



Issue Date: 10 December 2009

CASE NO: 2009-ERA-00016

*In the Matter of:*

SAPORITO ENERGY CONSULTANTS and  
THOMAS SAPORITO,  
*Complainants,*

v.

U.S. NUCLEAR REGULATORY COMMISSION,  
*Respondent.*

**ORDER TO SHOW CAUSE**

This matter arises out of a thrice-amended complaint filed by Thomas Saporito individually and Saporito Energy Consultants ("Complainants") against the United States Nuclear Regulatory Commission ("Respondent") under the employee protection provisions of the Energy Reorganization Act, 42 U.S.C. § 5851 ("ERA" or the "Act"). The matter has been docketed as case number 2009-ERA-00016.


The file shows that the Area Administrator of the Occupational Safety and Health Administration investigated Complainants' allegations and dismissed the Complaint. OSHA found that no employer-employee relationship existed or had ever existed between Complainants and Respondent. Additionally, it appears from the file that Complainants' allegations relate to failures by Respondent to investigate previous claims made by Complainants against other entities regulated by Respondent. Under the Act, employers are prohibited from taking adverse employment actions against any employee who makes a safety complaint regarding a utility regulated by Respondent. Based on the amended complaint herein, it does not appear that Complainants have successfully alleged a claim of discrimination under the Act in that they have not alleged either the existence of an employer-employee relationship or the taking by Respondent of an adverse employment action. The question thus arises whether the Complaint in this matter alleges a claim upon which relief can be granted.

Accordingly, IT IS HEREBY ORDERED:

1. Complainants shall, no later than January 8, 2010, show cause why their Complaint should not be dismissed for failure to state a claim upon which relief can be granted; and

2. Respondent shall file and serve its response to Complainants' submission, if any it has, no later than January 22, 2010. No further submissions will be entertained.

**SO ORDERED.**



**PAUL C. JOHNSON, JR.**  
Administrative Law Judge

## SERVICE SHEET

Case Name: SAPORITO\_THOMAS\_v\_US\_NUCLEAR\_REGULATOR\_

Case Number: 2009ERA00016

Document Title: **ORDER TO SHOW CAUSE**

I hereby certify that a copy of the above-referenced document was sent to the following this 10th day of December, 2009:

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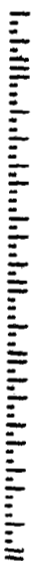
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UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE OFFICE OF ADMINISTRATIVE LAW JUDGES

Saporito Energy Consultants, Inc.  
Thomas Saporito,

ALJ NO. 2009-ERA-00016

COMPLAINANTS,

DATE: 28 DEC 2009

v.

U.S. Nuclear Regulatory Commission,

RESPONDENT.

COMPLAINANTS' REPLY TO ORDER TO SHOW CAUSE

NOW COMES, Saporito Energy Consultants, Inc. (SEC), and Thomas Saporito (Saporito) pro se, (hereinafter "Complainants") and file *Complainants' Reply to Order to Show Cause* in the above-styled proceeding and state as follows:

BACKGROUND

On March 23, 2009, Complainants filed a complaint with the Occupational Safety and Health Administration (OSHA) against the U.S. Nuclear Regulatory Commission (NRC) alleging discriminatory employment practices in violation of the employee protection provision of Section 211 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C.A. §5851 (ERA). Complainants subsequently amended their complaint on April 26, 2009; and May 16, 2009; and June 4, 2009. In summary, Complainants allege in

their complaints that the NRC retaliated against them in failing to investigate NRC licensee, Progress Energy (PE) for allegedly discriminating against Complainants in refusing to hire them; and the NRC's failure to investigate Exelon Corporation's alleged violation of the ERA in failing to hire Complainants<sup>1</sup>; and the NRC's refusal to hire Complainant as an independent contractor in violation of the ERA; and the NRC's failure to act on Saporito's 10 C.F.R. 2.206 petitions seeking enforcement action against the Florida Power and Light Company (FPL) related to ALJ Nos. 89-ERA-07/17.

On December 10, 2009, the presiding Administrative Law Judge (ALJ) issued an Order to Show Cause (Order) in the above-captioned matter requiring Complainants to show cause why their complaint should not be dismissed for failure to state a claim upon which relief can be granted. *Id.* at 1.

#### **LEGAL ARGUMENT**

On June 22, 2009, Respondent NRC asserted to this Court that Complainants have not made out a *prima facie* case under the ERA because they cannot establish the requisite employment relationship; that the NRC's alleged failure to consider

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<sup>1</sup>Subsequent to Complainants' filing of their ERA complaints in the instant action, the NRC has initiated investigative actions with respect to Exelon. Therefore, Complainants herein withdraw this particular allegation from their pending complaints before the Court.

Complainants' various petitions under 10 C.F.R. 2.206 does not create a cause of action with respect to Respondent NRC absent an employment relationship. *Id.* at 2.

However, Respondent NRC is clearly an employer of Complainants within the meaning of the ERA. Notably, the plain language of the ERA states, in relevant part, that:

**Employers covered by the ERA are:**

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

See, Federal Register/Vol. 72, No. 154/Friday, August 10, 2007/Rules and Regulations.

Here, Complainants made application to Respondent NRC for a position as an Independent Contractor. Therefore, Complainants have clearly established the requisite employee/employer relationship within the meaning of the ERA. See, *Stultz v. Buckley Oil Co.*, 93-WPC-6 (ALJ Aug. 23, 1993). In *Stultz*, the ALJ found that because Complainant had sought long term employment, he was accorded protection as a prospective

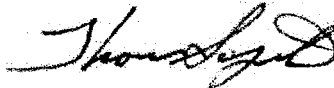


employee, citing the ALJ decision in *Young v. Hinds*, 86-ERA-11 (ALJ Apr. 8, 1986).

### Conclusion

FOR ALL THE ABOVE STATED REASONS, the ALJ should find that Complainants have made-out a proper *prima facie* case under the ERA having established all the required elements: (1) Complainants engaged in ERA protected activity; (2) Respondent NRC is an employer of Complainants within the meaning of the ERA; (3) Respondents had knowledge of Complainants' ERA protected activity when they took adverse action against Complainants; and (4) Respondents took adverse action against Complainants because of [their] engagement in ERA protected activity.

Respectfully submitted,



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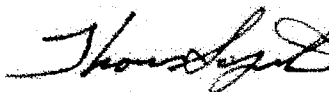
**SERVICE SHEET**

Case Name: **Saporito Energy Consultants, Inc. and Thomas Saporito v. U.S. Nuclear Regulatory Commission**

Case Number: **ALJ NO. 2009-ERA-00016**

Document Title: **Complainants' Reply to Order to Show Cause**

**I HEREBY CERTIFY** that a copy of the above-referenced document was provided to the following on this 28th day of December, 2009 by means indicated below:

By:   
Thomas Saporito

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