

**U.S DEPARTMENT OF LABOR  
ADMINISTRATIVE REVIEW BOARD**

THOMAS SAPORITO, and  
SAPORITO ENERGY CONSULTANTS

Complainants,

v.

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

Respondents.

ARB Case No. 09-129

ALJ Case No. 2009-ERA-006

October 8, 2009

RESPONDENT U.S. NUCLEAR REGULATORY COMMISSION REPLY TO  
COMPLAINANTS' INITIAL BRIEF

BACKGROUND

On November 22, 2008, Mr. Thomas Saporito (Complainant) of Saporito Energy Consultants filed a complaint with the Occupational Safety and Health Administration, Department of Labor (OSHA), on behalf of himself and his company, against Florida Power and Light (FPL), several FPL employees, and the U.S. Nuclear Regulatory Commission (NRC) alleging discriminatory employment practices in violation of the employee protection provisions of Section 211 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851 (ERA or the Act). Mr. Saporito amended his complain on January 4, 2009. The original complaint alleged that FPL and the NRC retaliated against the Complainants by seeking sanctions against them with respect to proceedings before the NRC's Atomic Safety Licensing Board Panel (ASLBP)<sup>1</sup>, and because the NRC denied his petition pursuant to NRC regulations at 10 C.F.R. §

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<sup>1</sup> The NRC did not seek sanctions against Complainant, but did not oppose FPL's various requests for sanctions.

2.206 ("2.206 petition"). Complainants amended their complaint on January 4, 2009, alleging that Respondent NRC should have granted Complainant's 2.206 petition and found FPL in violation of NRC regulations 10 C.F.R. § 50.7. On April 3, 2009, OSHA dismissed the complaints, and the Complainants appealed that dismissal on April 10, 2009. On April 30, 2009, the Administrative Law Judge (ALJ or Judge) issued an Order to Show Cause as to why the complaints should not be dismissed. Complainant filed his response on May 29, 2009. On June 8, 2009, the Judge issued an additional Order deeming respondent Florida Power and Light's response to be a Motion for Summary Judgment, and permitting Complainants to file an additional briefing by July 19, 2009, responding to the motions submitted by the Respondents, which Complainants filed on July 17, 2009. On July 30, 2009, the Judge issued his "Decision and Order Granting Summary Decision and Dismissing Amended Complaint" (Decision). On August 10, 2009, Complainants timely filed their "Petition for Review and for Briefing Schedule" in accordance with the Judge's Order and 29 C.F.R. § 24.110.

#### JUDGE'S DECISION AND ORDER

In granting summary decision and dismissing the complaint, the Judge made several key points with respect to the NRC. First, the Judge held, in accordance with federal law, that Complainants' amended complaint of January 4, 2009 was the operative pleading in the case. Decision at 2. Second, the Judge held that Saporito Energy Consultants, Inc. must be dismissed as a complainant because the Act does not provide a cause of action for corporations. Decision at 3. Third, the Judge found that there was no employment relationship between the NRC and Complainant, thus Complainant failed to establish an essential element of a whistleblower claim, thus a summary decision in favor of respondent NRC was appropriate. Additionally, the Judge held that Complainant's claims that he applied with the NRC as an independent contractor in March, 2009 were untimely because the issue was first raised in response to the April 30, 2009 Order to Show Cause and was not part of the original or amended complaint investigated by the

Area Administrator.<sup>2</sup> Decision at 6-7. Finally, the Judge held that failure on the part of the NRC to take enforcement action is not retaliation within the meaning of the Act, and noted that the Department of Labor lacks jurisdiction over NRC enforcement decisions. Decision at 7-8.

### COMPLAINANTS' INITIAL BRIEF

Complainants have taken exception to almost every aspect of the ALJ's decision and have requested that the ALJ's decision be vacated and the case remanded for hearing. Specifically, with respect to the NRC, the Complainants argue that: (1) the ALJ should have considered both of his complaints—not just the January 4, 2009 complaint as the operative complaint; (2) that the ALJ improperly dismissed Saporito Energy Consultants from the complaint; (3) that the ALJ improperly granted summary judgment in favor of the NRC based on there being no employment relationship between Complainants and the NRC; (4) that the ALJ should have considered Complainants' application to be an independent contractor with the NRC; and (5) that the ALJ's holdings that the NRC failure to take enforcement action would not dissuade a reasonable worker from making allegations in the future and that the Department of Labor has no jurisdiction over NRC enforcement decisions was in error. For the following reasons, Complainants fail to raise any issues that warrant reversal of the ALJ's decision.

### STANDARD OF REVIEW

The Administrative Review Board (ARB or Board) reviews questions of law *de novo*. In cases where a summary decision has been issued, the ARB applies the same standard as the ALJ, essentially that of Rule 56 of the Federal Rules of Civil Procedure. See *e.g.*, Tod N.

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<sup>2</sup> In addition to raising for the first time the issue of allegedly applying for an independent contractor position with the NRC, Complainants' response to the Order to Show Cause also raised, for the first time, the allegation that the NRC has violated the Act because it failed to conduct investigations of Complainants' allegations against Respondent FPL. This allegation is different from that made in Complainants' original complaints. The original complaints focused on the NRC's denial of Complainants' petitions for enforcement made under the NRC's regulations at 10 CFR § 2.206. In their Reply to the Order to Show Cause, Complainants alleged that the NRC failed to conduct investigations "required" by 10 CFR §§ 30.7 and 50.7 and the Complainants' Reply made no mention of the petitions under 10 CFR § 2.206.

Rockefeller v. Dept. of Energy, ARB No. 03-048, ALJ No. 2002-CAA-0005 (ARB Aug. 31, 2004).

“Accordingly, the Board will grant summary decision if, upon review of the evidence in the light most favorable to the non-moving party, we conclude, without weighing the evidence or determining the truth of the matters asserted, that there is no genuine issue as to any material fact.” Id. Under Rule 56 and Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986), the ALJ may issue summary decision “if the pleadings, affidavits, and other evidence show that there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law...Once the moving party has demonstrated an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation.” Seetharaman v. General Electric Company, ARB No. 03-029, ALJ Case No. 02-CAA-21, slip op. at 3 (ARB May 28, 2004) (internal citations omitted). “The non-moving party may not rest upon mere allegations, speculation, or denials of the moving party's pleadings, but must set forth specific facts on each issue upon which he would bear the ultimate burden of proof...If the non-moving party fails to establish an element essential to his case, there can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.” Id. (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)). The Board will affirm an ALJ's recommendation that summary decision be granted if, upon review of the evidence in the light most favorable to the non-moving party, it concludes, without weighing the evidence or determining the truth of the matters asserted, that there is no genuine issue as to any material fact and that the ALJ correctly applied the relevant law. Id.

The central legal issue in this case is whether Complainants have made a *prima facie* case. To make a *prima facie* case of retaliation under the Act, a complainant must show that he engaged in protected activity, that the respondent subjected him to adverse action, and that the

respondent was aware of the protected activity when it took the adverse action. Complainant must also raise the inference that the protected activity was the likely reason for the adverse action. Samodurov v. General Physics Corp., Case No. 1989-ERA-20, slip op. at 4 (Sec'y Nov. 16, 1993) (internal citation omitted). An essential aspect of the *prima facie* case is the existence of an employment relationship. Seetharaman, 02-CAA-21.

The issues raised with respect to the NRC are questions of law properly resolved by summary decision. The most significant is whether the filing of a petition with the NRC—absent any other type of employment relationship—creates a cause of action under the Act. The Agency does not dispute that Complainant has filed numerous petitions pursuant to NRC regulations at 10 CFR § 2.206 and has alleged FPL violations of NRC regulations (10 CFR §§ 50.7 and 30.7), and the ALJ appropriately considered the facts provided by Complainants in the light most favorable to them. However, nothing in Complainants' original or amended complaints, nor in their responses to the Order to Show Cause, satisfies the evidentiary burden required to survive summary judgment. Rather, Complainants have relied on assertions and specious interpretations of the Act and have not presented any evidence of a *prima facie* case. Absent some evidence of an employment relationship, Complainants' petitions and requests for enforcement do not by themselves satisfy the requirements of a *prima facie* case and do not give rise to a cause of action under the Act. In addition, the other issues noted in the ALJ's decision with respect to the NRC (the operative pleading and the timeliness of the claim that Complainants had applied for employment with the NRC) are also inherently legal issues that the ALJ properly resolved in his Decision.

#### DISCUSSION

1. *The ALJ Properly Found the January 4, 2009 Amended Complaint to be the Operative Complaint*

Complainants argue in their Initial Brief that the ALJ erred by not considering both the November 22, 2008 and the January 4, 2009 complaint. The sole basis for this argument appears to be that “the ALJ was well aware that Saporito was represented *pro se* and the ALJ should have provided ample latitude to Saporito and considered both of the aforementioned ERA complaints together as a single complaint.” Initial Brief at 2. Complainants’ argument on this point, that because they are proceeding *pro se* a different set of rules should apply to them, is contrary to well-established law.

*Pro se* litigants are “entitled to a certain degree of adjudicative latitude. However, such latitude does not extend to frivolous claims.” Saporito v. Florida Power and Light Co. and Muller, Mintz, Kornreich, Caldwell, Casey, Crossland & Bramnick, P.A., 1994-ERA-35, slip op. at 5 (ARB July 16, 1996). The ARB has repeatedly held that an ALJ has some duty to assist *pro se* litigants. See, e.g., Ray’s Lawn and Cleaning Service, Inc. and Howard Ray, ARB No. 06-112, slip op. at 4 (ARB Aug. 29, 2008). However, the ARB has also held that *pro se* litigants are held to the same burdens of production and persuasion as litigants represented by counsel. Canterbury v. Administrator, ARB No. 03-135, ALJ No. 2002-SCA-011, slip op. at 3-4 (ARB Dec. 29, 2004), and even *pro se* litigants must provide some sort of legal support for their arguments. See Nixon v. Stewart & Stevenson, ARB No. 05-066, ALJ Case No. 2005-SOX-001, slip op. at 5, note 46 (ARB Sept. 28, 2007). Moreover, the Supreme Court has said that “we have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.” McNeil v. US, 508 U.S. 106, 113 (1983).

Complainant Saporito has been involved in numerous cases before various levels of the Department of Labor and the federal courts for many years. Although he is *pro se*, his argument that both of his complaints should be considered merely because he is proceeding *pro se* defies logic and the law. As a legal matter, Complainants have provided no legal support

for their position that both of the complaints should be considered merely because they are proceeding *pro se*, nor have they provided any legal argument to indicate that the ALJ's ruling on this issue was legally incorrect in the first instance.<sup>3</sup> It is well-settled that an amended pleading supersedes the original.<sup>4</sup> Further, Complainants' argument defies logic, particularly given that he has appeared before the Department of Labor *pro se* no fewer than 20 times against at least 10 different responding parties and is well-versed in practice under the Department of Labor rules.<sup>5</sup> The Complainants' arguments are without merit and the ALJ's holding that the January 4, 2009 pleading is the operative pleading should be affirmed.

2. *The ALJ Properly Dismissed Saporito Energy Consultants From the Complaint*<sup>6</sup>

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<sup>3</sup> While the NRC's position is that Complainants have offered no legal basis to reverse the ALJ on this point, as a practical matter, it is largely irrelevant to the NRC's position. Even if both complaints were considered, Complainants have failed to make a *prima facie* case under the Act as set forth herein.

<sup>4</sup> The Judge cites to three 11<sup>th</sup> Circuit decisions on this point: Pintando v. Miami-Dade Housing Agency, 501 F.3d 1241, 1243 (11th Cir. 2007); Lowery v. Alabama Power Co., 482 F.3d 1 184, 111 9-1120 (11th Cir. 2007); Fritz v. Standard Sec. Life Ins.Co. of New York, 676 F.2d 1356, 1358 (11th Cir. 1982).

<sup>5</sup> Cases before the Department of Labor include: Saporito v. Fedex Kinko's Office and Print Sercices, Inc. and Smith, Moore, Luro, Hayes, Gravel, Otayza and Krieger, ARB No. 06-043, ALJ Case No. 2005-CAA-018 (ARB March 31, 2008); Saporito v. Center Locating Services, Ltd. And Asplundh Tree Expert Co., ARB No. 05-004, ALJ Case No. 2001-CAA-00013 (ARB Feb 28, 2006); Saporito v. GE Medical Systems and Adecco Technical Service, ARB05-009, ALJ Case Nos. 03-CAAA-1, 03-CAA-2 (ARB May 24, 2005); Saporito v. Florida Power and Light Co., ARB No. 04-079, ALJ Case Nos. 89-ERA-7, 89-ERA-17 (ARB Dec. 17, 2004); Saporito v. Florida Power and Light Co., ARB No. 98-008, ALJ Nos. 89-ERA-7, 89-ERA-17 (Dec. 16, 1997); Saporito v. Houston Lighting and Power Co., ARB No. 97-093, ALJ Case Nos. 93 ERA-28, 92-ERA-38, 92 ERA-45 (ARB May 13, 1997); Saporito v. Florida Power and Light Co. and Muller, Mintz, Kornreich, Caldwell, Casey, Crossland & Bramnick, P.A., 1994-ERA-35 (ARB July 16, 1996); Saporito v. Florida Power and Light Co., Case No. 93-ERA-23, (Sec'y Sept. 7, 1995); Saporito v. Arizona Public Service Co., The Atlantic Group, Inc., Case Nos. 92-ERA-30, 93-ERA-26, 93-ERA-45 (Sec'y June 19, 1995); Saporito v. Florida Power and Light Co., Case Nos. 89-ERA-7, 89-ERA-17 (Sec'y Feb. 16, 1995); Saporito v. ATI Career Training Center and Florida Power and Light Co., Case Nos. 90-ERA-0027, 90-ERA-0047 (Sec'y Aug. 8, 1994); Saporito v. Arizona Public Service Co., Arizona Power Project, The Atlantic Group, Inc., Case Nos. 93-ERA-26, 93-ERA-45 (OALJ May 19, 1994); Saporito v. Florida Power and Light Co., Case No. 93-ERA-23 (OALJ Nov. 12, 1993); Saporito v. Houston Lighting and Power Co., Georgia Power Co., and Nuclear Support Services, Inc., Case Nos. 92-ERA-38, 92-ERA-45 (Sec'y June 28, 1993).

<sup>6</sup> Respondent NRC did not brief this issue before the ALJ. As with the issue of which complaint is operative, as a practical matter with respect to the complaints against NRC, it is irrelevant whether complainant Thomas Saporito, complainant SEC, or both are proper complainants. Neither has

On this issue, Complainants argue that because the Internal Revenue Service (IRS) has recognized SEC as a legal entity, the Department of Labor should also. Complainants also argue that the IRS has recognized Thomas Saporito and SEC as a “single entity.” Initial Brief at 3.<sup>7</sup> Complainants are essentially making the same argument made and rejected by the ARB in Demski v. Indiana Michigan Power Co., ARB No. 02-084, ALJ No. 2001-ERA-036 (ARB Apr. 9, 2004), namely that a corporation with a sole shareholder should be considered an “employee” under the Act and thus be afforded the same protections. See Id., slip op. at 2. As noted by the ALJ in his decision, the ARB has never extended the protections of the Act to contract corporations. Decision at 3. In Demski, the ARB held that “A corporation has no standing to bring an action for cancellation of a contract under the ERA.” Demski, slip op. at 5. Moreover, Complainants’ tax status is irrelevant and in no way addresses the underlying legal issue of whether a corporation has standing under the Act. Complainants have not presented any legal argument on this point, and the ALJ’s application of Demski was proper. The ALJ’s Decision to exclude Complainant SEC was correct and should be affirmed.

3. *Summary Judgment in Favor of Respondent NRC was Proper*

Complainants’ Initial Brief raises several issues with respect to the employment relationship between Complainants and NRC. Complainants’ argument that the “ALJ departed from relevant law” basically implies that the ALJ improperly evaluated the evidence under the summary judgment standard. Initial Brief at 7. Complainants’ arguments regarding the NRC as a “covered employer” under the Act, Initial Brief at 8, continue to misconstrue the application of

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established that they have ever had an employment relationship with the NRC and thus an essential element of the *prima facie* case of retaliation is missing.

<sup>7</sup> Complainants have presented this information for the first time in their Initial Brief, despite respondent FPL having briefed this issue before the ALJ. The ARB does not consider issues raised for the first time on appeal. See Saporito v. Central Locating Services, Ltd. and Asplundh Tree Expert Co., ARB No. 05-004, ALJ Case No. 2001-CAA-00013, slip op. at 7 (citing Harris v. Allstates Freight Systems, ARB No. 05-146, ALJ No. 2004-STA-17, slip op. at 3 (ARB Dec. 29, 2005)).

the ERA. Further, and most significantly, Complainants have never presented evidence of one of the essential elements of a *prima facie* case, namely that an employment relationship exists between them and the NRC. Complainants' main argument in the Initial Brief, that the ALJ should have considered Complainants' after-the-fact "applications for employment" (Initial Brief at 7), is also without merit. This issue was not raised in a timely manner and was properly dismissed. Even if considered, Complainants still fail to make a *prima facie* case that they should be protected under the Act as "applicants for employment." Consequently, there is no reason to disturb the ALJ's decision granting summary judgment in favor of the NRC.

a. *The Summary Judgment Standard Was Properly Applied*

Complainants' initial point that the ALJ misapplied the summary judgment standard (Initial Brief at 7) is without merit. Complainants imply that because NRC did not present evidence on the issue of employment, that the ALJ should not have granted a summary decision. At no time has the NRC had the burden of proof with respect to an essential element of this case. As noted above, it is a well-established principle of law that, "The non-moving party may not rest upon mere allegations, speculation, or denials of the moving party's pleadings, but must set forth specific facts on each issue upon which he would bear the ultimate burden of proof... If the non-moving party fails to establish an element essential to his case, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." Seetharaman, 02-CAA-21, slip op. at 3, (citing Celotex, 477 U.S. at 322-23). Complainants fail to understand the burdens associated with a summary decision despite having been advised by the ARB on this issue and his burden of proof previously:

It is possible that Saporito is arguing that because the [respondent] law firm did not support [its assertions] with affidavits... [that] summary decision is not appropriate. [Celotex] has effectively resolved that argument... Here, Saporito, the nonmoving party with the burden of proof on the dispositive issues, failed even to assert that the conversation occurred before adverse action was taken

against Saporito by Arizona Public. That failure cannot be repaired by post hoc unsupported assertions.

Saporito, 1994-ERA-35, slip op. at 4. Complainants have provided no evidence, let alone a preponderance of evidence, on any of the elements of a *prima facie* case, and there is certainly no evidence of any type of employment relationship with the NRC. Complainants' argument that the Judge misapplied the summary judgment standard or that the NRC's failure to present evidence makes summary judgment inappropriate is simply without merit.

*b. Complainants Have Failed to Establish a Prima Facie Case of Retaliation*

The most significant—and fatal—failing of Complainants' case against the NRC is the failure to set forth a *prima facie* case as required by the Act. Complainants have not presented any evidence of an employment relationship between themselves and the NRC with respect to the events in the original complaints. In addition, as addressed below, Complainants more recent allegations that he was an “applicant for employment” are untimely and also fail to meet the requirements of a *prima facie* case.

Pursuant to Subsection 211(b)(3)(A) of the Act (42 U.S.C. § 5851(b)(3)(A)), the Secretary of the Department of Labor is required to dismiss a complaint filed under Section 211 of the Act and may not conduct the required investigation “unless the complainant has made a *prima facie* showing that any behavior described in Subsection (a)(1) of Section 211 was a contributing factor in the unfavorable personnel action alleged in the complaint.” To make a *prima facie* case of retaliation under the Act, a complainant must show that he engaged in protected activity, that the respondent subjected him to adverse action, and that the respondent was aware of the protected activity when it took the adverse action. Complainant must also raise the inference that the protected activity was the likely reason for the adverse action.

Samodurov, 1989-ERA-20, slip op. at 4 (citing Dartey v. Zack Co. of Chicago, Case No. 82-

ERA-2, slip op. at 8 (Sec'y Apr. 25, 1983)). An essential aspect of the *prima facie* case is the existence of an employment relationship:

Accordingly, essential elements of a whistleblower claim under the ERA are that the complainant be an employee and that the respondent be an employer. A complainant has the burden of proof to show that she is a covered employee under the ERA; if she is unable to establish that essential element of her claim, the entire claim must fail... Although "employer" is defined in the ERA, "employee" is not. Before other factors in an employment relationship are considered, an individual must be a "hired party," i.e., receive compensation in exchange for services.

Demski, 2001-ERA-036, slip op. at 4, (citing O'Connor v. Davis, 126 F.3d 112, 115 (2d Cir. 1997) (only when a person is hired in the first place should the common-law agency analysis be undertaken)).<sup>8</sup> See also Seetharaman, 02-CAA-21, slip op. at 5.

Complainants have not made the required *prima facie* showing with respect to Respondent NRC, because Complainants have provided no evidence that there has ever been an employment relationship with respondent NRC. Significantly, Complainants do not claim that they were an employee or contractor of the NRC at the time the events set forth in the original Complaint(s) occurred and have presented no evidence on this point at any time.

Complainants' Initial Brief revisits their previous arguments that because the Act includes the NRC as a "covered employer," establishing a *prima facie* case is apparently not required. Initial Brief at 8. Complainants misconstrue the meaning and coverage of the Act. Being a "covered employer" does not create automatic liability absent establishing the elements of a *prima facie* case, including a showing that there is an employment relationship. Subsection 211(b)(3)(A) of the Act clearly requires that a complainant make out a *prima facie* case and Complainants' selective reading of the statute contradicts the clear language and intent of the law read in its

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<sup>8</sup> The Administrative Review Board has adopted the principle that where a statute fails to define the term "employee," the term "must be construed to incorporate the master-servant relationship as understood by common law agency doctrine." Boschuk v. J & L Testing, Inc., 1996-ERA-016, 97-020 at 2 (ARB Sept. 23, 1997), (citing Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322-23 (1992)).

entirety. There is no indication from the plain language of the Act, the legislative history, or from the subsequent case law related to enforcement of the Act that Congress intended the NRC to be, in effect, a “super-employer” for every licensee or contractor to which the Act applies. Under Complainants’ theory, the NRC would enter into a *de facto* employment relationship with every employee of every licensee, and thus the type of activity allegedly engaged in by the Complainants with respect to FPL would mean that liability automatically attaches to the NRC even when no direct employment relationship exists between Complainants and the NRC.<sup>9</sup> This theory is simply not supportable.

Additionally, in previous pleadings Complainants alleged that because the NRC was “required” to conduct investigations of FPL under 10 CFR §§ 30.7 and 50.7,<sup>10</sup> that “the NRC is an employer under the ERA.” See Complainants’ Reply to Order to Show Cause at 6. Although Complainants’ Initial Brief appears to now focus almost entirely on their untimely “application” for employment with the NRC as establishing an employment relationship, these previous arguments should be addressed briefly. Again, Complainants are misconstruing the Act and the NRC’s employee protection provisions. In no case does an alleged failure on the part of the NRC to investigate such allegations create the required employment relationship necessary for Complainants to establish a *prima facie* case against the NRC under the Act. Similarly, if the basis of Complainant’s theory is that engaging in protected activity alone (*i.e.*, raising a safety-

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<sup>9</sup> Complainant has asserted (albeit unsuccessfully) a similar argument before in Saporito, 1994-ERA-35. In that case, Complainant Saporito argued that a member of the law firm employed by Florida Power and Light retaliated against him by making disparaging comments about him to a former employer. The ARB noted that Saporito had done nothing to establish an employment relationship between he and the law firm, and that even if that essential element were overlooked, he still did not make out a *prima facie* case.

<sup>10</sup> The provisions of 10 CFR §§ 30.7 and 50.7, both of which are entitled “Employee protection,” reiterate that discrimination against an *employee* by a licensee is prohibited by section 211 of the Energy Reorganization Act. These sections also make clear that an employee who feels that they have been discriminated against may seek a remedy before the Department of Labor. See 10 CFR §§ 30.7(b) and 50.7(b). These sections also make clear that a violation of these provisions by a licensee may result in various penalties or enforcement action by the NRC against a licensee. See 10 CFR §§ 30.7(c) and 50.7(c).

related matter within the scope of the Act to the NRC) automatically creates liability for the NRC under the Act, Complainants' interpretation is not supported by the law.

In ruling on Complainants' various theories about the NRC as a "covered employer", the Judge stated, "Complainants cite to no authority in support of their position and with good reason: if their position were the law, NRC would be transformed into an employer, with liability for whistleblower retaliation, of every employee of a licensed power reactor in the country. There is no statute, regulation, or case that would permit such a broad interpretation of the term 'employer.'" Decision at 7. With respect to the argument that the NRC's alleged failure to conduct a "required" investigation makes the NRC a "covered employer," the Judge states, "Again, this is an overly broad interpretation of 'employer' that is without foundation." Id. Complainants' Initial Brief has provided no basis to overturn the ALJ's decision. Complainants have provided no legal support for any of their various theories, all of which run counter to the clear statutory language of the Act. Simply stated, absent an employment relationship there is no cause of action under the Act. The ALJ's granting of a summary decision on this point was proper and should be affirmed.

*c. Complainants Allegations Regarding Application for Employment with NRC Were Not Timely and Were Properly Dismissed; Allegations Fail to Meet Requirements for a Prima Facie Case*

For the first time in Complainants' Reply to the ALJ's Order to Show Cause (filed by Complainants May 29, 2009), Complainants claimed that on March 22, 2009, they "made an application for employment with the NRC as an independent contractor through the agency's website..." See Complainants' May 29 Reply at 7-8. This allegation appears to now be the primary focus of Complainants Initial Brief, but is nonetheless without merit.<sup>11</sup> As a preliminary

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<sup>11</sup> Complainants filed a subsequent complaint against the NRC on March 23, 2009, amended April 26, May 16, and June 4, 2009, regarding this same subject (alleged retaliatory failure of the NRC to

matter, this allegation, first raised in May 2009 regarding an "application" for employment made in March, 2009, is irrelevant to the instant complaints, which were filed November 22, 2008 and January 4, 2009. Complainants did not seek leave to amend their Complaints to add this issue, which was not investigated by the Area Administrator. Complainants are, in effect, trying to create a cause of action after-the-fact by claiming that they have since applied for employment with the Agency. The ALJ's Decision properly found this argument to be untimely and dismissed it. ALJ Decision at 6-7, 13. Other than the inapplicable "continuing violation" theory (discussed below), Complainants have provided no basis to disturb the ALJ's finding on this point.

Nonetheless, even if these allegations were considered, Complainants fail to make out a *prima facie* case that the NRC retaliated against them by failing to hire them. Other than a copy of the email sent to the NRC (see Enclosure 7 of the attachments to "Complainants' Reply to Order Permitting Additional Briefing" filed July 17, 2009), Complainants have not presented any evidence of a *prima facie* case such that this "application" brings him under the protection of the Act. This email does not relate in any way to an actual job opening or contracting opportunity, thus Complainants clearly fail to establish a *prima facie* case. Complainants' Initial Brief cites to numerous cases in which independent contractors were found to be protected by the Act. See Initial Brief at 10-13. While the NRC does not dispute that independent contractors can be protected by the Act, Complainants in this case are not, and have not provided a single example of how their situation is in any way comparable to the facts of any of the cases to which they have cited. Had the ALJ considered the issue on the merits, it too would have been appropriately adjudicated via summary decision.

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hire Complainant based on the March 22, 2009 "application"). OSHA dismissed that complaint on Sept. 9, 2009, and Complainants have requested a hearing before an ALJ (filed Sept. 17, 2009). See OSHA Case No. 4-1050-09-039. These complaints also allege that the NRC has violated the Act by failing to investigate various NRC licensees' refusal to hire Complainant.

Where a complainant alleges that the adverse action was the prospective employer's refusal to hire him, in addition to the elements of a *prima facie* case already outlined above, he must also establish: 1) that he applied and was qualified for a job for which the employer was seeking applicants; 2) that, despite his qualifications, he was rejected and 3) that, after his rejection, the position was either filled or remained open and the employer continued to seek applicants from persons of complainant's qualifications. Hasan v. Enercon Services, Inc., ARB No. 05-036, ALJ Nos. 2004-ERA-022, 027 (ARB May 29, 2009), (citing Hasan v. Department of Labor, 298 F.3d 914, 916-17 (10<sup>th</sup> Cir. 2002)). The burden-shifting framework outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), also applies in determining whether a complainant in an ERA case has established adverse action in the failure to hire. Samodurov, 1989-ERA-020, slip op. at 4. As noted above, contract companies do not have standing under the Act. See Demski, 2001-ERA-036, slip op. at 4-5. Thus, Complainant SEC would have no standing in any event. However, it is well established that applicants for employment, including independent contractors, are protected by the Act. See Samodurov, 1989-ERA-020.

Nothing the Complainant has filed to date (including his two responses to the Show Cause Order and the Initial Brief) address these key elements required by Hansan regarding an "applicant for employment." In fact, the only "evidence" presented the Complainant is the email requesting to be an independent contractor, and this was not offered by Complainants until their additional briefing in response to the Order to Show Cause. Based on the available evidence, Complainants' "application" was nothing more than an unsolicited request that has no relation to an actual job opening or contracting opportunity for which the NRC was seeking applicants. On this basis alone, Complainants' fail to demonstrate that they are protected by the Act. Simply stated, Complainants have not provided any information in any pleading to establish a *prima facie* case that they were denied employment by the NRC for a reason prohibited by the Act.

Finally, Complainants have offered no support for their argument that the NRC's alleged failure to hire constitutes a continuing violation. See Initial Brief at 12-13. As noted by the ALJ, Complainants misconstrue this doctrine. Decision at 7, note 2. They are trying to save a meritless complaint by claiming that a new (and equally meritless) complaint—namely the refusal to hire—is a “continuing violation.” To permit the Complainants' erroneous interpretation of the Act would permit anyone who has engaged in protected activity to create a cause of action against the NRC (or any other entity covered by the Act) after-the-fact simply by sending an unsolicited letter seeking a position as an employee or independent contractor. Such a theory is clearly not supported by the law. As indicated by the decision in Connecticut Light and Power Co cited by the ALJ in his decision, a continuing violation is intended to “shelter claims” from the 180-day limitations period:

Under the continuing violation standard, a timely charge with respect to any incident of discrimination in furtherance of a policy of discrimination renders claims against other discriminatory actions taken pursuant to that policy timely, even if they would be untimely if standing alone. Lambert v. Genesee Hosp., 10 F.3d 46, 53 (2d Cir.1993), *cert. denied*, 511 U.S. 1052, 114 S.Ct. 1612, 128 L.Ed.2d 339 (1994). A continuing violation exists where there is a relationship between a series of discriminatory actions and an invalid, underlying policy. See Cornwell v. Robinson, 23 F.3d 694, 703-04 (2d Cir.1994). Thus, in cases where the plaintiff proves i) an underlying discriminatory policy or practice, and ii) an action taken pursuant to that policy during the statutory period preceding the filing of the complaint, the continuing violation rule shelters claims for all other actions taken pursuant to the same policy from the limitations period.

Connecticut Light and Power Co. v. Secretary, 85 F.3d 89, 96 (2<sup>nd</sup> Cir. 1996). In this case, there is not a continuing violation. Rather, Complainants are trying to bootstrap disparate and meritless claims against the NRC into a cause of action under the Act without providing any proof of an underlying violation of the Act.

*d. The ALJ Properly Determined that the NRC's Decision Not to Take Enforcement Action Does Not Constitute Retaliation.*

In his opinion, the ALJ noted two additional reasons why summary judgment for the NRC was appropriate. First, the judge states, “[I]t is clear that [NRC’s] failure to take enforcement action against FPL is not retaliation within the meaning of the Act.” Decision at 7. Further the judge notes that the Department of Labor lacks jurisdiction over NRC enforcement decisions. Id. at 8. Complainants’ arguments on these points are without merit and the ALJ’s Decision should be affirmed.

Complainants’ had previously alleged that the NRC was “required” to conduct an investigation of FPL pursuant to 10 C.F.R. §§ 50.7 and 30.7. The implication of Complainants’ various arguments was that the NRC’s refusal to do so constituted a *per se* violation of the Act. Complainants do not address the jurisdictional issue in their Initial Brief. With respect to whether the NRC’s enforcement decision constitutes retaliation, Complainants cite to the Supreme Court’s decision in Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006), and conclude that the ALJ “failed to apply the relevant law...” Initial Brief at 15. What Complainants fail to understand about the Burlington Northern decision is that it still applies a “reasonable person” standard in determining whether or not an action has a retaliatory effect. See Burlington Northern, 548 U.S. at 68-69. This standard has been adopted by the ARB with respect to claims under the ERA. See Overall v. Tennessee Valley Authority, ARB No. 04-073, ALJ No. 1999-ERA-025, slip op. at 11 (ARB July 16, 2007) (complainants must prove that an action is “materially adverse,” that is, actions must have been harmful to the point that they could well have dissuaded a reasonable worker from engaging in protected activity). While this standard does not require a “tangible employment action,” as the ALJ’s decision indicates, it certainly requires more than the NRC declining to take enforcement action. Complainants have not shown that the NRC’s enforcement decision resulted in any harm to them, or that such a decision by the NRC could be “materially adverse” under a Burlington Northern framework. Under Complainants’ theory, the NRC would violate the Act every time it declines to investigate

a licensee or take an enforcement action, regardless of whether a petitioner suffered any actual harm as the result of the NRC's refusal to take action (and, apparently, regardless of whether or not there is any type of employment relationship between the parties). Complainants' Initial Brief offers only the same circular argument rejected by the ALJ, without any support (legal or factual) as to why the Judge's decision was improper: "...the ALJ failed to consider Complainants' allegation that the NRC's refusal to investigate was improperly influenced by Complainants' engagement in ERA protected activity for which the NRC was well aware. Such retaliatory action on the part of NRC would and could dissuade a reasonable worker from requesting enforcement action from the NRC." Initial Brief at 14. Complainants do not offer any evidence that they have been dissuaded from requesting enforcement action from the NRC. Further, Complainants subsequent "application for employment" contradicts the very notion that they dissuaded from interactions with the NRC.

Finally, the ALJ's Decision points out that the Department of Labor lacks jurisdiction over NRC enforcement decisions. Decision at 8. Complainants' do not address this holding directly in their Initial Brief; however, Complainants' entire case is predicated on the theory that the Department of Labor would essentially have oversight over NRC's enforcement decisions because any refusal to take enforcement action would give rise to a retaliatory cause of action under the Act.<sup>12</sup> As the ARB has held, this is not what is intended by the Act: "As we have reported, employees who have concerns about nuclear energy safety hazards should report them to the NRC, which has all the necessary legal authority to force nuclear energy employers to rectify safety problems. The Department of Labor does not have that authority under the Energy Reorganization Act." Griffith v. Wackenhut Corp., ARB No. 98-067, ALJ Case No. 97-ERA-52, slip op. at 13 (ARB Feb. 29, 2000). Complainants concede that the decision to initiate

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<sup>12</sup> As the ALJ observes in his opinion, Complainants seem to imply that had the NRC taken enforcement action, FPL might have agreed to enter into a business relationship. Decision at 7. The ALJ notes that the NRC's decisions on enforcement are unrelated to licensee hiring decisions.

enforcement action is “entirely within NRC’s discretion.” Initial Brief at 14. Nonetheless, Complainants fail to recognize that if the NRC’s refusal to take enforcement action were reviewable by the Department of Labor, such review would necessarily require a determination as to whether the refusal was based on the merits of the safety issues raised or retaliatory animus. Such an outcome is clearly not intended by the Act and is not supported by the Board’s interpretation of the law.

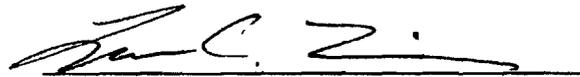
In sum, even if Complainants’ failure to establish a *prima facie* retaliation case could be overlooked, summary decision in favor of the NRC would still be appropriate. Complainants have not shown that a reasonable person would be dissuaded from requesting enforcement action simply because the Agency refused to take enforcement action. Further, the Department of Labor does not have jurisdiction to review the NRC’s enforcement decisions. Therefore, Complainants’ arguments that the NRC has violated the Act by declining to take the action urged by Complainants are without merit and Complainants have provided no legal basis to overturn the ALJ’s determinations on these points.

#### CONCLUSION

Complainants have not made a *prima facie* showing required by Subsection 211(b)(3)(A) of the Act with respect to these complaints, and thus the ALJ’s summary decision was proper. Complainants have not established that any type of employment relationship ever existed with the NRC. Complainants’ arguments that the NRC has violated the Act solely because of the alleged failure to investigate safety-related issues raised by Complainant with respect to Respondent FPL (whether under 10 CFR § 2.206 or 10 CFR §§ 30.7 and 50.7) are meritless and not consistent with the plain meaning of the Act. Regarding Complainants’ new claims that they applied for employment with the NRC on March 22, 2009, such an application is untimely and irrelevant to the claims at issue. The present claims were filed November 22, 2008 and January 4, 2009, well before Complainants’ say they applied for employment with the NRC.

Even if such an application were timely or relevant, Complainants have not provided any evidence that they can satisfy the criteria for a *prima facie* case to establish that he was an actual "applicant for employment" and thus protected by the Act. Complainants' Initial Brief reiterates meritless arguments without providing any legal support for the positions taken therein and does not specify in any meaningful way how the ALJ's decision is deficient.

For the foregoing reasons, the NRC respectfully submits that the ALJ's Decision and Order Granting Summary Decision and Dismissing Amended Complaint be affirmed in its entirety.



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**CERTIFICATE OF SERVICE**

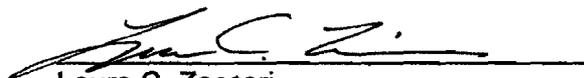
I hereby certify that a copy of the RESPONDENT U.S. NUCLEAR REGULATORY COMMISSION REPLY TO COMPLAINANTS' INITIAL BRIEF was sent on October 8, 2009 to:

By First Class Mail

Mr. Thomas Saporito  
Saporito Energy Consultants  
P.O Box 8413  
Jupiter, FL 33468-8413

By Overnight Mail. (Original and Four Copies)

Administrative Review Board  
U.S. Department of Labor  
200 Constitution Ave. NW  
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