

UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ADMINISTRATIVE REVIEW BOARD

In the Matter of:

ARB NO. 09-129

THOMAS SAPORITO and  
SAPORITO ENERGY CONSULTANTS,

ALJ NO. 2009-ERA-00006

DATE: 22 OCT 2009

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.

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COMPLAINANTS' REBUTTAL BRIEF IN RESPONSE TO RESPONDENT  
FLORIDA POWER & LIGHT COMPANY'S REPLY BRIEF

Complainants, Thomas Saporito and Saporito Energy  
Consultants, (Saporito or SEC or Complainants) hereby submit  
*Complainants' Rebuttal Brief in Response to Respondent Florida  
Power & Light Company's Reply Brief* (Brief) in the above-  
captioned matter and state as follows:

**LEGAL ARGUMENT AND ANALYSIS**

Respondent Florida Power & Light Company, et al. (FPL)  
argues in their Brief that "Complainants are not entitled to  
protections under the ERA because neither is an "employee" of  
FPL or NexEra." *Id.* at 14. However, Saporito is an employee  
under the ERA having been a former direct employee of Respondent

Florida Power and Light Company (FPL), *Connecticut Light & Power Co. v. Secretary of U.S. Dept. of Labor*, 85 F. 3d 89, 94 (2<sup>nd</sup> Cir. 1996). Since SEC is a legal entity under Internal Revenue Service (IRS) code as a subchapter "S" corporation, and since Saporito is the president and sole employee of SEC, FPL is an employer of SEC within the meaning of the ERA. SEC's status is well documented in public records as a subchapter "S" corporation and is readily available to anyone. Moreover, Since SEC and Saporito both made application to FPL for employment as Independent Contractors, FPL is a covered employer under the ERA of Saporito and SEC. *Michael Samodurov v. general Physics Corporation*, ALJ No. 89-ERA-20, Sec'y Decision and Order, (Nov. 16, 1993) and *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.

Next, FPL avers that the doctrine of *res judicata* prohibits Saporito from re-litigating this issue and that this issue has been conclusively resolved in FPL's favor. *Id.* at 18.

Complainant avers here that this issue is not subject to the doctrine of *res judicata* because Complainants' applications for employment at FPL as a Independent Contractor have never been previously adjudicated by the ARB to recollection and best knowledge of Complainants. Respondents appear to be slinging mud

at the wall in the hopes that some will stick? Notably, in *Thomas v. Arizona Public Serv. Co.*, 88-ERA-012 (Sec'y Sept. 25, 1993), the ARB found that the continuing violation theory applied and wrote that:

"Systematically excluding an individual from consideration for employment, by its very nature, is a continuing violation if it is based upon an employee's protected activity. *Egenrieder v. Metropolitan Edison Co./G.P.U.*, Case No. 85-ERA-23, Order of Remand, Apr. 20, 1987, slip op. at 4. In this case, [Complainant's former supervisor's] negative reference [about Complainant's performance, which the ARB found to be motivated by discriminatory animus, and which was made within 180 days of the filing of the complaint], to the extent that it is accepted as evidence of an ongoing decision to exclude [Complainant] from consideration for employment, is sufficiently similar in nature to [Complainant's] other allegations as to constitute a continuing violation. Slip op. at 7.

In the present case, FPL continues to discriminate against Saporito in violation of the ERA specifically because Saporito filed an ERA complaint against FPL with respect to [his] 1988 discharge from the FPL Turkey Point Nuclear Plant (TPN). Thus, FPL systematically excluded Saporito from consideration for employment, at least in part, because of his prior ERA protected activity. Notably, FPL has alleged in one or more ERA cases currently pending before the U.S. Department of Labor (DOL) the existence of a written "no-hire" policy where Saporito's name is somehow identified. Complainants' aver here that any such FPL policy would be inherently discriminatory and in violation of

the ERA serving to "blacklist" Saporito. Moreover, FPL has yet to produce the so-called "no-hire" policy to date to any presiding ALJ assigned to any case involving Saporito and FPL.

Next, FPL contends that *Samodurov* is not applicable to the instant action because "FPL had previously determined and communicated to Saporito was ineligible for rehire because of his termination for cause for insubordination in 1988. . ." *Id.* at 19. However, the issue of what exactly FPL communicated to Saporito is a genuine issue of material fact in "hot dispute" as Saporito has maintained that FPL desired recent related work experience similar to that performed at FPL's power plants and Saporito obtained that work experience as a result of FPL's communication via letter.

Here in the present case, as in *Samodurov*, Saporito and SEC were applicants for employment at FPL as Independent Contractors. Whether or not FPL was actually seeking to hire independent contractors is not relevant to determining whether Complainants are entitled to protection under the ERA as employees of FPL. Where Complainants were applicants for employment at FPL, they are covered employees within the meaning of the ERA. *Samodurov*. Moreover, to the extent that Saporito was a previous direct employee of FPL, Saporito is a covered employee of FPL under the ERA accordingly.

Next, FPL argues that Hay, Ross, Fernandez, and Hamrick are not Employers under Section 211 of the ERA. *Id.* at 19. However, individual FPL employees like Hay, Ross, Fernandez, and Hamrick may be covered employers under the ERA. *Faulkner v. Olin Corp.*, Case No. 85-SWD-3. In determining whether a contractor is an employee under *Faulkner*, the decision examines the degree of control or supervision by the respondent. *Michael Samodurov v. General Physics Corporation*, ALJ No. 89-ERA-20, Sec'y Decision and Order, (Nov. 16, 1993). Here, since FPL failed to hire Complainants, there is no evidence of the degree of control FPL employees Hay, Ross, Fernandez, and Hamrick would have had over Complainants' work. Therefore, the ARB is not precluded from making a determination that Hay, Ross, Fernandez, and Hamrick are covered employers within the meaning of the ERA at this stage of the proceeding. *Samodurov* at 4-5.

Next, FPL asserts that Complainants cannot show adverse employment action and that, "The law requires that, to establish an adverse employment action, a complainant must show that he suffered some tangible job consequence. . ." *Id.* at 20. Complainants clearly averred that FPL's conduct in making disparaging remarks in a pleading before the NRC Atomic Safety and Licensing Board (ASLB) seeking sanctions against Saporito, which FPL knew would be posted on a public website maintained by

the NRC, caused Complainants economic harm to the extent that their energy consulting business had not been able to capture clients as a result of FPL's conduct. Moreover, Complainants further alleged that FPL's adverse actions as described above, is retaliation within the meaning of the ERA and is actionable because it resulted in a tangible employment action which had a material adverse effect on Complainants' business opportunities resulting in economic harm to Complainants. See, *Overall v. Tennessee Valley Authority*, ARB No. 04-073, ALJ No. 1999-ERA-25 (ARB July 16, 2007); *Graf v. Wackenhut Services, L.L.C.*, 1998-ERA-37 (ALJ Dec. 16, 1999), *pet. For review withdrawn Graf v. Wackenhut Services, L.L.C.*, ARB Nos. 00-024 and 25 (ARB Feb. 16, 2000).

Notably, in *Graf v. Wackenhut Services, L.L.C.*, the ALJ found that "[t]he Tenth Circuit liberally defines the phrase 'adverse employment action' and 'takes a case-by-case approach to determining whether a given employment action is 'adverse.'" *Jeffries v. Kansas*, 147 F.3d 1220, 1232 (10<sup>th</sup> Cir. 1998) (employment action is not required to be materially detrimental)." The ALJ held, in relevant part, that:

. . . verbal interrogation and reprimand were sufficient to constitute adverse employment actions even though said actions did not actually have an adverse impact on the terms and conditions of the employee's employment. *Id.* Other examples of adverse

actions include "decisions that have demonstrable adverse impact on future employment opportunities or performances, demotions, unjustified evaluations or reports, transfer or reassignment of duties, [and] failure to promote." *Fortner v. Kansas*, 934 F. Supp. 1252, 1266-67 (internal citations omitted), *aff'd sub nom. Fortner v. Rueger*, 122 F.3d 40 (10<sup>th</sup> Cir. 1998). See also *Fortner*, 934 F. Supp. At 1266-67 ("[N]ot everything that makes an employee unhappy is an actionable adverse action." Speculative harm will not constitute adverse employment action. *Id.*

In the present case, Saporito made numerous employment applications at Exelon Corporation and at Progress Energy but has been rejected by both of those nuclear industry companies and alleges that FPL's conduct and actions in making public disparaging remarks about [h]im before the NRC caused employers Exelon Corporation and Progress Energy to reject Complainant's job applications at those companies.

Moreover, Respondents erred in applying a standard that is now outdated. Respondents aver that an alleged adverse action must rise to the level of a "tangible job consequence" in order to be considered actionable adverse action. However, the Supreme Court clarified that the appropriate standard is whether the actions were "materially adverse"; that is, "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." See, *Burlington Northern Ry. Co. v. White*, 548 U.S. \_\_\_\_\_, 126 S.Ct. 2405, 2409 (June 22, 2006) (addressing degree of impact that

employer's action must have on employee in order to be adverse under Title VII of Civil rights Act of 1964, 42 U.S.C.A. §2000e-3(a), and further noting that the reasonable worker must be assumed to be "in the [complainant's] position, considering 'all the circumstances'" ).

Here in the present case, FPL adverse actions taken against Complainants were materially adverse and harmful to the point that they could well dissuade a reasonable worker standing in Complainants' shoes from making or supporting a charge of discrimination.

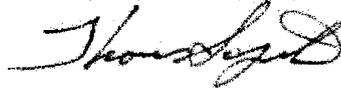
Next, FPL argues that they provided clear and convincing evidence that they would have taken the same action against Complainant Saporito absent his protected activity. *Id.* at 25. However, the record is devoid of even a scintilla of evidence to support FPL's assertion, not even a single affidavit or any documentary evidence exists to show clear and convincing evidence on the part of FPL. However, there are several genuine issues of material fact in "hot dispute" which must be resolved at a hearing through witness testimony and evidence.

#### **CONCLUSION**

Complainants established a valid prima facie case of discrimination and retaliation on the part of Respondents and made a valid showing of a nexus between FPL's illegal adverse

actions taken against them as a result of their ERA protected activity. In addition, Complainants established that FPL is their employer within the meaning of the ERA and that FPL took adverse actions against them solely because of their engagement in ERA protected activity and for no other reason. Thus, the ARB should vacate the ALJ's recommended dismissal and remand this matter for a hearing on the merits of Complainants' complaint accordingly.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY, that a copy of the foregoing document was provided on the 22st day of October, 2009, to:

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