



**In the Matter of:**

**THOMAS SAPORITO,**

**ARB CASE NO. 09-072**

**COMPLAINANT,**

**ALJ CASE NO. 2009-ERA-001**

**v.**

**DATE: April 29, 2011**

**FLORIDA POWER AND LIGHT COMPANY,**

**RESPONDENT,**

**and**

**SAPORITO ENERGY CONSULTANTS,  
INC., and THOMAS SAPORITO,**

**ARB CASE NO. 09-128**

**COMPLAINANTS,**

**ALJ CASE NO. 2009-ERA-009**

**v.**

**FLORIDA POWER AND LIGHT COMPANY,**

**RESPONDENT,**

**and**

**THOMAS SAPORITO and SAPORITO  
ENERGY CONSULTANTS, INC.,**

**ARB CASE NO. 09-129**

**COMPLAINANTS,**

**ALJ CASE NO. 2009-ERA-006**

**v.**

**FLORIDA POWER AND LIGHT COMPANY,  
NEXTERA ENERGY RESOURCES, LLC,  
LEWIS HAY III, MITCHELL S. ROSS,  
ANTONIO FERNANDEZ, STEVEN HAMBRICK,  
and NUCLEAR REGULATORY COMMISSION,**

**RESPONDENTS,**

**and  
SAPORITO ENERGY CONSULTANTS  
and THOMAS SAPORITO,**

**ARB CASE NO. 09-141**

**ALJ CASE NO. 2009-ERA-012**

**COMPLAINANTS,**

**v.**

**LEWIS HAY III and  
FLORIDA POWER AND LIGHT COMPANY,**

**RESPONDENTS.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainants:*

**Thomas Saporito, *pro se*, Jupiter, Florida**

*For the Respondent, U.S. Nuclear Regulatory Commission:*

**Laura C. Zaccari, Esq., U.S. Nuclear Regulatory Commission, Rockville, Maryland**

*For all other Respondents:*

**Mitchell S. Ross, Esq. and William S. Blair, Esq.; Florida Power and Light Company, Juno Beach, Florida**

**BEFORE: Paul M. Igasaki, Chief Administrative Appeals Judge; Luis A. Corchado, Administrative Appeals Judge; and Lisa Wilson Edwards, Administrative Appeals Judge.**

## **ORDER OF CONSOLIDATION AND FINAL DECISION AND ORDER**

Thomas Saporito and Saporito Energy Associates filed complaints with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) in the above captioned cases. The complaints allege that the Florida Power and Light Company (FPL) and the other named respondents violated the employee protection provisions of the Energy Reorganization Act of 1974, as amended, 42 U.S.C.A. § 5851 (West 2003 & Supp. 2010) (ERA). Department of Labor (DOL) Administrative Law Judges (ALJ) either granted FPL's and the other named respondents' motion to dismiss or determined that they were entitled to summary decision in their favor and dismissed the complaints. Saporito has appealed the dismissal of his complaints. We consolidate Saporito's appeals for the purpose of review and decision and summarily affirm the ALJ decisions.

## CONSOLIDATION

In view of the substantial identity of the legal issues and the commonality of much of the evidence, and in the interest of judicial and administrative economy, we consolidate Saporito's appeals of the dismissals of his complaints in the above captioned cases for the purpose of review and decision. *See Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114, -04-115; ALJ Nos. 2004-SOX-020, -036, slip op. at 6 (ARB June 2, 2006).

## BACKGROUND

### **Saporito's Appeal (ARB No. 09-072)**

Saporito filed a complaint alleging that FPL "terminated" him in violation of the ERA and that FPL verbally disparaged him in a public forum before the Nuclear Regulatory Commission (NRC) in retaliation for his "recent and his past whistle-blowing conduct in raising safety concerns to the NRC about FPL's nuclear operations." Specifically, Saporito had petitioned the NRC, seeking an enforcement action against FPL. During a teleconference with the NRC regarding his petition, Saporito stated his contention that FPL had wrongfully terminated him in violation of the ERA. In response, FPL's attorney urged the NRC to order Saporito to cease filing petitions regarding his discrimination allegations against FPL as they had already been fully litigated and rejected. Saporito alleges that as a NRC public transcript of the FPL attorney's comments is available, FPL has effectively blacklisted him from obtaining employment with other employers.

The ALJ noted that the FPL attorney's comments were neither discriminatory nor retaliatory under the ERA, as Saporito was not an FPL employee, he was terminated for insubordination and, therefore, FPL declared him ineligible for rehiring pursuant to FPL policy. Moreover, Saporito did not identify any alleged employers that declined to hire him due to the FPL attorney's comments or allege that FPL took any specific action to prevent such employment. Thus, as Saporito presented no evidence or genuine issue of material fact that the FPL attorney's comments were discriminatory or retaliatory under the ERA, the ALJ granted FPL's Motion for Summary Decision and dismissed the complaint. Saporito has appealed the ALJ's decision.

### **Saporito's Appeal (ARB No. 09-128)**

Saporito filed a complaint alleging that FPL again disparaged him in a public forum before the Florida Public Service Commission (FPSC) in retaliation for his whistleblower and safety complaints against FPL in violation of the ERA. Previously, Saporito had filed a petition

to intervene in a rate proceeding hearing that FPL had initiated before the FPSC seeking to amend the rates it charged for providing electricity. In response, FPL's attorney urged that the FPSC not permit Saporito to intervene in light of his prior "abusive behavior," "pattern of harassment," and "vexatious litigation" against FPL following his termination from FPL for insubordination. Saporito alleges that as the FPL attorney's response was made in a public forum and is available on a public website, Saporito and his company have been unable to secure any business or employment with other companies.

The ALJ noted that the FPL attorney's response did not constitute an adverse employment action under the ERA, as Saporito did not allege any "tangible" employment consequences and as Saporito was not employed by FPL. Furthermore, the ALJ determined that the FPL attorney's response was not retaliatory as a matter of law. Thus, the ALJ dismissed the complaint for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). Saporito has appealed the ALJ's decision.

### **Saporito's Appeal (ARB No. 09-129)**

Saporito filed a complaint alleging that FPL and other named FPL-related respondents refused to enter into a business partnership with his company and sought sanctions against him and his company from the NRC in violation of the ERA. His complaint alleges that the respondents did so in retaliation for his seeking an enforcement action before the NRC against FPL and for his whistleblower and safety complaints against FPL. In addition, Saporito alleged that the NRC declined to take any enforcement action against FPL in retaliation for his whistleblower and safety complaints against FPL. Saporito had written FPL proposing that it enter into a partnership with his company. FPL replied that as FPL had previously fired Saporito for cause and he was therefore ineligible to be rehired, his company would be an unsuitable business partner.

The ALJ initially dismissed Saporito's company as a named complainant, as it was not a covered "employee" as defined under the ERA. Moreover, the ALJ determined that the individuals also named as respondents were entitled to summary decision in their favor, as Saporito did not allege or present any evidence that they were "employers" as defined under the ERA or argue that they were individually liable under the Act. Similarly the ALJ determined that FPL's parent, FPL Energy (since renamed NextEra Energy Resources), was entitled to summary decision in its favor, as Saporito made no factual allegations nor presented any evidence that it retaliated against him. The ALJ further concluded that the NRC was entitled to summary decision in its favor as a respondent, as Saporito did not dispute that he did not have an employee-employer relationship with the NRC as defined under the ERA, and the NRC did not retaliate against him as defined under the Act.

Finally, the ALJ held that FPL was entitled to summary decision in its favor, as Saporito did not allege or provide evidence with his complaint that it had retaliated against him as an individual. Instead, the ALJ noted that the evidence presented only showed that FPL considered Saporito and his company unsuitable as a business partner because FPL had previously fired Saporito for cause, and he was ineligible to be rehired. Consequently, the ALJ granted the

respondents' Motion for Summary Decision and dismissed the complaint. Saporito has appealed the ALJ's decision.

### **Saporito's Appeal (ARB No. 09-141)**

Saporito filed a complaint alleging that FPL and an individual FPL employee violated the ERA when they failed to respond to his letter to them proposing that FPL enter into a contractual relationship with his company in retaliation for his previously seeking an enforcement action before the NRC against FPL. The ALJ initially dismissed Saporito's company as a named complainant, as it was not a covered "employee" as defined under the ERA. Moreover, the ALJ determined that the individual FPL employee also named as a respondent was entitled to summary decision in his favor, as Saporito did not evidence that he was an "employer" as defined under the ERA and as the Act does not provide for individual liability.

In addition, the ALJ determined that Saporito did not produce any evidence to support his allegation that FPL was seeking an employee or contractor to perform the duties he proposed in his letter, that he was qualified to perform those duties, or that FPL continued to seek employees or contractors to perform such duties after declining his proposal. Thus, the ALJ held that there was no genuine issue of material fact that FPL took adverse action against Saporito. In any event, the ALJ further determined that for legitimate, non-discriminatory reasons, FPL would not have hired or entered into a contractual relationship with Saporito because FPL had previously fired Saporito for cause, and he was ineligible to be rehired. Consequently, the ALJ concluded that FPL was entitled to summary decision in its favor and dismissed the complaint. Saporito has appealed the ALJ's decision.

## **DISCUSSION**

### **A. We Summarily Affirm the Dismissals of Saporito's Complaints**

In summarily affirming the dismissals of Saporito's complaints, we limit our comments to the most critical points. The granting of a motion to dismiss is a legal conclusion that we review de novo. *High v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-075, ALJ No. 1996-CAA-008, slip op. at 3 (ARB Mar. 13, 2001)(dismissal on the pleadings is a decision as a matter of law). Such motions should be granted cautiously.

Initially, we note that it is a matter of public record that FPL fired Saporito for cause in 1988. *See Saporito v. Florida Power & Light Co.*, ARB No. 98-008, ALJ Nos. 1989-ERA-007, -017 (ARB Aug. 11, 1998), *aff'd*, 192 F.3d 130 (11th Cir. 1999). In addition, Saporito has previously admitted that he again applied for a job with FPL in 2005 and FPL informed him that he was "not eligible for rehire" because he was terminated "for cause." *See Saporito v. Florida Power & Light Co.*, ARB Nos. 09-009, 09-010; ALJ No. 2008-ERA-014, slip op. at 2 (ARB Feb. 28, 2011).

Saporito also contends that the FPL attorney's publically available comments before the NRC and response filed before the FPSC blacklisted him or his company from obtaining employment with other employers. But Saporito filed his complaint in ARB No. 09-072 the same day the comments were made. Similarly, Saporito filed his complaint in ARB No. 09-128 only six days after the response was filed and only alleged that other potential employers had declined to hire him or his company prior to the filing of the FPL's response and his complaint. Thus, he has not alleged that the comments or the response adversely affected his compensation, terms, conditions, and privileges of employment or that any potential employers declined to hire him due to the comments or response at the time of his complaints. Thus, as a matter of law, the FPL attorney's comments and response about Saporito are not retaliatory.<sup>1</sup>

Saporito's complaints in the above-captioned cases are, therefore, without merit and frivolous. As noted in *Grizzard v. Tennessee Valley Auth.*, 1990-ERA-052, slip op. at 4, n.4 (Sec'y Sept. 26, 1991), "[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 again wholly failed to meet that elementary requirement. Consequently, these complaints are dismissed.

## **B. We Impose Pre-filing Requirements on Saporito's Future Appeals of FPL-Related Decisions**

Beyond our ruling on the merits, the record justifies the imposition of filing restrictions related to FPL due to Saporito's string of vexatious, harassing, and duplicative complaints against FPL, without a good faith expectation of prevailing, and subsequent appeals to the Board that are wholly without merit, causing unnecessary expense to FPL and placing a needless burden on the dockets of the OALJ and the Board. See *Safir v. United States Lines, Inc.*, 792 F.2d 19, 24 (2d Cir. 1986); see also *Saporito v. NextEra Energy*, ALJ No. 2011-ERA-007, slip op. at 2-3, n.2 (ALJ Mar. 9, 2011).

We have held that ALJs in ERA whistleblower cases have some inherent authority to control the cases before them. See *Saporito v. Florida Power & Light Co.*, ARB Nos. 09-009, — 010; ALJ No. 2008-ERA-014, slip op. at 2 (Feb. 28, 2011); see also *Blodgett v. Tennessee Dep't of Env't & Conservation*, ARB No. 03-138, ALJ No. 2003-CAA-015 (ARB Mar. 22, 2004)(recognizing inherent authority in administrative adjudications); *Secretary of Labor v. Daanen & Janssen, Inc.*, 19 F.M.S.H.R.C. 665 (1997)(same).

After our February 28, 2011 ruling in *Saporito v. Florida Power & Light Co.*, a DOL ALJ ruled in another case that Saporito's repeated ERA complaints against FPL are "taken in bad faith . . . frivolous, an abuse of legal and judicial process, and fraudulent," given the previous administrative rulings that Saporito was fired for cause in 1988 and deemed ineligible for rehire pursuant to FPL's policies. See *Saporito v. NextEra Energy*, ALJ No. 2011-ERA-007, slip op. at 9-10. The ALJ in the *NextEra Energy* case further found that, because Saporito "has

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<sup>1</sup> See *Saporito v. Florida Power & Light Co.*, ALJ No. 1994-ERA-035, slip op. at 4 (ARB July 19, 1996) (holding that Saporito's complaint is frivolous).

demonstrated a pattern of malicious and frivolous filings involving” FPL, he “should be sufficiently deterred from continued malicious and frivolous complaints against [FPL] for failure to hire him.”<sup>2</sup> The ALJ instructed as follows:

[U]ntil [FPL] changes its hiring policy and practice preventing the hiring of a former employee whose employment was due to involuntary separation, any complaints filed by [Saporito] against [FPL] for failing to hire him are frivolous, will subject him to sanctions under [Federal Rules of Civil Procedure] Rule 11, may subject him to referral to the U.S. District Court for the Southern District of Florida for sanctions, and may subject him to referral to the U.S. Attorney for felony criminal prosecution for violation of 18 USC §1505 (paragraph 2 related to corruption of administrative proceeding, as defined by 18 USC §1515(b)) and / or 18 USC §1621(2) (perjury by declaration, certificate, verification or statement).<sup>[3]</sup>

Accordingly, the ALJ placed Saporito “on notice” and ordered him to “cease and desist in filing malicious and / or frivolous complaints against [FPL] related to its failure to hire [Saporito] or to any other action involving [FPL] under [the] ERA related to [Saporito’s] lawful termination of employment by [FPL] in 1988.”<sup>4</sup> We have the same concerns in this case.

The right of access to the courts “is neither absolute nor unconditional.” *Cofield v. Ala. Pub. Serv. Comm’n*, 936 F.2d 512, 516 (11th Cir.1991) (quoting *In re Green*, 669 F.2d 779, 785 (D.C. Cir. 1981)). “Conditions and restrictions on each person’s access are necessary to preserve the judicial resource for all other persons. Frivolous and vexatious law suits threaten the availability of a well-functioning judiciary to all litigants.” *Miller v. Donald*, 541 F.3d 1091, 1096 (11th Cir. 2008).

Appellate courts have the same authority to control the cases before them. When a party has repeatedly filed the same claim or meritless claims, a court may impose restrictions on future filings. *See, e.g., Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980) (federal courts of appeal possess inherent authority to sanction frivolous appeals); *In re Thomas*, 508 F.3d 1225, 1226 (10th Cir. 2007) (where the court of appeals entered a pre-filing review order precluding the appellant from filing new appeals or petitions with the court unless certain requirements were met); *United States v. Buillion*, 466 F.3d 574, 575 (7th Cir. 2006)(a “defendant has no right to file a frivolous appeal . . . .”); *In re Martin-Trigona*, 9 F.3d 226, 228 (2d Cir. 1993)(noting appellate courts have imposed restrictive measures on vexatious litigants, as the “procedures authorized by statute and rule for the conduct of appeals . . . were never intended to be available

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<sup>2</sup> *Saporito v. NextEra Energy*, ALJ No. 2011-ERA-007, slip op. at 10-11.

<sup>3</sup> *Id.* at 11.

<sup>4</sup> *Id.*

for manipulation by individuals who have demonstrated an uncontrollable propensity repeatedly to pursue vexatious and harassing litigation.”).

Those restrictions include requiring the trial court to certify that the appeal is taken in good faith or requiring the appellate court to initially determine the appeal or petition has sufficient merit to proceed. *See Thomas*, 508 F.3d at 1226. Other courts have foreclosed the filing of designated categories of cases or subjected a vexatious litigant to a “leave of court” requirement with respect to future filings. *See Martin-Trigona*, 9 F.3d at 228-229 (and cases cited therein). The key is to be fair and allow appropriate access.

Thus, in light of Saporito’s relitigation of the same issues against FPL, we hereby notify Saporito that the ARB will not address the merits of any future petition for review from Saporito against FPL or FPL’s employees, unless Saporito complies with the following conditions when he files such petition:

1. Be represented by counsel;<sup>5</sup> and

2. Include in his petition for review:

- (a) A list of all complaints and appeals currently pending or filed previously with the OALJ and the Board and the current status or disposition of those cases;

- (b) A list of any outstanding injunctions or orders limiting his access to the OALJ for any reason; and

- (c) A sworn affirmation by Saporito that sufficiently explains how such petition and the underlying complaint are not essentially the relitigation of previous claims brought against FPL.

These pre-filing requirements must be met for Saporito’s appeal or petition for review to be deemed accepted for consideration on the merits; otherwise, the Board will not consider the merits of the appeal and no response shall be required of any other party.

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<sup>5</sup> We note that Saporito is represented by counsel in a pending appeal before the Board involving an unrelated complaint against another respondent and arising under a different statute. *Saporito v. Publix Super Mkts.*, ARB No. 10-73, ALJ No. 2010-CPS-001.



**CONCLUSION**

Accordingly, we **AFFIRM** the ALJs' dismissals of the above-captioned cases on all issues, and we **DENY** Saporito's above-captioned complaints.

**SO ORDERED.**

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**LISA WILSON EDWARDS**  
**Administrative Appeals Judge**