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

In re:
Saporito Energy Consultants, Inc. DATE: 16 JUN 2009

and OSHA NO.4-1050-09-052

Thomas Saporito,
COMPLAINANTS,

v.

Lewis Hay III and
Florida Power and Light Company,
RESPONDENTS.

COMPLAINANTS' MOTION FOR REMAND

NOW COMES Saporito Energy Consultants, Inc. by and through and with its undersigned president, Thomas Saporito, (hereinafter "Complainants") and submit *Complainants' Motion for Remand* in the above styled proceeding and state as follows:

BACKGROUND

On May 21, 2009, Complainants' submitted *Complainants' Complaint of Retaliation and Discrimination Against the Florida Power and Light Company (FPL)* alleging that Respondents violated the Energy Reorganization Act of 1974, as amended, 42 U.S.C.A. §5851 (ERA) in rejecting a January

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17, 2009 application for employment at FPL by Complainants as an Independent Contractor.

By letter dated May 26, 2009, the Occupational Safety and Health Administration (OSHA) advised Complainants, in relevant part, that:

" . . . An Investigator will contact you as soon as possible to request your assistance in the investigation of your complaint. . . You are expected to cooperate in the investigation of your complaint and failure to do so may cause your complaint to be dismissed due to lack of cooperation on your part. . . "

Id. at 1.

However, the OSHA investigator, Clarence Kugler (Kugler), identified in the aforementioned OSHA letter failed to contact Complainants regarding their complaint. Thus, OSHA failed to conduct a timely and meaningful investigation of Complainants' ERA complaint as required under 29 C.F.R. Part 24. Complainants note here that OSHA's May 26, 2009, letter was signed by Kugler for OSHA's Area Director Darlene Fossum (Fossum).

On or about June 10, 2009, Complainants' received an undated document from OSHA entitled "*Secretary's Findings*" signed by Fossum and who, apparently acting as an agent for

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the U.S. Secretary of Labor (SOL), dismissed Complainants' ERA complaint in its entirety. *Id.* at 3.

LEGAL STANDARD

1. Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provisions of Section 211 of the Energy Reorganization Act of 1974, as Amended

The Energy Policy Act of 2005, Public Law 109-58, was enacted on August 8, 2005. Among other provisions, this new law amended the employee protection provisions for nuclear whistleblowers under Section 211 of the ERA, 42 U.S.C. 5851; the statutory amendments affect only ERA whistleblower complaints. The amendments to the ERA apply to whistleblower claims filed on or after August 8, 2005, the date of the enactment of Section 629 of the Energy Policy Act of 2005. See, Fed. Reg. Vol. 72, No. 154, Aug. 10, 2007 at 44956-44957.

ARGUMENT

1. OSHA Failed to Conduct a Timely and Meaningful Investigation of Complainants' ERA Complaints as Required Under 29 C.F.R. Part 24

Under 29 C.F.R., in relevant part, "The complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and

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evidence to make a prima facie showing. . . For purposes of determining whether to investigate, the complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing, i.e., to give rise to an inference that the respondent knew or suspected that the employee engaged in protected activity and that the protected activity was a contributing factor in the unfavorable personnel action. *Id.* (emphasis added).

In the instant action, OSHA requested Complainants' cooperation in the agency's ERA investigation through an interview with OSHA investigator Kugler. However, Kugler never interviewed Complainants, and instead, Fossum simply issued a so-called "*Secretary's Findings*" without conducting a meaningful investigation as required under 29 C.F.R. Part 24. Thus, OSHA knowingly and improperly denied Complainants of "*due process*" in the government's investigation of Complainants' ERA complaint. Moreover, it matters not that a preliminary finding by OSHA can be reviewed *de novo* by a U.S. Department of Labor (DOL)

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Administrative Law Judge (ALJ) upon the filing of a timely objection and request for a hearing by Complainants, where the government knowingly and improperly denied Complainants' right to "due process" under the law. Here OSHA failed to fully and properly investigate Complainants' ERA complaint by failing to interview Complainants. Thus, OSHA's preliminary determination is *de void* of law.

CONCLUSION

FOR ALL THE FOREGOING REASONS, the Chief Administrative Law Judge should grant Complainants' motion and remand this case for further investigation by OSHA as a matter of law and to protect the integrity of OSHA investigations and proceedings brought under the ERA.

Respectfully submitted,



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CERTIFICATE OF SERVICE

CASE NAME: Saporito Energy Consultants, Inc. and Thomas Saporito v. Lewis Hay III and Florida Power and Light Company

CASE NUMBER: OSHA No. 4-1050-09-052

DOCUMENT TITLE: Complainants' Motion for Remand

I HEREBY CERTIFY that a copy of the foregoing document was provided to the following on this 16th day of June, 2009 by means shown below:



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