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Scott, OGC
Kotzalas, OEDO

UNITED STATES NUCLEAR REGULATORY COMMISSION
BEFORE THE HON. WILLIAM BORCHARDT

In the Matter of:

NEXTERA ENERGY,
FLORIDA POWER & LIGHT COMPANY,
John S. Odom, Joseph Kappes, and

Turkey Point Nuclear Plant,
(Units 3 and 4)

Docket Nos.: 50-250 and 50-251
_____/

Date: 12 SEPT 2010

PETITION UNDER 10 C.F.R. §2.206 SEEKING ENFORCEMENT ACTION AGAINST NEXTERA ENERGY, FLORIDA POWER AND LIGHT COMPANY AND TURKEY POINT NUCLEAR PLANT

NOW COMES, Thomas Saporito, (Petitioner or Saporito) and submits a "*Petition Under 10 C.F.R. §2.206 Seeking Enforcement Action Against NEXTera Energy, Florida Power & Light Company, John S. Odom, Joseph Kappes and Turkey Point Nuclear Plant, Units 3 and 4*" (Petition). For the reasons stated below, the U.S. Nuclear Regulatory Commission (NRC) should grant the Petition as a matter of law:

NRC HAS JURISDICTION AND AUTHORITY TO GRANT PETITION

The NRC is the government agency charged by the United States Congress to protect public health and safety and the environment related to operation of commercial nuclear reactors in the United States of America (USA). Congress charged the NRC with this grave responsibility in creation of the agency through passing the Energy Reorganization Act of 1974, as amended, 42 U.S.C.A. §5851 (ERA). In the instant action, NEXTera Energy, Florida Power & Light Company, John S. Odom, Joseph Kappes, and Turkey Point Nuclear Plant, Units 3 and 4, are collectively and singularly a "licensee" of the NRC and subject to NRC regulations and authority under 10 C.F.R. §50 and under other NRC regulations and authority in operation of the Turkey Point Nuclear Plant Units 3 and 4 near Miami, Florida. Thus, through Congressional action in creation of the agency; and the fact that the named-actionable parties identified above by Petitioner are collectively and singularly a licensee of the NRC, the agency has jurisdiction and authority to grant the Petition.

STANDARD OF REVIEW

A. Criteria for Reviewing Petitions Under 10 C.F.R. §2.206

Template: EDO-001

E-RIDS: EDO-01

The staff will review a petition under the requirements of 10 C.F.R. §2.206 if the request meets all of the following criteria:

- The petition contains a request for enforcement-related action such as issuing an order modifying, suspending, or revoking a license, issuing a notice of violation, with or without a proposed civil penalty, etc.

- The facts that constitute the basis for taking the particular action are specified. The petitioner must provide some element of support beyond the bare assertion. The supporting facts must be credible and sufficient to warrant further inquiry.

- There is no NRC proceeding available in which the petitioner is or could be a party and through which petitioner's concerns could be addressed. If there is a proceeding available, for example, if a petitioner raises an issue that he or she has raised or could raise in an ongoing licensing proceeding, the staff will inform the petitioner of the ongoing proceeding and will not treat the request under 10 C.F.R. §2.206.

B. Criteria for Rejecting Petitions Under 10 C.F.R. §2.206

- The incoming correspondence does not ask for an enforcement-related action or fails to provide sufficient facts to support the petition but simply alleges wrongdoing, violations of NRC regulations, or existence of safety concerns. The request cannot be simply a general statement of opposition to nuclear power or a general assertion without supporting facts (e.g., the quality assurance at the facility is inadequate). These assertions will be treated as routine correspondence or as allegations that will be referred for appropriate action in accordance with MD 8.8, "Management of Allegations".

- The petitioner raises issues that have already been the subject of NRC staff review and evaluation either on that facility, other similar facilities, or on a generic basis, for which a resolution has been achieved, the issues have been resolved, and the resolution is applicable to the facility in question. This would include requests to reconsider or reopen a previous enforcement action (including a decision not to initiate an enforcement action) or a director's decision. These requests will not be treated as a 2.206 petition unless they present significant new information.

- The request is to deny a license application or amendment. This type of request should initially be addressed in the context of the relevant licensing action, not under 10 C.F.R. 2.206.

- The request addresses deficiencies within existing NRC rules. This type of request should be addressed as a petition for rulemaking.

See, Volume 8, Licensee Oversight Programs, Review Process for 10 C.F.R. Petitions, Handbook

8.11 Part III.

REQUEST FOR ENFORCEMENT-RELATED ACTION TO MODIFY, SUSPEND, OR REVOKE A LICENSE AND ISSUE A NOTICE OF VIOLATION WITH A PROPOSED CIVIL PENALTY

A. Request for Enforcement-Related Action

Petitioner respectfully requests that the NRC take escalated enforcement action against the above-captioned licensee and suspend, or revoke the NRC license(s) granted to the licensee for operation of the Turkey Point Nuclear Plant (TPN), Units 3 and 4; and that the NRC issue a notice of violation with a proposed civil penalty against the collectively named and each singularly named licensee captioned-above in this matter.

B. Facts That Constitute the Basis for Taking the Requested Enforcement-Related Action Requested by Petitioner

Petitioner was employed by the licensee Florida Power & Light Company (FPL) from approximately March 1982 to December 22, 1988, as a journeyman level Instrument Control Specialist (ICS). Petitioner's last employment at FPL was at the TPN facility where FPL operates two nuclear reactors under licenses issued by the U.S. Nuclear Regulatory Commission (NRC). During Petitioner's employment at TPN, he raised nuclear safety concerns to FPL management verbally and documented nuclear safety concerns in Plant Work Orders (PWOs) assigned to [him] for completion. Petitioner raised numerous nuclear safety concerns about FPL's failure to follow established procedures at the TPN facility in letters to the NRC, the U.S. Department of Labor (DOL), and to a nuclear power industry organization, the Institute of Nuclear Power Operators (INPO). Notably, one of Petitioner's nuclear safety concerns involved the apparent and willful falsification of safety-related plant documents for which the NRC Office of Investigations (OI) had opened an agency investigation. Petitioner was advised by the NRC not to divulge nuclear safety concerns related to the NRC OI investigation to anyone so as the agency's investigation would not be undermined. On December 22, 1988, the licensee discharged Petition from his employment with the licensee for three alleged acts of insubordination.

Petitioner filed a whistleblower complaint against the licensee for which the Secretary of Labor (SOL) on June 3, 1994, issued a Decision and Remand Order (DRO) and made the following findings:

> ". . . [a]n employee who refuses to reveal his safety concerns to management and asserts his right to bypass the 'chain of command' to speak directly with the Nuclear Regulatory Commission is protected under [the ERA]." ". . . [c]overed employers who discipline or discharge an employee for such [protected] conduct have violated the ERA." ". . .FP&L violated the ERA when it discharged Saporito for refusing to obey [management's] order to reveal his safety concerns. . . The record in this case has been reviewed and . . . I do not agree with the ALJ,

however, that 'the reasons given by Respondent for the discharge [of Saporito] are . . . valid in the circumstances. . . When Saporito refused to reveal his safety concerns to Mr. Odom at the meeting of Nov. 23, 1988, and said he would only tell them to the NRC, . . . he was insisting on his right to bypass the chain of command in those circumstances. . . I find FP&L's rational for requiring Saporito to reveal his safety concerns to the Site Vice President disingenuous. Saporito told Odom on November 23, 1988, when Odom gave him a 'direct order' to tell Odom his nuclear safety concerns. . .that Saporito 'would only talk to the NRC.' Odom then ordered Saporito to tell the NRC his nuclear safety concerns 'at the first available opportunity' and Saporito said he would. . . At that point, FP&L knew that the NRC, the government agency responsible for nuclear safety, would be notified and it was reasonable to assume the NRC would notify FP&L immediately if there were an imminent threat to public health or safety. I find FP&L violated the ERA when it later discharged Saporito, among other reasons, for refusing to obey Odom's order to reveal his safety concerns. As grounds for dismissal, FP&L also cited Saporito's refusal to stay after his regular work day on November 30, 1988 to attend a meeting at which Odom again wanted to ask Saporito about his safety concerns. . . and Saporito's refusal to be examined by a company doctor. Odom's decision to require Saporito to be examined by a company doctor grew out of the excuse Saporito gave on November 30 for refusing to stay late for the meeting with Odom, that Saporito was ill, and Saporito's reason for taking 12 days sick leave after November 30, that Saporito was suffering from stress related medical problems. . . Each of these reasons for discharge is related, at least in part, to Saporito's refusal to reveal his safety concerns to FP&L, an act I have held protected under the ERA.

On Feb. 16, 1995, the SOL issued a subsequent Order holding that:

". . . The right of an employee to protection for 'bring[ing] information directly to the NRC,' and his duty to inform management of safety concerns,. . . are independent and do not conflict, although discerning an employer's motivation when it disciplines an employee in these circumstances may be difficult. The June 3 decision holds that such a factual situation should be reviewed pursuant to a dual motive analysis. . . But the ALJ did not reach that conclusion specifically in the context of the protected activity found by the June 3 decision, nor is it entirely 'obvious,' under dual motive analysis, the FP&L would have discharged Complainant for his unprotected activity alone. Thus, the ALJ did not appropriately examine the case within the dual motive context. . . The purpose of the employee protection provision of the Energy Reorganization Act. . . is to keep channels of communication open to the NRC to protect public health and safety. Among other things, an employee is protected under the ERA when he is 'about to' report safety concerns to a government agency or another level of management. . . If an employer could discipline an employee based only upon that employee's refusal to reveal safety concerns directly to the NRC, it would

significantly narrow this provision of the Act and discourage reporting safety concerns directly to the NRC. If the employee complied with management's order, he would risk retaliation. If he also reported the concerns to the NRC, any action taken by the NRC could be blamed on the employee. . . "

As surmised from the above, there were two hearings in this matter. The first hearing ending in approximately Jan. 1989, and the second hearing ending approximately five-years later.[1] The task handed down from the SOL to the ALJ on remand was to determine if the licensee would have ordinarily discharged Saporito absent [his] engagement in ERA protected activities with respect to the Nov. 30th, 1988, refusal by Saporito to meet with the licensee's site vice president, John S. Odom (Odom) where Odom again wanted to ask Saporito about his nuclear safety concerns; and Saporito's alleged refusal to be examined by the Company doctor on Dec. 16th, 1988.

For the reasons stated below, the NRC must find under 10 C.F.R. 50.7, that the licensee violated the employee protection provision of 10 C.F.R. 50.7 and violated other NRC regulations and authority when the licensee illegally discharged Saporito on Dec. 22, 1988:

First, the SOL found that FPL violated the ERA when it disciplined Saporito for [his] refusal to divulge his safety concerns to Odom on Nov. 23, 1988, and insisted on his right to speak directly with the NRC. At the remand hearing, Odom admitted under oath that [he] ordered Saporito to tell the NRC [his] safety concerns - and there was no relevant testimony on the part of Odom that [he] ordered Saporito to tell [him, Odom] his safety concerns. (Compare Odom's testimony from the first hearing with his testimony during the second hearing). Thus, the NRC is required, as a matter of law, to accept the SOL's finding that the licensee violated the ERA in this circumstance - and therefore the licensee violated NRC regulations under 10 C.F.R. 50.7 and under other NRC authority.

Second, only after the licensee failed to address and resolve Saporito's safety complaints did [he] communicate those safety complaints to the NRC. Clearly, the licensee, as well as INPO, was well aware of the safety complaints documented in the PWOs assigned to Saporito. Notably, on the morning of Nov. 30, 1988, Odom called the NRC Region II headquarters and spoke directly with NRC Oscar DeMiranda (DeMiranda) and NRC George Jenkins (Jenkins). During that call, the NRC informed Odom that Saporito's safety complaints did not have any immediacy to them - but should the NRC determine otherwise, the agency would certainly

1 At the end of the first hearing in 1989, the ALJ documented in the record that FPL's attorneys offered him a ride to his car and that [he] accepted the ride because [he] was unfamiliar with the area. Notably, the ALJ had no trouble walking the block or so to his car for the duration of the two-week hearing. Petitioner strongly suspects that the ALJ received unsolicited compensation from the licensee during that car ride in order to receive a favorable ruling from the ALJ. Notably, in early 2010, OSHA investigator, Clarence Kugler told Petitioner that James Bramnick, the attorney for the licensee in 1989, stated that [he, Bramnick] offered the ALJ a ride because it was raining. However, the precipitation reports on record clearly indicate otherwise. See. Enclosure Four attached herewith. The ALJ subsequently retired to the south Florida area near the licensee's headquarters. Moreover, during the remand hearing, a second ALJ assigned to the same case admitted in open court that [he] visited with the first ALJ in south Florida and discussed the whistleblower case. Thus, the second ALJ was clearly influenced by the first ALJ in this matter.

immediately notify the licensee. According to DeMiranda, Odom stated that [he, Odom] felt comfortable learning that information. Also, during that call, the NRC encouraged Odom to make requested PWOs available to Saporito at the TPN facility. It is noted here that during the remand hearing, Odom was questioned about [his] personal calendar that he kept at the TPN facility in 1988. Specifically, Odom was questioned about why the calendar page for Nov. 30th, 1988, was completely whited-out. Odom admitted to whiting-out the page for Nov. 30th, but stated that he didn't recall the reason.[2] In addition, Odom testified at the remand hearing that NRC resident inspectors were on site at the TPN facility and [he, Odom] spoke with them daily.[3] Thus, as of the morning of Nov. 30th, Odom felt assured through his contact with NRC Region II that Saporito had not raised any safety concern that had any immediacy and that the NRC would certainly notify the licensee if the agency learned otherwise. Clearly, Odom summoned Saporito to [his] office later in the day on Nov. 30th, to learn about the safety complaints Saporito provided to the NRC OI special agents. In any event, during the remand hearing Odom testified under oath that [he] summoned Saporito to his office on Nov. 30th to ask Saporito about his safety concerns. Thus, as the SOL found in the first instance on Nov. 23rd, where FPL violated the ERA by ordering Saporito to divulge his safety concerns, the NRC must find that the licensee similarly violated the employee protection provision of NRC regulations under 10 C.F.R. 50.7, on Nov. 30th, by ordering Saporito to stay-late past his quitting time to meet with Odom to again be asked about [his, Saporito's] safety concerns - for which Odom was advised about by the NRC that very morning. Incredibly, at the remand hearing the licensee's Maintenance Superintendent, Joseph Kappes (Kappes) testified under oath that during the entirety of Saporito's employment at the TPN facility in 1988, Saporito never raise any nuclear safety concerns. (Compare Kappes' testimony from the first hearing with his testimony at the remand hearing.) Notably, at the first hearing Kappes testified that [he] met with Odom in June of 1988, seeking to discharge Saporito and Odom referred Kappes to the FPL human resources department which rejected the request as having no basis. Kappes actions in seeking Saporito's discharge as of June, 1988, came on the heels of Saporito's raising nuclear safety concerns directly to Kappes.

Third, Odom testified under oath at the remand hearing that [he] actually made the decision to discharge Saporito on Dec. 16th, 1988, before Saporito left the TPN facility to be examined by the Company doctor. Odom testified that [he] believed in his mind that Saporito would somehow refuse to be examined by the doctor. Thus, what actually happened at the doctor's office is totally irrelevant in this matter since Odom discharged Saporito even before Saporito had a chance to visit with the FPL doctor on Dec. 16th. Thus, FPL's reason for discharging Saporito for allegedly refusing to be examined by the Company doctor is simply a pretext and not true. (Compare Odom's testimony from the first hearing with his testimony at the remand hearing). See, Enclosure One attached herewith and decisions rendered in ALJ Case Nos. 89-ERA-07 and 17, Thomas Saporito v. Florida Power & Light Company.

On September 23, 2009, the NRC Chairman, Hon. Gregory B. Jaczko sent Petitioner a

2 Odom maintained possession of the calendar over the years even after his employment at FPL ended in 1989. Moreover, FPL failed to produce Odom's personal calender during the first hearing.

3 At the first hearing, Odom testified that the NRC was not competent to determine what a nuclear safety concern was at TPN. After the hearing ended, those pages from the DOL transcript record were missing and FPL was permitted by the ALJ (over Saporito's objections) to supplement the official DOL record.

that FPL later illegally violated the ERA in discharging Saporito. Thus, as in ALJ No. 2000-ERA-5, where the NRC took enforcement action against FPL, the NRC must also take enforcement action against FPL as requested in this Petition as a matter of law.

The licensee continues in violation of NRC regulations and requirements under 10 C.F.R. 50 and 10 C.F.R. 50.7 in taking retaliatory discrimination against Petitioner in refusing to hire/rehire Petitioner at any of its NRC licensed nuclear facilities. On September 6th, 2010, Petitioner filed a whistleblower complaint against the licensee with the Occupational Safety and Health Administration (OSHA). The complaint was subsequently received by OSHA and is being processed for investigation by that agency. See, Enclosure Five attached herewith. Thus, to the extent that the licensee continues in violation of NRC regulations under 10 C.F.R. 50.7 and under other NRC authority in illegally discriminating against Petition in refusing to hire/rehire Petitioner at any of the licensee's nuclear facilities operated under NRC regulation, the NRC must also take enforcement action against the licensee in these circumstances.

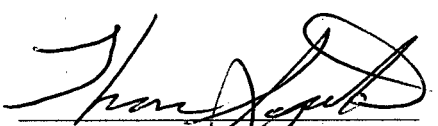
C. There Is No NRC Proceeding Available in Which the Petitioner is or Could be a Party and Through Which Petitioner's Concerns Could be Addressed

Petitioner avers here that there is no NRC proceeding available in which the Petitioner is or could be a party and through which Petitioner's concerns could be addressed.

CONCLUSION

FOR ALL THE ABOVE STATED REASONS, and because Petitioner has amply satisfied all the requirements under 10 C.F.R. §2.206 for consideration of [his] Petition by the NRC PRB, the NRC should grant Petitioner's requests made in the Petition as a matter of law.

Respectfully submitted,



Thomas Saporito, *pro se*
Petitioner
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 12th day of September, 2010, a copy of foregoing document was provided to those identified below by means shown:

Hon. William Borchardt
Executive Director for Operations
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
{Sent via U.S. Mail and electronic mail}

Hon. Gregory B. Jaczko, Chairman
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
{Sent via electronic mail}

Carolyn Evans, Dir. of Enforcement
U.S. Nuclear Regulatory Commission
Region II Headquarters
Atlanta, Georgia 30303
{Sent via electronic mail}

Hon. Gordon S. Heddell
Inspector General
Office of Inspector General
200 Constitution Ave., N.W.
Room S-5502
Washington, D.C. 20210
{Sent via U.S. Mail on CD}

Melanie Checkle, Allegations Coordinator
U.S. Nuclear Regulatory Commission
Region II Headquarters
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Oscar DeMiranda
Senior Allegations Coordinator
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Integrity Committee
Council of the Inspectors General
935 Pennsylvania Ave., N.W. Room 3973
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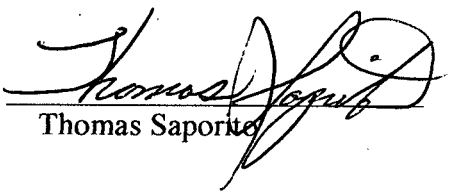
Local and National Media Sources

By: 
Thomas Saporito

Enclosure One

to 12 SEPT 2010

2.206 Petition

NEXTera Energy et al.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

In Re: *Saporito v. USDOL*, No. 98-5631 (11th Cir. Aug. 3, 1999) (appeal dismissed, table case at 192 F.3d 130), *reh'g en banc den*, No. 98-5631-B (Feb. 16, 2000) (table case at 210 F.3d 395)

THOMAS SAPORITO

Appellant,

versus

U.S. DEPARTMENT OF LABOR

Appellee.

Motion for Reconsideration
To Bring the Ends-of-Justice

(10 August 2008)

QUESTIONS FOR CONSIDERATION

1. Whether blatant error from the prior decision would result in serious injustice if uncorrected?; and
2. Whether blatant error from the prior decision would result in a violation of Appellant's First Amendment Right to "Free Speech"?

I. BACKGROUND

1. Facts

Saporito was employed by the Florida Power & Light Company ("FPL") from 1982 to 22 DEC 1988 as a journeyman level Instrument Control Specialist. Saporito's last employment at FPL was at the FPL Turkey Point Nuclear Plant ("TPN") where FPL operated two nuclear reactors under licenses issued by the U.S. Nuclear Regulatory Commission ("NRC"). During his employment at TPN, Saporito raised safety concerns to FPL management verbally and through his assigned Plant Work Orders ("PWOs") regarding FPL's nuclear operations. Saporito made numerous complaints about FPL's failure to follow established procedures at TPN in letters to the NRC, the Department of Labor ("DOL"), and to a private nuclear power industry organization, the Institute of Nuclear Power Operations ("INPO"). T.1967 after receiving no resolve about his safety concerns from FPL management. Shortly after Saporito raised his safety

concerns about FPL's nuclear operations at TPN to INPO investigators, he received retaliatory discipline from FPL managers. Subsequently, Saporito filed a complaint against FPL alleging a violation of the Energy Reorganization Act ("ERA") 42 USC 5851. That complaint was later adjudicated as Case No. 89-ERA-07 in which the Secretary of Labor ("SOL") held that there was no causation between Saporito's protected activity and the alleged retaliation by FPL.

Throughout the remainder of his employment at TPN, Saporito continued to raise safety concerns to FPL management through his PWOs and in grievances filed with his representative union the International Brotherhood of Electrical Workers ("IBEW"). However, Saporito never received any resolve from FPL about his safety concerns but instead received more and more retaliation. Saporito then contacted the NRC about his safety concerns at TPN.

On 23 NOV 1988, Odom, the FPL Senior Vice President Nuclear, held a meeting with various FPL managers, IBEW representatives and Saporito. At that meeting, Odom admitted that he was aware that Saporito had raised safety concerns about TPN operations and he asked Saporito what those concerns were. Saporito refused Odom's inquiry stating that he had engaged the NRC about his safety concerns at TPN. Odom then Ordered Saporito to tell the NRC

his safety concerns and Saporito agreed, (despite the fact that Saporito had already engaged the NRC about his safety concerns at TPN). T.1438J. Following this meeting, FPL immediately retaliated against Saporito by removing him from his normal duties as an I&C Specialist in the shop with his coworkers and instead placed him in an isolated work location in a separate building.

On 30 NOV 1988, Odom again sought a meeting with Saporito to again ask him about his safety concerns at TPN. Odom sent Kappes, the FPL Maintenance Superintendent at TPN, to find Saporito and to bring Saporito to Odom's office for a meeting about Saporito's safety concerns. Saporito was first approached by Harley, the TPN I&C Production Supervisor, and told that Odom wanted to meet with him (Saporito) about his safety concerns. Saporito told Harley that he didn't have any safety concerns to discuss with Odom. T.1794. Harley told Kappes that Saporito said he did not have any nuclear safety concerns and refused to hold-over for the meeting with Odom. T.1795; 2024. Shortly thereafter, Kappes approached Saporito in the I&C shop where Saporito stood with his coworkers ready to leave for home after having worked a 10-hour shift. Kappes directed Saporito to hold-over to meet with Odom about his safety concerns. Saporito refused to hold-over stating that he had

personal family matters to address and that he was sick. T.2026-27. RT. 119-120. FPL immediately retaliated against Saporito by suspending him from work at TPN until further notice. T.2027-29.

The next day, Kappes learned that Saporito would be out sick until 12 DEC 1988. T.1254; 2035; RT.124. Upon Saporito's return to TPN, on 16 DEC 1988, Odom ordered Saporito to be examined by the company doctor to learn whether Saporito was too ill to attend the 30 NOV 1988 meeting. T.2042; T.2053; RT.790. Despite the fact that Saporito visited the FPL doctor and was given an examination by the doctor in the presents of an IBEW representative, Odom none-the-less fired Saporito alleging insubordination in refusing to be examined by the doctor. T.1482; RT.127. Notably, Odom conceded at the Hearing on Remand that he [Odom] actually made the decision to fire Saporito before Saporito even left TPN to visit the FPL doctor. Odom reasoned in his mind that Saporito would refuse to be examined just as Saporito refused to reveal his safety concerns to him [Odom] earlier.[1]

[1] See relevant transcripts from the Remand Hearing. See also, Saporito briefs and filings with this court and with the Department of Labor ("DOL") Administrative Review Board ("ARB").

FPL's discharge notice gave three reasons for firing Saporito: 1) refusal on November 23, 1988, to comply with Odom's order to provide information about activities as the plant that could affect public health and safety, for which Saporito's access to vital areas and radiation controlled areas was restricted; 2) refusal to hold over for a meeting with Odom on November 30, 1988, for which Saporito was suspended indefinitely; and 3) refusal of an order on December 16, 1988, to be examined by the designated company doctor. R-104.

2. **Prior Adjudications**

On 3 JUN 1994, the Secretary of Labor ("SOL") issued a decision stating that, "[a]n employee who refuses to reveal his safety concerns to management and asserts his right to bypass the 'chain of command' to speak directly with the Nuclear Regulatory Commission is protected under [the ERA]." Decision and Remand Order (D.& R.O.) at 1. It also held that "[c]overed employers who discipline or discharge an employee for such [protected] conduct have violated the ERA," D.& R.O. at 1, and that "FP&L violated the ERA when it discharged Saporito for refusing to obey [management's] order to reveal his safety concerns." D.&R.O. at 6. . . . The record in this case has been reviewed and I agree with the ALJ's conclusions on the allegations of retaliatory

discipline and harassment raised in Case No. 89-ERA-7, that these alleged acts of discrimination were not "causally related to [motivated by] [Saporito's] protected activity." R.D. and O. at 16. I do not agree with the ALJ, however, that "the reasons given by Respondent for the discharge [of Saporito] are . . . valid in the circumstances. . . . " Id. at 18.

When Saporito refused to reveal his safety concerns to Mr. Odom at the meeting of Nov. 23, 1988, and said he would only tell them to the NRC, T.1438J, he was insisting on his right to bypass the chain of command in those circumstances. . . . **I find FP&L's rationale for requiring Saporito to reveal his safety concerns to the Site Vice President disingenuous.** (Emphasis Added). Saporito told Odom on November 23, 1988 , when Odom gave him a "direct order" to tell Odom his nuclear safety concerns, T.1438, that Saporito "would only talk to the NRC." T.1438H. Odom then ordered Saporito to tell the NRC his nuclear safety concerns "at the first available opportunity" and Saporito said he would. T.1438J; 907. At that point, FP&L knew that the NRC, the government agency responsible for nuclear safety, would be notified and it was reasonable to assume the NRC would notify FP&L immediately if there were an imminent threat to public health or safety. I find that

FP&L violated the ERA when it later discharged Saporito, among other reasons, for refusing to obey Odom's order to reveal his safety concerns.

As grounds for dismissal, FP&L also cited Saporito's refusal to stay after his regular work day on November 30, 1988 to attend a meeting at which Odom again wanted to ask Saporito about his safety concerns, R-104; T.1445-46; 2024, and Saporito's refusal to be examined by a company doctor. Odom's decision to require Saporito to be examined by a company doctor grew out of the excuse Saporito gave on November 30 for refusing to stay late for the meeting with Odom, that Saporito was ill, and Saporito's reason for taking 12 days sick leave after November 30, that Saporito was suffering from stress related medical problems. T.1455. Each of these reasons for discharge is related, at least in part, to Saporito's refusal to reveal his safety concerns to FP&L, an act I have held protected under the ERA. Accordingly, this case is REMANDED to the ALJ to review the record in light of this decision and submit a new recommendation to me on whether FP&L would have discharged Saporito for the unprotected aspects of his conduct in these incidents. Id. at 4.

On 16 FEB 1995, the SOL issued an ORDER stating that, "I issued a decision in this case on June 3, 1994. (June 3

Decision). Respondent moved on July 21, 1994 for reconsideration of that decision (Respondent's Motion). . . . The June 3 decision stated that "[a]n employee who refuses to reveal his safety concerns to management and asserts his right to bypass the 'chain of command' to speak directly with the Nuclear Regulatory Commission is protected under [the ERA]." Decision and Remand Order (D. & R. O.) at 1. It also held that "[c]overed employers who discipline or discharge an employee for such [protected] conduct have violated the ERA," D. & R. O. at 1, and that "FP&L violated the ERA when it discharged Saporito for refusing to obey [management's] order to reveal his safety concerns." D. & R. O. at 6.

In its motion for reconsideration Respondent characterized the holding of the June 3 decision as providing an employee with an "absolute right" to refuse to report safety concerns to the plant operator, if he plans to inform the U.S. Nuclear Regulatory Commission of the safety concerns. This is not an accurate interpretation of the holding of the June 3 decision. The right of an employee to protection for "bring[ing] information directly to the NRC," and his duty to inform management of safety concerns, . . . are independent and do not conflict, although discerning an employer's motivation when it disciplines an employee in

these circumstances may be difficult. The June 3 decision holds that such a factual situation should be reviewed pursuant to a dual motive analysis.

The ALJ however, held that Complainant did not even present a *prima facie* case Recommended Decision and Order (R.D. and O.) at 15. Although the ALJ stated that "[e]ven if one were to find, arguendo, that a *prima facie* case were established, it is obvious that the actions taken by FPL against Complainant . . . were entirely warranted . . . and would have been pursued regardless of whatever protected activity Complainant may have engaged in." R.D. and O. at 15. But the ALJ did not reach that conclusion specifically in the context of the protected activity found by the June 3 decision, nor is it entirely "obvious," under dual motive analysis, that FP&L would have discharged Complainant for his unprotected activity alone. Thus, the ALJ did not appropriately examine the case within the dual motive context. . . .

The purpose of the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C.A. §5851 (1981), is to keep channels of communication open to the NRC to protect public health and safety. Among other things, an employee is protected under the ERA when he is "about to" report safety concerns to a government

agency or another level of management. 42 U.S.C.A. §5851 (a) (1) (A) and (D) (West 1994). *Couty v. Dole,* 886 F.2d 147, 148 (8th Cir. 1989)(threatening to make complaints to the NRC protected activity). If an employer could discipline an employee based only upon that employee's refusal to reveal safety concerns directly to the NRC, it would significantly narrow this provision of the Act and discourage reporting safety concerns directly to the NRC. If the employee complied with management's order, he would risk retaliation. If he also reported the concerns to the NRC, any action taken by the NRC could be blamed on the employee.

For these reasons, I find no basis to reconsider the June 3 decision that disciplining an employee for refusing to reveal safety concerns to management when he is about to report his concerns to the NRC is a violation of the ERA. Id. at 4.

On 15 OCT 1997, the ALJ issued a Recommended Decision and Order on Remand in which he concluded that, "I hereby find and conclude Complainant's repeated insubordination, his reaction to direction if you will, was the general impetus for his termination. There is a narrowly circumscribe point within which the Energy Reorganization Act, an employee protection statue, can go no further in protecting an

employee. Complainant Saporito placed himself squarely within that point by his untruthful refusal to attend a meeting and his unwarranted refusal to be examined by a company doctor. These acts created sufficient justification for Respondent's termination of Complainant and Respondent has proven, by a preponderance of the evidence, that these acts would have led to Complainant's termination even if he had not insisted on his right to speak directly with the NRC. Accordingly, this Judge hereby **RECOMMENDS** that the foregoing complaint be **DENIED**. (R. D. and O. on R.) at 40-41.

On 11 AUG 1998, the SOL through his agent, the Administrative Review Board ("ARB") issued a Final Decision and Order (F.D.O.) stating that, "We join the ALJ in finding that FP&L has proven by a preponderance of the evidence that it would have discharged Saporito for his insubordination in refusing to attend a meeting with Site Vice President Odom and refusing to comply with the order to be examined by the designated company doctor, even if he had not engaged in protected activity on November 23. Accordingly, the complaint in this case is **DISMISSED**. (F.D.O) at 10.

On 03 AUG 1999, this Court dismissed Saporito's appeal in *Saporito v. USDOL*, No. 98-5631 (11th Cir. Aug. 3, 1999)

(appeal dismissed, table case at 192 F.3d 130), *reh'g en banc den*, No. 98-5631-B (Feb. 16, 2000) (table case at 210 F.3d 395) from the ARB's 11 AUG 1998 Final Decision.

II. STANDARD OF REVIEW

Under the ERA judicial review of the Secretary's orders "shall be in accordance with the provisions of Title 5 [5 U.S.C. §§ 701 et seq.]," the Administrative Procedures Act ("APA"). Under the APA, the Secretary's legal decisions must be sustained unless they are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and his findings of fact must be sustained unless they are "unsupported by substantial evidence" in the record as a whole. *See* 5 U.S.C. 706(2) (1988).

In this case, the Secretary, in reviewing the record from the first Hearing, sustained the ALJ's recommended decision with respect to Case No. 89-ERA-7 but overturned the ALJ's decision in the latter Case No. 89-ERA-17. The Secretary (ARB), in reviewing the record from the Hearing on Remand, sustained the ALJ's Recommended Decision. In its decision, the ARB refused to consider and denied Saporito's motion for reconsideration and remand of Case No. 89-ERA-07, which alleged that FPL engaged in harassment of Saporito for his protected activity. Id. at 6-7. Since the Secretary reviews

recommended decisions by ALJs *de novo*, this Court must set aside the Secretary's contrary decision if this Court finds that the Secretary's decision was not supported by substantial evidence.

A. Substantial Evidence

In this case, two ALJs made findings following a hearing. In doing so, they necessarily based their opinion on their impressions of the testimony of witnesses, their demeanor and credibility. The Secretary (ARB) deferred to such findings but they were not supported by substantial evidence. If the ERA is to have any meaning at all in Saporito, the Secretary-ARB must acknowledge his or her duty to defer to the ALJ's findings of fact, address those findings and demonstrate the ways in which they are not supported by substantial evidence. "Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *NLRB v. Columbian Enameling & Stamping Co.* 306 U.S. 292, 300 (1939) (internal quotations & citation omitted). Because the ALJs' findings in these cases were not supported by substantial evidence, the Secretary's-ARB's affirming decision must be set aside.

III. DISCUSSION

1. Secretary's June 3, 1994 Decision and Remand Order (Case No.89-ERA-7)

The Secretary agreed with the ALJ's conclusions, in part, that, ". . . the ALJ's conclusions on the allegations of retaliatory discipline and harassment raised in Case No. 89-ERA-7, that these alleged acts of discrimination were not 'causally related to [motivated by] [Saporito's] protected activity.' R. D. and O. at 16. Sec'y D. and R. O. at 2. The ARB later issued an August 11, 1998 Final Decision and Order adopting the Secretary's findings in Case No. 89-ERA-7. Id. at 6-7.

However, the substantial evidence on record amply demonstrates that Saporito suffered retaliation by FPL shortly after he raised safety concerns to INPO in the early part of 1988 at TPN. There exists voluminous case law supporting causation (*prima facie*) cases where, as here in Saporito, the employee was disciplined shortly after raising safety concerns.[2] The record in Case No. 89-ERA-07 clearly establishes that Saporito established a *prima facie* case against FPL and that the Secretary and the ARB failed

[2] The record before this Court is well documented in prior briefs and exhibits of which this Court has possession; therefore that record citation will not be repeated here for judicial economy reasons but is none-the-less incorporated into this document through this reference.

to properly considered the temporal proximity of FPL's retaliatory actions taken against Saporito shortly after he engaged in protected activity at TPN. Therefore, the Secretary's June 3, 1994 Decision with respect to Case No. 89-ERA-7, and the ARB's August 11, 1998 Final Decision and Order with respect to Case No. 89-ERA-7 must be vacated and reversed in Saporito's favor as a matter of law as the record is replete with evidence of retaliation taken against Saporito shortly following his protected activity in Case No. 89-ERA-7.

2. ARB's August 11, 1998 Final Decision and Order (Case No. 89-ERA-17)

In its August 11, 1998 Final Decision and Order (F. D. and O.), the ARB stated that, "This case . . . was remanded to the Administrative Law Judge (ALJ) after the Secretary found that "[a]n employee who refuses to reveal his safety concerns to management and asserts his right to bypass the chain of command' to speak directly with the Nuclear Regulatory Commission is protected [from discrimination under the ERA]." Secretary's Decision and Remand Order (Remand Order) at 1. The Secretary held that "[c]overed employers who discipline or discharge an employee for such conduct have violated the ERA." *Id.* Further, the Secretary found that Respondent Florida Power and Light Company

(FP&L) violated the ERA when it discharged Complainant Thomas Saporito (Saporito) for three reasons, one of which was his protected refusal to reveal his safety concerns to FP&L managers and his insistence on speaking directly to the NRC. *Id.* at 6. The Secretary directed the ALJ to review the record and submit a new recommended decision on whether FP&L would have discharged Saporito for legitimate reasons even if he had not insisted on his right to reveal his safety concerns only to the NRC. *Id.* . . . In a lengthy decision, the ALJ explicitly held that "either of the . . . two [unprotected] insubordinate acts itself would have justified . . . Saporito's termination." *Id.* at 33. . . . we agree with the ALJ, and dismiss the complaints. *Id.* at 2.

3. The ARB's Findings Are Arbitrary, Capricious, An Abuse Of Discretion, And Otherwise Not In Accordance With Law (Case No. 89-ERA-17)

As stated above, the Secretary found in Case No. 89-ERA-17 that,

> "When Saporito refused to reveal his safety concerns to Mr. Odom at the meeting of Nov. 23, 1988, and said he would only tell them to the NRC, . . . he was insisting on his right to bypass the chain of command in those circumstances. . . I find FP&L's rationale for requiring Saporito to reveal his safety concerns to the Site Vice President disingenuous. Saporito told Odom on November 23, 1988, when Odom gave him a "direct order" to tell Odom his nuclear safety concerns, . . . that Saporito "would only talk to the NRC." . . . Odom then ordered Saporito to tell the NRC his nuclear safety concerns "at

> the first available opportunity" and Saporito said he would. . . At that point, FP&L knew that the NRC, the government agency responsible for nuclear safety, would be notified and it was reasonable to assume the NRC would notify FP&L immediately if there were an imminent threat to public health or safety. I find that FP&L violated the ERA when it later discharged Saporito, among other reasons, for refusing to obey Odom's order to reveal his safety concerns.
>
> As grounds for dismissal, FP&L also cited Saporito's refusal to stay after his regular work day on November 30, 1988 to attend a meeting at which Odom again wanted to ask Saporito about his safety concerns. . . . and Saporito's refusal to be examined by a company doctor. Odom's decision to require Saporito to be examined by a company doctor grew out of the excuse Saporito gave on November 30 for refusing to stay late for the meeting with Odom, that Saporito was ill, and Saporito's reason for taking 12 days sick leave after November 30, that Saporito was suffering from stress related medical problems. . . Each of these reasons for discharge is related, at least in part, to Saporito's refusal to reveal his safety concerns to FP&L, an act I have held protected under the ERA. Accordingly, this case is REMANDED to the ALJ to review the record in light of this decision and submit a new recommendation to me on whether FP&L would have discharged Saporito for the unprotected aspects of his conduct in these incidents. *Id.* at 4.

As illustrated in the Secretary's Remand Order, the proper legal test that was required in this case was a dual motive analysis to discern whether Saporito's engagement in protected activity could be reasonably divorced from FPL's alleged insubordinate acts in (1) Saporito's refusal to stay after his regular work day on November 30, 1988 to attend a meeting at which Odom again wanted to ask Saporito about his safety concerns; and (2) Whether Odom's decision

to require Saporito to be examined by a company doctor grew out of the excuse Saporito gave on November 30 for refusing to stay late for the meeting with Odom, that Saporito was ill, and Saporito's reason for taking 12 days sick leave after November 30, that Saporito was suffering from stress related medical problems. If Saporito can establish that his protected activity was so intertwined with FPL's alleged acts of insubordination that they could not be separated or that FPL fired Saporito, at least in part, because of his protected activity, then this Court must find in favor of Saporito and vacate and reverse the ARB's August 11, 1998 Final Decision and Order in Case No. 89-ERA-17.

a. The ALJ's Findings in Case No. 89-ERA-17

In Case No. 89-ERA-17 (Remand Hearing), the ALJ found that:

> ". . . Odom had knowledge that Complainant had contacted and was in communication with the NRC. (RT 497) Respondent has stipulated that it received certain letters written by Complainant, either because they were sent directly to Respondent or were copied to it, between the dates of May 9, 1988 and December 28, 1988. (CX 143) The last letter of which Respondent was actually in receipt prior to Complainant's December 22, 1988 discharge were received on December 20, 1988. *Id.* at 9-10.
>
> ". . . On November 23, there was another meeting between Mr. Odom and Complainant . . . (RX 90) It was during this meeting that Mr. Odom informed Complainant that he had heard second hand that Complainant had some nuclear safety issues. (RT 511, 838, 1924; RX 90) . . . Complainant continued to refuse to disclose his

concerns to Mr. Odom, and finally stated he would only speak with the NRC. (RT 1374, 1925) Mr. Odom then told Complainant that if he would not tell Mr. Odom, he should tell the NRC as soon as possible. Mr. Odom then specifically used the word "direct order." (RT 513) Complainant agreed to tell the NRC. . . . Mr. Odom came away from the meeting with the impression that Complainant would tell the NRC his concerns. (RT 517) CX 167 is a November 23, 1988 letter from Complainant to the NRC." *Id.* at 12-13.

". . . Complainant adds that he did, in fact, contact the NRC as directed. (RT 1069) Complainant stated he thinks he wrote Mr. DeMiranda a letter over the Thanksgiving holiday and stated that he could not get hold of Mr. DeMiranda by telephone. Complainant stated that this effort was kind of 'repetitive' because Mr. DeMiranda had been brought up to speed on Complainant's concerns all along. . . . An employee could even bypass his immediate supervisor and report the concern directly to Mr. Odom or even the NRC without suffering any disciplinary action. (RT 218-219) . . . It was Complainant's understanding of Form 3 that employees were supposed to work in an environment that encouraged them to report safety concerns, or what they perceived to be safety concerns. This form also gave Complainant the impression that he could go to the NRC if his concerns were raised to management and not resolved. (RT 952)" *Id.* at 14-16.

"According to Complainant, he was called into this meeting on the 25th and was 'laid into' and 'chastised' for refusing a direct order. (RT 1076) (CX 95; RX 91) Complainant testified that he was informed that his site access was being restricted and that he was asked to repeat what he had been told, 'as if he were a door.' Complainant describes it as a 'very demeaning, debilitating exchange.' (RX 1077) Complainant was taken aback by the meeting because there was no mention of insubordination during the November 23 meeting, and all of a sudden, two days later, Complainant is being challenged by Mr. Kappes with insubordination. Complainant felt that the more he addressed safety concerns, the more retaliation he would suffer. According to Complainant, the retaliation had escalated because never before had he

had his site access restricted, thereby taking away his ability to identify his safety concerns." *Id.* at 16-17.

November 30, 1988 ". . . At approximately 5:00 p.m., Mr. Kappes instructed Mr. Harley to locate Complainant because Mr. Odom wanted to meet with Complainant about Complainant's safety concerns (RT 1946) and Mr. Harley did so. Complainant responded to Mr. Harley by stating that he had not requested a meeting and had no safety issues to discuss. (RT 1947) Complainant further responded that he was not holding over because he had personal family business to which he had to attend. Mr. Harley relayed this information to Mr. Kappes, who then went to the I&C shop himself.

Mr. Kappes approached Complainant in the I&C shop at approximately 5:15 p.m. and, in front of a number of other employees, directed him to stay beyond his normal quitting time for a meeting with Mr. Odom. (RT 948, 1418, 1420, 1950; RX 95) Mr. Kappes testified at hearing that he thought he told Complainant that Mr. Odom wanted to see Complainant about his nuclear safety concerns. (RT 1948-49, 1977). Complainant stated that he was leaning against his work bench, that he had been feeling poorly, and described Mr. Kappes as sneaking up on him and startling him. (RT 1481) This sneaking up allegedly precipitated Complainant's chest pains. (RT 1481) Complainant stated he had been experiencing chest pains for at least three months and that he believed it was from the harassment that he was receiving from Respondent. Complainant stated that his overall health had deteriorated to such a point that by the November 30th encounter with Mr. Kappes, he felt this heartburn sensation.

Initially, Complainant responded he could not stay because he had personal family matters to which he had to attend. (RT 1414, 1419, 1091) Then, upon being informed by Mr. Kappes that he was forcing . . . Complainant to holdover, Complainant repeatedly stated he was sick. (RT 1419, 1949, 1979-80, 1091)" *Id.* 17-18.

"Mr. Odom had become aware that Complainant was treating his gastritis with a medication and was of

the opinion that Complainant had to see a doctor to determine whether Complainant was truly sick when he refused to holdover. . . " *Id.* at 21-22

December 13, 1988 "Complainant testified that in reaction to this meeting, he found it amazing that Respondent was requiring him in mid-December to see a Doctor to determine whether Complainant was fit to walk from one office to another back on November 30. Complainant thought is was just a 'setup,' an attempt by Respondent to get Complainant to be insubordinate so that they could fire him. (RT 1154) *Id.* at 23-24.

". . . Mr. Caponi does not recall Complainant explicitly refusing to be examined or the Doctor ordering Complainant to get undressed. (RT 1613)" *Id.* at 27-28

"Mr. Caponi also recognizes the term holdover meaning job continuity. In Mr. Caponi's opinion, the order for Complainant to holdover for the November 30 meeting was not legal. . . (RT 1569, 1603)" *Id.* at 28-29.

ALJ "Complainant Saporito was not, as Respondent has suggested, required to comply and grieve the order. The refusal did not involve a work assignment or particular job function or activity; nor was it disorderly or disruptive of the workplace." *Id.* at 33.

ALJ ". . . Complainant was successful in obtaining a general agreement from Mr. Odom that he cannot disassociate his request for Complainant to come to his office from Complainant's safety concerns. (RT 673-676)" *Id.* 36-37

"Mr. Odom testified that he was the one who made the decision to terminate Complainant . . . " *Id.* at 10-11 See also, footnote 11 where the ALJ states that, "Mr. Odom made this decision late in the day on December 16, 1988. (RT 748, 1964, 2000)"

b. The ARB's Findings in Case No. 89-ERA-17

"Odom received about Saporito's response was that Saporito, in front of other employees, had refused to meet with Odom after being given a direct order by both Harley and Kappes. T.1794-95; RT. 120. Odom also

learned that Saporito had given changing reasons for refusing to attend the meeting: first that he had no safety concerns; then that he had personal family matters to attend to; and finally that he was sick. In light of Saporito's shifting justifications for his refusal to holdover to attend the meeting with Odom, Saporito's refusal appeared to Odom to be a clear act of insubordination. T. 1451. We agree with the ALJ that FP&L could have discharged Saporito for that reason alone." *Id.* at 7-8.

"Saporito had a duty to comply with the order to meet with Odom. If Odom again had asked about Saporito's safety concerns, Saporito then might have been justified in refusing to reveal those concerns." *Id.* at 7-8.

"Here, Odom clearly had a valid purpose in wanting to question Saporito about his safety concerns: to learn whether any of those concerns had immediate significance for public health and safety." *Id.* at 8-9.

"Saporito claims the order for him to be examined by a designated company doctor was a set-up to generate a pretext for firing him. The evidence does not support that conclusion. . . FP&L did not know in advance that Saporito would refuse to be examined." *Id.* at 9-10.

"This case is distinguishable from *Diaz-Robainas v. Florida Power & Light Co.*, Case No. 92-ERA-10, Sec'y. Dec., Jan. 19, 1996, in which an employee was fired for refusing to undergo a psychological fitness for duty examination. The Secretary held there that the order to submit to the examination was a pretext to discourage the employee from engaging in protected activity. *Diaz-Robainas,* slip op. at 19. Because the order to undergo the examination was illegal, the Secretary held that FP&L violated the ERA when it fired the employee for refusing to submit to a medical examination. *Diaz-Robainas,* slip op. at 20. In this case, in contrast, FP&L had legitimate grounds to require Saporito to submit to a medical examination: that he had refused to attend a meeting with Odom because he claimed to be sick and then took extended

sick leave for medical disorders which he asserted were related to stress." *Id.* at 10-11.

c. *Legal Analysis of the ALJ and ARB Decisions in* Case No. 89-ERA-17

First, examine the ARB's holding with the ALJ that,

> "In a lengthy decision, the ALJ explicitly held that 'either of the two [unprotected] insubordinate acts itself would have justified . . . Saporito's termination.' *Id.* at 33. . . . we agree with the ALJ, and dismiss the complaints. *Id.* at 2."

The ARB failed to properly apply the dual-motive analysis to Case No. 89-ERA-17 in reaching their decision. Whereas clearly illustrated above, the ARB agreed with the ALJ that the November 30, 1988 refusal by Saporito to attend a meeting with Odom about his safety concerns and the December 16, 1988 alleged refusal by Saporito to be examined by FPL's doctor were "[unprotected] insubordinate acts. " The ARB's holding that these two acts by Saporito were [unprotected] insubordinate acts, is in sharp contrast to the Secretary's June 3, 1994 Decision which held found that,

> "As grounds for dismissal, FP&L also cited Saporito's refusal to stay after his regular work day on November 30, 1988 to attend a meeting at which Odom again wanted to ask Saporito about his safety concerns, R-104; T.1445-46; 2024, and Saporito's refusal to be examined by a company doctor. Odom's decision to require Saporito to be examined by a company doctor grew out of the excuse Saporito gave on November 30 for refusing to stay late for the meeting with Odom, that Saporito was ill, and Saporito's reason for taking 12 days sick leave after November 30, that

> Saporito was suffering from stress related medical problems. T.1455. Each of these reasons for discharge is related, at least in part, to Saporito's refusal to *reveal his safety concerns to FP&L, an act I have held* protected under the ERA. Accordingly, this case is REMANDED to the ALJ to review the record in light of this decision and submit a new recommendation to me on whether FP&L would have discharged Saporito for the unprotected aspects of his conduct in these incidents. *Id.* at4.

Clearly, the Secretary found that the November 30, 1988 refusal by Saporito to attend a meeting with Odom about his safety concerns and the December 16, 1988 alleged refusal by Saporito to be examined by FPL's doctor were protected acts in that each of these reasons for discharge is related, at least in part, to Saporito's refusal to reveal his safety concerns to FP&L. *Id.* at 4. The ARB however, failed to properly weigh and consider the "protected" aspects of Saporito conduct in these incidents.

First, Odom was admittedly was the decision maker in firing Saporito, and had knowledge that Saporito had contacted and was in communication with the NRC. (RT 497). Moreover, FPL stipulated that it received certain letters written by Saporito, either because they were sent directly to FPL or FPL was copied, between May 9, 1988 and December 28, 1988. (CX 143). Notably, FPL received one of Saporito's safety concerns letters on December 20, 1988 only two days prior to his discharge.

1. **Saporito's November 30, 1988 Refusal to Meet With Odom About His Safety Concerns**

In his June 3, 1994 *Decision*, the Secretary found that,

> "I find FP&L's rationale for requiring Saporito to reveal his safety concerns to the Site Vice President disingenuous. Saporito told Odom on November 23, 1988, when Odom gave him a "direct order" to tell Odom his nuclear safety concerns. T.1438, that Saporito "would only talk to the NRC." T.1438H. Odom then ordered Saporito to tell the NRC his nuclear safety concerns "at the first available opportunity" and Saporito said he would. T.1438J; 907. At that point, FP&L knew that the NRC, the government agency responsible for nuclear safety, would be notified and it was reasonable to assume the NRC would notify FP&L immediately if there were an imminent threat to public health or safety. I find that FP&L violated the ERA when it later discharged Saporito, among other reasons, for refusing to obey Odom's order to reveal his safety concerns. *Id.* at 4.

Clearly, Saporito's refusal to stay late after his normal work day (a 10-hour work day) to attend a meeting with Odom about his safety concerns was a "protected activity" and had "protected" status under the ERA. Odom's testimony at the remand hearing that he required Saporito's attendance at a meeting on November 30, 1988 to again ask Saporito about his safety concerns, clearly shows that FPL was motivated, at least in part, by Saporito protected activity. Moreover, as the Secretary held in his June 3, 1994 decision regarding the first hearing in this matter, that "FP&L's rationale for requiring Saporito to reveal his safety concerns to the Site Vice President disingenuous."

T.1438H. Notably, Odom testified at the remand hearing that, "An employee could even bypass his immediate supervisor and report the concern directly to Mr. Odom or even the NRC without suffering any disciplinary action."[3] (RT 218-219) ALJ (R. D. and O.) at 14-15. Moreover, Odom had been in communication with the NRC and was assured by DeMiranda and Jenkins that Saporito's safety concerns did not have any immediacy about them.[4] Additionally, Odom learned from the NRC and from Saporito that Saporito's safety concerns were documented on his PWOs at TPN and Odom had ready access to those documents. The ALJ found that Odom primarily wanted the meeting (November 30, 1988) so that he could make arrangements for Saporito to review the PWOs, per Odom's commitment to the NRC. *Id.* at 17-18.

Thus, for the very same reasons that the Secretary found FP&L's rationale for requiring Saporito to reveal his safety concerns to the Site Vice President disingenuous, so must this Court. Moreover, FP&L's discharge of Saporito for refusing to attend the November 30, 1988 meeting with Odom about his safety concerns was motivated, at least in part

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[3] Kappes testified at the remand hearing that Saporito did not raise any safety concerns during his employment at the Turkey Point Nuclear Plant. (Citation omitted).

[4] See record exhibits including DeMiranda's deposition. See, also NRC records of the agency's communications with Odom.

if not entirely, by Saporito's protected activity in raising safety concerns to FPL in his PWOs and in his letters and Saporito's raising safety concerns directly to the NRC. But the ARB failed to properly apply the dual-motive analysis to the November 30, 1988 incident. Instead, the ARB reasoned that "Saporito had a duty to comply with the order to meet with Odom. If Odom again had asked about Saporito's safety concerns, Saporito then might have been justified in refusing to reveal those concerns . . . ARB (F. D. and O.) *Id.* at 8-9. First, Saporito did not have a duty to comply with the order to meet with Odom because the order was found by the ALJ to be illegal. "In Mr. Caponi's opinion, the order for Complainant to holdover for the November 30 meeting was not legal. . . (RT 1569, 1603)" *Id.* at 33. The ALJ found that,

> "Saporito was not, as Respondent has suggested, required to comply and grieve the order. The refusal did not involve a work assignment or particular job function or activity; nor was it disorderly or disruptive of the workplace." *Id.* at 33-34. See also, *Diaz-Robainas v. Florida Power & Light Co.*, 92-ERA-10, at pp. 4-5 (Sec'y 1/19/96); Order Denying Motion for Reconsideration, (Sec'y 4/15/96).

Second, FPL clearly communicated its reason to Saporito for requiring his attendance at the November 30, 1988 meeting through Harley and through Kappes, to ask Saporito about his safety concerns. Saporito did not have a duty to

comply with the order to meet with Odom as found by the ARB. Thus, the ARB erred in finding otherwise. The ARB also erred in finding that, "If Odom again had asked about Saporito's safety concerns, Saporito then might have been justified in refusing to reveal those concerns." As stated above, FPL clearly communicated its reason to Saporito for requiring his attendance at the November 30, 1988 meeting through Harley and through Kappes, to ask Saporito about his safety concerns. Hence, Saporito's refusal to Harley and to Kappes to attend the meeting with Odom about his [Saporito's] safety concerns is "protected activity" under the ERA and Saporito's refusal to attend the November 30, 1988 was directly communicated to Odom by Kappes. ALJ Decision at 20-21. Notably, Kappes threatened Saporito's employment in refusing to attend the meeting with Odom about his safety concerns, that Saporito "was making a career decision". ALJ decision at 20-21.

Therefore, in properly applying the dual-motive analysis to the November 30, 1988 refusal by Saporito to attend a meeting where Odom again wanted to ask Saporito about his safety concerns, FPL's rational for requiring Saporito's attendance must be found to be a violation of the ERA as the Secretary found in FPL's ordering Saporito to reveal his safety concerns one week earlier at the November 23,

1988 meeting. There is no distinguishable difference between FPL's ordering Saporito to reveal his safety concerns at the November 23, 1988 meeting, or later, in FPL's ordering Saporito to attend a meeting with Odom on November 30, 1988 about his safety concerns. In both instances, FPL communicated to Saporito that the sole inquiry was to learn what Saporito's safety concerns were and nothing else. At the remand hearing Odom admitted that he cannot disassociate his request for Saporito to come to his office from Saporito's safety concerns. (RT 673-676) ALJ Decision at 33. Saporito's refusal to attend the November 30, 1988 meeting about his safety concerns is protected under the ERA whereas the ERA's purpose is to ensure for unfettered channels of communication of safety concerns to the NRC by nuclear workers like Saporito to protect public health and safety. An employee is protected under the ERA when he is "about to" report safety concerns to a government agency or another level of management. See, 42 U.S.C.A. §5851 (a) (1) (A) and (D) (West 1994). *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989)(threatening to make complaints to the NRC protected activity). In the instant case, Odom was well aware that Saporito was communicating his safety concerns to the NRC prior to the November 30, 1988 meeting.

Thus, this Court must find that the ARB erred by not properly applying the dual motive analysis in the November 30, 1988 refusal by Saporito to attend a meeting with Odom where FPL communicated to Saporito that Odom wanted to ask Saporito about his safety concerns. Indeed, the ARB erred in failing to find Saporito's refusal to attend the November 30, 1988 meeting with Odom a "protected activity" under the ERA. Clearly, FPL was motivated, at least in part if not entirely, by Saporito's protected activity.

Therefore, this Court is required to vacant the ARB's August 11, 1998 (F. D. and O.) as a matter of law and find that FPL violated the ERA when it discharged Saporito for the reason of refusing to attend the November 30, 1988 meeting with Odom where FPL communicated to Saporito that the sole reason for the meeting was that Odom wanted to once again ask Saporito about his safety concerns.

2. Saporito's December 16, 1988 Alleged Refusal to be Examined by FPL's Company Doctor

As stated earlier in this motion, the Secretary in his June 3, 1994 Decision that,

> ". . . Odom's decision to require Saporito to be examined by a company doctor grew out of the excuse Saporito gave on November 30 for refusing to stay late for the meeting with Odom, that Saporito was ill, and Saporito's reason for taking 12 days sick after November 30, that Saporito was suffering from stress related medical problems. T.1455. Each of these reasons for discharge is related, at least in part, to

Saporito's refusal to reveal his safety concerns to FP&L, an act I have held protected under the ERA." *Id.* at 4.

The ARB in its August 11, 1998 Decision held that,

"Later Odom was informed, both by the Human Resources Department and by a union steward who accompanied Saporito to the doctor's office, that Saporito had refused to be examined by the doctor. RT. 790-91. This appeared to Odom as another act of insubordination by Saporito, which taken together with the refusal to meet with him on November 30, appeared to Odom to be gross insubordination. T. 1483; RT. 797. . . . Saporito claims the order for him to be examined by a designated company doctor was a set-up to generate a pretext for firing him. The evidence does not support that conclusion. In addition, FP&L did not know in advance that Saporito would refuse to be examined. . ." *Id.* at 9-10.

"This case is distinguishable from *Diaz-Robainas v. Florida Power & Light Co.*, Case No. 92-ERA-10, Sec'y. Dec., Jan. 19, 1996, in which an employee was fired for refusing to undergo a psychological fitness for duty examination. The Secretary held there that the order to submit to the examination was a pretext to discourage the employee form engaging in protected activity. *Diaz-Robainas,* slip op. at 19. Because the order to undergo the examination was illegal, the Secretary held that FP&L violated the ERA when it fired the employee for refusing to submit to the examination. *Diaz-Robainas,* slip op. at 20. In this case, in contrast, FP&L had legitimate grounds to require Saporito to submit to a medical examination: that he had refused to attend a meeting with Odom because he claimed to be sick and then took extended sick leave for medical disorders which he asserted were related to stress. We join the ALJ in finding that FP&L has proven by a preponderance of evidence that it would have discharged Saporito for his insubordination in . . . refusing to comply with the order to be examined by the designated company doctor, even if he had not engaged in protected activity on November 23.. . . *Id.* at 10-11.

Here again, the ARB failed to properly analyze Saporito's December 16, 1988 alleged refusal to be examined by FPL's company doctor in a dual-motive analysis. First, Odom testified at the Remand Hearing that he made the decision to discharge Saporito on December 16, 1988 prior to Saporito's visit to the company doctor's office, that "in his mind" Odom believed that Saporito would refuse to be examined by the doctor.[5] Therefore, Odom lied under oath in open court at the first hearing in this matter and again later at the second hearing on remand in this matter when he testified that, he ". . . was informed, both by the Human Resources Department and by a union steward who accompanied Saporito to the doctor's office, that Saporito had refused to be examined by the doctor. RT. 790-91. This appeared to Odom as another act of insubordination by Saporito, which taken together with the refusal to meet with him on November 30, appeared to Odom to be gross insubordination.. T. 1483; RT. 797. See also ARB's August 11, 1998 (F. D. and O.) at 9-10.

The ARB ignored the record evidence in reaching their decision in this case, finding instead that,

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[5] See generally, Odom's testimony at the Remand Hearing. See also, Saporito's prior briefs to this Court and to the ARB with citation to the record at the Remand Hearing regarding Odom's testimony on this point.

> "Saporito claims the order for him to be examined by a designated company doctor was a set-up to generate a pretext for firing him. The evidence does not support *that conclusion. First, FP&L did not know* in advance that Saporito would refuse to be examined. . . " *Id.* at 9-10.

Clearly, the ARB erred in their decision by not relying on the record evidence that shows Odom made the decision to fire Saporito on December 16, 1988 prior to Saporito's visit to the company doctor. Thus, FPL did set-up Saporito to generate a pretext for firing him. In addition, the ARB failed to properly consider, in a dual-motive analysis, that FPL's ordering Saporito to see the company doctor stemmed from Saporito's engagement in protected activity in refusing to attend the November 30, 1988 meeting with Odom where FPL clearly told Saporito that the sole reason for his meeting with Odom was that Odom want to ask Saporito about his safety concerns. Indeed, the ARB held in their August 11, 1998 decision that, "In this regard we find it significant that FP&L did not immediately discharge Saporito after the November 30 incident. . ." *Id.* at 7-8.

Notably, FPL never proved that Saporito did not have family business to attend to and that he was not sick. Moreover, the record is replete with evidence showing that Saporito's doctor, Dr. Karen Klapper, found that Saporito suffered from severe gastritis and Dr. Klapper required

Saporito to stay on medical leave for the 12 day period. Odom was well aware of Dr. Klappers diagnosis of Saporito prior to Odom's ordering Saporito to be examined by the company doctor. The ARB failed to consider that FPL's ordering Saporito to be examined by the company doctor stemmed from the continued harassment and retaliation that Saporito was subject to by FPL following his raising safety concerns to INPO and continuing to raise safety concerns to FPL through his PWOs and finally turning to the NRC to resolve his safety concerns. FPL admittedly had full knowledge of all Saporito's protected activities at TPN. As stated above, Dr. Klapper diagnosed Saporito with severe gastritis in mid-December 1988. This proves that Saporito had a legitimate reason not to attend the November 30, 1988 meeting with Odom and that he suffered from severe gastritis resulting from months and months of retaliation directed to him by FPL for his raising safety concerns about TPN.

3. FPL's Firing Saporito For Raising Safety Concerns at TPN Violated Saporito's Right to Free Speech Under the First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition

the Government for a redress of grievances. — *The First Amendment to the U.S. Constitution*

Under the First Amendment to the United States Constitution ("First Amendment"), Saporito had an unfettered right to bring his safety concerns about TPN directly to the NRC or to the media if he so desired. FPL's discharge of Saporito for insisting on his right to bypass FPL's chain of command and to bring his safety concerns directly to the NRC, violated Saporito right to free speech under the First Amendment.

IV. CONCLUSION

FPL admittedly was well aware, prior to Saporito's discharge, that Saporito contacted INPO and the NRC about his safety concerns at TPN and FPL was well aware that Saporito raised safety concerns in his PWOs. FPL alleged that Saporito was insubordinate on November 23, 1988 in refusing to comply with a "direct order" by Odom to tell Odom his safety concerns. Therefore, FPL knew or should have known that Saporito would again refuse to attend the November 30, 1988 meeting where FPL communicated to Saporito that the sole reason for his meeting with Odom on November 30, 1988 was for Odom to once again ask Saporito about his safety concerns. FPL's ordering Saporito to attend the November 30, 1988 meeting with Odom exacerbated

his condition of severe gastritis and Saporito experienced severe heart burn as a result. Notably, FPL failed to call Dr. Klapper as a witness at either hearing to cross-examine her diagnosis of Saporito of severe gastritis.[6]

Whereas, the ARB erred in failing to properly apply the dual-motive analysis in Case No. 89-ERA-17, this Court must vacate and reverse the ARB's August 11, 1998 (F. D. and O.) and rule in favor of Saporito providing him a make-whole remedy including an Order that FPL reinstate Saporito to his position at TPN with full back-pay and benefits which he was illegally deprived when FPL violated the ERA in discharging Saporito on December 22, 1988 for insisting on raising his safety concerns about TPN directly to the NRC.

Whereas, FPL violated Saporito's First Amendment right to free speech in bringing his safety concerns about TPN directly to the NRC, this Court must vacate the ARB's August 11, 1998 (F. D. and O.) and rule in favor of Saporito providing him a make-whole remedy including an Order that FPL reinstate Saporito to his position at TPN with full back-pay and benefits which he was illegally deprived when FPL violated Saporito's First Amendment right to free speech in discharging Saporito on December 22, 1988

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[6] Dr. Klapper's deposition testimony is on the record in this case regarding Saporito's diagnosis.

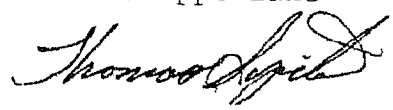
for insisting on raising safety concerns about TPN directly to the NRC.

It is the employer's motivation that is under scrutiny. *Passaic Valley Sewerage Com'rs v. Department of Labor,* 992 F.2d 474 (3rd Cir. 1993). The employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive. *Price Waterhouse v. Hopkins,* 490 U.S. 228, 252, 109 S.Ct. 1775, 1791, (1989). The legitimate reason must be both sufficient to warrant the employer's action and it must have motivated the employer at the time of the decision. *Id.* It is not enough that the decision was motivated in part by the legitimate reason. The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision. *Id.* at 252, 109 S.Ct. at 1792

In the instant case, FPL failed to show that the alleged insubordination by Saporito, standing alone and apart from his protected activity, would have induced it to make the same decision. Notably, as the ALJ found, Saporito ". . . was successful in obtaining a general agreement from Mr. Odom that he cannot disassociate his request for Complainant to come to his office from Complainant's safety concerns. (RT 673-676)" *Id.* 36-37.

Respectfully submitted this 10th day of August 2008.

For the Appellant



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Voice: (561) 283-0613
Fax: (561) 952-4810
Email: saporito3@gmail.com

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Appellant's Motion for Reconsideration to Bring the Ends of Justice was served on at least the following:

Solicitor
U.S. Department of Labor
Washington, D.C. 20001

Mitchell S. Ross, Esq.
V.P. & Associate Gen.Counsel
Florida Power & Light Co.
P. O. Box 14000
Juno Beach, Florida 33408

Cindy A. Coe
Regional Administrator
U.S. Department of Labor
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Room 6T50
Atlanta, Georgia 30303

Hon. David W. DiNardi
Administrative Law Judge
Office of Administrative
Law Judges
John W. McCormack Post Ofc.
and Courthouse, Room 507
Boston, Massachusetts 02109

Hon. George W. Bush
President, United States
The White House
1600 Pennsylvania Ave. NW
Washington, D.C. 20500

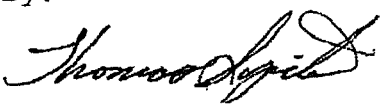
Kohn, Kohn & Colapinto, LLP
3233 P Street, N.W.
Washington, DC 20007

Executive Dir. for Operations
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20555-0001

U.S. Department of Labor
Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Hon. John G. Roberts, Jr., Chief Justice
Hon. John Paul Stevens, Associate Justice
Hon. Antonin Scalia, Associate Justice
Hon. Anthony M. Kennedy, Associate Justice
Hon. David Hackett Souter, Associate Justice
Hon. Clarence Thomas, Associate Justice
Hon. Ruth Bader Ginsburg
Hon. Steven G. Breyer, Associate Justice
Hon. Samuel Anthony Alito, Jr., Associate Justice
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

By:



Thomas Saporito, *pro se*

Enclosure Two

to 12 SEPT 2010

2.206 Petition

NEXTera Energy et al.

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

CHAIRMAN

September 23, 2009

Mr. Thomas Saporito, President
Saporito Energy Consultants, Inc.
Post Office Box 8413
Jupiter, Florida 33468

Dear Mr. Saporito:

This is in response to your letter to me dated August 8, 2009. In your letter, you request that the U.S. Nuclear Regulatory Commission (NRC) reconsider its decisions on petitions you filed under 10 CFR 2.206 regarding your termination of employment by Florida Power & Light Company (FPL) in December 1988. As the basis for your request, you refer to legal proceedings involving a complaint you filed with the United States Department of Labor (DOL) against FPL.

The NRC Staff investigated your case at the time you made your original allegations and found no violation of NRC requirements. The Staff's decision not to pursue enforcement action against FPL is therefore consistent with NRC enforcement policy. The NRC Staff has also considered DOL's decisions on the complaint you filed with that agency against FPL. In its final decision, DOL found that no violation of the Energy Reorganization Act of 1974 had occurred.

As Mr. Borchardt explained in his earlier letter, the NRC Staff did not review your May 2009 petitions because they did not present new or additional information concerning your retaliation claim against FPL. The Staff's decision is consistent with the NRC's Management Directive 8.11 concerning the review process for 10 CFR 2.206 petitions.

Accordingly, no further action needs to be taken by the NRC on this issue.

Sincerely,

Gregory B. Jaczko

Enclosure Three

to 12 SEPT 2010

2.206 Petition

NEXTera Energy et al.

From the Desk of Thomas Saporito

Post Office Box 8413, Jupiter, Florida 33468-8413
Voice: (561) 247-6404 Fax: (561) 952-4810
Email: saporito3@gmail.com

September 28, 2009

Hon. Gregory B. Jaczko
Chairman
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Chairman Jaczko:

This letter serves to reply to your September 23, 2009, letter regarding the U.S. Nuclear Regulatory Commission's (NRC's) outright refusal to take any enforcement action against its licensee the Florida Power and Light Company (FPL) for the apparent 10 C.F.R. 30.7 and 50.7 violations in illegally retaliating against the undersigned because [h]e refused to divulge his nuclear safety complaints to FPL executive management and insisted on [h]is right to bypass the FPL chain-of-command in taking [h]is nuclear safety complaints directly to the NRC to protect public health and safety regarding operations at the FPL Turkey Point Nuclear Plant in 1988.

In your letter Mr. Chairman, you state, in relevant part that:

> ". . . The NRC Staff investigated your case at the time you made your original allegations and found no violation of NRC requirements. The Staff's decision not to pursue enforcement action against FPL is therefore consistent with NRC enforcement policy. . ."

Id. at 1. To the contrary Mr. Chairman, the NRC Staff failed to consider all the relevant record evidence which clearly shows that FPL's executive vice president, John Odom, who made the decision to fire the undersigned admitted under oath and in open federal court that [h]e would not have fired the undersigned if [he] had not raised any nuclear safety concerns. Moreover, Odom further testified that [h]e made the decision to fire the undersigned before [he] ordered the undersigned to be examined by the company doctor on December 16, 1988. Thus, FPL's reasons for discharge are pretexual and illegal and a violation of NRC requirements at 10 C.F.R. 30.7 and 50.7.

Please take the time to read the brief submitted to the Eleventh Circuit Court of Appeals by following the link shown below:

http://www.docstoc.com/docs/document-preview.aspx?doc_id=12234249

Once again, I respectfully request that the NRC Commission act to cause an agency enforcement action against FPL with respect to the undersigned's December 22, 1998, discharge from the FPL Turkey Point Nuclear Plant.

Kind regards,

Thomas Saporito

Enclosure Four

to 12 SEPT 2010

2.206 Petition

NEXTera Energy et al.

Subject: FPL Attorney Was Not Truthful
From: Thomas Saporito <saporito3@gmail.com>
Date: Sat, 12 Jun 2010 14:08:54 -0400
To: Clarence Kugler <Kugler.Clarence@dol.gov>
BCC: [redacted]

Dear Mr. Kugler:

With respect to our recent discussion on June 3, 2010, related to the Exelon claim and our subsequent discussion related to the DOL hearing in ALJ Nos. 89-ERA-07 and 17, *Thomas Saporito v. Florida Power & Light Company*, the FPL attorney (James Bramnick) who apparently told you that he gave the presiding administrative law judge (Anthony Iacobo) a ride to the ALJ's car at the conclusion of the hearing because it was raining is simply not true. As can be seen from the attached weather calendar for Jan. 1989, there was no appreciable rain during the time of that DOL hearing. Considering the fact that the ALJ issued a decision in favor of FPL (which was later remanded by the SOL), and considering the fact that the ALJ failed to even find that I established a *prima facie* case, it is patently clear that FPL most likely gave the ALJ a large sum of money for the ALJ's decision in that case. Notably, the ALJ retired shortly after rendering that decision and relocated to south Florida! Moreover, the ALJ must have been seen getting into the FPL's attorney's car because the ALJ scribbled a hand-written note to the record documenting the event. However, the ALJ's hand-written note made no mention of rain as being the reason for the ride by FPL. In addition, at the time of the Jan. 1989 hearing, the NRC had labeled the FPL Turkey Point Nuclear Plant as one of the ten-worst nuclear plants in the nation and had issued FPL in excess of 1-million dollars in civil penalties for violation of NRC federal safety regulations at Turkey Point. All the more motive for FPL to illegally discharge me and to bribe the ALJ after the hearing.

Kind regards,

Thomas Saporito, Executive Director
EndangeredPlanetEarth.blogspot.com
Post Office Box 8413, Jupiter, FL 33468
Phone: 561-972-8363 Fax: (561) 247-6404
Electronic Mail: saporito3@gmail.com

Advocate of Greenpeace USA - Think Before Printing and Save a Tree

1989 JAN MIAMI WEATHER.pdf	**Content-Type:** application/pdf **Content-Encoding:** base64

Monthly Calendar Overview

« Previous Month | « 1988 | January 1989 | 1990 » | Next Month »

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
1 Actual: 82 | 66 Precip: 0.00 Average: 77 | 62 Precip: 0.08	2 Actual: 84 | 64 Precip: 0.00 Average: 77 | 62 Precip: 0.02	3 Actual: 82 | 64 Precip: 0.00 Average: 77 | 63 Precip: 0.05	4 Actual: 75 | 60 Precip: 0.00 Average: 76 | 62 Precip: 0.04	5 Actual: 73 | 54 Precip: 0.00 Average: 74 | 60 Precip: 0.07	6 Actual: 78 | 62 Precip: 0.00 Average: 76 | 61 Precip: 0.01	7 Actual: 80 | 64 Precip: 0.00 Average: 77 | 61 Precip: 0.02
8 Actual: 81 | 69 Precip: 0.00 Average: 77 | 62 Precip: 0.11	9 Actual: 81 | 66 Precip: 0.00 Average: 76 | 60 Precip: 0.10	10 Actual: 78 | 66 Precip: 0.36 Average: 76 | 61 Precip: 0.06	11 Actual: 80 | 68 Precip: 0.00 Average: 74 | 60 Precip: 0.17	12 Actual: 81 | 70 Precip: 0.06 Average: 74 | 57 Precip: 0.05	13 Actual: 82 | 64 Precip: 0.00 Average: 74 | 58 Precip: 0.02	14 Actual: 81 | 71 Precip: 0.00 Average: 75 | 58 Precip: 0.07
15 Actual: 82 | 72 Precip: 0.00 Average: 74 | 59 Precip: 0.13	16 Actual: 82 | 64 Precip: 0.00 Average: 75 | 57 Precip: 0.03	17 Actual: 82 | 64 Precip: 0.00 Average: 74 | 58 Precip: 0.06	18 Actual: 81 | 66 Precip: 0.00 Average: 75 | 59 Precip: 0.04	19 Actual: 80 | 64 Precip: 0.00 Average: 76 | 59 Precip: 0.03	20 Actual: 80 | 69 Precip: 0.00 Average: 75 | 59 Precip: 0.14	21 Actual: 82 | 64 Precip: 0.18 Average: 74 | 58 Precip: 0.04
22 Actual: 80 | 64 Precip: 0.03 Average: 74 | 58 Precip: 0.05	23 Actual: 73 | 55 Precip: 0.00 Average: 74 | 59 Precip: 0.12	24 Actual: 77 | 57 Precip: 0.00 Average: 75 | 59 Precip: 0.05	25 Actual: 79 | 63 Precip: 0.04 Average: 76 | 59 Precip: 0.06	26 Actual: 79 | 69 Precip: 0.00 Average: 74 | 58 Precip: 0.05	27 Actual: 80 | 66 Precip: 0.00 Average: 74 | 58 Precip: 0.09	28 Actual: 79 | 64 Precip: 0.00 Average: 75 | 57 Precip: 0.01
29 Actual: 79 | 64 Precip: 0.00 Average: 75 | 58 Precip: 0.02	30 Actual: 81 | 68 Precip: 0.00 Average: 76 | 58 Precip: 0.01	31 Actual: 80 | 62 Precip: 0.00 Average: 76 | 59 Precip: 0.00				

Enclosure Five

to 12 SEPT 2010

2.206 Petition

NEXTera Energy et al.

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ADMINISTRATIVE REVIEW BOARD

In the Matter of:

THOMAS SAPORITO
Complainant,

OSHA No. 4-1050-10-0

DATE: 06 SEPT 2010

v.

NEXTERA ENERGY,
Respondent.
_____/

COMPLAINANT'S SECTION 211 COMPLAINT OF RETALIATORY REFUSAL TO HIRE/REHIRE AGAINST NEXTERA ENERGY

COMES NOW, Thomas Saporito, (Saporito or Complainant), pro se, and hereby files *"Complainant's Section 211 Complaint of Retaliatory Refusal to Hire/Rehire Against Nextera Energy" (NE)*, in violation of the employee protection provision of the Energy Reorganization Act of 1974, as amended, 42 U.S.C.A. §5851 and states as follows:

BACKGROUND

Complainant was employed by Respondent NE, formerly known as Florida Power and Light Company (FPL), from approximately March of 1982 to December 22, 1988, as a journeyman level Instrument and Control Specialist (ICS). Complainant's last employment at NE was at Respondent's Turkey Point Nuclear Plant (TPN) located near Miami, Florida. Respondent's TPN facility is operated by permissive license from the U.S. Nuclear Regulatory Commission (NRC) under 10 C.F.R. §50. During Complainant's employment at TPN, [he] raised nuclear safety concerns to NE management and to the NRC about operations at

the TPN facility.

On November 23, 1988, Respondent's Senior Vice President at TPN, John Odom (Odom) asked Complainant about [his] safety concerns. Complainant refused Odom's inquiry stating that [he] had engaged the NRC about his safety concerns. Odom then ordered Complainant to tell the NRC his safety concerns and Complainant agreed - despite the fact that Complainant had already engaged the NRC about his safety concerns at TPN.

On November 30, 1988, Odom again sought a meeting with Complainant to again ask Complainant about his nuclear safety concerns at TPN[1]. Odom sent Kappes, the maintenance Superintendent at TPN, to find Complainant and to bring Complainant to Odom's office for a meeting about Complainant's nuclear safety concerns. Complainant was first approached by Harley, the TPN I&C Production Supervisor, and told that Odom wanted to meet with Complainant about his nuclear safety concerns. Complainant told Harley that he didn't have any safety concerns to discuss with Odom. Harley told Kappes that Complainant said he did not have any nuclear safety concerns and refused to hold-over for the meeting with Odom. Kappes then approached Complainant in the I&C shop and directed Complainant to hold-over to meet with Odom about his nuclear safety concerns. Complainant refused and was immediately suspended from work in

1 On the morning of Nov. 30th, Odom called the NRC and was told by NRC employees, Oscar Demiranda and George Jenkins that Saporito's nuclear safety concerns did not have any immediacy to them and the NRC would certainly immediately notify FPL if that were the case. Odom told NRC that he was satisfied or comfortable with that knowledge.

retaliation by Respondent.

The next day, Kappes learned that Complainant would be out sick until December 12, 1988, and upon [his] return to TPN, Odom ordered Complainant to be examined by the company doctor to learn whether Complainant was too ill to attend the November 30, 1988, meeting.

On December 22, 1988, Odom fired Complainant for three alleged acts of insubordination in 1) refusing to divulge his nuclear safety concerns to Odom on November 23, 1988; 2) refusing to hold-over on November 23, 1988, to meeting with Odom to again be asked by Odom to divulge his nuclear safety concerns; and 3) refusal to be examined by the company doctor on December 16, 1988.

The U.S. Department of Labor (DOL) investigated a whistleblower complaint filed by Complainant against Respondent and found in Complainant's favor. Following a hearing before a DOL Administrative Law Judge (ALJ) in 1989, the ALJ reversed the DOL preliminary findings and order, and ruled in favor of Respondent[2]. However, on June 3, 1994, the Secretary of Labor (SOL), issued a decision stating that, "[a]n employee who refuses to reveal his safety concerns to management and asserts his right to bypass the 'chain of command' to speak directly with the Nuclear Regulatory Commission is protected under [the ERA]." Decision and Remand Order (DRO at 1). The SOL also

2 Upon leaving the court room at the conclusion of the hearing, the ALJ admittedly accepted an offer from Respondent's attorneys to ride the ALJ to his car. The ALJ had no trouble walking the block or so to his car prior but claimed that [he] accepted the ride because he was unfamiliar with the area or words to that affect. However, earlier this very year-2010, OSHA investigator Clarence Kugler stated that [he] spoke with Respondent's then attorney, James Bramnick, who stated that the ALJ accepted the ride because it was raining. A subsequent investigation by Complainant revealed no significant rainfall occurred during that time period and that information was communicated to Kugler.

held that "[c]overed employers who discipline or discharge an employee for such [protected] conduct have violated the ERA," DRO at 1, and that "FP&L violated the ERA when it discharged Saporito for refusing to obey [management's] order to reveal his safety concerns." DRO at 6. . . When Saporito refused to reveal his safety concerns to Mr. Odom at the meeting of Nov. 23, 1988, and said he would only tell them to the NRC, . . . he was insisting on his right to bypass the chain of command in those circumstances. . . I find FP&L's rational for requiring Saporito to reveal his safety concerns to the Site Vice President disingenuous. Saporito told Odom on November 23, 1988, when Odom gave him a "direct order" to tell Odom his nuclear safety concerns. . .that Saporito "would only talk to the NRC." Odom then ordered Saporito to tell the NRC his nuclear safety concerns "at the first available opportunity" and Saporito said he would. . . At that point, FP&L knew that the NRC, the government agency responsible for nuclear safety, would be notified and it was reasonable to assume the NRC would notify FP&L immediately if there were an imminent threat to public health or safety. I find that FP&L violated the ERA when it later discharged Saporito, among other reasons, for refusing to obey Odom's order to reveal his safety concerns.

As grounds for dismissal, FP&L also cited Saporito's refusal to stay after his regular work day on November 30, 1988 to attend a meeting at which Odom again wanted to ask Saporito about his safety concerns. . . and Saporito's refusal to be examined by a company

doctor. Odom's decision to require Saporito to be examined by a company doctor grew out of the excuse Saporito gave on November 30 for refusing to stay late for he meeting with Odom, that Saporito was ill, and Saporito's reason for taking 12 days sick leave after November 30, that Saporito was suffering from stress related medical problems. . . Each of these reasons for discharge is related, at least in part, to Saporito's refusal to reveal his safety concerns to FP&L, an act I have held protected under the ERA. . . "

The case was then remanded to a new ALJ for further proceedings.[3] Prior to the commencement of the remand hearing, Complainant rejected Respondent's settlement offer in the approximate amount of $850,000.00, electing reinstatement to [his] job at TPN. On October 15, 1997, the second ALJ issued a decision favorable to Respondent. On August 11, 1998, the Administrative Review Board (ARB) affirmed the ALJ's decision. Complainant subsequently appealed to the 11th Cir. who arbitrarily dismissed the appeal without discussion. See, 192 F.3d 130, No. 98-5631-B (Feb. 16, 2000)(table case at 210 F.3d 395) from ARB's Aug. 1998 Final Decision.[4] The U.S. Supreme Court denied a subsequent writ filed by Complainant in the case.

It is important to note here that at the remand hearing, Odom conceded that <u>but for Complainant's engagement in raising nuclear safety concerns at the TPN facility</u>, [he, Odom] would not have fired Complainant. Moreover, Odom further admitted "under oath" at the

3 During the remand hearing, the ALJ admitted in open court that he visited with the prior ALJ about this case.
4 Complainant continues the legal process seeking reinstatement.

remand hearing that [he] made the decision to fire Saporito on December 16, 1988, prior to Saporito leaving the TPN facility to be examined by the company doctor. Thus, Respondent's reasons for firing Complainant were all a pretext and simply not true as a matter of law. See, Complainant's Motion for Reconsideration to Bring the Ends-of-Justice, (Aug. 10, 2008), CX-001, attached hereto.

Since Complainant's illegal discharge from Respondent's TPN facility, he has continually engaged in further ERA protected activity for the better part of 20-years. See, www.nrc.gov and search the NRC ADAMS database for Complainant. See also, www.osha.gov and search the whistleblower section for Complainant.

STATEMENT OF THE CASE

On August 15, 2010, Complainant made application at Respondent for the advertised position of Production Technician - Instrumentation & Control, Job ID 1001354. See, CX-002, attached hereto. Respondent subsequently acknowledged receipt of Complainant's job application for the above-named position. See, CX-003, attached hereto. Complainant alleges here that Respondent rejected [his] job application for Job ID 1001354 in violation of the employee protection provision of the ERA solely because of Complainant's engagement in ERA protected activity as described above for which Respondent is wholly aware and because of Complainant's engagement in ERA protected activity over the last 20-years for which Respondent is equally aware. Respondent admittedly concedes that Complainant was

qualified for positions that [he] made application for at Respondent. See, CX-004, attached hereto. Moreover, Respondent continues to seek other job applicants of Complainant's qualification, for the position(s) that Complainant has made application and for which Complainant was qualified to hold.

CONCLUSION

Complainant seeks a finding by OSHA in his favor along with a make-whole remedy, including but not limited to, an award of a position at Respondent, backpay, frontpay, compensatory damages, exemplary damages, payment of costs, witness fees, legal fees and attorney fees in bringing the instant action, and other unspecified damages.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a copy of the foregoing document was provided to those identified below on this 6th day of September, 2010, by means indicated below:

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