U.S DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

SAPORITO ENERGY CONSULTANTS and THOMAS SAPORITO Complainants, v. U.S. NUCLEAR REGULATORY COMMISSION, Respondent.	)	Case No. 2009-ERA-00016 January 20, 2010

RESPONDENT U.S. NUCLEAR REGULATORY COMMISSION RESPONSE TO COMPLAINANTS' REPLY TO ORDER TO SHOW CAUSE

Respondent U.S. Nuclear Regulatory Commission (NRC or Agency) hereby files its response to Complainants' Reply to the December 10, 2009 Order to Show Cause issued by Administrative Law Judge Paul C. Johnson, Jr. The NRC respectfully requests that this complaint be dismissed in its entirety, with prejudice, for Complainants' failure to state a *prima facie* case. Complainants' allegations against the Agency are frivolous and without merit for numerous reasons, primary among them the fact that Complainants and the NRC have never had an employment relationship as required by Section 211 of the Energy Reorganization Act of 1974, as amended, 42 USC § 5851 (ERA or Act).

BACKGROUND

Complainants filed virtually identical allegations in late 2008 and early 2009 against the NRC claiming that the NRC had violated the Act for failing to investigate and/or take action against one of the NRC's nuclear power licensees, NextEra Energy Resources (NextEra).[1] In that case (2009-ERA-00006), Complainants alleged that the NRC violated the Act for failing to

[1] The complainants filed claims against both the NRC and NextEra, which were addressed together by the Department of Labor, though the allegations against the NRC and NextEra arose from different factual circumstances.

take enforcement action against NextEra. Judge Johnson was also assigned to that case and on July 30, 2009 granted summary decision in favor of both NextEra and the NRC and dismissed the complaint in its entirety. *See* Saporito v. Florida Power and Light, et al. and U.S. Nuclear Regulatory Commission, ALJ No. 2009-ERA-0006 (ALJ Decision July 30, 2009) (hereinafter "Decision"). Complainants have since appealed to the Department of Labor Administrative Review Board (ARB) and a decision is pending at this time before the ARB. Several issues raised in the previous complaint and addressed by Judge Johnson's summary decision are also applicable in this case. Among those issues is the operative pleading, the dismissal of Complainant Saporito Energy Consultants from the complaint, whether the Department of Labor can order NRC enforcement action and, most significantly, the fact that the NRC and Complainants have never had the required employment relationship necessary to state a cause of action under the Act. The only distinction in the present case is Complainants' claim regarding the "application" for employment with the NRC, which is timely in this case and was included in the Area Administrator's investigation.[2] However, for the reasons set forth below, this "application" still does not create the necessary employment relationship, thus Complainant can not make out a *prima facie* case and this complaint should also be dismissed.

PROCEDURAL BACKGROUND

On March 23, 2009, Mr. Thomas Saporito and Saporito Energy Consultants (Complainants) filed a complaint with the Occupational Safety and Health Administration, Department of Labor (OSHA) against the U.S. Nuclear Regulatory Commission 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.

[2] In Case No. 2009-ERA-0006, Judge Johnson held that Complainant's claims regarding his so-called application for employment were not timely and thus he did not address the issue on the merits.

Complainants amended their complaint on April 26, 2009. On May 16, 2009, and June 4, 2009, Complainants filed their second and third amended complaints, respectively. In the original March 23 complaint, Complainants allege that the NRC violated the Act because it failed to investigate Progress Energy's (PE)[3] refusal to hire him or his company. PE's refusal to hire was allegedly in retaliation for the Complainant raising safety issues when he was employed as a contractor at the Crystal River Nuclear Plant (operated by PE) in the early 1990's. Complainants allege that the NRC's sole reason for not conducting an investigation of these allegations was in retaliation for his protected activity under the Act, and thus the NRC is in violation of the Act (March 23 Complaint at 4). Complainants' amended complaint of April 26 alleges that the NRC failed to investigate Exelon Corporation's alleged violation of the Act when that company also failed to hire the Complainants, again implying that that the NRC's alleged failure to investigate Exelon is itself a violation.[4] The amended complaint further alleges that the NRC also refused to hire Complainant as an independent contractor, thus violating the Act. The NRC responded on May 13, 2009 to the original complaint and the first amended complaint. Complainants' Second Amended Complaint of May 16, 2009 alleges that the NRC has violated the Act because it has not informed Complainants of any action that the NRC has taken related to safety concerns raised by Complainants regarding the Turkey Point Nuclear Plant, operated by NRC licensee, Florida Power and Light (NextEra). Complainants' Third Amended Complaint of June 4, 2009 alleges that the NRC has failed to consider Complainants' petitions pursuant to the NRC's regulations at 10 C.F.R. § 2.206, also related to NRC licensee Florida Power and Light (NextEra). The NRC responded to the second and third amended complaints on June 22,

[3] Progress Energy is a licensee of the NRC, as are Exelon and NextEra.

[4] Complainant states in Footnote 1 of "Complainants' Reply to Order to Show Cause" that he is withdrawing the allegation regarding Exelon from his Complaint. It is not clear from Complainant's wording if the entire Amended Complaint is withdrawn or just a specific allegation. Regardless, for reasons set forth herein, the NRC's position is that the Amended Complaint of April 26, 2009 is no longer operative in this matter.

2009 and on September 9, 2009, OSHA dismissed the complaints. On September 17, 2009 Complainants filed a timely request for a hearing.

On December 28, 2009, Complainant filed "Complainants' Reply to Order to Show Cause" (Reply). With respect to the required elements of a *prima facie* case, the only statement in Complainant's brief Reply is the following: "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." Reply at 3. Complainant has provided absolutely no evidentiary support that he in fact legally qualifies as an applicant for employment. Complainant's Reply is devoid of any factual support regarding the required employment relationship. As set forth below, the Complaint should be dismissed.

PROCEDURAL ISSUES

1. *The Operative Pleading is the June 4, 2009 Complaint*

As noted above, in addition to the original complaint, Complainant has amended his complaint three times, the last of which was filed with OSHA on June 4, 2009. Each complaint is significantly different from the previous one and alleges either a different "wrongdoing" by the NRC and/or involves a different entity regulated by the NRC (licensee). "Once an amended pleading is interposed, the original pleading no longer performs any function in the case and any subsequent motion made by an opposing party should be directed at the amended pleading." Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure, §1476 (2d ed. 2009) (internal references omitted).[5] Further, while it is certainly permissible for

[5] This issue was also addressed by Judge Johnson in the 2009-ERA-006 case: "It is well settled in federal law that an amended complaint supersedes the original and becomes the operative pleading in the case." *See* Decision at 2, citing 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).

an amended pleading to incorporate or "adopt some or all of the averments of the original pleading," id., failure to incorporate previous allegations necessarily means those allegations are no longer operative. The clear purpose of this rule is to ensure "that the pleadings give notice of all the issues that are in controversy so they can be handled and comprehended expeditiously..." Id.

In this case, Complainant amended his complaint three times. While the Third Amended Complaint refers to the previous complaints in the "Background" section, it is not clear that the previous complaints are incorporated by reference. Further, Complainant's summary of the previous complaints is incomplete, such that the Third Amended Complaint could not be viewed as a stand-alone, comprehensive document containing all of the Complainant's previous allegations. Consequently, in accordance with "well-settled" law, the June 4, 2009 "Third Amended Complaint" is the operative pleading in this case and only those allegations contained that complaint should be considered. The Third Amended Complaint alleges that the NRC retaliated against the Complainant by failing to "properly consider" the allegations in a petition filed by the Complainant with the NRC pursuant to the NRC's regulations at 10 CFR § 2.206. Third Amended Complaint at 2. The Complaint alleges that the NRC retaliated against the Complainant based on his engagement in ERA-protected activity, namely the filing of the original, first and second amended complaints in this case. Id, at 3. The Third Amended Complaint in no way addresses any of the requirements of a *prima facie* case, particularly the requirement of an employment relationship. While the NRC has arguably been given notice of Complainant's various grievances, the disparate factual and legal arguments contained in each of the complaints presents the very problem the operative pleading rules were intended to

address, namely to provide a respondent clear and comprehensible notice of the claims against them.[6]

2. *Complainant Saporito Energy Consultants, Inc. Must Be Dismissed From the Complaint Because the Act Does not Provide a Cause of Action for Corporations*

The present compliant has been brought jointly by Mr. Thomas Saporito and Saporito Energy Consultants, Inc., of which Mr. Saporito is the President. In Demski v. Indiana Michigan Power Co., ARB No. 02-084, ALJ No. 2001-ERA-036 (ARB Apr. 9, 2004), the Board held that a corporation with a sole shareholder could not be considered an "employee" under the Act. *See* Id., slip op. at 2. Further, the ARB held that "A corporation has no standing to bring an action for cancellation of a contract under the ERA." Id., slip op. at 5. As noted by Judge Johnson in his Decision in 2009-ERA-0006, "the Act does not provide a cause of action for corporations."[7] Decision at 3. Consequently, complainant Saporito Energy Consultants, Inc. should be dismissed as a complainant because the Act is not intended to provide relief for corporations, but only for individual employees.

LEGAL STANDARDS FOR SUMMARY DECISION

Under Rule 56 and Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986), an 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

[6] The NRC will address the allegations raised by the Complainant in each complaint because the common feature of each of the complaints is the failure to set forth a *prima facie* case. Further, as discussed below, the Department of Labor does not have jurisdiction over the NRC's decisions as to whether or not to investigate alleged licensee wrong-doing.

[7] This issue is now before the ARB on appeal in 2009-ERA-0006 and the Board's pending decision may provide clarity as to the standing of corporations under the Act.

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).

Summary decision is appropriate in this case because no material facts are in dispute and Complainant can not establish a *prima facie* case of retaliation. The NRC does not dispute that Complainant has engaged in protected activity under the Act by raising safety-related concerns with the NRC through means provided by statute and/or regulation. The parties also agree that Complainant has never been an employee of the NRC and is not currently an employee of the NRC. Consequently, the central element of a *prima facie case*—namely an employment relationship is absent and summary decision is appropriate. Furthermore, Complainant has presented no evidence that there has ever been an employment relationship with the NRC and he does no more than assert that he applied for employment. Such assertions are not sufficient to survive summary decision. *See* Seetharaman, ARB No. 03-029. Significantly, Complainant never provided a copy of the March 22, 2009 email he claims is an "application for employment" pursuant to this complaint. Complainant only provided a copy of the email as part of his "Reply to Order Permitting Additional Briefing" in case 2009-ERA-0006 on July 17, 2009, well after his June 4, 2009 Third Amended Complaint was filed.[8] In sum,

[8] Complainant raises this "application" as part of his Amended Complaint. As noted above, the operative complaint in this case is the Third Amended Complaint, which does not raise the application as a basis of retaliation. Nonetheless, the NRC addresses the merits of the "application" below. As a matter of law,

Complainant has presented no evidence regarding an essential element of his case, namely the existence of any type of employment relationship between the parties. Therefore, summary decision is appropriate in this case.

ARGUMENT AND LEGAL DISCUSSION

1. Complainant Has Not Established a Prima Facie Case Under the Act Because Complainant and NRC Have Never Had An Employment Relationship.

Complainant has not made the required *prima facie* showing with respect to the Respondent NRC, since the NRC at no time had an employment relationship with the Complainant. Significantly, Complainant does not claim that he was an employee or contractor of the NRC at the time the events set forth in the Complaint(s) occurred.

Section 211 of the Act prohibits an employer from taking an adverse action against an employee for engaging in protected activity. *See* Section 211(a)(1), 42 USC § 5851(a)(1). Pursuant to the Act, a complainant must demonstrate that protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint." 42 USC § 5851(b)(3)(C). Thus, in order to state a *prima facie* case under the Act, a complainant must show that s/he is an "employee" under the Act, that the respondent is an "employer" under the Act and also meet the following elements:

> To determine whether [a complainant] could proceed beyond the § 5851(b)(3) barrier, the [Department of Labor Administrative Review Board (ARB)] examined whether (1) he "engaged in protected conduct; (2) the employer was aware of that conduct; (3) the employer took some adverse action against him; and (4) there is evidence sufficient to raise an inference that the protected activity was the likely reason for the adverse action.

Hasan v. Department of Labor, 298 F.3d 914, 916-17 (10th Cir. 2002). *See also* Macktal v. U.S. Department of Labor, 171 F.3d 323, 327 (5th Cir. 1999); Dartey v. Zack Co., 1982-ERA-002, slip op. at 4 (Sec'y Apr. 25, 1983). A complainant has the initial burden of showing, by a

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this email does not constitute an "application for employment," thus Complainant is not protected by the Act as an applicant.

preponderance of the evidence, that their protected activity was a contributing factor in the adverse employment decision. 42 USC § 5851(b)(3)(C); Kester v. Carolina Power & Light Co., 2000-ERA-031, 02-007, slip op. at 4 (ARB Sept. 30, 2003); Dysert v. Secretary of Labor, 105 F.3d 607, 609-10 (11th Cir. 1997). In any case, an employment relationship is a necessary element and the Act itself and the case law interpreting the Act require and presume an employment relationship between the alleged whistleblower and the retaliating entity:

> 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 (2nd Cir. 1997).

Complainant does not offer any evidence or even make a claim that there has ever been an employment relationship between the Complainant and the NRC prior to or at the time the complaints in this case were filed. Further, the NRC has no record of the Complainant ever being an employee or contractor of the Agency or ever having applied for a position with the Agency. *See* affidavits of Dawn Powell and Mona Selden, attached. Consequently, Complainant fails to carry his burden and does not establish a *prima facie* case under the Act and the complaint should be dismissed.

In addition, some of the complaints in this case imply that the NRC is a "covered employer" regardless of whether an employment relationship with the NRC exists. While the operative Third Amended Complaint and the Reply appear to acknowledge that some type of employment relationship (in this case, the "application" for employment) is necessary to establish a *prima facie* case, the Agency will briefly address this theory. In the original

Complaint filed in this case, Complainant argues that "to the extent that PE is a licensee of the NRC and operates nuclear facilities by permissive licenses issued by the NRC... the NRC is an employer under the ERA." Complaint at 3. He makes the same argument in the Amended Complaint with respect to NRC licensee Exelon (Amended Complaint at 3), and in the Second Amended Complaint with respect to Florida Power and Light (Second Amended Complaint at 6). Complainant misconstrues the meaning and coverage of the Act. 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 enters into an employment relationship with every employee of every licensee, and thus the type of activity engaged in by the Complainant with respect to PE, Exelon, or FPL means that liability automatically attaches to the NRC even when no direct employment relationship exists between Complainant and the NRC.

While notifying an employer and/or the NRC of a violation of the Atomic Energy Act or the Energy Reorganization Act are protected activities under Section 211(a)(1) of the Act, merely engaging in these activities (and not getting the response one desires from the NRC) does not show a violation of the Act. To the contrary, the plain meaning of the statute shows that Congress intended multiple requirements to be fulfilled to demonstrate a cause of action: an adverse employment action arising from the employment relationship that is the result of engaging in a protected activity. Consequently, Complainant fails to make a *prima facie* showing that that an adverse employment action (which presumes an employment relationship) was taken by the NRC based on the Complainant's protected activities.

Complainant fails to provide any evidence that there has ever been an employment relationship with the NRC. On that basis alone, the complaint should be dismissed. Further, Complainant's arguments that the NRC is a covered employer under the Act regardless of

whether there is a direct employment relationship with the Agency are not supported by the clear language of the Act or any cases interpreting the Act. Thus, this complaint must be dismissed because the Complainant has not made the required *prima facie* showing required by the Act with respect to the NRC.

2. Complainant Has Not Established That He is An Applicant for Employment with the NRC

It now appears from the Complainant's Reply that the primary basis for Complainant's claim that he has established the required employment relationship with the NRC is his March 22, 2009 email to the NRC that he calls an "application" for employment. As set forth below, this email in no way satisfies the requirements of a legitimate application for employment that would bring an applicant under the coverage of the Act. Consequently, Complainant can not establish a *prima facie* case under this theory either, and the compliant should be dismissed.

It is well established that applicants for employment, including independent contractors, can be protected from retaliation by the Act. *See* Samodurov v. Gen. Physics Corp., 1989-ERA-020 (Sec'y Nov. 16, 1993). Where a complainant alleges that the requisite 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 (10th Cir. 2002).

On March 22, 2009, Complainant sent an unsolicited email with the subject "Contracting with the NRC" to several NRC employees and the NRC's office of Small Business and Civil

Rights (SBCR) seeking "independent contractor" opportunities.[9] In his Amended Complaint, filed April 26, 2009, Complainant claimed that the NRC retaliated against him by failing to hire him based on his "application for employment." Amended Complaint at 3. At that time, the NRC had no record of such an "application" and Complainant did not provide any evidence of any such application until after he had filed his Third Amended Complaint.[10] Significantly, Complainant never provided any evidence regarding the March 22 "application" pursuant to any of complaints in this case. Complainant's Second Amended Complaint, filed May 16, 2009, again claimed that the NRC retaliated against him by failing to hire him. Specifically, Complainant claimed that, "the NRC continues to see independent contract companies and workers through the agency's website. Despite Complainants' qualifications, the NRC has essentially rejected [t]heir employment application and the agency continues to seek applicants of Complainants' qualifications for the position that Complainants made application with the agency." Second Amended Complaint at 7. The Third Amended Complaint makes no mention of the alleged "application" for employment. Given that the Third Amended Complaint is the operative complaint in this case, it is questionable that the issue of Complainant's application needs to be addressed at all as a basis of alleged retaliation. Nonetheless, even if this "application" is considered, Complainant still can not make out a *prima facie* case.

None of the complaints filed to date address the key elements required by Hansan regarding an "applicant for employment." As noted above, the Complainant cites the required elements (*See* Second Amended Complaint at 7-8); however, he does no more than assert that

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[9] A copy of the March 22, 2009 email is attached.

[10] Complainant provided a copy of the email as part of his "Reply to Order Permitting Additional Briefing" in case 2009-ERA-0006 on July 17, 2009, well after the NRC's last response to OSHA in this case. As part of the NRC's May 13, 2009 response to the OSHA investigator regarding the Complainants' original and First Amended Complaint, the Agency included an affidavit from Mona Selden, an NRC employee of the Division of Contracts with oversight of unsolicited proposals. Her affidavit stated that she had no record of ever receiving a contracting proposal from the Complainant or his company.

he has met these criteria and provides no evidence regarding any of these criteria. At no time has Complainant offered any supporting information about the position for which he applied, such as the solicitation number, type of contract, etc. Complainant alleges "that the NRC continues to see independent contract companies and workers through the agency's website," but he does not provide any evidence that he applied for one of those positions or even what those positions were. Complainant does not provide any evidence that he applied for an open position or that his "application" was anything other than an unsolicited offer for employment which, by its very nature, fails to satisfy the requirement that he applied for a position *for which the NRC was seeking applicants.* Further, Complainant has provided no information regarding his qualifications for the unnamed position to which he supposedly applied or, more significantly, that another person with similar qualifications was hired through the same process in lieu of the Complainant. The March 22, 2009 email sent by the Complainants can not even be considered a resume because it has no information regarding Complainants' qualifications for the work he proposes to do for the NRC.

Further as Ms. Selden's attached affidavit states, the Agency has no record of Complainant applying for an open contracting position, nor did the Agency have any positions similar to the one outlined in Complainant's unsolicited email during the first half of 2009. Ms. Selden's affidavit explains that the NRC's primary tool for posting and receiving contracting opportunities is FedBizOps, and that the Agency has no record of Complainant availing himself of that system and there is no record of Complainant or his company seeking contracting opportunities through traditional contracting vehicles. Finally, Ms. Selden also states that the March 22, 2009 email does not meet the criteria set forth in the Federal Acquisition Regulations (FAR), 48 C.F.R. § 15.603, with respect to unsolicited contract proposals.[11]

[11] There is no legal support for the notion that an unsolicited contract proposal rejected pursuant to the FAR criteria would, alone, satisfy the requirements of a *prima facie* case regarding an applicant for

In the Reply, Complainant does nothing to address any of the requirements of a *prima facie* case. Rather, he asserts, without evidentiary support, "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." Reply at 3. The Reply also cites to Stultz v. Buckley Oil, 93-WPC-6 (ALJ Aug. 23, 1993) as standing for the proposition that seeking long-term employment can afford an individual the protections of the Act. The NRC does not dispute that an applicant for employment may be protected by the Act; however, Stultz and the other cases cited herein still require more than a mere assertion that that the person applied for a position. For example, in Stultz, the complainant was offered a position as an independent contractor and the parties were in the process of negotiating salary when the job offer was withdrawn. *See* Stultz v. Buckley Oil, 93-WPC-6 (Sec'y June 28, 1995). Thus, Stultz reiterates the Secretary's holding in Samodurov, but in no way stands for the proposition that an unsolicited proposal for employment *by itself* creates the necessary relationship to bring an individual under protection of the Act. The facts here are clearly distinguishable from those in Stultz and Complainant has provided no evidence that his "application" meets the criteria set forth in Hasan.

Simply stated, Complainants have not provided any information in any pleading to establish a *prima facie* case that they in fact qualify as an "applicant for employment." There is no evidence that Complainant applied for an open position for which the NRC was seeking applicants. In fact the statements of cognizant NRC officials establishes Complainant did not apply for any position with the NRC nor did the NRC have any positions available similar to that described by Complainant in the March 22, 2009 email. Complainant does not meet the legal requirements set forth in Hasan to be considered an applicant for employment under the Act.

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employment. As noted above, an unsolicited proposal by its very nature fails to satisfy the requirement that the individual applied for a position for which an employer was seeking applicants.

Therefore, Complainant can not establish a *prima facie* case and the complaint should be dismissed.

3. NRC's Failure to Take Enforcement Action Does Not Constitute Retaliation Under the Act and The Department of Labor Does Not Have Jurisdiction Over NRC Enforcement Decisions.

There are additional reasons why summary judgment for the NRC is appropriate.[12] First, the NRC's failure to take enforcement action against a licensee does not constitute retaliation under the Act because such refusal does not constitute an adverse employment action. Second, the Department of Labor lacks jurisdiction over NRC enforcement decisions and Complainant's arguments in this case misconstrue the responsibilities of the NRC and the Department of Labor under the Act. Even if the Complainant's failure to present a *prima facie* case could be overlooked, dismissal of the complaint would still be appropriate for any of the reasons discussed below.

All of the complaints filed in this case (including the operative Third Amended Complainant) claim that the NRC's failure to either investigate or sanction NRC licensees at the urging of Complainant constitutes the retaliatory action against him. Complainant has alleged that the NRC was "required" to conduct an investigations of NRC licensees pursuant to 10 C.F.R. §§ 50.7 and 30.7 or that the NRC failed to act on Complainant's petitions pursuant to 10 C.F.R. § 2.206.[13] Specifically, Complainant alleges that the NRC was "required" to conduct an

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[12] Judge Johnson analyzed these issues in his Summary Decision in 2009-ERA-0006. With respect to these points, the two cases are indistinguishable.

[13] 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 personal remedy before the Department of Labor. *See* 10 CFR §§ 30.7(b) and 50.7(b). These sections state 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). Section 2.206 of 10 C.F.R. permits any person to file a request to institute a proceeding under Part 2 of 10 C.F.R. (NRC's Rules of Practice for licensing proceedings and orders).

investigation of NRC licensees pursuant to 10 CFR § 50.7 regarding those licensees' failure(s) to hire the Complainant in retaliation for his protected activity. *See* Complaint at 4-5 (with respect to licensee PE); and Amended Complaint at 2 (with respect to licensee Exelon).[14] Complainant's Second and Third Amended Complaints also allege that the NRC failed to conduct "required" investigations or take other actions demanded by the Complainant with respect to safety allegation raised by the Complainant with respect to licensee FPL, and that the NRC's failure to conduct these investigations is retaliatory. *See* Second Amended Complaint at 5 (alleging NRC failure to conduct an investigation pursuant to 10 C.F.R. §§ 30.7 and 50.7); Third Amended Complaint at 3 (alleging NRC failure to "properly consider" issued raised by Complainant pursuant to NRC Management Directive 8.11 and 10 C.F.R. § 2.206). Nothing in these sections, or in the Act, supports Complainants' position that a cause of action under the Act exists against the NRC absent an employer-employee relationship, or that the NRC's refusal to take enforcement action is "materially adverse" within the context of retaliation.

The implication of Complainants' various arguments was that the NRC's refusal to take enforcement action or grant a hearing constituted a *per se* violation of the Act, a position that is not supported by the law. The Board follows the Supreme Court's holding in Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006), which requires that a complainant 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. Overall v. Tennessee Valley Authority, ARB No. 04-073, ALJ No. 1999-ERA-025, slip op. at 11 (ARB July 16, 2007). Thus, while this standard does not require a "tangible employment action," it certainly requires more than the NRC declining to take enforcement action. Complainant has not shown that the NRC's decisions resulted in any harm to him, or

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[14] Complainant's Reply appears to have withdrawn this particular complaint. Reply at 2, note 1.

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). Complainant does not offer any evidence that he has been dissuaded from requesting enforcement action from the NRC. Further, Complainant's "application for employment" contradicts the very notion that he has been dissuaded from interactions with the NRC.

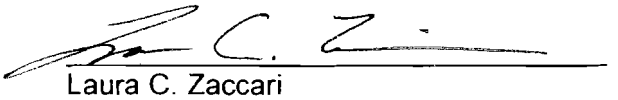
Further, the Department of Labor lacks jurisdiction over NRC enforcement decisions. Complainant's entire case is predicated on the theory that the Department of Labor would essentially have oversight over NRC's enforcement decisions because any refusal to take enforcement action would give rise to a retaliatory cause of action under the Act. 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). 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. Complainant has 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, Complainant's arguments that the NRC has violated the Act by declining to take the action urged by him are without merit and dismissal is appropriate on these bases.

CONCLUSION

Complainant has not made a *prima facie* showing required by the Act with respect to these complaints. He has not established that any type of employment relationship ever existed between Complainant and the NRC and none of the complaints nor the Reply suggest that one ever existed. Complainant is not an applicant for employment with the NRC because he has failed to provide any evidence that he applied for a position for which the NRC was seeking applicants or that any such position remained open after he was rejected. *See* Hasan, ARB No. 05-036. Additionally, the Department of Labor lacks jurisdiction over the NRC's enforcement decisions and the Agency's refusal to take enforcement action can not reasonably be considered "materially adverse." Consequently, a summary decision in this case is appropriate and the Agency respectfully requests the complaint be dismissed with prejudice.



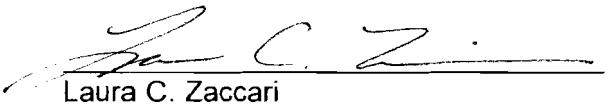
Laura C. Zaccari
Agency Representative
Office of General Counsel
U.S. Nuclear Regulatory Commission
Mailstop OWFN-15-D-21
Washington, D.C. 20555

CERTIFICATE OF SERVICE

I hereby certify that a copy of the RESPONDENT U.S. NUCLEAR REGULATORY COMMISSION RESPONSE TO COMPLAINANTS' REPLY TO ORDER TO SHOW CAUSE was sent on January 20, 2010 to:

By First Class Mail
Mr. Thomas Saporito
Saporito Energy Consultants
P.O Box 8413
Jupiter, FL 33468-8413

By Overnight Mail.
Paul C. Johnson Jr.
Administrative Law Judge
U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002
Fax: (202) 693-7365



Laura C. Zaccari
Attorney
U.S. Nuclear Regulatory Commission

U.S DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

SAPORITO ENERGY CONSULTANTS and THOMAS SAPORITO Complainants, v. U.S. NUCLEAR REGULATORY COMMISSION, Respondent.	)	Case No. 2009-ERA-00016 January 7, 2010

AFFIDAVIT

I, Dawn Powell, do swear or affirm the following:

1. I am providing this affidavit on behalf of the U.S. Nuclear Regulatory Commission (NRC) in the matter of Thomas Saporito v. U.S. Nuclear Regulatory Commission, Department of Labor Case No. 2009-ERA-00016. I have worked at the NRC for 33 years. I am currently the Deputy Associate Director for Human Resources Operations and Policy in the Office of Human Resources, U.S. Nuclear Regulatory Commission. I have held that position for 4 months and I have worked in the human resources and staffing area for more than 20 years.

2. In my capacity as an HR staffing specialist, I oversee the NRC staffing process for permanent and temporary positions with the NRC. The NRC uses the on-line web site USAJobs exclusively to post job openings with the Agency and accept applications for those positions. The NRC has used USAJobs to serve this purpose for 7 years.

3. On January 4, 2010, I was contacted by NRC attorney Laura Zaccari, who requested that I review the NRC's records to determine if a Mr. Thomas Saporito has ever applied for a job with the NRC or had ever been an employee of this Agency.

4. I have reviewed the Agency's records and did not find a record of Mr. Saporito having

ever been employed by the NRC or ever submitting an application for employment with the Agency via USAJobs.

5. The Office of Human Resources does not have any involvement with evaluating contract proposals.

In accordance with 28 U.S.C. Section 1746:

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Signature: Dawn D. Powell

Date: January 7, 2010

U.S DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

SAPORITO ENERGY CONSULTANTS and THOMAS SAPORITO Complainants, v. U.S. NUCLEAR REGULATORY COMMISSION, Respondent.	)	Case No. 2009-ERA-00016 January 15, 2010

AFFIDAVIT

I, Mona Selden, do swear or affirm the following:

1. I am providing this affidavit on behalf of the U.S. Nuclear Regulatory Commission (NRC) in the matter of Thomas Saporito v. U.S. Nuclear Regulatory Commission, before the Department of Labor (Case No. 2009-ERA-00016). I have worked at the NRC for 35 years. I worked as a contract specialist for 14 years and for the last 4 years (since May 2005), I have been a senior policy analyst. I am a GG-14.

2. In my capacity as a senior policy analyst, I receive and review unsolicited proposals sent to the NRC from people and companies wishing to contract with the NRC. I process those requests in accordance with the Federal Acquisition Regulation (FAR) Subpart 15.6, section 15.603.

3. On May 5, 2009, I was contacted by NRC attorney Laura Zaccari, who requested that I review my records to determine if a Mr. Thomas Saporito or Saporito Energy Consultants had submitted an unsolicited proposal to be an independent contractor with the NRC.

4. At that time, I reviewed my files and did not find a record of Mr. Saporito or Saporito Energy Consultants having submitted an unsolicited proposal to become an independent

contractor with the NRC.

5. I was subsequently provided a copy of a March 22, 2009 email from Mr. Saporito to the NRC seeking a position as an independent contractor. I have reviewed that email in accordance with FAR Section 15.603 and have determined that it does not meet any of the criteria set forth in that section.

6. The NRC's primary method for advertising contracting opportunities and accepting applications for those opportunities is through the General Services Administration (GSA) website, FedBizOps.gov.

7. I have reviewed the NRC's contracting opportunities listed on FedBizOps during the period from January 1, 2009 through June 30, 2009. During that period the NRC did not have any posted contracting opportunities similar to those proposed by Mr. Saporito in his March 22, 2009 email.

8. The NRC has no record of Mr. Saporito or his company applying for any posted contracting opportunities, nor is there any record of Mr. Saporito or his company contacting the NRC's Division of Contracts directly regarding contracting opportunities.

In accordance with 28 U.S.C. Section 1746:

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Signature: _____

Date: January 15, 2010

Thomas Saporito

From: Saporito Energy Consultants [SaporitoEnergyConsultants@gmail.com]

Sent: 22 March, 2009 09:47 AM

To: 'SmallBusiness.Resource@nrc.gov'

Cc: Tracy Orf; Jason Paige; Melanie Checkle; Oscar.DeMiranda@nrc.gov; R2ORA_EICSMailCenter.Resource@nrc.gov; Perez-Vargas, Evelyn - OSHA; Kugler, Clarence - OSHA

Subject: <<< CONTRACTING WITH THE NRC >>>

To Whon It May Concern:

We are interested in contracting with the U.S. Nuclear Regulatory Commission (NRC) as an independent contractor to make workplace assessments at commercial nuclear power plants within the continnental United States to ascertain:

- whether the licensee incorporates and Employee Concerns Program to provide a confidential avenue for nuclear workers to raise safety complaints
- whether the licensee's Employee Concerns Program (if used) is functional and used by the nuclear workforce
- whether the nuclear workers have confidence, including management, in using any Employee Concerns Program
- whether the licensee maintains a work environment that encourages nuclear workers, including management, to raise safety complaints without fear of retaliation
- whether the licensee's nuclear workers, including management, are afraid to raise safety complaint because of retaliatory practices taken against others who have raised safety complaints to the licensee or directly to the NRC
- whether the licensee' Employee Concerns Program (if used) has established well documented base-line data as a means to evaluate the effectiveness of the licensee's program
- whether the licensee's Employee Concerns Program (if used) can be enhanced and, if so, how and estimate the time period required for such enhancements to take effect and for future re-evaluation
- whether the licensee properly educates its nuclear workers, including management, about the requirements under 10 C.F.R. 50.7 and under 42 U.S.C.A. 5851 and about the nuclear worker and management rights for protection against retaliation under those parameters.
- whether the licensee properly educates its nuclear workers, including management, about how to file a complaint of retaliation under 10 C.F.R. 50.7 and under 42 U.S.C.A. if that believe that they have been retaliated against for raising safety complaints.

We have a well-documented expertise in NRC licensee Employee Concerns Programs and can greatly benefit the NRC in its Congressionally mandated duty to protect public health and safety with respect to operation of commercial nuclear power plants within the continnetal United States and we look forward to working with the agency as an independent contractor to promote the safe and efficient use of nuclear power generation.

In closing, we look forward to the agency's timely response to our request for employment with the agency as an independent contractor.

Best regards,

Thomas Saporito, President
Saporito Energy Consultants
Post Office Box 8413
Jupiter, Florida 33468-8413

Voice: (561) 283-0613
Fax: (561) 952-4810
Email: SaporitoEnergyConsultants@gmail.com
Web: http://SaporitoEnergyConsultants.com