

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ADMINISTRATIVE REVIEW BOARD

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

Complainants)

v.)

ARB Case No. 09-129

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

Case No.2009-ERA-00006

Respondents.)

NON-FEDERAL RESPONDENTS'
REPLY BRIEF

Respondent, FLORIDA POWER & LIGHT COMPANY (“FPL”), by and through its undersigned counsel on behalf of itself and NextEra Energy Resources, LLC (“NextEra”), Lewis Hay III, Mitchell S. Ross, Antonio Fernandez, and Steven Hamrick (collectively “Non-Federal Respondents”) and pursuant to the Administrative Review Board’s (“ARB’s”) “Notice of Appeal and Order Establishing Briefing Schedule” dated August 13, 2009, hereby files their Reply Brief in the above-captioned case.

For the reasons set forth herein, the Complaint filed in 2009-ERA-006 is utterly devoid of merit. As such, Administrative Law Judge (“ALJ”) Paul C. Johnson Jr. properly ruled in a well-reasoned Decision and Order Granting Summary Decision and Dismissing Amended Complaint

dated July 30, 2009 (“ALJ’s D&O”) that there was no issue of material fact and that Non-Federal Respondents were entitled to a decision in their favor as a matter of law. The ARB should affirm the ALJ’s grant of summary decision and the dismissal of the Complaint with prejudice.

Complainants have failed to offer even a scintilla of evidence to support essential elements of their allegations and have thus failed to establish the necessary elements of a *prima facie* claim under Section 211 of the Energy Reorganization Act of 1974, as amended, 42 USC § 5851 (“ERA”). Among the numerous fatal flaws in Complainants’ November 22, 2008 Complaint is that: 1) Complainant Saporito, who has not been employed by FPL since his termination for cause in 1988, is not an “employee” for purposes of the ERA; 2) Complainant Saporito Energy Consultants, Inc. (“SEC”) is not an employee under the ERA; 3) Complainants have not suffered any adverse employment action as a result of Non-Federal Respondents’ lawful activities, and; 4) Complainants have not proffered any evidence to support an inference that any causal link exists between the claimed protect activity and the complained-of actions.

Even if the ARB that concludes that the ALJ was incorrect in ruling that there was no genuine issue of material fact concerning any of these issues or that Complainants allegations, if assumed true, do not constitute a *prima facie* case of discrimination or retaliation under the ERA, Non-Federal Respondents have clearly demonstrated by clear and convincing evidence that Complainants’ protected activity, if any, was not a factor in FPL’s decision not to enter into a business relationship with Complainants and so Complainants are not, as a matter of law, entitled to the relief they seek under the ERA.

Therefore, Non-Federal Respondents respectfully request the ARB to affirm the dismissal this Complaint in its entirety, with prejudice, and states the following in support thereof:

BACKGROUND AND PROCEDURAL HISTORY

A. Complainant Saporito's Twenty (20) Year History of Specious Actions Against FPL.

Complainant Saporito's employment with FPL was terminated in 1988 for multiple acts of insubordination. In 1989, Saporito filed his first complaints with the U.S. Department of Labor's ("DOL's") Wage and Hour Administration¹ against FPL for the events which resulted in his 1988 termination of employment. In those complaints, Saporito separately alleged that he was discriminated against, 1989-ERA-007, and later terminated, 1989-ERA-017, in retaliation for engaging in certain activities protected by the ERA. Following an evidentiary hearing on the 1989 complaints, the ALJ issued a Recommended Decision and Order ("RD&O") in favor of FPL, dismissing the complaints. Saporito appealed the RD&O. On June 3, 1994, the Secretary of Labor ("Secretary") issued a Decision and Remand Order finding in favor of FPL regarding the allegations of harassment and retaliatory discipline in case 1989-ERA-007. Specifically, the Secretary found that FPL's discipline of Saporito was not causally related to any protected activity in which Saporito may have engaged. However, the Secretary disagreed with some of the ALJ's conclusions regarding case 1989-ERA-017 and remanded the case to the ALJ for a specific determination of whether FPL would have terminated Saporito's employment despite any protected activity.

Following the hearing on remand, the ALJ issued a Remand RD&O on October 15, 1997 in favor of FPL and again recommended dismissal of the complaint. In the Remand RD&O, the

¹ At the time of Saporito's original (then Section 210) ERA complaints against FPL, the agency charged with investigating such complaints was DOL's Wage and Hour Administration. Investigative responsibility for ERA complaints has since been transferred to DOL's Occupational Safety and Health Administration ("OSHA").

ALJ held that there was “overwhelming” evidence that Saporito was repeatedly insubordinate, “insolent,” “*blatantly lied*” and “*clearly lied*” to management, and engaged in a “mockery of management’s role.” Remand RD&O at 32–34, 40 (emphasis in original). Saporito appealed the ALJ’s Remand RD&O and, on August 11, 1998, the ARB issued a Final Decision and Order affirming the ALJ’s decision and dismissing the complaint. Saporito v. Florida Power & Light Co., 1989-ERA-017, 98-008 (ARB Aug. 11, 1998) (“ARB-1998”). Saporito then appealed the ARB’s decision to the Eleventh Circuit, which affirmed the ARB’s decision, and subsequently denied Saporito’s motion for rehearing *en banc*. Saporito v. U.S. Dep’t of Labor, 192 F.3d 130 (11th Cir. 1999) (*per curiam*), *reh’g en banc denied*, 210 F.3d 395 (11th Cir. 2000) (unpublished table decision).

On January 25, 2004, more than five years after the ARB’s final decision in ARB-1998, and four years after the Eleventh Circuit’s affirmance of that decision, Saporito filed a Motion for Reconsideration with the ARB of its decision in ARB-1998. On May 12, 2004, Saporito filed a Motion for New Trial with the ARB. On or about June 7, 2004, Saporito filed a Supplemental Motion for Reconsideration with the ARB. The ARB denied Saporito’s motions and dismissed the case, finding that the Eleventh Circuit’s adjudication of the complaints in 1989-ERA-007 and 1989-ERA-017 in 1999 and 2000 was final on the merits and, therefore, any further proceedings were barred by the doctrine of *res judicata*. Saporito v. Florida Power & Light Co., 1989-ERA-017, 04-079 (Dec. 17, 2004) (“ARB-2004”).

On or about February 9, 2005, Saporito petitioned the Eleventh Circuit for review of the ARB’s decisions in ARB-2004 and ARB-1998. FPL’s Motion to Dismiss that petition on grounds of *res judicata* was granted by the Eleventh Circuit on June 2, 2005. Saporito moved

for reconsideration of the dismissal, which the Eleventh Circuit denied on July 21, 2005. Saporito filed a Petition for Writ of Certiorari with the U.S. Supreme Court on or about October 17, 2005. That Petition was denied on January 28, 2006. Saporito v. U.S. Dept. of Labor, No. 05-10749-DD (11th Cir. Jun. 2, 2005), reh'g denied (Jul. 21, 2005), cert. denied, 546 U.S. 1150 (2006).

Completely undeterred by the previous two rulings against him, on August 10, 2008 (some 20 years after the events leading to his original complaints against FPL), Saporito filed a “Motion for Reconsideration to Bring the Ends-of-Justice” with the Eleventh Circuit in which he asked the court to re-visit its previous decisions in the challenge to the 1988 termination of employment. The court declined to entertain the motion as untimely filed. In summary, each and every one of Saporito’s allegations over the past 20 years that his termination of employment by FPL in 1988 violated the ERA has been completely rejected.

However, in addition to this direct line of complaints (and his multiple attempts to re-litigate the 1988 termination as described further below), Saporito has also filed numerous other frivolous complaints against FPL which he claimed either arose out of or related to his 1988 termination. Every single one of those complaints were dismissed at the investigative stage, by an ALJ, and ultimately by the Secretary or the ARB. See, e.g., Saporito v. Florida Power & Light Co., 1990-ERA-027, -047 (Sec’y Aug. 8, 1994); Saporito v. Florida Power & Light Co., 1993-ERA-023 (Sec’y Sept. 7, 1995); Saporito v. Florida Power & Light Co., 1994-ERA-035 (ARB Jul. 19, 1996). In 1994-ERA-035, the ARB not only summarily dismissed Saporito’s complaint as frivolous, it, most importantly for purposes of this case, found in 1996—13 years ago—that Saporito was not an employee of FPL.

In July 2005, at about the same time Saporito was asking the Eleventh Circuit to reconsider its 1999 refusal to overturn the ARB's rulings in ARB-1998, Saporito submitted a flurry of online job applications with FPL. In response to a request from Saporito to "investigate" the reasons he had not been re-hired in 2005, FPL sent him a letter reminding him that his 1988 "termination from employment from FPL was 'for cause'." The letter further reminded Saporito that he had been found to be repeatedly insubordinate, and additionally, found by a DOL ALJ to have "blatantly lied" to FPL management, and that "employees terminated for cause as a result of insubordination are not eligible for rehire with FPL." This letter, along with the application/rejection fact pattern, served as sole the basis for Saporito's 2005 Complaint alleging discrimination against FPL (which he voluntarily withdrew at both the investigation and appeal stages of the process). See Saporito v. Florida Power & Light Co., 2006-ERA-008 (ALJ Mar. 24, 2006).

On May 18, 2008, Saporito again applied for re-employment with FPL by submitting applications for four different positions posted on FPL's external website. One of the postings was withdrawn by FPL on May 20, 2008 and was instead posted on FPL's internal application system for bargaining unit employees. Saporito was not selected for either of the two positions for which FPL had evaluated his qualifications and, on July 4, 2008, Saporito filed a complaint with DOL alleging that FPL retaliated against him in violation of Section 211 of the ERA for engaging in protected activity during his initial employment with FPL twenty years before. OSHA investigated the matter and, on July 30, 2008, dismissed the case finding that Saporito's claim was time-barred.

On or about August 5, 2008, Saporito filed an appeal of the OSHA finding. On October 2, 2008, the ALJ dismissed the Complaint, ruling that:

[The statute of limitations for filing an ERA complaint] began to run for the Complainant when he was first informed of the “no rehire for employees terminated for insubordination” policy, which was, at the very latest, in December, 2005. There can be no doubt that the Complainant was well aware of the grounds for the decision not to rehire him since it was clearly and concisely communicated to him at the time by the letter he admits receiving. Complainant was aware of the policy and did not follow through with his alleged claim within the required statutory time period. No amount of subsequent online applications can resuscitate the original claim he failed to pursue.

Complainant did not file this complaint until July 4, 2008—over two and one-half years after the alleged discriminatory act, and well outside of the time limitations imposed by the statute.

Decision and Order Dismissing Complaint, 2008-ERA-014, at 4 (ALJ Oct. 2, 2008)

(emphasis in original) (footnote omitted) (appeal pending to ARB). Continuing, the ALJ also ruled that:

It would be unreasonable and impractical to allow an unlimited number of claims based on this set of facts, as proposed by the Complainant. The laws relating to Whistleblowers were not designed for that type of obvious and profound abuse. Theoretically, under Complainant’s argument, a discharged employee could apply hourly (or more frequently, if desired) to his or her former employer by use of the online application process and “create” new adverse actions each time. This would result in a never-ending stream of meritless litigation that would effectively put the courts into overload.

Id. (emphasis added).

In its Motion to Dismiss filed with the ALJ in 2008-ERA-014, FPL asked the ALJ to impose sanctions against Saporito. Specifically, FPL asked DOL to issue an order barring Saporito from filing any further ERA Complaints against FPL which in any way related to his 1988 termination for cause. FPL’s request was based on twenty years of Saporito’s meritless attempts to re-litigate his 1988 termination. Ruling on the sanctions aspect of FPL’s Motion, the

ALJ ruled that, “[u]nfortunately, this Court is not empowered to issue sanctions as requested by Respondent,” and that “Respondent must look to those civil remedies available in federal and state courts of general jurisdiction for relief.” However, the ALJ granted FPL’s request to dismiss the complaint. Saporito v. Florida Power & Light Co., 2008-ERA-014 (ALJ Oct. 2, 2008).

Saporito has appealed the ALJ’s Decision and Order Dismissing Complaint to the ARB, Case No. 09-009, and FPL has cross-appealed on the issue of whether the ALJ has the authority to sanction Complainant. Case No. 09-010. These appeals are fully briefed and are currently pending before the ARB.

B. Procedural History of the Instant Proceeding.

On August 1, 2008, Saporito, in his alleged capacity as “President” of SEC, wrote a letter to Lewis Hay III, Chairman of the Board of Directors and Chief Executive Officer of FPL Group, Inc. (FPL’s and NextEra’s parent company), proposing a “partnership” of an ill-defined nature. The letter began with the following paragraph:

My name is Thomas Saporito and I am a former employee of the Florida Power & Light Company, (“FPL”). I was employed at FPL’s Turkey Point nuclear plant prior to being fired after I had raised safety issues to the U.S. Nuclear Regulatory Commission, (“NRC”) about FPL’s nuclear operations. My employment at FPL lasted about 7-years and during that time, I gained a wealth of knowledge about the operation of nuclear power plants. Since then I have continued to bring safety concerns to the NRC about FPL’s nuclear operations such as the current matter before the NRC Atomic Safety & Licensing Board (“ASLB”) regarding a NRC Confirmatory Order with respect to the FPL St. Lucie nuclear plant.

On August 20, 2008, FPL's Vice President and Associate General Counsel, Mitchell S. Ross, sent Saporito a one page response to the August 1, 2008 proposal² which explained that:

[B]ased on the reasons for your termination from employment by FPL, you are not only ineligible for rehire as an employee, but the Company has also decided that you would be an unsuitable business partner. Further support for this conclusion is the fact that you have no apparent expertise in the energy efficiency field. According to the resumes that you have [previously] submitted to FPL, you have not held a job in the energy field in the past 15 years.

In other words, FPL's response clearly set out the reasons FPL declined to enter into the proposed partnership—reasons that had nothing whatsoever to do with Complainant's historical protected activity.

Complainant filed his initial Complaint against Respondents FPL, Hay, and Ross on November 22, 2008, claiming that FPL's refusal to accept Complainant's unilateral and unsolicited request for employment and Hay's and Ross' alleged roles as FPL's representatives somehow violated the ERA. Complainant then amended his Complaint on January 4, 2009 to include NextEra, Fernandez, and Hamrick (attorneys for FPL and NextEra Energy Resources, LLC, an affiliate of FPL, formerly known as FPL Energy, LLC), and the NRC as Respondents. Complainants failed to cite any legal authority for adding the additional parties to their amended Complaint, but have since argued that the amendment was somehow based on FPL's and

² Complainants refer to and quote a portion of FPL's August 20, 2008 letter in their original complaint, but did not attach it to the complaint. In their January 16, 2009 amended Complaint, Complainants simply refer to their previous allegation that FPL's refusal to enter into the unsolicited contractual partnership was discriminatory. However, FPL formally submitted both Complainants' August 1, 2008 proposal and FPL's August 20, 2008 response as exhibits to its June 3, 2009 Response to Complainant's Reply to Order to Show Cause. The ALJ cited FPL's inclusion of this evidence as the reason he construed the June 3, 2009 Response as a Motion for Summary Decision. See ALJ Order Permitting Additional Briefing, dated June 8, 2009. Accordingly, this evidence, which Complainants had ample opportunity to address, was properly before the ALJ and was part of the administrative record when the ALJ's D&O which is the subject of this appeal was issued.

NextEra's opposition to Complainants' attempts to intervene in, and seek sanctions regarding, several regulatory proceedings before the NRC involving various FPL/NextEra nuclear power plants.³ Complainant's January 4, 2009 amendment resulted in the present, omnibus Complaint.

On April 3, 2009, OSHA dismissed the Complaint, finding that: 1) "Complainant and his company, SEC, failed to show that they have suffered any tangible adverse employment action as a result of actions taken by FPL and [NextEra]...," 2) "Complainant cannot pursue a complaint under Section 211 of the ERA against FPL employees Antonio Fernandez, Lewis Hay III, Steven Hamrick, and Mitchell S. Ross because they are not 'Employers' as defined by the Act;" 3) "Complainant has not been employed by FPL since his termination for cause in 1988 is [sic] not an 'employee' as the term is used in the ERA...;" and 4) "Complainant is not now, and has never been, an employee of NextEra (formerly FPLE)...". OSHA also found that the NRC was not an employer under the ERA and dismissed the Complaint as to the NRC.

Complaint appealed the OSHA Finding on April 10, 2009, and on April 30, 2009 ALJ Johnson *sua sponte* issued a Order to Show Cause in which he directed Complainants to "show cause why their Complaint should not be dismissed for failure to state a claim upon which relief can be granted." NRC filed its response on June 16, 2009. On June 8, 2009, ALJ Johnson, after interpreting FPL's June 4, 2009 Response to Complainants' Reply to Order to Show Cause as a Motion for Summary Decision, issued an Order granting the non-FPL parties an opportunity to

³ See *In re* Florida Power & Light Co., Turkey Point Nuclear Plant, Units 3 and 4, ASLB No. 08-869-03-OLA-BD01 (Oct. 14, 2008); *In re* FPL Energy Seabrook, LLC Seabrook Station, Unit 1, ASLB No. 08-872-02-LA-BD01 (Oct. 14, 2008); *In Re* FPL Energy Point Beach, LLC, Point Beach Nuclear Plant, Unit 1, ASLB No. 08-870-01-LA-BD01 (Oct. 14, 2008). Every one of Complainant's attempts to intervene in these NRC licensing actions was denied by the NRC as baseless.

respond to FPL's Motion. Saporito and SEC filed a response on July 17, 2009. On July 30, 2009, the ALJ granted summary decision in favor of all Respondents. The ALJ ruled, in relevant part, that: "Saporito does not successfully allege or provide evidence of retaliation against him as an individual," ALJ's D&O at 10, that "FPL's decision not to enter into a business relationship with [Complainants] arose from their determination that Complainants would be unsuitable as an employee or as a business partner," ALJ's D&O at 11, and that "FPL has shown by clear and convincing evidence that they would have declined [Complainants'] proposal even without the protected activities by Saporito." *Id.* Complainants have appealed the ALJ's rulings to the ARB.

LEGAL ANALYSIS

A. Jurisdiction and Standard of Review.

The ARB has jurisdiction to review the ALJ's recommended decision pursuant to 29 CFR § 24.110 and Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the Board the Secretary's authority to review cases under the statutes listed, including the ERA). The standard of review for factual determinations made by the ALJ is the "substantial evidence" standard, but because neither the ERA nor the implementing regulations specify the ARB's standard of review for the ALJ's conclusions of law, the proper standard is one of *de novo* review. See 5 USC § 557(b). See also Overall v. Tennessee Valley Auth., ALJ No. 1997-ERA-053, ARB No. 98-111, -128 (ARB Apr. 30, 2001).

The ARB should affirm the ALJ's July 30, 2009 Decision and Order Granting Summary Decision and Dismissing Complaint because it is properly founded on both the facts and law as applied to this case.

B. The Summary Decision Standard.

Summary decision in an ERA case may be granted where, as here, there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. See 29 CFR §§18.40–.41; Howard v. Tennessee Valley Authority, 1990-ERA-024 (Sec'y July 3, 1991). Once the moving party has submitted its motion for summary decision, the non-moving party must present affirmative evidence in order to defeat a properly supported motion for summary decision; it is not enough that the evidence consists of the non-moving party's own affidavit or sworn deposition in opposition to the motion for summary decision. See 29 CFR §18.40(c). See also Cunningham v. Tampa Elec. Co., 2002-ERA-024 (ALJ Dec. 18, 2002); Flor v. U.S. Dep't of Energy, 1993-TSC-001 at 10 (Sec'y Dec. 9, 1994) (citing Anderson v. Liberty Lobby, 477 U.S. 242, 247 (1986)); Gillian v. Tenn. Valley Auth., 1991-ERA-031, -034 (Sec'y Aug. 28, 1995).

The non-moving party “may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.... [T]he party opposing summary judgment must present *affirmative evidence* in order to defeat a properly supported motion for summary judgment.” Anderson, 477 U.S. at 256–57 (emphasis added). See also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Carteret Sav. Bank, P.A. v. Compton, Luther & Sons, Inc., 899 F.2d 340, 344 (4th Cir. 1990). The non-moving party's evidence, if accepted as true, must support a rational inference that the substantive evidentiary

burden of proof could be met. Bryant v. Ebasco Servs., Inc., 1988-ERA-031 (Sec’y July 9, 1990). If the non-moving party “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial,” there is no genuine issue of material fact and the movant is entitled to summary judgment. Celotex, 477 U.S. at 322–23.

C. Summary Decision Was Properly Granted Because Complainants Failed to Make a Sufficient Showing to Establish the Existence of a *Prima Facie* Case of Retaliation.

To state a *prima facie* case under the ERA, Complainants must establish that they are employees under the ERA; that the respondents are employers under the ERA; and each of the following elements:

1. That he or she engaged in protected conduct;
2. That the employer was aware of that conduct;
3. That the employer took some adverse employment action against him or her; and
4. Further evidence sufficient to raise an inference that the employee’s protected activity was a contributing factor in the adverse employment decision.

Macktal v. U.S. Dep’t of Labor, 171 F.3d 323, 327 (5th Cir. 1999); Mosley v. Carolina Power & Light Co., 1994-ERA-023 (ARB Aug. 23, 1996); Dartey v. Zack Co., 1982-ERA-002 (Sec’y Apr. 25, 1983); Zinn v. University of Mo., 1993-ERA-034, at 3-4 (Sec’y Jan. 18, 1996) (citing Simon v. Simmons Food, Inc., 49 F.3d 386, 389 (8th Cir. 1995)). Mere inferences, assertions, or suppositions are insufficient. See Mosley, 1994-ERA-023.

In this case, Complainants fail to state—much less assert an ability to prove—a *prima facie* case under the ERA. Specifically, Complainants cannot show that they are entitled to the

protection afforded by the ERA because neither is an employee of FPL or NextEra. Saporito has not had any form of an employment relationship with FPL for the past *twenty one years* and SEC cannot be an employee of FPL as a matter of law. Complainants further cannot show that they have suffered any adverse employment action as a result of FPL's refusal to accept their unsolicited request for employment or from FPL's and NextEra's lawful petition of administrative redress before the NRC. Furthermore, assuming, *arguendo*, that adverse action occurred, Complainants have failed to allege evidence sufficient to raise an inference that Complainants' claimed protected activity was a contributing factor in the adverse employment action.

1. Complainants Are Not "Employees" under Section 211 of the ERA and are Therefore Not Entitled to Protection under the ERA.

Complainants are not entitled to protection under the ERA because neither is an "employee" of FPL or NextEra. While the scope of "employees" protected under the ERA is generally construed to include "former employees," see Connecticut Light & Power Co. v. Secretary of U.S. Dept. of Labor, 85 F.3d 89, 94 (2d Cir. 1996), this extension has only been applied whenever the alleged discrimination "arose out of" the employment relationship. EEOC v. Cosmair, Inc., L'Oreal Hair Care Div., 821 F.2d 1085, 1088 (5th Cir. 1987). See also Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 198–200 (3d Cir. 1994) (Title VII, Civil Rights Act of 1964); Passer v. American Chem. Soc'y, 935 F.2d 322, 330–31 (D.C. Cir. 1991) (Age Discrimination in Employment Act); Sherman v. Burke Contracting, Inc., 891 F.2d 1527, 1531–32 (11th Cir.), cert. denied, 498 U.S. 943 (1990) (Title VII).

The United States Supreme Court has held that where Congress fails to define the term “employee” in Federal employment discrimination statutes, the term must be construed to incorporate the master-servant relationship as understood by common law agency doctrine. See Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 348 (1992). The DOL’s test for determining whether a Complainant is a “covered employee” under the ERA is the application of the common law agency principles as set forth in Darden. See Boschuk v. J & L Testing, Inc., 1996-ERA-016, 97-020 at 2 (ARB Sept. 23, 1997). The Darden test enumerates a laundry list of criteria to be considered in determining an individual’s status as an “employee:”

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 348 (citing Community for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989)). Both the Supreme Court and the DOL have cautioned that “no shorthand formula or magic phrase that can be applied to find the answer ... all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” NLRB v. United Ins. Co. of America, 390 U.S. 254, 258 (1968). Where the Darden factors are not satisfied, dismissal is required. See Varnadore v. Oak Ridge Nat’l Lab., 1995-ERA-001 at 10 (ALJ Sept. 20, 1995), aff’d (ARB June 14, 1996); Plumlee v. Corp. Express Delivery Sys., Inc., 1998-TSC-008, 99-051 (ARB June 8, 2001).

Applying the Darden test to Complainants' unsolicited request for a contract with FPL results in the inescapable conclusion that neither Complainant is an employee of either FPL or NextEra. Neither FPL nor NextEra controlled the manner and means by which Complainants determined to send the unsolicited request; the skill with which they pursued that request; provide resources, instrumentalities, or tools for Complainants' utilization; did not specify Complainants' work location or duration; had no right to assign Complainants additional projects; provided them no compensation or benefits for the activities; played no part whatsoever in Complainants' hiring and paying of assistants; did not control whether the activities were part of Complainants' regular business; and neither FPL nor received any tax benefits for Complainants' activities.

Similarly, applying the Darden standards to Complainant's assertion regarding their attempts to intervene in FPL's and NextEra's regulatory proceedings before the NRC results in this same conclusion—neither Complainant is an employee of either FPL or NextEra. Neither FPL nor NextEra controlled the manner and means by which Complainants determined which petitions to file; the skill with which they pursued these activities; provide resources, instrumentalities, or tools for Complainants' utilization; did not specify Complainants' work location or duration; had no right to assign Complainants additional projects; provided them no compensation or benefits for the activities; played no part whatsoever in Complainants' hiring and paying of assistants; did not control whether the activities were part of Complainants' regular business; and neither FPL nor NextEra received any tax benefits from Complainants' activities.

Complainant Saporito is not also entitled to the extension sometimes granted to former employees under the Connecticut Light & Power standard. Saporito has not been employed by FPL since 1988. This is a much longer timeframe (20 years) than the 6 years between the time of termination and the complaint filed in a 1994 case filed by Complainant against FPL in which the ARB held that that Saporito was not an FPL employee for purposes of the ERA. See Saporito v. Florida Power and Light Co., 1994-ERA-035 at 4 (ARB Jul. 19, 1996).

The lack of any causal relationship between Complainants' unsolicited request for contract employment and Saporito's status as a former employee of FPL is evidenced by the fact that Complainants' proposal included an offer to perform work that Saporito has, to the best of FPL's and NextEra's knowledge, never performed for anyone, much less for FPL or NextEra. Because Complainants' unsolicited proposal did not "arise from" Saporito's employment with FPL some twenty one years ago, Saporito is not entitled to the protections afforded to former employees under the Connecticut Light & Power standard.

Similarly, the lack of causal relationship between Saporito's former employment with FPL and Complainants' submittal of enforcement petitions with the NRC regarding FPL and NextEra facilities and employee is evidenced by the fact that Complainants have filed a series of such petitions concerning facilities which Saporito has, to the best of FPL's knowledge, never visited or even seen, much less been employed at.⁴ Because Complainants' filing of administrative petitions for hearings at nuclear facilities all across the country does not "arise

⁴ As explained above, the requests to intervene in NRC proceedings were made in proceedings involving FPL affiliates FPL Energy Point Beach, LLC (Wisconsin) and FPL Energy Seabrook, LLC (New Hampshire) (FPL Energy is now known as NextEra Energy). Saporito lives more than 1,000 miles from each of the nuclear plants at issue in those cases and each of these petitions was dismissed by the NRC's Atomic Safety and Licensing Board as baseless.

from” Saporito’s employment with FPL some 20 years ago, Saporito is, again, not entitled to the protections afforded to former employees under the Connecticut Light & Power standard.

Furthermore, the doctrine of *res judicata* prohibits Saporito from re-litigating this issue. See Muino v. Florida Power & Light Co., 2006-ERA-002, 2006-ERA-008, 06-092, 06-143 (ARB Apr. 2, 2008) (“Collateral estoppel, or “issue preclusion,” is a concept included within the doctrine of *res judicata*, which “refers to the effect of a judgment in foreclosing a relitigation of a matter that has been litigated and decided.”) (quoting Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984)), aff’d sub nom. Muino v. Dept. of Labor, No. 08-13005-BB (11th Cir. Apr. 28, 2009) (unpublished); see also Univ. of Tenn. v. Elliot, 478 U.S. 788, 797-99 (1986) (when an administrative agency acts in a judicial capacity to resolve issues of fact which the parties before it have had an adequate opportunity to litigate, application of *res judicata* principles is appropriate). In this case Saporito has had multiple opportunities to assert before OSHA (and DOL’s Wage and Hour Administration before ERA cases were assigned to OSHA), an ALJ, and the ARB (and the Secretary before the existence of the ARB) that he is an employee of FPL. That issue has been conclusively resolved in FPL’s favor.

With respect to SEC, Complainants have not even *alleged* that there is or has ever been any employment relationship between SEC and either FPL or NextEra—nor could there ever be. The only possible relationship between these parties would be one of employer-contractor and the law interpreting the whistleblower protection provisions of the ERA is crystal clear: Contract companies are *not* employees and so are *not* covered by the ERA. See Demski v. Indiana Michigan Power Co., 2001-ERA-036, 02-084 at 3 (ARB Apr. 9, 2004) (“[E]ssential 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.”) (internal citations omitted).

In his Reply to the ALJ’s Show Cause Order at pages 4–6, Complainants cited the Secretary’s Decision and Order in Samodurov v. General Physics Corp., 1989-ERA-020 (Sec’y Nov. 16, 1993) to support their assertion that, as an applicant for employment with FPL, Saporito is an employee of FPL under the ERA. However, the facts in the Samodurov case are very different from Complainants’ situation and are easily distinguishable.

In Samodurov, the Secretary held that job applicants seeking hire as independent contractors *can* be covered employees under the ERA. Samodurov was a first time job applicant with the respondent, who did not hire Samodurov because of alleged time sheet discrepancies with another employer. In this case, however, Saporito is the furthest thing from a first time job applicant. As explained above, FPL had previously determined and communicated to Saporito was ineligible for rehire because of his termination for cause for insubordination in 1988 which has been upheld by DOL and the federal courts. For these reasons, the ALJ properly concluded that there is no genuine issue of material fact and FPL and NextEra were entitled to prevail as a matter of law that Complainants are not “employees” of FPL or NextEra for purposes of the ERA.

2. Respondents Hay, Ross, Fernandez, and Hamrick are not “Employers” Under Section 211 of the ERA.

Although the term “employee” is not defined by the ERA, the term “employer” clearly is. Section 211 of the ERA defines “employer” to include: (A) a licensee of the [NRC] or of an

agreement State . . . , (B) an applicant for a license from the [NRC] or such an agreement State; (C) a contractor or subcontractor of such a licensee or applicant; and (D) a contractor or subcontractor of the Department of Energy 42 U.S.C. § 5851(a)(2). This is an extensive list to be sure, but the one thing that is beyond argument is that employees of employers are not themselves employers. See Saporito v. Florida Power and Light Co., 1994-ERA-035 (ARB Jul. 19, 1996).

Despite the fact that Saporito has attempted (and failed) on other occasions to include individuals and unrelated parties in his meritless complaints, see, e.g., id., Complainants did not even make an attempt to justify the inclusion of the Chief Executive Officer of FPL's parent company (Hay) or its in-house counsel (Ross, Fernandez, and Hamrick) in this Complaint. As there is no legal basis for having included Hay, Ross, Fernandez, or Hamrick in the Complaint, and the ERA does not permit Complainants to allege otherwise, the ALJ properly held that there was no genuine issue of material fact and the individual Respondents were entitled to prevail as a matter of law that they are not employers of Complainants.

3. Complainants Cannot Show Adverse Employment Action.

Complainants have also failed to establish that they suffered adverse employment action, an essential element of their *prima facie* case. The law requires that, to establish an adverse employment action, a complainant must show that he suffered some tangible job consequence. See Robichaux v. American Airlines, 2002-AIR-027 at 5 (ALJ May 2, 2003). "Possible tangible job consequences include termination, demotion, or decrease in salary, benefits, responsibilities or title." Id. See also Oest v. Illinois Dep't of Corrections, 240 F.3d 605 (7th Cir. 2001)

(“Absent a showing of tangible consequences, mere criticism or negative performance evaluations cannot be considered adverse action.”)

There are two independent reasons why Complainants have not suffered adverse employment action from FPL’s decision not to enter into a business relationship with them. First, FPL is under no obligation to accept Complainants’ unsolicited business offer. Accordingly, Complainants have suffered no harm and have failed to establish an essential element of their Complaint. Second, even if Complainants’ unsolicited proposal was entitled to some sort of consideration (which it was not), FPL has previously communicated to Saporito in 2005 that he is not eligible for rehire. FPL’s explanation that it does not want to do business with Saporito—a former employee who was terminated for cause—is entirely legitimate, and does not violate the ERA. To the extent that Complainants are now challenging FPL’s “no-rehire” position as to Saporito, such challenge is also well outside the 180-day limitations period in the ERA. Saporito v. Florida Power & Light Co., 2008-ERA-0014 (ALJ Oct. 2, 2008 at 3–5) (appeal to ARB pending). Furthermore, FPL’s explanation that even if Saporito were not personally objectionable, he had no apparent expertise in the energy field and had not worked in the energy field in the past 15 years and is therefore not qualified to perform the proposed work for FPL, is entirely factual and legitimate, and does not violate the ERA.

Complainants also lament FPL’s and NextEra subsidiaries’ opposition to Complainants’ vexatious attempts to intervene in regulatory proceedings before the NRC as violative of the ERA. FPL and NextEra’s petitioning of the government for redress from Complainants’ frivolous actions is itself protected activity beyond the purview of the ERA. Saporito v. Florida Power & Light Co., 2009-ERA-001 (ALJ Mar. 5, 2009 at 9) (appeal to ARB pending) (“A

respondent...has the right to petition for relief appropriate to the circumstances in a proceeding before a federal agency”); Saporito v. Florida Power & Light Co., 1994-ERA-035 (ALJ Apr. 5, 1995) (FPL’s response to Complainant’s NRC enforcement petition is privileged under the First Amendment to the U.S. Constitution), aff’d on other grounds, (ARB Jul. 19, 1996).⁵ As the ALJ noted in a case that is virtually identical to the instant case, the Seventh Circuit Court of Appeals has ruled that:

The First Amendment guarantees defendants right to enlist the government on their side of the dispute. That this petitioning activity may have had incidentally an adverse effect on [plaintiff], that defendants knew this and intended such a result, has no effect on the First Amendment’s protection as long as the activity represents a genuine attempt to influence governmental action.

Saporito at 12 (ALJ Apr. 5, 1995) (quoting HAVOVO of Am. v. Hollobow, 702 F.2d 643, 650 (7th Cir. 1983)).

In the cited 1994 complaint, Saporito—exactly as he is doing here—alleged that FPL’s statements made to the NRC in response to an enforcement petition constituted “discrimination.” The ARB in that case put it bluntly: “This complaint is frivolous,” id. at 3, and the ARB’s reasoning in that case is entirely applicable here:

It is true that [FPL] made unflattering statements about Saporito in its NRC response. However, Saporito has not alleged that these statements adversely affected his compensation, terms, conditions, and privileges of employment. As a matter of law, therefore, [FPL’s] comments about Saporito in the NRC response cannot be found to be retaliatory.

Id. at 4 (emphasis added).

⁵ In its 1996 decision involving Complainant, the ARB did not overrule the ALJ’s finding that FPL had a First Amendment’s right to petition the government for a redress of the harm caused by Complainant. The ARB simply concluded that Complainant’s allegations were frivolous as a matter of law and so the ARB never reached the ALJ’s First Amendment analysis. *See* Final Decision and Order (ARB Jul. 19, 1996) at n. 6.

Complainants allege in their Initial Brief that “the ALJ failed to properly consider what affect [sic] FPL’s motion had on Saporito’s employment application at Exelon and at Progress Energy and on Saporito’s professional reputation in the nuclear industry”” Complainants’ Initial Brief at 19. This speculation by Complainants over what *might* have happened (without any offer of proof whatsoever) is the sole basis upon which Complainants argued that they suffered some form of adverse action. Incredulously, Complainants then argue that, to the extent that there is a conflict between FPL’s First Amendment right to redress the government and Complainants “rights” under the ERA, Complainants should prevail. As previously discussed, Complainants’ assertion is facially devoid of merit.

With respect to NextEra, the ALJ’s D&O (at page 4) correctly analyzed that NextEra did not have a role in the August 20, 2008 letter from FPL to Saporito denying the request for a business relationship. The ALJ’s D&O also correctly points out that no motions were filed at NRC regarding Complainants by NextEra. It was NextEra subsidiaries that filed such motions, but those subsidiaries were not named in the Complaint.

Thus, there is no factual or legal basis for concluding that either FPL’s refusal to accept Complainants’ unsolicited request for business or FPL’s opposition to Complainants intervention in regulatory proceedings before the NRC constitutes adverse employment action. Moreover, there are no facts alleged that NextEra had any role in retaliating against Complainants since NextEra was never approached to enter into a business relationship. Accordingly, there is no genuine issue of material fact as to the lack of adverse employment action and Respondents FPL and NextEra were correctly entitled to summary decision on this point.

4. Assuming, *Arguendo*, that Complainants Could Establish the Other Elements of a *Prima Facie* Case of Retaliation, Complainants' Alleged Protected Activities were not a Contributing Factor in FPL's Alleged Adverse Employment Action.

Assuming, without conceding, that Complainants are “employees” under the ERA who suffered some sort of adverse employment action, Complainants cannot proffer any evidence to raise an inference that, in FPL’s refusal to their unsolicited proposal, they were treated any differently than anyone else under like or similar circumstances. In whistle-blower protection cases, establishing a disparate treatment charge requires a showing that an individual has been singled out and treated less favorably than others similarly situated as a result of protected activity. See Doyle v. Secretary of Labor, 285 F.3d 243, 253 (3d Cir. 2002) (citing EEOC v. Metal Serv. Co., 892 F.2d 341, 347 (3d Cir. 1990)); Fritts v. Indiana Michigan Power Co., 2001-ERA-033, at 27–28 (ALJ Mar. 7, 2003).

The ERA makes it clear that an employee who has historically engaged in protected activity is not, thereafter, insulated from adverse employment decisions made for legitimate reasons. See, e.g., Sellers v. Tenn. Valley Auth., 1990-ERA-014, at 4 (Sec’y Apr. 18, 1991) (holding that adverse actions against complainant were not in retaliation for his NRC complaint, but were legitimate, nondiscriminatory actions taken due to work-related problems). It stands to reason, therefore, that FPL is entitled to decline an unsolicited offer to do business with an unqualified party who was previously terminated by FPL for cause and is ineligible for rehire.

Even assuming that there was some evidence that FPL’s refusal to enter into a business partnership with Complainants was retaliatory, which there is not, the ALJ concluded that “Saporito’s termination, upheld through decades of litigation, was lawful, and so is FPL’s determination that it makes Saporito and his business unsuitable for partnership.” Saporito v.

Florida Power & Light Co., 2009-ERA-006 at 11 (ALJ July 30, 2009) (ARB appeal pending) (“[N]o matter how often Saporito repeats it, or how strongly he believes it, as a matter of law his termination by FPL [in 1988] did not violate the [ERA].”).

D. FPL has Provided Clear and Convincing Evidence That FPL Would Have Taken the Same Action Against Complainant Saporito in the Absence of his Protected Activity.

Even assuming Complainants could establish a *prima facie* case of retaliation, the Complaint was properly dismissed because there is clear and convincing record evidence that Complainants’ alleged protected activity was not a factor in FPL’s complained-of business decisions. See, e.g., McNeill v. Crane Nuclear, Inc., 2001-ERA-003 at 35 (ALJ Oct. 4, 2001) (holding that if a complainant establishes by a preponderance of the evidence that his or her protected activity was a contributing factor in the adverse action, the burden shifts to the employer to demonstrate, by clear and convincing evidence, that it would have taken the same adverse action in the absence of the protected activity).

For the long list of reasons explained above, FPL had legitimate, well-documented, and non-discriminatory reasons for both declining to enter into a business partnership with an unqualified person/company and for requesting lawful relief from Complainants’ meritless attempts to intervene in regulatory proceedings. Even assuming that there was some evidence that FPL’s refusal to enter into a business partnership with Complainants was retaliatory, which there is not, the ALJ concluded that “Saporito’s termination, upheld through decades of litigation, was lawful, and so is FPL’s determination that it makes Saporito and his business unsuitable for partnership.” Saporito v. Florida Power & Light Co., 2009-ERA-006 at 11 (ALJ

July 30, 2009) (ARB appeal pending) (“[N]o matter how often Saporito repeats it, or how strongly he believes it, as a matter of law his termination by FPL [in 1988] did not violate the [ERA].). As such, Complainants cannot overcome FPL’s legitimate, non-retaliatory reasons for its actions with respect to Complainants and so the Complaint was properly dismissed.

CONCLUSION

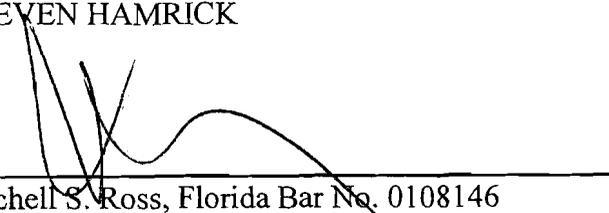
There is no genuine issue of material fact that Complainants have not established a *prima facie* case of retaliation because they cannot show that they were employees of FPL or NextEra, or that they suffered any adverse employment consequences as a result of alleged protected activity. There is also no genuine issue of material fact that Respondents Hay, Ross, Fernandez, and Hamrick are not employers under the ERA. Even if Complainants could make out the other elements of a *prima facie* case, there is no genuine issue of material fact that there is an insufficient causal connection between the alleged protected activity and the alleged adverse employment action. Moreover, even assuming *arguendo* that Complainants could establish a *prima facie* case of retaliation, it is undisputed that there is clear and convincing evidence that FPL and NextEra had legitimate business reasons for its actions taken with respect to Complainants regardless of their participation in protected activity.

WHEREFORE, Non-Federal Respondents respectfully request that the ARB affirm the ALJ’s Decision and Order Granting Summary Decision and Dismissing Complaint in its entirety, with prejudice.

Dated: October 13, 2009

Respectfully Submitted,

FLORIDA POWER & LIGHT COMPANY,
on behalf of itself and
NEXTERA ENERGY RESOURCES, LLC,
LEWIS HAY III,
MITCHELL S. ROSS,
ANTONIO FERNANDEZ, and
STEVEN HAMRICK

By: 
Mitchell S. Ross, Florida Bar No. 0108146
William S. Blair, Texas Bar No. 24031868
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 33408
Phone: 561-691-7126
Facsimile 561-691-7135
Email: mitch.ross@fpl.com

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U.S. Department of Labor
Suite S-5220
200 Constitution Ave., N.W.
Washington, DC 20210
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Via U.S. Mail

Thomas Saporito
P.O. Box 8413
Jupiter, Florida 33468

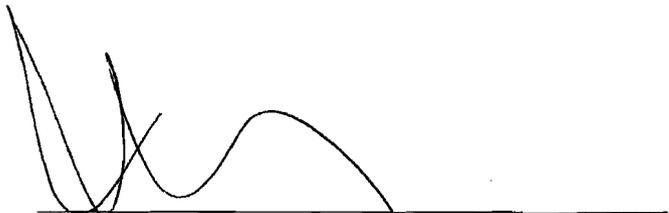
Laura C. Zaccari, Esq.
U.S. Nuclear Regulatory Commission
Office of General Counsel
Mailstop: OWFN-15-D-21
Washington, DC 20555

Hon. John M. Vittone
Chief Administrative Law Judge
U.S. Department of Labor
Office of Administrative Law Judges
800 K Street; Suite 400-North
Washington, DC 20001-8001

Hon. Paul C. Johnson, Jr.
Office of Administrative Law Judges
U.S. Department of Labor
800 K Street, N.W. Suite 400-N
Washington, DC 20001-8002

Assistant Secretary
Occupational Safety & Health Administration
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, DC 20210

Associate Solicitor
Division of Fair Labor Standards
U.S. Department of Labor
Room N-2716, FPB
200 Constitution Ave., N.W.
Washington, DC 20210



Mitchell S. Ross