In the Matter of:

THOMAS SAPORITO,

COMPLAINANT,

v.

EXELON CORPORATION,

EXELON ENERGY,

and

EXELON GENERATION COMPANY, LLC,

RESPONDENTS.

ARB CASE NO. 10-049

ALJ CASE NO. 2009-ERA-010

DATE: September 30, 2011

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Thomas Saporito, *pro se*, Jupiter, Florida

***For the Respondents*:**
Tamra Domeyer, Esq.; *Exelon Business Services Co.*, Warrenville, Illinois

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

FINAL DECISION AND ORDER

Thomas Saporito filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Exelon Generation (ExGen) 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 (Thomson/West 2010) (ERA). A Department of Labor (DOL) Administrative Law Judge (ALJ) granted ExGen's and the other named respondents' motion for summary decision and dismissed the complaint. Saporito has appealed the dismissal of his complaint. We summarily affirm the ALJ's decision.

BACKGROUND

Saporito's complaint alleges that ExGen and the other named respondents retaliated against him when they refused to hire him for any of six positions for which he applied. Specifically, Saporito contends that ExGen and the related respondents refused to hire him for they knew from the resume he submitted with his applications that his employment relationship with some of his previous employers, including the Florida Power and Light Company (FPL), had been terminated because he had raised safety concerns with the Nuclear Regulatory Commission regarding operations at those employers' nuclear plants.

The ALJ initially determined that the named respondent Exelon Corporation was entitled to summary decision pursuant to 20 C.F.R. § 18.40 (2011), as it has no employees and therefore could not have discriminated against Saporito by refusing to hire him. Similarly, the ALJ concluded that Exelon Energy was entitled to summary decision because Saporito did not apply for any positions with such an entity.

In addition, the ALJ determined that although Saporito's resume indicated that he had raised safety concerns with some of his previous employers, there is no evidence in the record of such safety complaints (such as a copy of a complaint or an evidentiary statement regarding such a complaint). Thus, the ALJ concluded that ExGen was also entitled to summary decision because Saporito did not present evidence to raise an issue of fact as to his self-proclaimed protected activity. Moreover, the ALJ determined that ExGen was entitled to summary decision because there is no evidence Saporito was qualified for one position and there is no evidence showing that any ExGen hiring official viewed Saporito's applications for the other positions and, therefore, had knowledge of his alleged protected activity. Consequently, the ALJ concluded that ExGen and the other named respondents were entitled to summary decision in their favor and dismissed the complaint. Saporito has appealed the ALJ's decision. .

DISCUSSION

In summarily affirming the dismissal of Saporito's complaint, 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.

Pursuant to 29 C.F.R. § 18.40(d), the ALJ may issue summary decision if the pleadings, affidavits, and other evidence, or "matters officially noticed," show that there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. *See generally Flor v. United States Dep't of Energy*, No. 1993-TSC-001, slip op. at 10 (Sec'y Dec. 9, 1994), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Once the moving party has demonstrated an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation. *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 158 (1st Cir. 1998).

We agree with the ALJ that Saporito failed to point to sufficient information in the record which could support a factual finding that Saporito engaged in protected activity. *See* 42 U.S.C.A. § 5851(b)(3)(C) (to establish a whistleblower claim under the ERA, a complainant must prove that he or she engaged in activity the ERA protects). Saporito's mere allegations on the resume he submitted with his applications that previous employers had terminated him for filing safety complaints against them is insufficient to show that Saporito engaged in protected activity. To avoid summary decision as the non-moving party, Saporito must demonstrate that there is a genuine issue of material fact on the issue of protected activity or that the undisputed facts establish protected activity as a matter of law. 29 C.F.R. § 18.40(d). *See Anderson*, 477 U.S. at 256.

In this case, Saporito alleged on his resume that FPL had previously terminated him for filing safety complaints against it. But, as the Board has previously noted, 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), *cert. denied*, 546 U.S. 1150 (2006). 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, -010, ALJ No. 2008-ERA-014, slip op. at 2 (ARB Feb. 28, 2011).

Saporito also alleges on his resume that he had previously been terminated from jobs at the Palo Verde Nuclear Plant and the South Texas Nuclear Plant for filing safety complaints against them. We note that while Saporito had filed whistleblower complaints regarding these terminations, those complaints were settled without any findings made in regard to whether he had engaged in protected activity. *See Saporito v. Houston Lighting & Power Co.*, ARB No. 97-093, ALJ Nos.1993-ERA-028, 1992-ERA-038, -045 (ARB May 13, 1997); *Saporito v. Arizona Pub. Serv. Co.*, Nos. 1993-ERA-026, -045; 1992-ERA-030 (Sec'y June 19, 1995).

Saporito's complaint is, 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." *See also Saporito v. Florida*

Power & Light Co., ARB Nos. 09-072, -128, -129, -141; ALJ Nos. 2009-ERA00-1, -006, -009,-012, slip op. at 6 (ARB Apr. 29, 2011); *Saporito v. Florida Power & Light Co.*, No. 1994-ERA-035, slip op. at 4 (ARB July 19, 1996) (holding that Saporito's complaint is frivolous). Saporito has again wholly failed to meet that elementary requirement. Consequently, his complaint is dismissed.

CONCLUSION

Accordingly, we **AFFIRM** the ALJ's Order Granting Summary Decision, and we **DENY** Saporito's complaint.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge