OALJ Case No.: 2021-ERA-00009
OSHA Case No.: 4-1510-21-053

In the Matter of:

THOMAS SAPORITO,
Complainant,

v.

MARGARET DOANE and
BOOMA VENKATARAMAN,
Respondents.

DECISION AND ORDER DISMISSING COMPLAINT AND GRANTING, IN PART, RESPONDENTS’ MOTION REQUESTING LITIGATION CONTROLS

Background

Thomas Saporito (“Complainant”) worked for Florida Power and Light Company (“FPL”) before his termination in December 1988. From 1989 to 2011, Complainant filed some fourteen whistleblower complaints with the U.S. Department of Labor’s Occupational Safety and Health Administration (“OSHA”) alleging FPL violated the employee protection provisions of the Energy Reorganization Act, (“ERA” or “Act”), as amended, 42 U.S.C. § 5851, when it fired him, by not rehiring him, and blacklisting him to other employers. Complainant named the United States

1 Florida Power and Light Company, a subsidiary of NextEra Energy, Inc. since 2010, is a Florida based utility company serving some 10 million people.

2 Section 5851 generally protects employees in the nuclear power industry who speak out about nuclear power hazards. The procedural regulations implementing the ERA are found at 29 C.F.R. Part 24.

Nuclear Regulatory Commission (“NRC”) as a co-respondent in one of these cases. All complaints were eventually denied, dismissed, or withdrawn. Complainant filed a separate complaint in 2009 against the NRC, later withdrawing it.

After a lengthy respite, Complainant renewed his litigious activities before the Department of Labor on November 16, 2020, when he filed his third complaint against the NRC, alleging they violated the ERA by refusing to take enforcement action against FPL related to his 1988 termination. OSHA dismissed the complaint on December 2, 2020, finding Complainant was not an “employee” within the meaning of Section 5851. Complainant appealed, requesting a hearing before the Office of Administrative Law Judges. The matter was assigned to Judge Applewhite, who dismissed the complaint with prejudice on February 8, 2021, finding it was not timely filed.

Complainant did not appeal the decision to the Department of Labor’s Administrative Review Board (“ARB”), instead filing his fourth OSHA complaint against the NRC on or about February 15, 2021, again alleging they violated the ERA’s employee protection provisions. Complainant specifically accused the NRC of failing to investigate FPL for not hiring/rehiring him and failing to properly process two petitions filed under 10 C.F.R. § 2.206, seeking $1,000,000.00 for lost wages and benefits. OSHA issued preliminary findings on March 2, 2021, dismissing the complaint for failing to state a claim upon which relief can be granted. Complainant objected to


7 Complainant alleged the NRC discriminated against him by “violating NRC policy in a continuing violation of Section 211 of the ERA over the last 30 years.” The specific policy violations he alleged included that the NRC never conducted an investigation pursuant to 10 CFR 50.7 into FPL’s stated reasons for firing him in 1988 and that the NRC failed to process his May 23, 2020 petition pursuant to 10 CFR 2.206 because the NRC did not “issue an acknowledgment letter and associated Federal Register notice of receipt or petition closure letter” within the required time period. Complainant further alleged that the NRC further discriminated against him by “failing to ensure that NextERA-FPL fostered and maintained a Safety Conscious Work Environment,” as required by NRC policies and that the NRC failed to take any enforcement action against FPL when it did not provide him with Plant Work Orders, as it was required to do.

8 Saporito v. U.S. Nuclear Regul. Comm’n, ALJ No. 2021-ERA-00001 (Feb. 2, 2021). An employee who believes he has been discharged or otherwise discriminated against in violation of the ERA has 180 days from the date of violation to file a complaint. 29 C.F.R. § 24.103(d)(2).
these findings and requested a hearing before a Department of Labor Administrative Law Judge. 29 C.F.R. § 24.106. The matter was then assigned to me.

As there appeared to be a preliminary question whether Congress has waived the NRC’s sovereign immunity under the ERA such that relief in the form of monetary damages that Complainant sought was available, I issued an Order to Show Cause Why Matter Should Not Be Dismissed for Lack of Subject Matter Jurisdiction. After Complainant and Respondent filed responses, I found the ERA does not contain an explicit waiver of sovereign immunity with respect to whistleblower claims against the United States, to include those against the NRC. Accordingly, I determined this tribunal lacked subject matter jurisdiction over the complaint and issued a decision and order dismissing it on May 12, 2021.

Complainant did not appeal this decision to the ARB, and it is final. Instead, three days later, on May 15, 2021, Complainant filed his fifth complaint involving the NRC, amended on May 18, 2021, this time alleging Margaret Doane, the NRC’s Executive Director of Operations, and Booma Venkataraman, the Acting Chief, Reactor Projects Branch 3, Division of Reactor Projects, violated the ERA by failing to investigate FPL for not hiring/rehiring him and failing to properly process two petitions filed under 10 C.F.R. § 2.206. In other words, Complainant alleges the same operative facts here as his February 15, 2021 complaint but now names two NRC employees as respondents in lieu of the NRC itself. OSHA dismissed this complaint on May 24, 2021, determining, in part, that no employee/employer relationship exists between Complainant and Respondents. Complainant filed a Notice of Appeal with the Office of Administrative Law Judges on May 22, 2021. The matter was docketed on May 22, 2021 and assigned to me on June 22, 2021.

This case also required I resolve a preliminary jurisdictional question relating to whether an action under the employee protection provisions of the ERA may be brought against individual employees of the NRC. Accordingly, I issued an order compelling Complainant to present some evidence tending to establish an employee-employer relationship within the meaning of § 5851 between himself and the two named Respondents in this case and show cause why his May 15, 2021 complaint should not be dismissed for lack of jurisdiction. The Office of the Solicitor, U.S. Department of Labor was invited to file an amicus brief. 29 C.F.R. § 18.24. Complainant responded on July 24, 2021 and Respondent on August 5, 2021. Respondent also filed Agency Motion for Litigation Controls the same day, to which Complainant responded in opposition on August 7, 2021. The Solicitor of Labor filed a brief as amicus curiae on August 20, 2021. For the reasons set forth in greater detail below, I find that individual employees of the NRC are not

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9 Most recently, in Peck v. Nuclear Regul. Comm’n, ARB No. 17-062, 12 (ARB Dec. 19, 2019), the Administrative Review Board (“ARB”) denied a complaint filed under the ERA’s whistleblower protection provisions, concluding that as “the whistleblower protection provisions of the ERA . . . do[] not contain an unequivocal expression of intent to waive sovereign immunity” the United States has not waived sovereign immunity for ERA whistleblower claims against the NRC. The United States Court of Appeals for the Fourth Circuit affirmed the ARB’s order in Peck in a published decision initially issued on April 30, 2021 and amended on June 21, 2021. Peck v. U.S. Dep’t of Lab., Admin. Rev. Bd., 996 F.3d 224, 234 (4th Cir. 2021), as amended (June 21, 2021) (“Waiving sovereign immunity is a legislative, not a judicial, prerogative. And the legislature has not exercised that prerogative here.”).

“employers” within the meaning of Section 5851 of the ERA and dismiss the complaint. I also impose limited controls on Complainant’s ability to file future cases with this Office.

Essential Findings of Fact

The following facts are derived from the public record, the pleadings, and the parties’ filings in this matter.

FPL is a Nuclear Regulatory Commission licensee.


Complainant has never worked at, been employed by, or a contractor of the NRC. Neither Margaret Doane nor Booma Venkataraman has ever supervised Complainant or directed his duties and both are full time federal employees of the NRC. Ms. Doane is the NRC’s Executive Director for Operations. Ms. Venkataraman was the Acting Chief, Reactor Projects Branch, Division of Reactor Projects from January 2, 2021 to March 27, 2021. Neither Ms. Doane nor Ms. Venkataraman is a licensee of the NRC or a contractor for a licensee of the NRC.

Complainant has previously alleged, unsuccessfully, that his former employer, FPL, intentionally retaliated and discriminated against him in violation of the ERA by rejecting his job applications and blacklisting him for raising safety concerns while working there in 1988.

Complainant filed petitions in 2020 addressed to the NRC’s Executive Director for Operations requesting the NRC Office of Inspections investigate his allegations against FPL and take enforcement action against it.

In her capacity as Acting Chief Reactor Projects Branch, Ms. Venkataraman signed a letter on January 21, 2021 addressing Complainant’s failure to hire/rehire allegations against FPL, why the NRC would not intervene, and that no further action would be taken on his petitions. This letter was issued within the scope of her official duties. Other than the January 21, 2021 letter, neither Ms. Doane nor Ms. Venkataraman have taken any other actions in this matter.

Discussion

Individual NRC Employees Are Not “Employers” Within the Meaning of Section 5851

The ERA provides, in pertinent part, that “[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee” engaged in a protected activity (emphasis added). 42 U.S.C. § 5851(a)(1). Thus, a necessary element of a claim of retaliation brought under
the ERA is that the party charged with a violation be an employer subject to the Act. See, e.g., Billings v. OFCCP, No. 91-ERA-35, slip op. at 2 (Sec’y Sept. 24, 1991). The term “employer” includes the Nuclear Regulatory Commission, licensees of the Nuclear Regulatory Commission, the licensees’ contractors and subcontractors, applicants for such licenses, and the Department of Energy. 42 U.S.C. § 5851(a)(2).

In this case, Complainant has alleged two NRC employees, the Executive Director of Operations and the Acting Chief, Reactor Projects Branch 3, Division of Reactor Projects, violated the employee protection provisions of the ERA when they failed to order the NRC Office of Inspections to investigate NextEra Energy/FPL for not hiring/rehiring him and not properly processing two Section 2.206 petitions. Before proceeding to the merits of the complaint, I must determine whether the named Respondents are “employers” subject to the ERA.

Neither the ERA nor its implementing regulations explicitly include “persons” within the definition of “employer,” and the ARB has previously held that individual employees are not “employers” under the ERA and are not properly named as respondents. Bath v. U.S. Nuclear Regulatory Commission, ARB No. 02-041, ALJ No. 2001-ERA-41 (ARB Sept. 29, 2003). Administrative law judges of the U.S. Department of Labor are bound by ARB precedent that is directly applicable and not reversed or superseded. The ARB’s holding in Bath is on point, has the force of law, and is controlling in this matter. Persons who are not employers are not liable under the ERA for whistleblower violations. As ARB precedent holds that individual NRC

11 A member of the public may raise potential safety issues against a Nuclear Regulatory Commission licensee or other person subject to the Nuclear Regulatory Commission’s jurisdiction in a petition to the NRC. This provision is contained in Section 2.206 of the NRC’s regulations. Section 2.206 petitions are to be addressed to the NRC’s Executive Director for Operations. If warranted, the NRC can take action to modify, suspend, or revoke a license, or take other appropriate enforcement action to resolve a problem identified in a Section 2.206 petition. See https://www.nrc.gov/about-nrc/regulatory/enforcement/petition.html.

12 By comparison, for example, the Surface Transportation Assistance Act (“STAA”) provides that “a person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment . . . .” 49 U.S.C. § 31105(a). The STAA’s implementing regulation defines “person” as “including one or more individuals, partnerships, associations, corporations . . . .” 29 C.F.R. § 1978.101(k). The Federal Railway Safety Act (“FRSA”) provides that “a carrier engaged in interstate or foreign commerce, a contractor or subcontractor of such a carrier, or an officer or employee of such carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee . . . .” 49 U.S.C. § 20109(a). The FRSA’s implementing regulation defines “carrier” as including a “person providing railroad transportation.” 29 C.F.R. § 1982.102(k).

13 See also Adams v. Dole, 927 F.2d 771, 776 (4th Cir. 1991) (Department of Energy individual contractors not liable under the whistleblower provisions of the ERA); Slavin v. Aigner, ALJ No. 2005-CAA-11, slip op. at 5 (ALJ Jan. 19, 2006) (“a federal employee is not a proper respondent in a CAA complaint”).

14 See Administrator, Wage and Hour Division v. Volt Management Corp., ARB No. 2018-0075, ALJ No. 2012-LCA-00044, slip op. at 11 n.53 (ARB Aug. 27, 2020) (an ALJ has no authority to refuse to follow clearly applicable ARB precedent). See also Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989) (declaring that “[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”).
employees are not employers within the meaning of the ERA under the facts of this case, the law compels me to find that this tribunal lacks subject matter jurisdiction over the complaint.

Complainant submits that the United States Court of Appeals for the Fourth Circuit’s recent decision in *Peck* provides the legal basis for the instant claim to proceed against Ms. Doane and Ms. Venkataraman. As noted above, the issue in *Peck* was whether the United States has waived sovereign immunity for ERA whistleblower claims brought against the NRC. The Fourth Circuit initially stated in its April 30, 2021 decision, in dicta, that “the aggrieved party can bring an action against the person employed by the NRC who committed the violation. See 42 U.S.C. § 5851(b). Such a respondent would be a ‘person’ as contemplated by the Statute.” Complainant submits that this tribunal must accept and adopt the ruling of the Fourth Circuit Court of Appeals and find that Respondents are “persons” within the statutory meaning of 42 U.S.C. § 5851(b) and subject to the remedies under the ERA for discriminating against Complainant.” (Compl. Br. at 3). But, as noted by Respondents and the Solicitor of Labor, the Fourth Circuit later issued an amended opinion on June 21, 2021, vacating the specific language now relied upon by Complainant. Accordingly, I find *Peck* no longer stands for the proposition Complainant submits - that an action may be brought under the ERA against an NRC employee who commits alleged Section § 5851 violations. In other words, *Peck* did not overrule *Bath*, which still remains controlling here, and individuals who are merely employees of an entity covered by the ERA’s anti-retaliation provision are not “employers” within the meaning of the Act.

**Filing Limitations Are Appropriate**

Complainant believes FPL fired him in 1988 in retaliation for raising safety concerns and has filed at least 14 complaints with OSHA between 1989 and 2011 trying to prove it. He has

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17 Additionally, Complainant never worked for, has been employed by or a contractor of the NRC, or been supervised or employed by the named Respondents and nothing in the complaint or papers filed with the tribunal establishes an employment relationship between Complainant and the named Respondents. In other words, even if individual NRC employees can be named in an ERA complaint, Complainant has not established an employment relationship between himself and the named Respondents here, also required to establish jurisdiction within the meaning of § 5851. Complainant submits that Respondents “established an employee-employer relationship when Respondents acted in place of its licensee NextEra-FPL in refusing two employment opportunities at NextEra-FPL for which Complainant made applications” (emphasis in original). In other words, Complainant avers that when Respondents did not investigate NextEra/FPL, which could have forced them to make a job offer to Complainant, Respondents took the decision making process away from NextEra/FPL, thereby making them “Employers” for purposes of Section 5851. Investigating or failing to investigate an NRC licensee does not establish an employee-employer relationship between Complainant and the NRC nor convert Ms. Doane or Ms. Venkataraman into an ”Employer” within the meaning of the anti-retaliation provisions of the ERA.

18 *Supra* note 3.
not, and both the ARB\textsuperscript{19} and OALJ\textsuperscript{20} have placed litigation controls on Complainant due to his history of vexatious litigation, harassing behavior, and duplicative complaints against FPL. However, Complainant still believes he was fired for blowing the whistle and continues to seek relief. Effectively precluded from proceeding against FPL, Complainant now has apparently set his sights squarely on the NRC, filing three more complaints against it or NRC employees in the first six months of 2021. The first two were dismissed by this agency without a decision on the merits, one as untimely filed and the other because the United States has not waived sovereign immunity against the NRC for the type of damages Complainant now seeks. Rather than accepting the results, or appealing those decisions, Complainant filed the instant complaint with OSHA, this time naming two individual employees of the NRC as Respondents, one who received petitions from Complainant to investigate FPL for not rehiring him and the other who informed him that the NRC would be taking no action against FPL or its parent company.

Respondents submit that this action is simply the latest in a series of meritless and repetitive complaints OALJ, the ARB, and the federal courts have previously addressed related to Complainant’s 1988 termination. As such, counsel for Respondents now moves this tribunal to impose litigation controls on Complainant “to minimize future meritless litigation.” Complainant disagrees, submitting that “the two prior ERA actions involving . . . the NRC were brought in good faith” and “dealt with the issue of sovereign immunity” whereas the instant complaint “ pivots on the issue of whether or not individual employees of the NRC who are alleged to have violated the ERA are subject to remedies under the Act.”

Determining whether to restrict Complainant’s future access to this tribunal requires that I consider, among other factors, his litigation history, motive in pursuing this case, whether he is represented by counsel, whether he has caused needless expense to the parties or placed an unnecessary burden on the tribunal and its staff, and whether other sanctions would be adequate to protect the tribunal and other parties. \textit{See, e.g., Safir v. U.S. Lines, Inc.,} 792 F.2d 19, 24 (2d Cir. 1986).

As noted, this is the fifth complaint filed against either the NRC or its employees, the third before OALJ this year, and the instant case is simply the next in a series of attempts by Complainant to use the adjudicative process, and this tribunal, to harass and hound FPL, through the NRC, and its employees, in a quixotic attempt to right a perceived wrong occurring some thirty years ago. Not only has Complainant had his day in court, he has had many more over the years. Yet Complainant continues to tilt at windmills. Complainant has been sanctioned previously regarding his vexatious litigation against FPL. I extend those sanctions here and apply them to

\textsuperscript{19} The ARB notified Complainant it would not entertain future petitions for review involving FPL or its employees unless he complied with certain conditions, to include being represented by counsel and providing a sworn affirmation that explained how the petition for review and underlying complaint were not relitigating previous claims brought against FPL or its employees. \textit{Saporito v. Fla. Power & Light Co.}, ARB Nos. 09-072, 09-128, 09-129, 09-141; ALJ Nos. 2009-ERA-00001, -00006, -00009 and 2009-ERA-00012, at 6-8 (ARB Apr. 29, 2011).

\textsuperscript{20} The presiding ALJ ordered Complainant to cease and desist in filing malicious and/or frivolous complaints against FPL related to its failure to rehire him or any other ERA action involving FPL related to his 1988 termination. \textit{Saporito v. NextEra Energy}, ALJ No. 2011-ERA-00007, slip op. at 11 (ALJ Mar. 9, 2011).
any future actions Complainant may contemplate against the NRC and its employees. Accordingly,

**ORDER**

The above captioned complaint filed by Thomas Saporito pending before the United States Department of Labor is hereby DISMISSED, with prejudice, for lack of subject matter jurisdiction.

Respondents’ Motion for Litigation Controls is GRANTED, in part. Contemporaneous with the filing of any future petition for review with OALJ in which the United States Nuclear Regulatory Commission, or any of its employees, is named as a Respondent, Complainant shall include:

A sworn affirmation listing all complaints and appeals filed by Complainant against the United States Nuclear Regulatory Commission, or its employees, that are pending with or previously decided by the U.S. Department of Labor’s Occupational Safety and Health Administration, Office of Administrative Law Judges, or Administrative Review Board, and any United States Federal District Court or Circuit Court of Appeals, and their current status or disposition; and

A sworn affirmation that explains how the current petition for review is not duplicative of actions previously filed against the United States Nuclear Regulatory Commission or its employees.

Such affirmations are required before a petition for review or request for hearing will be accepted by the Office of Administrative Law Judges and shall remain in place as long as Complainant remains a self-represented litigant.

**SO ORDERED.**

**STEPHEN R. HENLEY**
Chief Administrative Law Judge
NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board (“the Board”) within 10 business days of the date of this decision.

The date of the postmark, facsimile transmittal, or e-filing will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards.

If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. See 29 C.F.R. §§ 24.109(e) and 24.110.

IMPORTANT NOTICE ABOUT FILING APPEALS:

The Notice of Appeal Rights has changed because the system for online filing will become mandatory for parties represented by counsel on April 12, 2021. Parties represented by counsel after this date must file an appeal by accessing the eFile/eServe system (EFS) at https://efile.dol.gov/EFILE.DOL.GOV. Before April 12, 2021, all parties may elect to file by mail rather than by efiling.

Filing Your Appeal Online

Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at https://efile.dol.gov/support/.

Registration with EFS is a two-step process. First, all users, including those who are registered users of the former EFSR system, will need first create an account at login.gov (if they do not have one already). Second, if you have not previously registered with the EFSR system, you will then have to create an account with EFS using your login.gov username and password. Once you have set up your EFS account, you can learn how to file an appeal to the Board using the written guide at https://efile.dol.gov/system/files/2020-10/file-new-appeal-arb.pdf and/or the video tutorial at https://efile.dol.gov/support/boards/new-appeal-arb. Existing EFSR system users will not have to create a new EFS profile.

Establishing an EFS account should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at https://efile.dol.gov/contact.
If you file your appeal online, no paper copies need be filed. During this transition period, you are still responsible for serving the notice of appeal on the other parties to the case.

Filing Your Appeal by Mail

Self-represented litigants (and all litigants prior to April 12, 2021) may, in the alternative, file appeals using regular mail to this address:

Administrative Review Board  
U.S. Department of Labor  
200 Constitution Avenue, N.W., Room S-5220,  
Washington, D.C., 20210

Access to EFS for Other Parties

If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and EFS account, and then following the written directions and/or via the video tutorial located at:

https://efile.dol.gov/support/boards/request-access-an-appeal

After An Appeal Is Filed

After an appeal is filed, all inquiries and correspondence should be directed to the Board.

Service by the Board

Registered e-filers will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board-issued documents by regular mail; however, you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail.