



In the Matter of:

**THOMAS J. SAPORITO, JR.**

**CASE NO. 94-ERA-35**

**COMPLAINANT,**

**DATE: July 19, 1996**

**v.**

**FLORIDA POWER & LIGHT COMPANY and  
MULLER, MINTZ, KORNREICH, CALDWELL,  
CASEY, CROSLAND & BRAMNICK, P.A.,**

**RESPONDENTS.**

BEFORE: ADMINISTRATIVE REVIEW BOARD<sup>1/</sup>

### **FINAL DECISION AND ORDER**

This case, which is before the Board for review, was brought pursuant to the whistleblower protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988 and Supp. V). Complainant Thomas J. Saporito, Jr. filed this complaint against his former employer, Florida Power & Light Company (Florida Power) and Muller, Mintz, Kronreich, Caldwell, Casey, Crosland & Bramnick (the law firm), a law firm which represents Florida Power in certain matters. Saporito alleged that Florida Power and the law firm retaliated against him for engaging in activities protected by the ERA by making "adverse" and "threatening" comments about him to the Nuclear Regulatory Commission

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<sup>1/</sup> On April, 17, 1996, Secretary's Order 2-96 was signed delegating jurisdiction to issue final agency decisions under the environmental and nuclear whistleblower statutes and the regulations at 29 C.F.R. Part 24, to the newly created Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996)(copy attached).

Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Board now issues final agency decisions. A copy of the final procedural revisions to the regulations (61 Fed. Reg. 19982), implementing this reorganization is also attached.

(NRC), and that the law firm retaliated against him by contacting an attorney for a subsequent employer, Arizona Public Service Company (Arizona Public), about him.

Florida Power and the law firm filed a Motion for Summary Decision, which the Administrative Law Judge (ALJ) recommended be granted in a Recommended Decision and Order issued on April 5, 1995. For the reasons that follow we agree with the ALJ's recommendation and dismiss this case.

## BACKGROUND

This is the latest of several complaints brought by Saporito against employers, former employers, and third parties. A brief summary of the trail of litigation will help clarify this decision.

From March 8, 1982, until December 22, 1988, Saporito was employed by Florida Power as an instrument control technician. Following his termination Saporito filed complaints in Case Nos. 89-ERA-7 and 89-ERA-17, alleging, among other things, that he had been fired in retaliation for activity protected by the ERA's whistleblower protection provision.<sup>2/</sup> In the meantime, on December 14, 1989, Saporito was hired by the ATI Technical School (ATI) as a part-time instructor. Following his termination from that position in May 1990, Saporito filed a complaint against ATI and Florida Power in Case Nos. 90-ERA-27 and 90-ERA-47.<sup>3/</sup>

While these two cases were pending, Saporito was employed by the Atlantic Group (TAG) at Arizona Public's Palo Verde Nuclear Station (Palo Verde) from September 29, 1991, to December 31, 1991. Following his termination by TAG, Saporito filed complaints in Case Nos. 92-ERA-30, 93-ERA-26, 93-ERA-45, and 94-ERA-29, alleging that he was terminated and not rehired in retaliation for engaging in activity protected by the whistleblower protection provision of the ERA.<sup>4/</sup> Saporito subsequently alleged that during an ALJ hearing in Case No. 92-ERA-30 he learned of a Florida Power contact with Arizona Public executives regarding

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<sup>2/</sup> The ALJ recommended dismissal of Saporito's complaints. However, the Secretary disagreed and remanded the case for further proceedings. *Saporito v. Florida Power & Light Co.*, Case Nos. 89-ERA-7, 89-ERA-17, Sec. Dec. and Ord. of Remand, June 3, 1994. See also *Saporito v. Florida Power & Light Co.*, Case Nos. 89-ERA-7, 89-ERA-17, Sec. Ord., February 16, 1995 (denying Florida Power's motion for reconsideration).

<sup>3/</sup> In that case the ALJ recommended dismissal of the complaints and the Secretary concurred. *Saporito v. Florida Power & Light Co., and ATI*, Case Nos. 90-ERA-0027, 90-ERA-0047, Sec. Final Dec. and Ord., August 8, 1994.

<sup>4/</sup> The ALJ ultimately recommended approval of settlement agreements and dismissal of these complaints. The Secretary concurred. *Saporito v. Arizona Public Service Co. and the Atlantic Group*, Case Nos. 92-ERA-30, 93-ERA-26, 93-ERA-45, 94-ERA-29, Sec. Ord. Approving Settlements and Dismissing Cases, June 19, 1995, and Erratum, June 26, 1995.

Saporito's employment at Palo Verde. This was the basis of another complaint, Case No. 93-ERA-23, against Florida Power for retaliation in violation of the ERA.<sup>5/</sup>

Finally, in this complaint, filed on June 13, 1994, Saporito alleged that Florida Power attorney James Bramnick contacted Arizona Public attorney Thomas Kennedy regarding Saporito's protected activity and his ERA claims against Florida Power. This, Saporito alleged, was retaliatory action in violation of the whistleblower protection provision of the ERA.

Saporito's other allegation in this case is against both Florida Power and the law firm and relates to a petition which Saporito filed with the NRC pursuant to 20 C.F.R. § 2.206 seeking action by the NRC against Florida Power. Following the filing of Saporito's NRC petition on March 7, 1994, the NRC forwarded a copy of his petition to Florida Power with a request that it provide its views on the issues raised by Saporito. The NRC informed Saporito of this action, which was standard procedure.

On May 20, 1994, Florida Power submitted its response to Saporito's NRC petition. A cover letter to the NRC which accompanied the response was signed by Jerome H. Goldberg, President of Florida Power's Nuclear Division. With regard to the remarks in the Goldberg letter to the NRC, as well as the substance of Florida Power's response, Saporito asserted that:

[They] serve to threaten, intimidate, coerce, humiliate, and otherwise dissuade [Saporito] and FPL employees from directly contacting the NRC with perceived safety concerns regarding operations at FPL Turkey Point and St. Lucie nuclear facilities. FPL's conduct . . . serves to "chill" the overall workforce at FPL's nuclear facilities and to "chill" complainant's and the public's participation in NRC licensing proceedings . . . .

Complaint, ¶ 22 (emphasis deleted).

Saporito also alleged that the brief filed by Florida Power's attorneys on May 24, 1994, in Case Nos. 89-ERA-7 and 89-ERA-17 mirrored the comments in the Goldberg letter and the Florida Power memorandum to the NRC, raising the inference that the law firm had drafted the NRC submission. Therefore, Saporito asserted, the law firm also had retaliated against him in drafting Florida Power's response to the NRC. Complaint, ¶ 23.

Respondents moved for summary decision on various grounds, and on April 5, 1995, the ALJ recommended that the motion be granted and the complaint dismissed (R. D. and O.). For the reasons that follow, we agree with the ALJ's recommendation and dismiss this complaint.

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<sup>5/</sup> The ALJ recommended dismissal of the complaint in that case, and the Secretary concurred. *Saporito v. Florida Power & Light Co.*, Case No. 93-ERA-0023, Sec. Final Dec. and Ord., Sept. 7, 1995.

## DISCUSSION

This complaint is frivolous. Saporito alleges two violations of the whistleblower protection provision of the ERA: 1) that Florida Power and its law firm retaliated against Saporito by making negative statements about Saporito in a filing with the NRC; and 2) that the law firm retaliated against Saporito by contacting an attorney for Arizona Public regarding Saporito. Summary decision and/or dismissal is appropriate with regard to both issues.

Saporito failed to allege essential elements of a violation of the whistleblower protection provision of the ERA. As the Secretary has repeatedly stated, in order to prevail in a whistleblower protection case based upon circumstantial evidence of retaliatory intent it is necessary to prove that the complainant was an employee of a covered employer, the complainant engaged in protected activity, the complainant thereafter was subjected to adverse action regarding his employment, the Respondent knew of the protected activity when it took the adverse action, and the protected activity was the reason for the adverse action. *See Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984); *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-0046, Sec. Dec., Feb. 15, 1985, slip op. at 11 n.9, *aff'd sub nom. Carroll v. United States Dept. of Labor*, 78 F.3d 352, 356 (8th Cir. 1996). Saporito's case fails in several fundamental ways.

First, Saporito failed to allege that at the time of the alleged adverse action there was an employment relationship between himself and Florida Power. Florida Power has not been Saporito's employer since 1988, and the events at issue in this case occurred in 1994. As a former employer, of course, it would be possible for Florida Power to retaliate against Saporito by engaging in blacklisting activities. *See*, 29 C.F.R. § 24.2(b) (1995). However, Saporito did not allege that Florida Power engaged in such activities. All that has been alleged is that Saporito filed a petition with the NRC regarding his former employer, Florida Power, that the NRC in the normal course of business requested Florida Power's views on Saporito's petition, and that in response to that NRC request Florida Power provided its views.

It is true that Florida Power and its President for nuclear operations made unflattering statements about Saporito in its NRC response. However, Saporito has not alleged that these statements adversely affected his compensation, terms, conditions, and privileges of employment. As a matter of law, therefore, Florida Power's comments about Saporito in the NRC response cannot be found to be retaliatory.<sup>6/</sup> As this is the only claim made against Florida Power in this case, we dismiss the complaint against this Respondent.

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<sup>6/</sup> Thus, we need not address the ALJ's conclusion that Florida Power's submission to the NRC is privileged under the First Amendment right to petition the government. R. D. and O. at 12-13. *See HAVOCO of America v. Hollobow*, 702 F.2d 643 (7th Cir. 1983).

Neither is the law firm Saporito's employer within the meaning of the whistleblower protection provision of the ERA.<sup>7/</sup> Even if Saporito had surmounted that hurdle, however, he failed to establish that there were any outstanding issues of material fact regarding the adverse action that the law firm was alleged to have taken.

Saporito alleged that a member of the law firm, James S. Bramnick, had a retaliatory telephone conversation with Thomas Kennedy, an attorney for Arizona Public, another of Saporito's former employers. "Complainant believes that Mr. Bramnick's actions in contacting Mr. Kennedy about Complainant and the comments that Mr. Bramnick made to Mr. Kennedy about Complainant to be adverse and blacklisting conduct and considered discriminatory actions under the ERA." Complaint, ¶ 11.

In their motion for summary judgment, Respondents asserted that the Bramnick-Kennedy conversation concerning Saporito could not have adversely affected Saporito's employment at Palo Verde because the conversation took place *after* Arizona Public had taken adverse action against Saporito and even *after* Saporito had filed his initial complaint against Arizona Public. Respondents' Motion for Summary Decision and Memorandum of Law at 3, 28.<sup>8/</sup> On a motion for summary decision it was Saporito's duty to counter Respondent's assertion regarding the timing of events. He did not do so. In fact, Saporito made no reference to the timing issue at all before the ALJ. Rather, he waited until his Rebuttal Brief before the Secretary to assert facts relevant to the timing of events:

Respondents argue that when the Bramnick-Kennedy conversation concerning Complainant took place, that Complainant had already been rejected for rehire by Arizona Public Service Company ("APS") and that the conversation therefore could not have caused Complainant's rejection for rehire. Respondents however, do not address the fact that Complainant was rejected for rehire at APS facilities after the Bramnick-Kennedy conversations concerning Complainant took place.

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<sup>7/</sup> Section 211 of the ERA defines "employer" to include:

(A) a licensee of the [NRC] or of an agreement State . . . ., (B) an applicant for a license from the [NRC] or such an agreement State; (c) a contractor or subcontractor of such a licensee or applicant; and (B) a contractor or subcontractor of the Department of Energy. . . .

42 U.S.C. § 5851(a)(2) (1988 and Supp. V). Saporito made no attempt to address this issue. Instead he argued without support or explanation that, "[t]he issue of whether the Firm is an employer under the ERA is not before the [Secretary of Labor] and need not be addressed here." Complainant's Rebuttal Brief at 2. We do not agree with this assertion.

<sup>8/</sup> Respondents went so far as to state that "Complainant apparently concedes" that the Bramnick-Kennedy conversation took place after Arizona Power took adverse action against Saporito. *Id.* at 28.

Thus, Complainant's allegations of harm and discrimination are actionable claims under the ERA and require a hearing as a matter of law.

Rebuttal at 3. Saporito's belated claim does not remedy the fact that he made no effort to counter Respondent's assertion before the ALJ.

It is possible that Saporito is arguing that because the law firm did not support with affidavits its assertion that the Bramnick-Kennedy conversation happened after Arizona Public had taken adverse action against Saporito, summary decision is not appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), has effectively resolved that argument. There the Supreme Court held that:

In cases . . . where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." Such a motion . . . requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

*Celotex Corp. v. Catrett*, 477 U.S. at 324. Here, Saporito, the nonmoving party with the burden of proof on the dispositive issues, failed even to assert that the conversation occurred before adverse action was taken against Saporito by Arizona Public. That failure cannot be repaired by *post hoc* unsupported assertions.

## CONCLUSION

Saporito's complaint in this case is utterly without merit. Saporito proceeded *pro se* and is therefor entitled to a certain degree of adjudicative latitude. However, such latitude does not extend to frivolous claims. As the Secretary noted in *Grizzard v. Tennessee Valley Authority*, Case No. 90-ERA-52, Sec. Dec., Sept. 26, 1991, slip op. at 4 n.4, "[a]lthough a *pro se* Complainant cannot be held to the same standard of pleadings as if he were represented by legal

counsel, Complainant must allege a set of facts which, if proven, could support his claim of entitlement to relief.” Saporito has wholly failed to meet that very elementary requirement. For the foregoing reasons this complaint is dismissed.

**SO ORDERED.**

DAVID A. O’BRIEN  
Chair

KARL J. SANDSTROM  
Member

JOYCE D. MILLER  
Alternate Member