. NUCLEAR REGULATORY COMMISSION,  
Respondents.

**COMPLAINANTS' REPLY TO ORDER TO SHOW CAUSE**

**BACKGROUND**

By order dated April 30, 2009, the presiding Administrative Law Judge (ALJ) issued an *Order to Show Cause* to the Complainants identified in the above-captioned proceeding requiring Complainants to:

" . . . no later than May 29, 2009 show cause why their Complaint should not be dismissed for failure to state a claim upon which relief can be granted. . . "

*Id.* at 1.

**ARGUMENT**

In the aforementioned order, the ALJ stated, in relevant part, that:

" . . . A preliminary review of the file indicates that Complainants filed their Complaint after Respondents

declined Complainants' offer to enter into a business relationship. The file further reflects that Thomas Saporito was discharged from employment with Florida Power and Light in 1988 and that Respondents are not Complainants' current employer. The question thus arises whether the Complaint in this matter alleges a claim upon which relief can be granted. . ."

*Id.* at 1.

- A. The Florida Power and Light Company is an Employer Within the Meaning of the Energy Reorganization Act of 1974, as Amended, 42 U.S.C.A. §5851**
- 1. Thomas Saporito is a former employee of the Florida Power and Light Company**

In the instant action, it is undisputed that Thomas Saporito (Saporito) is a former employee of the Florida Power and Light Company (FPL) and that Saporito was fired on December 22, 1988, after [h]e raised significant nuclear safety concerns directly to the U.S. Nuclear Regulatory Commission (NRC) and to FPL management. *See, Connecticut Light & Power Co. v. Secretary of U.S. Dept. of Labor*, 85 F.3d 89, 94 (2d Cir. 1966), which held that whenever the alleged discrimination "arose out of" the employment relationship, the employer was covered under the ERA accordingly. Here, in the instant action, Complainants' filed a 10 C.F.R. 2.206 seeking that enforcement actions be taken against FPL by the NRC regarding a June 3, 1994, Decision and Remand Order by the U.S. Department of Labor (DOL), Secretary of Labor (SOL), which clearly found that FPL violated the ERA in ALJ Case Nos. 1989-ERA-07 and 17, and specifically that "FP&L

violated the ERA when it discharged Saporito for refusing to obey [management's] order to reveal his safety concerns." See, *Complainants' Amended Complaint of Retaliation*, Jan. 4, 2009, at 5.

Thus, Complainants' petition brought before the NRC arose explicitly from Saporito's prior employment relationship with FPL during the 1982-1988 time period. Moreover, Complainants' petition brought before the NRC expressly addressed the retaliation taken against Saporito by FPL during Saporito's prior employment period at FPL. Therefore, where Saporito was a prior employee of FPL and where Complainants' caused a proceeding before the NRC in filing a 10 C.F.R. 2.206 petition seeking enforcement action against FPL based solely on Saporito's prior employment relationship with FPL, Saporito is protected under the ERA and FPL is an employer under the ERA accordingly.

**2. Complainants Are Applicants for Employment at the Florida Power and Light Company**

Since May, 2008, Saporito has made several applications for rehire at FPL. Saporito's employment applications at FPL were made prior to a NRC August 14, 2008, teleconference between Complainants' and the NRC where FPL was represented and attended. Notably, the NRC teleconference was directly related to Complainants' filing of a 10 C.F.R. 2.206 petition with the

NRC seeking enforcement action against FPL and directly related to FPL's discharge of Saporito from the Turkey Point Nuclear Plant (TPN) in Dec, 1988 as referenced above in ALJ Case Nos. 1989-ERA-07 and 17. In addition, by letter dated August 1, 2008, Complainants' sought an employment relationship with FPL by establishing a partnership between SEC and FPL to perform independent contractor services for FPL in providing homeowners with reduced costs for home modifications related to energy usage such as lighting, hot water systems, solar energy, window tinting, air-conditioning, etc. Thus, where Complainants' are applicants for employment at FPL, Complainants' are protected under the ERA and FPL is an employer under the ERA accordingly. See, *Michael Samodurov v. General Physics Corporation*, ALJ No. 89-ERA-20, Sec'y Decision and Order, (Nov. 16, 1993).

Notably, in *Samodurov*, the SOL expressly found that:

". . . The ALJ found that Samodurov was not an 'employee' under the ERA's employee protection provision because he was an independent contractor whose only connection with General Physics was its rejection of his employment based on an unsolicited resume. . . I disagree . . . It is well established that the ERA covers applicants for employment. *Flanagan v. Bechtel Power Corp., et al.*, Case No. 81-ERA-7, Sec. Dec., June 26, 1986, slip op. at 7, 9, and *Cowan v. Bechtel Construction, Inc.*, Case No. 87-ERA-29, Dec. and Ord. of Rem., Aug. 9, 1989, slip op. at 2 (ERA covers former employees who sought reemployment and were not hired). See also, *Chase v. Buncombe County, N.C.*, Case No. 85-SWD-4, Dec. and Order of Rem., Nov. 3, 1986, slip op. at 3 (under analogous employee protection provision of Solid Waste Disposal Act (SDWA). A broad interpretation of 'employee' is necessary to give full effect to the purpose

of the employee protection provision, which is to encourage reporting of safety deficiencies in the nuclear industry. See *Faulkner v. Olin Corp.*, Case No. 85-SWD-3, ALJ's Recommended Decision, Aug. 16, 1985, slip op. at 6, 14-15, adopted in Sec. Final Ord., Nov. 18, 1985 (under SDWA). "

"Contrary to the ALJ, I do not find it significant that Samodurov initially forwarded his resume to General Physics without regard to a specific opening. See R.D. and O. at 12. . . Samodurov clearly was an applicant for a position at General Physics. . . I agree with the ALJ that Samodurov sought to be hired as an independent contractor, rather than as an employee. R.D. and O. at 12. I disagree, however, that contractor status places a complainant outside the protection of the ERA. Independent contractors may be covered employees. *Faulkner*, ALJ's recommended Dec. at 14-15; *Royce v. Bechtel Power Corp.*, Case No. 83-ERA-3, ALJ's Recommended Dec. of Mar. 24, 1983. slip op. at 3, 9, (temporary contract worker a covered employee), *aff'd*, Sec. Dec. and Final Ord., July 11, 1985. See also, *McAllen v. U.S. Environmental Protection Agency*, Case No. 86-WPC-1, ALJ's Recommended Dec. and Ord., Nov. 28, 1986, slip op. at 10 (contractor covered under analogous employee protection provision of the Water Pollution Control Act, 33 U.S.C. §1367)."

"In determining whether a contractor is an employee within the ERA's protection, the decision examines the degree of control or supervision by the respondent. See *Faulkner* and *McAllen*. Since General Physics did not hire Samodurov, there is no evidence of the degree of control it would have had over him and his work. The absence of such information in this complaint of an alleged discriminatory refusal to hire does not preclude a determination that Samodurov was a covered employee. Accordingly, I find that, as an applicant for employment as a contractor, Samodurov was a covered employee. . . "

*Id.* at 4-5.

Therefore, in the instant action as in *Samodurov*, where Complainants have made application for employment at FPL as an independent contractor, FPL is a covered employer under the ERA.

**3. The NRC is an Employer Within the Meaning of the ERA**

a. To the extent that FPL is a licensee of the NRC and operates nuclear facilities by permissive licenses issued by the NRC, the NRC is an employer under the ERA. In addition, where Complainants made application for employment at FPL, and where FPL rejected Complainants' applications for employment, and where ERA complaints were filed against FPL, and where the NRC was required to conduct an investigation under 10 C.F.R. 30.7 and 50.7, the NRC is an employer under the ERA. Because the NRC failed to conduct an agency investigation of Complainants' allegations that FPL violated NRC regulations and requirements under 10 C.F.R. 30.7 and 50.7, Complainants' employment opportunities were adversely affected by the NRC's failure to investigate. Had the NRC conducted an agency investigation under 10 C.F.R. 30.7 and 50.7, the licensee could have been influenced to reverse the alleged retaliation and discrimination complained about by Complainants in refusing to hire them at FPL.

Notably, ". . . one of the goals of the NRC's Enforcement Policy is to ensure, through appropriate enforcement action against a licensee or licensee contractor (and when warranted, against the individual personally responsible for the act of discrimination), that employment actions taken against licensee or contractor employees for raising safety concerns do not have

a chilling effect on the individual or others on the reporting of safety concerns. For purposes of this guidance, discrimination should be broadly defined and should include intimidation or harassment that could lead a person to reasonably expect that, if he or she makes allegations about what he or she believes are unsafe conditions, the compensation, terms, conditions, and privileges of employment could be affected." See, *NRC Enforcement Manual* at Section 7.7 Discrimination for Engaging in Protected Activities.

Therefore, it was incumbent upon the NRC to conduct timely and meaningful investigations under 10 C.F.R. 30.7 and 50.7 about Complainants' discrimination and retaliation allegations lodged against FPL, but the NRC failed to do so and the agency therein retaliated and discriminated against Complainants and became Complainants' employer within the meaning of the ERA.

b. On March 22, 2009, Complainants' made application for employment with the NRC as an independent contractor through the agency's website; however, the NRC failed to acknowledge or respond to Complainants' employment application. To date, the NRC continues to seek independent contract companies and workers through the agency's website. Despite Complainants' qualifications, the NRC has essentially rejected [t]heir employment application and the agency continues to seek



applicants of Complainants' qualifications for the position that Complainants made application with the agency. See, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Webb v. Carolina Power & Light Co.*, 93-ERA-42, 12 (ALJ July 24, 1996) (aff'd, ARB August 26, 1977). Here in the instant action, Complainants aver that [t]hey made application for employment at the NRC for a position that Complainants were qualified to hold; and despite Complainants' qualifications, the NRC rejected Complainants' application solely because of Complainants' engagement in ERA protected activities for which the NRC had direct knowledge; and that after Complainants' employment rejection by the NRC, the position remained open; and the NRC continued to seek applicants from companies and persons of Complainants' qualifications. See, *Samodurov v. Gen. Physics Corp.*, No. 1989-ERA-020, slip op. at 3 (Sec'y Nov. 16, 1993); *Chase v. Buncombe County, N.C.*, 1985-SWD-004, slip op. at 3 (Sec'y Nov. 3, 1986). Thus, the NRC is a covered employer under the ERA in the present case accordingly.

c. The ERA makes it illegal to discharge or otherwise retaliate against an employee in terms, compensation, conditions, or privileges of employment because the employee or any person acting at an employee's request engages in protected activity. Employers covered by the ERA are:

- The Nuclear Regulatory Commission (NRC)
- A contractor or subcontractor of the NRC
- A licensee of the NRC or an agreement state, and the licensee's contractors and subcontractors
- An applicant for a license, and the applicant's contractors and subcontractors
- The Department of Energy (DOE)
- A contractor or subcontractor of the DOE under the Atomic Energy Act (AEA)

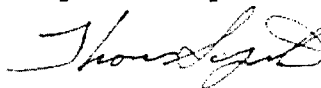
See, Federal Register/Vol. 72, No. 154/Friday, August 10, 2007/Rules and Regulations at 44969. Thus, as described immediately above, Congress fully intended that the NRC be a covered employer within the meaning of the ERA. Hence, there can be no doubt that in the instant action, the NRC is a covered employer under the ERA accordingly.

#### CONCLUSION

FOR ALL THE FOREGOING REASONS, and as a matter of law, the presiding ALJ should find that: (1) FPL and the NRC are covered employers under the ERA in the present case; and (2) that FPL's and the NRC's adverse actions taken against Complainants violated the employee protection provisions of the ERA; and (3) that FPL's and the NRC's adverse actions taken against Complainants negatively affected Complainants' terms,

compensation, conditions, or privileges of employment because Complainants engaged in ERA protected activity. Complainants collectively seek an award of damages in the total amount of \$100,000.00 plus associated costs in bringing the instant action but reserve [t]heir right to increase the amount of an award of damages as this matter proceeds accordingly.

Respectfully submitted,



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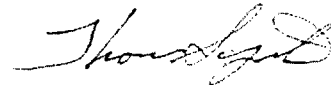
**CERTIFICATE OF SERVICE**

**CASE NAME:** Saporito Energy Consultants, Inc. and Thomas Saporito v. Florida Power and Light Company, NextEra Energy Resources, LLC, Lewis Hay III, Mitchell S. Ross, Antonio Fernandez, Steven Hamrick, and U.S. Nuclear Regulatory Commission

**CASE NUMBER:** ALJ Case No. 2009-ERA-00006

**DOCUMENT TITLE:** COMPLAINANTS' REPLY TO ORDER TO SHOW CAUSE

I HEREBY CERTIFY, that a copy of the above-referenced document was sent to the following on this 29<sup>th</sup> day of May, 2009:



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